MARCELO GALUPPO, MÔNICA SETTE LOPES,
KARINE SALGADO, LUCAS GONTIJO, THOMAS BUSTAMANTE
Editors

Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies

Proceedings of the XXVI World Congress of Philosophy of Law and Social Philosophy of the Internationale Vereinigunf für Rechts- und Sozialphilosophie

INITIA VIA
EDITORA

Belo Horizonte
2015

Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies: Proceedings of the XXVI World Congress of Philosophy of Law and Social Philosophy of the Internationale Vereinigunf für Rechts- und Sozialphilosophie

Marcelo Galuppo
Mônica Sette Lopes
Lucas de Alvarenga Gontijo
Karine Salgado
Thomas Bustamaente
Editors

1st Edition [E-book]– 2015 – Initia Via

Rua dos Timbiras, nº 2250 – sl. 103-104 - Bairro Lourdes
Belo Horizonte, MG, Brasil, 30140-061
www.initiavia.com

Editor-in-Chief: Isolda Lins Ribeiro
Review: Editors and authors
Graphic project: Ana Caroline Azevedo, Agda Torquato,
Olímpia Martins, Tomás Cirino.
Cover design: Eduardo Furbino
Cover image: Tiles at Church of Saint Francis of Assisi,
designed by Oscar Niemeyer, at Pampulha, Belo Horizonte, MG, Brazil.

Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies: Proceedings of the XXVI World Congress of Philosophy of Law and Social Philosophy of the Internationale Vereinigunf für Rechts- und Sozialphilosophie / editors: Marcelo Galuppo, Mônica Sette Lopes, Lucs Gontijo, Karine Salgado, Thomas Bustamanete. - Belo Horizonte : Initia Via, 2015.

3159 p.

ISBN 978-85-64912-59-5 [E-book]

1. Law - Philosophy. 2. Human Rights. 3. Rule of Law. I. Galuppo, Marcelo. II. Sette Lopes, Mônica. III. Gontijo, Lucas de Alvarenga. IV. Salgado, Karine. V. Bustamante, Thomas. VI. Título.

CDU: 34(082)

Contents

Property and Human Rights in Globalisation: an engagement

Communicational Theory of Law

Give Marxism what it deserves! Law and the Social Analysis: Is Marxism Still an Opportunity?

Redefining relationships between Public Law and Private Law in the Era of Globalization

Political obligation and political legitimacy

Bioethics, argumentation and human rights

AICOL – AI Approaches to the Complexity of Legal Systems

Concepts and Conceptions of Law

Alexy's Theory of Law

Critical Theory and Law in and after Habermas

Law and Music

Cities as networks of meanings: discursive plurality and the right to the city

Reinventing Legal Philosophy in Iberoamerica?

Towards a Normative Jurisprudence?

Kant's Concept of Law

Citizenship and access to justice in the democratic order

Innovational methodology in the teaching of Law

Autonomy and paternalism: searching for a socially built normativity for the contemporary private law

The political activity of judiciary

Legal Philosophical Pluralism

The philosophy of the limits to freedom of speech

Law as Literature: Memory and Oblivion

Institutional Philosophy and Institutional Theory

Law and Technology: the fusion of Law and Information Technology

Pragmatism and Legal Theory

Law and literature: experiences from my country

Legal Argumentation

Derrida and Law

Changing idea of legal personhood: interdisciplinary perspective

The Idea of Justice from the viewpoints of Legal Philosophy

VII Jornada Brasileira de Filosofia do Direito

The Natural Law Tradition

The many identities of Private Law

Questions of fact and legal reasoning

Cultural Turn and Philosophy of Law and State

Politics is conflict: Carl Schmitt and our time

Justice and the question of violence

Democracy, Social Justice and Labor

Freedom from poverty and a decent standard of living from a social justice and Human Rights perspective

Truth and objectivity: in Law and morals

Discrimination: Philosophical and Jurisprudential Issues

Legal Reasoning

Law and Democracy

Human Rights

Rethoric

International Law

Judicial Decision Making

Bioethics and Biopolitics

Hermeneutics

Law and State

Personhood and Private Law

Society, Culture and Law

Public Policies, Politics and Law

History of Law

Philosophy of Law: important issues

Theory of Law

Law and the Communication Processes

Law Epistemology

Kelsen and Law Theory

Theories of Justice

Law, Art and Narrativeness

Law and Ethics

Cities and their issues

Dworkin's perspectives on the knowlege of law

Hobbes and his thinking

Justice and Public Policies

Law and Education

War and International Law

Criminal Law issues

Multiculturalism and Human Rights

Alexy's theory

Democracy, Participation and Representation

Classical Natural Law

After World War II Philosophy of Law

Law and Democracy

***

Introduction

We are proud to present the Proceedings of the *XXVI World Congress of Philosophy of Law and Social Philosophy*.

The conference was organized by the *Internationale Vereinigung für Rechts- und Sozialphilosophie* (*International Association for the Philosophy of Law and Social Philosophy*) – IVR and by a *Associação Brasileira de Filosofia do Direito e de Sociologia do Direito* (*Brazilian Association for Philosophy of Law and Sociology of Law*) – ABRAFI and took place in Belo Horizonte, Brazil, at Universidade Federal de Minas Gerais' Campus, from July 21 through July 27, 2015.

The papers published in the Proceedings were presented during the Conference in many Working Groups and Special Workshops, which represent the significant diversity of themes and subjects discussed by the participants from all over the world. They express the high leveled research and the creative endeavor of each author, and help us to understand the broad and distinct perspectives in order to understand Law from the standpoint of the main theme of this Conference: Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies.

Marcelo Galuppo
Mônica Sette Lopes
Lucas de Alvarenga Gontijo
Karine Salgado
Thomas Bustamante

Belo Horizonte, June 2015.

Introdução

É com grande alegria que apresentamos os anais do XXVI World Congress of Philosophy of Law and Social Philosophy.

O congressso, organizado pela Internationale Vereinigung für Rechts- und Sozialphilosophie (International Association for the Philosophy of Law and Social Philosophy - IVR) e pela Associação Brasileira de Filosofia do Direito e de Sociologia do Direito (ABRAFI), foi realizado entre 21 a 27 de julho de 2013, em Belo Horizonte, Brasil, no Centro de Atividades Didáticas 1 (CAD1), no Campus da Universidade Federal de Minas Gerais.

Nos anais, que ora se publicam, estão trabalhos apresentados nos diversos Working Grupos e Special Workshops, que acolheram a significativa diversidade dos temas trazidos à discussão pelos congressistas vindos de várias partes do Brasil e do mundo.

Percorrer os textos, fruto do trabalho de pesquisa e do uso da energia criativa por parte de seus autores, permite sentir a dimensão das demandas que se abrem para a compreensão do direito na perspectiva do tema central daquele congresso - Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies.

Marcelo Galuppo
Mônica Sette Lopes
Lucas de Alvarenga Gontijo
Karine Salgado
Thomas Bustamante

Belo Horizonte, Junnho de 2015.

Kelsen and Justice

Hannele Isola-Miettinen[1]

Abstract: Hans Kelsen has had a great influence on the European legal theoretical thinking. We know him as a so called positivist and as a founder of the "pure theory of law". Kelsen saw that law is social phenomena, in its nature. For Kelsen the law is legal norms. But because of the scientific attitude to law, Kelsen wanted to separate and purify the concept of law from other norms in society, like political or moral system of norms. Kelsen excluded the idea of justice from his concept of law. Although doing so, Kelsen reflected wide the principle of justice in his writings. He concentrated to study how to achieve knowledge about the justice and, more deeply, how to cope justice in the work of law giver. This paper analyses Kelsen's writings on justice and his arguments about justice in his definition of concept of law. Hans Kelsen developed his theory in the era of big "isms" and in the sequence of events when nation states were strengthening their status in Europe. For example, the European constitutional court system, first established in Austria and later in most European countries, based their systems on the legal architecture and idea by Hans Kelsen. Kelsen in his writings was reflecting deeply the problem of pluralism and the polarisation of the great "isms". Kelsen's choice in this turbulent political situation was the scientific attitude to law. In his theory he put aside the content of law, also the values and principles like justice. He invented the "Grundnorm" to present kind a hypothetical basic norm of law in his theory.

1. Introduction

Hans Kelsen (1881-1973) definitely has had a great influence on European legal theoretical thinking. We know him as a legal positivist and as a founder of the theory named the "pure theory of law". We also know well Hans Kelsen's dogma on the Grundnorm (basic norm), understood as a necessary presupposition of any positivistic interpre-

[1] Lic.Adm.Sc (Public law). University of Eastern Finland. E-mail: hannele.isola-miettinen@kolumbus.fi

tation of the legal material[2]. Bindreiter's interpretation is that Kelsen's Grundnorm is the justification of valid law. It is a formal justification of valid law. It does not refer to any moral or political aspects. Bindreiter writes that the Grundnorm is figurative and theoretical and it does not have any normative content.[3]

This article analyses Kelsen's writings on "the justice". The interest in this article is on Kelsen's attitude towards the concept of justice and on the arguments why he rejected the concept of justice in his concept of law. And did he really so? The interest of the article is on Kelsen's writings on values related to the justice or such topics like basic rights or fundamental rights. Which were the arguments by which he excluded the justice from his concept of law? Kelsen actually grasped a lot the natural law idea and the concept of justice. He was also interested the topic like achieving knowledge about justice, in general and also in the work of law giver (legislator).

Hans Kelsen developed his theory during the era of European big "isms". That era was the sequence of events when the nation states were strengthening their status in Europe. There was a tendency of polarisation of "isms" in the political climate of Europe of that time. As a matter of fact, the whole European constitutional court system, first established in Austria, later instituted in the most European countries, is based on the mental architecture and proposals given by Hans Kelsen. His influence on the European constitutional doctrine has been immense. Vinx writes that Kelsen's political-theoretical works were "honest" in that respect that he did not wore two hats but explained the starting points of his pure theory of law[4].

2. Definition of law in Hans Kelsen's theory

For Hans Kelsen the law is "an order of human behaviour" and an order is "a system of rules."[5] Kelsen writes "Law is not, as it is sometimes said, a rule" but "It is a set of rules having kind of unity

[2] KELSEN, 1945, pp. 116-117, basic norm is not created in the legal procedure by a law creating organ, it is presupposed., it is kind of juristic consciousness. See also KELSEN, 1945, p. 395, positivism and epistemological relativism belong together just as much as do the natural-law doctrine and metaphysical absolutism.

[3] BINDREITER, 2002, pp. 15-16 also p. 22.

[4] VINX, 2007, pp. 15-16.

[5] KELSEN, 1945, p. 1.

we understand by a system"[6] Kelsen writes that "Every rule of law obligates human beings to observe a certain behaviour under certain circumstances."[7].

For Kelsen the norm functions as a scheme of interpretation both in the physical world and in the law. Kelsen explains that the "legal cognition" separates the human law from the laws of causality prevailing in nature[8]. And Kelsen explains the "is" and "ought" worlds do that the objective meaning of the "ought" is called norms. In this legal cognition of Kelsen's theory and in the "ought" world Kelsen finds two dimensions, the subjective and the objective. Namely, in this subjective dimension the "…legislative act, which subjectively has a meaning of ought, also has an objective meaning". That objective meaning for Kelsen is the meaning of a valid norm "…because the constitution has conferred this objective meaning upon the legislative act."[9]. For Kelsen "Meaning is norm". The meaning is not the wording of any actual statement (like criminal code or other law code) but "it is a command or an authorisation". So, the "ought" has two dimensions, the subjective meaning is an act of will, the objective meaning and this is called a norm.[10] Conklin writes that the norm in Kelsen's theory is language-dependent. This means that the act of will is expressed through a language. One has access to legislatures willed concepts only trough a language.[11]

Kelsen defines the concept of the "imputation" to connect the facts determined by the legal order as a condition with a consequence determined by that order.[12] Kelsen is adopting the model concerning the imputation from the natural science world and from the thinking of causality. Although Kelsen tends to think scientifically, the origin of the Grundnorm is explained to be "transcendental-logical", in its nature, like in Kant's epistemology[13].

2.1 Scientific approach to law

[6] KELSEN, 1945, p. 1.
[7] KELSEN, 1945, p. 1.
[8] KELSEN, 1967, pp. 3-4.
[9] KELSEN, 1967, p. 8.
[10] KELSEN, 1967, p. 2 and p. 7.
[11] CONKLIN, 2006, p. 106.
[12] KELSEN, 1967, p. 103
[13] KELSEN, 1967, p. 202. See also efficacy as a criteria, efficacy as a power of the state, KELSEN, 2003, pp. 108-110.

Kelsen in his pure theory of law saw that the law is social phenomena, in its nature. Anyhow, Kelsen wanted to separate and purify the concept of law from all other norms systems in society, like political and moral[14] system of norms.

Kelsen in his theory was looking for the scientific approach to law. What was Kelsen's main incentive to look for that scientific approach to law? Was the motivation based on the general development in philosophy, science and law? Or was the main reason the turbulent political timeline in Europe?

In his studies Kelsen reflects widely the development of social theory and the problem of justice. Kelsen reflects in his writings the progress of natural science as a model of method in science.[15] Kelsen sees that until the rise of historical school, the science of law was the science of the law of nature. And the law of nature believed to the necessity of treating positive law only in close connection with natural law[16]. Kelsen first time drafted his pure theory of law in the study "Hauptprobleme der Staatlehre" (1911) where he is strongly referring to the idea of Georg Jellinek. One must not forget that Georg Jellinek was the professor and teacher of Hans Kelsen. Kelsen stressed and emphasised that theories in law are not unchangeable in time. Kelsen was also welcoming the constructive criticism for his theory. In his "Pure Theory of Law"(1934) Kelsen was worried with the diversity of the contents of positive legal orders are increasing. Kelsen thought that as a consequence of this diversification, "a general theory of law" is in danger of missing some legal phenomena among its fundamental legal concepts: some of these concepts may turn out to be too narrow, other too wide.[17]

In Kelsen's eyes natural law was not made by human will. That criteria of human will made law was separating the positive law from natural law. Secondly, the validity of natural law is different from positive law because its rules flow from nature, they are immediately evident as the rules of logic, that is why they do not require no force for their realization.[18] Kelsen's concept of law was influenced by the thinking of historical school. What Hans Kelsen in his theory elaborated further,

[14] KELSEN, 1945, p. 375, deals the aspects of moral, is he admitting the role of morals in law, Kelsen says that it is by juristic interpretation that the legal material is transformed into the legal system.

[15] KELSEN, 1945, p. 391.

[16] KELSEN, 1945, pp. 391-392.

[17] KELSEN, 1967, introduction, p. V.

[18] KELSEN, 1945, p. 392.

was that he assimilated and coupled together the law and the state. As a consequence of that coupling there was the state which was representing an organ performing the law as commands.

2.1.1 Comparison and descriptive approach

As a matter of fact, in the preface of the study "General Theory of Law and State" (1945) Hans Kelsen explains that the positive law is always the law of a definite community, law of United States or law of France or Finland and so on. Kelsen explains in the preface of the study that the theory presented in this study is resulting from the comparative analysis of the different positive legal orders, and it furnishes the fundamental concepts by which the positive law of definite legal community can be described.[19] Kelsen in this study mentioned above adopted the comparative and descriptive approach to law. He thought that it is the method by which ensure the scientific approach to law.

2.1.2 A science of positive law must be distinguished from philosophy of justice

Kelsen writes that "Law as distinguished from justice is positive law". Kelsen continues …"a science of positive law must be clearly distinguished from a philosophy of justice."[20]. Kelsen thought that his concept of law must be separated from such ideals of justice like democracy or liberalism which are two possible principles of social organisation[21]. For that purpose and in order to structure the law Kelsen has been innovated the hypothetical Grundnorm idea.

2.1.3 Rational human cognition criteria

Kelsen writes that rational human cognition can grasp only a positive order evidenced by objectively determinable acts. This order is the positive law. Only this can be an object of science; only this is the object of the pure theory of law, which is a science, not metaphysics, of the law.[22] Kelsen was interested in the rational human cognition. Adjective

[19] KELSEN, 1945, preface, p. xiii.
[20] KELSEN, 1945, p. 5.
[21] KELSEN, 1945, p. 5.
[22] KELSEN, 1945, p. 13.

"rational" in dictionary means "having a reason or understanding"[23]. What human cognition actually means? Human refers to human beings. Generally the cognition has been defined to be an experience of knowing that can be distinguished from an experience of feeling and willing, it refers to the brain and mind. The essence of cognition is the judgement.[24] There are two main approaches to that contemporary cognitive theory, one is information-processing theory approach, the second is Jean Piagets theory viewing the cognitive adaptation.[25] So, for Kelsen it was only the positive law which could be the object of science. In pure theory of law Kelsen rejected metaphysics and other aspects outside the positive law. Anyhow, the problem of this approach is that the act of will is expressed through language and that the norm as such is language-dependent. Is it only the language which is the object of science in law studies?

3. Real and possible law, not the correct law

Hans Kelsen writes that his theory "…presents the law as it is, without defending it by calling it just, or by condemning it by terming it unjust. It seeks the real and possible, not the correct law. It is in this sense a radically realistic and empirical theory. It declines to evaluate positive law."[26]. Vinx has stated in his study that Kelsen tries to understand the law as a kind of social fact[27]. The concepts like "realistic" and "empirical theory" in Kelsen's studies necessarily give the impression that Kelsen understood the law as a reality.

3.1 Real law and not mixed with natural law

Kelsen stresses that pure theory of law presents itself as the "real" law. Theory of law which mixes the latter with natural law or any type of justice in order to justify or disqualify the positive law must be rejected as "ideological". In this sense the "Pure Theory" has outspoken anti-ideological tendency. Kelsen explains that "The Pure Theory of law exhibits this tendency by presenting positive law free from any ad-

[23] Encyclopedia Britannica
[24] Encyclopedia Britannica
[25] Encyclopedia Britannica
[26] KELSEN, 1945, p. 13.
[27] VINX, 2007, p. 10.

mixture with any "ideal" or "right" law. The "Pure Theory" desires to present the law as it is, not as it ought to be. It seeks to know the real and possible, not the "ideal", the "right" law. Kelsen writes, in this sense the "Pure Theory" of law is radical, realistic theory of law, that is a theory of legal positivism.[28] Kelsen's theory took sharp separation towards the legal philosophy of legal science. Kelsen writes that juridical science has maintained its interest on the "just" and "legal" antithesis, which manifests itself in the sharp separation of legal philosophy from legal science. Until the historical school of law, the science of law was the science of law of nature.[29] Kelsen seems to reject the role of legal philosophy in his attitude towards legal science?

3.1.1 Kelsen: Positive law should be just?

Kelsen in his theory saw that there was no reason to identify law and justice. Hans Kelsen thinks that if only a just order is called law, a social order which is presented as law, is at the same time presented as just, and that would mean that it would be morally justified. Kelsen writes that the tendency to identify law and justice is the tendency to justify a given social order. Kelsen continues "It is a political, not a scientific tendency."[30] So, what Kelsen articulates is that one must not identify law and justice. Hans Kelsen finds this kind of tendency to be political aspect, not a scientific tendency. Kelsen sees that law and justice are different categories of knowledge.

Kelsen writes that "At any rate a pure theory in no way opposes the requirement for just law by declaring itself incompetent to answer the question whether a given law is just or not, and in what the essential element of justice consist." Kelsen continues "A pure theory of law – a science – cannot answer this question because this question cannot be answered scientifically at all."[31] So, as it reads in the writings of Hans Kelsen, he admits "that positive law could or should be just", Kelsen sees that this requirement is self evident. Anyhow, to this discussion about justice Kelsen answers "what it actually means is another question."[32]

Kelsen writes about the limitation of positivism. Kelsen writes

[28] KELSEN, 1967, p. 105-106.
[29] KELSEN, 1945, p. 391.
[30] KELSEN, 1945, p. 5.
[31] KELSEN, 1945, p. 6.
[32] KELSEN, 1945, p. 5-6.

that the basic norm of given legal order is not itself a made, but a hypothetical, presupposed norm. It is not positive law, but only its condition. Kelsen writes that even this clearly shows the limitation of the idea of legal "positivity". The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, like a norm of natural law, apart from its merely hypothetical validity. The idea of a pure positive law, like that of natural law, has its limitations, writes Kelsen.[33] But Kelsen continues, the basic norm of a positive legal order cannot have the function of guaranteeing the "justice" of this system. This would be against the principle of positivism. Basic norm has to establish not a just but a meaningful order.[34] Kelsen explains with the rich and various vocabulary the status of "just" or "justice" in his theory. The most important message in this respect is that positive law and just/justice are separate categories of knowledge.

3.1.2 Justice and legality

In his discussion of justice and legality Hans Kelsen writes that the concept of justice as a secure ground of given social order means the same than legality. It is just for a general rule to be actually applied in all cases where according to its content, this rule should be applied. It is "unjust" for it to be applied in one case and not in another similar case. Justice in this sense of legality, is a quality which relates not to the content of positive order, but to its application. Justice in this sense is compatible with and required by any positive legal order. "Justice means the maintenance of a positive order by conscientious application of it". It is justice "under the law", Kelsen explains. The statement that the behaviour of an individual is "just" or "unjust" in the sense of "legal" or "illegal" means that the behaviour corresponds or does not correspond to a legal norm which is presupposed as valid by the judging subject, because this norm belongs to a positive legal order. Such a statement has logically the same character as a statement by which we subsume a concrete phenomena under an abstract concept. If the statement that certain behaviour correspond or does not correspond, to a legal norm is called a judgement of value, then it is an objective judgement of value which must be clearly distinguished from a subjective judgement of value by which a wish or a feeling of the judging subject is expressed. Kelsen

[33] KELSEN, 1945, p. 401.
[34] KELSEN, 1945, p. 402.

writes that the statement that particular behaviour is illegal or illegal is independent of the wishes and feelings of the judging subject; it can be verified in an objective way. Only in the sense of legality can the concept of justice enter into a science of law.[35] So, for Kelsen, the justice seems to be kind of criteria of application law.

As Kelsen writes "Justice is a quality of a social order, secondly a virtue of man." Kelsen grasping justice thinks that a man is just "if his behaviour conforms to the norms of a social order supposed to be just." Kelsen continues asking what it really means to say that a social order is just? For Kelsen it means that this order regulates the behaviour of men in a way satisfactory to all men, "that is to say so that all men find their happiness in it".[36]

3.1.3 Justice and social happiness is in the hands of the law-giver

Kelsen reflects widely the topic of just social order. Kelsen thinks that this order regulates the behaviour of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. Kelsen continues that "The longing for justice is men's eternal longing for happiness. It is happiness that man cannot find as an isolated individual and hence seeks in society. Kelsen writes that "Justice is social happiness."[37].

3.1.4 Two forms of social happiness

Hans Kelsen makes distinctions in this concept of "social happiness" in a: a) narrow sense of individual happiness, happiness of one individual will which in some time be directly in conflict with that another or in a b) happiness in the collective sense, satisfaction of certain needs, recognised by the social authority, the law-giver, as needs worthy of being satisfied (such as need to be fed, clothed, housed). [38] For Kelsen "happiness" is not happiness in subjective-individual sense, it must be happiness in a collective sense.[39] In this discussion of happiness Kelsen turns to the problem of ranking and values: "which human needs are worthy of being satisfied, and especially what is their proper

[35] KELSEN, 1945, p. 14.
[36] KELSEN, 1971, p. 2.
[37] KELSEN, 1945, p. 6.
[38] KELSEN, 1945, p. 6.
[39] KELSEN, 1971, p. 3.

rank"? Kelsen writes that these questions cannot be answered by means of rational cognition. "The decision of these questions is a judgement value, determined by emotional factors…"[40].

The timeline Hans Kelsen was reflecting the happiness fits with the era he analysed the Treaty of United Nations in his study "The Law of United Nations. A Critical Analysis of its Fundamental Problems" (the study is signed by Hans Kelsen 1949). In the study he was reflecting "rights", also the social rights and the conditions and problems to enforce rights written into the treaty. Kelsen grasped from that point of view the needs and their satisfaction from very realistic point of view.

3.1.4 The answer to the values is given by the generally valid norm

These subjective and relative judgement of value is usually answered by presenting "an assertion of objective and absolute value, a generally valid norm". Hans Kelsen writes:

> "It is a peculiarity of human being that he has a deep need to justify his behaviour, the expression of his emotions, his wishes and desires, through the function of his intellect, his thinking and cognition. This is possible, at least in principle, to the extent that the wishes and desires relate to means by which some end or other is to be achieved; for the relationship of means to end is a relationship of cause and effect, and this can be determined on the basis of experience, i.e. rationally."[41]

Kelsen continues this topic

> "To be sure, even this is frequently not possible in view of the present state of social science; for in many cases we have no adequate experience which enables us to determine how certain social aims may best be attained."[42] Kelsen is admitting the difficulty to determinate and realize the aims of legislator in society. What Kelsen is looking for is the experimental knowledge in this respect of helping the social planning in society.

[40] KELSEN, 1945, p. 6.
[41] KELSEN, 1945, p. 7.
[42] KELSEN, 1945, p. 7.

3.1.5 Problem of justice cannot be rationally answered

Kelsen writes that there in this respect are more usually given subjective judgements of value than objective insights into the connection between means and end, that is, between cause and effect. And Kelsen writes "and hence, at least for the moment, the problem of justice, even as thus restricted to a question of the appropriate means to a generally recognised end, cannot always be rationally answered."[43].

In his "Essays of Justice" Kelsen concludes that it is impossible to answer to the question what is justice. Kelsen continues that since science is his profession, and hence the most important thing in his life is, justice, is that social order under whose protection the search for truth can be proper. Kelsen writes that "My justice then is the justice of freedom, the justice of peace, the justice of democracy - the justice of tolerance".[44] Kelsen through his own subjectivity and emotionality gives meanings to the principle justice. Justice in this respect refers to freedom, peace, democracy and tolerance.

Declared appropriate means to the presupposed ends is not "true judgement of value" but a judgement concerning the connection between cause and effect and as such a judgement about reality, writes Kelsen.[45] Kelsen states that a judgement of value is the statement by which something is declares to be an end, an ultimate end which is not itself means to a further end. Kelsen sees that "Such a judgement is always determined by emotional factors."[46].

Every system of values, like a system of morals and its central idea of justice, is a social phenomenon. Every system of values is the product of society, and hence different according to the nature of the society within which it arises.[47] Hans Kelsen lifts up the difference and distinction between values, truth and correctness: "That many individuals agree in their judgements of value is no proof that these judgements are correct. … The criterion of justice, like criterion of truth, is not dependent of the frequency with which judgements about reality of

[43] KELSEN 1945, p. 7. See also KELSEN, 1971, pp. 1-24, about emptiness of the concept of justice, Kelsen in his essays concludes that it is impossible to answer to the question what is justice.
[44] KELSEN, 1971, p. 24.
[45] KELSEN, 1945, p. 7.
[46] KELSEN, 1945, p.7.
[47] KELSEN, 1945, p. 8.

judgements of value are made. "[48]. Kelsen remarks that since humanity is divided into many nations, classes, religions and so on, often variance with one another, there are a great many very different ideas of justice; too many for one to be able to speak simply of "justice".[49]

4. Natural law theories

Kelsen writes that …"one is inclined to set forth one's idea of justice as an only correct, the absolutely valid one." Kelsen continues that "The need for rational justification of our emotional acts is so great that we seek to satisfy it even at the risk of self-deception." [50] Kelsen sees that the rational justification of the postulate based on subjective judgement of value, on the wish, for example that all men should be free or treated equally is self-deception. Kelsen assimilates that self-deception to the ideology. Kelsen in this respect of natural law speaks about the nature of things or nature of man, about the human reason. The doctrine of natural law means that there is an ordering of human relations different from positive law, higher and absolutely valid and just, because emanating from nature, from human reason, (or from the will of God). The law created by a legislator is positive law, natural law, according to that special doctrine, is not created by the act of human will; "it is not the artificial, arbitrary product of man."[51].

4.1 Innate or inborn elements vs. not conferred by human legislator

Natural law "can be and has to be deduced from nature by a mental operation."[52]. Kelsen writes that by "carefully examining nature and especially the nature of man and his relations to other men, one can find the rules which regulate human behaviour in a way corresponding to nature and hence perfectly just. The rights and duties of man, established by this natural law, are considered to be innate or inborn in man, because implanted by nature and not imposed or conferred upon him by a human legislator."[53]. Kelsen remarks that none of the numerous

[48] KELSEN, 1945, p. 8.
[49] KELSEN, 1945, p. 8.
[50] KELSEN, 1945, p. 8.
[51] KELSEN, 1945, p. 9.
[52] KELSEN, 1945, p. 9.
[53] KELSEN, 1945, p. 9.

natural law theories has so far succeeded in defining the content of this just order in the way even approaching the exactness and objectivity with which natural science can determine the content of laws of the nature or legal science the content of a positive legal order.[54] Kelsen critically writes that so far put forth as natural law, including justice, consists for the most part from empty formulas or meaningless tautologies like categorical imperative, better known as Kant's doctrine that one's acts should be determined only by principles that one wills to be binding on all men.[55] There are questions which remain without answers, like the question what is rights what is wrong Kelsen writes.[56] But interestingly, Kelsen lifts up and deal the elements which are in modern life known as human rights based on human right conventions.

Private property belongs into to the so called natural, inborn rights of man, writes Kelsen. It is, however, hardly possible to prove this doctrine.[57] Kelsen in his analysis of rights writes that property is a typical absolute right: the proprietor has a right to demand from everybody to be left in undisturbed possession of his property. For Kelsen an absolute right there corresponds an absolute duty. Relative right corresponds a relative duty. Kelsen says that in as much as the right of one individual is possible only in relation to the duty of another, rights are relative rights.[58]

4.2 Doctrine of natural law

Whether the principles of natural law are presented to approve or disapprove a positive legal order, in either case their validity rests on judgements of value which has no objectivity, writes Kelsen.[59] Kelsen says that doctrine of natural law "is concerned not with the cognition of positive law, of legal reality, but with its defence or attack, with the political not with the scientific tasks.".[60] In his analysis concerning the dualism of positivism and natural law Kelsen concludes that justice is

[54] KELSEN, 1945, p. 9.
[55] KELSEN, 1945, p. 10.
[56] KELSEN, 1945, p. 10.
[57] KELSEN, 1945, p. 11.
[58] KELSEN, 1945, pp. 85-86.
[59] KELSEN, 1945, p. 11.
[60] KELSEN, 1945, p. 11.

an ideal inaccessible to human cognition.[61] The ideal of justice has ultimately no other meaning that the hypothetical basic norm of critical positivism with its function of constituting the empirical legal material as an order. For example, examination of the conceptual treatment of the principle of equality by the natural law theorists, who find in it the essence of justice, shows that they never have been able to determine what or who is equal.[62]

5. Conclusions

One is able to conclude that Kelsen's argument for establishing his legal science was based on the epistemological criteria, in other words, on criteria what is possible to know objectively and on aspects of human cognition and on the limitations of human cognition. Kelsen's purpose was to avoid metaphysical arguments or value judgements, which he categorised to be subjective and emotional, in their nature. Kelsen's ambition was to elaborate pure theory of law based on realistic and empirical theory.

Kelsen writes that "rational human cognition" can grasp only a positive order evidenced by "objectively determinable acts". This order is the positive law. For Kelsen only this positive order can be an object of science and the object of the pure theory of law. Positive law seeks real and possible. Positive law is free from metaphysics and any admixture with any "ideal" or "right" law. Kelsen based his approach to the idea of objectivity which is separate from the subjectivity and emotional aspects.

Kelsen excluded the idea of justice from his pure theory of law, because justice was for him an ideal inaccessible to human cognition. Kelsen analysed deeply the concept of justice and a topic how to achieve knowledge about justice. Kelsen elaborated the concept of "social happiness" for the activity of legislator. Kelsen prefers the collective happiness, he does not consider the individual-subjective happiness to be fruitful starting point. The ultimate problem in the decision making of legislator is how to prefer those values which are promoting social happiness in society? There is no absolute dogma to that. For example, social science is not able to give any solid answers to question how to gain the social happiness and full satisfaction of certain needs in the just way.

[61] KELSEN, 1945, p. 11.

[62] KELSEN, 1945,pp. 439-440.

Kelsen comes to the conclusion in the problem of ranking and values, and in topic which human needs are worthy of being satisfied, and especially what is their proper rank. Kelsen's conclusion is that these questions cannot be answered by means of rational cognition. The decision of these questions is a judgement value, determined by emotional factors. This is a task given to the legislator. Kelsen concludes that there are both absolute and relative rights of human, but it is not possible to prove them. None of the numerous natural law theories has so far succeeded in the defining the content of just order in the way. In his analysis, concerning the dualism of positivism and natural law, Kelsen concludes that justice is an ideal which is inaccessible to human cognition.

References

BINDREITER, Uta: Why Grundnorm?: A Treatise on the Implications of Hans Kelsen's Doctrine, Springer, 2002.

Encyclopedia Britannica Online, viewed 25.10.2013, Available from http://encyclopedia.britannica.com

CONKLIN, William: Kelsen on Norm and Language, 101-126, Ratio Juris, Vol. 19, No. 1 March 2006.

KELSEN, Hans: Principles of International Law, originally printed in USA 1952, New Jersey, 2003.

KELSEN, Hans: General Theory of Law and State, Translation by Anders WEDBERG, Harward University Press, 1945.

KELSEN, Hans: The Law of the United Nations: A Critical Analysis of its Fundamental Problems, originally published New York. E.A.Praeger 1950, New Jersey, 2000.

KELSEN, Hans: Pure Theory of Law, Translation by Max KNIGHT, originally published 1934 in Vienna, University of California Press, 1967.

KELSEN, Hans: What is Justice? Justice, Law, and Politics in the Mirror of Science, Collected Essays of Hans Kelsen, originally published 1957 in University of California, University of California, 1971.

VINX, Lars: Hans Kelsen's pure theory of law. Legality and Legitimacy. Oxford University Press, 2007.

Good men aren't enough

The dialectics[1] between the law and the practical virtue in the Aristotelian thought: the philosophy between normative and critical approaches

Marcella Furtado de Magalhães Gomes[2]

Abstract: The discussion between these two great streams of the Western political thought, normative and critical philosophies, can't forget its political-philosophical Greek root in the Aristotelian thought. His philosophy defends a path that doesn't adhere to extremes, but focuses on allying logically the ontic purpose and the unforeseeability of the results, which are only likely. In this paper, we address the dialectical movement between the ethical awareness of the individual and the political and legal organization of the excellent polis, in the thought of Aristotle. The man can only fulfill his end as a human being by internalising the heteronomous good expressed in the ethically constituted nomos and by the conscious exteriorization of the good in his own praxis. In short, the man may only become complete while an ethical being as he lives in an ethical community, i.e., a politically and legally organized community.

Keywords: Ethical and Political Philosophy – Aristotle – State, Law and Ethical Virtue

[1] In this article we mean by dialectical the way of explaining the becoming, the process of being what it is in essence of the human being, but without finding a causal or necessary link between the stages because this is the field of practical reason. We state that in the Aristotelian thought the fulfillment of the purpose of the human beings is a dialectical process of interaction between the law – the objective and social reason – and the virtue – the individual conscience. In this movement, there are continually exteriorization of social standards that contain abstract concepts of order and freedom and a progressive conscious and individual interiorization of these standards that allows each one of us to criticize them and improve them.

[2] Doutora e Mestre em Filosofia do Direito pela Universidade Federal de Minas Gerais. Profa. da Universidade Federal de Minas Gerais, Faculdade de Direito, Dep. de Direito do Trabalho e Introdução ao Estudo do Direito.

1. Introduction

The Aristotelian ethical and political thought, even though finalistic and thus liable to be characterized as normative for the contemporary philosophy, has the peculiarity of recognizing its boundaries and limits, as it will be discussed below. According to this author, life in the righteous *polis* is the only possible way to men to carry out their essences and therefore to be what they should be.

However, the life path that the inductive observation of human behavior points out is only a probable path. It is not a necessary and progressive process that historically reveals itself to reason and because of reason. It is not a necessary path, because there is no absolute guarantee that the consciousness of virtue is formed in the free ethical subject, because man is always tensioned between desire and reason. Even though not a necessary path, this path is the most probable way to create virtue, and thus, the most probable mean for men to become precisely what men already are in essence and the most probable mean to live a good life both individually and collectively.

We can conclude that Aristotle is not isolated inside a normative castle. He does not lose sight of the reality that unfolds beyond it, even though he points out the guidelines that can lead to self-realization of men in their existences. His thought keeps a critical perspective regarding ethical-political human societies, to the extent that it argues that the guidelines of those societies are not in themselves necessary, as they can't guarantee the occurrence of the result so desired, the *eudaimonia*.

We, therefore, believe that a discussion that counteract these two great streams of Western political thought, the normative and critical philosophies, can't forget its political-philosophical Greek root in the Aristotelian thought. His philosophy defends a path that doesn't adhere to extremes, but focuses on allying logically the ontic purpose and the unforeseeability of the results, which are only likely.

In this paper, we address the dialectical movement between the ethical awareness of the individual and the political and legal organization of the excellent *polis*, in the thought of Aristotle. The man can only fulfill his end as a human being by internalising the heteronomous good expressed in the ethically constituted *nomos* and by the conscious exteriorization of the good in his own *praxis*. In short, men may only become complete while ethical beings as they live in ethical communities, i.e., in politically and legally organized communities. In Aristotle's

thought, there's no doubt that reason is capable to grasp and to express this movement. On the other hand, reason knows it has boundaries when effectively intends to determine the choice to the ethical purposes it identifies.

2. Ethics, Politics and Law

To Aristotle, human existence has as its end the actualization of the specific work that defines us as human beings. The peculiar function of man is rationality. To live is to be in motion and our work is the activity according to reason. We must add that as the flute player, we can simply perform our work or we can exercise it well. The excellence of the rational activity is the purpose and the *ratio essendi* of every human being (*Nicomachean Ethics*, I, 1, 1094 a 1-16; I, 2, 1094 a 18-22; I, 2, 1094b, 7-10).

Rationality operates by capturing the immanent intelligible form in the sensible, contained in the sensation or *fantasy*, which allows us to identify, explain and transform the entities. However, the cognitive performance is only possible when reason curbs appetite. Thus, the apprehension of the intelligible for us also means the possibility to identify, from the apprehension of the surroundings, a course of action that presents consequences more enjoyable or more appropriate to the activity of reason. However, the excellence of reason, according to Aristotle, is not achievable by the individual man.

Our reason is *logos enhuloi*. Its activity can't be and is not separable from the body. It is conditioned by the material world on which it operates and the material world is its limit. The sensitive organs can't simultaneously receive all possible internal and external sensations. The existent is composed of form and matter, and matter is subject to movement, is subject to the continuous updating of its potentiality. Because of that, the material world is in constant state of corruption. Therefore, reason is not able to predict or anticipate all contingencies which govern its activity while attached in the matter, i.e., while in constant transformation. Each singularity lived provides more data to the next experience, but not the wholeness of the information which would enable reason to select the perfect or final option.

Furthermore, reason is also subject to movement, even though not to the same extent and degree that the body is. Our reason is not the same throughout our existence. It matures itself and degenerates itself.

It is in itself *apatheia*, but the *logos enhuloi* is affected by the matter, i.e., the reason in itself doesn't corrupt or change, but the compound that acts rationally corrupts itself and transforms itself (*On the Soul*, I, 4, 408 b 18-30). Man becomes by the passing time more fit to reasoning because he exercises its reasoning, because everyday experience increases his database, i.e., increases the amount of sensations and sensitive images stored and from which the intellect draws the intelligible. In addition to that, the reason in this compound seeks the intelligible immanent to the sensible corruption not only of the compound itself, but in the reality itself, i.e., the reason seeks the permanent in change. Thus, even if reason itself does not change, reason in the matter is perfected by its own activity. As Aristotle says: "[…] intellectual excellence in the main owes both its birth and its growth to teaching (for which reason it requires experience and time)." (*Nicomachean Ethics*, II, 1, 1103 a 15).

There is more to consider. The body is the instrument by which reason acts. As composed of matter, the body matures and degenerates. In our childhood we are not capable of the same degree of judgment that we have in our adult lives. Likewise, our memory and understanding are not the same in our old age. In old age, deterioration of the body begins to interfere with our ability to collect the sensitive shape, to reserve it and access it, which undermines the role of reason in the capture of the intelligible.

In our childhood the amount of experiences lived is minimal and thus the possibility of reason to identify and to anticipate a broad scenario of consequences is also reduced. Therefore, our choices do not represent, albeit rationally pointed out, the excellence of the rational activity. In general, we say that children hardly act rationally and, at least in most cases, they act without the full awareness of the consequences of their actions. Owners of a reason so feeble, they seem to succumb to the sensible wishes and move like animals, driven by external forces.

The desire for pleasure is limitless and opposes itself to any form of restriction. Rationality is limit because it's shape, i.e., determination, individualization of matter, of the shapeless, of the indeterminate (*Nicomachean Ethics*, I, 13, 1102 b 23-31). In each individual, a battle between the limited and the boundless, between reason and irrational is waged having as its purpose the supreme end, i.e., the self-realization of man. This self-realization is the achievement of what we should be (and are in potentiality) since the beginning: outstanding rational activity. However, if the reason operates over matter and, as such, is 'weakened' by the movement of matter, it fails to place the desire in the right mea-

sure. In this case reason requires aid. This aid is provided by the ethical habit formed in the subject by the *paideia,* that is, the rectification of the *appetite* towards the end rationally fixed (*Nicomachean Ethics*, VI, 1142b 15-35; *Magna Moralia*, I, 6, 1185b 38 – 1186 2).

The relationship between rational beings exponentially increases the unique experiences sensitively gathered and rationally interpreted. The sharing between subjects of countless singularities is what allows reason to leap from its former position as a mere servant of bestiality to the place of threshold imposed on the non-limit. Although rationality major duty is the capture of the intelligible form immersed in the matter, in the individual subject it is tied to the ephemerality and to the process of corruption-and-generation of the body and of the material world.

Only in front of another subject who makes the same tasks and communicates his work is reason capable of raising itself to the rank of master of the body. The work communicated is the result of the rational activity of the other subject. It works as a portal which connects us to a myriad of experiences, inductions and generalizations and which allows us to start our own walking now equipped with all that information. Thus, we will recognize objects not seen because they were rationally learned from the experiences of others. We shall be able to anticipate the consequences not experienced by us, but that we memorized from the communication with others.

There is more. The contact with other rational beings can arouse in us the reason that was overshadowed by instinct and necessity. Reason then seeks to act in the achievement of its own goals and realizes that only by controlling the desire it will be able to accomplish its purposes. Thus, that reason which first was an instrument of the instinct becomes a means to itself, i.e., starts to pursue its own activities and accomplishments. Reason is now competing with the *appetite* for the fulfillment of its own goals.

However, appetite is opposed to the rational imposition and obeys it only when conditioned to want what reason determines as correct. The rectification of appetite is the work of the community which guides the individual through education to act according its rules. Thus, *eudaimonia* will only be achieved by men raised by a good community, i.e., a community which has rules in agreement with what is right in accordance to reason (SIMPSON, 1998, p. 2-3).The acquisition of the virtuous habit requires others, who have the power to convince us, to transmit to us what is good and to constrain us to practice it. To Aristotle, the political community is the one which holds this power and the law is its

instrument of persuasion and coercion in the achievement of this goal (*Nicomachean Ethics*, X, 9, 1179a 33 – 1181b 15).

The law is the main instrument of *paideia* insofar as it orders the practice of all virtues and prohibits all vices. So conceived, it is universal justice, i.e., it is the result of the ongoing process of reflection and of collective decision of the reason about the good. It is what promotes the conscious evaluation of the *ethos* and what universally imposes it, through the apparatus of state power. It pursues social order and harmony, and as such, promotes the formation of the ethical habit in the individuals, which is the essential way to the acquisition of the ethical virtue. This result does not depend on any arbitrary law, but on the righteous law, that law which was drafted by the legitimate rulers of the *polis* in accordance to reason and considering the promotion of the ethical virtue (SIMPSON, 1998, p. 4-5).A righteous law is the one that distributes the goods of the city among its members in the proportion of their merits, promoting equality between them (*Nicomachean Ethics,* V, 1, 1129 b 26 – 35).

We must add that it is not enough for the law to be fair, but it is necessary the proper application of the law to the relations and disputes of men. When someone breaks the equality established by the distribution of goods, acquiring in the everyday negotiations and exchanges more than he should acquire, intentionally or not, the political apparatus of the community must intervene in this relationship and return the parties to equilibrium, to the *status quo ante*. The good *polis* is the one that applies law fairly. It is up to the rulers, thus, the development of righteous laws and the fair application of the law to the solution of the private conflicts, so that the *polis* is indeed able to provide the conditions for self-realization to its members (KRAUT, 2002, p. 378-379).

3. Discretionary power and law

However, Aristotle knows that it is possible that the laws do not meet these requirements. First, because the one who creates them can be wrong as to what is the benefit of citizens, even if he is able to create suitable rules for the promotion of the evil that he had conceived as good. Second, because those who create the laws, right or wrong about the welfare of men, may be unable to implement in the laws this idea of good. Thus, evaluation of justice in a city should be assessed in relation both to the design of good that it has, and in its ability to perpetuate such

ideals in the laws.

Even the righteous are not exempt from mistakes (*Politics*, III, 16, 1287a 30-31).Human reason is not omniscient and can't anticipate all the circumstances in which one act is circumscribed. Besides that, excellence is not achieved in one action, but throughout the whole existence, and during this journey, even the most virtuous of men may give in to the pressure of his own desires. On the other hand, even if the law is based on the work of sentient beings, law itself does not have passions (*Politcs*, III, 15, 1286a 19). When the law is not the result of selfish desire as in tyrannies, it is not the result of the will of a single man, but represents the conscious reflection of an entire community about what we should or should not do. In regimes in which law prevails over the egoistic will of the rulers, it is usually the representation of the repeated and rationalized *praxis* of a community. Thus, we believe that for the Stagirite the guarantee of a good *polis*, or of righteous laws and fair application of these laws, can be attained by all legal political regimes, i.e., for all political systems in which the egoistic will of rulers is submitted to the law[3]. All legal systems are suitable to the formation of the virtue of its citizens, although there is some hierarchy amongst them in the achievement of such purpose.

However, the law is designed and implemented by men and therefore is subject to theirs vicissitudes. Bad men make bad laws. The law also does not foresee any possible circumstance. The law is general and will always require supplementation in order to be applied to current facts, especially when we consider that the human needs are in constant change (*Politcs,* III, 15, 1286a 10 -13).The finding of the supremacy of the law over the selfish desire of the ruler does not elide the issue. Although the law might be the more reliable parameter of conduct that men provide to themselves - to the extent that stems from the examination and of judgment of the various choices of the various men throughout history and do not stems of a selfish desire of a single man - it does not represent the definitive option for action (*Politcs*, III, 16, 1287a 18

[3]In this sense, we disagree with the position of Kraut which holds that only the monarchy and aristocracy can lead to human excellence and the republic (politia) can, at most, form good citizens (and others regimes not even good citizens). For the arguments of Kraut, check: 2002, p. 383-470. The choice of the regime does have some repercussions, for the Stagirite, in the reaching of the common good and of the individual good, but if the regime is legal, that is, if the will of the rulers submits itself to the rule of the law, the polis can provide the formation of the virtue of its members. In this sense, check: MAGALHÃES GOMES, 2010, p. 201-213.

– 1287b 20).The law is the product of human deliberation and, as such, can't anticipate all the circumstances which we shall face throughout our lives. Of course its selection of situations covers much more cases than those that a man could live or even imagine. But the law does not cover all possible human concrete experiences and not even those of one man.

The *modus operandi* of reason is the unification of the infinitely diverse and complex things into similar traits, general and simple. When the legislator examines the myriad of human experiences, his rational inquire seeks amongst them similarities that can bring them together and make them an increasingly smaller subject to be understood. Each situation that seems unique to sensitivity becomes, gradually and faced with the reason, common to other facts. The natural human reactions to that same event are compared with each other and in relation to their consequences. After that, one of these actions is chosen as the one that should be taken every time that this event occurs. In this process what was concretely exclusive of this or that situation examined is dropped when setting the fact that unifies them. In concrete, however, the situations we face regain its former uniqueness. The real will always be singular.

One could say that there would be no problem on the illustration described above if the goal of the law was, simply, to list any course of action to men. But if the purpose of the law, as intended by the Stagirite, is to prescribe the best path of conduct possible to citizens, then we can't overlook its generality in relation to the facts.

If the law is, by its own nature, a generalization of concrete situations, its immutability or its strict application to any particular case will not be the best solution, it will not achieve justice, its *raison d'être*. It is necessary that those who exercise the functions of government in the *polis* can judge the law and change it, because of new unforeseen circumstances, or adapt it, because of the singularities of the case to which the law is being applied. Because of its generality, the fair application of the law depends on the discretion of the rulers, both the legislators and the judges (*Politcs*, III, 15, 1286a 20-25).

To what extent the discretionary power of the rulers is legitimate? How can we ensure that the rulers do not go beyond this measure, given that they own the force of the State (*Politics*, III, 15, 1286b 32-33)? The law is the product of human deliberation. And if those who govern us and create the laws are not good men, what will guarantee that the rules established by them are fair?

As regards the discretionary power, we understand that there are limits which the ruler must obey, otherwise his decision is illegitimate. Formally, the highest limit to the discretionary power of the ruler, whether he is the legislator or the judge, is the *politeia*. The decisions of the ruler can't overtake or denature the fundamental principles that characterize the regime of government established by the *politeia*. Otherwise, there is no established order and we are at the mercy of the selfish will of the ruler. Sets the Stagirite:

> "A constitution is the arrangement of magistracies in a state, especially of the highest of all. The government is everywhere sovereign in the state, **and the constitution is in fact the government**. [...] (*Politics*, III, 6, 1278b 9-11) – emphasis added.

If the decision of the ruler is in accordance with the underlying principles of that regime of government, it was not arbitrary; otherwise is unlawful and must be reversed (*Politics*, V, 3, 1303rd 21-24; V, 7, 1307b 2-6). The *politeia* is the true nature of a political community and thus the essence of its unit. Thus, for Aristotle, the duty of every citizen is to preserve their *politeia*.

Materially, the decision must be judged in the light of the common interest. The correct regimes are those in which rulers act in the best interest of all *(Politics*, III, 13, 1283b 36-42). The ruler can't put the interest of certain parts of the city above all others, but should guide their decisions by the achievement of the good of the city as a whole; they must be impartial (KRAUT, 2002, p. 389). In each case, the discretionary power of the ruler should be confronted to the common good: if there is the intention to strongly favor the interests of one part of the city at the expense of the good of others, the decision is unlawful and must be reversed; otherwise it can be maintained. Finally, it is necessary to comment that the Stagirite warns that the alteration of laws can't become a habit; otherwise laws will lose their strength (ROSS, 1957, p. 365).

4. Dialectics between Law and Virtue

Regarding the guarantee of the justice of the laws, the position of the Stagirite is circular. In order to the laws to be good, men should be good. In order to men to be good, laws must be good.

The laws of a city, as long as circumscribed in a legal regime, are a minimum of justice, although its content is not perfectly virtuous.

First, because they establish order and security, a way of proceeding in everyday actions which applies to everyone and that is the same under similar circumstances. The prevalence of the law is the realization of some portion of justice, because it guarantees the existence of some impartiality of the lawmakers, or of some consideration for the common good despite their own interests.

Moreover, even the law created by non-virtuous men (but law-abiding men) captures, even if partially, the experiences of his community throughout history. There was, in the preparation of that law, some reflection about the customs of his community, and, therefore, some evaluation from those decisions taken earlier on. So, the choice of one of them as a parameter is made it because that one experience was considered the best to run. Although this reflection and choice may have been misguided – because they didn't identified the true purpose of our actions, or because they didn't identified the best means to achieve it – there was, in this process, examination, judgment and choice about what to do in certain circumstances, which makes this path of conduct better than that instincts impose on us.

More than this, the creation of the law is not a lonely reflection out of a small number of personal experiences about a choice. The whole process of creating the law is a collective one. The experiences that serve as its parameter and that are analyzed and compared by its creators are the customs, the ideals and opinions of a large group of men, contemporaries and ancestors of the legislators. The decision, implementation, execution and subordination to the law are also acts of several men, even if carried out, at a given moment, by just one man.

The law is – when not an exclusive product of a selfish desire – usually, a conscious and collective model of conduct to the individual man. It is the product of the reflection and of the choice of a whole group of men over the best way to conduct them in life; and as such, their goals surpass those who we might establish individually for ourselves. This does not make it perfect, but our best option of action at a given time. This does not make it unchangeable, but a constancy, which guarantees some order and security in this so fickle world.

The relationship between social rules established in a certain community, that informs human behavior, and the concrete actions of the individuals of that society, which reinforce or undermine the prevailing *ethos* and *nomos*, involves different moments. The reiterated *praxis* of the group forms the body of rules, i.e., shapes the rational and collective conditions of the action of those individuals. This diffuse so-

cial order, in turn, is evaluated continuously by those who create and enforce the obligatory social rules, the *nomoi*. The laws of a community result from comparative reflection about the various maxims of action, about the customs, about the ideals, about the opinions of the group and about the laws that already exist. From this analysis there is the choice and the setting of a mandatory parameter of conduct for all the members of that community, which is the objective rationality of this group. The custom is not irrational, but its effect on individual conduct is pervasive and unconscious. Rather, the creation and application of each law result from conscious reflection on the circumstances of the action and of the careful choice of the action parameter to be laid down for all those who live in that community. There is, therefore, an overlapping spiral of the causal circularity of the *ethos*. To the dialectical movement custom-habit, mediated through individual action, overlaps with another circle. In this second circle, there is conscious evaluation of the first and its outcome is the *nomos*, which feeds back the ethical circle. The *nomos* imposes itself on the action and shapes habits that reinforce/modify the *ethos*. Over this second circle a third one arises: the judge evaluates the fact in the light of the *nomos* and of the *ethos* and, then, he decides. His sentence informs individual action and reinforces/modifies the *ethos* and the *nomos*.

But for men to behave in accordance with existing regulations it is necessary that they know it and therefore the *ethos* and the *nomos* must be transmitted to individuals through education. The group reflects on the *ethos* and the *nomos*, even if not yet methodically, and, then, it shapes upon those principles of action a knowledge that enables its transmission and collective representation. At the same time, to the extent that the individuals steadily acquire the habit of performing certain actions, the *ethos* and the *nomos* reassert themselves as a tradition of that people and, then, they effectively exist in the conduct of each of those individuals.

The aforementioned argument does not mean, however, that the subject becomes virtuous. Individuals can obey the rules only because they fear the consequences of the noncompliance. Nevertheless, the continuity of action in accordance with the rules creates a habit to carry them out and enables the rectifying of the appetite of men. But man isn't an external moldable mass that can be casted without any reflection or self-direction. The rules imposed socially act on a rational being, capable of understanding them and judge them. The individual that at first wanted only what was imposed by desire, now wants what the rule imposes. In this continuous movement of exteriorization of duty, the man,

as a rational being, becomes aware of the value of the rule itself and consequently of the value of his actions. The consciousness of the good contained in the rule and practiced by him may cause that the abiding of the rule happens for its own sake, for its virtue. The man practices virtuous actions by themselves, because they are the good towards he moves as a way to achieve his perfection.

The social life of the law allows, in principle, the formation of civic virtue, that is, respect for and defense of the existing order. Citizens come to understand that the existence of the group depends on the permanence of the order that sustains it. Not all the citizens of this political community are excellent men; maybe none of them are. But, at least, they are good citizens, because they understand the importance of their laws and they guarantee, by respecting them, the continuity of their *polis*. In a second moment, the rational maturing of that political community allows a deeper reflection and evaluation about the law. Yes, the existence of a set of rules is vital for the continuity of the group, but that does not mean that every rule should be kept, whatever the cost. Order and safety are not the only ends of the political community. The ultimate end of the *polis* is the good life of its citizens. The one that fully lives is the one that excellently realizes (makes real in concrete) his work, and, for rational beings, the one that excellently realizes reason. The *polis* should create the conditions for the development of virtue and, to do so, its rules can't prescribe any arbitrary content, but should impose the practice of all the virtues and banish the vices.

The final statement is: the rule of law possibly enables the building of good citizens, and good citizens can possibly create good laws, and good laws possibly enable the building of good men, and good men can possibly create good laws and so on and so forth[4].

5. Conclusion

The State is a community of men organized towards a common end. Its existence and its success (the accomplishment of its ultimate end) depend on the building of those men. It means that the State is only possible if its constituent parts (individuals, families, organizations, and so on) want and act towards the realization of the common goal. Those parts should cooperate with each other and each one should realize its

[4]Likewise, the absence of the rule of the law can promote a vicious circle (Politcs, V 8, 1307b 31-39).

specific function.

We can say, nevertheless, that the individuals are the core of this organization, because only they can act towards the ultimate end. They create the rules, they give life to the institutions, they are the ones that should be built in order to want and act towards their own ends which are, by consequence, the end of the *polis*. Therefore, the State can't rely exclusively on familial and social training of its citizens. The State must also be a promoter of the education of its members, so that their will and acts will be according to its purposes. And the law is the appropriate instrument of the State in the building of their citizens[5].

The process of formation and improvement of laws and men is a virtuous circle, in which the mechanical compliance of the law can become the awareness of the importance of the existence of the law for the community and the consciousness of the importance of the good content of the law for the self-realization of man.

The continuous process of formation of human excellence through the awareness of the virtue of the law will not necessarily make all men good, but it can make all citizens good, and probably most of men good. Of course this is a slow and difficult process, but it is the only possible way.

Reason is capable of apprehending and explicating the diversity of the ethical conduct, as the normative posture of philosophical thinking defends, but it can't guarantee that, even in the presence of the ideal conditions, man will necessarily choose to act in accordance to the ethical end by the reason revealed. The probability and not the certainty of the action is what allow us to recognize some critical traits in the Aristotelian thought.

References

ARISTOTLE. *The complete works of Aristotle*. The revised Oxford translation edited by Jonathan Barnes. Princeton: Princeton University Press, 1995. 2 V.

------. *Aristotle in 23 Volumes*. v. 19. Translated by H. Rackham. Cambridge: MA, Harvard University Press; London: William Heinemann Ltda, 1934. In http://

[5]In Books VII-VIII of the Politics, Aristotle describes the ideal education of the citizens. About the educational and legislative model presented by the Stagirite in Politics, check: Irwin, 2002, p. 416-423; Düring, 2005, p. 748-757; Mondolfo, 2003, p. 88-89; Kraut, 2002, p. 197-214; Simpson, 1998, p. 233-283; Hourdakis, 2001. On education by law in the Aristotelian thought, check: Romilly, 2004, p. 159-174.

www.perseus.tufts.edu/cache/perscoll_Greco-Roman.html.

-----. *Ethica Nicomachea*. Edited by J. Bywater. Oxford: Clarendon Press, 1894. 215 p. In http://www.perseus.tufts.edu/cache/perscoll_Greco-Roman.html.

-----. *Ética Nicomáquea, Ética Eudemia*. Traducción y notas por Julio Pallí Bonet. Madrid: Gredos, 1985. 561 p.

-----. *Política*. Introducción, traducción y notas de Manuela García Valdés. Madrid: Gredos, 1988. 490 p.

-----. *Política*. Texto grego com tradução ao lado para o português de Antônio Campelo Amaral e Carlos de Carvalho Gomes. Lisboa: Vega, 1998. 664 p.

DÜRING, Ingemar. *Aristóteles*: exposición e interpretación de su pensamiento. Traducción y edición Bernabé Navarro. 2ª ed. México: UNAM, 2005. 1032 p. Original title: *Aristoteles:* Darstellung und Interpretation seines Denkens.

HOURDAKIS, Antoine. *Aristóteles e a educação*. Tradução de Luiz Paulo Rouanet. São Paulo: Loyola, 2001. 151 p. Original title: *Aristote et l'éducation*.

IRWIN, Terence H. *Aristotle's First Principles*. Oxford: Clarendon Press, 2002. 702 p.

KRAUT, Richard. *Aristotle*. Political Philosophy. Oxford: Oxford University Press, 2002, 520 p.

MAGALHÃES GOMES, Marcella Furtado de. *O homem, a cidade e a* lei - A dialética da virtude e do direito em Aristóteles. Belo Horizonte: Atualizar Editora, 2010. 265 p.

MONDOLFO, Rodolfo. *El pensamiento antiguo*. Historia de La filosofía grecoromana. Traducción del italiano de Segundo A. Tri. Buenos Aires: Losada, 2003. V. II – Desde Aristóteles hasta los neoplatónicos. 456 p. Original italiano.

ROMILLY, Jacqueline de. *La ley en el pensamiento griego*. Buenos Aires: Biblos, 2004. 179 p. Original title: *La loi dans La pensée grecque*.

ROSS, W. D. *Aristóteles*. Tradução de Diego F. Pró. Buenos Aires: Editorial Sudamericana, 1957. 421 p. Original title: *Aristotle*.

SIMPSON, Peter L. Phillips. *A philosophical commentary on the Politics of Aristotle*. Chapel Hill/London: University of North Carolina Press, 1998. 476 p.

An historical evaluation of constitutional principles from Aristotle's *Politics* for human rights

Lourenço Torres[1]

Abstract: This work presents a comparison of ancient Greek thought confronted with current conceptualizations of Human Rights, their constitutive characteristics, especially when they drafted the text of the Brazilian 1988's Constitution. It studies initially a few characteristics of the Greeks, the Sophists, Aristotle's thoughts and modern Human Rights contents, confronting them, in an attempt to establish a historical relationship. In conclusion demonstrates if some hypotheses were incorporated or not, in current conceptions of Human Rights. The study acknowledges that such historical base influenced the Liberal content of individual Human Rights, today internalized in several jurisdictions of the Universal Declaration of Human Rights signatory countries including Brazil.

Keywords: History of Law. Human Rights. Rhetoric.

1. Introduction – Definition of the terms to be studied.

Certain elementary values of human beings had been established as rights and therefore they had been called Human Rights. My objective here is to search and to communicate the possible influence of Aristotle with his undoubted rhetorical contribution to individual basic rights, to establish an apposition to the liberal argument of natural law in the

[1] José Lourenço Torres Neto is a lawyer and a Law teacher. Master's degree in Theory, Sociology and Philosophy of Law at UFPE (Brazil); Bachelor in Law and Procedural Law specialist by UNINASSAU campus Recife/PE (Brazil); Researcher Member on the Rhetoric of History of Legal Ideas in Brazil researching group of UFPE coordinated by Prof. Dr. João Maurício Adeodato. Email: lourencotorres.advogado@yahoo.com.br. Lattes at: http://lattes.cnpq.br/7901606887149048.

evolution of the contents of western Human Rights. For this, the methodological instrument that I used was a comparative bibliographic revision. The bibliographic content includes the text of Aristotle - *Politics* - as representative of classic literature and some other doctrinal commentaries on the Universal Declaration of the Human Rights. In addition, I also took as paradigm the Brazilian Federal Constitution of 1988, with its explicit conceptual advances on the matter of Human Rights. However, here I abstained myself, strategically, of any evaluation concerning the ideological-political influences that probably have influenced its formation.

The definition of Human Rights is very wide and ample according some perceptions and rhetorical perspectives; it is something that certainly depends on ideological agreements and social interests, as well as cultural construction. Although today these agreements have become more known in general, and, therefore, more easily assimilated inside occidental cultures and its societies, it is far from being something pacific, mainly because of its ideological and political bonds. Yet, it is a wide concept because and is closely related to the evolution of philosophical, legal, sociological and political thought about inherent goods of humanity and, also, to social conviviality of human beings. They include, among others things, understandings about freedom, justice, equality and democracy. Moreover, there is an interrelationship with national and international legal systems, effective and historically dominant.

The constitutional principles of Human Rights that I analyzed in short are those contained in Brazilian Federal Constitution of 1988. It tried to simplify the content of these rights listing then firstly as individual rights in the final part of the *caput* of its 5th article: "the right to life, to freedom, to equality, to security and property" and after that, the content of the social rights in article 6th: "Are social rights the education, the health, the work, the housing, the leisure, the security, the social welfare, the protection to the maternity and infancy, the assistance to the abandoned ones, in the form of this Constitution" [2]. In truth, both, individual and social rights have been called simply "Human Rights" in the text of article 4th.

[2] Quoted from the original Brazilian Constitution text - Art. 5º: "o direito à vida, à liberdade, à igualdade, à segurança e à propriedade" and Art. 6º: "São direitos sociais a educação, a saúde, o trabalho, a moradia, o lazer, a segurança, a previdência social, a proteção à maternidade e à infância, a assistência aos desamparados, na forma desta Constituição". In: BRASIL. Constituição da República Federativa do Brasil. *Vade Mecum*. 8. ed. atual. e amp. São Paulo: Saraiva, 2009, p. 7.

Generically speaking, the expression "rights and fundamental guarantees for the Human Rights" holds, at least, two groups of ideas. One aspect of these ideas analyzes, at first, the earliest grounds of the rights and its interdisciplinary relevance, therefore, more including; whereas the second aspect analyzes the relations of the warranting legal mechanisms of such rights in the practice of modern States such as constitutions, treaties and conventions. Thus, this implies a fluid concept and in constant construction. However, importing primordially one of the meanings, the humanist and anthropic, this flow of ideas can be summarize in the affirmation that they are essential rights that man possesses just for being human; designed for its proper nature and the proper dignity that the humanity inherent[3]. For legal effectiveness, must be highlighted the fact that these rights are claims that, once written or normatized, they can generate obligations to particular people and to public service.

Thus, I adopted as object of study the concepts on the rights to *life*, *freedom*, *equality* and *property*. Although article 5th of the Brazilian Constitution detaches *security*, we must include it in the right to life, because of the intrinsic necessity of its preservation.

Life (βιος) presupposes auto-existence in an independently individualized and equalitarian form. That embodies self-defense and the prohibition of aggression to another life human being. Under a humanist perspective, since life is individualized, it should not have to be submitted to discrimination and to servitude. That is something that unleashed rights to different ones, accordingly to their conditions and limitations. **Freedom** (ελευθερία) corresponds to the rational behavior independent of restrictions and without coercion from power and violence; in it, the limit of freedom is reciprocity. Although the text of the 3rd article of the Universal Declaration of the Human Rights of 1948 does not have enclosed **equality** (ισότης) and **property**[4], those rights can be seen in articles 1 and 17 of that declaration, respectively[5]. This Indicates that major

[3] See: COMPARATO, Fábio Konder. *A afirmação histórica dos direitos humanos***.** 2. ed. rev. e ampl. São Paulo: Saraiva, 2001, p. 12.

[4] "Article 3: Everyone has the right to life, liberty and security of person". In: UN, Universal declaration of the Human Rights. http://www.un.org/en/documents/udhr/.

[5] "Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". "Article 17: (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property". In: UN, Universal declaration of the Human Rights. http://www.un.org/en/documents/udhr/.

human values can still be in discovery or development, whereas individual and social conscience grows.

Although the studied terms could seem equal, the historical contexts are not, and then, their contents and significances are not the same for different times. Even though it seems obvious that throughout history even concepts suffer changes, which are these differences? Why are so clamorous such historical differences thus? Which ware the possible evolution that these contents had suffered, and, which were the influence that remained from Aristotle's legacy? Perhaps these questions will not be answered directly, but this study, by means of its events description will be able to leave some sort of the impression in the mind of the reader.

2. The Greek context as a stage for a possible origin of the idea of Human Rights.

The similarities, and also some differences, about the basic characteristics of the contents of Human Rights with the classic Greek philosophical movement are unquieting. That society (the Greek) use to discriminate and to enslave, but amongst philosophers like the Sophists innovators, some questioning could be heard already against these preconceptions that traditions considered something normal. Those cultural expressions and philosophical dialogues recommended possible changes.

It was with the Greeks that fundamental progress for culture and all what concerns living in community was found. Despite all artistic, religious and politic accomplishments of peoples who lived before, "the history of that which we can with full conscience call culture only started with the Greeks" [6]. Jaeger also affirms that

> The universal importance of the Greeks [...] drifts out of their new conception for the place of individual in society. [...] If we contemplate the Greek people under the background of the old East history, the difference is so deep that the Greeks seem to merge themselves in a unit with the European world of the modern times[7].

[6] "A história daquilo a que podemos com plena consciência chamar cultura só começa com os Gregos". JAEGER, Werner Wilhelm. *Paidéia***.** 4. ed. São Paulo: Martins Fontes, 2001, p. 5.

[7] "A importância universal dos gregos [...] deriva da sua nova concepção do lugar do indivíduo na sociedade. [...] se contemplarmos o povo grego sobre o fundo histórico

Obviously, Jaeger's perception is attached to the Greek education. But it was not the Greek education that spread for all the known earth, through its conquests, also what today is known as culture, the Hellenism? The Greeks committed themselves in a solid way to art, to aesthetic, to oratory, to style and to rhetoric. This aptitude derived simply "from the spontaneous and full-grown sense of the laws that govern the feeling, the thinking and the language, which finally leads to the abstract creation and technique of logic, grammar, rhetoric"[8]. Their politics and laws changed the understanding and the perception about the human being and these concepts, offered to the normative force, revolutionized and developed the human being existence itself.

At that time tyranny, war, slavery and death penalty in an institutionalized form still existed. Not that today these do not exist in a "legal" form in various societies around the globe. We can perceive, discursively or at least conceptually, that they are undesired practices and we have the hope that one day they would be extinguished. However, democracy or some sort of democracy was born there. Even war's objective among them changed from mere expropriation to a civilizer one. Guthrie affirms that

> Aristotle describes some slaves speaking freely, and sometimes brazenly to their masters. To the intelligent ones they gave responsibility ranks as secretaries and bank controllers, and could finally be freed by its proper owners. [...] One common practice was for the owners of industrial slaves allow them to work independently, paying a fixed addition of their profits and being remaining portion for themselves, and these could save sufficiently to buy their own freedom[9].

---

do antigo Oriente, a diferença é tão profunda que os gregos parecem fundir-se numa unidade com o mundo europeu dos tempos modernos". JAEGER, *Op. cit*. p. 9.

[8] "do sentido espontâneo e amadurecido das leis que governam o sentimento, o pensamento e a linguagem, o qual conduz finalmente à criação abstrata e técnica da lógica, da gramática, da retórica". JAEGER, *Op. cit*., p. 11.

[9] "Aristóteles descreve alguns escravos falando livremente, e às vezes descaradamente a seus senhores. Aos inteligentes se davam postos de responsabilidade como secretários e gerentes de banco, e podiam finalmente ser libertados por seus próprios donos. [...] Uma prática comum era para os donos de escravos industriais permitirem-lhes trabalhar independentemente, pagando uma soma fixa de seus ganhos e ficando com o resto, e estes podiam economizar bastante para comprar a própria liberdade". GUTHRIE, W. K. C. *Os sofistas***.** São Paulo: Paulus, 1995, p. 146.

And continues coating Aristotle in saying that "Demosthenes also says that enslaved ones in Athens have greater rights of free speech than citizens of other states"[10]. If he is not very implausible, his understanding is, at least, admirable about the Aristotelian view which demonstrates displeasure and criticism to that Greek social moment. In chapter sixth of his book *Sophists*, this author brings references, confirmed by Sophists, on equality politics, equality of wealth, social equality and racial equality.

3. Probable influence of Aristotle's *Politics* in the development of practical concepts as contents of human rights.

Since the persuasive influence of the Greek culture on social and political factors is well known, either by its literature, theater or philosophy, a great jump in history will not be necessary to find the paradigm author that coexisted with the roots of the ideas that later, probable became concepts of Human Rights in the present time: Aristotle.

As we know, the encyclopedic knowledge of Aristotle produced considerable work on politics, such as *Politics*, the *Athenian Constitution* and the *Economic*. Also two works are told as composed by him when he was teacher of Alexander and to him were dedicated: *In favor of the Colonies* and *On Reign* whose content are currently still lost[11].

The meaning of **politics** for Aristotle seems to be entailed to an only object, the human happiness in the convivial gathering of the *polis*, either as an individual as citizen of the *polis*, either as a politician who searches the collective good, so from this politics can be then considered a practical science. Such idea can be perceived in the inaugural passage of the book in epigraph, transcribed as follow:

> Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good. (Pol.,

[10] "Demóstenes também diz que escravos em Atenas têm maiores direitos de discurso livre do que os cidadãos de outros estados". GUTHRIE, *Op. cit.*, *Idem*.

[11] KURY, Mário da Gama. Apresentação. In: ARISTÓTELES. A Política. Tradução Mário da Gama Cury. Brasília: UnB, 1985.

1252a) 12.

In similar way, the Aristotle's observation for **democracy** is not in a simplistic way. For him, democracy did not mean merely the government of the people or the government of the majority (*Pol*, 1290b) [13]. Majority was an accidental contingency. Democracy was the government of free men, but also not of some few free and rich ones, this would be, then, an oligarchy, and, for him, "there is a democracy when the free men withhold the sovereign power" (*Pol*, 1291a) [14]. The goal, yes, aims the satisfaction, the happiness and well-being of the majority.

> The end of the civil society is, therefore, to live well; all its institutions are just means for this, and the city itself is only one great community of families and villages where life finds all these means of perfection and sufficiency. This is what we call a happy and honest life. The civil society is, therefore, least a society of common life but a society of honor and virtue (Pol., 1281a) 15.

4. The Aristotelian understandings about the right to life, freedom, equality and property, important for today's Human Rights.

4.1. On the right to life.

In chapter I of book VI of his *Politics*, Aristotle, after a quick anal-

[12] ARISTOTLE. Politics. Translated by Benjamin Jowett. http://ebooks.adelaide.edu.au/a/aristotle/a8po.html.

[13] ARISTÓTELES, A Política. Tradução Mário da Gama Cury. Brasília: UnB, 1985, p. 126.

[14] "Há uma democracia quando os homens livres detêm o poder soberano". ARISTÓTELES. A Política. Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2006, p. 127.

[15] "O fim da sociedade civil é, portanto, viver bem; todas as suas instituições não são senão meios para isso, e a própria cidade é apenas uma grande comunidade de famílias e de aldeias em que a vida encontra todos esses meios de perfeição e suficiência. É isso o que chamamos uma vida feliz e honesta. A sociedade civil é, pois, menos uma sociedade de vida comum do que uma sociedade de honra e virtude". ARISTÓTELES, 2006, Idem., p. 56.

ysis of his master Plato's ideas and the Constitutions of some city-States, before discoursing on the government forms, brings his comprehension on the idea of a perfect city, a city he understands as "a community constituted from some towns". According to him, this community must have something of self-sufficiency, that is, beyond having "conditions to assure the life of its members, it [the community or city] also must grant a better life to them" (*Pol.*, 1253a)[16]. A clear reference to the right to life in those communities. More than biological life; it should grant life in quality. A parallel to that is firmed with the Brazilian Constitution in its 5th article that ratifies the Universal Declaration of the Rights of the Man of 1948, guaranteeing, before anything, the inviolability of the right to life. This is because among all rights nothing is more basic than that, the right to life, one that is estimated for the existence and the exercise of all others rights.

As said, in the Greeks communities certain guarantees with respect to the biological life already existed, however their understanding surpasses mere existence and searches arguments to convince other governments and constitutions with respect to a life worthier and better in quality. The understanding of what comes to be a "better life", more than an object of exhausting philosophical speculations, finds in Aristotle some disposals, at least, interesting.

Previously, he already had said that there is "something of good in the simple fact of being alive" and this, independently of the way of living, since "men in its immense majority are linked to life despite they have to face many misfortunes, as if it contained in itself certain enchantment and sweetness", although this life should not be "overloaded excessively with harms to be supported" (*Pol.*, 1278b)[17]. This is an argument that follows all the work and that is what he is determined to prove.

However, as the expression holds that relativist ambiguity ahead of the practical experience of the rhetoric of a philosopher, the "perfect life", even so "many times was unattainable" (*Pol.*, 1288b), is that one where "men do not acquire and preserve the moral qualities thanks to the external goods, but they acquire and preserve exterior goods thanks to the moral qualities" (*Pol.*, 1323b). Independently of any judgment of

[16] ARISTÓTELES, *A Política*. Tradução Mário da Gama Cury. Brasília: UnB, 1985, p. 15.

[17] ARISTÓTELES. *A Política.* Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2006, p. 89.

values attributable to this concept, more pertinent to Philosophy than to Rhetoric, Aristotle presents a decreasing scale of life quality opposed to some values and the goods, in a way that, already at that time, it would not be any normative system that, according to his suggestion, men would become worthy and happiest.

The "happy life", despite of depending on pleasure or moral qualities, or both, is found more frequently between those that cultivate the most good qualities and intelligence but are moderate in the acquisition of exterior goods, than those that are possessors of exterior goods beyond their capacity to usufruct them, being deficient in qualities and intelligence; not only in this way, but also appealing to reason, one can arrive at this conclusion. (*Pol.*, 1323b)[18].

And Aristotle continues to verify that, independently of the way a city or a State is rule, what is reflected in its Constitution, "the happiness of a city is the same the happiness of each man [...] where the best form of government is that where any person, whoever could be, can act better and live happily" (*Pol.*, 1324a)[19]. Still in the same passage he establishes a relation between qualities and participation in political life. All this suggests, according to a contemporary understanding, the entirety of important contents for humanity: life, human being dignity, quality of life and politic freedoms.

4.2. On the right to freedom and equality.

In despite of it, man, as citizen, must be free. Shortly, Greek **freedom** (ελευθερία) must be understood not as living in nature with the absence of laws, this Greeks mainly applied to the Barbarians. Since the archaic Greeks, free men were those ones that belonged to a *pólis* and were submitted to its laws.

> Only in this public space and between its equal the Greek ones were free, worthy to say, its citizenship and its freedom are not qualities attributed to man as human being, as it is the modern sense of the word [freedom], full of Christian philosophy and centuries XVII and XVIII jusnaturalism; rather, it was the essential prerequisite

[18] ARISTÓTELES, *A Política*. Tradução Mário da Gama Cury. Brasília: UnB, 1985, p. 220.

[19] "A felicidade de uma cidade é a mesma de cada homem [...] onde a melhor forma de governo é aquela em que qualquer pessoa, seja ela quem for, pode agir melhor e viver feliz". *Idem*, p. 223.

for politics action or participation in the public space[20].

Therefore, finishing up the idea, the use of the term freedom among the Greeks had a strong connotation both legal and political. They lived in one *pólis* where the equal ones lived under the principal of isonomy. So, freedom among them should not be understood as being a quality of man will, then, connected to subjectivity[21]. This transposition from the external plan to the internal was a late philosophical creation.

According to Hannah Arendt, in all Antique Philosophy there was not concern with freedom as a phenomenon of the will. Freedom, as attribute of the will and of the thought, freedom as free-will, only emerge in the philosophical tradition with the apostle Paul and later with Saint Augustine, both motivated by their religious experience and an innovative argumentative approach[22]. Also, freedom for the Greeks, according to Jaeger, consisted in feeling subordinated, as members, to the totality of a *pólis* and its laws[23]. It was political freedom, nothing similar to the understanding of freedom in the modern individualism. Therefore, among Greeks, the relations between law and freedom were external, dependent of an organization (the *pólis*):

> […] reason for which it does not make sense, in the analysis of the Greek law, to speak of a subjective right as an attribute conferred to a citizen, or to speak about a concept of right that has for essence the subjective freedom[24].

In truth, to the Greeks, freedom is a status described for Latin

---

[20] "Só nesse espaço público e entre seus iguais o grego é livre, vale dizer, sua cidadania e sua liberdade não são qualidades atribuídas ao homem enquanto ser humano, como quer o sentido moderno da palavra, pleno de filosofia cristã e do jusnaturalismo dos séculos XVII e XVIII; é antes, o pré-requisito essencial para a ação política ou participação no espaço público". ADEODATO, João Maurício. *O problema da legitimidade***.** No rastro do pensamento de Hannah Arendt. Rio de Janeiro: Forense Universitária, 1989, p. 30 – 31.

[21] ASSIS, Olney Queiroz. *História da Cultura Jurídica:* o direito na Grécia. São Paulo: Método, 2010, p. 60.

[22] ARENDT, Hannah. *Crises da República*. São Paulo: Perspectiva, 1973, p. 191.

[23] JAEGER, Werner Wilhelm. *Paidéia***.** 4. ed. São Paulo: Martins Fontes, 2001, p. 228.

[24] "motivo pelo qual não faz sentido, na análise do direito grego, falar de um direito subjetivo no tocante a um atributo conferido a um sujeito ou de um conceito de direito que tenha por essência a liberdade subjetiva". ASSIS, *Op. cit*. p. 61.

expressions: it is the *status libertatis* in opposition to *status servitutis*. On *contrarius sensu*, when dealing with slavery in chapter II of book I, Aristotle displays the thesis of some (another masters, the Sophists) that, "contrary to the nature [...] the distinction between slave and free person is only made by the laws, and not by the nature" and still, according to this thesis "by being based on force such distinction is unjust" (*Pol*, 1253b)[25]. This seems to demonstrate that, already in that time there was an agreement in some, that the slavery could be banished, even it was tolerable for economic and social circumstances. In the midst of a culture that believed in natural slavery, Aristotle used that rhetoric artifice who was an imported thesis from others to present innovative concepts. In the case of slavery it was accepted only in virtue of law or by the use of violence between men. Again, he suggested the possibility that it could be suppressed, as it is perceived in his subsequent arguments.

Among fellow creatures, honesty and justice consists in that each one should have his turn. Only this conserves the equality. Inequalities between equals and distinctions between fellow-man are against nature and, therefore, against honesty (*Pol.*, 1325b)[26].

It is an intermediate step for the subjective concept of freedom supported for equality. Although in truth, at least theoretically, freedom would be the legitimation of authority. Thus, following that, and still to support the essential condition of freedom, he affirmed that authority has distinct natures, the domestic and the political. This principle prevails here, at least, on the aspects of freedom, equality and property. The family head governs his whole family, including the slaves. The magistrate governs the free and equal men. Such distinction would indicate that the government authority would be restricted to the equal and free citizens. That, for inference, suggests that, if slavery was abolished, the government would not pass for any crisis of authority, because that authority would be attached to the familiar power. Furthermore, "in strict political terms", and corroborating for this all the cultural context of old Greece, "the *pólis* did not know the distinction between governed and governor, once that the not-citizens were not, strictly speaking, governed", that fit specifically to the families, "and to be a citizen implied in

[25] ARISTÓTELES, *A Política*. Tradução Mário da Gama Cury. Brasília: UnB, 1985, p. 17.

[26] ARISTÓTELES. *A Política*. Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2006, p. 63.

to participate in order not to be governed"[27].

Retaking the Aristotelian exposition on freedom, chapter II of book III from *Politics* externs his thesis on the government and the governing, affirming that the authority of the governor, the politician, is "an authority form through which a man governs people of the same race, and free men (*Pol.*, 1277b)[28]. Such concept, common between the Greeks, did not cogitate the possibility that somebody being free could be enslaved by some of its own, even so this "is equivalent to say that there was two species of nobility and freedom, one absolute and other relative" (*Pol.*, 1255b)[29]. This detaches the Sophist parameter of relativity. What an advance, exactly in face of an eastern society as the Jewish one, which tolerated the slavery of countrymen for its equal ones and even the self-slavery.

3. On the right to property.

Citizenship and **property** were linked. A citizen necessarily had property. It was practically impossible, if not at all, a man without property to be a citizen in old Greece. Thus, for them it also was a man's natural law beyond the power of acquisition and needing to be guaranteed when adjusted to its general thesis. With respect to the right to property, Aristotle foresaw three combinations between the property and its use: a) private property and common use; b) common property and private use and c) common property and use[30]. He did not cogitate of the private property and private use, concept that came out of the liberal full and absolute property, a thought influenced by absolutisms that had preceded it around century XVIII. For Aristotle, the justification of property was according the perspective of politics, that is, it was a requirement for the well-being of the citizen. Aristotle developed three arguments to justify the property. In *Politics*, I, 4-10, the property is justified under the

[27] "A *polis* não conheceu a distinção entre governantes e governados, uma vez que os não-cidadãos não eram, a rigor, governados", pois isso cabia especificamente às famílias, "e ser cidadão implicava participar de modo a não ser governado". ADEODATO, João Maurício. *O problema da legitimidade***.** No rastro do pensamento de Hannah Arendt. Rio de Janeiro: Forense Universitária, 1989, p. 31.

[28] ARISTÓTELES, *A Política*. Tradução Mário da Gama Cury. Brasília: UnB, 1985, p. 85.

[29] Idem, p. 20.

[30] ARISTÓTELES. *A Política*. Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2006, p. 19 – 31.

perspective of the **house**; in *Politics*, II, 5, he argues about which property system is better to the **city**; and finally, in *Politics*, VII, 9-10, he makes a connection between property and citizenship.

Under the perspective of the **house** (οίκος), Aristotle presented an instrumental justification of property: who governs a house needs property to play the function to provide its sustenance. As part of his argument, dissecting each main point to arrive to the details, he stressed out three aspects in the treatment of property in the scope of the house: the property was a dominial relation, that lord's power of the house over slaves, woman and children; the second aspect is that property is an attribution the lord of the house has, he carries out functions of the house and not as individual while such; the third aspect is that the acquisition of property is something natural in contraposition to the artificial acquisitions, derived out of commerce. Aristotle contrasted the acquisition art that aimed to satisfy the house's necessities and the limitless character out of commerce acquisition forms.

Aristotle condemned the artificial acquisition (called crematistic [χρεματιστική], from Gr. χρημα, wealth, possessions) that he identified with commerce (*Pol*, 1, IX, 1256b, 40 – 41). Arguing that things have two uses, a proper one identified with its destination and other deviated to some another finality. Thus, for him, the commerce was artificial, since the property had to assure a "happy life" and should not be destined to the limitless exchange:

> Hence we may infer that retail trade is not a natural part of the art of getting wealth; had it been so, men would have ceased to exchange when they had enough. In the first community, indeed, which is the family, this art is obviously of no use, but it begins to be useful when the society increases. But the members of the family originally had all things in common; (*Pol*, 1, IX, 1257a, 1-4)[31].

Thus, out of the two ways to acquire and be enriched, one by economy and the rustic works, and another by commerce; the first one is indispensable and deserves compliments; the second, on the other hand, deserves some censure: it receives nothing from nature, but everything of convention (*Pol,* 1258b)[32].

[31] ARISTOTLE. Politics. Translated by Benjamin Jowett. http://ebooks.adelaide.edu.au/a/aristotle/a8po.html.

[32] ARISTÓTELES. *A Política*. Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2006, p. 28.

In *Politics*, II, 5, Aristotle modified his justification argument from the context of the house to the scope of the **city** and with it intended to answer the following questioning - the property must be had in common by the citizens or must be in private? He explain the combination of private property and the common use based on the following arguments: a) common property gave cause to quarrels and claims about the way to distribute things; b) common property favored the recklessness of each one in the treatment of common things and, on the contrary, private property stimulated that each one was dedicated to what it was proper; c) private property stimulated the natural pleasures, in particular self-respect; d) private property favored friendship for the pleasure on helping and giving to friends; e) private property made possible the exercise of virtues, as long as generosity and moderation Thus, Aristotle concluded that property must be, in general, private, but according to utility, common. The common use did not modify the nature essentially private of the property, but rather assume it.

Therefore, Aristotle was not a defender of the sacred character of private property. Private property had to be limited for the common use. Also richest citizens should distribute part of its prescriptions among the poor citizens, not as a requirement of the State, but as a consequence of good customs. That's why Aristotle's ideal State assured, also, some public services to all the citizens, rich or poor: education, meals, justice and security. Strengthening its argument, Aristotle gave the model of Esparta, where the property was individual, but when necessary it was use commonly. For example, the slaves were used in common and, when necessary, also the horses. Although each citizen had its own property, one part of it was for use of friends, another part for use of all e, finally, one third part alone for personal use.

Aristotle still pointed another weight reason to explain its preference for the private property of the goods and its common use: the immeasurably great pleasure generated for property. Another derivative is the pleasure that friends take out in giving aids to friends. Aristotle considered the virtue of friendship a presupposition for the "happy life" (*eudaimonia*). Without private property, the friends would see themselves incapable to rescue the necessities of their friends and to place for service to them some of their goods. Without private properties, the citizens would be hindered to practice two essential virtues to the "happy life": the friendship and the liberality.

> Again, how immeasurably greater is the pleasure, when a man

> feels a thing to be his own; […]there is the greatest pleasure in doing a kindness or service to friends or guests or companions, which can only be rendered when a man has private property. These advantages are lost by excessive unification of the state. [...].Therefore how to be liberal if there is nothing to disposal? (*Pol*, 1263b)[33].

Finally, Aristotle defined the subjective scope of property, that is, who should be proprietor, owner. For Aristotle, the citizenship had to be restricted, in the context of the best city, to those that have natural capacity, virtue and availability to play the military and legal-deliberative functions. According to Aristotle, it was convenient that the properties were at the hands of these people, therefore was necessary that the citizens had an abundance of resources and these people (the military and the ones who deliberated) were the citizens. The vulgar ranks, the manual workers, did not participate of the citizenship. On the other hand, the happiness of the city, necessarily followed by virtue, had not only to be extensible to all the citizens and people and not only to some. Thus, in the ideal city, all the citizens had to be owner and all the proprietors, citizens.

5. Conclusion - A civility ideology of the contemporaneous States with roots in the principles of Aristotle's *Politics*.

The first conclusion I arrive in this study, therefore, is that it is possible to confirm the thesis that the development of the normative concept of the contents of the Human Rights had some base in Greek thought. I also observed that politics for Aristotle is tied to one object, the human happiness in the convivial gathering of *polis* (as individual, as citizen of the *polis* or as a politician that searches the collective good). Also for him, democracy did not mean the government of people or the government of the majority. Democracy was the government of free men, not some few free and rich ones, but of the free men who withhold the sovereign power with the objective to promote satisfaction, happiness and well-being of the majority. Therefore, under such perspective and purpose, his considerations on the rights to life, freedom, equality and property are more than pertinent, but were persuasive in its positive rhetoric throughout the centuries.

---

[33] ARISTOTLE. Politics. Translated by Benjamin Jowett. http://ebooks.adelaide.edu.au/a/aristotle/a8po.html.

In the same way, but under a posterior influence, the modern constitutions of some contemporaries States had been searching a persuasive and an up to date rhetorical speech, receiving the protectionist ideals of equality and freedom, also defended for the liberal ones. Also they searched in old Greek statements the social function to social ideals. Or, as Aristotle would say, "common use for a happy life", especially in respect to property. This adjusts current rhetorical propositions on defense of Human Rights to its historical roots in Classic thought, even so, not consistently.

Thus, I can conclude that the classic literature of Aristotle and the influences that he absorbed had had a historical paper in the source of the positive Human Rights. In it, the roots of the contents of the current Human Rights can be found, because the protective necessity came out of the judicial practice and politics. Certainly the studied terms had not perpetuated the same meanings throughout the years and with this, they had evolved to construct ideologies. We could not see this evolution in this study, but the participation and the help that Aristotle offers, more than important, is especially exciting, for unmasking part of the thought that was gaining form about necessities that today, still continuing to be necessary, had been legalized in the Constitutions of some modern states.

E-Citizenship:
Observations from the theory of communication of Lee Thayer

Ricardo Menna Barreto[1]

Abstract: The present text part of a theoretical interdisciplinary, aiming to establish a vantage point differentiated virtual communicational processes and their relationship with the Office of the e-citizenship. Starting from Cybernetics and the Theory of Organizational Communication, it seeks to understand the communication as a process that account with four levels of analysis, as proposed by Lee O. Thayer. In This way, the issue of e-citizenship will be seen from the observance of a "zone of overlap" of various levels of communication and their combinations. In fact, the establishment of an understanding of the relationship between communicational e-citizens and e-administration allows discovering the challenges of an effective expansion of (virtual) democratic space.
Key-words: e-citizenship. e-administration. Cybernetics. Communication. Lee Thayer.

> "*There is no subject* so *old* that something new cannot be said about it". Fyodor *Dostoevsky* [1821-1881]

Introduction

The famous words from Dostoevsky justify the(perhaps risky) salvaging this text will undertake: from the cybernetics (Wiener), Through the Theory of organizational communication (Lee Osborne

[1] Master and Graduated in Law by UNISINOS-RS. Member of the Brazilian Institute of Electronic Law [Instituto Brasileiro de Direito Eletrônico – IBDE]. Professor of the Courses of Law and Information Technology Management on the College of São Francisco of Barreiras [Faculdade São Francisco de Barreiras – FASB], Barreiras, Bahia, Brazil. Contact: ricardo.mennabarreto@gmail.com.

Thayer), searching for theoretical communicational inputs that promote a complex reflection about *e*-citizenship. It is about an interdisciplinary approach, based on scientific paradigms supposedly exceeded, however, in our understanding can serve as a motto for the establishment of a differentiated observation point about communication and agreed upon it, *e*-citizenship.

Originating thus, from forgotten theoretical stimuli harbored in the decades of 1950-1970, we comprehend the communication as a dynamic process underlying the existence, the growth, the modification and the behavior of all living systems(individual or organizational), through means of which the system relates to its environment and with each other.

Our main objective is to verify the applicability of the conceptual model of organizational communication of Lee Osborne Thayer to an interdisciplinary theorization(cybernetics/communicational/social) of *e*-citizenship. Certainly the present challenges of *e*-citizenship find themselves linked to not just the problematic of the digital inclusion/exclusion, but also equally dependents on a political deliberation kept by a public administration that proposes a diversity of services to online *e*-citizens.

E-citizens need, moreover, to be interlinked harmonically to the technical hardware that allows them an active *e*-participation – apparently today utopic, for being distant from the Brazilian reality.

The following text will be divided in three parts. In the first, entitled "Cybernetics: between the command and communication" (1), we will seek to present, in a general sense, the cybernetic en its interdisciplinary character, demonstrating how this knowledge opened new perspectives to the comprehension of not only the machines, but also the human beings and its society. It is about a scientific field that opens temporarily in parallel to the theorizations of Lee Thayer about the organizational communication.

Thereafter, we shall see the "Fundamentals of Communication theory on Lee Thayer"(2), where will be based the foundations of this barely remembered theoretician of organizational communications. We will demonstrate how Lee Thayer don't distance himself from the Cybernetic theoreticians, since they also concerned themselves about communication – especially from the information problematic. Therefore, we will propose a comprehension of the communication from four analysis levels about communicational problems, determinants to understand the very Thayerian idea of communication and its technologi-

cal instrumentality.

Finally, we will approach the E-Citizenship: limits and possibilities in a communicative perspective" (3). In this topic, the problematic of *e*-citizenship will be viewed in the communicational perspective of Lee Thayer, Observing thus the "zone of overlap" from the many levels of communication and its possible combinations. This "zone of overlap" indicates a symbolic point that develops a complex communicational plot between human beings (to an intrapersonal, interpersonal and organizational levels), and machines (technological level), allowing then a more sophisticated observation about the *e*-citizenship problematic.

It is understood that a social-communicational comprehension about the existing relationship between *e*-citizens and the *e*-management makes it possible to detect the complexity of elements of the current technological society and its challenges when it comes to an effective extension of the (virtual) democratic space.

1. Cybernetics: Between the command and communication

Cybernetics is a starting point chosen for out reflection. However, its pick is not random. Lee Osborne Thayer – Theoretician which reflections will serve as a basis to unveil our analysis about communication and *e*-citizenship -, upholds as well as it researches in the area of communication must seek assistance in a certain number of "contributor subjects" as empirical-conceptual nourishment. Something from the interdisciplinary nature of any serious attempt at theoretical preparation, evidenced by the vast scale and heterogeneity of its conceptual tributary principles, highlighting, amongst them, the *cybernetics*, the systems theory[2], the Communication theory(human and physical), the linguistics[3], amongst others[4].

In the plan of cybernetics it was Norbert Wiener who realized, from the end of World War II, researches that were species of ramifications of the called "messages theory". Wiener cared not only about

[2] BERTALANFFY, Ludwig V. Teoria Geral dos Sistemas. Petrópolis: Vozes, 1973.

[3] SAUSSURE, Ferdinand de. Curso de Linguística Geral. Organizado por Charles Bally, Albert Sechehaye, com a colaboração de Albert Riedlinger. 34ª edição. São Paulo: Cultrix, 2012.

[4] Cfe. THAYER, Lee Osborne. Comunicação e Teoria da Organização. In: DANCE, Frank E. X. (organizador). Teoria da Comunicação Humana. São Paulo: Cultrix, 1973, p. 97.

transmission of messages in the field of electrical engineering, but also with the study of linguistics, with the development of machines (computers) and other automatons[5].

Thus Wiener, together with W. Rosss Ashby[6], Heinz von Foerster[7], Gregory Bateson[8], amongst other thinkers of diverse areas consolidated, between the years of 1940-1950, this medley of ideas nicknamed by Wiener of *Cybernetics*.

It is about the derived expression of the Greek word *kubernetes*, or pilot – the same Greek word from which is derived the word Governor[9]. To Wiener , the objective of "cybernetics is to develop a technical language that enable us, in fact, to have with the issue about the *control and overall communication"* [10]. More than that: Wiener and his research companions went beyond, unveiling the link between cybernetics (seen as the science of auto-regulation), the theory of information (both human and machine) and the calculation of probabilities. This way the cybernetics erected, in time, a complex interdisciplinary web of knowledge that would start seducing thinkers of different areas.

The interdisciplinary Character of cybernetic thought was well shown by Helmar G. Frank, from the institute of cybernetics of the college of Berlin. Frank realized an analysis that transits between cybernetics and philosophy, sustaining that, even though one isn't originated on the other, they're both related amongst themselves, or even can be considered *complimentary*. Ergo, from this interface can arise both a *cybernetics philosophy* as a *philosophic cybernetics*. Frank claims that cybernetics is initially, the general mathematical theory of Information processing systems. Thus, its concretization happens in processes and Information processing systems that we can call *physical*, *physiological* or *psychological*. Finally the cybernetics can be viewed as a *technical realization* or *trans-*

[5] As Gordon Pask explains automaton, "abstractly, is a set of rules that establish a correspondence between symbols that constitute stimuli, and other symbols we call answers. Commonly also called automaton to any physical device embodying these rules". PASK, Gordon. Uma Introdução à Cibernética. Com prefácio de Warren S. McCulloch [M.I.T.]. Coimbra: Arménio Amado Editor, 1970, p. 227.

[6] ASHBY, W. Ross. Uma Introdução à Cibernética. São Paulo: Perspectiva, 1970.

[7] FOERSTER, Heinz von. Understanding understanding. A volume of von Foerster's papers. Springer-Verlag, 2002.

[8] BATESON, Gregory. Steps to an Ecology of Mind. University Chicago Press, 1972.

[9] WIENER, Norbert. Cibernética e Sociedade. O uso humano de seres humanos. 4ª edição. São Paulo: Cultrix, 1973, p. 15.

[10] Idem, ibidem, p. 17.

formations of said information and systems. Synthesizing, to Frank, cybernetics is the theory or technique of messages, and message processing systems[11].

We realize Frank doesn't diverge much from Wiener in his general theorization about cybernetics, but before, it seeks to place it from its own categorization in *General cybernetics* (formal) and *Material Cybernetics* (regional), both which would suffer, according to the author, subdivisions that would result in "seven fields of cybernetics". These fields, on the other hand, would be distinguished in "four problem levels of ascending cybernetic complexity". In such context Wiener would stand beside the "*Command Theory*", namely, that space that would constitute the "restricted cybernetics" (Wienerian Cybernetics), that belongs to the "theory of self-regulatory schemes in a circle", part of a not so widespread cybernetics: the post-Wiener learning system theory[12].

According to Frank, the "four problem levels of ascending cybernetic complexity" would be thus, the following: 1) *The message theory*, that concerns itself with different sign species, signals, their message structuring and information value; 2) the *Informational systems theory* [data processing theory], busy with the functions, algorithms or continual processes; 3) *the theory of relational schemes in circle*, which is charged with the influence that exert delivered data by an informational system over its following data assimilation; and 4) *the theory of system complexes,* where its own environment of an informational system contains, again, at least an informational system that cooperates with it or the opposite [in this level of cybernetics, can be also found the mathematical theories of games and cybernetics pedagogy] [13].

Notwithstanding, Frank's main concern lies actually in the following point: at least one part of the data to be elaborated by a cybernetic system, are not originated from said system, *but from its environment*, what leads to a series of relevant questioning, amongst which: is it possible that a servomechanism[14] can classify, learn, deduce, *describe* its environment? Could a servomechanism describe itself? Or, maybe: how is developed a conjunctive system composed of many servomechanisms

[11] FRANK, Helmar G. Cibernética e Filosofia. Rio de Janeiro: Tempo Brasileiro, 1970, p. 27 (grifamos).

[12] Idem, ibidem, p. 29.

[13] Idem, ibidem, p. 29.

[14] Servomechanism refers to Cybernetics, a system which performs /perform certain functions, being able to adapt to the environment. For this, see: WIENER, Norbert. Cibernética e Sociedade. Op. cit., pp. 48 e ss.

communication amongst themselves? [15]. Questions like these appear to find easy answers in modern informatics and in the systemic-constructive thinking, however, in this time; they serve as a mote to interesting problematic in the philosophical plane. In such context could be seen cybernetic reflections entwining themselves with philosophy, epistemology and the communications theory.

Certainly it were "cyber-philosophical" reflections as Frank's that led important scientists like Gordon Pask, to realize researches in the field of *learning* observation and prediction. To Pask, "observers are men, animals or machines capable of learning its environment and taken to reduce, by force of learning, the uncertainty around its occurring happenings"[16].

In a cybernetic perspective, the prediction is linked to the problematic of uncertainty. To Pask, an observer will be, initially, uncertain about its own objective, in other words, about the predictions it wishes to realize. The observer (usually a scientist) will also always have a *functional uncertainty* that will rest upon the kinds of studied structures and even upon their own mediations. This leads Pask to study the many sources of uncertainties and get to the following conclusion: Uncertainty always results from us and our contact with the world[17], In other words, the uncertainty did not reside in machines, but they would be an inherent phenomenon from human beings.

Gordon Pask, observes that the theoretical cyberneticists have as an object of study every kind of system, "whether artificially built, resultant from the abstraction of the physical structure of a natural system that reveals interaction amongst its parts, in a way that they control each other, and independently of the physical character of these parts" [18]. Its emphasis will be thus, in the study of *structure*, for the cybernetic way of leading with issues, according to Pask, can reach the *generality* and emit severe affirmations about the organization[19].

In a sense close to Pask, Jacques Guillaumaud points that cybernetics can be useful in many analysis of which, offering the possibilities of learning in its diversity, in its own device, the organized matter, can need the notion of *structure*. The essential task of cybernetics to Guillau-

[15] FRANK, Helmar G. Cibernética e Filosofia. Op. cit., p. 31.
[16] PASK, Gordon. Uma Introdução à Cibernética. Com prefácio de Warren S. McCulloch [M.I.T.]. Coimbra: Arménio Amado Editor, 1970, p. 41.
[17] Idem, ibidem, pp. 43-46.
[18] Idem, ibidem, p. 35.
[19] Idem, ibidem, p. 39. (grifamos)

maud, would be thus, the scientific conquest of the organized systems, in other words, to study, under a different angle, the highly complex matter (living beings, societies) in their evolution[20]. Guillaumaud defends that cybernetics roots itself deeply in the *technics* of the *automatism* that allow men to substitute themselves in the most elementary tasks of control, for a machine capable of reproducing some of its own movements[21].

In effect, amongst the cyberneticists this was one of the most hot topics for discussion: Up to which point would a machine be able to reproduce the "movements" – and even for some, the "thoughts" or "feelings" of humans? Herbert A. Simon, considered the father of the "artificial science", sustained that if we added "a learning capacity, it is certain that the computer would be able to create for itself new competencies, being able to even 'self-program' to resolve new issues […][22].

Norbert Wiener, based on such discussions, raises a concern exemplified from the automatic chess machine. At the time of its reflections, Wiener believed that a machine able to "play chess perfectly" would be something unachievable[23], for it would require too great a number of combinations, so that even with superfast computers (it should be noted: *computers* at the time, on the decade of 1950), would reach, with a certain success, the evaluation of every possibility two moves ahead, in the legal time for a game for a move[24].

Wiener's concern with the "automated chess machines" – also a concern of Shannon[25] – was that if transcended the mere automatized

[20] GUILLAUMAUD, Jacques. Cibernética e Materialismo Dialético. Rio de Janeiro: Tempo Brasileiro, 1970, pp. 09-10.

[21] Idem, ibidem, p. 147 (grifamos).

[22] SIMON, Herbert A. Herberto Simon, O Computador-Rei. In: PESSIS-PASTERNAK, Guitta. Do Caos à Inteligência Artificial. Entrevistas de Guitta Pessis-Pasternak. São Paulo: Unesp, 1993, p. 230.

[23] Nevertheless, in the nineties of the last century, has become globally known the existence of the computer Deep Blue, a modern designed by IBM to play chess games machine. Between the years 1996-1997, Garry Kasparov, then considered one of the greatest chess players in the world, made some comparisons with this computer, earning him some matches and drawing the other. However, surprisingly, in 1997 Deep Blue Kasparov eventually won, becoming the first machine in history to accomplish such a feat. On the episode, it is suggested to watch: JAYANTI, Vikram (Diretor). Game Over: Kasparov and the Machine (Documentário). Produção: Thinkfilm e Alliance Atlantis. Ano: 2003.

[24] WIENER, Norbert. Cibernética e Sociedade. Op. cit., p. 173.

[25] SHANNON, Claude E. A Teoria Matemática da Comunicação. São Paulo: Difel, 1975.

chess machines, building intelligent machines capable of measuring military situations and determining to its best accord in any specific stage, what would be a most dangerous and imminent contingency[26].

It is worth to observe that Wiener is not as naïve to think that danger itself lies in the "machine itself", in the sense that we are at the risk of "domination from the machines", as science fiction suggests in literature and cinema. The threat, to Wiener is that "such machines, albeit defenseless, can be used by a human being or a group of human beings to increase their dominion over the rest of humankind" [27]. Wiener explains, fundamentally, why we do not need to fear the domination of mankind by the machines (on their own); he argues:

> Machine's greatest weakness – a weakness that has saved us so far from being dominated by it – is that it cannot yet take in consideration the wide range of probabilities that characterizes the human situation. The domination from the machine presupposes that a society in its last stages of growing entropy, when probability is insignificant and the statistical differences between individuals are null. Fortunately, we have yet to reach said state[28].

Certainly the fear of "domination from machines", at the time transcended the discussions from cyberneticists, reaching other fields of knowledge, such as Psychology. At that cybernetic-technologic context, was unveiled the questioning about "where we are now and where we are headed", taking Erich Fromm, important social psychologist to affirm (in 1968):

> It seems to me that the main issue is not the possibility of the creation of a computer-man; it is before to know why the idea is becoming so popular in a historic period when nothing seems more important than to transform modern man in a more rational, harmonic and peace-loving man [29].

---

[26] WIENER, Norbert. Cibernética e Sociedade. Op. cit., p. 175-176. Indeed, fears of Wiener and Shannon were not entirely unfounded, since we now know that the Internet itself was born of a project aimed at the development of communication and military practices, i.e., designed for military purposes.

[27] Idem, ibidem, p. 178.

[28] Idem, ibidem, p. 178.

[29] FROMM, Erich. A Revolução da Esperança. Por uma tecnologia humanizada. 4ª ed. Rio de Janeiro: Zahar Editores, 1981, p. 59.

Inside this heated discussion, Guillaumaud ponders about what effective differs, in essence, living beings from machine, explaining why the waiver to recreating a living being 'externally': "the electronic machine looks infinitely closer to men than the steel man from romances of scientific forwardness […]. This robot was reduced, usually in fact, to a remotely operated mechanism by men. [30].

Polemic questions such as these dazzled scientific communities for decades, in the most distinct countries, whose researchers accompanied the unveiling of cybernetic thought and its interfaces with distinct areas of human knowledge. And so it was with Law. At the beginning of the 1970s there were already in Brazil, lawyers concerned about the influence of the cybernetic innovations in legal practice.

Luiz Fernando Coelho was, possibly, one of the first theoreticians of Brazilian law to speak properly about a "Cyber Law" [31], claiming to have forged this expression on 1974. Notwithstanding, Igor Tenório had already realized years before an interesting analysis of the relations between Cybernetics in Law [32]. One way of another, the objective of both authors was the same: To study, from this new branch of legal knowledge, "the law as a phenomenon of communication and control through computers"[33].

Coelho, for instance, shows how the Cyber Law permeates distinct branches of knowledge and legal practice: from the judicial process (with implications relative to jurisprudence, data processing, etc.), up to public management – which went on to serve on the spoils of "mechanized systems" to the processing of the main jobs that would be translated into bureaucratic hassles[34].

This is because of a creative dialectic, crystallized between the diverse mechanisms of control and communication of which individuals and society would benefit from.

Well, on Wiener's cybernetics there was already a tracing of a relationship between "*law, control* and *communication*. For this author "law can be defined as the ethical control applied to communication, and to language as a means of communication, especially when such normative aspect is under command of any authority sufficiently powerful to

[30] GUILLAUMAUD, Jacques. Cibernética e Materialismo Dialético. Op. cit., p. 122.

[31] COELHO, Luiz Fernando. Saudade do Futuro. Transmodernidade, Direito, Utopia. 2ª edição, revista. 2ª reimpressão. Curitiba: Juruá, 2013.

[32] TENÓRIO, Igor. Direito e Cibernética. Brasília: Ebrasa, 1972.

[33] COELHO, Luiz Fernando. Saudade do Futuro. Op. cit., pp. 80-81.

[34] Idem, ibidem, p. 82.

give its decisions the character of an effective social sanction"[35]. Rightly, complements Wiener, affirming: "the problems of law can be considered problems of communication and cybernetics – that is to say, problems of systematic control and repeatable of certain critical situations.

Based on this brief exposure, we can infer that cybernetics is not, in any way, "lost in time": it is about a knowledge that has yet to find able to provide bases of the historical-theoretical character useful to comprehend our present technological society. Erected interdisciplinary, cybernetics redefined important notions, such as *system, control* and *communication* – of which can with due care , be better appropriated by jus-philosophical reflection.

It is worth noting that the theorization about communication in Lee Thayer, to be outlined in the next point, finds itself in many aspects tuned with the presupposed theoretical cyberneticists. This way, a review on the proposed categories by Thayer, in light of certain cybernetic bases, can be of great value to unveil the theoretical route that culminated in what we know today as the Information and communications technology (ICT).

2. Fundamentals Of The Communications Theory In Lee Thayer

Lee Osborne Thayer was the director of the Center for the Advanced Study of Communication of the University of Missouri, city from Kansas, Being also a member of the Council of National Society for the Study of Communication (USA). Renowned theoretician in the communications area, Thayer became very known on Management for his organizational communication theory, realizing researches marked as interdisciplinary parallel to cyberneticists especially between the years of 1950-1970.

Thayer doesn't grow far, therefore, from the cybernetic theoreticians, as these also worried themselves with communication – notedly starting from the information problematic. In effect the first possible parallel between the communications theory of Thayer and the cyberneticists happens by the fact that both recognize that communications begin from 2 basic functions: a) *the adaptation*, that is, the fact that we are destined and to a certain degree programmed to receive the communication from our environment, what allows us to adapt and maneuver in order to achieve our objectives; and b) *To communicate with a living*

[35] WIENER, Norbert. Cibernética e Sociedade. Op. cit., p. 104.

being (a person for example) *from the environment*, what enables the establishment, maintenance and exploration of different measures in the relation of said living being with ourselves. In the first case, we receive and process internal and external facts, aiming *adaptation*, in the second, we produce (generating or scattering data managed to others) in order to *adapt a person to our reality*[36].

In the same way, both Thayer and Wiener recognize that we can find, in the study of the nature of the communications in the society, the answer of how communication sediments its own *social structure*. It is in this scenario that the concepts and analytical instruments outlined by Thayer, to be seen next, can be of basic importance to erect a theorization about the communicational processes that involve the *e*-citizen in a complex society.

2.1 Levels of analysis of communication

Lee Osborne Thayer Propose that we think about communication from four levels of analysis. Nevertheless, before we observe such levels, we must unveil the Thayerian concept of communication. Between the many possible definitions of communication, Thayer's approach is different, especially, for recognizing not only the *complexity*, but the *humanity* of the communicational phenomenon.

According to Lee Thayer, the communication is, for the sentiment and the human intellect, what the physical metabolism represents to the physiological processes of the body. Accordingly, the communication can be seen as "one of two basic processes of all living beings - the transformation of food in *energy* and the transformation of the facts in *information*" [37]. In other words, the communication maybe considered a dynamic process underlying the existence, the growth, the modification and the behavior of all living systems, whether subject or organization through which will be established a relationship with the environment, with others and their own parts[38].

Once such concept is agreed on, we pass onto the analysis of the four levels (*intrapersonal, interpersonal, organizational* and *technologic)* of

[36] THAYER, Lee Osborne. Comunicação: Fundamentos e Sistemas. São Paulo: Atlas, 1979, pp. 50-51. Também WIENER, Norbert. Cibernética e Sociedade. Op. cit., p. 26-27.
[37] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 34.
[38] Idem, ibidem, p.34.

problems of the communications area, thus exposed by Lee Thayer[39].

To Thayer, it is necessary recognize, initially, the existence of the [1] *Intrapersonal level*, from which is studied the behavior of the subject, namely, what is going on "inside" people during the development of the communicative process.

Thereafter, in the level [2] of the *interpersonal communication* is studying, basically, the way certain subjects affect each other mutually over the intercommunication and, thus, regulate and control each other.

The next level, [3] is the *organizational.* It is about the data system networks that link between themselves the members of a certain organization and "provide the means of which the enterprise relates to the environment".

Finally, the ultimate level of analysis is the [4] *technologic*. To Thayer, when the center of attention rests on the technology of communications, "we start worrying about the equipment, about the hardware and the formal software to generate, store, process, translate, distribute or exhibit data". Note that Thayer doesn't neglect the *human element* in this plane of analysis, because to him, "the ears and eyes must be considered an aspect of the communications technology, along with the television and the modern personal computers" [40].

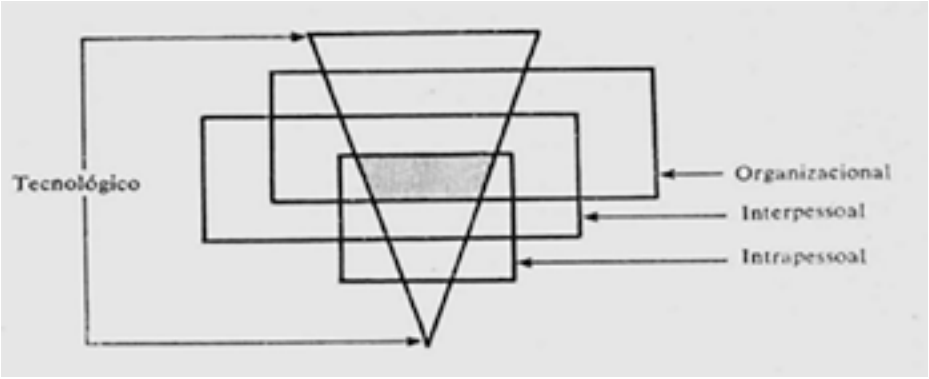
Certainly any theoretical initiative about reflecting on the aspects that shape the *e-citizen* must pause on the *technologic* level, what doesn't prevent, however, that it rests its attention, for example in aspects of the second level (*interpersonal)* – even because the technologic level *comprehends* of all the others[41]. The diagram below, proposed by Thayer, seeks to illustrate the four levels of communicational analysis[42].

[39] Conforme exposto por Thayer, op. cit., pp. 47 e ss.

[40] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 48.

[41] Later on, we will resume this point, explaining the overlap of levels and combinations thereof.

[42] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 49.



Picture 1

In such perspective, the communication must be seen, initially as a *cognitive* process originating from the internal level (*subject*), in direction to the external plane (*social*), generating thus reflexes on the environment. And strengthen up the theoretical proposal of Thayer that does not address these levels in a tight manner, for they overlap, intertwining each other. In the following matter, we shall see how the communication still divides itself in *instrumental* and *consummatory*, what will show that the virtual communication coats itself with a certain *instrumentality*, generating consequences (still not so clear) in the field of *e-citizenship*.

2.2 *Virtual communication: Instrumental technology*

Thayerian distinction of the communication in *instrumental* and *consummatory* finds echo in the philosophy of language of John Searle[43]. Lee Thayer understands that part of our communication serves as an "end and itself", even if sometimes we can produce or receive information without any intention, direct or indirect. In other words, at times we can communicate in a "consumable way", that is, "we can consume part of our own behavior and of another person's, without anything else in mind but its mere consumption(…); [one possible example is] the fact that someone speaks only to hear its own voice. A consummatory com-

[43] SEARLE, John R. Teoria da Comunicação Humana e a Filosofia da Linguagem: alguns comentários. In: DANCE, Frank X. (Org.). Teoria da Comunicação Humana. Tradução de Álvaro Cabral e José Paulo Paes. São Paulo: Cultrix, 1973, p. 155.

munication" [44].

However, if on one side John Searle emphasizes the utterance of who speaks and their intentions, Thayer doesn't find itself distant by explaining what he understands for *instrumental communication*: it is about that communication with an objective in mind, in other words, *intentional*, "because we cannot neglect the fact that communication always generates some con sequence, even when said consequence is not sought out" [45].

Thayer contemplates his idea, asserting: "*any communication that happens and has any consequence to the interpersonal or organizational relationship with the persons involved is instrumental*" [46].

In this point, we can observe the *interpersonal/technologic* interface and the instrumentality of the communication, transposing these ideas to the plan of the virtual communication (harbored, obviously in the *technologic* level of the communication problems). For that, we must consider, initially, the following premises: the human communication happens always in a structured context and, therefore, organized, in a manner that the basic function of the communication is to evoke and invigorate behavioral systems[47].

On the interpersonal level of communication, it is interesting to know up to what point there is a "control" of the subjects through communication. This presupposes a teleology of the communication act itself, in other words, the existence of the intention of an *alter* in controlling your relation with *ego*. This communication level (Interpersonal) does not discard the "social dimension" (the individuals belong to a more inclusive social unit – a nation, for instance) and of how everything is subject to the ideology-technology of time and space[48].

In effect, reflecting over subjects in interaction/communication implies in recognizing the existence of a determined kind of *natural organization*: the society. For Thayer, this special form of organization consists in the "structure of relations between people and departments, and the rules through which is governed the behavior between them"[49].

---

[44] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 52 (grifamos).

[45] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 52.

[46] Idem, ibidem, p. 52 (grifo do autor).

[47] THAYER, Lee O. Comunicação e Teoria da Organização. In: DANCE, Frank X. (Org.). Teoria da Comunicação Humana. Tradução de Álvaro Cabral e José Paulo Paes. São Paulo: Cultrix, 1973, p. 113.

[48] Idem, ibidem, p. 116.

[49] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 113.

Therefore "to rule the behavior" of others is only possible *instrumentally*, since the *instrumentality of communication* starts, nowadays, to coat itself of a *technological drapery*. Not that the computers themselves "communicate between each other, but they start being used

> to increase and amplify the processing capacity and production of information of men. The computers do not transport data from one place to another, as great part of previous technological innovations; processing of data. They are projected and programmed for reducing, analyzing, synthesizing, reorganizing and for, in many ways, exhibit or *publishing* ways or series of data that cannot be, in other way, be available to us, or can require considerably more time for its production or processing[50].

Thayer, at the time outlines a conception of compatible computing with what we understand as a computer today. Moreover, it is the interface man/computer that configures the symbolic-communicational space presently known as cyberspace. Pierre Lévy understands as *cyberspace* that "space of communication open by a worldwide interconnection of computers and the memories of said computers" [51].

In this context, analysis both in the area of communication and sociology must seek to comprehend how the Internet affects the social relationships; but not only as the mediation as computer affects the *quality* of said interactions and the social relations as a whole – in the sense of knowing if *online* relationships will be "better" or "worse". We must know, beyond that, up to which point the communication mediated by computers affects the "mix" of interactions and social relations[52].

We understand that a complex mix arising from the virtual interaction (through the Internet) between individuals is situated in a "zone of overlapping of the many levels and their combinations", in other words, in the surface of contact indicated by the *dashed central space*[53]. This space points to a complex communicational web embraced by the

---

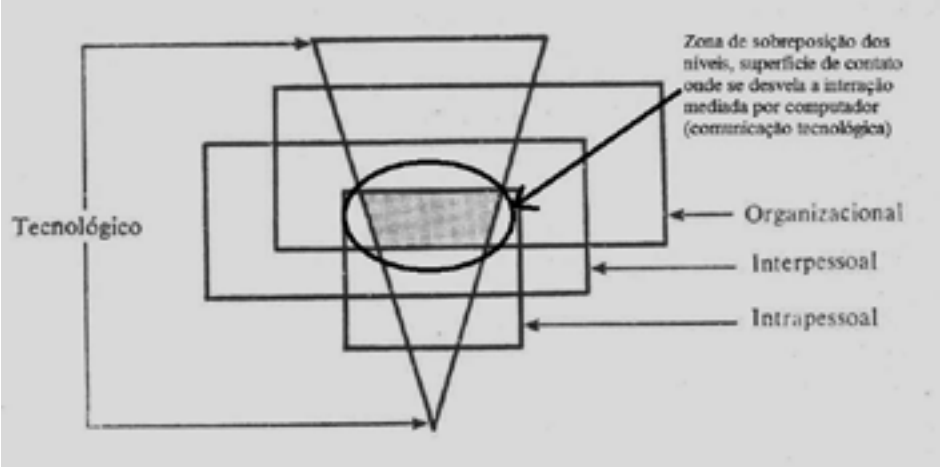
[50] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 283 (grifo do autor).

[51] LÉVY, Pierre. Cibercultura. São Paulo: Ed. 34, 1999, p. 92.

[52] CUMMINGS, Jonathon N., BUTLER, Brian e KRAUT, Robert. The Quality of Online Social Relationships. In: Communications of the ACM – How the virtual inspires the real, July 2002/Vol. 45, No. 7, p. 103. Disponível em: http://portal.acm.org/citation.cfm?id=514242. Acesso em: 05 de maio de 2011.

[53] THAYER, Lee O. Comunicação e Teoria da Organização. Op. cit., p. 116 (grifamos).

technological level, making it possible to speak, hereinafter, in a *computer mediated interaction* (technologic communication) – as the picture below states:



Picture 2

Observing this contact zone we realize it is not with the "affairs" (material or immaterial) of the world that we deal with. For Thayer, we deal with the *information* about these affairs, in a way that the "affairs" are mere physical data that are sensed and translated by the sensorial equipment of a subject, endowing him with *gross sensorial data*. It is the psychological system of the subject that will transform these "gross data" into information[54], to which it can be communicated both *physically* and *virtually*.

Brennand and Brennand show us how the recent process of aggregation of social virtual networks and its actors have *relational dimensions* (interactional) complex, because virtual communication, complexifies the very social web, allowing for new social aggregations, collective identities and horizontal cooperation [55]. This way, the flux of the information networks and communication brings to spotlight the *diffuse* and places in evidence the *temporal indetermination* generated by a process of

[54] THAYER, Lee O. Comunicação e Teoria da Organização. Op. cit., p. 118.

[55] BRENNAND, E. G. de Góes e BRENNAND, E. J. de Góes. Arquiteturas Cognitivas e Informacionais no Contexto das Dinâmicas Sociais Contemporâneas. In: Liinc em Revista, v. 6, n. 2, pp. 316-323, setembro de 2010, Rio de Janeiro, pp. 318-319. Disponível em: http://revista.ibict.br/liinc/index.php/liinc. Acesso em: 12 de fev. de 2011.

which interact *human intellect* and *intelligent machines*[56].

It is the interaction between human intellect and intelligent machines that will lead us, in the next chapter, to consider the areas of contacts *interpersonal* ↔ *organizational* and *organizational* ↔ *technologic.* In it we mean to unveil the limits and possibilities of thinking about *e-citizenship* from the theoretical stimuli of Thayer.

3. E-Citizenship: limits and possibilities in a communicational perspective

To comprehend the *e-citizenship*[57] we must establish before a comprehension about what is a *political participation* coated *technologically*. Edouard Bannwart, on unveiling the configurations of the "multimedia society", shows us how through *political participation* we can understand the intervention in matters of opinions and decisions in the most diverse areas of public life, what substantially reconfigures in a context of which the technological advances offer new opportunities in the plane of political participation[58].

We would be, in this context of technological advances, therefore, before a "new citizenship"? Michel Miaille helps to answer this question, by confirming that "whether about a new citizenship to come or an already committed citizenship, everything depends on the type of comprehension that we testify in relation to what is new about this citizenship, namely, the most contemporary technology that is allowed to exercise"[59].

The "contemporary technology" highlighted by Miaille can be seen as a powerful instrument "see, for example, the handouts of the Web 2.0[60] that must according to Sanchez, be accompanied by a "ca-

[56] Idem, ibidem, p. 321 (grifamos).

[57] We adopted in this research, the term e-citizenship, despite some authors use other terms to mean the e-citizen, such as "virtual citizen" as intended MIAILLE, Michel. O Cidadão Virtual. Cadernos Adenauer IV (2003), n. 6. Mundo Virtual. Rio de Janeiro: Fundação Konrad Adenauer, abril 2004, ou "cibercidadão", conforme sustenta PÉREZ LUÑO, Antonio E. ¿Ciberciudaní@ o Ciudadaní@.com? Barcelona: Editorial Gedisa, 2004.

[58] BANNWART, Edouard. Nota Introductoria. In: BRAUNER, Josef e BICKMANN, Roland. La Sociedad Multimedia. Barcelona: Gedisa, 1996, p. 123.

[59] MIAILLE, Michel. O Cidadão Virtual. Op. cit., p. 16.

[60] "Web 2.0 is the business revolution in the computer industry caused by the move to the internet as platform, and an attempt to understand the rules for success on that new

pacitation of society, especially civil society, to understand it and use it according to democratic values. Otherwise, there will be just a vertical transfer of power – from bureaucracy to the government – through a better control of information" [61]. This capacitation is, thus, a way of overcoming the present mismatch between "civil society" and the "technological society", in a way that the inception of new technological devices becomes not only useful, but closer to each citizen's reality.

Without further ado, let us pass, thus, to observe the problematic of the *e-citizenship* in the communicational perspective of Lee Thayer. For such, we need to go back to the referred "zone of overlapping" of communication levels and its combinations – previously illustrated. We mentioned that the surface of contact indicated in the diagram by the *dashed central space* represents a symbolic point in which is developed the complex communicational web; in it, the technological level covers the other levels (Intrapersonal, interpersonal and organizational). In the dashed area we can observe and comprehend how is developed the interaction/communication mediated by computer.

Similarly, we mention that the areas of *interpersonal organizational* and *organizational technologic* are the ones that is of our interest to observe. But why? Foremost, by the fact that Lee Thayer proposes a Theory that aims to explain a problem rather practical: *the behavior of the subjects in a interpersonal contexts*. Nevertheless, such contexts do not end in themselves; they must be observed as *dynamically involved in an organizational context*. There is no way to unlink the *interpersonal* and *organizational* planes. , for any interpersonal encounter that persists (repeats itself) becomes (generically) an organization[62].

Every interpersonal relationship can be seen, thus, as an organization, even if the essence of any organization consists properly in the "structure of relations between people and departments, and the rules through which is governed the behavior between them" [63] – that

platform. Chief among those rules is this: Build applications that harness network effects to get better the more people use them. (This is what I've elsewhere called "harnessing collective intelligence)". See O'REILLY, Tim. Web 2.0 Compact Definition: Trying Again. In: O'Reilly Radar: Insight, analysis, and research about emerging Technologies. Disponível em: http://radar.oreilly.com/2006/12/web-20-compact-definition-tryi.html. Acesso em: 2 de maio de 2011.

[61] SANCHEZ, Oscar. A. O Poder Burocrático e o Controle da Informação. In: Lua Nova, n. 58, pp. 89-120, 2003, p. 91.

[62] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 105.

[63] Idem, ibidem, p. 113.

may result from the relations from other people, or can be imposed by planned relationships[64]. The structure of the organization characterizes itself thus, "by the pattern or by the flux networks of information-decision, inside the organization and by the channels and networks that describe its communication with the environment" [65]. From cybernetic stimuli, we can also assert: organizations presuppose a decrease (but not removal) of uncertainties – once that the *uncertainty is synonymous of "little information".* This way, the observation (in the organizational level) can be faced as an effective process of uncertainties removal of a mass of possibilities [66].

Today, the *natural organizations* (individuals in organized interactions, or societies) structure and regulate themselves from technology coated relations. However, there is, in this point, a communicational problem - that was also an object of concern to cyberneticists: The *compatibility*. Technologies (notedly the information systems) *need to be compatible to the systems to which they link to be considered efficient.* Accordingly, an example is the necessary harmony of the user's language with the computer's language, imperious condition for an efficient relation man/machine[67].

The *e-citizen* can be considered that citizen that appropriates and makes use of digital tools that lead him to an effective interaction and political participation in the organizational-technologic plane of public management. Or according to Ferreira [*et. al.*], "from the moment in which the citizens have a right of access to public services, to educate themselves, to communicate though TIC, it can be said that in *e-citizenship*, a way of exercising citizenship with the support of the technologies of information and communications"[68].

Regardless, today we do not have e-citizens operating in line, homogeneously, consisting of digital supports that make them able to interact with public management. To an effectiveness (practical) of the e-citizenship, we must remember that the citizenship itself must count on a "way to be and live marked by the ideals of equality and dignity,

[64] Idem, ibidem, p. 114.

[65] Idem, ibidem, p. 132.

[66] PASK, Gordon. Uma Introdução à Cibernética. Op. cit., p. 56.

[67] THAYER, Lee O. Comunicação: Fundamentos e Sistemas. Op. cit., p. 200.

[68] FERREIRA, Marcus V. A. da Silva; SANTOS, Paloma M.; BRAGA, Marcus de M. e ROVER, A. José. Convergência Digital e e-Participação. In: CALLEJA, Pilar L. (Org.) La Administración Electrónica como Herramienta de Inclusión Digital. Zaragoza: Prensas Universitarias de Zaragoza, 2011, p. 22.

as well as liberty"69. But we could also add: marked by the idea of compatibility. It is about compatibility between the services offered online by the public management and the sociocultural reality of Brazilian citizens.

Rodegheri, Santos and Oliveira address the necessity of the existence of an

> Annexation of the space offered by the *web* as an alternative way of the exercise of democracy, not substituting the current model, but reinforcing it and deploying a new medium, in which stand the ease of use, access and transmission of information[70].

But we reinforce: Not necessarily the new Technologies incorporated by the public management are synonymous of "easy and dynamics services". Ease of usage will only exist if there is a *compatibility* and *incorporation* of these technologies by their recipients: the citizens. On the other hand, we do not doubt that, on its own the virtual space opened by the web, when incorporated by the public management, strengthen, amongst other factors, the visibility, allowing for a bigger possibility of controlling the public acts. As well sustains Temis Limberger, such fact enables us to talk (without utopias) in the observance of the *principle of publicity and the right to be informed* of the citizen, on which rests the legal system in the Democratic State [71].

This administration, transparent, publicized, coated by new technologies is being called "*e-management*", for it counts on a plentiful set of activities, realized through the internet, in which the citizen can consult, inform himself, and realize formalities and online transactions with governmental organs. This way, governs seek with such activities, to offer more comfort and haste to e-citizens, eliminating thus the middle-man

---

[69] MIAILLE, Michel. O Cidadão Virtual. Op. cit., p. 26 (grifamos).

[70] RODEGHERI, Letícia B.; SANTOS, Noemi de F. e OLIVEIRA, Rafael Santos de. A Construção da Ciberdemocracia por meio do Debate Público na Blogosfera. In: Revista Democracia Digital e Governo Eletrônico, n° 6, p. 98-119, 2012, p. 110.

[71] LIMBERGER, Têmis. As Novas Tecnologias e a Transparência na Administração Pública: uma alternativa eficaz na crise dos controles clássicos do Estado, a fim de viabilizar a concretização de direitos. In: SANTOS, André Leonardo Copetti, STRECK, Lenio Luiz e ROCHA, Leonel Severo. (Org.). Constituição, Sistemas Sociais e Hermenêutica. Anuário do Programa de Pós-Graduação em Direito da UNISINOS, n. 3. São Leopoldo: UNISINOS; Porto Alegre: Livraria do Advogado, 2007, p. 216.

between said entities and the State[72].

The positive aspect of the *e*-management lies in the fact that it is not about a "project" anymore, but a reality in a big measure put in motion. Meanwhile the organization, the *e*-management plans and establishes information systems that guarantee the necessary communication to keep this "virtual organization" in motion and by reach of all *e*-citizens. However, its negative aspect is that there are no effective stimuli – capacitation/compatibility – on the government's part so that "common citizens" can effectively become *e*-citizens. This happens because of a (still existent) scenario of *digital exclusion*[73]. Speaking about digital exclusion, we're not dealing with "just economical exclusion, but also cultural exclusion. The complexity and the abstraction of the society of information are really factions of acceleration on the distance between 'info-elected' and 'info-excluded'[74].

In a way or another, the brand of the modern public managements, since the availability of the new information technologies and communications, is the [attempt to offer citizens] the usage of these technologies, in an aggressive way, be it to offer services of informational nature, to give support and favor the supply and the utilization of the public services[75]. In other words, there is a pretension to coat the relation between citizens and public management in a technological suit.

We understand that a communicational comprehension of the existing relationship between *e*-citizens and the *e*-management allows us to recognize the inherent complexity in the overlapping of the many levels of communication analysis, especially from the point of view of three (of four) levels: Interpersonal/organizational/technologic. The common point between the different levels is that all of them deal with communication systems (or information processing), in which operations consist in the *conversion of data into information.* The intertwining of

---

[72] SANCHEZ, Oscar. A. O Poder Burocrático e o Controle da Informação. In: Lua Nova, n. 58, pp. 89-120, 2003, p. 93.

[73] SORJ, Bernardo e GUEDES, Luis Eduardo. Exclusão Digital: problemas conceituais, evidências empíricas e políticas públicas. In: Novos Estudos - CEBRAP. 2005, n.72, pp. 101-117, p. 103.

[74] QUÉAU, Philippe. Cibercultura e Info-ética. In: MORIN, Edgar (Org.). A Religação dos Saberes. Jornadas temáticas idealizadas e dirigidas por Edgar Morin. 3ª ed. Rio de Janeiro: Bertrand Brasil, 2002, p. 465.

[75] FUGGINI, M. G., MAGGIOLINI, P., e PAGAMICI, B. Por que é difícil fazer o verdadeiro "Governo-eletrônico". In: Revista Produção, v. 15, n. 3, p. 300-309, Set./Dez. 2005, p. 301.

the factors that compose the unique levels of analysis leads us to detect the existence of a mismatch between the *technologic* and the *interpersonal*, so that the technologic increment coating public management still requires an effective digital inclusion of their management in its broadest sense: cultural, economic and technologic.

If political liberation, sustained by the riches of the public virtual spaces, to occur effectively – with the participation of the *e*-citizens – in now virtual and not just territorial space, we can have, who knows, in a near future, more important decisions taken both in the cyberspace and the territorial space, in a symbiosis that will make no distinction between the legitimacy of the word proffered in the physical of virtual plane. In this way, the tendency is that the acts founded on the public management will be made more transparent to the citizens, who will contribute with their ideas, opinions and solutions to the debate over public matters[76], crystallizing what can be called today the *e*-participation.

Conclusions

This text had for its basic objective to establish, interdisciplinary, a communicational-social comprehension of the e-citizenship. For this, our starting point was the cybernetics, aiming to open a perspective for the comprehension of the organizational communication. The interdisciplinary character of the cybernetic thinking, could show how this area of the scientific transcends the mere technical realization or the transformation of processes and systems: cybernetics should be seen as an yet present point of problematic of the social implications and philosophical of the interaction man/machine. In this sense, the *cybernetic theory of complexes of systems* shows how the environment of an informational system keeps other systems (humans, mostly), that can cooperate with it, or be against it. Cybernetics, thus, serves as an observation point to all kinds of systems, whether artificially built, resultant from the abstraction of the physical structure of a natural system. Its relevance is in offering a theoretical instrument able to study the *structures* and the problematic of the information/communication.

Not very distant from cybernetics, it was possible to see in Lee Thayer that the fear of cyberneticists of a "domination from the ma-

[76] Conforme sustenta RODRIGUES, R. Ciberespaços Públicos: As Novas Ágoras de Discussão. In: BOCC (Biblioteca Online de Ciências da Comunicação). Disponível em: www.bocc.ubi.pt/pag/cibrespacos-rodrigues.pdf. Acesso em: 14 de maio de 2011.

chines" has yet to find grounds to support it, because speaking of machines we are dealing (presently) of *communication machines.* Furthermore, the communication, in Thayer, must be seen as a dynamic process by existence, growth, modification and behavior of all *living systems* (machines do not have a life of their own!), be they an individual or an organization through which will establish a relationship with the *environment*. What there is, thus, is *a communication led by living beings, but coated of a* Nano chemical *or technologic coating.* The "zone of overlapping" of the many communication levels, seen from Thayer's point of view, can show exactly that: how the *dashed central space* is a symbolic point where the complex communicational web can unveil between human beings (on the intrapersonal, interpersonal and organizational levels) and machines (technologic level). The "dashed point" is, thus, the ideal point of observation – in a communicational perspective – in order to comprehend and learn the problematic of *e*-citizenship.

Surely, *e*-citizenship finds itself, today, linked not just to digital exclusion/inclusion, but equally dependent of a political deliberation kept by a public management that proposes a diversity of services to virtual citizens in line. In a context in which public management finds itself, gradually taking advantage of the digital Medias, ideas like visibility, transparency and control of the public acts can become a possible reality. Notwithstanding, this will only be possible if the *e*-management is marked by the referred aperture and the horizontality – recognizing that the public management and citizens find themselves in the same symbolic plane (cyberspace)

Finally, we sustain that the perception of the exchanges occurred between *e*-citizens and *e*-management in the cyberspace can be better unveiled from the theoretical instrument proposed by Lee Thayer. From this point, we have a different observation of the plot *e*-citizens/*e*-management, perceiving thus not only the complex aspects that coat the *technological communication*, but recognizing that "by amplifying in the internet, the public space aspires sociability, private life and the expressivity of individuals" [77].

[77] CARDON, Dominique. A Democracia Internet: promessas e limites. Tradução Nina Vincent e Tiago Coutinho. Rio de Janeiro: Forense Universitária, 2012, p. 105.

References

ASHBY, W. Ross. *Uma Introdução à Cibernética.* São Paulo: Perspectiva, 1970.

BANNWART, Edouard. Nota Introductoria. *In*: BRAUNER, Josef e BICKMANN, Roland. *La Sociedad Multimedia*. Barcelona: Gedisa, 1996.

BATESON, Gregory. *Steps to an Ecology of Mind*. University Chicago Press, 1972.

BERTALANFFY, Ludwig V. *Teoria Geral dos Sistemas*. Petrópolis: Vozes, 1973.

BRENNAND, E. G. de Góes e BRENNAND, E. J. de Góes. Arquiteturas Cognitivas e Informacionais no Contexto das Dinâmicas Sociais Contemporâneas. *In*: *Liinc em Revista*, v. 6, n. 2, pp. 316-323, setembro de 2010, Rio de Janeiro, pp. 318-319. Disponível em: http://revista.ibict.br/liinc/index.php/liinc. Acesso em: 12 de fev. de 2011.

CARDON, Dominique. *A Democracia Internet*: promessas e limites. Tradução Nina Vincent e Tiago Coutinho. Rio de Janeiro: Forense Universitária, 2012.

COELHO, Luiz Fernando. *Saudade do Futuro*. Transmodernidade, Direito, Utopia. 2ª edição, revista. 2ª reimpressão. Curitiba: Juruá, 2013.

CUMMINGS, Jonathon N., BUTLER, Brian e KRAUT, Robert. The Quality of Online Social Relationships. *In*: *Communications of the ACM* – How the virtual inspires the real, July 2002/Vol. 45, No. 7, p. 103. Disponível em: http://portal.acm.org/citation.cfm?id=514242. Acesso em: 05 de maio de 2011.

FERREIRA, Marcus V. A. da Silva; SANTOS, Paloma M.; BRAGA, Marcus de M. e ROVER, A. José. Convergência Digital e e-Participação. In: CALLEJA, Pilar L. (Org.) *La Administración Electrónica como Herramienta de Inclusión Digital*. Zaragoza: Prensas Universitarias de Zaragoza, 2011.

FOERSTER, Heinz von. *Understanding understanding*. A volume of von Foerster's papers. Springer-Verlag, 2002.

FRANK, Helmar G. *Cibernética e Filosofia.* Rio de Janeiro: Tempo Brasileiro, 1970.

FROMM, Erich. *A Revolução da Esperança*. Por uma tecnologia humanizada. 4ª ed. Rio de Janeiro: Zahar Editores, 1981.

FUGGINI, M. G., MAGGIOLINI, P., e PAGAMICI, B. Por que é difícil fazer o verdadeiro "Governo-eletrônico". In: *Revista Produção*, v. 15, n. 3, p. 300-309, Set./Dez. 2005.

GUILLAUMAUD, Jacques. *Cibernética e Materialismo Dialético*. Rio de Janeiro: Tempo Brasileiro, 1970.

JAYANTI, Vikram (Diretor). *Game Over*: Kasparov and the Machine (Documen-

tário). Produção: Thinkfilm e Alliance Atlantis. Ano: 2003.

LIMBERGER, Têmis. As Novas Tecnologias e a Transparência na Administração Pública: uma alternativa eficaz na crise dos controles clássicos do Estado, a fim de viabilizar a concretização de direitos. *In*: SANTOS, André Leonardo Copetti, STRECK, Lenio Luiz e ROCHA, Leonel Severo. (Org.). *Constituição, Sistemas Sociais e Hermenêutica.* Anuário do Programa de Pós-Graduação em Direito da UNISINOS, n. 3. São Leopoldo: UNISINOS; Porto Alegre: Livraria do Advogado, 2007.

MIAILLE, Michel. O Cidadão Virtual. *In: Cadernos Adenauer IV* (2003), n. 6. Mundo Virtual. Rio de Janeiro: Fundação Konrad Adenauer, abril 2004.

O'REILLY, Tim. Web 2.0 Compact Definition: Trying Again. In: *O'Reilly Radar*: Insight, analysis, and research about emerging Technologies. Disponível em: http://radar.oreilly.com/2006/12/web-20-compact-definition-tryi.html. Acesso em: 2 de maio de 2011.

PASK, Gordon. *Uma Introdução à Cibernética*. Com prefácio de Warren S. McCulloch [M.I.T.]. Coimbra: Arménio Amado Editor, 1970.

PÉREZ LUÑO, Antonio E. *¿Ciberciudaní@ o Ciudadaní@.com?* Barcelona: Editorial Gedisa, 2004.

QUÉAU, Philippe. Cibercultura e info-ética. *In*: MORIN, Edgar (Org.). *A Religação dos Saberes*. Jornadas temáticas idealizadas e dirigidas por Edgar Morin. 3ª ed. Rio de Janeiro: Bertrand Brasil, 2002.

RODEGHERI, Letícia B.; SANTOS, Noemi de F. e OLIVEIRA, Rafael Santos de. A Construção da Ciberdemocracia por meio do Debate Público na Blogosfera. *In*: *Revista Democracia Digital e Governo Eletrônico*, n° 6, p. 98-119, 2012.

RODRIGUES, R. Ciberespaços Públicos: As Novas Ágoras de Discussão. In: *BOCC* (Biblioteca Online de Ciências da Comunicação). Disponível em: www.bocc.ubi.pt/pag/cibrespacos-rodrigues.pdf. Acesso em: 14 de maio de 2011.

SANCHEZ, Oscar. A. O Poder Burocrático e o Controle da Informação. In: *Lua Nova*, n. 58, pp. 89-120, 2003.

SAUSSURE, Ferdinand de. *Curso de Linguística Geral.* Organizado por Charles Bally, Albert Sechehaye, com a colaboração de Albert Riedlinger. 34ª edição. São Paulo: Cultrix, 2012.

SEARLE, John R. Teoria da Comunicação Humana e a Filosofia da Linguagem: alguns comentários. *In*: DANCE, Frank X. (Org.). *Teoria da Comunicação Humana*. Tradução de Álvaro Cabral e José Paulo Paes. São Paulo: Cultrix, 1973.

SHANNON, Claude E. *A Teoria Matemática da Comunicação.* São Paulo: Difel,

1975.

SIMON, Herbert A. Herberto Simon, O Computador-Rei. In: PESSIS-PASTERNAK, Guitta. *Do Caos à Inteligência Artificial*. Entrevistas de Guitta Pessis-Pasternak. São Paulo: UNESP, 1993.

SORJ, Bernardo e GUEDES, Luis Eduardo. Exclusão Digital: problemas conceituais, evidências empíricas e políticas públicas. In: *Novos estudos - CEBRAP*. 2005, n.72, pp. 101-117.

TENÓRIO, Igor. *Direito e Cibernética.* Brasília: Ebrasa, 1972.

THAYER, Lee Osborne. Comunicação e Teoria da Organização. In: DANCE, Frank E. X. (organizador). *Teoria da Comunicação Humana*. São Paulo: Cultrix, 1973.

THAYER, Lee Osborne. *Comunicação*: Fundamentos e Sistemas. São Paulo: Atlas, 1979.

WIENER, Norbert. *Cibernética e Sociedade*. O uso humano de seres humanos. 4ª edição. São Paulo: Cultrix, 1973.

Open source software, access to knowledge and software licensing

Marcella Furtado de Magalhães Gomes[1]
Roberto Vasconcelos Novaes[2]
Mariana Guimarães Becker[3]

Abstract: The world depends more and more on computers. Open source and free software create the ideal conditions to access the fundamental digital tools, allowing the advance of knowledge, research and development in countries such as Brazil that would be otherwise deprived of these kinds of benefits.
In spite of the common terms, there are different ways to license and distribute open source software. The open source spectrum ranges from complete grant of commercial uses to those that demand that derivative works are distributed under the same license terms. These differences have important economical, legal and technical consequences. Those different structures affect software development, longevity of projects and software distribution.
In USA there is a better developed and structured legal precedent collection. In Brazil, however, the legal sphere is yet to study the precise rules and consequences of open source software, especially concerning intellectual property and patents.
Nevertheless, in the past decade Brazil government had supported the utilization of the open source software in its internal organizations. There is also a new legislation that illuminates the uses and advantages of those technologies. In this paper we present this Brazilian legislation regarding open source software licensing, and also analyses the gains of productivity or economic benefits

[1]Doutora e Mestre em Filosofia do Direito pela Universidade Federal de Minas Gerais. Profa. da Universidade Federal de Minas Gerais, Faculdade de Direito – Departamento de Direito do Trabalho e Introdução ao Estudo do Direito.
[2]Doutor e Mestre em Filosofia do Direito pela Universidade Federal de Minas Gerais. Prof. do IBMEC Minas Gerais, Curso de Direito.
[3]Graduanda em Direito pela Faculdade de Direito da Universidade Federal de Minas Gerais.

derived from the adoption of those systems. This way, we intend to show that the availability of open source and free tools is a fundamental factor to promote development that could otherwise be haltered due to high costs and private control of technology. The access and availability of open source software is a vital way to create better governments, public transparency and human rights enforcement.

Keywords: Free Software, Software Licensing, Access to knowledge

1. Introduction

In a world where our activities depend heavily on software performance, to create and disseminate free software, i.e., software that allows users to have access to its structural code, means to be able to provide meaningful technological access to many societies.

Despite its universal nomenclature, these tools have different kinds and levels of openness and use, which allows for various serious legal, economic and technological repercussions.

Campaigners of this technology argue that its use provides access to the most advanced digital tools, contributing to the progress of knowledge, research and development in countries, such as Brazil, in which the absence of these platforms would be more sharply felt, as a result of its technological gap, if compared to developed countries.

In this paper, we present what is free software, which open source legal arrangements there are and what are the ramifications of the different types of licensing, as well as the impact of its use, particularly in Brazil, which has adopted a government policy of encouraging the use of this tool.

2. Free Software and Open Source Software Concept

In 1985 the *Free Software Foundation* was created, a non-profit organization, dedicated to eliminating restrictions on the use, copy, distribution, study and change of software. These actions are pillars of the free software definition; even though this definition is in constant improvement, due to the different social demands and constant technological developments in IT.

According to the *Free Software Foundation* (FSF), by free software we should understand software that respects the freedom and sense of

community of its users. It reaffirms, thus, the foundations that enabled the creation of the FSF, i.e., free software users have the freedom to run, to copy, to distribute, to study, to change and to improve software in order to control the program and what it would be able to do. (http://www.gnu.org/philosophy/free-sw.html)

This freedom regards both the software's use and implementation, as its ability to process and adapt data to new needs and applications, and it can only be exercised concretely by providing the source code that makes up the software for further analysis and modification by its user.

When the source code is available, it allows for a high degree of innovative technological production. A program can be disassembled and refurbished to generate several other programs which are different from their originals. It also allows certain social freedom, due to the occurrence of new partnerships between several programmers and users, which are not possible in software developed under proprietary license.[4]

The sheer amount of contributors can also lead to increase in software reliability by the simple fact that several developers, from all around the world and with all kinds of skills, work to improve them. Additionally, users who use these programs may report more fully the limitations and errors in its operation and are in a better position to deal with these failures, as they have access to the structure of the software they use.

All these contribute to the programs greater longevity. Proprietary software may go out of line, preventing their recycling into programs that are more modern or with new applications. Free software, although they are also liable to fall into disuse, are easily accessible to be reused.

The various licenses governing free software use[5], first of all, revolve around preventing commercial exploitation of exclusive nature of its source codes. This does not mean that it cannot occur any kind of economic exploitation using free software or its source code; but only that the user must have access to the source code and thus, enabling, further than economic gain, that the user may relish the software intellectual value and have control over the program.

---

[4]The term proprietary is used to refer to programs and licenses that cannot be considered free according to the given definition.

[5]To be considered truly free these licenses cannot restrict the freedoms mentioned, having as its purpose to guarantee them.

Therefore, free software bears this name because its user is free to learn and use the structure on which that system was build:

> "Thus, "free software" is a matter of liberty, not price. To understand the concept, you should think of "free" as in "free speech," not as in "free beer"." (http://www.gnu.org/philosophy/free-sw.html)

The FSF has identified four essential freedoms that must be present in software so that it can be called free:

- "The freedom to run the program, for any purpose (freedom 0).
- The freedom to study how the program works and change it so it does your computing as you wish (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbour (freedom 2).

> The freedom to distribute copies of your modified versions to others (freedom 3). By doing this you can give the whole community a chance to benefit from your changes. Access to the source code is a precondition for this." (http://www.gnu.org/philosophy/free-sw.html)

The only limitation to these freedoms, particularly to freedom 3, is what is known as Copyleft, i.e., the possibility of imposition by the free software license that the distributed copies must be licensed in the same way as the original software is, not allowing for the addition of restrictions contrary to the central freedoms. This rule has the ability to prevent free software from losing, in its process of modification by the community, the qualities that characterize them as such.

Open Source Software is another term commonly used to refer to free software, and, in fact, basically define the same type of programs. Nevertheless, the use of these two terms as synonyms can be regarded as mistaken. Open source software is not necessarily focused on user's freedom, one of the main issues of free software. Here, what really matters is the practical aspects of making the source code available, i.e., the way it was developed, its benefits, its great capacity for innovation and reliability. Free software movements have a more politically and socially engaged view, and therefore care about access to knowledge and freedom to use that knowledge.

3. Law and Software Licenses

In Brazil, Law No. 9.609/98 - Software Law and Law No. 9.610/98 - Copyright Law governs computer programs, both free and proprietary software. Regarding free software, it is necessary to emphasize that the application of copyright must first be recognized so that, later, it may be waived in favour of other users and programmers. However, free software regulamentation depends heavily on its licenses, specially developed for this type of program, as they stipulate, in large part, the legal consequences of using this type of software.

Through our study of Software Law, we verified that users can do close to nothing with a purchased program beyond using it on their own computers and making one copy for safekeeping. It is the author's prerogative to authorize less restrictive uses of the programs. These permissions are usually granted through licenses that, in turn, ensure the freedoms that underlie the concept of free software.

The permissive character of free software licenses is not absolute. There are certain licenses, such as the original BSD License (Berkeley Software Distribution), that require mentions to the program's authorship, and others like the GNU GPL (General Public License from GNU Project), which endorse Copyleft.

Free software licenses can be classified in two groups, permissive licenses and licenses that apply Copyleft. Permissive licenses such as the MIT License and the Apache License, only refer to the use, redistribution and modification of software. They do not require that in redistribution the software keeps itself free and do not require that open source versions be distributed, which allows free software to become proprietary. These licenses, however, are interesting to be used when the purpose of the project focuses on its wide dissemination.

In a certain way, permissive licenses are the maximum guarantee of freedom of speech and users have autonomy to use free software in the way they wish. On the other hand, it might also end up restricting this freedom to the extent that it might omit freedom of third parties that would come in the chain of redistribution. This leads to the big problem that the code of programs distributed under this type of license, be they modified or not, can go closed. Permissive license admits that redistributors combine open source with material based on closed source, which allows developments latter added to the code to end up being made under a proprietary license. Now, softwares are dynamic structures that

are only useful if they follow the constant changes and new realities and needs of users. Therefore, even if the original code remains free, if their subsequent developments become proprietary, in the long run, this can derail their use without purchasing the subsequent modifications, which ultimately force the user to acquire later developments.

Licenses that apply Copyleft, on the other hand, require, in case of redistribution, conditions that ensure the software will keep its original freedoms, acting to prevent that a later version will become closed. This limitation on the maximum expression of freedom imposed by Copyleft can be regarded as a precaution so that the freedom of others may remain assured.

The GNU GPL license was the first one to apply the concept of Copyleft, developed by Richard Stallman, original author of the GPL. Copyleft uses Copyright laws to ensure that the code will remain freely available:

> "To copyleft a program, we first state that it is copyrighted; then we add distribution terms, which are a legal instrument that gives everyone the rights to use, modify, and redistribute the program's code or any program derived from it but only if the distribution terms are unchanged. Thus, the code and the freedoms become legally inseparable. Proprietary software developers use copyright to take away the users' freedom; we use copyright to guarantee their freedom. That's why we reverse the name, changing "copyright" into "copyleft."" (Stallman, 2002, p.91)

By requiring that the source code be available, GLP propitiates modifications on the software and, if they occur and the modified program is redistributed, the new version's source code should also be available, enabling new subsequent modifications.

In theory, the combination of open source code with proprietary code would cause any software that includes material derived from a combination of codes to be regarded as free. Therefore, theoretically, to combine free licenses that apply copyleft with proprietary licenses or other permissive licenses would be impossible.

However, that does not mean that it is not possible to simultaneity use programs with both licenses, or even combines them. Each free software license applies its precepts in different ways and to different degrees, and there are several ways to combine programs.

4) Development and economic exploitation

To refer to software as free alludes to its ideology of respect for its essential freedoms that are crucial to society, especially considering that our daily activities are increasingly digitized and depend on the performance of the software that structure them. In this context creating and disseminating free software has the power to give relevant technological access to several nations, promoting economic development and freedom in general.

The anti-free software speech often argues that for the production of software to be possible is necessary to pay many people, especially programmers. The debate on the economic issue in free software, i.e., how to generate income and profits from its production is, in fact, an argument about this model's durability, because there will always be a need for resources, whether economic or workforce.

Programmers need indeed to be paid in some way and companies that develop it must work with profits. However, various models have already shown that it is possible to combine free software with forms of exploitation so that its production can still occur.

Free software sales may seem, at first, somewhat contradictory, but a deeper analysis shows that it is exactly the opposite. As already discussed, free software are free and not for free, thereby, whoever acquires free software is free to share them, which includes selling, enhancing its natural tendency to spread. This does not occur with proprietary software, whose distribution without previous permission is illegal.

Furthermore, a major source of income from these programs is work for hire, providing classes on the use of software, technical assistance, specific adaptations that interested parties may request. As they say in the free software community: software are free, people aren't - "software are free to be reproduced and distributed, but for people's knowledge you must pay."

Generally, the original developers can best offer these improvements. It is also pointed out that free software are often used as subsystems and applications for electronic devices, i.e., as by-products of another main business that provides the income.

Free software market provides people and businesses capable of offering maintenance and technical support for programs and products that work based on free software. In theory, anyone can become an expert in a given program, and, therefore, capable of offering this kind of

service, mainly because there is not, necessarily, a dependence on the support of the software's producer and its authorized service providers. The user, thus, is free to choose who they want to hire.

Free software have been providing a new vision on how to deal with computer programs, which cease to be something static, dependent on its original developers to originate new improvements and applicability. They have started to have a dynamic nature, on which the user has control to use them however they want in any given circumstances, being able to adapt them, improve them and make them more useful. Such dynamism leads to the emergence of several new updates and software derived from their original with such a speed that cannot be verified in proprietary software. The dissemination of new or upgraded technologies has a potential benefit to society as a whole.

Moreover, one of the great merits of free software is exactly to demonstrate, through successful practical examples, that production models based on non-proprietary structures actually work. It is possible to extrapolate these models to other economic areas and verify their productive, financial, technological and social impacts. With the internet it is possible to transmit knowledge and culture at levels never before dreamed.

For example, the approach to commercial exploit the music industry is changing. The easiness of downloading music illegally has reduced physical album's sales making music sales over the Internet at a diminished price possible. There are artists who offer their works on the internet to be purchased at the price the consumer wants to pay. It applies here, too, the model of work for hire, in which the main source of income is no longer selling products but profits from the concerts.

> "In a way, free software is a cutting edge that is experiencing, from many points of view, new models of production of intellectual works. Models that do not restrict the user's freedom to protect the author's. Models in which anyone can improve the work of others. Models in which, in the end, we are rediscovering how to cooperate. "(González-Barahona et al., 2012, p.29)

5. The Brazilian government experience

Brazilian government has been encouraging free software development in the country with various motives, such as saving public

money by not paying for expensive proprietary licenses and developing local IT industry. Free software is seen as an excellent alternative for sharing information to meet specific government needs.

Expenses on software and IT in general have increased in all sectors, including in the government. Free software offer the possibility of reducing costs, saving public funds by not payment for proprietary licenses. There is independence from suppliers, which avoids the usual proprietary lock-in, for there is no obligation to acquire new licenses from a single manufacturer with the release of new versions. With free software, there is no dependency since there is a wide range of companies that could be hired to upgrading them. This would even encourage domestic market with the increase in demand for IT professionals. Furthermore, using free software also aims to universalize services for citizens through Brazilian population's digital inclusion, taking into account communication and education rights through access to technology.

Seeking to enable this project Brazilian government has adopted favourable laws and measures. In 2005 the "Free Guide: Migration Reference to Free Software by the Federal Government" was created, having "The IDA Open Source Migration Guidelines" of the European Community, in its second version, as a basic reference. This document establishes a strategy for free software implementation, aiming to sever technological dependence on large groups:

> "Over the past three years, we have implemented a strong policy of technological independence, strengthening high performance computing research, digital inclusion and adoption of free software." (Reference Guide for Migration to Free Software by the Federal Government - Organized by Working Group Migration to Free Software - Taken from the Introduction text by President Lula)

This independence also avoids a problem that has occurred in some countries, where old files can no longer be accessed due to the change of the default code in which they were developed. Proprietary software does not allow that these files source code be updated so they become obsolete and the information they contain inaccessible.

Arising out of the free software implementation initiative, the concept of Public Software emerged as a way to share software developed by the government. The GPL License was adopted by government

in its search for ways to make the sharing of solutions between public institutions feasible. To this end, in 2004, the National Institute of Information Technology, responsible for the Technical Committee for the Implementation of Free Software in the Brazilian Electronic Government, commissioned a study on the constitutionality of the GPL License. It resulted in the "Study on Free Software" by the Getúlio Vargas Foundation, which concluded that the GPL is consistent with the Brazilian legal system. The study generated the book "Free Software Law and Public Administration".

Public Software is developed by the government and as such is a public good. The availability of software by the public sector goes beyond the world of open source, so the basis of Public Software concept was established as a manifestation of public interest for a given solution. In this respect, the study mentioned above says that "the note that allows the administration to assign, as its discretion, the particular use is compatible with the public interest [...]" (Falcon et al., 2007, p. 161).

In 2005, it was licensed the first federal free software, whose guidelines was based on what was available in the country at that time, the Copyright Law, the Software Law and the Resolution No. 58 of the National Institute of Industrial Property. This program, initially developed to meet the demands of government, exceeded the federal public sector.

The availability of software in a public environment of collaboration enabled the intensification of its use and the speed of its adoption meant that a network of service providers arose rapidly throughout the country. Society assumed a dynamic role in software development process.

In 2007, the Brazilian Public Software Website was created, whose goal revolves around its effectuation as a public good, promoting a collaborative environment for users, developers and service providers. The available services are accessed by other countries, such as Uruguay, Argentina, Portugal, Venezuela, Chile and Paraguay and the software that are available on the website follows the guidelines of Instruction No. 1/2011 of the Secretary of Logistics and Information Technology in the Ministry of Planning, Budget and Management:

> "Article 2nd –The Brazilian Public Software is a specific type of software that adopts a free license model for its source code, protection of its original identity which includes its name, brand, source code, documentation and other related artefacts through

> the Trademark Public License model and is available on the Internet in a public virtual environment, being treated as a benefit to society, market and citizen [...]."

The Trademark Public License, launched in 2010, has as its main legal objective to protect software trademarks offered in the Brazilian Public Software Website. Its graphical representation was an idea copied from Copyleft, being the letter "R" inside a circle used to indicate trademark, only reversed. It is in its first version and is based on models developed in the various versions of the GPL and the Creative Commons License, especially the License for Trademarks:

> "Article 3rd V - Trademark Public License: type of trademark license that preserves its original identity which includes its name, brand, source code, documentation and other artefacts related to the Brazilian Public Software and in which the registration holder allows generically, without any kind of prior and / or specific approval, that others use it for free for the purposes of copy, distribution, sharing and transmission in any physical or virtual appliance, including commercial purposes [...] ". (Instruction No. 1/2011 of the Secretary of Logistics and Information Technology in the Ministry of Planning, Budget and Management)

Considering the Brazilian legislation on trademarks and patents the Trademark Public License ensures the mark's original structure and recognizes its authorship, so the author can just waive its exclusivity on the developed program. It allows the user some free software basic principles, its copying, distribution, sharing, transmission and marketing in a permissive way, not requiring prior permission, provided that the brand continues unchanged and there is respect to its definition and proportionality.

6. Political interferences on free software use: Paraná's case.

Even before the creation of the Federal Government Guide for migration to Free Software in 2005, the State of Paraná was already establishing itself as a national reference in independence and sustainable technological innovation being indicated as one of the biggest free software user and developer in the country. The Information Technology and Communication Company of Paraná (CELEPAR), organization that

centralizes the activities of information technology in Paraná, conducted this strategic policy.

The State Government aimed to raise public informatics and intensify the democratic process, knowing that public investment in this area should be done in a responsible and sustainable manner.

In 2003 were sanctioned state laws 14.058/2003 and 14.195/2003 on the preferential use of free technologies and of open source by the State Government. These laws state that, when purchasing software, Paraná's administration should opt for free software, operating systems and word processors of open source and, in case of proprietary software acquisition[6]; preference should be given to those that operate in multiplatform environment, enabling implementation without restrictions on free software operating systems. With this measure, public coffers saved U.S. $ 127.3 million[7] in just the first three years of its implementation.

Thus, public administration bodies' softwares were available to society by editing a General Public License (GPL) based on international copyright laws. Paraná's public informatics had been progressing through a more participatory management, with the support of technology to government decisions.

However, in April 2013, Carlos Alberto, who was Governor of Paraná at the time, signed a memorandum of understanding with Microsoft whose proposal was to provide free technology solutions for training people in IT and the use of a virtual learning platform for a period of two years. Software options to be implemented by the government in the areas of education, skills, innovation and entrepreneurship will be provided. A similar agreement was signed with the State of São Paulo stating that domestic and international investors trust was rescued with the government new guidelines.

This bland disregard of Law 14.058/2003, about the acquisition of proprietary software platform, demonstrates a common problem of Brazilian public administration: public policies instability because of the different political inclinations that are in power. Moreover, this situation also reflects a serious problem that the free software movement faces, pressure from large companies to bar initiatives of adopting them.

When the State of Paraná started treating software as a means of

[6] Law 14.058/03 - Article 3 - It is understood by software with a proprietary license one whose usage license implies license payment for the intellectual property of their creation, and offers manufacturer's warranty regarding its effectiveness and exact use.
[7] http://www.softwarelivre.gov.br/noticias/News_Item.2006-06-23.3734/

production and not only as a product, enabled the development of technologies that, in turn, drove the emergence of new economic enterprises, thus contributing to socioeconomic development of the state and the country. A clear example is the software developed by the Paraná called *Expresso*, which functions as an agenda, calendar, email, whose community; *Expresso Livre* is constantly improving the program. With over half a million users spread across 167 institutions, *Expresso Livre* shows that developing technological solutions of high quality and in a collaborative way in Brazil is possible.

As it is, this agreement with Microsoft may mean a setback in digital inclusion and independence, including those regarding the economic factor, given that the offered software has its gratuity restricted to two years. In addition, Microsoft's software is not multiplatform, which renders the use of concurrent programs impossible.

In the public sector, the adoption of free software seems imperative. Not only aimed at saving resources, but also because the government stimulus leads to the emergence and strengthening of communities of IT and software alternatives that benefit society as a whole.

7. Conclusion

Since the beginning of its development, software has always been associated with cooperation and with sharing being generally developed in academic environments and in enterprise collaboration. Software was not seen as something separated from hardware and its source code used to be provided so that potential failures could be corrected and further improvements could be made. Software was free at least for those who had access to the technology available at the time.

The concept of free software as we know today emerged during the 1980s as an alternative to the trend that grew stronger to block the user's ability to access the source code in order to prevent its study and modification. Software industry was changing; the constraints were increasingly more common. Richard Stallman, then a member of MIT, attempted to gain access to a Xerox printer so he could fix a code error, but access was denied. From this experience, Stallman devised the free software movement, starting the GNU Project and subsequently creating the Free Software Foundation.

Since then, the free software community have been growing, its programs become increasingly known and used by the average user,

allowing anyone access to free software. However, this expansion is still somewhat shy especially in regard to its freedom and cooperation philosophy. There are misconceptions, vague ideas, and a large lack of knowledge that hinders the understanding of its advantages.

The free software concept was developed in certain a way that, as it primarily considers the set of freedoms that are guaranteed in their licenses, makes it a legal concept. The licences that generally govern non-free software, as well as the laws about copyright that govern software rights, impose the conditions under which they can be used, distributed and modified, and always in a very restraining manner. Users have no right to exercise freedom of use over acquired software unless explicitly authorized by the license holder.

Our society is used to prohibition, not permission. Free software licenses act in a permissive way, guaranteeing freedom of use, distribution and modification.

Software has an amazing ability to adapt, and may be reproduced in different contexts and easily adapted to perform numerous tasks. Current legislation prohibits exploring this capability, which can obstruct economic development of poorer nations. These limitations make them extremely rigid and immutable, even if the user has the technical expertise to adapt it according to their interests or those of their community. Interestingly, adherence to free software also provides technological independence from suppliers.

It is argued that a capitalist society cannot be based on products that do not comprise property concepts, but when dealing with income generation and profit from free software, many examples have shown that it is possible to combine them to various forms of economic exploitation. In addition, the experience with free mode of production and software distribution has been overcoming the technological field, being noticed in various intellectual fields. Internet has had a major role in enabling this expansion, increasing the transmission of knowledge and culture.

As another interesting example of free software applicability, we can point out Brazilian government's successful experience, whose encouragement of free software has generated tremendous savings in public spending with proprietary licenses and development of the local IT industry.

From this initiative the Public Software arose. It was considered a manifestation of public interest for a particular solution for sharing software developed by the government. In order to protect it, the Trade-

mark Public License was developed based on the GPL License and the Creative Commons License. It ensures the mark's original structure and recognizes its authorship, so the author can waive its exclusivity on the program. To assist Public Software implementation, the Brazilian government has developed a guideline to free software migration.

Despite all these efforts for its introduction in government sectors and expansion in society, large corporations' particular interests and political disagreements act as a barrier to free software establishment. The change of political groups in power reflects often in a change in government policy, in order to benefit different interests that often do not coincide with those of the population.

The State of Paraná was in the forefront of sustainable technology in Brazil by the enactment of two state laws that give preference to the use of free technologies, or at least that operate in multiplatform environment.

However, changes in the state's political power led to the signing of a memorandum of understanding with Microsoft, which marks not only a setback for the free software community, but also for Brazilian society which is back to its technological dependence from a single vendor prison. Microsoft's choice to offer this technology for free (for a period of two years) for essential areas of development to the country as education, innovation and professional qualification can be seen as a strategy to investigate this dependence.

References

FALCÃO, Joaquim. LEMOS, Ronaldo. FERRAZ JUNIOR, Tércio. Direito do Software Livre e a Administração Pública. Brazil: Ed. Lúmen Júris, 2007.

GONZÁLEZ-BARAHONA, Jesús M. *et al*. Copyleft: Manual de Uso. Brazil: 2012.

ST. LAURENT, Andrew M. Understanding Open Source and Free Software Licensing. EUA: O'Reilly Media, 2004.

STALLMAN, Richard M. Free Software, Free Society: Selected Essays of Richard M. Stallman, Edited by Joshua Gay. Boston: GNU Press, 2002.

WILLIAMS, Sam. Free as in Freedom (2.0): Richard Stallman and the Free Software Revolution. 2ª ed.

LEGISLATION:

Law No. 9.609, of 19 February 1998 governing Software protection.

Law No 9.610, of 19 February 1998changing and updating Copywrite legislation.

Normative Instruction No 01, of 17 January 2011 governing the Brazilian Public Software.

Companhia de Tecnologia da Informação e Comunicação do Paraná - Celepar. <http://www.celepar.pr.gov.br/modules/noticias/article.php?storyid=1044#>. Last accessed 02/09/2013

Paraná Wireless: cidades digitais, software livre e inclusão. <http://www4.serpro.gov.br/inclusao/noticias/parana-wireless-cidades-digitais-software-livre-e-inclusao>. Last accessed18/09/2013

Portal do Software Público Brasileiro. <http://www.softwarepublico.gov.br>. Last accessed 05/07/2013

Software Livre em xeque no Paraná.<http://softwarelivre.org/portal/governos/software-livre-em-xeque-no-parana>. Last accessed: 02/09/2013

Software Livre no Governo do Brasil. <http://www.softwarelivre.gov.br/>.Last accessed 06/03/2013

STALLMAN, Richard M. Why Open Source misses the point of Free Software. Disponível em: <https://www.gnu.org/philosophy/open-source-misses-the-point.html>. Last accessed 10/02/2013

The Free Software Definition. <http://www.gnu.org/philosophy/free-sw.html.en>. Last accessed 17/10/2013.

Linux Magazine. São Paulo: Linux New Media do Brasil Editora Ltda. Special Edition.

Linux Magazine. São Paulo: Linux New Media do Brasil Editora Ltda. No. 49, Dez. 2008.

Others:

Study on Free Software by the Getúlio Vargas Foundation

Free Guide: Migration Reference to Free Software by the Federal Government

The Ontological Nature of Value on Miguel Reale's Tridimensional Theory of Law

Alan Mariano Bezerra de Carvalho[1]

Abstract: Miguel Reale is mostly known in Brazil and overseas for his Tridimensional Theory of Law. One of the most intriguing contributions Miguel Reale has made to the Philosophy of Law is his work on the fields of Epistemology, Ontology, Gnosiology and Axiology. He proposes a distinct approach to the problem of knowledge, which he deems "ontognosiology", that can be summed up as the necessary complementary dialetic implication between subject and object. This "complementarity dialetics" permeates his work on Ontology, Gnosiology and Axiology, and should be considered when dealing with his thoughts on Value as an object of knowledge, especially on its distinctive "relative objectivity". This article will seek to present this "relative objectivity" of Value on a comprehensive manner considering the author's larger work and unravel some of its consequences on the knowledge of Law as a subject, for both academic research and professional practice. The article will also try to convey the role of this peculiar object on the tridimensional structure of facts, values and norms that compose his Tridimensional Theory of Law, a structure that claims for the interdisciplinary vision on legal phenomena.

Keywords: ontology, value, tridimensional theory of law.

Introduction

Reale's axiology, or theory of value, was the turning point for the creation of his theory of law, widely known in Brazil as Tridimensional Theory of Law. It is so called for, as Reale says in his work, Law should always be regarded as having three distinct and interwoven dimensions: Fact, Value and Norm.

Reale recognizes that this distinction is not by any means origi-

[1] Associate Attorney practicing Environmental and Mining Law at Braga & Carvalho Law Firm – BCA and student of Philosophy of Law at the University of São Paulo's Masters Program.

nally his, and in his book "Teoria Tridimensional do Direito"[2], strives to look historically and contemporarily around the world on how other thinkers developed this distinction, also looking on its development in terms of approaching a "concrete experience" of Law.

In this search, Reale goes from some of the authors that predated and heavily influenced his work, such as Giorgio Del Vecchio, Santi Romano, Maurice Hauriou, Emil Lask, Gustav Radbruch, and Roscoe Pound[3], to his contemporaries such as Luís Recaséns Siches, Luigi Bagolini, Hans Welzel and Wilhelm Sauer.

His Tridimensional Theory differs from the authors that predated him in that it not only sees the distinct dimensions of Fact, Value and Norm as methodological guidelines for the scientific study of law, prompting independent Sociological, Axiological and Normative studies.

His "concrete tridimensionalism" goes further to say that these three dimensions should be considered on the problematic level of experience, an idea he develops through the study of Edmund Husserl's phenomenology and of the role of structure on the sociological studies of Talcott Parsons and Robert Merton, and the works of Eugen Ehrlich and his "living law"[4].

Reale sustains that Fact, Value and Norm are interwoven on the level of experience by an implication-polarity complementary dialectic between Facts and Values. This dialectic gives rise to the creation of Norms posited by power to try to stabilize the polarity between "is" and "ought".

This particular form of dialectic can be considered an "open dialectic", as the Norm posited will never really overcome the conflict between "is" and "ought", but will become part of a new Fact-Value polarity. The Norm will, as long as it can, stabilize this polarity, until the Fact-Value tension calls for a new Norm.

In this way, Facts, Values and Norms are an example of culture in motion throughout history, being part of this value driven spiral as human beings seek to continuously realize their potentials, searching for the limit of what they are and they ought to be.

---

[2] Reale, Miguel. Teoria Tridimensional do Direito, 5 ed., Saraiva, São Paulo, 1994, p.11.

[3] Ibid, p. 23.

[4] Reale, Miguel. O Direito como Experiência, 2 ed. fac. sim., Saraiva, São Paulo, 1992, XIV-XVIII.

1. Ontognosiology.

Reale names his approach to the theory of knowledge "ontognosiology". This big and maybe clumsy word, made by the fusion of the known philosophical terms ontology and gnosiology, serves, in Reale's works, to sum the fundaments of a particular conception of how knowledge is processed.

The subject and the object of knowledge are in correlation, a point that Reale takes from and shares with Nicolai Hartmann[5]. Reale differs from Hartmann, however, when he sustains the dialectic nature of knowledge, an implication-polarity complementary dialectic between the subject and the object of knowledge.

The subject does not passively receive an impression that reveals itself in him as an object, and something does not transfer itself to the subjective plan, reduzing itself to its subjective structures. When an object is known, there is something of its structure that conditions how it can be known and, just as well, the conditions of the subject interfere on how said object will be known.

Object and subject call for and interfere with each other on the process of knowledge, deeply interwoven but still distinct. Reale sustains that this dialectic nature, this mutual interference, on which the elements of the dialectic process are never consumed or reduced to one another, must be considered on the study of any subject, calling for a transition from an abstract methodology to a concrete methodology.

When considering Law as a subject of knowledge, this concrete methodology must consider Law's three dimensions, Fact, Value and Norm, and allow for a kind of approach that could be summed on Reale's maxim "to distinguish without separating".

When studying the factual dimension, a role generally assigned to the subject of the Sociology of Law, the axiological and the normative dimensions cannot be overlooked. They will not be the focus of the sociological study, but Law can never be treated as being pure Fact, on pain of showing a distorted view of the concrete phenomena.

The same applies for both the dimensions of Value and Norm. While the tridimensional approach from a methodological point of view is not new, as Reale himself built on this pre-established theoretical base, his "concrete" approach, taking the question of experience as means to escape a purely abstract approach to knowledge, can be considered to

[5] Reale, Miguel. Filosofia do Direito, 20 ed., Saraiva, São Paulo, 2002, pp.125-127.

go a step further.

And so, the theory of knowledge would be composed of the study of the positive conditions of knowledge, the well known category of Logic, and also of the transcendental conditions of knowledge, the category of ontognosiology.

2.Value as an object of knowledge.

Reale regards the change on his view of Value as the turning point of his theory of law[6].

Reviewing Franz Brentano's theory of objects, based on a realist comprehension of Kant's distinction between "is" (Sein) and "ought" (Sollen), Reale considered that the "ought" should necessarily be converted, at a moment in history, in something that could be updated or realized, or else it would just be ethereal.

With this view, he came to understand Value as being not an ideal category of "is", but consisting on a pure category of "ought". While you cannot pass from the "is" to the "ought", the contrary is not entirely true.

As Reale sustained previously, if Value did not manifest itself, or realized itself in history, it would persist being a purely ideal and ethereal concept. It is then that Reale points out to a new category of object, the cultural objects.

3. Value and cultural objects.

On his review of Brentano's theory of objects, Reale adds the category of cultural objects. This category, in Reale's words, consists of the objects that "are as they should be"[7].

Cultural objects are an integration of an object of "is" and Values of the "ought". Values reveal themselves to knowledge by being manifested throughout an object used as a support for its meaning.

The main example Reale uses for a cultural object is that of a sculpture. Using stone as a support, the sculptor seeks to convey a meaning of Beauty. Ink on paper, language, can also have the same role as a support, as the reading of a literary work, or the listening of an inspired

[6] Reale, Miguel. O Direito como Experiência, 2 ed. fac. sim., Saraiva, São Paulo, 1992, XV.

[7] Reale, Miguel. Filosofia do Direito, 20 ed., Saraiva, São Paulo, 2002, pp.187-189.

speech can attest.

As such, Value has a relative objectivity. It can never be fully understood in the same way as other objects of knowledge, but it can be understood throughout them, as they are used as supports of meaning.

Reale gives a few pointers of particular characteristics of Value as a category of "ought"[8].

Values are always bipolar. While a possible characteristic on ideal objects, it is an essential characteristic of values. To Justice there is Injustice, to Good there is Evil, and so on. This polarity of positive and negative Values is what drives the dialectics of culture throughout history.

A second characteristic of Values is that they reciprocally implicate each other. This means that the realization of a Value always interferes, positively or negatively, on the realization of other Values. They have, as such, an expansive nature and a pretension to universality, which inevitably brings to situations of tension.

As a third characteristic, Reale says that values have a need of orientation, which he calls referability. Values always transcend the Facts, as they can never be reduced to them, but they refer to the Facts as a means for their realization.

When faced with a Fact, the human spirit is provoked to take a stance, to act in face of it. For this action, Values are understood with an orientation, a direction, being, as such, vectorial entities. They are, as such, determinant for human conduct, an End being a Value rationally recognized as a motive of conduct[9].

And that brings us to the fourth characteristic of Value, preferability. These distinct vectors of action can be chosen by the acting party, and one does not automatically reveals itself as the one true path.

Our actual experience, however, points that some of this choice can be preconditioned, and the fifth characteristic pointed by Reale is the possibility of hierarchical graduation of Values. A society can establish a table of preference of Values, even if they cannot be measured.

At last, Reale points out to the three last characteristics of Value, objectivity, historicity and inexauribility. These characteristics point out that Values have objectivity in cultural objects, that they are revealed and updated throughout history and that they can never be truly, fully realized on the plane of "is".

[8] Ibid, pp. 189-192.

[9] Ibid, p. 191.

4. Conclusion

The recognition of Values as having a relative objectivity manifested on cultural objects, and the reference for the need of a concrete methodology, bring forth a few challenges on tackling Law with interdisciplinary research.

A concrete methodology must take into account the nature of its object of study, and when several distinct sciences intend to face different dimensions of a same object there is a need for a unifying element on the Sociological, Axiological and Normative approaches.

Interdisciplinary research must be able to cope with the constant interaction of Facts, Values and Norms and, for those inclined to face the challenge, of the peculiar nature of the axiological content that exists in Law.

References

Miguel Reale. *Teoria Tridimensional do Direito*, 5 ed., Saraiva, São Paulo, 1994.

Miguel Reale. *O Direito como Experiência*, 2 ed. fac. sim., Saraiva, São Paulo, 1992.

Miguel Reale. *Filosofia do Direito*, 20 ed., Saraiva, São Paulo, 2002.

The missing link between property law and labour law

Martin Dumas

Abstract: A refined understanding of the theoretical repercussions entailed by the addition of a societal value to consumer goods is essential in examining the role of market transparency in the development of consumocratic law. Considering that the foundations of the liberal order is the subject of differing positions depending on one's socioeconomic viewpoints, a fair understanding of the consolidation of this power requires that we revisit pre-consumocratic conceptions of commodity valorisation. In contrast with the work of prominent analysts who regarded the act of purchase as a process mainly guided by individuality, non-responsibility, or fallacious wants – in turn by 'alienated' (Marx), 'hypnotised' (Baudrillard) or 'manipulated' (Galbraith) consumers – it is examined that the societal value of consumer goods may embody social meanings, social responsibilities, as well as calls for moderation in the mouvance of ethical buying, corporate social responsibility, and sustainable development.

Keywords: Consumocracy, product evaluation.

1. Introduction

Popular initiatives, behaviour and techniques now commonly referred to as 'fair trade', 'ethical purchasing', and 'societal labelling' remind us that consumers are increasingly exposed to a wider range of information pertaining not so much to market goods themselves as to conditions linked to their production or usage. Such other-regarding attributes of market goods, when revealed, empower them in ways that predictably enrich their ability to be citizens (Scammel 2000; Canclini 2001; Kysar 2005). Consumers are indeed called upon to acknowledge some part of responsibility in the persistence of a number of irritants which the sole intervention of the state, in the operation of markets, cannot seem to combat satisfactorily (Stiglitz 2005).

More precisely, informational barriers between the loci of pro-

duction and consumption are being gradually removed, providing consumers with the choice of combining, in their purchasing decisions, both the final attributes of goods (e.g., their price or manufacturing quality) with their peripheral attributes (e.g., the social, environmental or ethical conditions under which they are produced). By the means of societal marketing[1], the spheres of production and consumption may connect through a third, informational sphere – a societal window, as it were. This bridging device may turn a potentially oppressive state of affairs into an object of regulation by consumers who pay attention to societal information. It makes it possible to appreciate the value of commodities from a wider perspective and to redefine one's perception of what is a desirable product or service. In other words, the societal window serves a potentially emancipatory function, in so far as widespread socio-environmental conditions of production are deemed unacceptable by significant segments of the population. I call 'consumocracy'[2] this system by which consumers can exert authority on corporations through the broadening of what qualifies as a desirable consumer good.[3] Consum-

[1] One may define societal marketing as the marketing of goods or services whereby societal information is signaled to consumers through various means. Societal information in turn pertains to certain conditions or effects observed or to be observed at the stage of production, distribution, or usage of goods, in accordance with the terms of a corporate code (Kotler and Levy 1969: 10). For an earlier vision of this marketing form, see Crane and Desmond (2002).

[2] From *consummare* (Lat.), to consume, and kratos (Gr.), authority. See Midgley (1996) for an account of the early departure of the consumocratic movement, in England; and Cashore (2002) for an analysis of how such 'non-state, market-driven governance systems' are gaining rule-making authority.

[3] No comparative study appears to have been conducted recently on the relative dependence of firms on the preservation of market shares likely to be boosted or curtailed by consumocrats. But it has been suggested in 1979 that a minimum relative market share is needed for the long term sustainability of a business and that such 'critical share is (often) of the order of ¼ of the leader's share' (Abell and Hammond 1979). It is implied for instance that a corporation should keep a minimal share of approximately 4 % when the leading corporation controls 16% of a given market. In the United Kingdom, Asda (Wal-Mart's former supermarket chain) is still doing well economically, with 17.5% of the market share (in 2009) while the leader in that region, Tesco, has a 30.4% share of the grocery market (Longbottom 2009). By comparison, Wal-Mart stores in Germany captured only 2% of the grocery market following their entry on the territory in 1997 and remained a marginal player there, far behind Aldi, the leading competitor with a 19 per cent share. Wal-Mart pulled out of Germany in 2006 with a financial loss of about one billion dollars (Newsweek 2005). It is therefore suggested that, under certain conditions,

ers who pay attention to societal information will thus be referred to as 'consumocrats'.

In a non-consumocratic setting, concerns which do not traditionally belong to the sphere of consumer influence are usually seen as sensitive issues to be (pre-eminently) examined by states (Bator 1958). They are traditionally estranged from the foundational values of commodity markets. In a consumocratic setting, protection and equity concerns may reach individuals through the transparent diffusion of societal information. The type of commodity value which is emphasised in the process is the *societal value* of the commodity.

Understanding the theoretical repercussions entailed in the addition of a societal value to consumer goods or services is essential in examining the role of market transparency in consumocratic developments. One must recall in this regard that the foundations of the liberal order is the subject of distinct views depending on whether one is a partisan of Marxism, neo-liberal economism, Keynesianism, or post-modernism and, accordingly, that a fair understanding of consumocratic developments require that we reconsider earlier conceptions of commodity valorisation.

This article is intended to elucidate these reconfigurations by contrasting the societal value with the use, exchange, sign, and fallacious value of the commodity – a result generally alien to the thought of classical and contemporary theoreticians. No veritable theory of consumption is said to exist and, given the tentacular nature of the subject, it is affirmed that no such theory could ever be developed (Miller 1987: 175). Although a growing 'puzzle' (Campbell 1989), modern consumerism may be examined through the prism of product valuation – i.e., by paying special attention to the use, exchange, sign, or fallacious value assigned to products, the societal type of which has not yet been integrated in the literature. This article is therefore intended to start filling this lacuna by critically contrasting the representation of societal value with earlier, influential critiques of commodity value, developed prominently by Marx, Baudrillard, and Galbraith. It will thus reveal the social meanings (2.), the social responsibilities (3.), and the likely calls for moderation (4.) embodied in the societal value of consumer goods, where these theoreticians saw a process guided by individuality, non-responsibility, or fallacious wants created by the marketing industry. It is a prerequisite

---

competing firms often have to consider (potential) variations in their market share very seriously, even if a relatively small portion of the market is at stake.

for a better understanding of the development of consumocratic law on the margins of state law (Dumas 2013).

2. Beyond use and exchange values: rediscovering social meanings

The theory developed by Karl Marx identifies the isolation of the spheres of production and consumption as a necessary condition for the exploitation of labour by capital. The alienation of labour first rests on the estrangement of labour on modern production sites in that salaried workers work independently from each other, following the 'objectification of labour'. Salaried workers neither see consumer goods in their final form, nor do they consume them directly; they are here estranged from the fruits of their labour. This alienation would reveal itself in the corresponding estrangement of a worker's product, i.e. in the 'loss of the object' to which the worker would otherwise relate more authentically. According to Marx, this process does not take place at the individual level only; it is immediately extended to the wider social sphere within which the alienated worker relates to other people:

> 'An immediate consequence of man's estrangement from the product of his labour, his life activity, his species-being, is the estrangement of man from man. When man confronts himself, he also confronts other men. What is true of man's relationship to his labour, to the product of his labour and to himself, is also true of his relationship to other men, and to the labour and the object of the labour of other men.' (Marx 1975: 330).

The relationship of a salaried worker to commodities or consumer goods is further translated in the division of the product of labour into a 'useful thing' and a 'thing possessing value'. Marx was particularly concerned with the transformation of useful things (bestowed with use value) into such things possessing value (bearing exchange value). Whereas the *use value* of the useful thing derives principally from the satisfaction of human needs, the *exchange value* of the thing possessing value signals a thing which 'transcends sensuousness' and which may therefore possess mysterious attributes. For Marx, as soon as a useful thing emerges as a commodity ready for exchange and turns into a thing possessing value, it lends itself to an undesirable fetishisation:

> 'The mystical character of the commodity does not arise from its use-value (…) [The] fetishism of the world of commodities arises from the peculiar social character of the labour which produces them. Objects of utility become commodities only because they are the products of labour of private individuals who work independently of each other.' (Marx 1976: 163, 165).

As a result of the rupture between the spheres of production and consumption, consumers are made unaware of the nature of the social relations governing the production of commodities and are invited to evaluate these commodities on largely uncertain grounds. The mysterious character of the commodity would arise from its exchange-value, as opposed to its sensuousness as an article of utility: '[Exchange][v] alue, therefore, does not have its description branded on its forehead; it rather transforms every product of labour into a social hieroglyphic.' (Marx 1976: 167).

To better appreciate the *societal value* of the commodity, it is useful to effectuate a rapprochement with the Marxist conceptions of use value and exchange value.

Marxist and several classical economists struggled in vain in their attempt to assess the use-value of a product. In spite of its relatively low (high) exchange-value, the *use value* of bread (gold) must be high (low), the old theory goes, if one is to consider that by its properties it satisfies *human needs*. The central problem they were facing derived from the fact that defining human needs strictly and distinguishing between degrees of authentic use value proved too deterministic a process. Human needs and wants not only appear to be diverse, but they also seem to defy simplistic attempts to theoretical prioritisation. One may recall Veblen's pertinent observations in this regard:

> 'No class of society, not even the most abjectly poor, forgoes all customary conspicuous consumption. The last items of this category of consumption are not given up except under stress of the direst necessity. Very much of squalor and discomfort will be endured before the last trinket or the last pretence of pecuniary decency is put away. There is no class and no country that has yielded so abjectly before the pressure of physical want as to deny themselves all gratification of this higher or spiritual need.' (Veblen 1957: 85)

Whereas Veblen contributed to blur the lines between the necessary and the unnecessary in economic theory, it is Maslow, a psycholo-

gist, who first endeavoured to establish a hierarchy of 'human needs' (1943). Although by no means authoritative in the way it offers to structure the process leading to the satisfaction of human needs,[4] the pyramid of Maslow is a notable reminder of their patent heterogeneity.[5] A better understanding of the complexity of such needs eventually led economists to abandon their search for an all-embracing theory of use value to the benefit of a more flexible theory of exchange value.

The fact remains, however, that we normally do not value things or activities deemed useless, and that the use-value problem is primarily one of measure. Paying more attention to the types of human needs likely to be satisfied through market mechanisms may actually become a necessary step in improving instruments of global governance. A closer examination of the types of needs and motivations potentially satisfied through market relations reveals some important imperfections in popular theories of consumer behaviour. One of these imperfections relate to the neglected role of markets in their capacity to help fulfill so-called higher needs – such as 'self-actualisation needs' – understood in a non-narcissistic sense. This is particularly relevant in the examination of expanding consumer-sanctioned schemes or 'fair trade' initiatives which are essentially predicated on a consideration for others.[6]

The Marxist conception of use value is explicitly linked to the notion that a useful thing possesses some degree of 'sensuousness', the general property by which it can satisfy 'human needs'. With his con-

[4] See Herskovits (1960: 462) [observing that 'higher needs' may displace 'lower needs' (i.e., physiological ones) and that 'families of a man aspiring to great prestige may go hungry', as cited by Campbell (2000: 69)].

[5] Maslow suggested that there are five major groups of human needs, which he placed in a hierarchy ranging from physiological needs, to safety or security, to a sense of belonging (i.e., the desire to be accepted and appreciated by others), to ego-status needs (which motivate a person to contribute to the efforts of a group in return for numerous forms of reward), to self-actualisation needs (which motivate a person to enrich his or her life in order to experience a sense of achievement through doing). According to Maslow, some minimal degree of satisfaction is required before a lower need ceases to preoccupy an individual to the exclusion of higher needs. Once that point is reached, the individual may then be motivated by higher needs, in ascending order (Maslow 1943: 370).

[6] Such considerations in economic theory have been the object of models describing the behaviour of philanthropic corporations and family members in particular. The same literature suggests that the altruistic reflex would not be as widespread in the consumer market as it is within families because it would not efficiently produce the 'psychological income' sought by the altruist (Becker 1981). Freeman (1994) exceptionally offered an economic model for the endogeneisation of altruistic *consumers'* motives.

temporaries, Marx did not contemplate the satisfaction of non-physiological, diverse needs and motivations, while theorising on the use value of commodities. It is not by its sensuousness, however defined, that a 'fair trade' product may genuinely satisfy consumers' 'higher needs'; in spite of its potential instrumentality, the societal value of the commodity therefore falls outside the meaning of the use value as defined by Marx. The societal value, as I will explore in more depth, is the expression of a transformative appeal more than a strict or broad appreciation of usage.

As regards the Marxist conception of exchange value, one must first note that it differs from its Marshallian variation in at least one important respect.[7] It is also in that respect that Marx's original notion proves pertinent in the uncovering of the societal value of commodities. Unlike neoclassical attempts to assess the value of a commodity, Marxist ones are mainly based on the idea that, if one had perfect knowledge of the relations and activities which govern the production of commodities, one would then be in a position to provide an accurate, materially informed elucidation of the valuation process:

> 'The determination of the magnitude of value by labour-time is therefore a secret hidden under the apparent movements in the relative values of commodities. Its discovery destroys the semblance of the merely accidental determination of the magnitude of the value of the products of labour, but by no means abolishes that determination's material form.' (Marx: 1976: 69-70)

It is precisely because consumers are not aware of the true status of these workplace relations that commodities ready for exchange would be endowed with the imaginary and mysterious attributes re-

[7] While stressing the significant role of some environmental and conjectural factors in the determination of the (demand-side) exchange-value of commodities, Alfred Marshall, founder of neo-classical economics, clearly separates this evaluation process from the workplace social relations that characterise any sphere of production. The key notion retained by Marshall in this regard is the fairly subjective amount of 'satisfaction' derived from an eventual purchase, in comparison to that derived from the status quo: 'We may now turn to consider how far the price which is actually paid for a thing represents the benefit that arises from its possession. This is a wide subject on which economic science has very little to say (…) the price which a person pays for a thing can never exceed, and seldom comes up to that which he would be willing to pay rather than go without it: so that the satisfaction which he gets from its purchase generally exceeds that which he gives up in paying away its price' (Marshall 1997: 124).

flected in their pricing. This determinism has proved false in so far as what consumers are prepared to pay in exchange for products and services delivered painlessly or with great effort may simply run counter to Marxist assumptions. Marx's intuitions are none the less worthy of interest in two significant ways.

First, the idea that the rupture between production and consumption may turn into a source of oppression is not devoid of sense. Let us consider the situation of fundamental labour rights. By the standards of the International Labour Organization, there are certain things that one should not do to people in their place of work. In this sense, workers are the holders of fundamental rights. We count among these rights the right to physical integrity, and the rights to freedom of mobility and expression. In the labour context, they consist of the right of children to a task and a work environment that do not pose serious risks to their integrity; the right of under-age children not to perform work; the right not to be subject to forced labour; the right not to be subject to discrimination; and the right to associate with the goal of agreeing upon suitable working conditions.[8] These rights attach to individuals in their workplace. In no way do they commingle with the rights in those things manufactured by a person at work. Besides, the conditions under which a thing is produced do not legally qualify the traditional status of that same thing. It follows that 'real rights' attach to the thing (from a civilist perspective, more particularly), but are alien to the conditions under which the item was made. Under both the common and civil law regimes, the sale (which implicates the private law of contract) of a stolen carpet (property law pertaining to the private right in goods) might be stained with illegality,[9] whereas the sale of a carpet manufactured

[8] These are, more precisely, the rights envisioned in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (87), the Right to Organize and Collective Bargaining Convention, 1949 (98), the Forced Labour Convention, 1930 (29), the Abolition of Forced Labour Convention, 1957 (105), the Equal Remuneration Convention, 1951 (100), the Discrimination (Employment and Occupation) Convention, 1958 (111), the Minimum Age Convention, 1973 (138), and the Worst Forms of Child Labour Convention, 1999 (182), which are brought out by the *ILO Declaration on the fundamental principles and rights at work* (1998).

[9] This relates to a rule that is firmly rooted in both legal traditions: in the common law, one may refer, for example, to the decisions rendered in *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 AC 548; *R. c. Ilich* (1987) 69 ALR 231, 244; *Merry v. Green* (1841) 7 M and W 623; *Rex v. Hutton* (1911) 19 WLR 907 (the simple theft of water might be – or have been – an exception); or, in the civil law, to the French *Code Civil* (articles 1599

under illegal working conditions would not normally be stained with such illegality, whether or not the buyer is aware of the manufacturing conditions. Within this institutionalised rupture between the spheres of production and consumption, goods produced under conditions that violate the workers' fundamental rights can therefore be offered and sold legally on the markets.

Second, the proposition that this rupture is also responsible for consumers' illusory views about the value of commodities is interestingly progressive. At this level of generality, it lies at the centre of any contemporary consumocratic initiative. Consumers who are in the impossibility of knowing the conditions under which goods are produced may in effect be valuing things in a non realistic way, depending on how one defines such things to be valued. It is in the details that differences become apparent between the rationales underlying a 'fair trade' initiative, for instance, and Marx's conjectures on the separation of production and consumption. From a Marxist perspective, this separation is radical and its effects on the 'mysterious' exchange value of commodities are irreversible. The social relations that characterise the labour process being determined materially and in isolation, their true nature is inevitably unknown to consumers. Moreover, the conception of 'estranged labour' resulting from the rupture between labour and the fruits of labour presupposes the impermeability of the production and consumption spheres to any post-production linkage. Hence the impossibility of a 'reconciliation' of labour and the fruits of labour within capitalist societies, and the abolition of private property as a desirable solution. From a consumocratic perspective, informational barriers between the loci of production and consumption are partially removed, thereby providing consumers with the choice of combining, in their purchasing decisions, traditional and peripheral attributes of goods. Efficient societal marketing, this societal window through which the spheres of production and consumption may connect, may thus help improve the management of forests (e.g., via the FSC code) or augment the number of schools of quality (e.g., via the Rugmark / GoodWeave code). Less predictable societal marketing objectives include the reduction of extreme remuneration disparities, the direction of corporate political financing, the downsizing of the military industry, the passage from unqualified

---

and 2279), the Spanish *Codigo Civil* (articles 433, 447, 464 and 1950), the German *Bürgerliches Gesetzbuch* (articles 861, 935 and 1006) as well as the ancient Roman Law I ([*Corpus Juris Civilis, Digest* 47.16]; *de receptatoribus*).

material growth to 'sustainable' or 'viable' production within liberal society, and other concerns which do not traditionally belong to the sphere of consumer influence.[10]

The extent to which the *societal value* of the commodity is taken into account in the appraisal of its *exchange value* then becomes a matter of fact, a process made plausible.[11] In the absence of consumocratic devices and of such reconsiderations, the exploration of new areas of regulation within the modern order's economic socket would remain, at best, a utopian project. In this sense, the theorisation of the physical isolation of labour and consumption as a source of alienation is non-consumocratic or, more deterministically, pre-consumocratic.

3. Beyond sign values: rediscovering social responsibilities

One of the most influential critiques of consumerist capitalism comes from Baudrillard. From a puzzling although less naïve notion of human wants (i.e., 'interchangeable myths'), Baudrillard advances that commodities are social signs and that modern consumption is more properly understood as the consumption of signs hierarchically placed according to a logic of social differentiation – supplanting other systems of birth, class, caste, and positions.[12] The resulting system of ob-

[10] With similar views in sight, relatively complex regulatory instruments, such as the *Filos Mundi* code, are incidentally being developed (see for instance: http://site.filosmundi.org – accessed on 10 July 2012).

[11] Financial constraints undeniably act as a deterrent if consumers must pay a substantial premium in the aim of supporting those corporations engaged in integrating pre-targeted rights into their practices. Since the ratio of a product's price to the total income of a consumer is likely to favour the elasticity of demand as this ratio increases, societal marketing is clearly doomed to failure if consumocratic premiums are out of the consumers' reach.

[12] Baudrillard's semiotically organised system of consumer goods may allude to earlier periods, as suggested in a mockery of Marx's representation of the commodity value in the secluded world of Robinson Crusoe, a favorite reference with classical economists. Marx once wrote: 'All relations between Robinson and the objects that form this wealth of his own creation are here so simple and clear as to be intelligible without exertion… And yet those relations contain all that is essential to the determination of value.' (Marx 1976: 170), to which Baudrillard replied: 'the Crusoe myth describes, in "transparent" isolation (where the anterior mode of agriculture and craftsmanship reappears, and the laws of the market and exchange disappear), the ideality of bourgeois relations: individual autonomy, to each according to their labour and their needs; moral consciousness bound to nature – and, if possible, some Man Friday, some aboriginal servant (but if

jects/signs provides a code to such signs and thereby constitutes a new language; with the spread of consumerist capitalism, it is becoming a universal code of recognition, deprived of any mutual obligation.

In so far as individuals, in this language, may be described in terms of their possessions, the new functional code is 'symbolically and structurally impoverished'. The universal character of the code would not only suffer from drastic simplification, but also emerge as a 'regression in the language of values' (Baudrillard 1988b: 21). Examples of this impoverishment include the 'sign-wars' of art auctions: 'art-lovers' would often not offer money for the intrinsic value of the work of art, but overtly wager it with a view to outbidding more than exchanging. Moreover, kitsch 'pseudo-objects' are seen by Baudrillard as trashy imitations more tied to social mobility constraints than consumers' bad tastes: they are signs in a code of social distinction, a hierarchy separating the abundance of kitsch from the non-abundance of 'high-class goods'. More subtly, and as hinted by Veblen, inconspicuous consumption is the new sign response of the wealthy as lower classes may now enjoy consuming conspicuously.

If commodities are social signs, they also 'lose their reality' in their pre-arrangement to become 'hyper-real' or 'simulacra' (images of something), insists Baudrillard. Marketing specialists have long understood this phenomenon: 'Any buying process is an interaction between the personality of the individual and the so-called "personality" of the product itself.' (Baudrillard 1988b: 14). The 'loss of the real' here is reflected in the general 'triumph of art over reality' and, more demonstrably, in a shift from advertisements which contain product information to those which incorporate loser, 'lifestyle imagery' (Featherstone 1991: 83). It is in this sense that marketing messages may neither be true nor false; as simulacra, they generate their own 'reality'. Marketing is 'the art of making something true by *saying* that it is true' (*l'art de rendre les choses vraies en affirmant qu'elles le sont*).

It follows among other things that marketing messages are often not 'falsifiable' in the Popperian sense. When a message pertains to a simulacrum (e.g., any variation of 'lifestyle imagery'), it indeed excludes itself from the domain of empirical verification. This may reinforce the

---

Crusoe's relations to his labor and his wealth are so "clear", as Marx insists, what on earth has Friday got to do with this set-up?). In fact, nothing is clear about this fable… the whole system and its "mystery" were already there with Robinson on his island, and in the fabricated immediacy of his relation to things.' (Baudrillard 1988a: 75).

code described by Baudrillard, for '[o]bjects are categories of objects which quite tyrannically induce categories of persons'. Simulacra thus reflect the *categories* of an authoritarian code potentially reinforced by its own magical character. And everyone would be involved in the perpetuation of the code:

> '[N]o one escapes it: our individual flights do not negate the fact that each day we participate in its collective elaboration. Not believing in the code requires at least that we believe that others sufficiently believe in it so that we can enter the game, even if only ironically. Even actions that resist the code are carried out in relation to a society that conforms to it.' (Baudrillard 1988b: 20).

Only one type of exchange would escape the impoverishing, non-responsible, system of sign values: it is the *symbolic exchange*, the platform from which Baudrillard launches his critique of consumerist capitalism. A symbolic exchange involves a social obligation between individuals, as exemplified in the exchange of (non-substitutable) wedding rings; a reciprocated, ambivalent act charged with unique significations. 'Gifts' (objects, but also rituals, courtesies, and dances) in the earlier societies described by anthropologist Mauss (1968) enter into symbolic exchange as well for the reason that their recipients were under social obligation to 'repay' them. The modern regression in the language of values would then result from the loss of symbolic values in liberal democracies (Baudrillard 1970: 309).

If, according to Baudrillard, the development of exchanges could be traced from a symbolic ensemble of social obligations to untrascendental emissions and receptions of substitutable signs, it must be assumed that contemporary market exchanges do not effectively lend themselves to the expression of 'social obligations'. This is a valid assumption if, in turn, one is to retain a strict *interpersonal* conception of these obligations – involving reciprocated responsibilities between one giver and one receiver. For the expression of social responsibility on commodity markets may well occur between consumers and producers who *do not interact directly* with each other. Through the transmission of societal information to consumers, producers are in principle committed to exercising a certain social responsibility, and consumers who respond positively to that information equally exercise a social responsibility by encouraging such behaviour. This interaction, albeit desensualised, is made possible by the means of societal marketing; and what it elicits is

precisely the *societal value* of the commodity. It is ultimately appropriated by the individual consumocrat who, in a conscious or more instrumental way, is furthering collective interests.[13]

In general terms, the societal value of the commodity is typically revealed through an act of non-indifference towards distant people or things – an act of responsibility, more or less consciously and instrumentally carried out. Its basic ingredients, in the form of societal information, may or may not be mixed with the simulacra and imageries of modern marketing. Unlike the sign value described by Baudrillard, though, the societal value is less hardly shielded from the results of investigations designed to authenticate its claims. The degree of transparency retained in communicating societal information to consumers may thus lie at the centre of a more highly receptive social interface. This requires some precisions.

First, the societal value of the commodity partly differentiates itself from the sign value in that its ingredients are still presented under a falsifiable format. Unlike the sign value, which arises from the social pre-arrangement of objects within hierarchies of objects, the societal value of commodities typically reveals itself in the appreciation of more concrete elements. In general, the promises of societal marketing may be validated and they often are. There is nothing very magical in verifying whether corporations are paying 'living wages' to their employees, using fishing nets of a certain size, treating waste water, employing adults while funding schools for their children, or else conducting themselves like 'socially responsible' organisations. Messages supporting the societal value of commodities may, as a result, prove sensitive in comparison to those which more freely entertain the code of sign values. It is no doubt another mission to try to falsify the code of sign values and confirm or infirm whether, for instance, buying a certain item helps 'make the most of now' or 'look right / feel right' – hence perhaps the determination of producers and advertisers to exclude societal information from false advertising regulation.[14]

---

[13] See in this regard the developments surrounding Micheletti's oxymoronic though interesting notion of an 'individualized collective action' (2003).

[14] The *Nike* case provides a now famous illustration of this. When faced with charges of labor exploitation, the transnational company attempted to depict itself as a 'socially responsible employer' but nevertheless sought the protection of the First Amendment to isolate this very claim from the false advertising regulation applicable to commercial speech. It contended that commercial speech should not be considered as encompassing attributes other than 'the qualities of a product as such (like its price, availability,

Second, it is not implied that only societal information is falsifiable, but rather that it is perhaps more likely to shock consumers, when falsified and found to be deceptive. Evaluating the final or so-called 'tangible' attributes of products, such as their availability and suitability is unquestionably within the reach of empirical verification. But as stressed earlier, marketers tend to incorporate loser, lifestyle imagery into contemporary advertisements, to the detriment of information which contains more falsifiable elements – i.e., under a traditional format, to the detriment of the final attributes of products as such. It is also admitted that the mystification of sign values reflected in the passage from falsifiability ('*Product A is more resistant to shocks than product B*') to unfalsifiability ('*Look right*', '*It's the real thing*') in advertising is not the preserve of product information management. Under a less traditional format, it could as well characterise the treatment of societal information. Nothing in effect prevents societal marketers from associating a 'smart car' – or other so-called environmentally friendly cars – with a 'right look'. It is not clear however whether this transition towards more sign values could *equally* characterise the treatment of product and societal information. One may question in this regard the equivalence of flaws detected in societal attributes (e.g., a 'cool' *green car* polluting as much as regular cars) and products as such (e.g., a 'cool' *sports car* accelerating like regular cars). And more particularly the likeness of their potential effects on two advertising campaigns using sign values. It is not clear indeed whether the code of sign values would prove equally impermeable to an eventual exposition of both types of flaws. One may hypothesise that flaws detected in the societal discourse could more effectively upset consumers. Given the societal nature of the code, flaws likely to disconcert and affect others (in the form of relative increases of pollution) may be more severely judged by consumocrats than flaws likely to affect product users mainly (by way of a relative decrease in car performance). All the more so since beguiling consumers' other-regarding attentions is likely to attract more extensive media coverage; under the social code of sign values, an uncovered defective societal value may indeed convey more long-term liabilities than a disappointing use-value.

---

and suitability)'. See *Nike, Inc. v. Kasky*, 45 P.3d 243 (Cal. 2002); 123 S. Ct 2554 (2003). (note after "car performance: "In the language of Baudrillard, there would be grounds for advancing that not-so-green cars could see their sign value deteriorate along with their faulty societal value in a manner inconsistent with the fate of not-so-fast cars sign value.")

Lastly, one should consider the possibility that the societal value of a commodity remain covered under an undisturbed code of sign values. A really *smart car* could end up being successfully and closely associated with a coded *right look* by the means of modern marketing. The resulting situation is interesting to say the least: it is more or less consciously that 'hypnotised consumers' (to borrow the phrase of Baudrillard) would contribute to improving pre-targeted socio-environmental conditions, without the intervention of states. Complex and *real* non-consumocratic 'market failures', in this context, would be successfully attended to by means of… simulacra.

4. Beyond fallacious values: 'Moderation tastes better'

As capitalism developed in parallel with minimally protective laws and arrangements, analysts such as Galbraith became more interested in the 'production of consumption'[15] than in the consumption of production. While Galbraith did not regard the salaried worker as an alienated person in a Marxist sense, it was his view that, as a consumer living in an affluent society, that person was being manipulated. He was particularly concerned with what he saw as the *creation* of new wants and valuations by influential institutions of 'advertisement and salesmanship'. He set up, following Marcuse (1964) in particular, a view of consumerist capitalism which has not lost all its appeal. This view is essentially based on a distinction between urgent, original wants, and fallacious ones:

> 'If the individual's wants are to be urgent, they must be original with himself. They cannot be urgent if they must be contrived for him. And above all, they must not be contrived by the process of production by which they are satisfied. For this means that the whole case for the urgency of production, based on the urgency of wants, falls to the ground. One cannot defend production as satisfying wants if that production creates the wants. (…) So it is that if production creates the wants it seeks to satisfy, or if the wants emerge *pari passu* with the production, then the urgency of the wants can no longer be used to defend the urgency of the production. Production only fills a void that it has itself created.' (Galbraith 1987: 127)

[15] The expression is borrowed from Lukács, as quoted by Campbell (2000: 48).

We have seen that Marx was alarmed by the shift from a logic of instrumentalism to a logic of exchange in his portrait of the relationship between labour and the fruits of labour. For Galbraith, it is the manufacturing of wants more than the manufacture of products which is a cause for alarm in affluent societies. That production may generate more wants and, sequentially, the need for more production, would initiate a 'Dependence Effect' to be ignored only to our peril. Whether this effect is partly responsible for the concomitant 'pathologising' of increasing forms of 'addictive consumption' – from drugs to shopping – (Reith 2004) remains unclear; whether both phenomena shed a critical light on the (pre-consumocratic) notion of 'consumer freedom' is certainly less so.

But with Marx, Galbraith fell into the trap of reductionism while establishing a rather strict correspondence between original wants with primary or physiological ones:

> 'The fact that wants can be synthesized by advertising, catalyzed by salesmanship, and shaped by the discreet manipulations of the persuaders shows that they are not very urgent. A man who is hungry need never be told of his need for food. If he is inspired by his appetite, he is immune to the influences of [institutions of advertisement]. The latter are effective only with those who are so far removed from physical want that they do not already know what they want. In this state alone, men are open to persuasion.' (Galbraith 1987: 131)

Original, non-fallacious valuations, therefore, would not only stem from '*independently determined* desires' or '*independently established* needs', but also from a qualitatively restrictive pool of such desires and needs. Outside the pool of primary wants, needs are manipulated according to Galbraith, for whom the notion of need is pre-specified and strictly related to one finite object or another. There seems to be no room in this view for needs expressing themselves within more complex interactions between people and objects, such as the wants to interact originally and play a role in a network of choice – which may certainly be satisfied through consumocratic devices. It is not very clear, on the one hand, whether such wants would have been regarded as 'socially desirable needs' by Galbraith and have legitimised further increases in the production of goods and services likely to satisfy them. It is no clearer whether he, on the other hand, would have considered any desire sup-

posedly 'synthesised by advertising' to be fallacious. Ironical cases are manifold in the mouvance of 'voluntary simplicity': what of some increasingly popularised wants to live simply, to consume moderately, to recycle things, or to be known as someone who lives simply, consumes moderately, and recycles things?[16]

More certainly, Galbraith did not seem to have envisioned markets in which instruments of marketing would encourage consumers to prevent or mitigate some of the very excesses for which he held these instruments to be responsible. It is indeed an ironic reversal that one solution to the generation of consumer addictions under the liberal order finds itself potentially of the same mind. And the expansion and diversification of societal marketing instruments may in the end call for a more nuanced appraisal of the sort of dependence Galbraith meant to condemn. It would otherwise appear contradictory to depict the societal value of the commodity as a rival to its fallacious type, in so far as the societal value is emphasised by marketing instruments – the very source of the dependence effect feared by Galbraith.

References

ABELL, Derek. F., HAMMOND, John .S. *Strategic Market Planning. Problems and Analytical Approaches*. 1st ed. New Jersey: Prentice-Hall, 1979.

BATOR, Francis M. The Anatomy of Market Failures. *Quarterly Journal of Economics.* 1959, 72(3), 351-479. DOI 10.2307/1882231

BAUDRILLARD, Jean**.** *La société de consommation*. 1st ed. Paris : Denoël, 1970.

BAUDRILLARD, Jean. For a Critique of the Political Economy of the Sign. In POSTER Mark. Sous la dir. de *Jean Baudrillard: Selected Writings*. 1st ed. Cambridge: Polity Press, 1988a, pp. 60-100.

BAUDRILLARD, Jean. The System of Objects. In POSTER Mark. Edited by. *Jean Baudrillard: Selected Writings*. 1st ed. Cambridge: Polity Press, 1988b, pp. 13-31.

BECKER, Garry S. *A Treatise on the Family*. 1st ed. Cambridge: Harvard University Press, 1981.

CAMPBELL, Colin. *The Romantic Ethic and the Spirit of Modern Consumerism*. 1st ed. Oxford: Blackwell, 1989.

[16] Illustrative of such trends in the marketing sphere is the slogan, 'Moderation tastes better', and popular variations around Mies van der Rohe's famous aphorism: 'Less is more'.

CAMPBELL, Colin. The Puzzle of Modern Consumerism. In LEE Martin J. Edited by. *The Consumer Society Reader*. 1st ed. Oxford: Blackwell, 2000.

CANCLINI, Nestor G. *Consumers and Citizens: Globalization and Multicultural Conflicts*. 1st ed. Minneapolis: University of Minnesota Press, 2001.

CASHORE, Benjamin**.** Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority. *Governance*, 2002, 15(4), 503-529. ISSN 952-1895.

CRANE, Andrew., DESMOND John. Societal Marketing and Morality. *European Journal of Marketing*, 2002, 36(5/6), 548-569. DOI 10.1108/03090560210423014 (Accessed on 21 August 2012)

DUMAS, Martin. Three Misunderstandings about Consumocratic Law. *Comparative Labour Law and Policy Journal*. 2013, 35(1), 67-92.

FEATHERSTONE, Mike**.** *Consumer Culture and Postmodernism*. 1st ed. London: Sage, 1991.

FREEMAN, Richard. A Hard-Headed Look at Labor Standards. In INTERNATIONAL LABOR STANDARD (ILO) Edited by. *International Labor Standards in the Globalized Economy: Issues, Challenges and Perspectives* Geneva: ILO, 1994, pp. 79-92.

GALBRAITH, John Kenneth**.** *The Affluent Society*. 2nd ed. Harmondsworth: Penguin Books, 1987.

HERSKOVITS, Melville **J.** *Economic Anthropology: A Study of Comparative Economics*. 1st ed. New York: Alfred A. Knopf, 1960.

KOTLER, Philip; LEVY Sidney J**.** Broadening the Concept of Marketing. *Journal of Marketing*, 1969, 33(Jan.): 10-15. (Accessed on 21 August 2012). Available at http://trp.jlu.edu.cn:8000/yuhongyan_jpk../uploadfile/200705/20070523144447507.pdf

KYSAR, Douglas. A. Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice. *Harvard Law Review*. 2005, 118(2), 525-642. (Accessed on 21 August 2012). Available at http://scholarship.law.cornell.edu/lsrp_papers/8

LONGBOTTOM, Chris. Another Record Share for ASDA, 2009, TNS Worldpanel. (Accessed on 21 August 2012). Available at marketresearchworld.net

MARCUSE, Herbert. *One-Dimensional Man*. 1st ed. London: Routledge, 1964.

MARSHALL, Alfred. *Principles of Economics*. 1st ed. Amherst: Prometheus Books, 1997.

MARX, Karl. Economic and Political Manuscripts. In *Early Writings*. 1st ed. Lon-

don: Verso, 1975, pp. 274-400.

MARX, Karl. *Capital.* 1st ed. London: Verso, 1976

MASLOW, Abraham. A Theory of Human Motivation. *Psychological Review*. 1943, 50, 370-396. DOI 10.1037/h0054346

MAUSS, Marcel. *Essai sur le don*. 4th ed. Paris : Presses universitaires de France, 1968.

MICHELETTI, Michele. *Political Virtue and Shopping*. New York: Palgrave Macmillan, 2003.

MIDGLEY, Clare. Slave Sugar Boycotts: Female Activism and the Domestic Base of British Anti-Slavery Culture. *Slavery and Abolition.* 1996, 17(3), 137-162. DOI:

10.1080/01440399608575190

MILLER, Daniel. *Material Culture and Mass Consumption*. 1st ed. Oxford: Blackwell, 1987.

REITH, Gerda. Consumption and its discontent: addiction, identity and the problems of freedom. *British Journal of Sociology.* 2004, 55(2), 283-300. ISSN 0007-131

SCAMMEL, Margaret. The Internet and Civic Engagements: The Age of the Citizen-Consumer. *Political Communication.* 2000, 17, 351-5. DOI: 10.1080/10584600050178951

STIGLITZ, John.; CHARLTON, Andrew. *Fair Trade for All: How Trade Can Promote Development*. Oxford: Oxford University Press, 2005.

VEBLEN, Thorstein. *The Theory of the Leisure Class*. 1st ed. New York: New American Library, 1957.

Communicational Theory of Law and topology of juridical legitimacy

Henrique Mello[1]

This paper is a result of the presentation given by me in the XXVI IVR (Internationale Vereinigung für Rechts- und Sozialphilosophie) World Congress of Philosophy of Law and Social Philosophy[2], which took place in the city of Belo Horizonte from July 21st to 26th, 2013.

Such presentation was surrounded by the debates occurred in the *Special Workshop* of Communicational Theory of Law, coordinated by professors Gregorio Robles and Paulo de Barros Carvalho, to whom I'm grateful for the honor of having participated in the discussions between Brazil and Spain at that opportunity from the Communicational Theory and the Logical-Semantic Constructivism points of view, which are of great value for the development of the General Theory of Law and Philosophy of Law worldwide.

This text bears almost the same title of the mentioned presentation. Nonetheless, I've added the adjective "Juridical" to the term "Legitimacy" in order to make my argumentative intentions more explicit, which will be herein substantiated and detailed in comparison with my time-limited speech at the World Congress. Throughout this work, the title chosen will be further explained.

The following words serve as a testimony of the applicability of the Communicational Theory. We will notice that an empirical verification in the tax law field finds an explanation and a solution based on the

[1] Professor and coordinator of the Tax Law lato sensu post-graduate course in the Brazilian Institute of Tax Studies (IBET), in São José do Rio Preto, São Paulo, Brazil; president of the Tax Law Commission in the 22nd Subsection of the Brazilian Bar Association, Tax Lawyer.

[2] XXVI World Congress of Philosophy of Law and Social Philosophy – Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies. Belo Horizonte: Fórum, 2013, p. 407-414.

theory above mentioned, attesting its usefulness as Legal Science for the improvement of its object.

In order to better comprehend this work´s content and, as a consequence, provide better control on the findings by the interlocutor, it's interesting to restate some premises without which this reading would be impaired.

Some necessary categories will be extracted from the Logical-Semantic Constructivism, viewed from the exclusive legal positivism[3], fact not to be confused with methodological syncretism[4], as the Constructivism chats very closely with the Communicational Theory of Law, as friends who have very similar conceptions of life and, in diverging, complement each other.

As to the proposed theme, it's important to highlight that, in this paper, whenever we refer to Law, we mean positive law, a crucial methodological perspective to this essay that excludes any analysis related to the inclusive comprehension of law toward the moral norms or any other conduct norms that are not positivated by the legal system.

Discussing the theme based on the teaching of the Communicational Theory of Law presupposes conceiving the positive law as language. Language characterized for prescribing inter-human (inter-subjective) behavior.

---

[3] See Torres, Heleno Taveira. Direito Constitucional Tributário e Segurança Jurídica – Metódica da Segurança Juridica do Sistema Constitucional Tributário. São Paulo: RT, 2012, p. 59. "For a hermeneutics dedicated to the "ought to" perspective (a) and restricted to the positive law (b), the thing to do is examine if the validity or the interpretation of the legal norms can admit the inclusion of morality (or social values). The ones who accept this inclusion share the positivist view called inclusive legal positivism (dualism) and the ones who deny it are allies of the exclusive legal positivism, the monists."

[4] The law is subject to multiple theoretical approaches, each one based on a given perspective of knowledge; therefore, it's subject to epistemological pluralism (see Robles, Gregório. As regras do direito e as regras dos jogos. São Paulo: Noeses, 2011, p. 10), and methodological plurality. The methodological syncretism would be the misguided combination of distinct methods which diverge about theoretical models adopted for the comprehension of the object in question. We believe there's no methodological syncretism in the dialogue between the Logical-Semantic Constructivism and the Communicational Theory of Law, once both of them are based on the same fundamental categories for the understanding of the positive law. About methodological syncretism, refer to Torres, Heleno Taveira, op. cit., p. 44-47; Sainz de Bujanda, Fernando, Un arquetipo de derecho tributario – Hacienda y derecho. Madrid: Instituto de Estudios Políticos, 1975, vol. 2, p. 225.

Law is a cultural object[5] idiomatically built by human beings in the attempt to prescribe behaviors, and bring them closer to the values considered to be relevant by the context in which are encased.

Paulo de Barros Carvalho has had the opportunity to teach us that there's no law without language.[6] *Being language* is the essence of law. The prescriptive language — as previously mentioned — makes itself present in communicational settings, once there's no other form of modifying conducts than through communication.[7] Every language, in the broad sense, is an instrument susceptible to producing communication,[8] which makes the positive law a complex and specific model of human communication. In other words, saying that law is communication is saying that, through linguistic signs, the addresses of the legal rules are communicated about how they should proceed to act in a coherent manner with the relevant values to a given society.

The positive law is constructed in such a way that its empirical content can be used by its recipients as a basis for the understanding of what conduct is expected by the legal system. Therefore, law is a communicational fact.[9] Its prescriptive language is conveyed as a *message* to

---

[5] De Barros Carvalho, Paulo. Direito Tributário Linguagem e Método. São Paulo: Noeses, 2008. Cultural objects are built by human beings, "they're real, have spatial and temporal existence; therefore, they're susceptible to experiments, besides being positively or negatively valuable. The cognoscitive access happens through comprehension, and the method is the empirical-dialectical one, since the knowledge, on this field, presupposes uninterrupted comings and goings of the material basis to the plan of values, and of the latter to the concretion of the physical entity we evaluate", p. 17.

[6] De Barros Carvalho, Paulo: "...I believe nowadays it's foolhardy to discuss the law disregarding its unique means of manifestation: the language. Not each and every language, but the verbal and written language through which the inter-subjective conducts are established, earning objectivity in the speech universe. The assumption that the 'unappealable enclosure of the language' will certainly guide us toward a semiotic conception of the legal texts in which the syntactical or logical, semantic or pragmatic dimensions work as precious tools for the cognoscitive deepening." Op. cit., p. 162.

[7] See Tomazini de Carvalho, Aurora. Curso de Teoria Geral do Direito – O Construtivismo Lógico-Semântico. São Paulo: Noeses, 2013. "Considering that the social system is constituted of communication acts, we know people only interrelate when they're able to understand each other; when there's a sign system that ensures interaction among them. In this regard, we soon realize there's no other way society can conduct inter-human relationships than through communication acts", p. 171.

[8] Robles, Gregório. Op. cit., p. 16.

[9] De Barros Carvalho, Paulo: "It's certain that law, regarded as a great communicational fact (…) lies, as it couldn't be otherwise, in the philosophy of language, but it assumes

its addressees, having as content the inter-subjective conduct considered coherent with the values regarded as relevant by the totality of the legal communicational system, encased by the respective social context.

To Robles, law is a means of social communication and its message is the meaning addressed to someone in order to lead his thoughts or behavior in a certain direction.[10] The sender addresses the message to the receiver so that the latter can apprehend its sense, establishing a communion of action between both of them.[11] The message of law is the legal rule,[12] issued by the legitimated authority, and directed at the members of the community.

Insofar as the language of law deals with inter-subjective relationships, the prescription of rules is fundamental, since the rules, properly conveyed, guide or address certain aspects of the human actions.[13] As Robles would like, that's why, in that sense, law can be compared to games, since it sets rules of conduct that, once disrespected, will unbalance the relationships and deviate the participants from the intended purpose, which is exactly the compliance with the imposed rules.[14] As with games, law fixes, for instance, who can act — who can produce speech acts, legislate, rule; how one can/must proceed (procedures); who is one supposed to obey; how to obey, etc.

---

an interesting combination of the analytical method and hermeneutics, advancing its structuring program of a new and thought-provoking Theory of Law, which handles the legal norms as messages issued by the competent authority to the members of the social community. Such messages are enlivened by the juridical tone, that is, they prescribe conducts, guiding people's behavior in order to settle the values present on the collective consciousness." Op. cit. p. 164.

[10] Robles, Gregório. O direito como texto – Quatro estudos de teoria comunicacional do direito - O que é a teoria comunicacional do direito?. Barueri: Manole, 2005, p. 79.

[11] Robles, Gregório. *Op. cit.*, p. 79.

[12] The expression "legal rule" is herein used in coherence with the Communicational Theory of Law. For the Logical-Semantic Constructivism, it is possible to consider it as a "legal norm".

[13] Robles, Gregório. As regras do direito e as regras do jogo... p. 3 onwards.

[14] Talking about the teleological or finalist approach of Law, Gregorio Robles shows that, just like in the games, the ends that generally are attributed to Law are actually the ends pursued by the involved subjects. The author says: "The inherent purpose of a game is to play and the one of Law is to accomplish legal actions." (Op. cit., p. 14) Therefore, it can be said that the purpose of Law is not justice; it's the fulfillment of its rules. Justice or injustice is the purpose of the subject who applies the law. So, the legal certainty is the number one rule of Law (regarded as the rule which ensures the proper fulfillment of the other rules in the system).

The aforementioned communication, which aims to alter intersubjective conducts as well as any other forms of communication, in line with the teachings of Roman Jakobson, happens through the transmission of a message issued by the sender through a channel, to a receiver, according to a shared code, and inside a specific context.[15] The mentioned author identifies six elements that, associated, enable the existence of the communication process: sender, receiver, message, context, code, and channel.

The juridical messages, thus wrapped in a communicational context, are no exception to the rule: they are transmitted by a sender (e.g. legislator, judge), through a channel or means of communication (e.g. official journal), to the receiver of the message (which is the legal rule), according to a shared code (e.g. the Portuguese language), based on a context, which are the historical and cultural circumstances that surround the subjects of the communication.[16]

The adequate transmission of the legal message presupposes a sender properly designated by the legal system as competent for its production. This is one of the rules of the game. The only one who can send a message prescribing conducts inside the juridical context is the one whose actions are based on a previous and higher rule that allows him to proceed in such a way.[17] In other words, only the "competent authorities" can act as senders of messages within the legal communication system. By "competent authorities" we mean both the legislator, for the general and abstract norms, and the judge, or an administrative official, for the individual and concrete norms.

Nonetheless, the message does not come ready.[18] The receiver of the rule only has access to the channel through which the message is transmitted. It's up to him to construe the content conveyed by the sender. He is the one who, based on the context, must construe the meaning

[15] Jakobson, Roman. Linguística e comunicação. São Paulo: Cultrix, 1991, p. 123.

[16] It´s not too much to remember that Paulo de Barros Carvalho adds a seventh element, which he called "psychological connection". It is the sender's and receiver's subjective concentration during the process of issuing and apprehending the message. (Op. cit. p. 167) In order to remain close to the Communicational Theory as proposed by Gregorio Robles, we shall not discuss the seventh element in this paper.

[17] De Barros Carvalho, Paulo. Op. cit.: The law appears "…as a great communicational fact, being the normative creation trusted to the entities accredited by the system", p. 169.

[18] Tomazini de Carvalho, Aurora. Op. cit.: The message does not come ready, as many assume. It is the sense of the code structured by the sender, and it's only present in the receiver's mind, with its decoding. p. 175.

of the text.

This *path of meaning construction*[19] starts from the physical support, that is, the means for transmitting the message itself, which, in law, is the ink impressed on legal documents (rules, sentences, notices of infraction, contracts, and so on). Then, the interpreter/receiver puts together the enunciations from the text, organizing them in the hypothesis-consequence format, which is proper to norms, obtaining the legal propositions[20]. Once the normative propositions (norm in the strict sense) are built, the receiver incursions the legal communicational system as a whole, relating his initial comprehension of the message to the context, which is formed by the other statements that compose the system, and to which the linguistic construction relates in a situation of hierarchy and derivation.[21]

For example, a Brazilian taxpayer who has access to the official journal organizes the linguistic signs he comes across in enunciations — statements that contain information about a certain tax, tax rates, tax base, collector, payer, etc. Then he arranges the enunciations in hypothesis and consequence, realizing that taxation has been imposed upon his income. He does so because it's written that all those who have a source of income must contribute with a percentage of it, to a certain entity, in a certain place, at a certain time. The taxpayer, receiver of the message, examines other messages of the legal system in the attempt to verify the coherence of the rule communicated with its context. At the end of this path, the message will be ready, construed by the receiver, who will have to abide by the rule that obliges him to pay the tax.

From a rhetorical perspective of law as a communicational fact, the sender of the juridical message always tries to convince the receiver that the prescribed content should be fulfilled. As said before, this is the purpose of the law: convincing the receiver that the rules must be observed, abide by.[22] To put it another way, it is possible to affirm the legal

---

[19] De Barros Carvalho, Paulo. Op. cit., p. 181 onwards.

[20] The expression legal — or normative — proposition was here used in the sense assigned by the Logical-Semantic Constructivism, not in the kelsenian sense.

[21] For a more detailed reading on the path of meaning construction, besides Paulo de Barros Carvalho, also see Tomazini de Carvalho, Aurora. Curso de Teoria Geral do Direito, p. 240 onwards.

[22] If the ultimate purpose of law is the fulfillment of the prescriptive message (its rule), the persuasion is the purpose of the juridical language, which makes law rhetoric. In that sense, see Adeodato, João Maurício. Uma teoria retórica da norma jurídica e do direito subjetivo. São Paulo: Noeses, 2011.

certainty is the most primary and vital of the legal rules.

The main guideline for every single system of rules is that its rules are to be followed. Otherwise, it wouldn't be necessary to have them in the first place. Those authorized to produce speech acts[23] within the legal system, that is, those who are invested with the power to create new rules must, above all, obey the "number one rule". Only then the receivers of the legal messages will be able to fulfill the law, for they also must abide by the first of all rules.

To comply with the juridical prescription, the receiver should be convinced that, the sender of the message himself is the authority empowered by the legal system to transmit the message. Again, the rules of law dictate who can act, that is to say, the one who has the "capacity to exercise"[24] when it comes to sending prescriptive messages; the one who has been legitimated by the system to deliver speech acts. Determining the competence of the sender to act as such is part of the legal certainty principle.

That principle, in what concerns this paper, establishes beforehand that only certain people can issue certain prescriptive messages or generate speech acts within the system. Yet, according to the legal certainty principle, only the legislator can produce laws; only the judge can sentence; only the tax auditor can issue infraction notices related to the taxation matter; and so on. Thus, one should only abide by a law issued by the legislator, a sentence ordered by a judge, an infraction notified by an auditor, etc.

In order to follow the legal certainty rule, when a message is sent, it is necessary to ensure that its recipient is able to recognize, during the path of meaning construction, who the sender of the prescriptive content is. Otherwise, the meaning of the text is impaired, and the text itself ceases to be.[25]

---

[23] The expression "speech acts" is here used according to the teachings of Gregorio Robles. After the (extra- or intra-systemic) decision, a speech act always take place; a communicative action, through which the message is produced.

[24] Robles, Gregório. Op. cit.: The legal system points out who the subject is and under what circumstances he can act as such. p. 45. Being able to act as the subject accredited by the legal system is the capacity to exercise.

[25] Tomazini de Carvalho, Aurora. Op. cit.: "The physical support of a text is its empirical material. In the written language, it's the marks of ink impressed on the paper (…) The one who doesn't know how to handle such marks and can't link them to a meaning is not capable of constructing any meaning at all. He looks at that collection of symbols and only sees ink marks on a paper. This proves two things: (i) first, the meaning is not in

For that reason, it's needed that the channel — the material fact, the physical support — bear particular signs which will guarantee that the receiver construes the information about who the sender is, verifying, in the intersystem contextualization, if he's an individual or represents an institution who has the competence to act in that sense; someone legitimated by the legal system to take part in the communicational process of law actively.

It's imperative that the receiver of the speech identify the *ethos* in order to adequately comprehend the message transmitted, convincing himself of the need to observe the prescriptions contained therein. The *pathos* and the *logos*[26] are not enough. Under other circumstances, the receiver won't be persuaded to comply with the legal rules.

If only some individuals are authorized to send prescriptive messages to the receivers within the legal system, then the latter expect such messages to be effectively communicated by the former, being able to analyze who sent them swimmingly.[27] Without being capable of understanding the signification of the message by getting reliable information about the sender, the receiver will be prevented from certifying that the primary rule of the system — the legal certainty — has been observed by the responsible for producing the speech act in question. Consequently, the receiver himself will disregard the message and disrespect the most

---

the physical support, it's built in the interpreter's mind; and (ii) secondly, there's no text without meaning." p. 177.

[26] See Adeodato, João Maurício. Uma teoria retórica da norma jurídica e do direito subjetivo. Ethos, pathos e logos are the classical means for the rhetorical persuasion. (p. 109). According to Aristotle, those are the three dimensions of rhetorical which constitute the means for persuasion, since the goal of the rhetorical is to persuade. His classic definition states 'the first kind depends on the personal character of the speaker; the second on putting the audience into a certain frame of mind; the third on the proof, or apparent proof, provided by the words of the speech itself'. The terms ethics, pathetic and logic stem from Aristotle's ideas, with all their variations of meaning throughout the centuries. That's why Aristotle claims 'it's not true that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses'. (p. 294) Associating this idea to what we've been discussing, the 'character' of the sender of the legal message, as a condition to act in the legal communicative process, is extremely relevant to persuade the receiver to abide by the rules.

[27] Expecting the rules to be effectively fulfilled and, consequently, that the messages are only sent by those legitimated by the legal system, can be related to a study about legal certainty in the sense of expectancy of legitimate trust. See Torres, Heleno Taveira. Op. cit., p. 183 onwards, especially from p. 215 on.

primary of the rules.

All that is easy to be proved when we come across legislative documents (physical supports) which do not contain any proper signature or identification (for instance, sentences with no signature or carrying just the rubric of the office's employee). However, the matter we discuss here is more complex.

If it's true the receiver of the prescriptive message should apprehend it through a meaning-construction path, which begins once he has access to the physical support, it's also true that the physical support itself (the channel or means) ought to contain the sign or signs through which the sender can be identified. But where, in the physical support, must such information be inserted? Is there a particular place in the material fact where the sender's identification lies? Or is it enough that such identification rests anywhere in the physical support?

The sender's identification sign shouldn't only be located in the physical support from which the receiver's interpretation process starts. Moreover, the identification sign of the authority who is legitimate to produce speech acts in the legal system should be in a specific place within the material content.

The message will only make sense to the receiver if the sender as an individual is able to relate harmoniously to both the content of the transmitted message and the reflection of the communication on the receiver.[28]

The sender's identification inside the message is not sufficient. It ought to be specifically placed in the message. It's important to elucidate that we apply the term *topology* in the title of this essay in the sense of "study of the place, the specific place" where the identification of the one empowered by the legal system to convey rules lies. Juridical legitimacy, for our purposes, is the attribute of the one to whom the competence has been designated.

The Brazilian tax law provides us with a perfect example of a physical support in which, despite the existence of the identification sign of the sender of the legal message, it is not possible to understand the message adequately due to uncertainties regarding the responsible for the speech act.

We refer to the fiscal procedure mandate (approximate translation for *mandado de procedimento fiscal - MPF*),[29] a physical support

[28] Ethos, pathos and logos together, inseparably.

[29] An administrative act through which a previously designated authority attributes spe-

through which the message is sent by a competent authority ordering a second authority, hierarchically inferior, to initiate inspection procedures against a taxpayer.

The rules that specifically concern the fiscal procedure mandate state those inspection procedures must occur during a limited period of time, which can be extended by the authority who issued the inspection order himself.[30]

What draws the attention, however (and was the object of the empirical observation that guides this paper) is that the legal system itself foresees how such document (the fiscal procedure mandate) is supposed to be; it literally presents a model for the physical support, and how its alterations should be done, including the aforementioned time limit extension.[31]

The problem seen in this specific material content is that despite the rules clearly predicting that only the authority who has issued the document can alter its time limit, the model for this particular material content does not contain any identification of the message sender in case the time limit extension happens. There is indeed a blank for the sender's identification. Still, that signature blank comes before the time limit alteration blanks, which causes the latter to be included in the document without any identification of who inserted them. So you can better understand, we took the liberty of including the model for the message´s physical support, as envisaged by the legislation.

---

cific jurisdiction to another authority so the latter can initiate inspection procedures against a given taxpayer. The fiscal procedure mandate (approximate translation for mandado de procedimento fiscal- MPF) is foreseen in the Decree no. 3.724/01: "Article 2. The tax proceedings regarding taxes and contributions administered by the Secretariat of the Federal Revenue of Brazil will be executed, on its behalf, by the tax auditors of the Federal Revenue of Brazil, and will only be initiated with the specific order called fiscal procedure mandate, instituted by act of the Secretariat of the Federal Revenue of Brazil." It's ruled by the ordinance no. 3.014/11 of the same Secretariat.

[30] The sixth article of the ordinance no. 3.014/11 states who the Brazilian authorities who can issue fiscal procedure mandates are. "Article 11. The fiscal procedure mandates have the following maximum time limits (...); Article 12. The extension of the time limits comprised in article 11 can be executed by the issuing authority, as many times as needed, since each act observes the time limits fixed on the subparagraph I and II of article 11, depending on the case."

[31] The models for the fiscal procedure mandate are anticipated in the article 19 of the ordinance no. 3.014/11: "The models for fiscal procedure mandate herein are approved (…)". The models can be accessed on www.receita.fazenda.gov.br/Legislacao/Portarias/2011/portrfb30142011.htm.

We evidently encounter the problem. There's a field for the competent authority's signature, the sender of the message; however, below the time limit alterations (which, by the system of rules, should be executed by the same authority) there are no specific blanks that anticipate an identification in case deadline extensions occur, despite the fact that the rule itself defines who the legitimate person is to produce such speech act within the legal communication system.

That example demonstrates the relevance of the questions previously worded in this paper: Where, in the physical support, is the legal identification of the message sender supposed to be? Is there a particular place in the material content where that identification should be? Or is it enough that the competent authority's identification sign is inserted anywhere in the physical support?

It is not possible for the interpreter/receiver of the message,[32] considering the example above, to construe the transmitted information properly, once it hasn't been given him the chance to acknowledge who the sender of the prescriptive message extending the inspection period is.

It can be said that the blank assigned for the competent authority's identification sign, regarding the empirical fact presented, causes incertitudes for the receiver about whether the legal certainty rule has been satisfied or not.[33] Without being able to comprehend the *ethos* of the transmitted message, the receiver won't be persuaded into abiding by it.[34]

---

[32] It's interesting to notice that the recipient of the fiscal procedure mandate is both the subordinate authority, responsible for the inspection (tax auditor), and the taxpayer against whom the inspection procedure was issued.

[33] Pragmatically, we refer to the nullity of inspections extended by invalid fiscal procedure mandate due to the impossibility of apprehending the legal message (lack of sender — competent authority). To solve the matter, it would suffice for the Secretariat of the Federal Revenue of Brazil to modify the rules, foreseeing a new model of fiscal procedure mandate with a signature field for the competent authority placed below the time limit extension fields.

[34] In Robles's opinion, we can compare the legal taxation example to a soccer game. Imagine the final match of the Soccer World Cup. According to the rules, in the event of a draw, it's the referee's responsibility (the competent authority) to send the game to extra time. Supposing the match remains tied after the extra time, a penalty shoot-out should start. In that case, the 45-minute halves are officially over, and neither of the teams has scored. The referee — who is supposed to be on the field to act as such — should then blow the whistle to end the regular-time period, and determine the beginning of the extra time through sounds and gestures. So that the message sent by the referee is properly

The idea of the topology of legitimacy — or where the competent sender's mark should be — has always involved the human communicational activity. It´s from this idea that comes the expression "to sign under"[35], that means that by the act of signing below the content of the transmitted message someone is attesting that wrote the message or that agrees with its content to the point to sign it as his own. "To sign under" conveys the idea that the sender's identification sign has been placed there after all the other signs (signs of content of the message).

It's highly advisable that we rethink that matter nowadays. Since the emergence of electronic legal documents, to identification the senders of prescriptive messages is increasingly untrustworthy, often making it impossible for the receivers to recognize the issuer of the rule, once the electronic systems enable anyone who has access to them to include or alter data.

We're not saying the identification signs of the competent authorities should always be placed below other content signs in the message. What we've been trying to evidence is that, based on the understanding of law as a communicational fact that transmits messages to the receivers so they can construe meanings from the physical support, it's necessary that the sender's identification signs be located somewhere the interpreter of the message can realize they've been placed there after the content signs properly speaking. Only then it'll be possible to affirm with certainty[36] if the authority legitimated by the communicational system was the one who effectively transmitted the message content.

As mentioned earlier, the sender is one of the elements of communication. In a communicational system such as the legal one, which foretells who the issuers authorized to produce speech acts are, un-

---

comprehended by the players and the audience, the recipients must be able to actually see that the shrill sound really came out of the referee's whistle, who was on the field. They must effectively visualize the competent authority exercising his competence in a valid situation. Otherwise, the players can assume it was a ball boy, or an assistant referee, or even a supporter who whistled, feeling free to disobey the transmitted message.

[35] The term signature derives from sign (Latin translation = signo) and it's connected to the Greek word logos (Latin translation = verbum). Logos and signo both bear the acceptation of imprinting a mark on something. Insegnare means to teach, to imprint ideas onto someone. These terms are also associated to the ethos, in the sense of The Logos of the Living World (the representation of God, the divine) or Jesus Christ the World´s Logos, the embodiment of God on Earth.

[36] Relative certainty, obviously. The matter will be subject of confrontation between proofs.

doubtedly, we must ensure that the receiver do know the sender of the prescriptive message; otherwise, there might be no sense in the interpreted text and hence no rule to be fulfilled.

So the signs of the message sender can be satisfactorily construed, put differently, so the issuer's legal legitimacy can be recognized and the message properly construed in the receivers' mind in such a way the they are convinced to abide by the prescription transmitted, the signs must be strategically placed in the legal document, the physical support, allowing the recipient to be sure that those linguistic marks were produced after the content signs of the message, and that the legal certainty principle was duly observed by the sender and will be also by him, the receiver.

The place, in the physical support, for the identification of the authority legitimated to issue speech acts within the legal communicational system is essential to the proper construction of the legal message.

References

ADEODATO, João Maurício. *Uma teoria retórica da norma jurídica e do direito subjetivo*. São Paulo: Noeses, 2011.

DE BARROS CARVALHO, Paulo. *Direito Tributário Linguagem e Método.* São Paulo: Noeses, 2008.

JAKOBSON, Roman. *Linguística e comunicação.* São Paulo: Cultrix, 1991.

ROBLES, Gregório. *As regras do direito e as regras dos jogos – Ensaio sobre a teoria analítica do direito.* São Paulo: Noeses, 2011.

_____. *O direito como texto – Quatro estudos de teoria comunicacional do direito.* Barueri: Manole, 2005.

SAINZ DE BUJANDA, Fernando, *Hacienda y derecho.Vol. 2.* Madrid: Instituto de Estudios Políticos, 1975.

TOMAZINI DE CARVALHO, Aurora. *Curso de Teoria Geral do Direito – O Construtivismo Lógico-Semântico.* São Paulo: Noeses, 2013.

TORRES, Heleno Taveira. *Direito Constitucional Tributário e Segurança Jurídica – Metódica da Segurança Jurídica do Sistema Constitucional Tributário*. São Paulo: RT, 2012.

XXVI World Congress of Philosophy of Law and Social Philosophy – Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies. Belo Horizonte: Editora Fórum, 2013.

Legal Validity As Membership

Félix Francisco Sánchez Díaz[1]

Abstract: The concept of "legal validity" offered by formalistic theories of law has been claimed to be insufficient. The Communicational Theory of Law (CTL) strives for proving just the opposite. This proof can be attained, it is proposed in this paper, by distinguishing between the "concept"of legal validity as "membership" and the "topic" "legal validity". Semiotics and theory of language will help by providing legal theory with the conceptual triad "syntactics, semantics, pragmatics". The threefold theoretical framework will make it possible to sustain a "pure", "formalistic" concept of legal validity, while semantics and pragmatics build up the "topic". "Concept" and "topic" compose together the whole "theory" of legal validity.

Keywords: Legal validity, syntactics, semantics, pragmatics, concept, topic, membership, reasons form membership, interpretants of validity, legal ambit, legal order, legal system.

1. It is the purpose of this paper to explore the couple of notions "concept - topic" in order to develop a *theory of legal validity.* This paper and its proposals should be placed in the context of the Communicational Theory of Law (hereinafter CTL) defended by Professor Gregorio ROBLES in his already extensive work on legal theory[2].

What is suggested in this paper is that it is possible to build up a theory of legal validity, based on the definition made by CTL of the term "legal validity" as *membership;* a definition that will make possible to explain and not just to describe the semantics of the term (its multiple meanings), and also connect functionally with the network of actions

[1] Las Palmas de Gran Canaria. Spain.

[2] Gregorio ROBLES, Teoría del Derecho – Fundamentos de Teoría Comunicacional del Derecho. Volumen I, Cizur Menor (Navarra), Thomson – Civitas, 5ª ed., 2013.

and institutions referred to by the term *legal system*, which is definitely a *system of communications* (the system of *legal* communication), but is also, perhaps derivative but nonetheless decisively, a *pragmatic system* or *system of action*. This explanation will require to use a set of theoretical tools that are specific to the structural-functionalist paradigm. Here we argue that this paradigm, which has been claimed as an asset of the sociological perspective, is actually an expression of an instrumental point of view, which is internal to the system where action develops. Thus, it is possible to defend the correctness of the conclusions and/or discoveries reached by using this paradigm, while limiting at the same time their scope, since they are not realistic descriptions of effective social events, so that such findings do not constitute empirical socio-legal views.

2. The question, what the identifier criterion of elements inside or outside the legal system should be, goes back to the origins of Western civilization. Originally linked with the distinction between good and evil, and also with the question of what is justice or injustice, the question of what is or is not legally valid has been answered in an evolving way throughout history: from an initial identification of legal validity with what is good or what is just to the more abstract, complex and yet more morally ambiguous answers given by the two main versions of legal positivism (sociologism and normativism)[3]. We believe that CTL has decisively contributed to clarify the deeper meaning of "legal validity", running under every use of that term in legal discourse. We argue that the notion of "lawfulness" or "membership" to a legal system, despite its naked condition of mere logical connective, and despite its "senseless" (in the sense Charles MORRIS uses the term "sense", as the result of combining signification and interpretants)[4], succeeds in introducing the element which is common to all possible meanings, according to cur-

[3] Let us mention, as a mere sample in spanish language, these two pieces: Ernesto GARZÓN VALDÉS, "Algunos modelos de validez normativa", en RODRÍGUEZ GARCÍA, Fausto E. (Coord.), *Estudios en honor del Doctor Luis Recaséns Siches*, México, UNAM, 1980, págs. 375 - 402; reimp. en Ernesto GARZÓN VALDÉS, *Derecho, Etica y Política*, ed. Centro de Estudios Constitucionales, Madrid, 1993, pp. 73 – 105. José DELGADO PINTO, "La validez del derecho como problema de la filosofía jurídica", en *Estudios en Honor del Doctor Luis Recaséns Siches*, op. cit, pp. 221 – 259. It can be checked in these two articles how interesting and complex the theoretical debate on legal validity has become, since the time when legal positivism spreaded itself in western legal culture to this day.

[4] Charles MORRIS, Fundamentos de la teoría de los signos, Barcelona, Paidós, 1985 ; and especially, La significación y lo significativo, Madrid, Alberto Corazón ed., 1974.

rent uses of legal language. The notion of "membership to a legal ambit" constitutes the *formal concept of legal validity.* But a theory of legal validity is not a mere conceptual recount. Rather, it is a discourse that makes use of concepts in order to explain a portion of the world: in this case, to clarify an essential aspect of a type of communication systems: *legal systems.* That is why we say that one thing is the "concept" legal validity and quite another is the "topic" legal validity. While the former refers to the *meaning* of the term, the second refers to the *sense* of legal validity.

3. *Concepts and theory.* Viewed from semiotics, every theory is a type of speech. As such, it uses syntactic and semantic structures, and serves to perform a specific pragmatic function. From this perspective, theory is, therefore, *semiosis;* and theoretical concepts, only the specific semantics of the theoretical discourse.

Whenever the subject of a theory is a *communication system,* the theoretical discourse becomes a *semiosis of a semiosis.* Moreover, if object semiosis is a communication system composed by consciously produced elements -in a higher proportion than is typical of natural language, then a dialogue develops usually between the discourse of theory and the communication system that theory tries to describe and explain. Such a dialogue operates changes on both sides: theoretical concepts will be used in the object language, undergoing modifications that in turn can cause parallel changes in the language of theory. This phenomenon, despite its disturbing air, can (and should) be led into a "productive" direction, that is, to improve both theory of the communication system and the communication system itself.

Conceived law as a communication system, the theory of law amounts to be a conscious semiosis of another to a great extent conscious semiosis, i.e, *legal semiosis*. The basic conceptualization of a theory of law, which deals with "syntactic", "formal", fixed, universal aspects, present in all systems of legal communication, must be done in such a way that *a)* reflect the actual legal language and therefore be aware that the theoretical terms acquire their own life in the ordinary legal language, but also *b)* be able to go beyond the mere reflection of the life of legal language, to become an explanation of the structure and evolutionary potential of legal language, searching for the deeper meaning of legal semiosis' elements. In this task, theory of law's basic concepts, under investigation by the *formal theory of law,* (hereinafter FTL, which is the *formal* subdiscipline of CTL)[5] should orientate the ordinary legal lan-

[5] Gregorio ROBLES, Teoría del Derecho – Fundamentos de Teoría Comunicacional del

guage. They must at all times demonstrate (and not merely claim) that they offer better descriptions and explanations of the systems of legal communication than other usual legal theory conceptions do.

4. From above it follows a proposal for a *method* in the sciences dealing with communication systems, as does the complex of disciplines grouped under the label CTL. The method proposed starts by (1) a study of the current uses of language, follows by (2) a discovery of the *common element* present in all meanings of a term that commonly occur in the respective communication system, in the hope that this constant meaning will help unveil the *role* that the term and its different meanings play; to this end, it is necessary a previous formulation of an hypothesis about the *general role* which communication systems play in the broader social interaction, and (3) once functionally outlined the basic meaning of the term (i.e., once it has been obtained a formal concept of that term), it will be possible to explain its various forms and meanings in a structural-functional way, i.e., in terms of the operation types the communication system makes possible. Such operation types are important insofar as *a)* they define the applicability of the term in its most abstract (formal) signification and *b)* they report on its *role* in the communication system through the study of their pragmatic interpretant.

Once implemented the method outlined above to the term "legal validity", some relevant findings are made:

4.1. The term "legal validity" has, in the ordinary legal language, as well as in the language of the theory of law, a plurality of meanings that CTL has to purify and clarify.

4.2. The common element in all meanings, practical or theoretical, of the term "legal validity", present in all possible uses of it, is the one of "membership"[6] or inclusion of the item legally "valid" in a system that receives it and in turn gives it full meaning. The very "membership" of the elements of a legal ambit is its *lawfulness,* i.e., its legal character.

4.3. The idea of "membership" as formal signification of the term "legal validity" expresses with the highest possible level of abstraction the common element in all cases where use of that term is conceivable. However, this formal signification involves a lack of meaning or sense, which is necessary to fill up. This is how analysis of the *concept* leads to a composition of the *topic* "legal validity". Again, such composition will start with an analysis of the uses in legal language, both profes-

---

Derecho. Volumen I, op. cit., pp. 171 – 172.

[6] *Idem,* pp. 322, 365 – 369; 371 – 375.

sional and theoretical, and follow by making use of (1) theoretical tools provided with by semiotics, and of (2) the internal structural-functional paradigm which applies to (communicative) action systems, in order to compose *a)* a *theory on the reasons for legal validity* (a Semantics of legal validity) and *b)* a *theory about the implications or consequences of legal validity* (a *Pragmatics* of legal validity). Together, formal, semantic and pragmatic theories build up *the topic "legal validity"*, that is, a theory of legal validity as due part of a communicational theory of law.

5. *Membership, action and legal validity.* The formal concept "legal validity" as membership makes legal theorist wins in terms of universality as much as she loses in terms of richness of content. "Membership" is a formal property of *all the* elements of a legal ambit, typically of legal actions and provisions. As to the latter, it is always possible to make a judgement of *legal validity,* which will be decisive in determining whether they should remain or be removed from the legal system (and therefore from the legal ambit). Not so with *legal actions:* they belong (or not) to the respective legal ambit, but it is not always possible to make a judgment of legal validity of an action. This is the reason why, despite being obvious that, for example, murder is an action which belongs to a particular legal ambit, it is however meaningless to qualify a murder as legally valid or invalid.

The above reflections should not be construed as a criticism to the formal concept of legal validity as membership advocated by CTL. However, they do point to the need to transcend the stage of formal conceptualization addressed by CTL through formal theory of law (FTL) in order to build a theory of legal validity that, starting with a formal concept of legal validity as membership, explain the mechanisms or operations leading to the making of a legal validity/invalidity judgment, as well as the mechanisms that organize the pragmatic interpretants of the term within specific legal systems/ambits. To this end, as already noted, it is needed to start making some remarks on the *role* legal systems play, as well as on their specific character as *action systems.*

The ascertainment of certain elements' membership to a legal ambit or, in other words, the formal determination of *the structure of a legal ambit,* is a function which is fulfilled inside the legal ambit by the complex *legislation - doctrine - case law,* which CTL calls the Complex Legal Order/Legal System, or "ORD/SYS"[7]. This function is connected with the general role that legal systems play in the context of the society in

[7] *Idem,* p. 487.

which they develop and evolve. Primary expression of it is the fact that legal systems define, organize, coordinate, channel, limit and repress *actions,* that is, that legal systems are *action systems.* They are, of course, *communication systems,* as long as communication is a feature common to all systems, both human in origin (as legal systems), and extra-human in origin (as the system of Physics). Not all systems are, however, systems of action, although it should be noted that the latter are multiple and varied: from guidebooks, through technology, to reach the highest peaks of culture (Policy , Law, Morality, Religion) there is a wide array of systems of action: they all share *a function:* basic, elemental, very low-level but really essential: the facilitation of human life by reducing the effort required to operate and attain goals, through *action standardization or semi - automation* fostered by such systems. Each system of action is a characteristic form of action standardization or semi - automation. This feature is connected with the *specific function* the system seeks to meet in society, which *expresses itself* communicationally within the system itself in the form of *values.*

It is claimed in this paper that the specific function of legal systems must be extracted from the hermeneutics of the dark and complex term "justice", a term which expresses, in spite of its darkness, the fundamental value that legal systems themselves raise as the guiding principle of his special way of organizing human action. It is proposed, in effect, to set this value in functional terms, as the function of *ensuring the predictability of actions and expectations, while ensuring compatibility between the various systems of the existing social action, including the legal system itself.* Legal systems play this role by creating a "virtual space" called *legal ambit* which encompasses and comprises all actions constituted and organized by the textual complex "ORD/SYS", along with the textual complex itself, which on its side works as the backbone of the field of action. "Organization" here means implementing, via communication, a specific combination of techniques of action standardization or semi - automation, These techniques operate by disregarding the specific object, content and purposes of standardized actions, to focus on certain features or properties present in every action, whatever the field of life or social subsystem in which they develop. These are generally action's procedural aspects, although in many cases standardization focuses on action's contents or outcomes. This latter form of standardization is a second - level standardization, in the double sense that it is less common than the first one and that it presupposes an underlying procedural standardization. In each contingently social subsystem where legal

regulation focuses, the legal system *set out* actions to be placed in the legal ambit, in view of the presence therein of certain defined properties of a general or abstract character. Each legal system establishes these relevant properties by means of a particular "membership rule" which decides what actions are to be considered as included in the ambit. This membership rule is the most formal precipitate of a more substantial "theory of legal validity." As it will be shown, any theory of legal validity presupposes a particular and more or less accurate membership rule, not the reverse being necessarily true.

6. Legal systems constitute and organise action through a combination of *four techniques of standardization or semi - automation:*

a) Standardization of *environment* and *actors,* by means of *ontic rules.*

b) Standardization of *procedures through technical rules* which set various types of legally relevant actions.

c) Standardization of action's *contents* and/or *outcomes,* through *deontic rules.*

d) Standardization of *judgment* prior to legal decision-making, through *principles:* a kind of technical rules that govern intellectual procedures leading to discretionary decision-making.

It is the interplay of these four standardization techniques which makes possible to establish *membership rules* within legal ambits, at least in two levels: the first level membership rule results from a combination of ontic and technical rules. This level can be considered as basic and corresponds to the usual meaning of the term "formal validity", that is, the belonging of an action to a legal ambit *in view of its formal properties,* connected with the structural aspects of the legal ambit, which is a four - dimension (subjective, procedural, time-space) domain.

To the second level of action standardization belongs the setting of the *results or contents of actions as either banned or compulsory.* This standardization technique through *deontic rules* requires previous first level standardization. Indeed, rules can not impose duties if time-space environment, subjects and procedures in the ambit are not previously set. This technique appeals more to volition than to cognition of the players in the ambit, and is therefore more exposed to failure risks than techniques of the first level. For this reason, it is usual to reinforce it within the legal system itself, 1) by connecting deontic rules with other deontic rules specialized in *organizing coercion (sanctions),* or 2) by connecting deontic rules with *second level membership rules*, so that it becomes possible to judge about membership to the legal ambit of actions which, being le-

gal under their "formal" properties, nevertheless violate certain deontic rules. This second level membership rule is usually called "substantive or material validity", i. e., the *lawfulness of an action (most often, of a legal provision), its membership to the legal ambit, by reason of its compliance with deontic rules that serve as a vehicle for standardization of action's contents or outcomes.*

A particular case is that of making the conformity with certain *principles* of legal action a prerequisite for such action (which is typically a *legal decision*) to enter the status of membership to a legal ambit (in legal decision-making, membership of the resulting legal provision to the respective legal order). Principles, as rules of thought, are clear cases of *technical rules.* Yet in virtue of their origin as generalizations or abstractions from deontic rules, standardization through principles seems to share traits with first and second level standardization techniques already dealt with. In fact, standardization through principles rises as a completely different mode of standardization, since it focuses on the weighting process which is inherent to any legal decision-making. Principles require consideration of certain duties (which are neither typically nor necessarily decision-maker's duties) when making a legal decision. Thus, deontic rules become part of the mental process prior to making a discretionary legal decision, however not directly standardizing contents or results of action, but rather making them the focus of decision as intellectual process. In this sense, principles are a specific type of technical rules, though its solemnity and the importance of the situations that make them invoked may lead to consider its use as a duty for actors present in the legal ambit. To make the respect of certain principles a reason for the belonging of a provision to a legal ambit thus becomes a particular case of first level membership rules (which make of the procedural properties a reason for membership) that is unique in that *action is not only standardized in its "external" aspects (those that refer to action's external properties or elements) but also in its "internal", intrapsychic or intellectual aspects*. True, these "internal" aspects cannot be accessed unless they show up externally (e. g., it cannot be known whether a discretionary legal decision has respected the principle of equality of the parties in the judicial process without checking what the effective treatment granted to the parties by Court, even fulfilling procedural rules, has been in effect. Yet it can be discerned, from the very external appearance of Court's performance, whether or not the principle of equality of the parties has or not weighted in the discretionary decisions made by the Court -for instance: when it comes to the admission of evidence

offered by the parties. Such a judgment may determine the reviewing Court's decision about the discretionary decision made, even under all the procedural formalities, by the lower Court).

7. While membership rules operate automatically when passing judgment on the inclusion of an act or a provision in a concrete and specific legal ambit, non-membership judgments are not made in the same automatic way; instead, they are institutionalized in legal systems by a regulatory mechanism requiring a *prior decision,* expressly adopted by certain actors in the ambit (typically, courts or administrative bodies endowed with reviewing functions) that the act or defective provision ceases to belong to the respective legal ambit. This mechanism, called *presumption of validity,* emerges as a reinforcement device of the semi - automation operated by the legal system as a system of action. Presumption of validity ensures the system's operability and provides actors in the legal ambit with certainty in their operations; the latter 1) may (or) must invoke and use those legal provisions which, under external features, are shown to be effective members of the legal order and 2) can ignore a provision or action with apparent legal validity only in case that an institutionalized expelling decision, in accordance with the current theory of membership to the legal ambit, has been issued; a decision therefore based solely on internally established criteria for expulsion, either original (i. e., not taken from other action system but resulting from the internal logic of the legal system itself) or incorporated and re-enacted by the legal system (for example, the inclusion in the legal system of social, religious or moral rules).

8. The foregoing considerations have focused entirely on what is probably the most intricate aspect of the theory of legal validity: the general theory of the reasons for membership of actions and provisions to a legal ambit, which, based on the uses of legal language, has sought to explain such uses without disregarding the internal point of view, linking the linguistic utterance with action organization techniques, thus formulating a rough theory of the mechanisms of standardization or semi - automation that helps explain the heterogeneity of the meanings of "legal validity", both in the ordinary and in the theoretical uses of legal language, while allows to resolve certain paradoxes or apparent contradictions resulting from attempts to explain legal validity from a sheer "normative" view.

We would like to close this paper with a brief foray into the not so intricate, but equally critical other side of the theory of legal validity: *the pragmatics or theory of interpretants of legal validity,* which is the theory

that informs on the consequences or implications of legal validity, being a research of the expectable reactions, according to the current in legal communication pragmatic rules, after a positive or negative judgment has been uttered on the legal validity of an action or a provision. Mention shall be made below of some of the more obvious interpretants.

8.1 *Validity and referability of legal norms and provisions.* Membership judgements of legal norms and provisions are essential to the work of jurists. They need to have as much certainty as possible about what their work material is. No less essential is that certainty, however, for non-professional actors in the legal ambit, as guidance for action and support for interests' promotion and defence, as well as basis for decision. Membership judgements help therefore build the legal discourse, for they provide with precise information about which legal norms and provisions are to be used.

8.2. *Validity and intelligibility.* Membership of an action to a legal ambit, i.e., *lawfulness* of an action, is the first condition of its intelligibility as *legal* action. Without a prior membership judgement, the *specific meaning* of the underlying set of physical and mental movements changes radically. Thus, e. g., the specific meaning of an economic association changes completely if we think of a group of friends who join themselves to fund a night out, as to when we think of a group of investors which establish a capital fund in order to undertake a common business. Key to this change of meaning, despite visible similarities between both cases, is the fact that contribution to capital funds is legally regulated, while party nights funds are not.

8.3. *Validity and justification.* Just as it is impossible either to invoke norms and provisions, or a right understanding of actions and action complexes without a previous membership judgement, it is equally impossible to make any justification judgement, on the one hand, of legal norms and provisions and, on the other, of legal actions, without having previously decided about their membership to the legal ambit. This latter judgment is formulated in terms of the *inner values* of the respective legal ambit, as they are produced by or accepted in ORD/SYS complex, particularly but not exclusively in the form of *deontic rules.* On the other hand, this legal membership judgement can be converted by the legal system that makes it possible in another *element of legal action* (especially when it comes to legal decisions) which in turn can be converted by the membership rule of the system in a reason for the membership of decisions to the respective legal order. Thus, legal system incurs a spiral "membership-justification-membership", so that the material justifica-

tion *(righteousness)* of a legal provision is internalized by the legal system and becomes itself a part of its mechanism of action standardization.

8.4. *Legal membership and action coordination.* After the occurrence of a *legal action,* that is, an action whose membership to a legal ambit is accepted, it can be expected the performance of one or more actions, belonging as well to the same legal ambit and connected with the first one by rules of the respective legal system. *Coordination* is therefore a reflection of the *institutions* created within the respective legal system. On the other hand, coordination not only produces action-complexes that are usually perceived as a "coordinated action" (association, contract, administrative procedure...) but also action-complexes that are usually perceived as "conflicting" (e. g., crime and acts of criminal prosecution).

Communicational Theory of Law and Tax Computerization

Guilherme Lopes de Moraes[1]

Abstract: This work intends to show that computerized processes used by the Brazilian tax authorities may, and must, be analyzed in light of Communicational Theory of Law, since messages are poured in texts and their linguistic approach surely has to be the appropriate. And to test the applicability of this theory in terms of tax computerization, we opted for the Nota Fiscal Eletrônica system, real progress in Administration-taxpayer relationship, given how quickly the constitution of the tax legal fact, the facility in handling the data tax and the security at the trade relations.

Keywords: Tax Computerization, Communicational Theory of Law, Nota Fiscal Eletrônica system

1 Introduction

We have observed, in a surprising way, the communicational process of law being innovated by many information technologies, which seek to streamline this area of knowledge. They give better agility to the processes and permit that new uses can be incorporated by this digital communicational happening.

Individual and concrete standards are electronically issued and immediately become part of the legal system. Some formalities required for the constitution of some determined legal facts are being replaced by certificates and digital signatures, legal-virtual valid documents, magnetic files etc.

The Communicational Theory of Law has already proven to be an excellent tool for the positive law analysis and, knowing this reality, its scholars must use it to go deeper into the theoretical study of the legal

[1]Master and Doctorate student in Tax Law by the PUC/SP. Teacher of the Instituto Brasileiro de Estudos Tributários – IBET. Tax Auditor of SEFAZ/GO.

issues imposed and exposed by the tax computerization.

Currently the acknowledgment of some administrative acts are digital and electronic tax addresses, which is a reality in the daily tax administrations. Moreover, taxpayers and documents exist only virtually because people hire, from kilometers away, through a computer connected to the internet.

This new digital reality will require new knowledge and attitudes from the positive law interpreter. The answers should be searched from the existing theories, in a way that only the ones properly tested, proven and approved will remain applicable.

The purpose of this study is to apply the institutes of the Communicational Theory of Law in this new legal-communicational reality. For that, we will discuss the institutes thought by Gregorio Robles (organization, system and legal scope) and the communication elements from Roman Jakobson, focusing our attention on the computerized process of electronic receipts issuance and on the reflexes that its usage brought in relation to the intersubjectivity of legal relations.

2 Brief History of Electronic Receipt

One of the greatest Brazilian tax computerization advances (if not the greatest) was the Electronic Receipt system (which we will simply call NF-e), which allowed lots of advantages, among the ones we can highlight the easiness of access to the electronic receipt, the speed in the information exchange among the ones who are interested (senders, receivers, tax administrations and other public bodies) and the uncomplicated and no cost storage.

The NF-e is an electronic receipt (sent and electronically stored, with only a digital existence) established by Ajuste SINIEF 07/05 of October 05, 2005, whose legal validity is ensured by the sender digital signature. It also has to have the authorization for the usage by the tax administration from the taxpayer's State/DF, even before the establishment of the legal tax fact ("occurrence of generator fact" according to § 1º from the First Clause of the related agreement). Thus, to complete the issuance of the NF-e, the taxpayer is required to transmit the electronic file to the Farm Department (or Finance) of his jurisdiction, which will return an Usage Authorization for the NF-e and generate a protocol confirming the file receipt.

Understood as a communicational computerized act, the issu-

ance process for the NF-e will serve as a background to the issues risen on this paper, since it represents an important and current computerized resource.

3 The elements of communication by Roman Jakobson and the Electronic Receipt

It is important to remember that the positive law system consists of the set of legal rules and that have a main goal: regulate the intersubjectivity behavior. For this, it is necessary the efficiency of this system in informing the individuals about the legality or not of their possible behaviors.

After this quick introduction, we must observe that the communication process of the law fits the molds designated by Roman Jakobson[2], for which the constitutive factors of every verbal communication act externalize when

> "The SENDER sends a MESSAGE to the RECIEVER. To be effective, the message requires a CONTEXT which it referees (or 'referent' in another nomenclature something ambiguous), apprehended by the receiver, and that is either verbal or capable of verbalization; a total CODE or partially common to the sender and the receiver (or, in other words, to the message encoder and decoder), and finally a CONTACT, a physical channel and psychological connection between the sender and the receiver, which enable both of them to enter and remain in communication. "

Thus, we have six elements in total (sender, receiver, message, contact, code and context); without them is not possible the act of communication. There are two issues that are necessary to emphasize at this point of study. One of them is regarding what Roman Jakobson called contact. For him, as it can be seen in the text above, channel and psychological connection are part of the contact, being linked to it. It can be evidenced by the analysis of the phatic function of language, which is closely related to the contact. When we say "Hello, are you hearing me?" on the phone, we are testing both the channel and whether there is psychological connection with our interlocutor. Then, we can say that if the channel does not work perfectly or if the psychological connection is not

[2] JAKOBSON, Roman. Lingüística e Comunicação. São Paulo: Editora Cultrix, 1999, p. 123.

maintained, there will be no contact and consequently, communication. Some scholars see the psychological connection as another element of the communication act, but it does not seem to be the best way.

The second issue relates to the positive law context, which shows a large amplitude in the communication process. This element is present in every act of communication, however a major difficulty is to establish its limits. Communication only occurs because it is within a context, which gives to any message a referential function (may be accompanied by others).

In summary, the law communication process is established when an individual, capable of, issues a prescriptive statement, from the receivers acknowledgment (express or operational, according to art. 3 of the Introductory Law to the Civil Code), becomes part of the positive law system. This statement will pass for an interpretation process, whose product is the standard law, result from the interpreter intellectual construction. This interpretative way is also known as *path sense generator*.

Our study focus will be on the individual and concrete standard, in other words, the one that performs a linguistic clipping in the social reality to constitute a legal fact. And we will seek, at the issuance act of the NF-e, understand and analyze the presence of the six elements of the communication act mentioned before.

As *sender*, we have the person who accesses the system through his digital signature previously registered in ICP-Brazil, which in this act, represents the company that is sending the merchandise (seller). As stated previously, the Medida Provisória n. 2.200-2/2001 established the rules to secure the system and give legal validity to digital documents issued.

As the message *receiver*, we have the tax administration of the federal unit where the NF-e sender company is located, which is addressed by the excellence of the information contained in the NF-e, whose *message* is exactly its content (type of merchandise, quantity, value, receiver company, carrier etc.). This communicational act *contact* is provided by the connection between the company's computers and computerized systems of the tax authorities, which should provide security in the transmission of computerized data.

To make possible that the company can use this channel and send a NF-e, it is required the prior register of your own digital certificate. As we stressed before, the NF-e expedition is completed with the "return of receipt protocol", which gives intersubjectivity to this specific

communicational process. It can mean the confirmation of receipt message, which just became aware in its entire scope. This aspect will be important when we are analyzing the clipping linguistic made by the individual and concrete standard in the launch through approval, which, in our view, has undergone a substantial change with the NF-e acquisition.

The *code* is nothing more than the computerized language containing the information in Portuguese (numeric characters, letters, punctuation, etc.). The sixth and last element relates to the *context*, which is not limited to computational scope necessary for the NF-e expedition, but covers the set of legal standards that relate to each other, directly or indirectly, with the NF-e system. We cannot forget that this information is processed under a legal apparatus that gives to their acts and procedures the necessary legal power to release relations of the same nature.

4 Communicational Theory of Law and Tax Computerization

The communicational theories gain space among the existing ones, because they offer a greater apparatus of analysis tools, allowing a deeper approach to the context in which the digital messages transit.

At the vanguard of these theories, it is found the Communicational Theory of Law, which places this knowledge area as a great communicational process. In the words of Gregorio Robles[3]

> The communication theory conceives the law as a communication system whose pragmatic function is to organize the human contact through, basically, the actions regulation.
>
> Another way to express that the law is a system of communication obtained from the affirmation that the law is text. Unlike other texts, such as the literary or historical, the law is a regulator-organizer text.

In order to better understand this theory, we will analyze its three central figures: organization, system and legal scope. Moreover, it is important to relate these institutes with computerized processes, seeking demonstrate the application of those in the correct understand-

[3] ROBLES, Gregorio. **O Direito como Texto**: Quatro Estudos de Teoria Comunicacional do Direito (Tradução de Roberto Barbosa Alves). Barueri/SP: Editora Manole, 2005, page 01.

ing of these ones.

The legal system, and the lines drawn by Prof. Gregorio Robles, is the set of written rules (laws, decrees, treaties, tax assessments etc.) that compose the normative outline. The organization, then, consists of what "went out from the legislator's mouth" (we use the term "legislator" in a broad sense, in a way to contemplate the numerous sender's agents of prescriptive statements). In other words, the organization is what has been published in the Official Diary (or other means of publication, depending on the normative act).

The legal system is result from the system regulation by itself, since it is by nature, disordered (or not completely ordered). The legal system, then, comes from the interpreter's construction work, who, from the raw text, tries to give a consistently scientific shape to the organization, adding their values and philosophic conception.

Another contribution from this theory, perhaps the one that completes its creator logic, is the figure of the legal scope. Thus, every or any situation involving something legal, belongs to the legal scope, without necessarily belonging to the organization or system. In the words of Gregorio Robles[4]

> A legal scope includes, therefore, the legal organization and the legal system. In addition it also includes a set of communicative acts (hence translatable into specific texts) that occur or may occur in relation to those. Finally, it also includes those acts which do not generate the text by themselves in the strict sense, but they acquire their sense since the "reading" that makes ordering from the organization/system.

After this brief reflection on these Communicational Theory of Law institutes, we believe that it is possible to establish some relations between them and the elements of communication. The organization is closely related to the communicational act's sender, since the legislator, when issues a prescriptive statement, gives life to it, which means that such a statement acquires autonomy in relation to the sender. This statement contradicts the authors' thinking who seek the message meaning in the legislator's wish, the old fashioned *mens legislatoris*. In another study, we had the opportunity to position ourselves in the following

[4] ROBLES, Gregorio. Teoria del Derecho: Fundamentos de teoria comunicacional del derecho. Volumen I. 4. Ed. Madrid: Civitas, 2012. p.483.

terms[5]

> Here is registered the disagreement with the ones who defend the will of the law (*mens legis*) or the legislator's intention (*mens legislatoris*). The law, from this view, contains a message poured into language (...). On this way, the interpreter is stuck only to the legislated product, being irrelevant the issues pertaining to the legislator or to the production process, unless the text itself contains some reference.

Another interesting relation is about the legal system and the message receiver. The interpreter build the legislated message based on prescriptive statements, which does not mean that the result will be the one desired by the legislator (sender). The legal system is a result from this interpretive construction, which has the message receiver as responsible for the brute text organization.

At last, it remains to relate the legal scope to the context which the legal communication is established. We can observe that these two legal-communicational elements have a broad spectrum and it is difficult to characterize its contours. Again, the precise definition of the Law concept is crucial to delimit the boundaries of these institutes.

It is important the complementarity between the Gregorio Robles theory and Paulo de Barros Carvalho's teaching lines. Legal scope and positive law system (through the Professor Paulo's sense): what are the similarities and differences between these two legal figures? The legal standards (in the context of Paulo de Barros Carvalho's work) would be equivalent to legal acts pertaining to the legal scope?

5 Intersubjectivity

The law allows life in society and a peaceful coexistence among the individuals, because it stipulates rights and duties. According to Paulo de Barros Carvalho[6]

> The pragmatic function which convey to the law language is the

[5] MORAES, Guilherme Lopes de. Definição Conotativa nas Normas Gerais e Abstratas em Matéria Tributária. 2010. 251 f. Dissertation (Master's degree in Legal Law) – Pontifícia Universidade Católica de São Paulo, São Paulo. p. 82.

[6] CARVALHO, Paulo de Barros. Direito Tributário: Fundamentos Jurídicos da Incidência. 8. Ed. São Paulo: Saraiva, 2010, p. 13.

> prescription of conducts, because its goal is to change the behavior in the interpersonal relations, guiding them towards the values that the society intends to implant. (...) And this is the way that the law works, making itself on the intersubjectivity conducts, since the intra-subjectivity ones go out from their scope, letting behind the precepts of morality, religion etc.

Based on these arguments, we can conclude that the intersubjectivity is an indispensable feature of prescriptive statements, requiring from its receiver's receipt that it can have its own legal effects and create new legal relations. However, there are situations that the sender's acknowledgment is not necessary for the system, such as the launches by approval.

As a rule, the prescriptive statement (law, decree, ordinance, tax assessment or a sentence) should have a specific form of science by its receiver. This measure is important to the law, because is only from it that the counting time begin (decay, prescription, to come in with an action or appeal etc.). The laws, decrees and other normative acts are published in the respective gazettes, and in most cases, the individuals do not know. This is a situation that the law seeks to get around with a statement which operates as a rule over the entire system. As we have already mentioned, it is the art. 3º of the Introductory Law to the Civil Code, which states that "nobody is excused from complying the law, claiming that do not know it." Although this article does not refer to the regulatory system constitution, "it establishes its principle of functionality and existence condition, which corresponds to the law command", in the words of Clarice Von Oertzen de Araujo[7].

In terms of the NF-e issuance act, it is important to highlight the legal effect of the "science of tax administration," which occurs before the issuance. As the positive law exists to moderate the intersubjectivity conducts, it is essential to verify the exact moment that the intra-subjective conduct passes to the intersubjectivity scope or, in other words, when a situation becomes legally moderated.

To better fix the situation, we will take the act of NF-e issuance in comparison with the previous system. In general, for covering up a commercial operation, the taxpayer emitted an official tax document and only at the end of the month (or the first days of the next month) the transaction was recorded in the tax book. After the deadline, the taxpay-

[7] ARAUJO, Clarice Von Oertzen de. Semiótica do Direito. São Paulo: Quartier Latin, 2005, p. 50.

ers should deliver a magnetic file, which should contain all the operations occurred throughout the period (arrival and departure of merchandise).Thus, the tax administration began to know about these operations a long time after their happening, since the files delivery deadline was postponed to the end of the month or beginning of the next one. However, this knowledge was only indicative, since there still was the need to check the veracity of the information electronically delivered, because these ones could not match with the ones contained in the legal books (legally valid). This reflection allows us to know the discern the "knowledge" of electronic information from the "science" by itself, in terms of communication, it requires the presence of the message receiver.

This procedure contained in the NF-e legislation, except better judgment, establishes an important innovation in the field of taxation, as the passive taxpayer, in advance, "scientific" the active subject of the operation occurrence of merchandise's movement, giving intersubjectivity to communicational act.

The event is taken from the competent legal language and the legal tax fact properly constituted at the NF-e issuance moment, since the active individual's acknowledgment is instantaneous regarding to the tax relation. We have set the self-assessment according to the precise teachings from Paulo de Barros Carvalho.

While the previous system of tax documents issuance did not permit the receiver's acknowledgment (tax administration), the NF-e issuance depends on this acknowledgment, in reason to the return of the authorization protocol. The NF-e has already set up a communicational act, since it counts with the presence of the message's receiver, whose content refers to all the criteria of the rule-matrix of tax incidence (in this case, from do ICMS). This digital document is the linguistic clipping of the factual occurrence (event) of the merchandise's circulation. This is the individual and concrete standard issued by the passive subject (self-assessment), who shall, in addition to properly apply the general and abstract rules, inform the tax authorities about the occurrence of the respective fact.

There is no way to get confused about the taxpayer credit with the debits from the occurance legal tax facts, however the fiscal book linked the two realities and showed them as standards of the same nature. With the NF-e system, it is clear the separation between individual and concrete standard for the legal tax fact constitution (NF-e sender emission) and individual and concrete standard to use the right to fiscal credit (arrival time of the respective digital structure with the entrances).

6 Conclusion

The tax computerization development observed in the most part of the countries is something irreversible. The usage of information technology reached many sectors and comes with the incorporation of values to the processes, in addition it also considerable decrease the costs.

The legal scope has been innovated really fast and it contains all the production of virtual legal standards. Being familiar with the legal organization, this new scope need to be deeply understood for the good comprehension of the tax standards, result from the virtual exposure process.

One thing is right: we have complete conviction that the topic does not finish in this brief and superficial paper. We look for the analysis of the communication elements and how to relate them with the institutes from the Communicational Theory of Law, having the NF-e as example of computerized process.

Some considerations done throughout this paper should be revised, such as the case of intersubjectivity. In our feeling, this characteristic is necessary to the law, it can exist legally without the receiver's knowledge, as it occurs with the assessments by approval. It is what used to occur in the previous systems that issued fiscal documents, which receiver just knew the linguistic clipping of the event in the approval act, if they occur.

Within this scenario, we understand that the Communicational Theory of Law can help the tax computerization processes, a reality in our legal-tributary everyday. As a reflex from this technologic advancement, the positive law scholar must worry about the proving issue, since the computerized processes (such as the NF-e) call for new approach to a better understanding of the virtual process for the enunciation of legal standards and their effects over the tax legal relations.

Legal Dogmatic And Theory Of Texts

Dr. Gregorio Robles[1]

1. Framework of the subject in the Communicational Theory of Law (CTL): some basic traits.

The aim of this paper is to analyse the relationship between legal dogmatics and theory of texts from the standpoint of the Communicational Theory of Law (CTL). I am working on these notions since the eighties and have published some books[2] and articles about this topic. As a matter of course, I shall here notably simplify some aspects of this theory that are much more complex, actually.

The aim of CTL is to understand the legal phenomenon from the human communication point of view, as a linguistic phenomenon, and consequently, as a text. All that is communicated or communicable can be conveyed through language and more precisely through a system of

[1] Ordinary Professor of Philosophy of Law. Faculty of Law. Balearic Islands University

[2] Mainly, G. ROBLES, Teoría del Derecho. Fundamentos de Teoría comunicacional del Derecho ("Theory of Law. The Foundations of a Communicational Theory of Law"). First edition 1998. Fifth edition: Thomson-Reuters / Civitas. Cizur Menor (Navarra) 2013. Comunicación, Lenguaje y Derecho ("Communication, Language and Law"). Fontamara. México DF 2012. "The Idea of Justice in the Games" (in: Shing-I Liu & U. Neumann, Gerechtigkeit – Theorie und Praxis / Justice – Theory and Practice, Nomos, Baden-Baden 2011. La justicia en los Juegos ("Justice in Games"). Trotta. Madrid 2009. El Derecho como texto. Cuatro estudios de Teoría comunicacional del Derecho ("Law as Text. Four Studies of Communicational Theory of Law") (1998). Second edition, Civitas. Madrid 2006. Las Reglas del Derecho y las Reglas de los Juegos ("The Rules of Law and the Rules of Games"), Palma de Mallorca 1984; second edition UNAM, México 1988.

signs. Thus, all that is communicated or communicable can be translated into written texts. That is also true as regards customary law; although it comes from a complex of facts or actions by members of a social group, its meaning is necessarily verbalized. This is the reason why theory of texts is a substantial part of CTL, which endeavours to analyse law as a set of communication processes.

Before dealing with the subject of this paper –the relationship between legal dogmatics and theory of texts- it would be helpful to explain some basic traits of CTL: the nominalistic thesis, the concepts "legal order", "legal system" and "legal ambit" (or "framework") and their relationships, and the idea of law as text.

2. The nominalist thesis.

For CTL "law" has not a *factual* existence. "Law" is only a *nomen* whose reference is a plurality of legal ambits: those ambits which existed in the past, do exist today and probably will exist in the future.

Books of legal philosophy and legal dogmatics often begin by proposing a definition of the concept of law which is supposed to be universally valid. The fact is, however, that there is up to now no agreement on a particular definition. That is the reason why sometimes jurists are held up to ridicule for their lack of capability to settle in a definition. Here are some examples: "noch suchen die Juristen eine Definition zu ihrem Begriff des Rechts" ("still are jurists looking for a definition of their concept of law") (Kant)[3]; or "thousands of words have been written on the concept of law, without having found a definition which satisfies us all" (De Castro y Bravo)[4]. In fact, a very thick book with many pages could be written, full of law definitions proposed by the most outstanding jurists in history. This perplexing situation shows very clearly how "law" is a *word* suggesting so many things that it becomes impossible to reduce it to a shorter concept. Several notions of law have come as a consequence of diverse philosophical or ideological *conceptions*, each one drafted as the only representative of the definitive truth.

CTL does not defend a strong ontological thesis. It states that law only becomes meaningful through language and, consequently, CTL

[3] I. Kant, Kritik der reinen Vernunft, en: Gesammelte Werke, vol. IV. Ed. by W. Weischedel. Suhrkamp. Frankfurt am Main 1968, p. 625.

[4] Federico de Castro y Bravo, Compendio de Derecho Civil. Instituto de Estudios Políticos. Madrid 1968, p. 13.

leans on the use of language as departing point for its analysis.

3. Legal order, legal system, legal ambit.

It is convenient to distinguish between these three concepts: legal order, legal system and legal ambit. These three realities are cross-connected. Even so, a system only exists in highly educated societies.

A legal *order* is a global text composed by a set of partial texts with normative character and binding effects within a particular society, at a given moment.

Imagine we visit a library containing all the legislation currently in force in a state nowadays, e.g. Spain. We will have the following texts there: the Spanish constitution, the various codes and statutes, the rules of the public administration (regulations and so on), the international treaties signed by the Spanish government, judgements –specially Supreme Court's and Constitutional Court's case-law, etc. We could accede to these texts and their updates since they are data-based. It will be an ever-changing texts-complex due to constant promulgation of laws, continued normative creation by the public administration and courts' everyday decision-making. This legal database demands daily updating so we can say at the end of each day: "Here we have all current Spanish law".

This "textual totality" –the legal order- presents some problems to be previously solved, in order to make it applicable to each case. These multiplicities of texts, which are integral part of that totality, were enacted by different authorities with not always coinciding points of view. For this reason, texts usually have gaps, contradictions, ambiguities, imperfections, strange concepts (at least for the layman) and often mysterious expressions. This situation requires doctrinal work, which makes possible to solve the above-mentioned problems and build a coherent legal *system*. On the one hand, legal system reflects legal order; on the other, legal system completes legal order. A legal system can be described as the best version of a legal order, its wisest version.

Inside legal dogmatics authors frequently disagree. Their opinions often differ, as it also happens in other social sciences. Disagreement pervades political economy, sociology, anthropology and psychology. Jurists, as opposed to economists and other social scientists, have "institutionalised" a way to determine which doctrinal opinions constitute a legal system. This is what classical authors called "common

opinion" or "dominant opinion". Between legal order and legal system exists a nowadays very complex hermeneutic relationship.

Legal order and legal system represent two "textual totalities". Both are composed by partial texts, each of them acquiring its own meaning connected to the respective "textual totality". When reading any statute or judgement, we say: "these texts belong to the legal order". In the same way, when reading any treatise on commercial or criminal law, we state: "these texts belong to the legal system", or at least: "these texts aim to be a part of the legal system".

However, the idea of law as text applies also to other aspects of legal praxis. There are texts which are "juridical" but they belong neither to the legal order nor to the legal system; e.g., a legal report, a lawsuit, a criminal indictment, a legal counselling; on the other side there are texts, like bills, parliamentary debates, negotiations previous to the signature of an international treaty, and so on. All these texts and many others are a part neither of the legal order nor of the legal system. Nevertheless, they shape together the legal *ambit*. There is the Spanish legal ambit, the Brazilian legal ambit, the International legal ambit, the legal ambit of the European Union, etc. Every legal order implies a legal ambit, which is a kind of virtual framework. It is not equivalent to a physical space, although the latter is an element to be considered.

In modern legal world, the axis of each legal ambit is the duality "order-system" (ORD/SYS). However, there are ambits without system: primitive legal orders are legal ambits with no legal system, because a primitive community has no written law. In connection with this axis there are other communication processes that come or can be conveyed in texts. A legal ambit is composed of the axis ORD/SYS and the rest of related communicational processes. It also comprehends all legally meaningful actions. It can be said that a crime belongs to the legal ambit as long as some physical and psychological movements can be "read" through the axis ORD/SYS.

4. Law as text: legal texts.

From above we can infer one of the basic theses of CTL: Law *is* language, i.e. text. CTL's starting point is legal language, legal texts. The use of "is" in the phrase "law is language", does not imply a strong ontological thesis. CTL does not focus on the *essence* of law, which can be seen as the concept of law definition problem. CTL is not interested in

finding out the essence of law. Its own perspective is based on communication, that is, on the language or texts where law comes to expression.

Legal language is the specific jargon of jurists and a part of ordinary language at the same time. This double character does not show up in other professional jargons. This is because, besides being an object of study and of practical application for jurists, law is also a part of ordinary human live. Law is the formalization of social life.

There are different types of text: descriptive, narrative, emotive, persuasive, interrogative, directive, regulative texts and so on. A descriptive text shows reality as it is. A narrative text aims to tell a story, true or not: in the first case we have a historical text, in the second case, a fictional text. Emotive texts transmit feelings to the reader; that is the case of poetry. The basic function of a persuasive text is to convince other people. That is the case of political language and also of lawyers' language, especially when they appear before the bench. The objective of an interrogative text is to raise a question or a problem. Directive texts are oriented to rule human behaviour. These texts can be grouped under several types: commands, advices, petitions, threats, promises, etc. Regulative or normative texts fall within the category of *directive texts*: moral and religious norms, social norms (social patterns), rules of games and legal norms. A theory of texts deals with the study of the diverse types of texts as well as their mutual relations. For instance, a legal text may have, besides its directive function, a persuasive and an emotive aspect.

5. Legal dogmatics: its relation to medical and to theological dogmatics.

The word "dogmatics" and its derivatives (dogma, dogmatic, dogmatism and so on) appeared in Ancient Greek medical literature[5]. A medical dogma is a true proposition coming from experience obtained in a lot of similar cases, that is, by induction. Its first meaning was therefore "a proposition referred to facts", that is, a true empirical proposition. In time these words were applied in the realms of jurisprudence and theology.

Theological dogmatics takes the Holy Scriptures as its field of work. Its goal is to explain clear and systematically the meaning of the

[5] Maximilian Herberger, Dogmatik. Zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz. Ius Commune – Sonderhefte. Vittorio Klostermann. Frankfurt am Main 1981; passim.

different books of the Bible. Theological dogmatics is a hermeneutic discipline or science, because it reaches its aim through interpretation of sacred texts. These texts have been written by revelation, what makes them intangible to the interpreter, who may comment on them but not cause any change.

Jurists' approach to legal texts is similar to that of the theologian to sacred texts. Jurists may not change the legal text, they may only comment, systematize, clarify or complete it according to its proper spirit.

It is necessary to add that theologians and jurists, in their respective hermeneutic works, should not limit themselves to explain texts *in abstracto*. They are expected to make texts understandable and applicable to current circumstances. In theology, like in legal doctrine, a constant outcomes updating becomes a need.

Still, there are very relevant differences between theology and jurisprudence:

A) The object of Theology is a set of fixed texts : the Bible is a closed text: it begins with Genesis and ends with Apocalypse. In contrast, the object of jurisprudence is always an open and ever-changing text. Statutes are constantly created and modified. Court decisions increase in a daily base and are often modified.

B) In order to do Theology, theologian's faith is a must. A theologian who does not believe in God is an oxymoron: he would not be a true theologian but a literary commentator or critic, an anthropologist of religion, a restless spirit, or something similar. In contrast, lawyers do not need this internal engagement.

6. The communicational relationship between legal order and legal system.

It is easy to answer the question, what the texts of a legal order are: constitution, statutes, regulations, judgements, etc., as they appear in official bulletins. On the other side we have legal doctrine. Libraries are packed with all these contents: treatises, studies, reviews where articles about all subjects can be found. Now the question is: how can we pick from such a big repository of legal resources that one which is the relevant one in order to determine the content of the legal system in a particular moment? This is a hard task. It is necessary to adopt certain criteria that make it feasible. A legal system is built out of pieces that have their own tradition. This is why it is possible to distinguish be-

tween a system of constitutional law, civil law, criminal law, commercial law, etc. The whole legal system is the result of putting together all these partial systems or *subsystems*.

Inside each of these subsystems we face the same problem anyway: How can we know which doctrinal opinion establishes the subsystem's content? And, which opinions from what authors with *auctoritas* are the decisive ones? In each legal ambit this problem will be solved to a greater or lesser accurate way. For instance, this is what happened to Roman jurisprudence during a certain period of its history, when there was a group of jurists who had the *ius respondendi*. In current law, the common or dominant opinion among authors can be shown through the highest courts' decisions analyse. It is necessary to research each legal branch's specific doctrines applied by judges. This is a hard but perfectly possible task to undertake, as the permanent release of doctrinal books proves.

The idea of a legal system is also a kind of fiction. We wouldn't find a whole consistent legal system in a law library's shelves. Strictly speaking, a consistent legal system is unlikely to be found anywhere. This is a regulative idea whose function is to show how legal ambits work, and what are the textual relationships existing between their various elements.

Judges rarely mention authors whose doctrines they apply. They usually reproduce doctrinal arguments without quotation. They do not use legal doctrine in an abstract way, rather adjusting doctrine to the case they must decide on. The main difference between a mere doctrinal text (i.e., a text of legal dogmatics) and a judgement's text is this: a doctrinal text treats cases in a generic fashion, while in a judicial text a case is considered in itself. In legal dogmatics, cases are weighted up in general, as a hermeneutic "horizon" that allows interpreter to connect the legal text to any possible real-life cases. In a judicial decision this "horizon" is "the case". However, sentence's reasoning usually contains some general linguistic expressions, whose meaning can be applied to similar cases. Judicial reasoning, although focused on a concrete case, develops in the form of abstract expressions, in order to apply to similar cases.

An accurate research of the reasoning and of the corresponding legal doctrines appearing as judgements' content will show whose are the doctrines judges think of when justifying their decisions.

7. Functions of legal dogmatics: Legal dogmatics works by interpreting, criticizing and posing proposals.

A view on the best treatises of legal dogmatics shows immediately the functions this kind of legal texts accomplish. Their first function is the one of constructing the legal system. This only comes from an interpretation of the "legal matter" (i.e., the "brute text" of the legal order). Dogmatics, as a hermeneutic discipline, aims primarily to build a system able to reflect a legal order. This function undoubtedly helps legal practice. How could lawyers give a piece of advice to clients, produce documents and gain judges's confidence? Obviously they read first the relevant statutes and case-law, but that will not be enough; they need to deepen authors´ doctrine books. Otherwise they will undergo a scant and defective legal knowledge.

Presentation of the legal system is just one of the functions legal dogmatics carries out. It is also supposed to provide for a scientific critique of valid law and consequently to set out new proposals for legislative improvement. Besides the basic function of legal dogmatics (constructing the system through interpretation and systematization), legal dogmatics accomplishes two supplementary functions: first, as critique of legislation currently in force, and second, as proposal for law enhancement.

Legal dogmatics cannot change legal order texts by itself; this is a law-makers task. But legal dogmatics not only presents a reasonable interpretation of the existing law. Starting by the establishment of valid law, legal dogmatics is in the best condition to open debate on current legal institutions' functionality and their regulation. In order to change them, comparative research and sociological knowledge will be helpful too.

8. Inter-textual relationship between legal order and legal system.

As we know, legal system reflects, completes and perfects legal order at the same time. Not only it explains what is written in legal order texts, but also defines legal-dogmatic concepts, solves interpretive doubts, clarifies ambiguities, dissolves contradictions and overlaps, makes implicit rules explicit, and presents the outcome of all these operations in systematically organized texts.

As already said, legal system becomes the best version of legal order. But there is also a feedback phenomenon. Knowledge produced into the system returns to the legal order under the form of new statutes and/or more recent case-law. System is therefore a new starting point to improve and transform legal order's text. The elaborated text of the system becomes the basis of future legal order texts (the future "brute text"). This continuous feedback evolves and generates a "hermeneutic spiral", where new regulatory texts are born. The duality ORD/SYS shows itself as a very dynamic dialogical textual reality.

9. Legal dogmatics and sociology of law[6].

Legal dogmatics can be cultivated either in an open or in a closed way. It is frequently stated that so-called "conceptual jurisprudence" (*Begriffsjurisprudenz*) stood out as an extremely formalistic method, oriented only to legal concepts discovery. From these legal concepts it could be inferred rules of law through deductive reasoning. Instead of this "closed" dogmatics, the "second Jhering"[7] proposed a new model: the "interests jurisprudence" (*Interessenjurisprudenz*), that is, a new way of legal science: a science opened to research of the diverse (individual and collective) interests that can be found in every society. These two positions caused a debate on which kind of legal dogmatics is to be developed.

Pure Theory of Law was on the first group's top: its very name conveys how legal science needs to be purified of all extralegal (i.e., empirical and ideological) elements[8]. It is necessary to underline, however, that pure theory of law is only –its only aim is to be- a formal theory of law, that is, a theory of the formal concepts and structures of legal phenomenon. This is the reason why Pure Theory of Law cannot be considered as a theory of legal dogmatics.

Secondly, we find the idea of substituting sociology of law for legal dogmatics. This is the case of founder of legal sociology Eugen Ehrlich's writings[9]. Ehrlich understands jurisprudence not as real science, but as "art" (*Kunst*). According to his view, a real science should

[6] G. Robles, Sociología del Derecho. 2nd ed. Civitas. Madrid 1997.

[7] Specially R. Jhering, Der Zweck im Recht, two volumes:1877, 1884.

[8] H. Kelsen, Teoría pura del Derecho (1934). Trad. by G. Robles and Félix F. Sánchez. Ed. Trotta. Madrid 2011.

[9] E. Ehrlich, Grundlegung der Soziologie des Rechts. Duncker & Humblot. Berlin 1913.

research facts. Legal dogmatics does not research facts, being instead a text-interpreting discipline. Theodor Geiger holds a similar position: his aim was to replace the general theory of law with a legal sociology[10].

I think that legal dogmatics can –and ought to- be a discipline open to empirical knowledge, that is: open to sociology, psychology, anthropology, economics, and all the factual sciences in general; in sum, it must be open to the so called social sciences. This does not mean, however, that legal dogmatics should give up its traditional style, which is interpretive, conceptualistic and systematic. This means it may incorporate extra-legal knowledge. In this fashion the above-mentioned social disciplines are to be considered as auxiliary, never as a substitute for legal dogmatics [11].

[10] Th. Geiger, Vorstudien zu einer Soziologie des Rechts (1947). 4th ed. by M. Rehbinder. Duncker & Humblot. Berlin 1987.

[11] G. Robles, Ley y Derecho vivo. Método jurídico y Sociología del Derecho en Eugen Ehrlich. Centro de Estudios Políticos y Constitucionales. Madrid 2002. On Geiger, G. Robles, "Reine Rechtssoziologie" versus "Reine Rechtslehre". Zur Effektivität und Geltung des Rechts. In: S. Bachmann, Theodor Geiger. Soziologie in einer Zeit „zwischen Pathos und Nüchternheit" (Beiträge zu Leben und Werk). Duncker & Humblot, Berlin 1995, p. 239-252.

The Communicational Theory of Law (CTL) and the Language of Jurists

Aurelio de Prada García[1]

Abstract: Taking into account that the Communicational Theory of Law, defended by Prof. Robles, is presented as an analysis of the language of jurists, we will focus on the position of this theory within the secular dispute about the nature of legal language. Should it be a specialized language or a common language, the language of common people, so to speak? In order to achieve that goal, we will carefully analyse the concept of jurist, and therefore, the concept of Law, which the Communicational Theory of Law defends to draw the appropriate conclusions.

Keywords: Communicational Theory of Law (CTL), language, jurist and citizen.

"Legal language is the language of jurists."

"Leges ab omnibus intellegi debent."

1. Introduction.

One of the most interesting contributions to Law Theory in the last years has been the proposal of a "Communicational Theory of Law" by Spanish Prof. G. Robles, who has been drawing its guidelines with remarkable effort and rigour both in successive publications[2] and his

[1] URJC Madrid

[2] Epistemología y Derecho, Pirámide. Madrid 1982, Las reglas del Derecho y las reglas de los juegos, Palma de Mallorca, 1984. Introducción a la Teoría del Derecho, Debate, Barcelona 1988, El Derecho como texto. Cuatro estudios de Teoría comunicacional del Derecho. Madrid, Thompson 2006, Teoría del Derecho. Fundamentos de Teoría Comunicacional del Derecho. Civitas, Madrid 1998.

inaugural address to the Spanish Royal Academy of Ethics and Political Sciences, titled *Comunicación, Lenguaje y Derecho. Algunas ideas básicas de la Teoría comunicacional del Derecho*[3].

Within those guidelines, undoubtedly the consideration of Law as language - "Law is language"-, as stated in his own words[4], stands out. However, this does not imply "the defense of a strong ontological thesis, but only that the way Law appears, in any of its modalities, is precisely language[5]. This remark does not end here, because the language that Law is, - the legal/ juridical language - becomes very special, according to the author, since "even though it belongs to the common language, to the language of the common people, it is at the same time the specialized language of a professional class, that of jurists" [6].

Moreover, - and this would complete this guideline-, jurists play a decisive part in the formation of legal language given that, according to our author, "as regards our culture, the words of the Law are mostly creatures of that professional class" so that " … it is perfectly right to state that legal language is the language of jurists"[7].

By making this statement –essential to his Communicational Theory of Law (CTL) conceived therefore as an "analysis of the language of jurists" [8] - Prof. Robles takes sides in a central dispute whose origins can be situated at the very beginning of Law, as it is known in Western culture. It is the dispute dealing with the features of legal language: Should it be a specialized language or a common language, the language of common people, so to speak, or should we adopt an in-between position?

Having said this, with the inclusion of one of the guidelines of the CTL in the dispute about legal language, it seems convenient to analyse this thesis in greater detail, within this dispute. Therefore, we will firstly sketch a short synopsis of that dispute; then, we will briefly expose the main points of the CTL. Finally, we will draw the appropriate conclusions.

---

[3] ROBLES, G.: Comunicación, Lenguaje y Derecho. Algunas ideas básicas de la Teoría comunicacional del Derecho. Discurso de Recepción como Académico de Número. Real Academia de Ciencias Morales y Políticas. Madrid 2009

[4] ROBLES, G.: Comunicación, Lenguaje y Derecho, cit. p. 30.

[5] ROBLES, G.: Comunicación, Lenguaje y Derecho, cit. p. 31.

[6] ROBLES, G.: Comunicación, Lenguaje y Derecho, cit. p. 32.

[7] ROBLES, G.: Comunicación, Lenguaje y Derecho, cit. pág. p. 33.

[8] ROBLES, G.: Introducción a la Teoría del Derecho. Madrid, Debate, 6ª ed. p. 34.

2. A brief historical approach.

Of course, there is apparently no discussion as to when the dispute about legal language arose: at the very origins of Law, as known in Western culture. Not only is it agreed that the profession of jurists - related to the priestly function at the beginning – is one of the most ancient ones, as pointed out by Prof. Robles[9], but also, that Law itself appears with the distinction between jurists and laymen, between those who make use of a specialized language and those who do not[10].

In fact, at the very beginning, laws were considered to be revelations of God's will, or quasi-prayers that should be recited literally and at the right moment to be effective, to such an extent that any change made them completely useless[11]. The knowledge of these sacred formulas, of these prayers, was not general but monopolized, so to speak, by "pontifices" recruited amongst the most important patricians already at the very beginning of Roman law. Thus, the first jurists were priests, people with a special authority, with a specialised language, the juridical one that, therefore, appears as a "jurists' language" which is not accessible to common people.

However, as it is common knowledge, this conception of Law changes with the Twelve Tables in the 5th century BC. Law is no longer considered as unchangeable and divine, but as a human creation. Formerly conceived as a part of religion and, therefore as a property of the sacred families, it turned into a common heritage of all citizens[12]..

As a matter of fact, the juridical language, used by the "jurists-priests" at the very beginning, became part of "common language", as stated by our author: A language all people could "read and speak", but not in full, because the calendar of the judicial actions and the technical rules of legal procedure, i.e., the forms containing the words which had to be spoken in court to begin a legal action, were kept secret by the patricians and the "pontiffs" so that they could maintain their advantage over the plebeians.

These forms were still a part of a specialised language, the jurists' language, which was not accessible to laymen until around 300 B.C.,

[9] ROBLES, G.: Comunicación, Lenguaje y Derecho, cit. p. 33.
[10] ROBLES, G.: Comunicación, Lenguaje y Derecho, cit. p. 33.
[11] FUSTEL DE COULANGES, N. M.: La Ciudad Antigua. Barcelona, Iberia, 1979, p. 232.
[12] FUSTEL DE COULANGES, N. M.: La Ciudad Antigua. cit. p. 392.

when Cneus Flavius made them public, as shown in the Digest[13]. A fact that, understandably, the priests-jurists did not appreciate at all[14].

Leaving this resistance aside, even though it was strong, the publication of the calendar and the technical rules did not involve a substantial change, as the new jurists were still patricians, and kept making use of a technical, specialised language when interpreting the *ius honorarium.* This made those who were even able to read and write feel illiterate, to such an extent that they needed a notary (*notarius*) to draw up a contract or any other public document…[15]

In the classical period of Roman law, the function of jurists as producers and holders of juridical language became stronger because the answers of those jurists authorized by the Emperors (*ius respondendi ex auctoritate principis)* were the main source of Law from the first century B.C. to the middle of the 3rd century. These answers were binding for judges and were just recited in trials by other jurists. This is another change in the conception of Law and, once more, the constitution of a hierarchy of priests-jurists, as in Ancient Rome. It is not surprising that Ulpian then defined jurisprudence as the knowledge of divine and human things *(divinarum atque humanarum rerum notitia),* and jurists as priests of justice, as appears in the Digest[16].

The actual change in the juridical language, conceived once again as a part of "common language", takes place with the fall of the Western Roman Empire and the absence of any centralized power. These circumstances, along with the influence of the so called barbarian peoples, gave birth, during the upper Middle Ages, to a model of Law excluding both a specialized language and the role of jurists. Law emerged from the community through a spontaneous process –by means of custom- and became immediately accessible to everyone, as it was present in the commonly used language[17].

But, as it is well known, the disappearance of the jurist, as shaped by the Roman model and the transformation of the juridical language into a part of the common language was not definitive for Western cul-

[13] DIGEST 1, 2,9

[14] Vid. GARCÍA GARRIDO, M. J., y EUGENIO, F.: Estudios de Derecho y Formación de Juristas. Madrid, Dykinson, 1988, p. 38.

[15] VEYNE, P.: "El imperio romano" in Historia de la vida privada, Vol.1, Madrid, Taurus, 1992, p. 32.

[16] Digest, 1,1,10,2 y 1,1,1,1.

[17] GARCÍA PELAYO, M.: La Idea Medieval del Derecho in Obras Completas, Vol. II, Madrid, Centro de Estudios Constitucionales, 1991, pp. 1087.

ture. The discovery of the Digest in the 11th century and the renovation of Roman law meant the creation of the jurist profession, as it is presently known. The professionalization of an activity that, as just mentioned, did not require any special knowledge or dedication; from then on, demanded "learned/lawyers", as Law was not just technically complex but also written in Latin, a learned language. In this context, the juridical language became once again a specialized language for jurists, unavailable to laymen.

This new profession demanded social recognition at once, based upon Ulpian's approach, which defined jurists as priests of justice and was subscribed by the most important jurists of the 12th century, such as Azo. According to him, doctors in Law should be included among the highest dignities, "as they played the role of priests"[18] . A new type of social status gave birth to *the militia legum,* which joined the two previous ones, the *militia armata* of the knights and the *militia inermis* or *celestis* of the priests. This new militia spread very soon to the field of the arts subjects *(militia litterata* or *doctrinale* or *doctoralis*).

Endowed with privileges, as appears in the "Partidas"[19] , this new nobility became very soon hereditary. One of its most impressive examples is Charles Louis de Secondat, the father of the theory of the separation of Powers, along with John Locke; his uncle actually bequeathed him the office of "Président à Mortier" in the Bordeaux Parliament, provided he adopted his surname, Montesquieu, with which he went down in history[20].

But logically enough, this new transformation of the juridical language into a jurists' language, not accessible to laymen, generated early reactions and so, the detachment of juridical language from the common language, the ever-growing complexity of the laws and the return to formalism, which involved the renovation of Roman Law, became a common target of criticism in the 16th and 17th century literature:

> "King Ferdinand, sending colonies to the Indies, wisely provided that they should not carry along with them any students of jurisprudence, for fear lest suits should get footing in that new world, as being a science in its own nature, breeder of altercation and di-

[18] Cfr. KANTOROWICZ, E. H.: Los dos cuerpos del rey. Un estudio de teología política medieval, Madrid, Alianza, 1985, p. 126.

[19] Cfr. GARCÍA PELAYO, M.: La idea medieval... cit. p. 1097 and 1098.

[20] TRUYOL y SERRA, A.: Historia de la Filosofía del Derecho y del Estado. Vol. II, Madrid, Revista de Occidente, 1975, p. 218 and 219.

vision; judging with Plato, "that lawyers and physicians are bad institutions of a country."

Whence does it come to pass that our common language, so easy for all other uses, becomes obscure and unintelligible in wills and contracts? and that he who so clearly expresses himself in whatever else he speaks or writes, cannot find in these any way of declaring himself that does not fall into doubt and contradiction? if it be not that the princes of that art, applying themselves with a peculiar attention to cull out portentous words and to contrive artificial sentences, have so weighed every syllable, and so thoroughly sifted every sort of quirking connection that they are now confounded and entangled in the infinity of figures and minute divisions, and can no more fall within any rule or prescription, nor any certain intelligence

"Confusum est, quidquid usque in pulverem sectum est."

As you see children trying to bring a mass of quicksilver to a certain number of parts, the more they press and work it and endeavour to reduce it to their own will, the more they irritate the liberty of this generous metal; it evades their endeavour and sprinkles itself into so many separate bodies as frustrate all reckoning; so is it here, for in subdividing these subtilities we teach men to increase their doubts; they put us into a way of extending and diversifying difficulties, and lengthen and disperse them. In sowing and retailing questions they make the world fructify and increase in uncertainties and disputes, as the earth is made fertile by being crumbled and dug deep.

"Difficultatem facit doctrina."

We doubted of Ulpian, and are still now more perplexed with Bartolus and Baldus. We should efface the trace of this innumerable diversity of opinions; not adorn ourselves with it, and fill posterity with crotchets." [21]

Moreover, the desire of a world without jurists and working with very few, easy to understand laws became explicit at that very moment, as can be seen in one of the most famous descriptions of the Utopians' customs:

[21] MONTAIGNE: Of Experience, in Essays, Vol. III, XIII,. Project Gutenberg's The Essays of Montaigne, Complete, by Michel de Montaigne.

> *'They have but few laws, and such is their constitution that they need not many. They very much condemn other nations whose laws, together with the commentaries on them, swell up to so many volumes; for they think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk, and so dark as not to be read and understood by every one of the subjects.*
>
> *'They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters and to wrest the laws, and, therefore, they think it is much better that every man should plead his own cause, and trust it to the judge, as in other places the client trusts it to a counsellor; by this means they both cut off many delays and find out truth more certainly; for after the parties have laid open the merits of the cause, without those artifices which lawyers are apt to suggest, the judge examines the whole matter, and supports the simplicity of such well-meaning persons, whom otherwise crafty men would be sure to run down; and thus they avoid those evils which appear very remarkably among all those nations that labor under a vast load of laws. Every one of them is skilled in their law; for, as it is a very short study, so the plainest meaning of which words are capable is always the sense of their laws; and they argue thus: all laws are promulgated for this end, that every man may know his duty; and, therefore, the plainest and most obvious sense of the words is that which ought to be put upon them, since a more refined exposition cannot be easily comprehended, and would only serve to make the laws become useless to the greater part of mankind, and especially to those who need most the direction of them; for it is all one not to make a law at all or to couch it in such terms that, without a quick apprehension and much study, a man cannot find out the true meaning of it, since the generality of mankind are both so dull, and so much employed in their several trades, that they have neither the leisure nor the capacity requisite for such an inquiry*." [22]

This "utopic" ideal, as never so clearly expressed, was accepted in one way or another by the French Revolution in 1793 with the closing of the Law faculties, the places where jurists were formed[23]. A fact proving to be perfectly coherent with the denial of the old incomprehensible jurists' language by the revolutionaries and the clear desire the new laws to be made in an intelligible way, as Mirabeau stated[24]. All this was

[22] MORE; TH. Utopia, Planet PDF, http://www.planetpdf.com.p. 134 y 135.

[23] KOSCHAKER, P.: Europa y el Derecho Romano, Madrid, Ed. Revista de Derecho Privado, 1955, p. 291.

[24] GARCIA DE ENTERRIA, E.: La lengua de los derechos. La formación del Derecho

in fact present in the two first projects of the *Code Civil* and in the *Declaration des Droits*, aimed to be clear and easy to understand[25].

But this intention did not last much, as it is well known, because the third Project of Code shows a return to Jurisprudence and Roman law, whereas the fourth Project, enforced as a law later on , left aside the idea of an easy and understandable *Code* and came back to the former priest-jurist conception, and therefore to that of juridical language as the jurists' language, as can be seen in the famous *Discours Préliminaire* by Portalis[26].

As a matter of fact, the Law faculties, "*les séminaires de la magistrature*", so to speak, were reestablished in 1804, the same year when the publication of the *Code Napoleon* took place[27]. This fact seems to be definitive because, - as far as we know and leaving aside sporadic revolts, such as the famous "*Pas d'avocats*" during the Paris Commune [28] or the revolt against formalism with the Free Law Movement-, there have not been any other petitions intended to close Law faculties. In brief, we have to conclude that the dispute dealing with the features of legal language has come to an end, at least up to the present, with the triumph of the conception of juridical language as jurists' language.

3. The communicational theory of Law TCL and the language of the jurists.

After this brief historical approach to the dispute about the features of legal language we have just developed, and with the help of the conclusion we have drawn, it is time to analyze the main thesis of the TCL and to relate them to that dispute. This is something we have started before. As mentioned above one of the guidelines of the TCL defended by Prof. Robles is the consideration of Law as a language.

In relation to this, you will remember the following steps in that guideline of the TCL. The first one was precisely the consideration of Law as language. The second was to point out the specialty of that lan-

---

Público europeo tras la Revolución Francesa. Alianza Universidad, Madrid 1994, p. 35

[25] GARCIA DE ENTERRIA, E.: *La lengua de los derechos* cit. p. 31

[26] PORTALIS, J. E. M.: Discurso preliminar del proyecto de código civil francés, Valparaíso, Edeval, 1978, p. 38 and 39.

[27] KOSCHAKER, P.: Europa y el Derecho Romano, cit. p. 291.

[28] CAPELLA, J.R.: "Sobre la extinción del derecho y la supresión de los juristas" en Materiales para la crítica de la Filosofía del Estado. Fontanela, Barcelona 1976, p. 66.

guage as "even though it belongs to common language, to laymen's language, it is at the same time the specialized language of a professional class, that of jurists". Finally the author qualifies this specialty of legal language to such an extent that he makes it even contradictory by saying "as regards our culture, the words of Law are mostly creatures of that professional class" so that " … it is perfectly right to state that legal language is the jurists´ language".

Given the above, we have to conclude that the TCL supports the main conclusion of the dispute regarding the features of legal language: legal language is the language of jurists, but Prof. Robles does it in a quasi-contradictory way by saying that said language is created by the jurists and that at the same time it belongs to common language; in other words to the language of laymen. So we have to analyze whether this statement is contradictory or not taking into account the author's own words.

A first argument in order to conclude that the TCL is not contradictory at this point would be to consider those statements in which the author states that legal language is used by citizens or by the common people in daily life. This is something the author states very often but it cannot be considered as a strong, definitive argument, as it does not take into account the very fact that, according to prof. Robles, legal language is created by jurists and so, strictly speaking, it does not belong to common language, even though common people incorporate that language to their every day life.

A second argument would be to consider that, according to prof. Robles, jurists and citizens are not as different as one could think at first glance. Actually in Robles' opinion common people become jurists when drawing up a contract or any other public document and so forth. Once again we cannot consider this argument as a definitive. Even though citizens become jurists when acting in a legal way, they are not jurists strictly speaking, i.e, creators of legal language to quote our author once again.

Moreover, Prof. Robles makes a distinction among jurists, *strictu sensu*, in which citizens are not included. In fact he speaks about three different kinds of jurists. First the creators, so to speak, the ones that create the legal texts that constitute Law, the legal order; then, the appliers, those that apply the legal texts to the concrete cases; finally, the theorists, the ones that do not create legal texts and do not apply those texts to concrete cases, but think about the laws, about the legal system and try to expose it under the systematic form of a "hermeneutic science".

Due to the above, we would have to conclude that the TCL is contradictory at this point because the statement that legal language is created by jurists is not consistent with the statement that it belongs to laymen's language. But this conclusion is really too hasty since we are not taking into account the main function that Prof. Robles attributes to the third kind of jurists, the theorists which is to make the juridical practice easier by building a well-made legal language.

Not many words are needed to explain that with this statement the TCL comes very close to the second statement we have quoted at the very beginning of these pages; *Leges ab omnibus intellegi debent* "Laws must be understood by everyone". And really if the theorist- jurists have as their main function to make the juridical practice easier they must make legal language as close as possible to common language. They must build a legal language understandable to laymen, even though Prof. Robles, as far as we know, has not developed his theory to this end.

4.-To sum up: A well-made legal language.

After all we have seen up to this point, we can conclude that TCL, one of the most interesting contributions to Law Theory in the last few years, is not contradictory in regards to the consideration of legal language as both jurists' language and common people's language. Furthermore, one should take into account that TCL is not only descriptive but prescriptive. It aims at developing a well-made legal language, that is to say, to make all the communicative processes of Law easier and, therefore, to make them perfectly understandable to laymen.

Things being so the TCL would be placed in a very peculiar and original position in relation to the dispute about the features of legal language. In fact it would be in an in-between position: legal language is both jurists' language and common people's language. We really hope Prof. Robles develops this point in his future works.

Intertextuality among legal subsystems: the Brazilian tax experience on "revenue", "tax" and "inputs"

Cecilia Priscila de Souza
Fernando Gomes Favacho[1]

Abstract: This paper deals with law "as a text" and, therefore, impossible to be detached from its context. It includes the definition of legal concepts, and how to establish criteria for the use of such concepts when conflicts occur among them. It presents the study of "intertextuality" as a facilitator of legal interpretation, establishing the textual and contextual boundaries of normative discourse in conflict resolution. Given these assumptions, we apply the study of intertextuality in known controversies on the definition of three concepts in Brazilian tax law, namely, "revenue", "tax" and "inputs". This text is a study on the dialogue among different subsystems of the same legal system. To answer "what are inputs", for an example, tax attorneys who aim to use tax credits would say "if water is used in the making of a product, is undoubtedly an input". Some fiscal agents would say "inputs are only raw materials, intermediate products and packaging materials, as the legal tax regulation says"– and, with this thought, water could not be used as tax credit. This simple question reflects not only the aporia of a concept definition, but also the different values of society and its contingencies. It is imperative to discuss other issues, such as: Input to a tax shall have the same concept definition of another one? Who defines the concept of "input": the doctrine? The laws? The jurisprudence? A technical report? The legal concept may change according to social changes? Can it be detached from reality? The (non)technical writing of a law, and its longevity in the crossing of so many different legal systems could have changed the definition of the previous concept? These issues transcend the limits of Tax Law and reach the field of philosophy of language, with discussions on how they form communication

[1] The authors hold a Master's Degree in State Law by the Pontifical Catholic University of São Paulo (PUC-SP) and are professors at the Brazilian Institute of Tax Studies (Instituto Brasileiro de Estudos Tributários).

processes and its failures (either because the participants do not share the same concepts - and to what extent these differences can be accepted in this language game, as taught by Robles).In this sense, in order to solve communicational conflicts, wondering if there is a way to define these concepts as to eliminate the issues related to vagueness and ambiguity, we begin to look into formal logic, but always considering empirical problems: as a process of formalization of knowledge, as taught by Barros Carvalho.

Keywords: Legal Intertextuality. Definition of Concepts.Legal TaxConcepts.

1. Introduction

What is input? Those who aim to use the credit coming from non-cumulative PIS and COFINS would say that the energy used in the making of a product is undoubtedly an input. Tax experts[2]would say that inputs are only the raw materials, intermediate product and packaging materials, as the Tax on Manufactured Products Regulation says. And, with this thought, energy costs could not be used to reduce the amount due as social security contributions. In a simple quest to answer the aporia of a concept definition, the society and its contingencies are reflected: its multi-value aspect.

We shall continue the quest: what is an input? What does the law (in the broad sense) say, or what is it to economy? Input to PIS/COFINS must have the same concept definition as to IPI? In law, who defines the concept of input? The doctrine? The laws? The jurisprudence? A technical report? The legal concept may change according to social changes? Can it be detached from reality? The (non)technical writing and its longevity in the crossing of so many different legal systems could have changed the definition of the previous concept? Is there a presupposed concept?

The scope of a term among users of legal communication and its interpretation in this field of knowledge are issues that transcend the limits of Tax Law and reach the field of Philosophy of Language, with discussions involving the formation of communication processes and its failures (considering that the participants do not share the same concepts and examining the extent to which these differences can be ac-

[2] This is what is stated in the Normative Instructions of the Federal Revenue Office 247/02 (amended by 358/03) and 404/04.

cepted). In this plan, we wonder if there is a way to define the concepts in order to eliminate the issues related to vagueness and ambiguity we begin to look into Formal Logic, but already considering empirical problems: as in a process of formalization and deformalization of knowledge to pursue the ideal for rigor and univocity.

With that, in the introduction we convey the first assumption/conclusion, namely: in order to solve questions involving communication noises, syntactic rules and semantic issues, we can use language technologies to approach the object of study.

This paper presents the study of intertextuality as a facilitator of legal interpretation, establishing the textual and contextual limitations of normative discourse in conflict resolution, *in casu*, in relation to tax activities.

At the beginning, we will deal with law as a text and, therefore, impossible to be detached from its context. We will also present intertextuality as an informant principle of interpretation, addressing the need for systemic interpretation before the partial. Later we will also address taxonomy and the definition of legal tax concepts, establishing the criteria for the use of the concepts when conflicts occur among definition standards. We will also explain the role of decisions and the relationship of concepts with the authority that defines them (doctrine, law and jurisprudence). Given such assumptions, we will apply the study of intertextuality in known controversies about the definition of three legal tax concepts, namely, revenue, tax and input. On a line, this paper is a study on the dialogue among different subsystems of the same legal system[3].

To address these issues, we will use the Communicational Theory of Law by Gregorio Robles, which alongside the Logical-Semantic Constructivism advocated by Lourival Vilanova and developed especially by Paulo de Barros Carvalho, presents an analytical-hermeneutic method, dealing with law as a text(limited to its context) and stressing the activity of creation of the world by the jurist, instead of giving a mere description.

[3]The work ahead is derived from the conversation between two texts produced in the academic sphere that, even with different objects, came from the same assumptions and methods: the Master's thesis of the Pontifical Catholic University of São Paulo:Definição do Conceito de Tributo(in a free translation: "Definition of the Concept of Tax"), by Fernando Gomes Favacho, and Intertextualidade no Direito Tributário(in a free translation: "Intertextuality in Tax Law"), by Cecilia Priscila de Souza.

1. Definition of legal concepts

1.1. The truth is not absolute

The concept of truth as a correspondence between knowledge and a thing goes back to ancient Greek thinkers. They believed that there was a "universal truth", in contrast to an apparent truth, an illusion. As they used to believe in an ideal being that was independent from the user, absolute truth was a redundancy to the paradigms at the time. For a sentence to be true, it should correspond to the truth. "True is the speech that says things as they are, false is the one that says things as they are not", argued Plato[4].

With the advent of the philosophy of language, we see a serious shift in thinking[5]. The truth becomes consensual, as there must be a prior consensus: any statement will only be true according to the rules of a system. To paraphrase Plato, in this new intellectual context, true is the speech that says things as they were agreed on; false is one that says things as they were not agreed on. "Strong ", unique and uncontroverted truths have no need for consensus. Determining the scope of any term depends on an agreement among the members of the community.

In the theory of knowledge, to say that the truth is absolute is to not admit the different existing systems, the different points of reference. The truth changes depending on the context, so it is only possible to think of something as "absolute ", in the sense of being timeless and non-territorial, if we adopt the philosophy of being, of Greek tradition. This is the vision of Flusser, when he says that language is reality[6] (footnote-work and page). As there are multiple languages, reality is relative – relative to each language, or relative according to each linguistic system. There is not a single reality for different languages, and there is not a single legal reality for the different legal contexts. Terms such as 'revenue ' or 'tax' may mean to Tax Law something that is very different from what they mean to Civil Law or Financial Law. Therefore, in order to expect a consensus on a particular concept, we first must establish the context to which it applies, the reality that we are talking about.

It is importantly to mention: in the case of law, the truth is an in-

[4]Nicola Abbagnano, Dicionário de Filosofia, p. 1183.

[5]Dardo Scavino, La filosofia actual: pensar sin certezas, p. 90.

[6]Cf. VilémFlusser, Língua e realidade, passim.

applicable value. The decisions of the Superior Courts, when they come from "what the law says", deal with the validity of the interpretations of the terms, and never the truth. To say that something is true or false is the role of the Legal Science, which describes its object (law).

1.2. Our reality is made out of language

In order to know we need to represent. To represent, we need language[7]. This representation through language shows that we do not exactly describe reality but we constitute it[8]: what is the raw data for us, other than what we know, that is, its representation, the linguistic cosmos? Hence, Vilém Flusser "language is the reality", because all we know is a representation made by language. Therefore, there is a need to understand language[9], which is our way to constitute (and de-constitute) the world.

The reality of law is like that. It only exists through language, but with a specific difference: legal language, competent under the rules of the normative system. There is no law outside of legal language, or, in the words of Paulo de Barros Carvalho[10], the legal reality

> (...)is constructed by the language of positive law, taken here in its broadest meaning, that is, the set of prescriptive statements issued by Legislative Power, the Judiciary, the Administrative Power, and also by the private sector, the latter, indeed, the most fruitful and numerous, albeit with lower hierarchy than the other sources. Such statements articulated in the implicational form of normative structures, and organized in the superior system setting; they, again, form, create and propagate the legal reality.

Nothing exists without language, nor is there law without legal language. According to Clarice von Oertzen de Araújo[11], "language is included among the institutions resulting from life in society. Law is just

---

[7] Ibidem.

[8] Ibidem, p. 202.

[9] We clarify that language is the sum of language (set of signs) with speech (use and updateof the language). Language is the code,sign system that, by convention, has the same meaning for both the speaker and the recipient. Ferdinand de Saussure, Curso de lingüística general, p. 45-56.

[10] Direito tributário, linguagem e método, p. 172-173.

[11] Clarice von Oertzen de Araújo, Semiótica do direito, p. 19.

one of the institutional social ways that is manifested through language, which enables and provides its existence".

To interpret is to build meaning from the contact with the object. It is to assign value. Language, as seen, is unremovable, since it participates in the constitution of the object: we build meaning through the use of language.

1.3. The difficulty in determining concepts

Natural language is marked by semantic problems caught in the concepts, either because they can represent multiple objects or because they not have a delimited meaning.

Luis Alberto Warat[12] discusses these two semantic problems: ambiguity and vagueness, present in the meaning we create when we get in touch with any linguistic sign. Such problems are what we call communication noise, and can confuse and hinder communication.

Ambiguity occurs when we do not know which of two or more meanings that we can build from the text is the best one to use in a given context. Vagueness, on the other hand, occurs due to an absence of parameters (conventions) for its denotation. There is ambiguity when we read the word "tax" because it can be connected to different meanings. Tax as a tax relationship? As a financial relationship? As money? And there is vagueness when using the word "tax", as it may denote various kinds of exactions. What tax? Duty? Fee? Contribution for improvement?

In Portuguese, as in all other non-formal languages, there is not a single word with only one meaning, particularly when used colloquially. Nor are there, without prior agreement, two or more words that mean exactly the same thing. We will just be able to find perfect synonyms in a totally artificial language, one that does not suffer the influence of pragmatic contexts: this is the case of formal logic.

Such communication noises always remain in informal languages, but may be decreased by a larger set of words, each of which adds up usage criteria and restrict the possibility of elements to be included. With the exception of Logic, there is no certainty of light and twilight in language.

Morris R. Cohen warns about extremely vague concepts, which "swallow their negatives", such as reality, experience, existence and the

[12]Luis Alberto Warat, O Direito e sua Linguagem, p. 76-79.

universe[13]. Examples in positive law are principles such as "justice" and "legalcertainty", values that are characteristically indefinable.

The uncertainty, thus, proceeds to give greater freedom to the interpretation of the user, revealing to be more permeable to the influence of ideologies. To Cohen, the efficiency of law depends on concepts that are more clearly defined, but that bring the curse of inappropriate and dangerous legalism[14]. Kaufmann thinks likewise: The indeterminate legal concepts leave a margin of free appreciation and offer the possibility of taking into account the particularities of the concrete case, but there is a risk of arbitrariness and legal uncertainty[15].

The possibility to give significance to terms, which could be obvious - and perhaps necessary for legal certainty - is inseparable from values. Therefore, we see a huge problem: the definition of concepts depends on indefinable entities. And, so, the problems persist, seeking points of reference to guide our interpretation.

In addition, there is the difficulty resulting from differences in definitions due to form and use: some for agreements on characteristics (the clock must have two to three pointers), and some for agreements on functions (the clock must show the time).

The major discussions on tax matters brought to the Superior Courts deal with disputes arising from the interpretation of the concepts used to create and, especially, to collect taxes. Such demands occur due to the different definitions that are assigned to concepts in the various branches of law, such as happens with tax law and private law in regard to the concepts of service, revenue, turnover, payroll, property, merchandise, and also within tax law, as recently occurred with the determination of the concept of input for the levy of PIS/COFINS, concept that is very different from the one used for IPI.

In tax matters, the regulation of intertextuality focuses only on conflicts generated by concepts, considering two different areas of law,

[13]Morris R. Cohen, Concepts and Twilight Zones, p. 679.

[14]In the original: Hard and fast rules also depress social initiative and make legalism a curse. Ibidem, p. 683.

[15]Filosofia do Direito, p. 150.

in the same system[16], under Article 110 of the CTN[17], determining respect to the concepts of private law when these are constitutionally provided for.

The difficulty is in determining which concepts of private law are constitutionally determined for the attribution of tax powers and how this process takes place. This is what we will try to develop from this point on.

The term "definition" is seen here as a logical category: the understanding of the semantic aspect of a term occurs when we are able to include objects to this class (by criteria) and distinguish them from other objects (which do not have the required characteristics). Creating a name for a class, in this way of thinking, is similar to creating a definition.

The word becomes intelligible through other words existing in our collateral experience. To define an idea it is necessary to set the criteria for the use of the word that represent this idea. That is, initially have a word that represents a concept. Subsequently, we seek which words may be associated with that concept-word, thus defining the concept.

We can define a term in two ways: as we indicate the criteria for its use (connotative or intentional definition), or as we indicate the objects meant by the term (extensional or denotative definition)[18]. It is clear, therefore, the usefulness of studying the logic of classes for defining concepts. We see an example with our object of study: Article 3 of CTN says: "Tax is all compulsory pecuniary provision, in currency or whose value can be expressed in currency, and that does not constitute sanction of an unlawful act, established by law and charged due to administrative activity that is fully bound". It is a connotative definition. And Article 5 says: "taxes are duties, fees and contributions for improvement". It is a denotative definition. We will use the "connotative defini-

[16] We state that law is a single system, whose division is presented with didactic purposes only. We do not intend to contradict this assertion, just to confirm it, since law is a single body of language, but, because it is prescriptive, it is regulated by deontic logic, submitting its proposals to the values of validity and invalidity and allowing, therefore, the presence of contradictions within it, which could not be conceived with the Science of Law.

[17] Article 110, CTN - The tax law cannot change the definition, the content and the scope of institutes, concepts and forms of private law, used, explicitly or implicitly, by the Constitution, the Constitutions of the States, or the Organic Laws of the District Federal or Municipalities, to define or limit taxing powers.

[18]Guibourg, Ghighliani e Guarinoni, Introdución al conocimiento científico, p. 41-42.

tion" in this work as a synonym for "concept definition".

It is worth mentioning that the "clarification" concerning an expression also presents other terms that need to be interpreted, contextualized and understood, elucidations are limited, and this "pure" equivalence between *explicandum* and *explicatum* only exists in formal logic.

The term is a representation of its characteristics. This brings a certain practicality, as we do not have to present, at all times, such characteristics. But this substitution of the *definiendum* by the *definiens* has a price. It is precisely the impossibility to view, fully, all the details of the defining notes[19]. Tax, in a sense, will present characteristics that are different from the other possible meanings.

As in a molecule, the addition or removal of an atom makes it a totally different species. A different interpretation of the term "provision", "pecuniary", "compulsory" etc. may also differentiate a tax provision of an obligation without this note. So, in addition to not knowing when the word "tax" refers to the standard, to obligation, to pecuniary or to revenue, there are still terms like "compulsory", "that does not constitute sanction of an unlawful act" and "established by law", which are too controversial and need to be elucidated.

We observe that the 1988 Constitution has few legal tax concepts. Among them we find "non-cumulative" (Art. 155, § 2) and "duty" (Art. 145, § 1). The specifics of most terms have been left to the infra-constitutional legislator, under a tax sphere, the CTN (this is why it is seen as a "didactic" code). Of course, it is not because certain concepts are not defined that we cannot pass judgment on them - our collateral experience allows it to happen - but the more words that are used, the smaller is the twilight zone, as stated previously.

Finally, it is worth mentioning that it is not possible to say that meaning is in the text; law is only the physical support from which the interpretations of the hermeneutist will arise in contact with this support. Nor is it possible, therefore, to "extract the essence of the text", since the "spirit" of the text is not hidden in the paper marks. All subsumption is equivalent to the interpretation, which is equivalent to the translation. Law is never just applied, it is interpreted, translated. There is more than to it than a mere application: there is a creation.

[19]"Words are a thing in the place of another thing", Cf. Vilém Flusser, op. cit., passim.

2. Intertextuality among legal systems

2.1. The legal system creates its own reality(ies)

System is the set of elements that have one or more identifiable features in all of the elements and maintain a minimum of structural organization. To Tárek Moysés Moussallem: "the system (class - extension) exists when its elements (denotation) are propositions that fulfill the criterion of relevance stipulated by connotation,which, in turn, maintain relationships of subordination and coordination"[20].

Positive law is an autopoietic system[21]as it produces its own way of creation and organization, being autonomous in relation to the surrounding environment, that is, to other social systems, and does not accept the inclusion of schemes in a natural way, in a way that it cannot exert its force on these innovations.

There is no way to deny the communication established among the regulatory system and other social systems, since it is up to law the task of providing life in society, as it dictates the values that it considers necessary to individuals;however, we cannot state that this intersystemic intertextuality occurs indiscriminately, in a come and go of concepts and values, without rules or procedures.

In this paper we will deal with issues of intrasystemic intertextuality[22], that is, the conversation among subsystems of the same system.

With regard to its regulator aspect, law is monologic as it does not allow for the competition of any other form of control, always ensuring its own prevalence[23].

Although the various areas of law form a single reality, the peculiarities of each branch can define differently the meaning of the same word. 'Guilt' in Criminal Law is divided into 'malicious intent','conscious guilt ' and other categories necessary for the accurate dosimetry of the sentence. In Civil Law, there is no need for this differentiation. In Tax Law, the word 'property', for the incidence of property taxes, is not

[20]Revogação em matéria tributária, p. 127.

[21]Vide Niklas Luhmann, Social Systems. Stanford: Stanford University Press, 1995.

[22]There is also the intersystemic intertextuality understood by the conversation between the language of the legal system and other social systems, which, however, are related to law.

[23]Cf. Clarice de Araújo, Incidência jurídica: teoria e crítica, p. 75-76.

usually treated with the same rigor of Civil Law, which differentiates it from the terms 'possession', 'usufruct', etc.

2.2. *Are there limits to interpretation?*

The interpreter uses the text to build meaning contents. If the physical support presents problems that hinder this process, the possibility of two or more interpreters to have a fruitful discussion on the text becomes impossible, since each interpreter will establish very different assumptions for his/her reasoning.

To the interpreter, however, it is imposed constraint in the limits of what can be attributed to the concepts, limits that are imposed to ensure a minimum of consensus to enable a common code in the communication process. The teaching of Fabiana Del Padre Tomé[24] is fundamental in this matter:

> The logic-semantic constructivism does not allow for the conclusion that the interpreter has the freedom to assign to a particular word the meaning that s/he sees fit. Of course there is a stipulative freedom, but it is limited by the horizons of culture. Otherwise, we could not even mention the existence of ambiguity and vagueness in words, which are semantic difficulties that exist wherever there is language.

The limit for the creation of legal rules is established by the text itself, as well asserts Tárek Moysés Moussallem[25]:

> [...] positive law, through rules of structure, limits the activity of the interpreter/ applicator. This is why it is not any meaning that can be attributed to the words Federal Union, States, Municipalities, income, service, merchandise, tax, public employee and many other words. Otherwise, legal texts would not be worth anything.

It is up to law to establish the limits of this intertextuality, by issuing norms that determine how intertextuality can/should act in the legal system. The most common structure norm that expresses intertex-

[24]Vilém Flusser e o Constructivismo Lógico-Semântico. In: Florence Haret; Jerson Carneiro (coords.). Vilém Flusser e Juristas, p. 339.

[25]Interpretação restritiva no direito tributário. In: Direito Tributário e os conceitos de direito privado, p. 1215-1216.

tuality in tax matters is the rules of jurisdiction. This limitation is stated in Article 110 of the CTN. The intertextuality norms should always be put in the legal game, this isa rule of paramount importance to the game and, as such, it could not be presented differently from the constitutional level.

Each branch of law is a part of the same whole, and receives a specific name to facilitate the analysis and application of legal texts, in accordance with the pretentions and the use made of them. Thus, some concepts may be used/defined in several of these branches, according to which each branch wants to regulate. It is essential, however, to reinforce the idea that all these "branches of law" form a single reality. What we need to focus on is the peculiarities of each branch, which influence, often in a different way, the attribution of meaning to the same concept.

Thus, for tax purposes, concepts that are already used in other areas of law may be used, whether in private law (civil, labor) or public law (administrative). And, in the opinion of Heleno Taveira Tôrres[26],

> [...] when tax law does not state otherwise, the institutes, concepts and forms of the other branches of law will be preserved in their original characteristics.

This activity, however, operates in constant transformation, of pragmatic order, required by the evolutionary process that every organism is subjected to.

2.3. Concepts, intertextuality and the hierarchy of norms

As seen herein, normative texts present a constant relationship, as elements of the legal system. The way these relationships occur is what suffers variations. There are relationships among hierarchically arranged provisions, called subordination, as well as relationships that are held between diplomas of the same level, called coordination relationships, because the inferior norms are meant to give positivity to superior norms, and the more shallow their level is, the greater is the degree of concreteness that the norm will make use of,in a way that the inferior rule will always be more precise than the superior rule.

Disputes like this are a part of everyday law, as well emphasizes

[26]Boa fé e argumentação na interpretação das normas tributárias. In: Direito Tributário e os conceitos de direito privado, p. 556-557.

Tácio Lacerda Gama[27]:

> [...]the relationship between tax authorities and taxpayers, the doubts concerning the incidence of tax rules, often are resolved by infra-legal acts - regulations, ordinances, interpretation acts– that turn positive the more analytical meaning of the text, if compared to the meaning posed in a synthetic form by law. Hence, this is why it is intuitive the notion that the infra-legal act assigns meaning to law in the same way that law assigns meaning to the Constitution.

As a consequence of the amplitude that is inherent to constitutional norms, often it is not possible to readily determine which concepts were defined and which are part of the constitutional definition.

There will always exist, however, this dialogue among the norms of the various hierarchical levels, a relationship that is possible and inherent to legal language, which does not allow us to conclude, in any way, that in establishing such relationships, with the justification of granting precision and concreteness to superior norms, the inferior norms change their content. That is because we know that infra-constitutional norms cannot change the meaning and scope of those placed in the Constitution as the rule of the arrangement game demand obedience to the hierarchy of norms, in accordance with its content, and the vehicle that introduces it to the system, the formal and material criteria, respectively, provide valid grounds for its creation.

2.4. What is intertextuality after all?

Intertextuality is a concept originating from Linguistics, whose adaptation is promoted in various communication systems, which is the case with law. This is intertextuality: fixing concepts, as they are incorporated into the linguistic system.

In this way, José Luiz Fiorin adds: "the real is presented to us semiotically, which implies that our discourse does not relate directly to things, but with other discourses that semiotize the world. This relationship among discourses is the dialogism"[28].

The construction of a text will always be the consequence of several other texts, so dialogism is presented between discourses, even if

[27]Sentido, consistência e legitimação. In: Vilém Flusser e juristas, p. 246.

[28]Interdiscursividade e intertextualidade. In: Bakhtin - outros conceitos-chave, p. 167.

the speaker is the same in both texts. It is important to mention that in law this overlap of texts is limited by the system itself, as it is established, for example, in the rule of Article 110 of the CTN.

Intertextuality is equivalent to dialogism[29], which is the exchange of statements between discourses, between utterances between the self and the other.

Intertextuality can act in the production of texts in several respects: (i) in the context, (ii) regarding to voices, and (iii) in communication. Regarding the context (i), there is dialogism among the current text, the one that is being produced,and its predecessors, which contribute to the production of utterances, and they are competitors or are in dissonance. In this aspect, dialogism is equivalent to a scientific research, one in which the researcher seeks for already prepared material on his/her object of study, and from which s/he will build his/her positive and negative judgments, and adds this new knowledge to the prior knowledge, producing a new text on the subject. A Master's thesis is great example of this kind of dialogism.

Clarice von Oertzen de Araújo addresses other issues on dialogism in legal language, stating that

> The monologic aspect (verify) of normative language is in its prescriptive function as a form of regulating conducts. With regard to its regulator aspect,law is monologic as it does not allow competition of any other form of control, always ensuring its own prevalence[30].

As seen previously, intertextuality is presented in two ways: (i) among texts produced within the legal system and (ii) among texts of the legal system and other social systems.

The classification presented follows the pattern proposed by Paulo de Barros Carvalho:

> [...]intertextuality in lawis presented in two levels that are very characteristic: (i) the strictly legal level; which is established among the various branches of the system [...] and (ii) the one called legal in a broad sense,

[29]The concept of intertextuality was developed from the work of Bakhtin. In his writings, however, there is not one mention of the term, making the scholars studying his theory have chosen to equate the concepts of dialogism and intertextuality. See José Luiz Fiorin. Interdiscursividade e intertextualidade. In: Bakhtin - outros conceitos-chave.

[30]Incidência Jurídica. Teoria e crítica, p. 75.

> encompassing all sectors that have law as the object, but consider it under an external angle, that is, in relation to other cognizant proposals.[31]

It is up to law to establish the limits of intertextuality, by issuing rules determining how intertextuality can/should act in the legal system.

2.5.The limitations of culture

Among the concepts that are worked in Semiotics, we will take the collateral experience, the prior intimacy with that which the sign denotes and that is contained in our culture. It is the area of intersection between the already known and what can be known. Without the minimal collateral experience it is not possible to produce meaning[32], because the understanding of the message assumes a series of such associations (common code). Therefore, every time a sign triggers in us the production of meaning, we interpret it according to our context.

The use of a term by the legal community depends upon the concept definition of other terms related to it. Therefore, there is no text that does not suffer influence of context. Even in an equation that seems basic to us, such as "1 + 1", in a binary context is not equal to 10 and not 2. And in this sense, Arthur Kaufmann teaches: "Only from the perspective of aggravated robbery can we use the hypothesis of hydrochloric acid as a "weapon"[33].

Knowledge of the data is language,and depends on the repertoire of the knowing subject. The greater the knowledge is, the more language can be produced on the data, and more complex and detailed the fact will be.

The representation depends on the knowing subject, his/her impressions of the event, which means to say that there is no real truth, what we have are points of view on the same object.

This translation depends on two linguistic bodies: the one for social language and the one for legal language. Buying a property occurs in a social context, an event, and will be translated into legal language,

---

[31]Direito Tributário – Linguagem e Método, p. 195.

[32]Lucia Santaella, A teoria geral dos signos, p. 36. Invoking Peirce, the author adds, "to the extent that the interpret is a creature created by the sign itself,this creature receives from the sign only the aspect that he carries in his correspondence with the object and not all other aspects of the object that the sign cannot cover".

[33]Arthur Kaufmann, Filosofia do Direito, p. 145.

forming legal facts of different kinds: (i) the public record required by law, (ii) property rights, (iii) the tax relationship with taxes payable due to the transfer of the property;as we can see, a number of assumptions can be made out of the same occurrence.

Note that, even with the preservation of the text (in the strict sense), the society, in a continuous process of evolution, can at any given moment, assign new meanings to old texts. The maintenance, in this case, is unique to syntax, while semantics and pragmatics are subject to continual changes in the event of changes in the context (text in the broad sense).

It is impossible that the general rule enumerate all the events foreseen by it, determining that the applicator perform a new interpretation created for each created norm. There is no way to conceive the absolute closure of the types or concepts, so each decision must take into account the whole legal system, and not only an isolated norm[34].

2.6. Regulation of intertextuality and divergence of concepts

Clarice von Oertzen de Araújo approaches the subject with clarity:

> When a concrete questioning on the legality of legal relations established occurs, judicial decisions are often made in prestige to political values, making the imperativeness of one or more norms occur according to a semantic/pragmatic criterion, whose syntax does not match the general prediction of the law system. These phenomena cause doubt and force the development of reflections on the system. Often the produced result is reformulation or a proposal for new definitions, considering the possibility of faults or deviations from the previously established criteria for the establishment of legal relations.[35]

We do not aim toclaim absence of political arguments in legal decisions, of the Superior Courts; what we must have as a parameter, however, is that this politicism must match the measure imposed by the

[34]In this sense Rodrigo Dalla Pria strives for a new interpretation plan, the one for the norm in a concrete sense, or "S5", where the judge reinterprets the legal system to build the sentence. Cf. Constructivismo Jurídico e Interpretação Concretizadora: Dialogando com Paulo de Barros Carvalho e Friedrich Müller. In: Derivação e positivação no direito tributário, passim

[35]Semiótica do Direito, p. 16-17.

normative system and cannot extrapolate or counteract these limits .

The indetermination of legal concepts is an issue that is faced and recognized by the wider doctrine. Daniel Mendonca is clear in stating that "accepting that every linguistic expression always has a zone of uncertainty does not imply in saying that it never has an area of certainty"[36]. To deny the existence of this zone this would imply in a language without rules, or limits, whose users could not maintain a minimum of communication.

As seen previously, as if it was not enough the fact that the legal system uses some concepts differently from other systems, within the system diversity in concepts is very common. That is because, just as law gets from social reality only those aspects that are relevant to the normative incidence, to the various branches of law such relevance, that is, these aspects may also be different from one norm to the other. The concept will oscillate, therefore, in accordance with the legal reality in which it is inserted. Arthur Kauffmann exemplifies:

> The concept of "document", when talking about the crime of forgery, is essentially different from the concept of document in the procedural perspective of documentary evidence. It is precisely as Wittgenstein would say: the meaning of a legal concept depends on the legal relationship in which it is used. It is, therefore, not accurate to speak, in this context, of "relative legal concepts". It would be correct to use the word "relational" because the meaning of the legal concept is, as stated, determined by the relationship from which it arises.[37]

It is not correct to say, however, that in certain circumstances, there is defiance to concepts from other systems; the constructive activity of law is to get from reality the aspect that matters to it, attributing this aspect values that are inherent to the legal activity. It is up to the applicator to define the meaning of normative propositions, and this activity is solely limited by the legal context imposed by positive law.

To Tathiane dos Santos Piscitelli, "the interpretation of legal texts do not occur in a vacuum, but rather limited, initially, by the constraints of language itself, which we will call 'rules of use ' of the respective expressions"[38]. These rules are not imposed by pre-established criteria,

[36]Interpretación y aplicación del derecho, p. 31.

[37]Filosofia do Direito, p. 145.

[38] Os conceitos de direito privado como limites à interpretação de normas tributárias: análise a partir dos conceitos de faturamento e receita. In: Direito Tributário e os Con-

but depend on the contexts in which texts are inserted, since it is the consensus delimiting the context, and due to the decisions (re)contextualize legal norms, that is, they are rules of legal language use.

As said previously, the legal reality focuses on the social reality, but it does not coincide with it. From this statement, we can formulate the argument that legal concepts can, not only be more comprehensive or restrictive than social concepts, but may also diverge from them: that is the autonomy of legal language!

Similarly, this divergence can occur internally, that is, in the universe of positive law, considered here a given system, which regulates the actions of a society, historically situated in time and space, about which there is no way to guarantee the absence of contradiction.[39]

There is no concept of reality that overlaps law. In other words, a legal concept can be detached from reality. The legal incidence, according to Clarice de Araújo, is a translation operation of the social environment to the legal universe. In her words: "Also to the legal universe reality itself and absolute truth are inarticulable, only ideally desirable, reached in an approximate extent, limited by the observation and conformation that this language confers to the consciences of its operators and to the world itself"[40].

Being positive law a linguistic body that, in order to exist, uses the terms of the Portuguese language and, in some cases, even foreign languages[41], whose core meaning is already embedded in society, tra-

ceitos de Direito Privado, p. 1231.

[39] Since the legal language is predominantly prescriptive of conducts, and not descriptive of the social reality, not being subjected to the logical law of non-contradiction.

[40] Clarice de Araújo, Da incidência como tradução, p. 160.

[41] The fact that a judgment may contain passages written in a foreign language does not justify its annulment. Although Article 156 of the Code of Civil Procedure provides that it is mandatory in the case, the use of the national language, we have to verify if the passages in other languages hinder the understanding of the parties as to the reasoning of the judge. With this understanding, the 3rd Chamber of the Superior Labor Court did not accept the review appeal by Caixa EconomicaFederal(CEF) that contested the decision of the Regional Labor Court of the 3rd Region(MG) that had parts in English and Spanish in the lawsuit of the former employee request for wage claims after being unfairly dismissed. CEF argued that knowledge of a foreign language is not part of the curriculum of law or the examination of the Bar Association of Brazil. Therefore, the lawyer is not required to learn other languages".(BRAZIL. Superior Labor Court. Trechos em língua estrangeira não invalidam decisão judicial. News of the Superior Labor Court. Sep, 21. 2011. Available at: <http://www1.trt18.jus.br/ascom_clip/pdf/103497.pdf>. Accessed on: Sep, 29. 2011, p. E1).

ditionally the meaning of its terms will be that same used in social language. So far there is no great controversy. The problem starts when assigning meaning to legal texts leads to meanings that are completely different from traditional definitions.

In such cases, in which the legislator does not want to use the "common" or "vulgar" meaning concerning a concept, s/he (the legislator) must make an exception. This implies claiming that there is no assignment of meaning that different from the traditional, whether it is more restrictive or broad, that is given in an implicit manner.

Luís Eduardo Schoueri is timely when reflecting on the theme: "today it is fit to the interpreter to verify if the legislator took into account, or not, the structure of private law, in the definition of the tax hypothesis. The legislator is free to link, or not,to that law"[42]. From the analysis of the divergence found in our system, we can conclude on the possibility of a concept to suffer variations in scope because due to the values that we intend to protect.

The presence of concepts with varied meanings within the same system happens due to the form in which intertextuality is presented in the legal system, and does not make it inconsistent.

The consistency of the legal system is conferred by the exclusivity in the modality of each conduct: if it is required, it may not be prohibited; if it is permitted not to do, it cannot be required to be done. The logical structure of normative discourse is in regulating conducts and not in univocal meaning.

3. Application of intertextuality in legal tax concepts

We will now present three examples of concepts used in various forms, varying according to the legal subdomain which they refer to, to demonstrate how context influences intertextual relationships among norms, comparing the legislation that regulates the institute, a brief presentation on the ways use and, at the end of each topic, judicial decision recognizing the dissimilarities.

3.1. Revenue

[42] Direito Tributário, p. 614.

Act 5,172, from 1966 (National Tax Code)	Art. 110. The tax law cannot change the definition, the content and the scope of institutes, concepts and forms of private law, used, explicitly or implicitly, by the Federal Constitution, by the Constitutions of the States, or by the Organic Laws of the Federal District or Municipalities, to define or limit the taxing-powers.
Federal Constitution of 1988	Art. 195. Social security shall be financed by all of the society, directly and indirectly, under the terms of law, using funds coming from the budgets of the Union, the States, the Federal District and the Municipalities, and the following social contributions I –from employers, levied on the payroll, turnover and profit;
Act 9,718, from November 27, 1998	Art. 2 Contributions to PIS/PASEP and COFINS, payable by legal entities of private law, will be calculated based on its turnover, subject to applicable law and the amendments made by this Act. Article 3 The turnover referred to in the previous article corresponds to the gross revenue of the legal entity. § 1 It is understood by all gross revenue the total revenue earned by the legal entity, irrespective of the type of activity it exercises and the accounting classification used for the revenue.
Constitutional Amendment 20, from December 15,1998	Article 195. Social security is financed by all of the society, directly and indirectly, under the terms of law, using funds from the budgets of the Union, States, Federal District and Municipalities, and social contributions of the following: I - the employer, company and entity under the law, relating to: a) the payroll and other employment incomes paid or credited, in any way, to the person who performs services, even without employment relationship; b) the revenue or turnover; c) the profit;

In the first square of the table, the National Revenue Code of 1966, approved by the Federal Constitution of 1988, prohibits the concepts of "private law" to be modified by tax law. In the second square, the Constitution authorizes the creation of social security contributions levied on the companies' turnover. In the third square, the Act 9,718 associates "turnover" with "gross revenue" which is the total revenue earned by legal entities. On the fourth square, the Constitutional Amendment 20 alters the Constitution, including the possibility of levying not only the turnover, but also the revenue.

This is not an issue to address right now, but the constitutionality of Act 9,718/98 was then questioned, as the Constitutional Amendment 20/98, which gave the Union the power to tax the revenue of legal persons (and not only their turnover), was published after the enactment of Act 9,718/98.

The disturbance was taken to the highest court of the judiciary by numerous processes that aimed at the declaration of unconstitutionality of the provision, with the justification that turnover was a concept of private law, especially of commercial law, maintained by the Constitution to divide the taxing powers among them - specifically regarding the powers of the Federal Government to institute social contributions to social security financing.

The total turnover as a calculation basis comes the idea of *issuing invoices*. Thus, there is incidence only on revenues from sales of goods and/or provision of services. Gross revenue, on the other hand, includes all entries of the legal entity, whether they are from the sales of goods and/or provision of services.

The Supreme Court ended up declaring the unconstitutionality of Art. 3, I of Act 9,718/98, for electing gross revenue as the basis for calculating the contributions without any prediction on FC/88 for this, being improper its subsequent "constitutionalization" by issuance of the CA 20/98[43]. The following is an excerpt from the Amendment:

> SOCIAL CONTRIBUTION - PIS – GROSS REVENUE - NOTION - UNCONSTITUTIONALITY OF § 1 OF ARTICLE 3 OF ACT NO. 9,718/98. (...) It is unconstitutional the § 1 of Article 3 of Act No. 9,718/98, in which expanded the concept of gross revenue to involve all revenues earned by legal entities, regardless of the activity developed by them and the accounting classification adopted.

Here are two limits present. As for the hierarchy of norms, the syntactic limit, the reconfiguration of the definition of turnover resulted in the expansion of the taxing power. As for the limits of culture, unless express constitutional provision to the contrary, the legislator itself has used the language of private law, where turnover does not include the gross revenue.

In this case, two points are equally important to be raised: (i) are gross revenue and turnover equivalent terms? (ii) where do we find the

[43]RE 390.840, Rapporteur Minister Marco Aurélio, Full Court, judged on11.09.2005, DJ 08.15.2006.

definition of each term?

In situations where the legislator innovates the legal reality not only for inserting into the environment new norms, which are related to prescribing behaviors, but also by changing the social reality, regardless of whether there is a consensus concerning its concepts, the interpretation of legal texts is facilitated.

Thus, for two classes to be considered equal, that is, governed by the logical principle of identity[44], all elements inserted into a class must also be presented in the other class, and the same reasoning is given to the elements that are excluded.

Bringing to the situation being analyzed, the gross revenue could only be used for purposes of contribution to Social Security if the situations encompassed by this concept were exactly the same involved in the concept of turnover; however, this is not the conclusion reached when a closer analysis is made on the subject.

The granting of meaning to legal texts will always be the result of interpretation and, as seen, grounded and constrained by the context. In tax matters, the Article 110 itself of the CTN highlights the concern to limit the content of the posed norm, which ignores the concept of private law.

The Minister Cezar Peluso presents the requirements for the interpretation of normative orders, saying: "when there is no legal concept expressed, the interpreter has to help to rebuild the semantics of the instruments available in the actual system of positive law, or in different bodies of language"[45].

With this, we can say that the Constitution cannot bring definitions to its concepts, as a rule, but because it represents the highest point

---

[44] By the logical of identity, a proposition always implies on itself ($p \equiv p$), that is, antecedent and consequent are identical, equivalent concepts. From the application of logical rules, the interpreter maintains contact with knowledge of law as a system; in the proposed methodology of Lourival Vilanova, knowledge implies in knowledge of the principles, handling the categories, global, operational and functional systematic vision, being essential to relate law with the fundamentals in general and in the context in which it is inserted. Logic provides this knowledge, relating empirical data and logical structures. A legal form (content-free), in which the formal structure of law is establishedthrough the analysis of language of positive law, through formalization. However, the full legal experience presupposes the analysis of positive law: the logical in statements and the empirical in the actual data selected in the physical and social realities.

[45]Extraordinary appeal no. 390.840/MG. Rapporteur: Minister Marco Aurélio. Judgement: Nov 9. 2005. Judging Body: Full Court. Publication: DJ Aug. 15, 2006.

of the law system, it shall present harmonic linguistic body, providing instrumental in defining the concepts inserted to it, keeping a coherent discourse, and even if it does not present express definitions of its concepts, confer to the interpreter, the applicator and the infra-constitutional legislator, the limits of use of its terms.

The Minister Marco Aurélio was based on this to deliver his opinion: "In my vote, I had the assumption that the incidence basis was already defined in the Constitution, that is, turnover. And if it is already defined in the Constitution, there is no enforceability of the specific instrument, which is the complementary act."[46] It follows from this reasoning the inability of the infra-constitutional legislator to make equivalent, while exercising the authority to tax, turnover to gross revenue, since the imposed constitutional limit, whose classes contain different elements, is the reason why they cannot be equivalent.

That was the solution given by the Supreme Court in deciding to restrict the scope of the term gross revenues for all other exactions that use the term, ensuring compliance with the limits of the distribution of power of tax authorities.

We cannot conclude from this, however, the impossibility of the Union to tax revenue, but to do so, of course, it shall be guided by the rules imposed by the Constitution, that is, the constituent legislator assigned to it (Union) the power to tax situations that are configured as revenue.

3.2. Tax

[46]However the legislative procedure was ignored and has no Constitutional Amendment 20 prerogative to validate the act no. 9718/98. So says the Minister Cezar Peluso: "If the norm produces before the Constitution is compatible with this, it is received by the new system; if it is not, it is revoked, or, the same thing, loses its validityfoundation". With the advent of the said Amendment the jurisdiction of the Union was constitutionally enlarged guaranteeing the ordinary legislator the drafting of a new exaction that included as gross revenue as a hypothesis for tax incidence. BRAZIL. Supreme Court. Extraordinary appeal No. 390.840/MG. Rapporteur: Minister Marco Aurélio. Judgment: Nov. 9 2005. Judging Body: Full Court. Published: DJ Aug. 15, 2006.

Act 4,320/64 General Budget Act	Art. 9. Tax is the derived revenueestablished by entities of public law, including duties, fees and contributions under the constitution and applicable law on financial matters and the product is destined to fund general or specific activities carried out by these entities
Act 5,172/66 National Tax Code	Art. 3. Tax is all pecuniary provision, in currency or whose value can be expressed in currency that does not constitute sanction of unlawful act, established by law and charged by an administrative activity that is fully bound. Art. 4 The specific legal nature of the tax is determined by the event that causes the respective obligation, and it is irrelevant to qualify it: II - the legal allocation of the proceeds of the collection.
Constitution of 1988, with wording given by the CA 42/2003	Art. 167. The following are forbidden: IV - to bind tax revenues to an agency, fund or expense, except for the sharing of proceeds from the collection of the taxes referred to in articles. 158 and 159, the allocation of resources to the actions and services of public health, maintenance and development of education and to perform tax administration activities (...);

Part of the doctrine says it is not good for law to give definition of concepts. According to Luciano Amaro, "to define and classify the institutes of law is the task of the doctrine. Yet, in 1966, the newly enacted Tax Reform translated into the Amendment no. 18/65, the National Tax Code adopted didactic line in the discipline of the tax system, insisting, throughout its text, the establishment of certain basic concepts"[47]. And according to Geraldo Ataliba, referring to the concept of tax: "Of course, it is not the function of any law to formulate theoretical concepts"[48].

The explanation, perhaps based on the misconception of the doctrine as a source of law, it honors the scholars as if the legislator was, as if elected by the people, could prescribe conducts. Or, on the other hand, as if law, while defining concepts, could change the social (non-legal) reality by the simply saying, as if our congressmen and senators were gods.

The communicational noise caused by the adoption of the same physical support for the various meanings can be seen in several pas-

[47]Luciano Amaro, Curso de direito tributário, p. 19.
[48]Geraldo Ataliba, Hipótese de incidência tributária, p. 32.

sages of the legal text. Without any explanation, it is possible to read: "the tax taxes, taxing tax". The same term, in the example, can be seen as a legal norm, as a legal relationship, as a procedure and as an amount of money.

At this time it is proposed to research definable notes of the concept of tax in the sphere of taxation and financial law. Such notice is imperative, before the two articles of the 60'sthat can interfere with work, namely art. 3 of Act 5,172/1966 (definition of the concept of tax in a taxation sphere), and art. 9 of Act 4,320/1964 (definition of tax in a financial sphere).

As a financial norm tax is seen as revenue derived from the empire power of the State, a "product of collection of taxes". It is tax as pecuniary, not in a taxation sphere, but in a financial sphere. The subjects of the legal relationship are no longer the taxpayer and the tax authority, but the various agents of the Public Administration.

The characterization of the tax as "revenue" has its regulations in norms for the allocation of tax revenues, contained in Section VI of the National Tax System (Articles 157-162). In art. 9 of Act 4,320/1964, we find a definition of the concept of tax in the financial sphere.

Inside the Brazilian system of positive law, there is a separation between the financial system and the tax system[49]. However, a possible approach appears with the Complementary Act 101/2000, the Tax Responsibility Act: *Article 11. Constitute essential requirements of responsibility in the tax management of the institution, forecasting and effective collection of all taxes of constitutional power of the Federation's entity.* The Tax Responsibility Act is concerned about the responsibility from the institution to public spending. However, it is still not possible to say that there is a junction between the two systems, because (i) the Constitution, of higher hierarchy, separates the tax system from the financial system, and (ii) the FRL only cares about tax norms for accountability at the administrative level, without taking into account the relationship with the Taxpay-

[49]Marco Antonio Gama Barreto makes no distinction between the financial and tax systems. And with that, he does not consider the deletion of Art. 9 of Act 4320 by Art. 3 of the CTN, as if the later Act had revoked the previous one, but yes, he understands that they are complementary and coexisting. "It happens that we do not see the possibility of issuing a revoking speech act based on a comparison between Articles 3 CTN and 9 of Act no. 4,320 of 1964 because i) the CTN did not expressly repealed Article 9, ii) Article 9 does not show inconsistency with Article 3 and, iii) the CTN has not regulated entirely the subject matter of the Act no. 4320 of 1964". O conceito de tributo no direito brasileiro, p. 90

ers, subject who is essential in a tax relationship.

The law that addresses the preparation and control of budgets and balances of federal entities shows taxes as a type of revenue. About revenue (for budgetary purposes), Aliomar Baleeiro says:

> The amounts received from the public purse are generically referred to as "entries" or "entrances". Not all of these entrances, however, are public revenue, as some of them are only "fund movement", without any increase in government assets, since they are subject to refund or represent mere recovery of amounts lent or given by the government.[50]

The goal of Financial System Science is to understand where they come from, how and where public entries go. "Tax" in this context, is essentially treated as a kind of revenue.

A question that arises then is whether a new tax relationship can arise through a financial relationship, if there is a mix at the time: and if the money collected in a contribution does not go to its specific legal allocation? Can the taxpayer repeat the "undue" payment?

Albeit in different ways, many scholars believe that the legal allocation is not only relevant for the determination of the type of tax, but also for its control. Even Marco Aurélio Greco, who does not admit to be possible to return the collected amounts, understands that institutionalized allocation and non-application of resources through the analysis of the enforcement of guidelines law and budget law, according to the criteria that extracts from tax liability act, can lead to the recognition of the constitutionality of unenforced contribution in the purposes that are constitutionally foreseen in relation to future years[51].

We think that the allocation relevant to the characterization of a tax is only a "normative allocation", which specifies the purpose of the norm imposing the tax. At the time of drafting of the act, to the contribution it is necessary to foresee the legal allocation, because it is a criterion for the exercise of such powers. But everything else is irrelevant and posterior to the legal nature of taxes. The repetition of the

[50]Op. cit., p. 116.

[51]For the author, the correct or incorrect application of resources is a supervening event to the incidence of the norm, as it is extraneous to the tax norm. With the payment, the link between the amount paid and the partial disapplication of the feature set is diluted. Therefore, he believes it is not possible to repeat the divergence of allocation. Em busca do controle sobre as Cide's. In: Direito das telecomunicações e tributação, passim.

undue payment would only be possible, thus, through disrespecting the assumption (absence of allocation norm at the time of the institution, which would imply in the unconstitutionality of the norm), but not for disrespecting the legal regime to be adopted.

Both the Constitution (Art. 165 and its subsections) and the Tax Responsibility Act require responsible tax management. But these norms are aimed at the Administration, and not the tax authority-taxpayer relationship. Even the Annual Budget Act, from the Executive Power, not predicting allocation, does not create rights to the passive subject of the compensation obligation.

Nor do we think that the non-application of the raised funds can lead to the recognition of unconstitutionality of the exaction in relation to future years, as it is a norm that requires only administrative authority, and on it rests the control of the application of the taxes. The legal tax fact is the record in the adequate language of the occurrence of the hypothesis, and not the fulfillment by the state, of the contributions' purposes.

Finally, it is worth to discuss the ADI 2,925-8/DF, which has the following Amendment:

> ADI 2925 / DF - FEDERAL DISTRICT. DIRECT ACTION OF UNCONSTITUTIONALITY. Rapporteur: Min. ELLEN GRACIE. RapporteurtoJudgment: Min.MARCO AURÉLIO. Judgment: 12/19/2003. Judging Agency: Full Court.
>
> BUDGET ACT–INTERVENTION CONTRIBUTION IN THE ECONOMICAL SPHERE - IMPORT AND MARKETING OF OIL AND OIL PRODUCTS, NATURAL GAS AND NATURAL GAS PRODUCTS, AND FUEL ALCOHOL - CIDE - ALLOCATION - ARTICLE 177, § 4, OF THE FEDERAL CONSTITUTION. It is unconstitutional the interpretation of the Budget Act No. 10,640, of January 14, 2003, that implies in the opening of additional credit in heading strange to the allocation of what was collected from the provisions of § 4 of Article 177 of the Federal Constitution, given the exhaustive nature of subparagraphs "a", "b" and "c" of subsection II of the said paragraph.

The Minister Ellen Gracie wrote in her vote that the contribution is the tax type "characterized by the purpose of its institution and not for

the allocation of the respective collection"[52]. In fact, the definition that qualifies a contribution is the prediction in law of the "normative allocation" of the proceeds from the collection at the time of institution of the tax. The system of tax law deals with the pre-collection, collection and executive moments. It has nothing to do with budget issues.

And, if on one hand the divergence of allocation does not give right to the repetition of the undue payment or to the allocation in own funds of the quantum raised from contributions. Carlos Velloso exposes his opinion:

> Of course I'm not telling the Government to spend. The realization of expenditure depends on public policies. What I say is that the Government cannot spend the proceeds from the collection of CIDE outside from that the Federal Constitution establishes, Art. 177, § 4, II. In other words, the government can only spend the proceeds from the collection of the said contribution in what is established in the Constitution, Art. 177,§ 4, II.53

There is no legal possibility in Brazilian law to repeat undue tax payment when there is divergence in tax allocation. And we do not say this with joy, as it would be an excellent way of population pressure as to public spending, but sadly, due to lack of legal means for such control. The federal government is thus free to transform social contributions in taxes that are not shared among other federal agencies. And as for deviation of money by the public servant, it is limited functional liability.

Celso de Barros Correia Neto[54], in criticizing the division between Financial and Tax Laws confirms the different treatment given to the subjects.

> Moreover, it is curious to note that the accuracy of the defined limits makes the collection an element that is external in relation to Tax Law. In fact, by defining the payment as the last limit of Tax Law, it is evident that the revenues earned are not contained in this discipline: they are external and extraneous consequences. So much so that commenting on the Constitutional Charter of 1967, Pontes de Miranda states, with his enthusiasm: "The budget does not give al-

[52]ADI 2.925-8/DF. Rapporteur ELLEN GRACIE. Judgment: 12/18/2003. Judging Body: Full Court. Publication: DJ 04-03-2005 PP-00010 EMENT VOL-02182-01 PP-00112 LEXSTF v. 27, n. 316, 2005, p. 52-96.

[53]Ibidem, p. 178.

[54]O avesso do tributo: Incentivos e Renúncias Fiscais no Direito Brasileiro, p. 51.

> location to taxes, it gives allocation to revenue". Upon termination of the legal tax relationship with payment, what comes next is fit to the other bodies of Law and not anymore to the regulations of the taxes. Tax revenues would be, thus, a factual consequence which follows from the imposing norm, a state of affairs that is external to what is produced.

With this, we make the following questions: is it possible the difference in the concept of tax in the tax and financial spheres? Yes, again by confronting issues of intra-systemic intertextuality. The peculiarities of the differences are put in norms of the same hierarchy (Act 4,320 and Act 5,172). Moreover, they are different spheres (Tax Law and Public Budget). This brings two visible consequences: the first is that allocation is not a part of the definition of concept of tax in the sphere of taxation, which could characterize the Guarantee Fund for Time of Service as a tax[55]. The second is that poor use of the tax can be of responsibility of the State's tax management, but does not entitle the taxpayer to repeat the "undue payment".

3.3. Inputs

Regulations of IPI: from Decree 70,162/1972 to Decree 7,212/2010, in force	Article 43. May have tax suspension: VI - **raw materials, intermediate products and packaging materials used in manufacturing**, as long as the manufactured products are sent to the premises sending those inputs;
Federal Constitution, of 10/05/1988	Article 153. It is fit to the Union to institute taxes on: IV - manufactured products; § 3 - The tax established in subsection IV: II - **will be non-cumulative, compensating what is due in each transaction with the amount charged in the past**;

[55]Alongside the author of the National Tax Code, Rubens Gomes de Sousa, has spoken for the tax nature of FGTS (Cf.Natureza tributária da contribuição para o FGTS. In: Revista de Direito Público 17, p. 317), the Supreme Court judged for the labor nature (RE 11.249/SP – Full Court – rap. Oscar Correa – j. 12.01.1987 – DJ 07.01.1988)

PIS/COFINS Act: Act 10,637, from12/30/2002, and Act 10,833, from 12/29/2003	Article 3 The amount calculated in accordance with Art. 2the legal person may **deduct credits calculated in relation to: II - goods and services used as inputs in the provision of services and in the production or manufacturing of goods or products destined to sales**, including fuels and lubricants;
Constitutional Amendment 42, from 12/19/2003	§ 12. Law shall define the sectors of economic activity for which the contributions levied under subsections I, b; and IV of the heading,will be non-cumulative.
Normative Instruction SRF 247, from 11/21/2002, amended by Normative Instruction SRF 358, from 09/09/2003, and Normative Instruction SRF 404, from 03/15/2004	Article 66. (...) It is understood as inputs: I - used in the manufacturing or production of goods destined to sales: a) raw materials, intermediate products, packaging material and any other goods that undergo changes such as wear, damage or loss of physical or chemical properties, due to the action directly exerted on the product being manufactured, as long as not included in the fixed asset;

The third proposed issue deals with the definition of the concept of inputs for non-cumulativeness of the Contribution to the Program for Social Integration and Formation of the Public Servant Asset and the Contribution for Social Security Financing (PIS/COFINS), and the non-cumulativeness of the Tax on Manufactured Products (IPI) .

In the system of taxation, there are taxes incident in an operation, such as on the property, and other that are dependent on a number of previous steps in order to be required, as the ones resulting from manufacturing or revenue of a company, called taxes on aggregate value. In Brazil, the Vehicle Tax (IPVA) is an example of the first case. IPI and PIS/COFINS are examples of the second case.

To the taxes incident on activities resulting from steps, the "non-cumulativeness" was created, with the aim of charging only what is added. Non-cumulative is a term with concept definition in the Federal Constitution: at least for the IPI, it says that *it will be non-cumulative, compensating what is due in each transaction with the amount charged in the past*.

The basis for the calculation is the final value minus the taxes

paid in the previous steps. Paulo de Barros Carvalho[56]says that the non-cumulativeness is an objective limit that aims to reach the value of the tax justice, so that the impact of percussion does not cause distortions. It works to determine the amount to be collected through tax, recording only the wealth added to the good or service[57].

In the IPI, the non-cumulativeness is based on production inputs: goods and services linked to the final product. The manufacturer can "credit itself", that is, decrease its tax burden with what was previously paid, provided that the inputs integrate or are used in the production process. For example, water to make a soft drink, kerosene as a solvent in the chemical industry. Water and kerosene, if used as a source of energy to make the same soft drink, do not fit the definition of input.

It should be noted that input may have broader concept, such as everything that is used to ensure a product or service object of the business activity. As the definition of Eduardo Marcial Ferreira Jardim[58], following the semantics of Antonio Houaiss, input means everything that enters, coupled with the paternal word "consumption". Equipment, capital, workforce and energy,and components associated with the production of goods or services would be covered by the concept. But not in IPI.

Frontally we have a divergence: goods and services used in the production or manufacturing of goods are not, necessarily, raw materials. Here the same fuel serves to deduct credits from PIS /COFINS. After the calculation of all revenue, the deduction of the credit amount corresponding to the rates imposed by way of contributions takes place.

The question, in this case, involves independent systematics, without any subordination relationship between them. They are contexts that should not influence one another, as each has its own regulations and, in this case, a norm does not preclude the other, in the same way that does not bring to itself the application of what regulates in the case of a tax. In the words of Bakhtin[59], they are parts of the same whole that do not communicate.

The concept of "input" applicable to PIS and to COFINS has been, little by little, changed by jurisprudence. The definition that, until recently, was very restricted begins to be shaped closer to the broad

[56]Paulo de Barros Carvalho, Direito tributário, linguagem e método, p. 256.
[57]André Mendes Moreira, A não cumulatividade dos tributos, p. 61.
[58]Eduardo Marcial Ferreira Jardim, Dicionário de direito tributário, p. 224.
[59]Mikhail Bakhtin, Estética da Criação Verbal, passim.

concept of "cost of production of goods and services" present in the Income Tax Regulation - RIR, especially in Articles 290 and 299, which include all the "necessary expenses to the company's activity and the maintenance of its production source".The Administrative Tax Appeals Council (CARF) has already ruled as follows:

> […]the term "input" used for the calculation of non-cumulative PIS and COFINS must necessarily include the operational costs and expenses of the legal entity, as defined in Articles 290 and 299 of the RIR/99 and not be limited only to the concept brought by the Regulatory Instructions No. 247/02 and 404/04 (which are based exclusively on the inapplicable legislation of IPI)[60].

Alongside this concept definition, arises doctrine and jurisprudence agreeing that the inputs of IPI have nothing to do with the inputs of PIS/COFINS, and little have to do with the "inputs of Income Tax", not including all expenses deductible in this tax. It is what we read in the STJ (Superior Court of Justice), in the vote draft by Minister Mauro Campbell Marques (Special Appeal No. 1,246,317-MG):

> 4. According to the teleological and systematic interpretation of the law system in force, the concept of "inputs" for the purposes of Art. 3, II , of Act no. 10,637/2002 and Art. 3, II , of Act no. 10,833/2003, is not identified with the concept adopted in the legislation of the Tax on Manufactured Products - IPI, since it is overly restrictive. Similarly, it does not correspond exactly to the concept of "Operating Costs and Expenses" used in the legislation of Income Tax - IR, as it is quite broad.
>
> 5."Inputs" are, for the purposes of Art. 3, II, of Act no. 10,637/2002 and Art. 3, II, of Act no. 10,833/2003, all those goods and services pertaining to, or that enable the production process and the provision of services that may directly or indirectly employed and whose subtraction results in the impossibility of providing the service or production, that is, whose subtraction prevent the company's activity, or implies in substantial loss of quality of the product or service as a result of this subtraction.

[60] BRAZIL. Ministry of Finance. Board of Tax Appeals. Voluntary Appeal No.369.519/RS. Case No. 11020.001952-2006-22. Judgment: Dec.8, 2010. Judging body: Second Panel / Second Chamber. Edition: Jan.17, 2011.

Given the different matters (manufacturing, revenue and income), it is impossible to compare inputs without getting lost in the understanding of such taxes. In the case of PIS/COFINS, the term "input" does not indicate a substance itself[61], included in a specific list, but in relation to the way in which revenue is acquired.

There is a common way to which it shall be submitted to the determination of what may be inputs to all taxes subject to the non-cumulative systematic. In this same sense, are the words of Fábio Palaretti Calcini:

> The expression "input" should be linked to the expenditures made by the taxpayer who, in a direct or indirect manner, contributes to the full exercise of his/her economic activity (industry, commerce or services) aimed at obtaining of his/her revenue[62].

The limitation of the meaning initially built by a norm will only happen on the basis of the other norms existing in the system, with contrary meaning, which are hierarchically superior.

The issue, in this case, involves independent systematics, without any subordinate relationship between them. They are contexts that do not influence one another, because each has its own regulation and, in this case, a norm does not preclude the other, in the same way that it does not bring to itself the application of what regulates it in the case of a tax. There is a genre of which both participate, but it needs to be specified so that both can incur.

Conclusions

The legal truth is arrogant: jurists are not mere descriptors of the reality of law, but the creative builders of this reality. If language is reality, we have at least two important consequences: (1) as law is a text, it is impossible to be interpreted without a context, and (2) the theory of law is the analysis of the jurists' language.[63]

The meaning of a word depends on the conversation that takes

[61] SeeNatanael Martins e Daniele Souto Rodrigues, A evolução do conceito de insumo relacionado à contribuição.

[62]PIS e COFINS. Algumas ponderações acerca da não cumulatividade,p. 58.

[63]Gregorio Robles, O direito como texto: quatro estudos de teoria comunicacional do direito, p. 19.

place with the other participants. There is no "basic" definition. What is there is a more intensive use of a term than of another, such as dictionaries are organized. This does not prevent law, as artificial language, to say that a word means something else than the existing meanings in the natural language, and also the limits of the legal system itself (such as the hierarchy of norms). The goal in defining concepts lies in reducing the vagueness/ambiguity of terms.

With regard to the contribution to PIS/COFINS, at the time the only possible basis for calculation was turnover. Initially, turnover implied in incurring only on the revenues arising from sales of goods and/or provision of services. Subsequently, the concept was widened, becoming equivalent to gross revenue, that is, all entries of the legal entity, whether they are from the sales of goods and/or provision of services. We believe that there is no such possibility. The issue of revenue implies in taxing power rules, increasing the powers of the Union. Moreover, unless there is an express constitutional provision to the contrary, the legislator himself has used natural language.

The word "tax" has different significance depending on the tax subsystem, if it is Tax Law or Financial Law. The allocation, in the tax subsystem, is irrelevant to the characterization of the tax. Without taking into consideration the allocation of the *quantum* collected as a characterization of the tax exaction, the Guarantee Fund for Time of Service (FGTS) can be considered a tax. Another demonstration is in the bad use of a social contribution, which does not entitle repetition of the undue payment by the taxpayer, and is the State's responsibility.

The definitions of input may vary depending on the context (IPI, PIS/COFINS or Income Tax). There is no subordination between one act and another. The same word has different meanings depending on the tax. Thus, intertextuality is within the same legal subsystem, the tax system. The non-cumulativeness is applied differently to both cases, but should have the same effect, due to constitutional hierarchy.

In general, we also conclude that:

1. The legislator and the judge always create, but are inserted in a given linguistic context that cannot be ignored.

2. For a concept to evolve and be accepted there must be coherence and consistency, at the risk of disabling communication.

3. An utterance is always modulated by the speaker to the social, historical, cultural and ideological context[64].

[64]Mikhail Bakhtin, *Estética da Criação Verbal*, *passim.*

4.Concepts cannot be simply borrowed from different legislations, from taxes coming from different matters.

References

ABBAGNANO, Nicola. *Dicionário de Filosofia*. 5th ed. rev. and ampl. São Paulo: Martins Fontes, 2007.

AMARO, Luciano. *Direito tributário brasileiro*. 15th ed. São Paulo: Saraiva, 2009.

ARAÚJO, Clarice von Oertzen de. *Da incidência como tradução*. In: Florence Haret; Jerson Carneiro (coord.).VilémFlusser e Juristas: comemoração dos 25 anos do grupo de estudos de Paulo de Barros Carvalho. São Paulo: Ed. Noeses, 2009.

_____. *Incidência jurídica: teoria e crítica*. São Paulo: Noeses, 2011.

_____. *Semiótica do Direito*. São Paulo: QuartierLatin, 2007.

ATALIBA, Geraldo. *Hipótese de incidência tributária*. 6th ed. São Paulo: Malheiros, 2004.

BAKHTIN, Mikhail. *Estética da Criação Verbal*. Translated by Maria Ermantina Pereira. Editora Martins Fontes, 1997.

BARRETO, Marco Antonio Gama. *O conceito de tributo no sistema brasileiro*. Master's Thesis. São Paulo: PUC/SP, 2008.

CALCINI, Fábio Pallaretti. *PIS e COFINS. Algumas ponderações acerca da não cumulatividade*. In:Revista Dialética de Direito Tributário no. 176. São Paulo: Dialética, 2010.

CARVALHO, Paulo de Barros. *Direito tributário, linguagem e método*. 3rd ed. São Paulo: Noeses, 2010.

COHEN, Morris R. *Concepts and Twilight Zones*. In: Journal of Philosophy 24. No. 25. p. 673-683. New York: The Journal of Philosophy, 1927.

CORREIA NETO, Celso de Barros. *O avesso do tributo: Incentivos e Renúncias Fiscais no Direito Brasileiro*. Ph.D. Thesis. São Paulo: USP, 2013.

ECHAVE, Delia Teresa; URQUIJO, María Eugenia; GUIBOURG, Ricardo A. *Lógica, proposición y norma*. 6th ed. Buenos Aires: Astrea, 2002.

FAVACHO, Fernando Gomes. *Definição do conceito de tributo*. São Paulo: QuartierLatin, 2011.

FIORIN, José Luiz. *Interdiscursividade e intertextualidade*. In: BRAIT, Beth (Org.). Bakhtin - outros conceitos-chave. São Paulo: Contexto, 2010.

FLUSSER, Vilém. *Língua e realidade*. 2nded. São Paulo: Annablume, 2004.

GAMA, Tácio Lacerda. *Competência tributária: fundamentos para uma teoria da nulidade*. São Paulo: Noeses, 2009.

_____. *Sentido, consistência e legitimação*. In: Florence Haret; Jerson Carneiro (coord.). Vilém Flusser e Juristas: comemoração dos 25 anos do grupo de estudos de Paulo de Barros Carvalho. São Paulo: Ed. Noeses, 2009.

GRECO, Marco Aurélio. *Em busca do controle sobre as Cide's*. In: André Mendes Moreira; Antônio Reinaldo Rabelo Filho; Armênio Lopes Correia (org.). Direito das telecomunicações e tributação. São Paulo: QuartierLatin, 2006.

GUIBOURG, Ricardo A.; GUARINONI, Ricardo. *Introducción ao conocimiento científico*. 3rd ed. Buenos Aires: Eudeba, 1998.

JARDIM, Eduardo Marcial Ferreira. *Dicionário de direito tributário*. São Paulo: Noeses, 2011.

KAUFMANN, Arthur. *Filosofia do Direito*. 3rd ed. Preface and Translation: António Ulisses Cortês. Lisbon: Ed. CalousteGulbenkian, 2009.

LUHMANN, Niklas. *Social Systems*. Stanford: Stanford University Press, 1995.

MARTINS, Natanael; RODRIGUES, Daniele Souto. *A evolução do conceito de insumo relacionado à contribuição ao PIS e à COFINS*. In: PIS e Cofins à luz da jurisprudência do Conselho Administrativo de Recursos Fiscais: volume 2. Gilberto de Castro Moreira Junior, Marcelo Magalhães Peixoto (coordenadores). São Paulo: MP Editora, 2013.

MENDONCA, Daniel. *Interpretación y aplicacióndelderecho*. Almería: Universidad de Almería, 1997.

MOREIRA, André Mendes. *A não cumulatividade dos tributos*. São Paulo: Noeses, 2010.

MOUSSALLEM, Tárek Moysés. *Interpretação restritiva no direito tributário*. In: Priscila de Souza (Coord.). Direito Tributário e os Conceitos de Direito Privado. São Paulo: Noeses, 2010.

_____. *Revogação em matéria tributária*. São Paulo: Noeses, 2005.

PEIRCE, Charles S. *Prolegomena to an Apology for Pragmaticism (CP 4.537)*. Available at: http://www.existentialgraphs.com/peirceoneg/prolegomena.htm. Accessed on: June 4. 2013.

PISCITELLI, Tathiane dos Santos. *Os conceitos de direito privado como limites à interpretação de normas tributárias: análise a partir dos conceitos de faturamento e receita*. In: Priscila de Souza (coord.). Direito Tributário e os Conceitos de Direito

Privado. São Paulo: Noeses, 2010.

PRIA, Rodrigo Dalla. *Constructivismo Jurídico e Interpretação Concretizadora: Dialogando com Paulo de Barros Carvalho e Friedrich Müller*. In: Priscila de Souza (coord.). Derivação e positivação no direito tributário. São Paulo: Noeses, 2011.

ROBLES, Gregorio. *O direito como texto: quatro estudos de teoria comunicacional do direito*. Translated by Roberto Barbosa Alves. Barueri: Manole, 2005.

SANTAELLA, Lucia. *A teoria geral dos signos: como as linguagens significam as coisas*. São Paulo: Cengage Learning, 2008.

SAUSSURE, Ferdinand de. *Curso de lingüística general*. Translation, prologue and notesby Amado Alonso. 24th ed. Buenos Aires: Editorial Losada, 1945.

SCAVINO, Dardo. *La filosofia actual: pensar sin certezas*. Santiago del Estero: PaidósPostales, 1999.

SCHOUERI, Luís Eduardo. *Direito Tributário*. São Paulo: Saraiva, 2011.

SILVEIRA, Lauro Frederico Barbosa da. *Curso de semiótica geral*. São Paulo: QuartierLatin, 2007.

SOUSA, Cecília Priscila de. *Intertextualidade no Direito Tributário*. Master's thesis. São Paulo: PUC/SP, 2012.

SOUSA, Rubens Gomes de. *A natureza tributária das contribuições para o FGTS*. In: Revista de Direito Público 17. São Paulo: Ed. Revista dos Tribunais, 1971.

TOMÉ, Fabiana del Padre. *A prova no direito tributário*. São Paulo: Noeses, 2005.

_____. *Vilém Flusser e o Constructivismo Lógico-Semântico*. In: Florence Haret; Jerson Carneiro (coord.). Vilém Flusser e Juristas: comemoração dos 25 anos do grupo de estudos de Paulo de Barros Carvalho. São Paulo: Ed. Noeses, 2009.

TÔRRES, Heleno Taveira. *Boa fé e argumentação na interpretação das normas tributárias*. In: SOUZA, Priscila de (coord.). Direito Tributário e os Conceitos de Direito Privado. São Paulo: Noeses, 2010.

VILANOVA, Lourival. *As estruturas lógicas e o sistema do direito positivo*. São Paulo: Noeses, 2005.

WARAT, Luis Alberto. *O direito e sua linguagem*. 2ndexpanded ed. Porto Alegre: Sergio Antonio Fabris Editor, 1995.

The "syndrome" of legislative reforms in Brazil: criticism of the institutionalization of law in peripheral capitalism[1]

Carolina Alves Vestena[2]

Abstract: This paper proposes a research agenda on the role of legal form in the social reforms lead by the state in the periphery, considering the dialogue between critical theory and postcolonial studies. In the first part I present the "state of the art" of the theories of legal sociology in Brazil and interpretations of the Law, which have certain emancipatory features. By doing this exploratory analysis, some criticisms are pointed out, for example, the maintenance of Eurocentric regulatory proposals and the lack of a critical reading about the limits related to the institutionalization of legal form. These aspects open lines for the connection between legal critique and postcolonial studies. In the second part, I bring a preliminary analysis, result of ongoing research, on the influential approaches of postcolonial studies for the Latin American social theory. With these contributions, it can be possible to indicate an opening of the field of social sciences to post-colonial studies, as well as the gains that these can bring to the analysis of the role of law within global capitalism. Finally, I resume the working hypothesis, namely, the proposed dialogue between critical theory and postcolonial studies as a research agenda that takes seriously the potential construction of a new imaginary for the critique of legal form.

Keywords: Legal form, post-colonial studies, critical theory

1. Introduction

Reformative actions are an important strategy of the State and

[1] Paper presented in the Special Workshop "Give Marxism what it deserves! Law and the Social Analysis: Is Marxism Still an Opportunity?" on 22th June 2013.

[2] PhD student at the Graduate Law Program of the State University of Rio de Janeiro, UERJ, Brazil. E-mail: carolvestena@gmail.com.

for the state. They primarily represent the institutional managing model in capitalism, as the reforms are cyclically handled in order to provide conditions for economic progress and social equality. If observed from the point of view of this social formation, they mean, therefore, a repertoire of common action, and their characteristics may be different, as a function of the ideology of the elected government, the political and economic scenario, and the scope of the agenda of human rights and social justice.

The discussions on reform were born from social struggles promoted by workers. Nevertheless, over time, the reforms were linked to the possibilities of transformation within the capitalist system itself. Traditionally, the term "reform" lay within a critical theory that set the idea of reform to against that of radical social transformation, to the revolution (Luxemburg, 2007; Settembrini, 1983). In this debate, on one side was the revolutionary movement, which was economically, politically and culturally antithetical to capitalism, regardless of the means necessary to be so; on the other side was the reform movement, whose purpose was to improve and enhance the existing order, as the foundations of this order were considered absolute and necessary for the development of men (Settembrini, 1983). With the world changes introduced in the postwar period and due to criticisms of the totalitarianism of the Stalinist regime, the reform/revolution dichotomy gave way to the issue of the gears of the state and democracy. The different approaches to this subject include the debate about the "crisis of the State" in the 70s, which brought the discussion of hegemony and material determination of the State due to the conflict of their fractions of class (Poulantzas, 1969; 2001). This approach was extremely important to discuss the role of ideology and law in capitalism, showing how these assume a unifying meaning, of an intrinsic order of the social body, which no longer had a transcendent authority over all subjects, as stated by Buckel and Fischer-Lescano (2009). Hence, the forms of State action depend on control mechanisms of hegemony, which support the maintenance of political authority and its legitimacy (Buckel; Fischer-Lescano, 2009). Although the reform action is aimed at transforming some aspect of social reality, its intervention limits do not exceed the possibilities of political emancipation of the project of modernity linked to capitalism. Which factors characterize this model of State action? Is its reproduction widespread in the world system? Do center and peripheries use the reform discourse with the same meaning?

The last Brazilian governments, for example, have worked

through reforms intended to improve their legal institutions in line with a project of democratic consolidation post-dictatorship and also with new-developmental proposes. To this end, the justice system should be efficient, rational and democratic, according to the models set out by international agencies, such as the World Bank and the IMF. [3] The reform of the Judicial Branch [4] and a number of law changes resulting from the reform of the civil code, the code of civil procedure and tax reforms have followed these requirements. The assumption inherent in these reforms comes from the following equation: a more efficient legal system means more investment, more development and, ultimately, more income to fight the economic and social inequalities. One might ask then, which rules determine investment priorities? Will an environment conducive to more investments necessarily result in social benefits? Which rules determine the governments' political choices of the reforms to be implemented?

The Latin American social thought, especially the dependency theory, also produced interpretations of the State, capitalism and reforms. These theories have sought to observe the overall dynamics of the economy and social relations, explaining the center-dependent development from the underdevelopment of the periphery (Dos Santos, 2010). This movement led to the reinterpretation of the concepts of center and periphery, based on unequal, yet interwoven positions for the widespread reproduction of capitalism in the world system. It introduced the foundations for the development of the world-systems theory refined by Wallerstein in the 70s, which added complexity to the criticism of capitalism by globalizing the social division of labor as the basis of social inequality in the world system (Wallerstein, 2000; Robinson, 2011). Therefore, it opened up space for a review of the political and epistemological hegemony of the global north (the West represented by Europe and the USA), bringing the Southern epistemologies as alternative interpretations of the constitution of individuals and civil society about the meaning of modernity in different locations and, consequently, about the political and economic processes of capitalism. The notion of "neoco-

[3] To read more about the influences of international documents on the reform of the Brazilian Judicial Branch, see: Candeas, 2009; Ministério da Jutiça, 2005.

[4] Held by constitutional amendment 45, in 2004, it changed the institutional framework of the Brazilian court system by creating the Brazilian Council of Justice (CNJ), modifying the powers of labor courts and creating an environment that was conducive to the expansion of policies of social participation in the judicial branch. Read more about it in Vestena, 2010.

lonialism" started to be used in the social sciences as an explanatory key to the reconstruction of scientific interpretations embedded in a post-colonial view (Gonçalves, 2012, p. 23). Then, since this paper presents a research agenda, some questions and lines will remain open for further development. In resume, the main objective of this paper is to introduce some questions and steps for a critical interpretation of the legal reforms in periphery, and doing so, also an observation of the social reforms. The set of theories included in the "global south" presents the possibility of new interpretative dialogues on macro-social thinking.

2. About the Brazilian field of sociology and theory of law

In order to construct a frame analysis on the interpretation of social reforms in peripheral capitalism, it is important to explore the knowledge on the main theoretical approaches that have been developed in Brazil in the past years. I can state, in general, this theoretical field uncritically adopts the socio-legal standards of modernization set by the legal models of core countries. Because of this, it is unable to build criticism on the structural role of the legal form in global capitalism. This partial conclusion of the research study was drawn in the course of the first year of the doctoral program. The first objective of doing this diagnostic was the understanding under which roots the social interpretation of law in Brazil is currently framed. In the paragraphs below, I briefly present this first diagnosis based on such insights. I will present the systems theory approach, the theories grounded in the legal pluralism and, finally, the social interpretations of the Brazilian constitution, so called "neoconstitucionalism".

There is significant diversity of approaches related to the systems theory, especially with regard to the normative projects that resulted from their diagnoses of Latin America and Brazil. Campilongo (2000; 2002) focuses his analyses on the relations between the legal and political systems. In discussing the judicial politicization, the author offers interpretations of the need for operational closure in the licit and illicit code as an alternative. Neves (2000, 2003), in turn, discusses the structural problem of the Latin American economic and political inequality by describing this society as an arena of social miscellany that is an integral part of a negative modernity. Against this process, the author states the need for introducing the general principles of generalized inclusion and differentiation of the legal system. By reaching such decision-making

parameters, the periphery would be able to recover from the tardiness caused by *coronelismo* and *paroquialismo,* [5] and would encourage citizens' active participation. Lastly, Gonçalves critically describes the structural damage to law which was produced by the process of systemic corruption of the economy. He emphasizes the impossibility of controlling the damage caused by judicial politicization, which led to its subsequent economization (Gonçalves, 2011). This statement also calls for the need to close the legal system under the standards of what Luhmann calls legal differentiation (autonomy of the communicative code and function). Legal differentiation means the congruent generalization of normative expectations, the creation of an autonomous legal dogmatic and an exclusively legal communicative code. This perspective corresponds to the standard of autonomy of the legal system of the central countries.

However, it should be noted that, influenced by Neves, the systems theory looked to the notion of periphery. The convergent receipt of this concept by the systems theory and by its tradition in the Marxist studies and in world-systems theory has not taken place, though. In Brazil, among the authors who have adopted the systems theory, this thought fed criticisms of the epistemological Eurocentrism that underlies the Latin American and Brazilian sociology in the construction of development models similar to those adopted in major capitalist nations (Gonçalves, 2010). From the perspective of the systems theory it is possible to identify a historical journey that begins in the legal differentiation as developed by the semantics of the core countries and ends at a more critical reception of such standards, but this kind of development is still in construction.

The second line of Brazilian social-legal theory analyzed in this study is the legal pluralism and its corresponding developments. The legal pluralism theory recognizes the mark of inequality among population groups and observes the specificities of the organization of their social relationships, assigning them forms of legal regulation, or, in this case, non-legal regulation. This perspective draws on the idea of social resistance comparing the law of *favelas* to the official law of the State. The pioneering studies of Santos (Santos, 1974) developed a theory that demonstrated the inability of formal law to promote social equality. Santos explained the intrinsic connection between formal law and politics in the modern Western state and its aptitude to oppress mar-

[5] Translator's note: these expressions were forged in Brazilian social thought and result from a compromise, an exchange of favors between the government and local bosses.

ginalized groups, while maintaining structural inequalities among the classes (Santos, 1988). The solution proposed by the author was linked to the movement of Marxist interpretations according to Gramsci, which advocated that the State itself should be used to offer resistance. In the last decade, in parallel to this discussion, Santos championed a project of democratic reform of the State and legal system (Santos, 2007, 2009). Note that despite advances in the criticism of the legal form of his early writings, the reception of his theory in Brazil has been used primarily to justify the reform projects, which means trusting in the role of the State and its mechanisms of representation. Therefore, his writings apparently fall into contradiction: they produce criticism of the legal form, but his interpretations are eventually and uncritically assigned an institutional view that adopts a meaning of achievement of human rights according to the semantics of the center as something to be developed by the dynamics of law in the periphery.

These approaches played a prominent critical role in the production of an alternative theory of law that uses patterns of material rationality to design the interpretation parameters to be used in court decisions. However, the criticism of the legal form, as expressed in reports against the hegemony of monism and the proposal of alternative sources of law, found its limit in the State itself. Interpretations of the possibility of resistance to the law based on the law itself were changed with the enactment of the 1988 Constitution, a starting point for redemocratization. This opened up space for the emergence of another trend consisting of the reinterpretation of the social role of law by defending principle-based models, the so-called "*neoconstitucionalismos*." This trend was received in Brazil by a number scholars and reputable lawyers, and is explained especially in the studies of Barcellos (2005) and Barroso (2002). Brazilian constitutionalism after the year 1988 sought to assert the actual effectiveness of the federal constitution. According with this new potentiality, it was open a new front for affirmation of human rights: the rights that were considered rebellious in the dictatorial periods became then part of the institutional and argumentative rhetoric inside the new constitution. The dispute for law was incorporated in the political strategy in this field. One of the problems to be solved would be the handling of complex cases, which allow inconsistent interpretations within the regulatory framework. To this end, techniques for building arguments, justifications and explanations of court decisions have assumed great importance vis-à-vis the criticisms of judicial majoritarianism and the expansion of law and its institutions on the social stage. Hence, this last

trend stands out due to the democratic potential supposedly present in the exercise of legal technique through the guarantee of material contents of the rights ensured in the modern constitutions. This theoretical system presupposes the existence of a democratic institutional architecture that protects fundamental freedoms. It requires from the State, at the level of legal rules, the protection of individuals, but fails to address the reasons for the social and structural inequalities. Furthermore, it also stays away from post-colonial issues, since it assumes the universal meaning of the legal form as presupposed data, or in other words, it stays involved within the limits of the Eurocentric forms of social and political imagination.

According to such diagnosis, the Brazilian social legal theory oscillates between fully embracing the reform project and aspects of criticism of the legal form. It does not offer an alternative to the reform project, since, even though it came close to the criticisms, it did not assume the criticism as a regulatory path to be taken. The solutions resulting from this theory add further strength to the idea that the best way is the reforms, that is, the design of institutional solutions that will direct society towards the standards of economic and cultural development that are similar to the reality of the center of capitalism. This top-down process based on policies developed by the legislative, executive or judicial branches would be responsible for ensuring social and welfare services for all. Even if its ideas stem from empirical diagnoses grounded in the Brazilian reality, one should ask: would the reproduction of the Western modernity project be a constraint to its regulatory proposals? By considering that the democratic rule of law is the most democratic, egalitarian and fair model of sociability, wouldn't they be falling back upon the same modernizing projects inherent in a notion traditionally linked to the legal dogmatic?

The dependency theory had already spotted constraints in the action models adopted within capitalism and their lack of aptitude for the reduction of economic inequality and social emancipation. Theotônio dos Santos demonstrates the attraction that the social sciences had towards the theory of modernization and development, when they attempted to explain the progress made by powerful European nations in the post-war period. His goal was to relate the development to the adoption of "rules of behavior, attitude and values consistent with the modern economic rationality characterized by the pursuit of maximum productivity, savings and the creation of investments that would lead to the permanent accumulation of wealth for individuals and each national

society" (Dos Santos, 2011). Earlier, due to the cold war, and today, as democracy is believed to be the only political system capable of promoting rights, the theories about law offer solutions embedded in the formal institutional framework and in the reforming action of the State. One should then ask: are the reforms the path towards social emancipation? In what context is an environment conducive to the reforms of the periphery forged? The next topic presents some of the theoretical assumptions that led to conclusions about the dependency theory. It will discuss the extent to which the interpretations of law based on post-colonialism have incorporated these conceptual acquisitions. At the end of this paper, some issues will be broached to demonstrate the limits of the current literature on post-colonialism and law and connected to them the open questions about the emancipatory or conservative character of the social reforms that have been taken place in peripheral countries in recent years, as example, in Brazil.

3. Contributions since Latin American' social and post-colonial theory

The previous topic supported that the current literature on Brazilian sociology of law and theory of law is limited when it discusses legal form and State action within the capitalist social formation. Regarding this interpretation, it is possible to state that the alternatives offered to consolidate the "rule of law" are merely idealistic regulatory parameters of law and policy according to standards established by the center. Considering the notion of "*neocolonialismo*" as a criterion of explanation for the phenomenon investigated, Latin American social thought, particularly the movements that led to the design of the dependency theory, served as a means of analysis to discuss the role of legal form in the State reforms.

When the dependency theory emerged, the view of the role of periphery in the world system and the criticism of the cultural, economic and political domination were not at all new. The foundations of this argument can be found in the writings of Mariátegui on the reality of Spanish colonization in Peru, or even in "internal colonialism," a theoretical movement that preceded the dependency theory, represented by the writings of Stavenhagen (1963) and Casanova (2006). Besides this, the political anthropology of Pierre Clastres (1989) discussed the meanings that the traditional ethnography assigned to the description of the

Latin American indigenous people. It considered archaic the entire negative content of its fate doomed to subordination and colonization.

José Carlos Mariátegui, in his essays on the Peruvian reality, addresses the gradual transformation of Peru into a bourgeois economy, which took place together with the historical and political processes of the world system. As the author puts it, the feudal economy had, little by little, been transformed into a bourgeois economy, yet without ceasing to be colonial in the world context. In this respect, the author argues that the position of Peru in the process of widespread reproduction in world capitalism was, just like that of other colonies, one that provided support to the economic revolutions of the center. The progress in the production processes of the colony and its cultural changes maintained such supportive position, which was demonstrated by the author when he referred to the coexistence of different types of economy. Therefore, his concept of modernity is permeated by the dialectics of different conflicting social segments, ethnicities and economic formations that intermingle, thus producing social effects and forms of regulation or rights (Mariátegui, 1971).

In this aspect, Rodolfo Stavenhagen also criticizes the Spanish colonization model and the exploitation faced by the indigenous people in México in a much more contemporary essay. He recognizes that America was critical for the development of the Spanish model, since the exploitation of indigenous production in the colony supported the similarly weak Spanish production model. The development of the colony was maintained under the foundations of a local aristocracy that had been homogenized according to the interests of the colonizer. This colonizer, in turn, was not interested in the internal differentiation. Hence, the lands were transferred to homesteaders that arranged the evangelization and acculturation of the indigenous people (Stavenhagen, 1963, p. 244). Stavenhagen argues that the colonial relations were a mere aspect of the class relations that the mercantilist system forged on a world scale. As previously mentioned, the theoretical movement of internal colonialism put forward the debate that was later incorporated by the dependency theory by placing the colonial world within the generalized system of reproduction of global capitalism.

According to Stavenhagen, the development of the colonial "underdevelopment" resulted in the separation of individuals from their communities. The system of interethnic stratification is maintained as a conservative propeller. The modernity that arises vis-à-vis internal colonialism consists of two structures: the indigenous cooperative commu-

nity and the global society, where the role of nationalism and the *ladino* — the mestizos who have local identity — gain strength. In short, four elements are critical in the modern society relations forged in the colonial experience: colonial relations, class relations, social stratification and the process of acculturation (Stavenhagen, 1963, p. 245). However, these interpretations are quite determinist: considering the economic and political conditions put before the center and the periphery, would the result always be the same?

To summarize this, it is worth listing the following contributions from the authors: (i) the history of the colony-Iberic metropolis relationship forged a sort of mining colonialism that was highly harmful to the autochthonous populations of Latin American countries, which eventually affected the society as a whole; (ii) the economic foundations of these places eventually reflected production methods based on different principles, which consisted of slavery, feudal systems and the emerging bourgeoisie, meaning that the modern society of the periphery presents such diversity, rather than a homogeneous process of "bourgeoisification" of the economy, the culture and the politics; (iii) the presence of indigenous people in these places triggered processes of legal control over these individuals through homogenization efforts aiming to include the indigenous people in society and in labor arrangements; lastly, also in terms of structure, (iv) the acculturation processes meant the resistance of these people, who used the discourse of protection of their identity and their forms of social relations as mechanisms of resistance to the acculturation. The arguments of the two authors present features of an original interpretation of the legal form that considers its strength to reproduce the dynamics that characterize capitalism – universalization and occultation of material inequalities, while it points to the possibilities of societal resistance. However, a central aspect remains unexplained: why is the cultural domination accepted and supported under the legal form? Isn't the perception of inequality enough to motivate the building of alternative, autonomous and free society models?

Mariátegui and Stavenhagen draw insights from the history of incorporations and resistance of indigenous communities in two Latin American locations to demonstrate how the legal form influences the infrastructure, providing the bases for the consolidation of the capitalist production model. This finding unveils the possibility of making criticisms of law, as it ultimately confirms that the legal form is forged from inequality. Put differently, the law that formally makes people equal is born to ensure that those considered culturally unequal be maintained

in a position of permanent material inequality once they are received in the labor market. The material sense of maintaining inequalities, as assumed by the legal form, can be combined to a cultural blinding, that means, indigenous, primitive, archaic, peripheral are assigned characteristics that depreciate the subjects' position in this subaltern context. Hence, if there is extreme poverty, inequality, deficit of rights, it is because these societies have not matured and developed enough to overcome these obstacles. The logic of inequality is reflected in the individualist discourse that looks for the *homo-economicus,* "a rationalist and utilitarian individual that ultimately expresses human nature as freed from antihuman traditions and myths" from the modernizing project at all locations (Dos Santos, 1970).

A set of pairs of concepts is recurrent in the descriptions of society, politics and law in the peripheries. In Latin America, since the first ethnographic narratives, such terms as primitive and developed, archaic and modern, pre-political and political, non-historic and historic, enliven such classifications, which are filled by a valuing repertoire that sought to understand "new" social spaces from the grammar established in its scientific founding *locus*: the center of the colonial world system based in the most powerful Western nations of that time (Clatres, 1989). The maintenance of that grammar, after struggles for political independence and transformations in world geopolitics requires a daily process of epistemological decolonization. Why do the societies of the global south, regardless of their temporality, their process of economic change, their successful political strategies or their position in the international stage, still have a complex of inferiority attributed by the recurrent imagery of the model based on Western patterns and, therefore, on the center of capitalism?

As already mentioned, the dependency theory movement sparked fierce debates on Brazilian social thought by trying to debunk the myths of U.S. developmentalism and structuralism, as well as the determinations of a positivist Marxism that revolved around the experience of the Soviet Union. The supporters of that movement challenged the forms of characterizing the world, as represented by the theories of social evolution prevailing in the West. As Theotônio dos Santos argues, Latin America itself wanted full independence from the British and U.S. political pressures. In this context, it became a birthplace of theories that challenged the explanations that traditionally attributed the political and economic accomplishments of Europe to an alleged racial and cultural superiority (Dos Santos, 1970). Dependency theory allowed "un-

derstanding development and underdevelopment as a historic result of the development of capitalism as a world system that produced, at the same time, both development and underdevelopment" (Dos Santos, 2011, p. 09).

This theory critically considered the possibilities of internal development in a global capitalist system that stratified different nations in terms of economic status. The national bourgeoisies based their participation on the international capitalism, but did not compete on equal terms due to the constraints of a development started at a moment in history in which business groups of the center enjoyed a clear hegemony. Not even the crisis arising from decolonization, which opened up the doors to this issue, was enough to overthrow crystallized hegemonic positions (Dos Santos, 2010, p. 10). The dependency movement served as ground for Wallerstein's world-systems theory, which brought about a global view of the structures of capitalism reproduction as a background for the processes of cultural domination. Increasingly strong criticisms of Western epistemology centered in the universalization of the political and subjective ideal represented by the rational-emancipated European man are argued in the writings of the Latin American *decoloniales* thinkers Enrique Dussel (1995, 2003), Aníbal Quijano (1992; 2000), Walter Mignolo (1995; 2001; 2010) and Edgardo Lander (2005).

As a response to the economicist determinism of Marxist interpretations, a post-colonial line of interpretation sought to explain the cultural and symbolic elements of the relationship of domination between the center and the periphery. From the criticism of Said (2003) to the *decoloniales* researchers, the universal project of European modernity has been seen as a weapon of epistemological recolonization that covers all social sciences. It is worth incorporating into the legal field of studies a debate long embedded in the human and social sciences about the need to produce models that are both autonomous and independent from the Western-universal criteria for providing descriptions of world reality. In sociology, anthropology, history and political science, this debate has been enhanced by the defense of the idea of "provincilizing" European thought (Costa, 2006); that is, the idea that whatever is produced in the center derives from standards of sociability local to center, which, due to its political strength in the world relations of capitalism, consist of universalities of thought, politics and law. The interpretations presented by the Brazilian theory of law were restricted to the development of social and legal models that put the Brazilian society on the same footing as the cultural and intellectual standards of the capitalist

center reality. As stated by Gonçalves, the use of parameters "forged by the European conceptual heritage" reinforces a vicious cycle of diagnosis of lateness and consequent frustrated reforms (Gonçalves, 2010). Once the central development standards are adopted, it is a matter of applying the European models to the peripheral realities whose historic processes triggered diverse sociabilities, which, therefore, do not fit the desired molds. The failure to fit into these molds causes the permanent intervention of social and economic reforms in favor of development, which also support permanent frustrations, which will entail additional interventions and the permanence of a discourse politically and hierarchically organized within global society (Gonçalves, 2010).

The post-colonial approach offers a lengthy debate on the relationship between universality and specificity of the "local", which is present in the issues of multiculturalism, protection and recognition of differences and in the hierarchies of the globalized world. However, the incorporation of this theoretical approach is still incipient in the legal field, which, as discussed above, neither goes beyond the alternatives of the modernizing project, nor discusses systematically the forms of domination and hegemony of capitalism in its normative formulations on law in the periphery. Therefore, it can be argued that the theory of law is very likely to incorporate post-colonial studies. Actually a set of scholars is bringing inside the field of law the pos-colonial perspective especially when they observe the multi-ethnic and multi-identity Constitutions in Latin countries as Bolivia and Venezuela. Despite the relevance of this approach, the main interest of this work is not the constitutionalization processes in Latin America, neither the recognition of rights inside the formal perspective of law, but instead the real possibilities of critique in these matters. This can mean, even the construction of other ideia of rights and the role of law.

One of the main risks that law field should care about this incorporation is falling into a reductionist criticism limited to the critique of importing models or of eurocentrism. To avoid this risk, it is argued that the critical theory of law as proposed by Buckel and Fischer-Lescano (2009) may expand the cognitive universe of post-colonial analyses of law. The dialogue of these two theoretical universes makes it possible to reinterpret the notion of reform in capitalism and its determining correlations with legal form. This is intended to observe how the notion of reform in the periphery operates within a certain "world view," which drives those that are determined to act consensually rather than from a mechanical perspective of power (Buckel; Fischer-Lescano, 2009). This

calls for an investigation on how this consensus materializes certain values which underpin dynamics of reform deriving from a model of sociability that universalizes legal form, positions the strategy of the State as a birthplace for capitalism and places the subjects in the individualized figure of the emancipated rational man.

In short, the literature review in the first part of this research calls for new operative investigations of theory to analyze the assumption of work. On the one hand, the Brazilian theories of law lie on the border of projects for the improvement of the capitalist State, underpinned by legal form and based on the patterns of the semantics of the right of central countries. On the other hand, Latin American social thought, which flows into the dependency theory and into post-colonial studies, indicates the maintenance of social and economic differences and moral hierarchies between the global north and south, which allows analyzing the phenomenon of reforms in the periphery as a "syndrome" that moves towards continuous repetitions and frustrations. However, the reflections on dependency theory do not go beyond a determinist system that relates colonization and dependent development, failing to deeply analyze its cultural processes of resistance. Post-colonial thought, for one side, offers an important analysis key, which is the observation of categories from the notion of *neocolonialism*, which allows criticizing eurocentrism, but, on the other side, it is hardly able to broach the processes of domination by global capitalism. [6] These limitations call for a research agenda capable of extrapolating the conclusions of post-colonial studies into a critical theory of law of capitalist society. This is intended to identify the relationship between a model of modernization and the ideological dimension of reforms, which lead to the subordination to certain development standards grounded in Western epistemology, or a "world view" that determines the paths to be taken to ensure the support of global political power structures. This requires opening up for a theory of law forged from the concept of hegemony, as proposed by Buckel and Fischer-Lescano (2009).

4. Some steps for the further research agenda

The global purpose of this investigation is to develop an interpretation of the legal form of capitalism by mapping out State reforms, resulting from a dialogue between post-colonial thought and the criti-

[6] About this discussion, see: Ziai, 2010.

cal theory of law. Research studies on Latin American thought and on Brazilian theory of law had been conducted as briefly presented in this project. A number of questions remained unanswered during the course of the first set of theoretical studies. Some problems that the Brazilian theory of law was not able to answer remain to be solved. It is necessary to review the critical theories touching the legal form in order to employ a macro-social approach on the strategy of reforms in global capitalism. At this research level, new analytical contributions can be offered to tackle the political and social variants of the phenomenon of reform in a non-deterministic approach, showing the processes of rationalization and fight for hegemony within this social formation.

As demonstrated in the theoretical background of the project, a key step of the research study depends on reviewing critical theories to the legal form that can be incorporated into the analysis framework to build a model for understanding the reforms in peripheral capitalism. Research on Brazilian theory of law found that these theories are not enough to develop an explanatory model that covers the structural analysis of the legal form and the mechanisms of rationalization of power linked to Western epistemology. A group of researchers in Germany has developed critical approaches that aim to distinguish the legal phenomenon as an instrument of power, stressing its paradoxical role, while concealing hegemonic visions of politics needed to support the operations of the legal dogmatic, creating new subjectivities, socially educating and opening space for counter-hegemony actions. [7] This interpretive key shows the process of rationalization of power in modernity, in which legal form takes a decisive role in the formation of social consensus, since domination does neither take place due to the existence of a transcendent authority, nor due to the violence monopolized by the State. This theory has a descriptive potential that can be operationalized for an interpretation of the most complex and sophisticated forms of domination that intertwine in the current social phenomena of reforms and their legal forms. It opens space for a fruitful dialogue with post-colonial studies, which, in recent years, have been consistently developed in innovative ways.

Most studies have focused on the economic and political effects of State reforms. In the case of legal reforms, as mentioned in this work, they were interpreted primarily by readings that justified their imple-

[7] About this approach, see the works of Sonja Buckel, Andreas Fischer-Lescano, Christoph Menke and Alex Demirovic.

mentation without addressing the macro-social problems or limitations of such phenomena. In view of this scenario, the purpose of this research is to reflect on the Brazilian institutional situation, which has repeatedly sought strategies for social and economic development through reforms, whose results can be seen from a critical perspective.

References

Barcellos, Ana Paula de. Ponderação, racionalidade e atividade jurisdicional. Rio de Janeiro: Renovar, 2005.

Barroso, Luís Roberto. "Here, there and everywhere": Human dignity in contemporary law and in the transnational discourse. In: Boston College International and Comparative Law Review, n. 2, v. 35, 2002.

Buckel, Sonja; FISCHER-LESCANO, Andreas. Gramsci reconsidered: hegemony in global law. In: Leiden Journal of International Law, n. 3, v. 22, Sep., 2009, pp 437-454.

_____. Subjektivierung & Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts. Weilerswist, 2007.

_____; Fischer-Lescano, Andreas. 'Hegemonie gepanzert mit zwang'. zivilgesellschaft und Politik im staatsverständnis von Antonio Gramsci. baden-baden, 2007.

Campilongo, Celso Fernandes. O direito na sociedade complexa. São Paulo: Max Limonad, 2000.

_____. Política, sistema jurídico e decisão judicial: uma redescrição a partir da teoria dos sistemas. São Paulo: Max Limonad, 2002.

Candeas, Ana Paula Lucena Silva. Os valores recomendados pelo Banco Mundial para os judiciários nacionais. In: Cidadania e Justiça. Brasília, 2004, ano 7, n. 13. Disponível em: <HTTP://www.amb.com.br/docs/publicacoes/outros/revista_cj_n7.pdf>, Acesso em 10 mar. 2009.

Casanova, Pablo González. Internal Colonialism and National Development. In: Studies in Comparative International Development, n. 4, v. 1, Apr., pp 27-37, 1965.

_____. Sociología de la Explotación. México D.F.: Siglo XXI, 1969.

_____. Colonialismo Interno: Una Redefinición, in A. Borón, J. Amadeo e S. González (orgs.), La Teoría Marxista Hoy: Problemas y Perspectivas. Buenos Aires: CLACSO, pp. 409-434, 2006.

Clastres, Pierre. Society Against the State: Essays in Political Anthropology. Zone Books, 1989.

Costa, Sérgio. Desprovincializando a sociologia. A contribuição pós-colonial. In: Revista Brasileira de Ciências Sociais, v. 21, n. 60, fev, 2006.

Dos Santos, Theotônio. The structure of dependence. In: The American Economic Review, n.2. v. 60, pp. 231-236, 1970.

_____. A teoria da dependência: um balanço histórico. [S. I.]. 2011.

Dussel, Enrique. The Invention of the Americas: Eclipse of "the Other" and the Myth of Modernity. New York: Continuum, 1995.

_____. Philosophy of Liberation. Wipf & Stock Publishers, 2003.

Fischer-Lescano, Andreas. Globalverfassung. Die Geltungsbegründung der Menschenrechte. Weilerswist, 2005.

_____. Global Constitutional struggles: Human rights between colère publique and colère politique«, in: Wolfgang Kaleck/Michael ratner/tobias singelnstein & Peter Weiss (eds.), International Prosecution of Human Rights Crimes, new york, 13-29, 2005.

_____; Teubner, Gunther. Regime-Collisions: the vain search for Legal unity in the Fragmentation of Global Law. In: Michigan Journal of International Law 25, 999-1046, 2005.

Gonçalves, Guilherme L. Rechtssoziologische Interpretationen des Rechtsdiskurs in Lateinamerika: eine postkoloniale Kritik. Juridikum Zeitschrift für Kritik/Recht/Gesellschaft, v. 21, p. 311-320, 2010.

_____. Entre politização e judicialização: limites estruturais do direito e da política. In: MOTTA, Luiz Eduardo; MOTA, Maurício (orgs.). O Estado Democrático de Direito em Questão: teorias críticas da judicialização da política. São Paulo: Elsevier, 2011, pp. 76-93.

_____. Are We Aware of the Current Recolonisation of the South? In: This Century's Review - Journal for Rational Legal Debate, Frankfurt am Main, p. 22 - 25, jun. 2012.

Lander, Edgardo. (org.) A colonialidade do saber. Eurocentrismo e ciências sociais. Perspectivas latino-americanas. São Paulo: CLACSO, 2005.

Luxemburg, Rosa; SCOTT, Helen (Ed.). The Essential Rosa Luxemburg: Reform or Revolution and the Mass Strike. Haymarket Books, 2007.

Mariategui, José Carlos. Seven Interpretive Essays on Peruvian Reality. Austin: University of Texas Press, 1971.

Mignolo, Walter. The Darker Side of the Renaissance. Literacy, Territoriality and Colonization. Ann Arbor: The University of Michigan Press, 1995.

_____. Capitalismo y geopolítica del conocimiento. El eurocentrismo y la filosofía de la liberación en el debate intelectual contemporáneo. Buenos Aires: Ediciones Signo/Duke University, 2001.

_____. The geopolitics of knowledge and the colonial difference. In: Contribution for Praxis Pública, Oct., 2010.

Neves, Marcelo. Zwischen Themis und Leviathan: Eine Schwierige Beziehung - Eine Rekonstruktion des demokratischen Rechtsstaats in Auseinandersetzung mit Luhmann und Habermas. Baden-Baden: Nomos, 2000.

_____. From Legal Pluralism to Social Miscellany: The Problem of the Lack of Identity of the Legal Sphere(s) in Peripheral Modernity and Its Implications for Latin America. In: César A. Rodrígues. (Org.). Law and Society in Latin America - Beyond Law: New Work on Law and Social Change from Latin America and Around the World. Bogotá: Instituto Latinoamericano de Servicios Legales Alternativos - ILSA, v. 9, p. 125-154, 2003.

Ministério da Justiça. Secretaria de Reforma do Judiciário. Judiciário e Economia. 2005. Disponível em: <http://portal.mj.gov.br/main.asp?View={597BC4FE-7844-402D-BC4B-06C93AF009F0}>. Acesso em 12 mar. 2009.

Poulantzas, Nicos. Clases sociales y poder político en el estado capitalista. México: Siglo Veinteuno Editores, 1969.

_____. State, Power, Socialism. London: Verso Books, 2001.

Quijano, Aníbal. Colonialidad y modernidad/racionalidad. In: Perú Indígena: Lima v. 13, n. 29, 1992.

Quijano, Coloniality of Power, Eurocentrism and Latin America. In: Nepantla: Views from South, n. 1, v. 3, Duke University Press, 2000.

_____. Aníbal. Modernidad y democracia: intereses y conflictos. In: Anuario Mariateguiano. Lima, v. 12, n. 12, 2000.

Robinson, William I. Globalization and the sociology of Immanuel Wallerstein: A critical appraisal. In: Internacional Sociology, 2011. pp.1-25.

Santos, Boaventura de Sousa. Law Against Law: Legal Reasoning in Pasargada Law. Cuernavaca CIDOC, 1974.

_____. O discurso e o Poder. In: Ladeur, Karl et al (org.). Verfassungstheorie,Verfassungsinterpretation und Politik. Frankfurt: Syndicat, 1980.

_____. O discurso e o poder. Ensaio sobre a sociologia da retórica jurídica.

Porto Alegre: Fabris, 1988.

_____. Os Tribunais nas sociedades contemporâneas. In: Revista Brasileira de Ciências Sociais, 1996 n. 30, a. 11. Disponível em: <http://www.anpocs.org.br/portal/publicacoes/rbcs_00_30/rbcs30_07.htm 1995. Acesso em 19 mar. 2009.

_____. Para uma Revolução Democrática da Justiça. São Paulo: Cortez, 2007.

Said, Edward W. Orientalism. London: Penguin Books, 2003.

Settembrini, Domenico. Reformism. In. BOBBIO, N (Ed.). Dictionary of Politics. French & European Pubns: 1983.

Stavenhagen, Rodolfo. (1963), "Clases, Colonialismo y Aculturación en América Latina". Centro Latinoamericano de Investigaciones en Ciencias Sociales, n. 4, pp. 63-104.

Vestena, C. A. Participação ou formalismo: o impacto das audiências públicas no Supremo Tribunal Federal brasileiro. 2010. 111f. (Mestrado em Poder Judiciário). Escola de Direito Rio – Fundação Getúlio Vargas, Rio de Janeiro, 2010.

Wallerstein I, Globalization or the age of transition? A long-term view on the trajectory of the world-system. In: International Sociology, 2000, 15, pp. 249–265.

Ziai, Aram. Postkoloniale Perspektiven auf „Entwicklung". In: PERIPHERIE Nr. 120, 30. Jg. 2010, Verlag Westfälisches Dampfboot, Münster, pp. 399-426.

Sovereignty in a world of tangled legal orders

Mirlir Cunha[1]

Abstract: Unlike the traditional view amongst legal theorists about the international order, this paper argues that we do not live in a world with global institutions able to enforce their standards to our social practice. This observation is based on the fact that the international relations are developing at the same rate as the sovereignty of the state is being reinforced. This is happening because global governance requires the state's infrastructure to make the international directives obligatory and respected by ordinary people.

This new situation can be described as a division of labour where every global instance of rule-making recognizes the others as important and limited. Nevertheless, the power to constrain is exclusive of the state's legal system, especially when human rights cases are under consideration, as some authors such as Marcelo Neves, Thomas Nagel, Amartya Sen, Joseph Raz, and Jurgen Habermas have argued.

Yet in the contemporary legal order there is no consensus about how this account of sovereignty is able to provide certainty and predictability. While Neves, for example, treats the "shared or divided sovereignty" as a set of constitutional interactions of tangled legal orders, where different cultures reflect about themselves and other analogous cultures with a view to learn something from the analysis of the other people's experience, Habermas focus on the level of democracy and how far politics becomes from citizens in this new context, and tries to identify the means to develop the idea of a dual citizenship, in which one can be at the same time a citizen of the country and of the international community.

However it may be, the solution to these problems must start from the acceptance that with a fragile international authority, state sovereignty is necessary to enforce the international standards, while, at the same time, cannot

[1]Police officer in the Policia Militar of Minas Gerais, promoted to the rank of First Lieutenant in 2006. Bachelor of Law from the UFMG Law School (2007), with a specialization in Process by Continuing Education Institute - IEC PUCMG (2012), and has been a student of the MSc Program in Law at the UFMG Law School since 2012. (Currículo lattes: http://lattes.cnpq.br/6600002614769287; email: mirlircunh@gmail.com)

be seen as an excuse to disrespect that authority. Hence, the international community should move beyond the current strategy of reducing international aids for countries where international regulations are disobeyed. It should put these countries under pressure until their governments and their society revise their policies to respect the authority of the international community and the argument of human rights.

In the context of this interesting debate about the authorities of the international community and the state, this essay attempts to develop a jurisprudential theory of justice in a global world and to realize its effects on traditional concepts which figure in legal theory and in theories about the state.

Keywords: Global Justice, Sovereignty. Legal Theory.

1. The facts.

With the progress of international trade, interaction between people from all over the planet, global communication through the world wide web, and an increase in non-state institutions' regulatory activities, with different levels of entanglement between communities, it is possible to identify an interesting phenomenon—one that, until recently, had been making itself present in a rather shy manner. Around the discussions on globalization and its effects orbits the questioning of the realization of justice and promotion of human rights on a global scale. Furthermore, one must recognize its reflections on traditional conceptions of law that are the results of the theory of law and constitutional law, such as sovereignty, authority, and political self-determination of a people in its territory. Therefore, this is the important issue that guides the development of the present work.

When reflecting on the realization of human rights on a global scale, major contemporary philosophers and jurists, such as Jurgen Habermas, Amartya Sen, Anthony Appiah, Thomas Nagel, Joseph Raz, and Jeremy Waldron, made significant advances towards new interpretations that associate the aforementioned concepts regarding the protection of human dignity, the establishment of forms of political control that prohibits degrading treatment of human beings, and the institutionalization of the existing order beyond State borders. The recurrence with which the said concern is raised and the reasonableness of the analyses

presented by these authors highlight the importance of this debate for understanding the legal practices adopted by our society.

Due to the importance and topicality of this issue, one can observe that the present discussion has been raising the interest of broad groups from the international community as the integrative effects of globalization policies are felt in a rather impactful manner, both inside the residences and over foreign policy-making. As can be seen in section two, this new approach significantly changes how the theory of law deals with international law and promotes the upgrading of traditional legal institutions based on concern for human dignity and human rights.

In section three, the author continues to delineate reasoning through the reflection on current solutions of control and the use of force in the international arena, in the face of the actual inefficiency of political and legal systems with regard to the current legal and political globalized practices. These developments are perceived as common constitutional problems that serve as foundations for serious issues that affect the globalized States, especially the democratic ones. Such issues are deemed too dangerous for the social stability of countries and will progress rapidly if political reforms are not effectively applied to various regulatory bodies whose decisions interfere in the relationships between individuals, organizations, and institutions.

As will be outlined in section four, mainly due to the economic crisis of 2008—which was the first major challenge to be addressed by the international community—and its consequences, the inequalities of the current practices of globalization denounced by intellectuals, not only in economic terms but also in social, humanitarian, and environmental, have become even more evident and have generated diverse reactions from the public policies of the community of states. This hard reality has set out a new form of organization of the National States, exposing a new concept of sovereignty. Contrary to predictions of great legal theorists of the first half of the twentieth century, there were no valid hypotheses intensifying national borders, nor letting them go altogether in favor of a central institution endowed with coercive power and control over political, legal, economic, and social issues. There was no central hypothesis in favor of a central institution that was skilled enough to develop core standards of recognition, change, and standards of judgment upon all States.

What happened, as discussed in section 5, was the realization that the solution to the current problems affecting political States and communities will not be arrived at unilaterally. There is a strong trend

towards collective proposals, which require some loosening of the notion of sovereignty focuses on dialogue, cooperation, and negotiation with other States and peoples and is strengthened by enhancing its role as the guarantor of legal institutions within each nation. As a result, these collective proposals are able to protect the human dignity of the citizens of political States and promote human rights. This new direction shows that without the proper functioning of State institutions and official statements, as well as spaces for debate and discussion, any notion of global justice is an illusion too utopian to become a reality.

Therefore, the main thesis defended in this paper focuses on the issue of the reinterpretation of the notion of sovereignty under the influence of the phenomenon of transconstitutionalism, understood as the entanglement of constitutional orders and their impact on the design of a theory of justice in the international arena.

2. Law, coercion, and morals in international law.

Unlike the theoretical constructions about legal systems and the traditional theories of justice, which are well developed because they are linked to political and legal orders of States, the discussion on the functioning of the international order is surrounded by doubts and uncertainties. These doubts and uncertainties arise because any claim towards a theory of decision or a proposed theory for justice on a global level presents an obstacle. The obstacle is the idea that this field of human social relations is still in the early stages of development (NAGEL, 2005, p. 113), and therefore, suffers from a lack of basic constructions, such as the notion of authority and legitimacy of decisions.

For Bentham, the founder of the term international law (HART, 2009, p. 305), the idea of an order that regulates the actions between States should be devised in a manner analogous to the operation of the existing law in them. By transposing the notions regarding the rights of delimited space and groups, Bentham was faced with a number of incongruities that was inadmissible under the traditional General Theory of Law, such as the absence of coercion and institutions with authority to impose sanctions on transgressors whose behavior is regarded as deviant. In addition, there was no easy way to reconcile the notions of sovereignty with the imperative nature of a foreign legal system. These and other issues were the reasons that motivated the understanding that international standards should be taken as the rule of law only through

their common use or convention, and therefore not constituting a proper legal system. The objections to this proposal, as Amartya Sen noted, led to an opposite understanding of what Bentham advocated. The said objections placed international law under an ethical perspective, the perspective of human rights that follows in the opposite direction, instead of understanding them as requirements and legal claims (SEN, 2011, p. 398).

The first contact with the debate on the ethics of international law in the General Theory of Law is a bit rough and generates a series of questions about legislation, legality, and coercion in international law. There are many doubts about the existence of a political community and international institutions that are able to coordinate the interaction between States and peoples. The more traditional texts, with a positivist view, do not address the issue with due importance. These texts are restricted to discussions either regarding the preparation of legislation in each State concerning the protection of individuals, or about the development of mechanisms for peaceful coexistence between States and peoples. Even sophisticated readings that critically address these standards, such as Hart's paper on International Law, start the analysis with the comparison between the former and internal law. In these papers, international law is compared to a simple system of primary rules of obligations. International law is then at a far less developed stage than domestic laws of national states, in which we see political and legal structures that are more organized and "sophisticated," and are regarded as a "luxury" (HART, 2009, p. 303). These domestic laws are the result of the hierarchical political organization of national states—something that is not perceived internationally.

Considering the long time lapse between the historical moment in which positivist conceptions were developed and the social realities of today, we see that historical facts overtook the assumptions of this theory on international law. Currently, they are an inadequate basis for contemporary reflection of the study of law, since international law can no longer be understood as "a set of standards accepted by States as binding norms" (HART, 2009, p. 304). Due to the failure of positivism in offering an appropriate proposal for the study of international law, some important jurisprudence philosophers became interested in the subject, and presented their contributions on it. Among these jurisprudence philosophers, we highlight the contributions of John Rawls.

Like Hart, Rawls also brings the elements of his theory to the international level. With this initiative, he goes on to defend the assump-

tions of political liberalism in the international order and the moral character of "International Law," which he called the "Law of Peoples." According to its design, the first step in the development of the Law of Peoples is the elaboration of principles of justice for a national society, according to which government, as a political organization of the people, is not the author of all its powers. That is because in reshaping the powers of sovereignty in the light of a reasonable Law of Peoples, the State would abdicate traditional rights to war and unrestricted internal autonomy (RAWLS, 2001, p. 34–5) when it comes to the protection of human rights.

Rawls' argument overcomes former positivists views according to which international law would be a simple set of rules of a factual character, denying an essential point for discussion about international law: the importance of moral character[2] contained in the notions of *ius cogens* and human rights. From then on, they are abandoned or reformulated, rendering space to the theoretical constructs compatible with the issues of justice and transconstitutionalism conflicts involving human rights.

This observation leads to the understanding of international law, today, not as a series of treaties and intergovernmental agreements (NEVES, 2009, p. 133), but as social and legal practices whose intentions express concerns mainly on issues relating to the defense of human rights. At the heart of the debate about constitutional aspirations, increasingly influenced by events and reflections developed around the world, is the concern for the protection and promotion of rights that tend to be seen as universal achievements. This fact leads to the recogni-

[2] In the view of Amartya Sen, Hart is one of the major proponents of the idea and the usefulness of human rights as a source of inspiration for legislation, according to positions presented by the jurist in the article "Are there any natural rights?" (SEN, 2011, p. 398–9). In this paper, there are no agreements with this interpretation of Hart's work. The proposal developed herein identifies the author as someone very concerned about the rights and fundamental guarantees of equality and freedom under the formalism of moral critique of law that may be held by official institutions, hence a coherent stance with the text of the known work. "The concept of law" (HART, 1955, p. 189). Regarding international law, our shared interpretation is that Hart argues (1) the thesis of separability between law and morality, since although the contents of international law resemble that of the primary standards (standards of conduct that establish obligations), it is improper to insist that all standards not supported by threat are a form of "moral" (Hart, 2009, p. 292); (2) the law critically accepted as a standard; and (3) the denial of the law as only a set of coercive orders.

tion of a transconstitutional web established through the exchange of information and critical legal content.[3]

Renowned jurists in the last thirty years, such as John Rawls, Jurgen Habermas, and, Amartya Sen, pointed out in their work on the notion of international law under the conception of human rights, which is taken as the basis of international law and therefore, as a connecting element between morality and law. In this way, human rights, when understood as coercive subjective rights that assure individuals a space for freedom and self-determination, would present two faces, much like Janus: one faces morality while the other faces the right itself (HABERMAS, 2012, p. 18).

Nowadays, support for the moral character of international law stems from the perception that one should care for the idea of justice in the context of international law, not only the differences involving conflicts between States, but also those that involve the State and its citizens in interdependent common cases that are often recognized in different legal systems. This interpretation makes the positioning of Rawls described above, although innovative, the target of much criticism, one of which came from Habermas. For the German philosopher, the theory presented by Rawls in his work "The Law of Peoples" is limited to the relations between people in the context of war, resulting in a subsidiary and insufficient protection of human rights in everyday relationships within States. It fosters a mild deflation of human rights into a new minimalism that ends up loosening the strength of human rights, by separating them from their essential moral impulse represented by the protection of the equal dignity of each. "This minimalism forgets that the continuous tense relationship, internal for the State, between universal human rights and the rights of private citizens is the legislative basis for the international dynamics" concerning human rights (HABERMAS, 2012, p. 35).

By developing a theory of justice in international law that strengths the relations between Peoples represented by States, Rawls underestimated the importance of the political participation of individuals that incorporates them into a collective will. The peoples conceive

[3] "From the point of view of the international order, it means the incorporation of constitutional issues within the competence of the courts, which are to raise the claim to decide immediately to character-binding agents and citizens of the States" (NEVES, 2009, p. 133).

political participation and derive said participation from a binding contract. The advantage of the liberal democratic peoples is treated as inherent in this culture of political participation, leaving the analysis of the reason of success of these or the inhibiting factors of the development of other peoples, classified as "decent," "developing," or "outlaws." Rawls' rating system, besides being airtight and somewhat idealized when it comes to the nobility and morality of liberal peoples, presents a descriptive reason. This descriptive reason builds an international order lacking both mobility and the participation of individuals, through their critical positions, on the events happening around them.

Another important criticism of the proposal formulated by Rawls came from the acclaimed positivist Joseph Raz whose text, "Human Rights without foundations," posits that state autonomy was mistakenly appreciated by Rawls. Because state autonomy was mistakenly appreciated by Rawls, Joseph Raz insists that Rawls' doctrine of basic justice (structured on the State) cannot simply be extended to the international arena. The principles of justice that govern domestic relations cannot be extended to international relations. The criticism of Raz concludes that moral principles that determine the limits of sovereignty should not only reflect the limits of State authority, but also, relatively, set (establish) limitations on the possibility of justifying intervention by international organizations and other States in what concerns the offended State (RAZ, 2005, p. 16).

Notwithstanding the undeniable contribution made by Rawls' view about the law in the international arena, and through the criticism of his theory, it is possible to think of a theory of justice at the international level that does not depend only on the State. It is possible to identify the social and institutional practices that work in an inductive manner from the events and reflections from various locations around the world, which allow us to identify the occurrence of cross-pollination between constitutional challenges. Thus, on a case-by-case basis, it is possible to evaluate the aggregate result of this succession of episodes that affect the construction of moral concepts discussed by all spheres of the international community in a legal-constitutional political debate that is fostered within each State. From this point on, we must not only discuss the emancipation of the peoples, but also of individuals through citizenship, political, and democratic actions. Current theories are committed to the pursuit of interpretations that balance the ideas of shared sovereignty, public reasoning in the international community, institutions and control of transnational economic practices, and social policies

that benefit the development of the dignity of individuals.

3. The concentration of force.

Instead of promoting a federalist hierarchy among nations that concentrates on, and is organized around, a center of power endowed with supranational authority, the discussion about the organization of the States of the international community has made good progress towards the defense of transconstitutional hierarchical cooperation between the international, national, and supranational structures that are in place today. This progress, however, has not yet allowed for a proper understanding of the social, political, and legal scenarios currently developing in the international community due to the exchange of practices stimulated by globalization.

As an achievement of the last fifty years, one can point to the deflation of the concern regarding the issue of the understanding of international law or human rights as law, as constructs that did not fit in the model of law as commands constrained by threats. The debate was overcome after the State concentrated coercive functions, concerning issues of human rights, in structures set up by the State. This means that, according to the history, as long as there is the absorption of the ideals shared universally by constitutions and the strengthening of transnational regulatory bodies, one can verify the importance of state institutions in the process of the achievement and creation of acceptable legal behavior by the international community.

In a multilateral legal and political cooperation, it is possible to observe that the external decisions of States are evaluated and interpreted for them through the institutions of such cooperation. The States only then later incorporate the external decisions in the laws of the inner plane. After performing an evaluative step, the reason constructed in the external arena is critically introduced within the internal orders by state institutions, which are able to welcome and legitimate demand, through the imposition of sanctions. The compliance with legal practices results from interpretations contained in external decisions, especially when these decisions relate to human rights (HABERMAS, 2012, p. 62).

Thus, the theme of human rights, which was viewed with some suspicion,[4] finds protection in the constitutional powers that mention re-

[4]Habermas, mentioning Neves, warned that "regardless of the strength merely symbolic of fundamental rights in many of the façade democracies of South America and other

spect for fundamental rights. At the same time, in order for the violations of these guarantees not to be hidden and therefore become invisible because of the sovereignty of each State, the defense of human rights must be shared with agencies and supranational entities or interstate bodies. From the point of view of the intertwining between legal systems, these agencies, entities, or bodies monitor and control the episodes of offense and divulge them through their agencies and media. Therefore, they are able to pressurize States, entities, or individual transgressors.

Due to the problems of efficiency and legitimacy faced by organizations and international institutions that have the duty to oblige various States to respect and promote human rights, the international community has been structured in such a way that there was no concentration of political and legal debate about human rights in various forums. In spite of this lack of concentration and political debate, the implementation of coercive and corrective measures necessary for the realization of human rights, remained tied to the local forces and legal structures of each State (NEVES, 2009, p. 165).

As pointed out by Anne-Marie Slaughter (NAGEL, 2005, p. 139), one can verify that the recognition of the new order in the consolidation process involves the understanding that international governance must be conducted in accordance with the capacity and responsibility of the various actors belonging to the communities that make up the international community. In this scenario of constant negotiation and communication among stakeholders, a chain of "shared labor" is instituted by the articulation between external and local authorities. This exchange takes place within the sovereignty of the States. This type of network process connects disintegrated parts in transterritorial structures that share common responsibilities and powers beyond the boundaries of individual States.

In this sense, it is possible to agree with the understanding that there is a strategic gain by stimulating the defense and realization of human rights as a national project, built by the critical legal debate about the interpretation of these rights, according to the cultural perspectives and political community whose practice is under evaluation (NEVES, 2009, p. 153). It is believed that this attitude allows greater legitimacy of the decision making process, given that the interpretation of human

---

places, the politics of the United Nations' Human Rights reveal the contradiction between the expansion of rights rhetoric humans, on the one hand, and its misuse as a means of legitimation for political power usual, another" (HABERMAS, 2012, p. 135).

rights is promoted through an adjustment of the claims inherent in the content of these regional expectations.[5] Concerning this point, the aforementioned author establishes that even with the diversity of the doctrinal and jurisprudential repertoire, Constitutional Courts of the countries or supranational communities seek legitimacy for their decisions through a process of questioning institutional practices that are contrary to the protection of the freedoms and rights of individuals. It can be observed that Constitutional Courts are becoming increasingly self-referential in the solution of common constitutional cases, in a typical case of migration of constitutional ideas. More than a phenomenon of reciprocal influence between legal states, or a case of transjudicialism where courts promote reciprocal referrals, transconstitutionalism between legal systems implies that, in typically constitutional cases, the decisions of Constitutional Courts invoke the decisions of other states, cited not only as *obiter dicta*, but also as elements of the *rationes decidendi*. This phenomenon implies a reinterpretation of foundations not only of the starter line, but also of the finishing line (NEVES, 2009, p. 166–167).

In the examples presented by Neves, it is interesting to note that even the more closed courts, such as the United States, have some concern with the debate being conducted in foreign jurisprudence (NEVES, 2009, p. 168). This demonstrates that Americans are not so oblivious to world events and hermetically focused on their propositions. They also accept the persuasive force of the arguments advanced by other peoples, although they are more reluctant to accept political reflections undertaken by other communities. Contrary to this American position, Courts in South Africa, Canada, India, Zimbabwe, Israel, New Zealand, Ireland, Switzerland, England, and Brazil, among others, did not adopt the stance of the immediate deployment of foreign law. Instead, they adopted a reception of foreign law through internal processes of critical self-validation (NEVES, 2009, p. 171). Thus, they turned the reception into a dialogue capable of representing the development of reflective self-consistency while maintaining itself constitutionally open to learning from the experiences of others Courts, in judicial practice or presentation of models based on the study of comparative law.

Based on the study carried out by Slaughter (cited NEVES, 2009,

[5] Neves writes about the search for a model to "reconcile the dissension" between constitutional orders involved in the conflict and how to allow that there is a minimum balance between legal consistency (internal) and legal adequacy (external) in a transcontitutional "conversation" (NEVES, 2009, p. 165).

p. 184), we find that there is a form of rejection verified in less efficient Courts in the transconstitutional process that are characterized by the absence of a minimum standard with respect to fairness. This situation, however, is not so simple, since whenever a country does not accept transconstitutionalism, due to not adopting constitutional institutions in their modern sense, but radically rejects it, there is an almost an insuperable difficulty for the transconstitutional conversation that will change the status quo. And so proposes Marcelo Neves, following the trails of Slaughter, is the overcoming of this event and the search for interaction with these courts averse to constitutionalism, even though passive agents initially, through face-to-face meetings between judges. The success of this proposal is due to the assumption that the transconstitutionalism model imposes respect for the differences between constitutional orders and their particularities with regard to the normative content as well as procedures.

The realization of constitutional dialogue between legal State depends on the emergence of a "*judicial comitas*" and on judicial trading through which one might establish the following chain of events—while the former can provide the structure and rules for a global dialogue between judges in the context of specific cases, the latter is more limited and reflects the overall bankruptcy of cases that go beyond borders. This transconstitutionalism should not be confused with an overarching global order (NEVES, 2009, p. 186), but should be recognized as the provision of legal entities engaged in resolving disputes, interpreting, and applying the law in the best manner possible. The starting point of transconstitutionalism is not a denial, but the opening of State constitutionalism to other jurisdictions, either similar or from a different species.

Thus, one will deem a decision adequate, perennial and stable, and thus legitimate, when it was guided by dialogue and accessible arguments able to represent the desire of local people for pursuing the protection of individuals. Considering the peculiar aspects of the history of the regional community inside in a global context of the protection achievements by the international community, the achievements guide the ongoing debate, with the occurrence of internally influenced episodes that allow the change in parties' conceptions (NEVES, 2009, p. 228).

With the author of "Transconstitutionalism," it is manifested interest in this essay, but also demonstrates the concern about what he calls the development of a right "no punctual" (*contrapontual* in Portuguese) (NEVES, 2009, p. 154). A nice overview of this phenomenon is

the realization that, at first, it promotes the adjustment of the tension between internal and external perspectives held by a constitutional entanglement founded in the conversation needed for reciprocal learning for the actors of an interpretive community, which is very positive. Although, at a different time, it authorizes the relativization of the normativity of human rights under the same matter between the States on the grounds of "*direito contrapontual*" (in Portuguese), a promoter of the autonomy of national melodies and shares with misaligned institutional practices that are being promoted by the community.

The harmful behavior, builder of fear, perpetuates cynical interpretations that deny rights and restrict the efficiency of the design rules provided by the history of these achievements. On this issue, Habermas also does not fail to expose the problematic side of the attempt to establish a world order made up of fragmentary institutions, because these, can be unsuccessful, can cause ambiguity of human rights, which makes its own standards suspect (HABERMAS, 2012, p. 32).

4. The new conception of sovereignty.

Regardless of the risks, the scenario that is set for States and international organizations and transnationals is that they are closely related in their actions and attitudes through a legal code, not just a moral code, in that this scenario is open to the experiences and social practices, political and economic facts, and interpretations, which are derived from its constitution. From start to finish, we verify that the various contemporary legal systems share a common identity since all of them share the same binary code of the common legal system, legal/illegal, and the problems they face (NEVES, 2009, p. 115).

However, what is legal or illegal and how the legal systems of a modern world society within a plurality of orders work, each with their different legal requirements and programs, in a theory of law, remains an empty question, as it is no simple task to correlate the basis of various legal barriers for cooperation. Thus, the relationship between systems must be done first before the possibilities of building a cross rationality through reciprocal learning and creative exchange can be optimized. In this way, the internalization and externalization of information arising from social spheres play various roles in the efficient realization of the binary code, legal/illegal. The internalization and externalization of information is reciprocal in a multitude of orders. The fact that there is

a multiplicity of orders does not mean they should be isolated. Since always, even in classical international law, input/output relations and the interpretation of legal orders have been observed through treaties, the international legal order of representatives, and practical and legal perspectives.

As set forth by Marcelo Neves, Jurgen Habermas and Amartya Sen, the point of convergence between these multiple orders is the ability of people to question and act in a critical manner. The action should have political reflections when considering "problems" of their community and the achievements of other communities. The dynamics mentioned are moved by a sense of reciprocity that grounds the idea of equality between individuals and makes them act in pursuit of treatment and conditions similar to others.

For their potential in fostering a political-legal regime in which people are viewed equally, self-determination, political liberalism, and the democratic rule of law are seen as social constructions that contribute to the consolidation of the notion of human dignity, the central point of the fight for human rights claims today. This positive perception of these social constructions stems from the fact that these 1) highlight tolerance to individual choices regarding religion, sexual choice, 2) and are endowed with institutions that seek to suppress possible offenses based on gender, race, background, or financial ability, allow social advances, through the inclusion and participation of people in the design of community projects. It does not hold here that the aforementioned social constructions are not prone to institutional errors, but, if there are distortions, these have the environment conducive for corrections.[6]

In this respect, in his work "On the European Constitution," Habermas[7] defends a cosmopolitan attitude in which human rights, col-

[6] Nicolas Berggruen and Nathan Gardels, however, present a position somewhat skeptical about the ability of liberal democracies and participatory self-regulation. In their work, Intelligent Governance for the 21st Century, the authors point out flaws in the self-regulatory process of liberal democracies, which often fall prey to a "consumption citizenship" that presents populist policies unable to promote policies and structural unpleasant reforms to the population that are necessary for fundamentals of good governance in the long term. They question whether, like the market, a liberal democracy is able to regulate itself to preserve its system from malfunctioning (BERGGRUEN; GARDELS, 2013, p. 69).

[7] In the aforementioned work, as highlighted by Alessandro Pinzani in presenting the Brazilian edition of Habermas' book (2012: p. XIV), unlike earlier works, the German philosopher adopts a decidedly normative position on the concept of human dignity,

lectively constructed through institutional achievements[8] has always found in its core the notion of human dignity. He regarded human dignity as "the conceptual hinge that connects the morale of equal respect for each with the positive law and the democratic legislation so that, in their cooperation under favorable historical circumstances, can emerge a political order based on human rights " (HABERMAS, 2012, p. 17–18).

Compatible with the thought presented by Habermas, Kwame Anthony Appiah highlights that the commitment to human dignity, built by local political movements with outpouring of support from the international community, is the attitude that avoids disrespectful actions towards others and allows the evolution of a legal system toward the preservation of individuals (APPIAH, 2012, p. 140). On the notion of human dignity, Jeremy Waldron argues that the spread of the concept of dignity offers one promising idea to envision to all people the right to the same noble treatment, previously restricted to the high caste. That means, he continues, building concepts that give everyone the same respect and equal rights, ideas worthy of egalitarian liberalism (WALDRON, 2009:28).

For a sense of reciprocity, it is necessary that before an identity geared towards guaranteeing the right to respect is established for the democratization of criticism, it is important to make the criticism a popular and common practice, thereby spreading reflexive thoughts. Thus, the concern is with respect to what makes the connection between the good life, built by the individuals' participation in government, and the place they occupy in the world. The universal dignity, which Habermas also attributes to all persons, supports the connotation of self-respect in social recognition, an attitude referred to by Appiah as one of honor. According to the philosopher,

> (...) The honor is not a vestige of a decadent pre-modern order, for us, it is what it always was: a mechanism driven by dialogue between our self-conceptions and consideration of others, which can propel us to fade seriously our responsibilities in a world we share. A person with integrity will care to live according to their

one that theories of justice have always avoided. This attitude can be illustrated by the passage according to which human dignity, for the author, is one and the same everywhere and for each, based on the indivisibility of human rights (HABERMAS, 2012, p. 16).

[8] According to the author, "Human Rights resulted from violent historical struggles for recognition and sometimes revolutionary" (HABERMAS, 2012, p. 28).

> ideals. If you can, we should respect it. But worry about doing the right thing is not to worry about being worthy of respect. It is the concern with the respect that makes the connection between living well and our place in the social world. The honor makes the integrity public. (APPIAH, 2012, p. 184)

In the same sense, Waldron also talks about honor, distinction, and position when dealing with the legal notion of dignity as it is conceived today. However, for him, unlike the majority of philosophers who believe in the loss of certain habits distinctive of value as the gain for the construction of the notion of dignity, there was a unification of the social classes. They share the same habits of nobility and equal respect as universal rights, and reject special privileges or honor as corresponding rights (WALDRON, 2009, p. 27).

Since human dignity is a concept about equal respect, it is grounded in a sense of belonging to a community that is organized geographically and temporally under the banner of a civil status. Hence, the concept of human dignity is promoted by combining the moral contents, with equal respect for each other and an order of citizens who are subjects and are endowed with rights that are recognized as equal and claimable (HABERMAS, 2012, p. 24).

Thus, the philosopher predicts that the validity of positive human rights is only perceivable when situated in a particular community, primarily within a state, in the form of fundamental rights. However, for Habermas, they are endowed with a claim to universal validity that transcends national boundaries and towards a "cosmopolitan inclusive community" based in a "democratically constituted world society," which does not need to develop the same characteristics and structures of the State itself (HABERMAS, 2012, p. 24). Right now, what we observe is an idea of "shared or split sovereignty."

Throughout the debate on the topic, especially based on the experience of community law of the European Union, the notion of sovereignty was reinterpreted through the concept of "shared or split sovereignty" between legal systems that intertwine in what can be referred to as the "transnationalization of popular sovereignty" (HABERMAS, 2012, p. 50), or the "transconstitutionalism between supranational law and state law" (NEVES, 2009, p. 152). The new paradigm means the transfer of a part of "competence of competence" for a more comprehensive legal domain present in a relationship of complementarity that is located in a "network of constitutional elements" in the view of the citizen

(NEVES, 2009, p. 153–154). This phenomenon points to a constitutional conversation focused on mutual learning, rather than a monolithic hierarchical way, whose process consists of three components. These are: (1) the democratic communitarisation of the idea that the subjects of Law are free and equal, (2) the organization of collective action capabilities, and (3) the means to integrate a civil solidarity among strangers (HABERMAS, 2012, p. 50).

The similarities between Neves and Habermas concerning the matter in question go only as far as its identification, as they differ on the understanding of what it represents. Neves values the intertwining of orders through the process of reciprocal learning between the legal orders established in multilateral discussion forums, mostly officers, about certain shared constitutional matters. Habermas' argument about constitutional change focuses on dual citizenship accumulated by citizens of European nations in a unique process in which it is possible to follow the formation of a new form of sovereignty where the individual is at the same time a citizen of the nation and a citizen of the Union.[9]

Thus, Habermas supports the idea of transnationalization of popular sovereignty as a democratic alliance between nation states so that, on the one hand, nation states accept to undergo rights established at a supra-national level, and on the other, give citizens the constituent power of the union with a limited number of "constituent States," receiving a mandate from their people to be consistent for the foundation of a supranational community (HABERMAS, 2012, p. 49).

Thinking in terms of Habermas, according to whom honor and value the political capacity of each individual as a conductor of his own life project, raising it to the merit of the writer and interpreter of legal and constitutional history to be inherited by their peers, is to also report that the process of global governance performed by intertwining institutions and governmental entities, and non-governmental, lacks a deficit of democratic legitimacy. This deficit results in the gap between those endowed with power to decide and will be influenced by the consequences of political decisions. The reflection of this political abyss generates a series of distortions increasingly complicated and impractical to overcome with only localized measures (HABERMAS, 2012, p. 85).

This same observation is made by Berggruen and Gardels (2013:48), when they analyzed the changes in globalization, from the

[9]According to Habermas "(...) the division of sovereignty between two subjects constituents, citizens and peoples of the States" (HABERMAS, 2012, p. 90).

1990s to the present day. According to them, the "economic power" experienced pre-2008 crisis resulted in a cultural and political assertiveness that led to a "pluralism normal" in the history of humanity. However, the complexity of a greater global integration in trade, investment, production, consumption, information flows, has pressed authorities to demand greater involvement of governments at the technical and policy levels, mega urban regional, national, and supranational level in order to manage systemic linkages of interdependence that exist today. In conclusion, everyone will lose if it all falls apart.

Thus, according to the authors, "the political awakening that is noticeable in many places requires the dignity of meaningful participation. The failure to find an institutional response to this challenge will result in a crisis of legitimacy for any government system, for the inability to function enabling inclusive growth and employment, or it is because a 'democratic deficit' that silent many voices of the population will harm an effective consent" (BERGGRUEN; GARDELS, 2013, p. 49).

The expressions above represent the current responses to writings, such as that of Thomas Nagel, in which institutions are sustained in a stage of pre-organization of world politics which, despite the abovementioned democratic deficit and in spite of being deemed "unfair" for not having passed democratic process, have the capacity to implement measures of common interest among States imposed by bargaining power between them, thus being able to minimize the problem of global justice in a system that may be centralized and then critically questioned (NAGEL, 2005, p. 146).

5. Politics in the contexts of life.

The pessimistic scenario described by Habermas (2012:85), derived from the unfolding of the global crisis of 2008, is about a society in which the political elite is far from the population, which in its turn, ignores the real intentions of those who made these policies that are followed by Nations; who change the rules unilaterally, focusing on efficiency, and deconstructing, in the wake of their advance, the guarantees and rights of individuals. About this Habermasian concern, Amartya Sen affirms (2011:377) that democracy, through the representation that it causes between citizens and government, allowed the development of measures that guaranteed freedoms and reduced social inequalities, which can stimulate the healthy growth of the individual. Without the

controlling instruments of existing decisions in a democratic context, global governance would possibly become nothing more than a government of bureaucratic political elite, insensitive to the needs of particular communities and involved only with its power and institutional arrangements.

Discussing democracy, Sen (2011:359), citing Habermas, describes the need for a public arena where arguments can be defended freely during the process of decision making. This is recognized not only in solemn moments of the procedures of democratic decision-making, but also in the day-to-day speech and actions of the people of a political community that reinterpret social practices, allowing for reflection and improvement of these through transit of information and demands between stakeholders and those with power to decide (SEN, 2011, p. 438).

Because they are bound to the community they represent, the holders of political power should be aware of the fact that when the gap between what is said and what is perceived increases; when the difference between truth and propaganda is so great, people eventually simply cease to believe in the system—a system that will take only as much as a push to fall (BERGGRUEN; GARDELS, 2013, p. 81). Therefore, at any level of State action, authorities should cherish acting in accordance with the desires and expectations of their populations, favoring space for debate and accountability as a means to avoid being targeted or criticized by the public. Thus, the public sphere of debate is the environment wherein one will find the possibility of good governance that allows for an environment where plans capable of producing patterns of conduct and standards, and with the ability to ensure the promotion of human dignity and citizenship are discussed (SEN, 2011, p. 383–384).

To perform in the arena where public reason can be conducted, certain institutions are needed. As Nagel points out, the individual and political action of the people only makes sense in a manner capable of changing consolidated social practices when they are contextualized in a mechanism endowed with structures in motion, with the potential to be targets of the insurgency. Anarchy does not allow for progress as it seeks to restrict the ability of individuals to move toward a definite proposal for the long term. However, contrary to what the American philosopher supports, one should not be compelled to accept illegitimate and unjust institutions as a necessary evil to achieve global justice (SEN, 2011, p. 362).

As the capacity for action and communication is not limited to national borders, the preservation of the media and free press repre-

sents the maintenance of important arenas for the promotion of public argumentation and protection of human rights in transnational forums (HABERMAS, 2012, p. 84). After all, among the achievements of democracy and its inclusive process of participation is the ability to "make people interested, through public discussion, in the difficulties of others and have a better understanding of their lives" (SEN, 2011, p. 378). Defending the standpoint of Appiah, based on Habermas' communication and discourse theory, Sen (2011:427) explores the importance of pressure from the world media and human rights organizations in the protection of fundamental rights in the local communities, where hierarchical exclusionary practices disrespects the constitutional freedoms of weaker individuals by reason of their condition, subordination, or minority.

Thus, one can conclude that legal orders based on subjective rights, protected by the freedom of expression and the ability of political action of individuals, are indeed endowed with sovereign institutions, which can be deemed legitimate, as they are constantly subject to correction by their population. Although regarded as the most efficient ones to date, even these institutions face major challenges over the economic and political entanglement in the international arena, which despite being touted as a stage for decisions with serious effects on national constitutional spheres, are characterized by the absence of any form of coordinating or legitimately established power that hinders the development of responses to shared problems.

There is no denying that all sovereignty nowadays is open to transnational learning, even though some are more than others are. It is observed that such opening has as its foundation the quest for efficiency that reflects the quality of life of society and its political maturity, economic and social. Such is the new format of State sovereignty that needs to be articulated at various levels—national, international, and transnational, which can develop individuals and make a system thrive. Due to the tangling of very similar and interconnected dilemmas, in all corners of the planet, States must share the idea of the realization of the protection and promotion of human rights as a type of justice in the international arena, endowed with reflexivity, impartiality, and transparency.

6. Conclusion

The discussions on global justice have progressed towards the ability of societies to associate the regional interests of their population

in broader perspectives that affect all others. From the moment one verifies the existence of connected practices through a network that surpasses the code of sovereignty with relative ease and familiarity, one might notice the consolidation of other decision-making arenas in different environments which, with or without mature Institutions, will require a new attitude from the traditionally practiced policies in the current constitutional States of nowadays. This evidence left behind the limitations and doubts posed by legal positivism of the first half of the twenty-first century as to the existence of international law and the sharing of common ideals such as human rights.

That which affects the populations of the world today the most is directly linked to their ability to generate welfare societies, or efficiency societies, and to promote a sense of dignity. Socioeconomically stable societies tend to persevere in their territories without serious conflicts and promote the strengthening of institutions endowed with legitimacy and credibility. Their development is so great that it renders them able to generate patterns capable of influencing other societies, to the extent to which they are presented as viable after an incorporation process through procedures and local interpretations.

As pointed out by Marcelo Neves, who innovatively verified the strengthening of what he called "cross-pollination" between constitutional systems of the world, pointing out the decisions reached by major courts of the world that were in full dialogue, we now realize that there is more than dialogue in this new social formation that affects the interdependent global society as a whole. There are legitimate demands for representation, in different spheres of power, that use of the media as grounds for action and political pressure.

It is unsettling to acknowledge that there is a mismatch in the international arena between the economy and law, on one the hand, and politics on the other, the latter being practiced in an unsatisfying manner—or none whatsoever, depending on the subject. Flowing from the thought of Habermas, it is seen that this gap has caused political instability in many countries, even liberal democracies, whose systems, by themselves, are not capable of generating responses to the welfare demands of the population.

The actions outlined until now by political leaders have been insufficient or hopeless since their early stages, due to the lack of ability from the structures to articulate internationally concrete policies that combine efficiency and legitimacy. Although limited and with little success, in Europe, as pointed out by Habermas (2012:62), there are already

global forums such as the G20 in which, according to appointment by Nicolas Berggruen and Nathan Gardel (2013:53), one can point to an outline of international coordination skilled to control organizations and practices that erode the national structures, thereby causing serious imbalances and constitutional problems.

We can refer to this phenomenon as politics being required to expand its borders beyond sovereignty boundaries in a process of "political globalization," arising from economic and cultural globalization. This historical moment is characterized by diffuse uncertainty due to the lack of market transparency, to government omission, as well as to the convenience of various governments regarding risky and ambitious economic practices. Faced with the current disarray of institutions in the face of adversity, the actual stage demands a concern with stable and sustainable growth. Therefore, the capability of survivability of States and their institutions depends directly on the willingness of their societies to self-correcting in an articulated and critique-wise way, mixing regional, supranational, and international actions that both seek results and focus on the development of people and strengthening of human rights.

This means that if at first national policies stimulated economic globalization, resulting in an opening of markets and cultures, which established a certain easing of sovereignty, now the same policy sees the need to share this sovereignty and to render accounts to external parties, or risk having to forfeit the credibility and trust of the international community, risk-averse, and eager for growth.

As a new chapter in the history of mankind begins, we perceive that the current form of organization and production will tend to stabilize this cycle when the sense of belonging to a broader community becomes more encouraged in a way that the highest standards of human development goals are taken seriously by any government. When the expansion of rights and the rule of law occur in a sustainable manner, public demonstrations and popular political demands shall be taken seriously by governments and institutions, as they will be supported as sources of information about the system malfunctions that may contain the key to improving governance and the development of the peoples.

References

APPIAH, Kwame Anthony. *Código de honra: como ocorrem as revoluções morais*.

Translated by Denise BOTTMANN. São Paulo: Companhia das Letras, 2012.

BERGGRUEN, Nicolas and GARDELS, Nathan. *Governança inteligente para o século XXI: uma via intermediária entre o ocidente e o oriente*. Translated by Martin CARDOSO. Rio de Janeiro: Objetiva, 2013.

HABERMAS, Jurgen. *Sobre a constituição da Europa: um ensaio*. Translated by Denilson Luiz WERLE, Luiz REPA, and Rúrion MELO. São Paulo: Ed. Unesp, 2012.

HART, Herbert Lionel Adolphus. Are there any natural rights? *The Philosophical Review*. 1955, 64(2), 175–191.

NAGEL, Thomas. The problem of global justice. *Philosophy & public affairs*, 2005, 33(2), 113–147.

NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009.

RAWLS, John. *O direito dos povos*. Translated by Luiz Carlos BORGES. São Paulo: Martins Fontes, 2001.

RAZ, Joseph. Human Rights Without Foundations (March 2007). Oxford Legal Studies Research Paper No. 14/2007. Viewed June 6, 2013. Available at SSRN: http://ssrn.com/abstract=999874

SEN, Amartya. *A ideia de justiça*. Translated by Denise BOTTMANN. São Paulo: Companhia das Letras, 2011.

WALDRON, Jeremy. Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley (September 1, 2009). NYU School of Law, Public Law Research Paper No. 09-50. Viewed March 10, 2013. Available at SSRN: http://ssrn.com/abstract=1461220

The paradox of popular sovereignty

Saulo Monteiro de Matos[1]

Abstract: In this paper, my intention consists in trying to shed light on the debate about authority and law. I argue that the current debate on authority and law corresponds "cum grano salis" to the classical claim of the doctrine of popular sovereignty. According to the classical formula of popular sovereignty, all state authority is derived from the (will of the) people. Different from many current answers to the challenge of justifying legal authority, modern constitutional texts claim that political actions in form of legal commands are only justified (and hence legitimate) if and only if they correspond to the will of the people. This idea gives rise to the following paradox: people are at the same time authority and subject of legal commands. Accordingly, there are two ways to solve a paradox: either denying one of the paradox premises or accepting the paradox in a dialectical way. On the one hand, one can deny the existence of such a necessary relationship between the will of the people and the law. In this case, law should be obeyed not in virtue of a necessary identity between law and society, but rather as matter of contingent reason. Accordingly, the consent of the subjects has a role of improving the efficacy of laws. On the other hand, one can state that a weak and defeasible obligation to obey the law follows from the necessary identity between law as social action and its subjects. According to this argument, people are not just likely to obey the law if it corresponds to their will. Rather, it is necessary to the concept of law to be a result of a social will. I believe that this second way to deal with the paradox of popular sovereignty will turn out to be better able to deal with law's own understanding, especially regarding the legitimacy of (constitutional) court decisions.

Keywords: popular sovereignty – authority – legitimacy.

I. Introduction.

Although political and legal philosophy have concentrated their

[1] Ph.D. Student, University of Göttingen.

efforts on elucidating basic issues of contemporary political authority since the second half of the last century, basic concepts of contemporary constitutional law – like human dignity, popular sovereignty or social State – have not been regarded or considered as a possible way to approach such problems of politics and law. Contrary to this approach, current legal science (above all in Europe) remains using these basic legal concepts in order to approach fundamental issues of law and, hence, to construct a legal conceptual framework, which should be able to give legal and often ethical answers (Bogdandy 2009, 364–400).

Concepts are the basic structure or unity of our thoughts. They are formed through unities of representation and propositions. From these basic structures, legal science generates rules and norms that are intended to form institutions and guide human actions. Furthermore, these concepts are able to generate values, that is to say, to guide principles that can direct legal, i.e., political actions.

One of these basic legal concepts of contemporary constitutional law is popular sovereignty (I am going to abbreviate it as "PS"). PS is usually associated with two formulas: "We the people …" and "all State Authority is derived from the People". These propositions isolated are usually not taken as being able to generate institutional rules or norms in the sense of standards of actions, but rather ideas, values or principles. PS is, therefore, conceived as a kind of value which should guide political actions and institutions. Furthermore, it is possible to say that PS should, according to modern constitutionalism, provide an answer to the question of the legitimacy of political authority in a constitutional State.

I will, in this sense, approach the question of this paper as a question of the possible meaning of PS in the law. In doing that, I will be approaching the problem of what the meaning of the proposition "all State Authority is derived from the People" is and, precisely, what should be accepted as the best explanation of this idea so that it makes sense. Nevertheless, I am not able to present any concluding view about PS. This concept has a paradoxical life due to its nature as physical liberty and I am not sure if this paradox should be solved or the dialectics of modern political authority presupposes such a paradox. Although the subject of PS is extremely large, the goal of this paper is very limited: it consists in reconstructing the modern idea or value of PS and defending the possibility of talking about PS in context of political authority debates.

II. The concept of popular sovereignty in law.

One of the fundamental cruxes of modern political and legal philosophy seems to consist in identifying State authority with reference to individual wills, the fundamental Kantian dichotomy between autonomy and authority. Law consists in the most fundamental instrument of exercising State authority in the modernity. In this sense, a political authority can be regarded as legitimate if and only if there is a relative clear connection between the political action of the State and the individual actions *in lato sensu*.[2] Politics and law go hand in hand in the enterprise of justifying the political authority of the State, that is to say, in making a clear route from the individual will to the will of the State. In sum, political philosophy has to do with the attempt to guarantee self-determination through the law.

Expressions such as "popular sovereignty", "parliamentary sovereignty" or "national sovereignty" are still used by lawyers in order to justify State actions. Despite the possible relevance or contingent meaning of these concepts in a national legal framework, it is, nonetheless, hard to grasp their real or relative necessary conceptual meaning. Indeed, it is hard to see whether it is possible to relate a central meaning to each of these terms, but it seems to be the case that these variations of sovereignty have always meant something like the unlimited power of a parliament, a people or a nation due to a specific concept of sovereignty (Eleftheriadis 2010, 537).

In spite of this possible meaning of sovereignty as unlimited power, popular sovereignty has possibly more to do with a most fundamental enterprise of justifying the State authority. I follow, in this particular point, the basic idea of Tocqueville regarding democracy and PS: "Sovereignty of the people and democracy are two perfectly correlative words; the one represents the theoretical idea, the other its practical realization" (Tocqueville YTC, CVh, 22). PS is without doubt a central legal concept not just because of its historical character as normative claim of the constitutionalism movement of the eighteenth and nineteenth century, but above all due to its presence (*Vertextung*) in almost all currently democratic and non-democratic constitutions in the world. The invocation of the People as the source and the only fundament of political

[2] Here I take for granted that an individualistic ethics is the only possible moral philosophy of a modern State. See Pfordten 2005, 1069–1071.

authority represents the basic claim of modern political philosophy.[3] In this way, PS raises a claim of universality: only the subjects, i.e., individuals can justify a political authority.

Thus, PS leads to the view of a limited political authority; an authority which has to be justified through the individual interests. But, there are two other concurrent views to the PS model of State.

On the one hand, there are of course other kinds of legitimacy transfer between sovereignties in the history of political philosophy, for instance with reference to God or another authoritative will. A political authority would be justified should there be another authority, who is able to transfer its power to the currently one. According to PS, this kind of enterprise clearly fails to provide a rational answer to the fact of political authority due to the very nature of a political authority, that is to say, due to its essence as collective action (Hobbes 1839, 74). This ontological argument runs thus: if political authority must be regarded as a collective action, i.e., someone has authority over a number of individuals, this political authority as collective action presupposes individual actions in order to *be* a political or collective authority. The acceptance act of a given authority is a necessary element of the authoritative phenomenon and the mere reference to God or another authoritative will cannot take this fact into consideration.

Another kind of justification in contrast to PS, on the other hand, seems to embrace the acceptance act of an authority and, furthermore, turn it in the only possible justification of political authority. Accordingly, the political authority of a State can be identified either with the fact of a sovereign power or with the fact of a so-called rule of recognition. Political authority is a social fact and, hence, one should not seek to justify it or to establish its conceptual deduction.

In the case of political authority as the fact of a sovereign power, the State action has authority because someone with a sovereign power made it such, not because of what they demand or entail (Eleftheriadis 2010, 539). And this sovereign power results from a pure historical process of confronting powers and prevalence of one, the ultimate domination of one historical power.[4] According to Austin (1995, 166): "1. The bulk of a given society are in a habit of obedience or submission to a de-

[3] See, for instance, Hobbes 1994, 50; Hume 1985, 32, 38, 489; Rousseau 2006, 17; Sieyès 2003, 94.

[4] In German, it is possible to differentiate the meaning between "Macht" and "Gewalt" in order to distinguish power and sovereign power.

terminate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior". Hart (1994, 53–58) has already proved the failure of such enterprise in providing a plausible explanation for the succession of sovereigns. I will offer here only a brief account of Hart's criticism, since they have been well explored in the bibliography of legal theory. According to Hart, there are two basic problems of this account: (1) it cannot accommodate the idea of the succession of the sovereign. "When Rex I dies there will have to be an unbridgeable gap in the legal system. There cannot be a legal system until Rex II establishes his authority through a pattern of obedience" (Eleftheriadis 2010, 544); and (2) that idea of political authority as a matter of fact fails to take into account the necessary procedure of identifying a command issued by a political authority. For it is necessary to what makes the case that a give speech act must be taken for a command or law. "It is usually the case, even in states where sovereignty is in the hands of a single person, that laws are created only when the sovereign follows a certain accepted procedure of legislation" (Raz 1980, 38)

The fact of a rule of recognition as possible explanation for a political authority turns to be very similar to that of the fact of a sovereign power. Accordingly, a command has authority not because of its content, but rather due to the existence of a given secondary rule. A rule of recognition consists in a necessary secondary rule, which transfers authority to State agents. It is the fact of a rule which creates a sovereign power and entails necessarily the habit of obedience regarding the people (the acceptance of the rule) and the use of the rule by officials, courts and others as authoritative criteria for identifying primary rules and obligations (Hart 1994, 100). In spite of the clear necessity of such rule regarding a modern political authority, the theory tells us only that there is a secondary rule and, however, fails to present a justification for the political authority.

These explanations of political authority are concurrent views to PS in the sense that either they do not embrace the individuals as ultimate source of political authority, or they refuse to provide a justification for a given political authority. Even if one accepts Austin's or Hart's explanation of legal authority as a fact or rule, it does not follow that the authority is justified, i.e., legitimate. Authority as a fact or secondary rule does not explain the authority *per se*, that is, why it is rational to obey the States' or a political authority's commands. PS, like the refer-

ence to will of God or some hereditary rule, seeks to provide a kind of rational deduction for the political authority and, therefore, cannot be satisfied with a mere reference to the existence of an habit or rule. In Tocqueville's ironic words: "There are even some who have discovered it (the national will) fully formulated in the silence of the people and who have thought that from the fact of obedience came, for them, the right of command" (Tocqueville 2010, 91).

The common birth of constitution[5], as the basic result of the historical process of Enlightenment (called constitutionalism), and PS, as the basic value of that justification, can be regarded as the attempt to justify the authority of a modern State.[6] It represents above all the necessity of an ethical deduction of the State as political authority. Fundamentally, PS consists in a kind of normative invocation of the people as source (*degré zéro*) in the sense of justification for all political authority (Müller 1997, 25), which is intrinsically associated with two constitutional formulas: "We the People …" (Preamble of the United States Constitution) and "All State Authority is derived from the People" (Art. 20 par. 1 of the German Fundamental Law). Because of these fundamental relations between the concepts of PS and constitution, it seems possible to say that the constitution is an attempt to justify the political authority of the State through the PS.

Despite the fact that PS is part of innumerous constitutions and a central claim during constitutionalism, it is far from clear what the legal proposition "all State Authority is derived from the People" means (Möllers 2011, 337). Constitutionalists seem to regard PS as the basic principle of democracy without being aware of its real meaning. Principle in this sense means something like value or idea of democracy, that is to say, a kind of very abstract concept which should found our democratic system. However, maybe due to the abstractness of this concept or, perhaps, the necessity of a minimal reference to the individuals in order to justify each State authority, a number of non-democratic States make also references to PS as a means of justifying their authority. In some sense, the vagueness of the concept of PS in modern constitutional law and political philosophy contributes to fundamental problems regarding the justification of modern State authority nowadays and of a

[5] According to Tocqueville (2010, endnote "k", 96): "Say that it (constitution in America) is only a changing expression of the sovereignty of the people, that has nothing of the perpetual, that binds only until it is amended".

[6] The invocation of God in addition to the people in many contemporary constitutions should not put doubts on the central character of PS for the modern States justification.

right to democracy.

By reflecting on the justification of State authority, PS goes besides an actually legal concept, like leasing or donation, and can be regarded, therefore, as a legal relevant concept (Radbruch 2003, 114), which embraces very abstract features, like State, sovereignty, authority, individual and legitimacy. For the justification of modern political authority does not only mean a reference to democracy as State form and its rules (for instance, majority rule, representation etc.), but rather presupposes specific evaluations on the relation between individuals and States. If the central task of political and legal philosophy consists in providing an ideal balance between moral autonomy and political authority (Wolff 1998, 14), it is clear that PV is a conception (Rawls 1971, 10; Dworkin 1986, 70–72) and has to do with the foundations of modern political and legal philosophy.

III. Stating the paradox.

In philosophy, paradoxes can be defined as a kind of argument which apparently holds truth but in fact involves two possible contradictory propositions as premises or an unacceptable conclusion of these two propositions. Paradoxes centrally involve difficulties in determining truth values (Cargile 2006, 105). For the sake of this paper, a paradox is a set of individually plausible but jointly inconsistent propositions (Sorensen 2003, 6). It is different from a riddle since a philosophical paradox must be able to be resolved rationally, i.e., it must be justifiable before the court of reason. Therefore, it is easy to see that a paradox must entail a cognitive element which allows us to criticize its presuppositions and conclusions.

In Kantian philosophy, this kind of knowledge reflects the second part of each philosophical enterprise, the so-called *Dialektik*, in contrast to the first part called *Analitik*. A good example provided by Kant (1974, 279) is the paradox or antinomy of taste in his third critic (*Kritik der Urteilskraft*): (1) Thesis: taste is not based on concepts because otherwise we could dispute (talk about proof) about taste; (2) Antithesis: taste is based on concepts because otherwise, regardless of some differences, we could not dispute about it. In this way, a simple antinomy of PS would be something like: (1) Thesis (*Political Authority)*: State has the supreme political authority over the people in a given territory because political authority is a fact; (2) Antithesis (*PS*): the People has the supreme politi-

cal authority because it is the source and only fundament of all political authority.[7] Like in the case of Kantian taste, we are in a dispute between facts and reasons.

But, let me try to explain more precisely the problem of PS. Like other relevant legal concepts with a high degree of abstractness, *verbi gratia* "human dignity" or "rule of law", PS as normative proposition "All State Authority is derived from the People" has usually been regarded with a skeptical look by political and legal philosophers, although a clear development of this concept can be observed in other fields, especially political science. Therefore, the primary connection between PS proposition and law has been taken to consist in a straight association between sovereignty of the people and legal mechanisms of direct democracy, that is to say, the right that each individual among the people would have to take part in the government. Ergo, PS has nowadays been taken for a concept of political science, which describes – and not prescribes – some practices, facts or rules associated with direct democracy, like plebiscite or referendum. For instance, even in the context of the German Constitution, the normative character of that proposition is usually seen as extremely weak and sometimes even completely limited through the second proposition of art. 20 par. 2: "It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies".

Indeed, PS has to do with self-determination and self-government and, therefore, with legal mechanism of participation in political decision making, as I stated above and is well known.[8] However, this association between PS and direct democracy consists only in possible representation of PS or, indeed, a descriptive moment of PS.[9] Such an understanding of PS as direct democracy raises the question as to whether it still makes any sense to speak about PS since direct democracy is just a form or a possible realization of democracy, like indirect democracy or direct-indirect democracy. For if democracy is just a State form, like it seems to be, PS has no specific function in explaining this phenomenon.

PS can only make sense if we take the modern project of political authority seriously, that is to say, if we preserve a (even weak) norma-

[7] "In a democracy the people are, in certain respects, the monarch; in other respects, they are subjects" (Montesquieu 2011, 10).

[8] For instance: "Yet another fundamental law in democracy is that the people alone should make laws" (Montesquieu 2011, 14).

[9] See Tocqueville 2010, endnote "e", 93.

tive character of PS. For the modern project of constitutional authority, this association of PS with direct democracy does not solve the difficulty in the idea of political authority and, therefore, obscures any possible normative sense of this concept. If democracy has to be regarded as the best standard for legitimate States, it is necessary to identify its value or basic idea.[10]

Although I believe PS is a central concept of modern political philosophy and, especially, constitutionalism, the term "PS" did not appear or was not frequently used by the central philosophers of the enlightenment. In spite of this fact, PS remains, nevertheless, a central concept for the democratic enlightenment enterprise. One, for instance, can compare PS with "human dignity", which is considered nowadays not only a central concept of human rights but also of Kant's moral philosophy, despite the fact that Kant himself rarely used the term "human dignity" in his moral philosophy (Pfordten 2009, 9).

Although Montesquieu (2011, 22) calls democracy a popular government and tries to establish its fundamental principles, the first attempt to identify the real meaning of PS with reference to democracy as a form of legitimate State or the *right* to command was apparently made in the nineteenth century by Alexis de Tocqueville (2010) in his famous *De la démocratie en Amérique*. He dedicated one chapter in the first part of the book in order to elucidate the idea of PS, namely chapter 4 "Of the Principle of the Sovereignty of the People in America". As I noted in the introduction, Tocqueville's goal was to defend a necessary relation between PS and democracy: "When you want to talk about the political laws of the United States, you must always begin with the dogma of the sovereignty of the people" (Tocqueville 2010, 91). In a manuscript, he even wrote that PS represents a theoretical ideal and democracy its concretization (Tocqueville YTC, CVh, 22). Like Montesquieu (2011 ,21), Tocqueville differentiates between the nature or form of a State and its principle or political virtues[11], that is to say, nature as what makes it what it is, and principle as what makes it act.

If my view holds any truth, Tocqueville has two basic claims regarding the relationship between PS and democracy as State form. (1)

[10] This view can be taken as a natural law argument: "The central claim of natural law political philosophy is that law has this reason-giving force through the common good of the political community" (Murphy 2006, 1).

[11] "I speak about political virtue, which is moral virtue in the sense that it points toward the general good, very little about individual moral virtues, and not all about that virtue which relates to revealed truths" (Montesquieu 2011, endnote 9, 25).

PS is the base of all human institutions because all States claim a right to command and therefore to be obeyed, and the only way to create this right and obligation is through the will of the people (Tocqueville 2010, 91). PS is then a necessary concept when you talk about a legitimate modern authority. (2) Democracy is the only State form which is able not to hide or sterile PS (Tocqueville 2010, 91). In democracy, State power exists only inside the society, that is to say, the political authority or the right to command is exercised only by and on the society. Democracy is the only possible form of individual self-determination regarding political authority since it allows in some sense the people, i.e., the addressees of political commands to take part in the creation of these commands. In this way, Tocqueville follows Montesquieu once again in his classical relationship between the four forms of Government and their corresponding principles, namely, democracy – virtue, aristocracy – moderation, monarchy – honor and despotic – fear, although democracy seems to be the only form of a legitimate State according to Tocqueville.

It is, however, even for Tocqueville, evident that the will of the people does not sometimes – or usually – correspond to the will of the State in indirect democracies or even in direct democracies. This idea gives rise to the following thoughts according to Tocqueville's political philosophy:

(L) All States claim legitimacy or the right to command.

(PS) A legitimate State presupposes that people are at the same time authority and subject of legal commands, that is to say, that the will of the State must correspond to the will of the people.

(D) Democracy is the only possible form of legitimate State.

(C1) In democracy as the only possible form of a legitimate State, people usually do not have authority over all commands emitted, that is to say, the will of the State does not usually correspond to the will of the people.

If democracy is the only possible legitimate State, that is to say, the only possible State form, in which there is, in fact, a right to command, how is it possible that the will of the people does not always correspond to the will of the State in democracy? Why should we regard democracy as a legitimate State if the moral right to self-determination is not always preserved?

Of course, I do not intend to solve all the possible problems of this paradox here. My attempt consists in showing that the content of PS is possible, that is to say, the premise of PS itself does not form a paradox, as many philosophers believe. In doing that, I will briefly re-

construct the basic idea of PS and democracy according to Tocqueville. It is possible – and maybe only possible – to speak about the identity between authority and subject in a constitutional State. Constitution and PS have a common birth, as I stated above.

IV. A life in paradox.

There are basically two fundamental problems regarding the foundation of a constitutional State on the basis of PS. The elucidation of these two problems regarding PS consists in the basic solution to the paradox formulated above.

1. Sovereignty + People ≠ Popular Sovereignty.

On the one hand, some authors believe that PS is a self-contradictory concept. In this sense, a strong paradox of PS can be formulated when the term "popular sovereignty" is literally taken for a mere addition between "sovereignty" and "people". Sovereignty can be formulated like: (R) S is obeyed by everyone; (O) S does not obey anyone. People consists in all addressees of the sovereign commands. When you add sovereignty and people in this way, it follows an identity between sender and addressee of the commands: (R) Everyone is obeyed by everyone; (O) No one obeys no one, where everyone and no one are people, i.e., addressees. In this case, PS turns out to be a kind of direct and consensual democratic theory, which is far off from our current democratic States.

Another way to think about the same problem is to take for granted, as we did above, that every political authority presupposes a secondary rule in order to establish authority (transfer of authority and identity of commands). In this sense, since each authority is necessarily subordinated to secondary rules, people as the addresses of State politics are not sovereign even in the case of constitution making. Every political authority and even the people as political authority are necessarily subjected to rules, like the rule of recognition or adjudication.[12]

In order to understand PS, it first seems necessary to grasp its function in a legal and moral system. Both Tocqueville and Montesquieu are very clear at this point: PS is a virtue, idea, value or principle. In this sense, it consists not in a specific reality in the sense that the ad-

[12] For this view, see Eleftheriadis 2010, 560–561.

dressees of commands turn to be the commanders.[13] Democracy as the concretization of PS can be developed in many ways and PS is just the virtue that moves this realization. In this way, the second dilemma of PS regarding necessary secondary rules turns to be unproblematic, since PS should not be regarded as a reality or, in this case, a specific State form.

Thus PS has to do with the question of how one can say that the State has the right to command. "C is legitimate" is the fundamental evaluation regarding PS. "C is legal" or "C is just" are other different evaluations. In this sense, it is possible to state that the question of legitimacy of political power is the fundamental question of PS. In a constitutional State, one needs to make a reference to the people in order to answer the question whether a political authority has the right to command or not, as PS prescribes.

It is clear, then, that the first problem about the identity between sender and addressee of commands is indeed not a real problem for PS. As I argued above, PS is an idea or principle of democracy.[14] Is it, nonetheless, not possible to say that the idea of PS consists in a direct and consensual democratic view, something like "one man/woman, one vote"? I believe the answer must be "maybe". Although I will not make an argument regarding this problem now, PS presupposes the question of political fundamental rights, like the right to vote, equality, fairness and so on. In this sense, if we can put the question in another way, as "Does the idea of PS not consist in a kind of direct and consensual democratic view with the guarantee of political fundamental rights?", I believe the answer is "yes", although I cannot address this question further at this point.

2. Justice and Legitimacy.

As I stated above, PS has to do with the legitimacy of political authority and it should not be confused with its justice. Justice embraces only a content justification for political actions, whereas legitimacy has more to do with the participation of the people, i.e., the addressees in the deliberative political process; justice regarding political actions is a moral liberty, whereas legitimacy in the sense of PS is a physical liberty

[13] Against this view, Maus (2011, 11) argues that there are two models of democracy, namely presidentialism and parliamentarism, and only a parliamentary system corresponds to PS.

[14] See Pfordten 2009, 59–79.

(Schopenhauer 1977, 44).

I am aware that this possible tension between the two basic values of justice and legitimacy concerning political authority cannot of course be solved so easy and, so far as I can see, it has been subjected to innumerous approaches in the history of modern political philosophy and especially since the second half of the last century.[15] Therefore, my attempt concerning this topic consists only in reconstructing the paradox of PS regarding justice and legitimacy in a comprehensible way.[16]

Liberty can be conceived as a negative concept. When we think through the concept of liberty, it is often the case that we imagine the absence of all obstacles or impediments. But, obstacles or impediments are, indeed, positive concepts, that is to say, a kind of force which creates hindrance to something. In this way, physical liberty is the absence of all kind of material obstacles or impediments. Concerning the animal nature, that is to say, movements that come from the will, these are called free when there are no material obstacles that can render the movement impossible. Thus, the physical meaning of liberty has to do with actions that are determined only by the individual will. In its first sense, the concept of liberty refers to action or movement possibility without material obstacles.

We can call some people or nations free and this proposition has usually to do with a kind of physical liberty (Schopenhauer 1977, 44). That is to say, we understand through this evaluation of a political community that they govern according to the laws which they themselves created. It is only through this concept of liberty that we can state that the people of a State obey their own will. The political liberty concerning PS is, in this sense, a kind of physical liberty.

The traditional and here unsolvable paradox of PS emerges when we add another kind of liberty, a here called moral liberty (Schopenhauer 1977, 45). According to this concept, liberty consists in the absence of all necessities regarding the action will. Necessity is, then, the opposite of contingency. We can say that an action is necessary when there is a reason/cause for this action. Free is an action when there is an absence of reasons/causes for this action. In this sense free will would be the case when the will would not be determined through reasons but rather would be formed from itself.

---

[15] For instance: Wolff 1970; Rawls 1971; Nozick 1977; Dworkin 1986 176–224; Luhmann 1983; Habermas 1998, 109–165; Simmons 2001; Gilbert 2006.

[16] This part of the paper is based on Schopenhauer 1977, 43–49.

On the one hand, liberty in a moral sense creates the paradox that even a consensual and direct decision of the people regarding a political action, i.e., a free decision according to the physical concept of liberty, would be not free if it is determined by interests or reasons, that is to say, if it is necessary. On the other hand, a political action on the basis of a moral concept of liberty does not need to regard PS since it seeks a kind of absolute contingency.

V. Conclusion: the possibility of living in a paradox.

The basic point of this paper was to shed light on the possibility of PS as the foundation of a modern justification for political authority. That means that I tried to defend a possible meaning for the fundamental proposition of PS – "All State Authority is derived from the People", which, as I claimed, should be regarded as the foundation of a constitutional answer to the problem of the State authority. Due to its abstractness, that is to say, comprehensiveness PS turns to be, however, a very weak answer or justification for the necessary political claim of legitimate authority.

It is, at the end of this paper, frustrating not be able to give a direct answer to the problem of political authority through the concept of PS, that is to say, PS cannot give a accurate answer to the question "why should I obey the law?". Ultimately, it is only possible to say that the reference to people in most contemporary constitutions in the world implies that the political authority must be justified through the people, i.e., the addressees of politics. Therefore, from the invocation of people on the bottom or inside of many constitutions follows the necessity of a minimal reference to the people in every political action.

The reference to the people through the legal concept of PS entails a kind of value and, therefore, an evaluation of political authority. Some conclusions regarding this view were already presented in this paper: (1) PS is an idea or value and, therefore, should not be confused with direct democracy, which is a possible concretization of this value; (2) As a value, PS has to do with legitimacy, that is to say, with the evaluation of a State in the sense of attributing to it the value of legitimate or illegitimate; (3) PS does not imply that the people should have absolute authority in a legitimate political State, but rather that PS is a limitation to the political authority in a negative sense of the concept or something that moves the political society in a positive sense of the concept.

Finally, PS is linked with the first kind of liberty, that is to say, the physical liberty. In this sense, people are considered free if the obstacles for ~~the~~ their participation in the political process are absent or not so strong. PS has then a paradoxical life when we think about it in terms of moral liberty. Moral liberty as absence of necessity regarding human actions does not presuppose PS and the common birth of constitution and PS implies, above all, the necessary paradox between these two liberties in the heart of modern legal systems.

References

Austin, John. *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press, 1995.

Bogdandy, Armin von. "The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe". *International Journal of Constitutional Law* 7.3 (2009): 364–400.

Cargile, James. "Logical Paradoxes". *A Companion to Philosophical Logic*. Ed. Dale Jacquelle. Oxford: Blackwell, 2002. 105–114.

Dworkin, Ronald. *Law's Empire*. Cambridge (MA): Harvard University Press, 1986.

Eleftheriadis, Pavlos. "Law and Sovereignty". *Law and Philosophy* 29 (2010): 535–569.

Gilbert, Margaret. *A Theory of Political Obligation*. Oxford: Oxford University Press, 2006.

Habermas, Jürgen. *Faktizität und Geltung*. Frankfurt am Main: Suhrkamp, 1998.

Hart, H. L. A. *The Concept of Law*. Second Edition. Oxford: Oxford University Press, 1994.

Hobbes, Thomas. *Leviathan*. The English Works of Thomas Hobbes. vol. III. London: John Bohn, 1839.

___. *Leviathan*. Indianopolis/Cambridge: Hackett Publishing, 1994.

Hume, David. *Essays: Moral, Political and Literary*. Indianopolis: Liberty Fund, 1985.

Kant, Immanuel. *Kritik der Urteilskraft*. Frankfurt am Main: Suhrkamp, 1974.

Luhmann, Niklas. *Legitimation durch Verfahren*. Frankfurt am main: Suhrkamp, 1983

Maus, Ingeborg. Über *Volkssouveränität: Elemente einer Demokratietheorie*. Frankfurt am Main: Suhrkamp, 2011.

Möllers, Christoph. "Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts". *Das entgrenzte Gericht: eine kritische Bilanz nach sechzig Jahren*. Ed. Christoph Möllers *et al.* Frankfurt am Main: Suhrkamp, 2011.

Montesquieu. *The Spirit of the Law*. Trans. and ed. Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone. Cambridge: Cambridge University Press, 2011.

Müller, Friedrich. *Wer ist das Volk?* Elemente einer Verfassungstheorie VI: die Grundlage der Demokratie. Ed. Ralph Christensen. Berlin: Duncker und Humblot, 1997.

Murphy, Mark C. *Natural Law in Jurisprudence and Politics*. Cambridge: Cambridge University Press, 2006.

Nozick, Robert. *Anarchy, State and Utopia*. New York: Basic Books, 1977.

Pfordten, Dietmar von. "Normativer Individualismus und das Recht". *Juristen Zeitung* 22 (2005): 1069–1080.

___. *Menschenwürde, Recht und Staat bei Kant: fünf Untersuchungen*. Münster: Mentis Verlag, 2009.

Radbruch, Gustav. *Rechtsphilosophie*. Second Edition. Ed. Ralf Dreier and Stanley L. Paulson Munich: C. F. Müller, 2003.

Raz, Joseph. *The Concept of a Legal System: an Introduction to the Theory of Legal System*. Second Edition. Oxford: Oxford University Press, 1980.

Rawls, John. *A Theory of Justice*. Cambridge (MA): Harvard University Press, 1971.

Rousseau, Jean-Jacques. *The Social Contract*. New York: Penguin, 2006.

Schopenhauer, Arthur. Über *die Freiheit des menschlichen Willens*/Über *die Grundlage der Moral: die beiden Grundprobleme der Ethik*. Kleinere Schriften II. Zurich: Diogenes, 1977

Sieyès, Emmanuel Joseph. *Political Writings*. Indianopolis/Cambridge: Hackett Publishing, 2003.

Simmons, A. John. *Justification and Legitimacy*. Cambridge: Cambridge University Press, 2001.

Sorensen, Roy. *A Brief History of the Paradox*. Oxford: Oxford University Press, 2003.

Tocqueville, Alexis de. *Yale Tocqueville Collection*. Collection of manuscripts of Yale University. Cvh: Bundle no. 3, 1–5. Cited as "Tocqueville YTC, Cvh".

___. *Democracy in America*. Ed. Eduardo Nolla. Trans. James T. Schleifer. Indianapolis: Liberty Fund, 2010.

Wolff, Robert Paul. *In Defense of Anarchism*. Berkeley and Los Angeles: California University Press, 1998.

An ontological turn of political obligation

Hirohide Takikawa[1]

Abstract: Thomas Hobbes claims that everyone in the state of nature agrees to establish a commonwealth to avoid his violent death because his primary purpose is self-preservation. A traditional approach, by reference to game theory, regards the state of nature as the prisoner's dilemma or the stag hunt, and then shows that Leviathan is necessary to reach a Pareto optimal solution. But it is well known that in an infinitely repeated prisoners' dilemma, the option of conditional cooperation is more rational than the option of unconditional defection under some conditions. This paper aims to show that human death offers some essential reasons to enter into a civil state, which are very different from the grounds that Hobbes and his successors have supposed. The conclusion is that we would owe no political obligations if we were immortal.

Keywords: Political Obligation, Thomas Hobbes, Mortality

1. The State of Nature

An important method to defend the legitimacy of a state is by comparing two conditions: the one we would experience if we lived in a civil state and the other we would face if we lived outside of one. The latter has been traditionally called the state of nature (SN). Many authors accept this thesis:

SN: Everyone gets more expected benefits in the civil state than in the state of nature.

Thomas Hobbes endorses the SN thesis by stating that in a state of nature, men are "in that condition which is called war, and such a war as is of every man against every man"(Hobbes 1651:13.8). In the state of nature, the life of man is "solitary, poor, nasty, brutish, and short" (Hobbes 1651:13.9). In De Cive, Hobbes showed a comparative list of the state of nature and the civil state: "Out of it [i.e., the state], there is a Do-

[1] Faculty of Law, Rikkyo University, Tokyo, Japan.

minion of Passions, war, fear, poverty, slovenliness, solitude, barbarism, ignorance, [and] cruelty. In it, the Dominion of reason, peace, security, riches, decency, society, elegancy, sciences, and benevolence" (Hobbes 1642:10.1).

Hobbes's claim is much stronger than it first appears. He does not claim that in some civil states, people would be better off than in the state of nature. In contrast, his position is rather that in any civil state, people are better off than in the state of nature. He writes the following: "the greatest that in any form of government can possibly happen to [attribute] the people in general is scarce sensible, in respect of the miseries and horrible calamities that accompany a civil war" (Hobbes 1651:18, 117).

Hobbes's way of describing the state of nature has been criticized on several grounds. Samuel Pufendorf proclaimed that it is just "a description by fiction." He maintains that, instead, a real state of nature is not a state of war but a society where people lead cooperative lives (Pufendorf 1673:II.1.6). Since Pufendorf's objection, the state of nature has not been generally depicted as a state of war. John Locke, for instance, claimed that the state of nature is "a state of liberty" but not "a state of license" because "[t]he state of Nature has a law of Nature to govern it, which obliges every one"(Locke 1698:II.6). There is a "plain difference between the state of Nature and the state of war" because men live together according to reason (Locke 1698:II.19). Jean Jack Rousseau joined the troops by writing that "there is no general war among men" (Rousseau 1997:166). The state of nature is "the most peaceful and the most preferable state" (Rousseau 1755:153). Inequality is almost zero in the state of nature (Rousseau 1755:193).

Thus, we find two contrasting ways to depict the state of nature: Hobbesian war versus non-Hobbesian peace. Philip Pettit tries to reconcile them by introducing a historical hierarchy for the state of nature (Pettit 2008:99). In general, the state of first nature is the state of animals, and in this state, a human being can live an untroubled life. This is the non-Hobbesian state of nature. Once humans acquire language, they live a different life; they get into strife about honor. This is the Hobbesian state of nature. What divides them is a divergence in their focus on the stages in the state of nature, but not a disagreement about the concept of the state of nature. Even Rousseau could accept the Hobbesian SN; i.e., "the natural state" meant the state of the second nature, or what he calls "the civil state" (Rousseau 1755:121).

2. Basic Assumptions

On what grounds does Hobbes characterize the state of nature as a state of war? Hobbes's basic assumption is that men are equal in the faculties of body and mind; i.e., "the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy" (Hobbes 1651:13.1). As no one is strong enough to avoid being killed by others, men are fundamentally vulnerable to each other. This assumption is in sharp contrast with the Aristotelian view that some are born governors and others slaves.

From this equality of ability, Hobbes argued that conflicts arise. Hobbes found three main causes of conflicts in the nature of man: competition, diffidence, and glory. Hobbes wrote that "the first maketh men invade for gain; the second, for safety; the third, for reputation" (Hobbes 1651:13.6). It would be an interesting task to precisely understand this line of his argument. Before exploring this issue, I will examine Hobbes's basic assumption on motivational elements. According to Hobbes, men's end is "principally their own conservation" (Hobbes 1651.13.3). While the best among the good things is self-preservation (*sua conservatio*), death is the worst among all the bad things (Hobbes 1658: 11.6). As we will see later, since death is morally bad, fear of death is considered politically good. Vainglory is the most frequent cause of crime among various kinds of passions (Hobbes 1651:27.13). Vainglory, or pride, arises from men's imagination of their own power and ability, which is not grounded on their actual achievements (Hobbes 1651:6.49). Vainglorious men delight in supposing themselves superior to others. These two motives, fear of violent death and pride, are considered as the two major passions in Hobbes's human beings since Strauss (Strauss 1965). According to Strauss, vainglory is a vice; it is the ultimate cause of injustice. Fear of violent death is a virtue; it is shared by every human being and enables humans to overcome the bad effects of pride and live under the same sovereign.

3. Prisoners' Dilemma

The arguments above can be described and clarified by game theory. Noncooperative games have two basic assumptions: players are rational and their agreements are not trustworthy. These two assumptions correspond to two origins of conflicts discussed by Hobbes: com-

petition for gain and diffidence by safety. On the basis of these assumptions, game theory can show how the state of nature turns into a state of war. The state of nature has the following payoff matrix.

	Y		
	C	D	
X	C	3,3	0,4
D	4,0	1,1	

This is called the prisoners' dilemma. The two players, X and Y, each have two options: cooperate (C) or defect (D). They are rational, and they attempt to maximize their own expected benefits. Because option D is the best response for each individually, they each choose D. In other words, (D,D) is a Nash equilibrium. However, (D,D) is worse than (C,C) for them collectively. In theoretical terms, (D,D) is not a Pareto optimal. Because they seek their own gain, they get into the worst situations, i.e., a state of war. Individual rationality causes irrational results on a larger scale. This is a social dilemma.

Humans in the state of nature cannot solve the dilemma by contracts or agreements because they cannot be certain that others would not break the agreement, even if everyone managed to agree for all to choose option C in the first place. They cannot trust the other party's words because concluding that the other party will betray is logical, given the assumption that the other party is rational[2].

To get out of the prisoners' dilemma, the matrix must be changed by punishing the betrayers. Hobbes writes the following: "there must be coercive power, to compel men equally to the performance of their Covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their Covenant" (Hobbes 1651:15.3). Suppose that the commonwealth punishes the betrayer by depriving him of his gain. The matrix can now be rewritten as follows.

[2] Hobbes used the term "the state of nature" in his De Cive, but he stopped using it in his Leviathan because it would be impossible to leave the state of nature and go into a civil state if we suppose that a state of war exists at the beginning of hypothetical history. Hence, he called several difficulties in our real societies "natural conditions" and explored those conditions under which we can live together peacefully.

		Y	
		C	D
X	C	3,3	2,0
D		0,2	1,1

In this Leviathan, option C is the best response for each individually as well as for both collectively. Therefore, (C,C) is a Nash equilibrium. In addition, (C,C) is a Pareto optimal. They can now solve the dilemma by introducing the commonwealth, which Hobbes named the Leviathan. This is the first argument to justify the state: the state facilitates cooperation among those who would struggle among themselves without it.

This model goes along with a basic assumption that humans are eager to avoid violent death. In the prisoners' dilemma, they choose D because they avoid being killed by the betrayer. In the Leviathan, they choose C because they avoid being killed by the sovereign. Here the fear of death is a good passion that enables humans to leave the state of nature.

4. Stag Hunt

It appears that the prisoners' dilemma provides a good reason for a Hobbesian interpretation of the state of nature. However, it is important to notice that Hobbes's own assumption about human beings may lead to a contradicting conclusion: a non-Hobbesian interpretation. Because everyone is equal in vulnerability, the betrayer will face a counterattack. In that case, the matrix is modified as follows.

		Y	
		C	D
X	C	3,3	0,2
D		2,0	1,1

This is known as the assurance game, or the stag hunt (Skyrms 2004). In this game, option D is not dominant; it would be rational to take C if the other player takes C. Both (D,D) and (C,C) are Nash equilibria. In other words, if the state of nature is regarded as a stag hunt, (D,D), a state of war, might not emerge. (C,C), which is a state of peace and is beneficial to everyone, can arise without a coercive state, the Le-

viathan. Rousseau describes the state of nature as a stag hunt in his "A Discourse on the Origin of Inequality" (Rousseau 1755:96-97) and not as a prisoners' dilemma. In contrast with their assumed behavior in the prisoners' dilemma, men can naturally cooperate with each other in the stag hunt. Therefore, they do not need the state's punishment to live peacefully together. Rationality does not necessarily disturb cooperation. Self-interest goes hand in hand with self-preservation.

5. Pride Game

Why does Hobbes then equate the state of nature with a state of war? To answer this question, we must bring glory or pride into the model, the third origin of conflicts suggested by Hobbes[3]. Glorious men break the natural law that requires men to "acknowledge other for his equal by nature" (Hobbes 1651:15.21). They feel delighted in finding themselves superior to others. They are not only interested in their absolute benefits but also in the relative difference between their and others' benefits. They can be called "negative altruists" (Taylor 1987) because while an ordinary or positive altruist gains utility when the other party gets more benefits, they gain utility when the other party gets less. Vainglory is the power that makes men blind (Strauss 1965), and therefore, they misconceive their own benefits. They take relative superiority and inferiority seriously. A payoff matrix in a glorious society can be described as follows.

	Y		
	C	D	
X	C	3,3	−2,4
D	4,−2	1,1	

Compared with the stag hunt, the worst case for X occurs when X is defeated by Y and the best arises when X defeats Y. This game can be called the pride game. In this game, any rational player takes option D, and then option D is dominant. Therefore, (D,D) is a Nash equilibri-

[3] Michael Oakshott points out that Hobbes recognizes a twofold meaning: pride as a virtue and vainglory as a vice. The latter is an endeavor to put oneself in place of God, and can be an obstacle to peace. The former is an endeavor to imitate God, and can promote peace (Oakshott 1975:130). I examine the latter meaning of glory.

um. In other words, even when the state of nature is per se the stag hunt, glorious men consider it a pride game, and the state of nature turns into a state of war. The reason for this conclusion is clear and simple; the pride game has the same payoff structure as the prisoners' dilemma. This shows that pride of glory is the ultimate cause of conflicts. To avoid the state of war, even humans capable of living cooperatively in the state of nature need a civil state. Hence, the Leviathan is called the "King of the Proud" (Hobbes 1651:28.27; Job 41).

6. Repeated Game

To sum up, the state of nature is a state of war whether it is naturally supposed as a prisoners' dilemma or is depicted as a stag hunt, which then turns into a pride game that is also a prisoners' dilemma, originating from vainglory. If this process is accurate, is it necessary that the state of nature is a state of war? The answer is no. In an infinitely repeated prisoners' dilemma (or a prisoners' dilemma supergame), the option of conditional cooperation is more rational than the option of unconditional defection under some conditions. This folk theorem proves that defection is not the only Nash equilibrium. Conditional cooperation stably arises because, over repeated games, the betrayers are excluded from future cooperative gains. Exclusion from cooperation has the same effect as punishment by the state (Kavka 1986:140). In addition, in evolutionary games, where the component ratio of each strategy changes in promotion to its benefits, the strategy called tit for tat can be an evolutionarily stable strategy (Axelrod 1984).

This could mean that even when the state of nature is a prisoners' dilemma, people would cooperate without any coercive sanctions provided that the state of nature is infinitely repeated, lasts for a long period of time, or has no end. Men can solve social dilemmas in the state of nature with no help from the state. Therefore, it is not the case that the state of nature is a state of war even when it is a prisoners' dilemma. However, this line of argument, which tries to solve the dilemma, faces at least two problems (Taylor 1987).

The first problem concerns the number of people involved. The argument above supposes a two-player game. However, in a game of prisoners' dilemma with n-players (n is more than two), a dynamic has been observed where the more players that engage in the game, the less likely it becomes that cooperation among them will emerge. People will

stop cooperating if they find that others do not cooperate. Therefore, they will probably not cooperate in a large society because they cannot watch others to ensure their cooperation. The second problem arises from people's attitude toward the future. Those players with a high discount rate evaluate their future benefits in comparison with their present ones. I will examine this point later in Section 8.

7. Coordination Game

The state of nature is sometimes depicted as a coordination game. Coordination problems are "situations of interdependent decision by two or more agents in which coincidence of interest predominates and in which there are two or more proper coordination equilibria" (Lewis 1969:24). In other words, any out of a given set of equilibria will do, but one of them must be selected. A typical case of the coordination game is known as Hume's boat, which has the following payoff matrix.

		Y	
	C	D	
X	C	2,2	0,0
D	0,0	1,1	

When both X and Y row the boat (C), the boat runs. When neither X nor Y row (D), the boat does not advance, but X and Y can rest. When only one of them rows, the boat stays and rolls and neither can rest. (C,C) and (D,D) are Nash equilibria, and they are also Pareto optimal. Our society faces many coordination problems such as traffic rules, tax systems, and social security arrangements. John Finnis maintains that "[t]he ultimate basis of rulers' authority is the fact that they have the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community's coordination problems" (Finnis 1980:351). In other words, the state acquires legitimate authority because it solves coordination problems by showing a salient equilibrium. Salience solves the problem of competing but otherwise equal solutions (Lewis 1969:35; Schelling 1960:91). A public announcement made by the state, such as "Now we drive on a right side of the road," is more salient than a single person's declaration.

Does this argument justify the state's authority? The answer is no because the state is not necessary to solve coordination problems.

When some conventions emerge spontaneously, society will progress well without a state. Where some conventional rules of right-side traffic are brought into existence through social cooperation, it is unnecessary for the state to declare those rules. Some might argue that the state's punishment is necessary to solve coordination problems as it is necessary to resolve the prisoners' dilemma; however, it is not. As Lewis observes, "punishments are superfluous if they agree with convention, are outweighed if they go against it, [and hence] are not decisive either way" (Lewis 1969:45). The conventions will be stable without any back-up of the state once they arise because the actions prescribed by them are Nash equilibria; nobody has incentive to break these conventional rules[4].

8. Mortality

The argument above seems to show that people do not require the state to overcome those difficulties they would face in the state of nature. Whether the state of nature is a prisoners' dilemma or a coordination game, people can cooperate without any help from the state.

However, I claim that this conclusion overlooks one basic human condition: mortality. I will suggest that human beings are in need of the state's authority because they are destined to die. As I examined above, two approaches have been offered to understand Hobbes's argument about the state of war. The first approach, which stresses an element of self-preservation, regards the state of nature as a state of war because humans compete with each other as they cannot trust each other. As they aim for their own gain, they paradoxically fall into a state of war, which would be the worst case scenario for each individually. This is shown by reference to the prisoners' dilemma game. The second approach, which emphasizes an element of vainglory, considers the state of nature as a state of war because people are sensitive to their relative status. Because they are obsessed by their priority over others, they fall into a state of war. This is shown by reference to the pride game. Both approaches show their own routes to the state of nature being considered a state of war. However, in infinitely repeated games, these approaches fail to show that the state of nature is a state of war.

Folk theorems, which show that conditional cooperation arises

[4] The coordination game can be considered a variation of the stag hunt game. Therefore, as the state is unnecessary in the latter case as mentioned above, it is so in the former.

in repeated games, do not necessarily hold true because humans are mortal. Mortality changes the calculation matrices of both above approaches for two reasons. First, because humans are mortal, they do not believe in the infinite repeat of games, and thus, the game will come to an end at some point in time. When games repeat only a finite number of times, players are rational by choosing not to cooperate in the last game. Because they predict that other players will also not cooperate in the last game, they will not cooperate in the second-to-last game either. Following this line of thought, people will not cooperate from the beginning in finitely repeated games.

Second, because humans are mortal and they do not know when they will die (they might perhaps die at any instance), their discount rates tend to be high. When discount rates are high enough, (D,D) is a Nash equilibrium. Mortal creatures will betray others when they earn more current benefits than discounted future benefits. Human beings in the state of nature often discount their future interests for several reasons. First, as they will seldom meet the same party again, they figure that they will not see the same party whether they cooperate or defect. Therefore, they are inclined to give priority to their present certain benefits over future uncertain benefits. Second, they are so fragile and mortal that they might not survive until they see and cooperate with the other party again. Cooperative benefits, which they can only get in the future, might not fall into their hands. Third, they tend to become risk-averse because they are exposed to high risks regarding their security. Thus, they try to keep their current real benefits above all else. In conclusion, an infinitely repeated prisoners' dilemma turns into a one-off game because the benefits accruing only in the future do not carry enough weight.

We have several potential ways to overcome the problems originating from discount future benefits. The first way is through an ideological construction or religion. Even if men are mortal, those with some kind of religious faith can believe in their eternal life: their souls are eternal, or they transmigrate. Men with these beliefs can cooperate in this world even though they are mortal. However, in contrast, those who do not believe in this kind of virtual immortality are not likely to cooperate because they think their lives will come to an end. We require other means to enable cooperation. One such way is social security. By offering a secure future for people and giving them a good opportunity to survive, social security can reduce their discount rates. In well-arranged social security, people are not exposed to the risks of avoidable death.

This encourages them to cooperate with each other. A third way is coercion. People can work together by punishing those who do not cooperate. The state can utilize the second and third ways to ensure that their subjects cooperate.

As for coordination games, we have seen that the state is unnecessary because some conventional rules can coordinate people's behaviors. However, mortality does matter in the coordination games because people cannot wait for conventions to emerge. They hope that coordination problems will be solved within their era. Some conventional rules will probably emerge in the long run, but that would be too late for them. Here the state can create rules to solve problems through its saliency. Once it declares certain rules, their conspicuousness gives subjects enough reason to follow them. The enactment of rules by the state can abridge the process of conventions emerging.

It is important to reconsider the significance of death in legal and political philosophy. Hobbes and his successors suppose that human deaths are politically good because they enable men to leave the state of nature and go into a civil state. I have shown that human deaths are politically bad, let alone ethically bad, because they force men to struggle with each other. If we were immortal, we would not need a civil state.

*The research for this paper was funded by Grants-in-Aid for Scientific Research (C) 20530015 from Japan Society for the Promotion of Science (JSPS).

References

Axelrod Robert (1984). *The Evolution of Cooperation*. New York: Basic Books.

Finnis, John (1980) *Natural Law and Natural Rights*, Oxford University Press.

Hobbes, Thomas (1642[1998]) *De Cive,* edited by Howard Warrender. Oxford: Clarendon Press. = (1998) *On the Citizen* , edited and translated by Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press.

Hobbes, Thomas (1651) *Leviathan*, edited, with introduction and notes by Edwin Curley, Hackett, 1994.

Hobbes, Thomas (1658) De Homine.

Kavka, Gregory S. (1986) *Hobbesian Moral and Political Theory*, Princeton University Press.

Lewis, David (1969[2002]) *Convention: A Philosophical Study*, Blackwell.

Locke, John (1698[1988]) *Two Treatises of Government*, edited with an introduction and notes by Peter Laslett, Cambridge University Press.

Oakeshott. Michael Joseph (1937[1975]) *Hobbes on Civil Association*, Blackwell.

Pettit, Philip (2008) *Made with Words: Hobbes on Language*, Mind, and Politics, Princeton University Press.

Pufendorf, Samuel (1673) *De officio hominis et civis juxta legem naturalem libri duo*. (1991) *On the Duty of Man and Citizen According to Natural Law*, edited by James Tully, translated by Michael Silverthorne, Cambridge University Press

Rousseau, Jean-Jacques (1755[1964]) *Discours sur l'Origine et les Fondements de l'Inégalité parmi les Hommes*, Œuvres complètes de Jean-Jacques Rousseau, tom. III, Gallimard: 109-223.

Rousseau, Jean-Jacques [1997] "The State of War," in Victor Gourevitch (ed.) *Rousseau: The Social Contract and Other Later Political Writings*, Cambridge University Press.

Schelling, Thomas C. (1960[1980]) *The Strategy of Conflict*, Harvard University Press.

Skyrms, Brian (2004) *The Stag Hunt and the Evolution of Social Structure*, Cambridge University Press.

Strauss, Leo (1965) *Hobbes' Politische Wissenschaft*, Luchterhand.

Taylor, Michael (1987) *The Possibility of Cooperation*, Cambridge University Press.

Biomedical Principles:
Systematic aspects[1]

Oscar Vergara[2]

Abstract: Beauchamp and Childress propose four basic principles that can be used when making ethical decisions in the biomedical sphere. These principles were determined by means of the coherent specification of a set of rules. The purpose of this paper is to analyse principlist methodology by applying the theory of normative systems. Such an analysis throws up problems with the normati-vity of the system; in the formulation of its axiomatic basis (regarding its formal properties, namely plenitude, coherence and independence); in the deriving of rules through specification; and in the choice of the right set of norms. The aim of this study is to shed a critical light on all these issues.

Keywords: Biomedical ethics. Principlism. Specification. Normative systems. Hermeneutics.

Approach

This paper is located in the biomedical sphere and its purpose is to analyse a specific aspect of the decision-making methodology known as "Georgetown Principlism", as it has been developed by Tom L. Beauchamp and James F. Childress[3]. The standpoint from which this methodology has been analysed is that of normative systems. Beauchamp and Childress propose four principles that, from this standpoint, can

[1] This study is part of the Research Project «Principialismo y teoría de la argumentación en la toma de decisiones biomédicas» (DER2010-17357), led by Pedro Serna Bermúdez, and funded by the Spanish Ministry of Education and Science during the years 2010-2013 and by the Galician Government, through its Program "Consolidación y Estructuración de Unidades de Investigación Competitivas del Sistema Universitario de Galicia para Grupos con Potencial de Crecimiento (CN 2012/283).

[2] University of Corunna, Spain.

[3] It is largely developed in Beauchamp & Childress, 2013. This is the 7th edition of the book, which was first published in 1979, a fact that gives some idea of its great success.

be seen as the axiomatic basis for a normative system that makes it possible to derive an increasingly specific succession of rules, with a view to providing answers to all the bioethical problems that may arise in the medical field, and to do so coherently. The issue at point is whether this has been achieved.

Elements of principlism

The first thing to consider are the famous four principles. There is indeed a great deal of food for thought here, but for the purposes of this paper a mere overview will suffice, since what interests us is not so much the semantic issue concerning how these principles should be interpreted, but rather the *syntactic* issue, which concerns not only the relationship between them, but also that with their eventual specifications. According to the principle of respect for autonomy, a patient should be able to act in accordance with a plan of behaviour he or she has him or herself chosen[4]. The principle of non-maleficence can be summed up in the classical aphorism *primum non nocere*, i.e. "first, do no harm"[5]. The principle of beneficence refers to the obligation to procure the patient's wellbeing[6], whilst, finally, the principle of justice concerns what is traditionally known as distributive justice, which deals with the fair distribution of goods and burdens[7].

With regard to their *scope*, it is evident that these four principles cover much of the range of cases that may arise in the sphere being analysed. It is therefore an easy matter to find sufficient support in one principle or another to provide an ethical justification for the way in which a given case is resolved. Similarly, and as far as their *content* is concerned, they are certainly intense or fertile, since each of them displays a wealth of moral content that can easily be brought into play in the case of any eventuality. The problem with this great breadth and density is that they favour the justification of *conflicting solutions* for a given case, according to which principle is invoked or whether it is interpreted in one way or another. To give an example, faced with a patient who asks her physician for a Caesarean delivery on the basis of the principle of autonomy, the latter can justify his or her refusal by appealing to the principle of

[4] Cf. ibid., pp. 101-102.
[5] Cf. ibid., p. 150.
[6] Cf. ibid., pp. 202-203.
[7] Cf. ibid., pp. 249-250.

non-maleficence. It is therefore necessary to descend the scale of specification of these principles, something which, furthermore, must be done coherently.

Following the line taken by William D. Ross, Beauchamp and Childress take pains to indicate from the outset that the four principles do not present any absolute requirements, only *prima facie* ones. This means that we have to wait for each individual case before deciding which of the principles that come into play carries most weight[8]. In the face of the criticism of intuitionism levelled at them, from the fifth edition onwards Beauchamp and Childress have recourse to a contribution provided by Henry Richardson. This is none other than what is known as "specification", the purpose of which is to establish some kind of rational control between the principles and a specific case. This mediation is performed by formulating rules of an increasingly restricted scope, a process that involves specifying elements such as what, where, when, why, how, by what means, by whom and to whom[9].

However, the same problem that arose at the level of the basic principles reappears, with exactly the same intensity, at the specified rule level. Indeed, both Richardson and Beauchamp and Childress admit that there is no unique and necessary connection between the general norm and specified norm[10]. Returning to our previous example, if we try to find a rule we discover there are two (if not more) that share equal legitimacy: "any mother can choose the method of delivery by virtue of the principle of autonomy"; and "any mother, by virtue of the principle of autonomy, can decide the method of delivery, provided it is compatible with clinical indications".

For this reason principlists turn to the concept of "reflective equilibrium", derived from Rawls' theory of justice. The basic idea it represents is that from all the various possible specifications the one that should be chosen is that which "favours reciprocal support between the set of norms considered to be reflectively acceptable"[11].

This a fundamental requirement of the idea of a normative system, which, to the extent that it aims to guide behaviour, cannot be home to contradictory norms. This, however, merely transforms the problem of the validity of a particular norm into one of the validity of a set of

[8] Cf. Ross, 1994, p. 34.
[9] Cf. Richardson, 1990, p. 295.
[10] Cf. Richardson, 1990, pp. 301-302; Beauchamp & Childress, 2013, pp. 24-25.
[11] Cf. Richardson, 1990, p. 302.

norms. Indeed, the choice of a valid set of norms cannot be made deductively, as Beauchamp and Childress themselves admit[12]. We will return to this issue at the end of this paper, but first we need to look at other difficulties concerning the methodology being analysed.

Difficulties of the principlist system

a) To begin with, the system claims to be "normative"[13]. The principles, however, are taken from common morality, and far from justifying themselves, the authors state that are of a *historical* nature[14]. If this is so, the system cannot aspire to any kind of normativity, since, logically, duty cannot be derived from being. But if their principles lack normativity, so will the both the specified norms (if the latter do indeed logically derive from the former) and the solutions indicated for any particular case.

b) Secondly, the axiomatic basis of the system, constituted by the four principles, suffers from several problems with regard to its formal properties. In the case of *plenitude* there is no justification of how the four principles are drawn from an alleged common morality nor why such a formulation is preferable to others, such as, for example, that of European principlism. Reference has at times been made to "moral imperialism" to denote this attitude[15]. In that of *coherence*, it has also been pointed out that the principles are mutually contradictory. Gert, Culver and Clouser have stressed the lack of unity of these principles, each of which has been taken, according to them, from widely differing ethical theories[16]. Finally, the question of independence also presents problems, since the principles in question overlap and it is hard to establish the boundaries between them[17].

c) Thirdly, and as García Llerena has pointed out, derivation from a principle is, by definition, unviable, since it is impossible to establish whether a particular kind of action is able to satisfy the initial

[12] Cf. Beauchamp & Childress, 2013, p. 393.

[13] Ibid., p. 2.

[14] Cf. ibid., p. 4.

[15] Cf. Tealdi, 2005, pp. 4-5.

[16] Cf. Gert, Culver & Clouser, 2006, p. 122.

[17] Proof of this are the strenuous efforts made by Beauchamp and Childress, in opposition to Frankena, to draw the boundaries between non-maleficence and beneficence. There are indeed authors who consider non-maleficence to be included in beneficence, as the physician's principal obligation. Cf. Pellegrino & Thomasma, 1993, p. 53.

norm or not[18]. Indeed, Richardson states that his theory of specification is based on certain ideas expressed by Aristotle and St. Thomas Aquinas, without giving any more detail. However, it is extremely useful to see how the latter distinguishes between conclusion and determination[19]. He refers to the derivation of human laws from natural laws, but the same distinction can be applied, by analogy, to the case that concerns us. By virtue of this distinction, one norm derives from another by *conclusion* when the content of the former is derived as the conclusion of a judgement or practical syllogism. This is obviously the assumption analysed by Alchourrón and Bulygin in their book *Normative Systems*. Indeed, from the norm "only over-22s are allowed to vote" there logically follows the norm "30-year olds are allowed to vote". The derived norm is as valid as the initial one. However, a norm can also be derived from another by *determination* when we are faced with having to choose between two or more possible ways of fulfilling the first norm. And this is precisely what occurs, in our opinion, in the case of specification. Let us think once again of our running example. Other moral considerations apart, from the standpoint of the specifying operation itself, both rules, i.e. the one that gives preference to the mother and the one that subordinates her autonomy to clinical indications, are perfectly legitimate. A choice, however, has to be made between them.

This has considerable consequences, if we are to go by what St Thomas Aquinas has to say: "Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. *But those things which are derived in the second way, have no other force than that of human law*"[20]. Applied to our case, this plainly means that the principles do not cover the validity of any subsequent specification. To put it another way, the latter do not belong to common morality and have to demonstrate their own plausibility.

Doubtlessly in order to avoid this consequence, Richardson states that what we have referred to, following St Thomas Aquinas, as "determination", and which he calls "a less formal procedure", has nothing to do with specification. According to him, the latter does not modify the norm, whilst the former implies the creation of a new norm. Specifying,

[18] Cf. García Llerena, 2012, p. 163.

[19] Cf. St. Thomas Aquinas, Summa Theologica, Part I-II, 95, 2 c.

[20] Ibid. (My italics)

then, is only a question of interpretation, which is why it requires an explicit connection between the original norm and the specified norm. One must not say, "follow a patient's prior instructions when they are clear and pertinent", but "respect a patient's autonomy by following his or her prior instructions when they are clear and pertinent". However, the use of this merely nominal expedient does not avoid having to make a choice and perform an act of will, so what we have is the creation of a new norm. In the example we have followed it is clear that both rules need some kind of additional justification in addition to having to show their connection with the basic principles. In reality, what we have here is a determination, and, therefore, a new norm that needs, to use Richardson's own words, "complex [individual] justifications".

d) Finally, we have to return to the issue that was left pending above. By means of reflective equilibrium we can construct a provisional set of principles and rules that serve both to *justify*, as a result of the requirement of coherence, subsequent specifications and to at the same time self-adjust the system. But, as has already been mentioned, a coherent system that justifies a particular rule has no greater legitimacy than another coherent system that justifies the opposite rule. Beyond respect for the four basic principles there is no way of discriminating between the two or more resulting systems. We are still at square one.

For this reason Beauchamp and Childress, once again following Rawls, have adopted their notion of "wide reflective equilibrium". This implies calibrating the various different moral systems in the light of the alternative moral theories (Utilitarianism, Kantianism, Perfectionism, etc.) of procedural theories of justice, personality theories and even of sociological theories of an empirical kind.

However, regardless of the critiques this notion has received, which revolve around the model's lack of practicality, if indeed it can be considered to be practical at all[21], attention must be drawn to a logical impossibility deriving from the postulates of modern hermeneutics. Indeed, according to this, pre-undestanding is a transcendental condition of all understanding[22]. Following this argument, even though one may compare one's own moral theory with those of one's neighbours, one will not be able to help seeing the latter in the light of the former. Attempting to avoid the hermeneutic circle by means of wide reflective equilibrium would appear to be, from this point of view, as fruitless as

[21] Cf. Arras, 2009, p. 49.

[22] Cf. Gadamer, 1991, p. 363.

trying to tread on one's own shadow.

Conclusion

The purpose of this paper has been to analyse North American Principlism from the standpoint of normative systems and to point out the difficulties that might become apparent when seen from this perspective. Without prejudice to the great contribution that Principlism has made to bioethics, the most significant difficulties can be outlined as follows. Firstly, it has problems in justifying the normativity of the system because common morality is characterised in historical terms. Second, the basis of the system reveals certain problems regarding its formal properties (plenitude, coherence and independence). Third, the rollout of the system by means of specification is in reality an operation of determination that implies a break in the logical link between the initial norm and the specified norm, preventing the latter from claiming the support of common morality. Fourth, and finally, if Narrow Reflective Equilibrium is considered to be an unsatisfactory way of regulating relationships between systems due to its relative nature, Wide Reflective Equilibrium is not less so due, amongst other reasons, to its being able, to the contrary of what it claims, to overcome the hermeneutic circle.

References

Alchourrón, Carlos E. & Bulygin, Eugenio (1971). *Normative Systems,* Vienna, Springer.

Arras, John (2009). "The Way We Reason Now: Reflective Equilibrium in Bioethics", in Steinbock, B. (ed.), *The Oxford Handbook of Bioethics,* New York, Oxford Univ. Press.

Beauchamp, Tom L. & Childress, James (2013). *Principles of Biomedical Ethics,* New York, Oxford Univ. Press.

Gert, Bernard, Culver, Charles M. & Clouser, K. Danner (2006). *Bioethics: A Systematic Approach,* 2nd ed., New York, Oxford Univ. Press

Gadamer, Hans-Georg (1991). *Verdad y método (Truth and Method),* trad. de A. Agud y R. de Agapito, Salamanca, Sígueme.

García Llerena, Viviana (2012). *De la bioética a la biojurídica: el principlism y sus alternativas,* Granada, Comares.

Pellegrino, Edmund D. & Thomasma, David (1993). *The Virtues in Medical Practice,* New York, Oxford Univ. Press.

Rawls, John (1999). *A theory of Justice,* 2nd ed., Cambridge, Mass., The Belknap Press of Harvard University.

Richardson, Henry S. (1990). "Specifying Norms as a Way to Resolve Concrete Ethical Problems", *Philosophy and Public Affairs*.

—— (2000). "Specifying, Balancing and Interpreting Bioethical Principles", *Journal of Medicine and Philosophy,* 25.

Ross, William D. (1930). *The Right and the Good*, Oxford, Oxford Univ. Press. *Lo correcto y lo bueno* (1994), trans. L. Rodríguez, Salamanca, Sígueme.

Tealdi, J. C. (2005). "Los principios de Georgetown: análisis crítico", in Garrafa, V., Kottow M. & Saada, A., *Estatuto epistemológico de la bioética,* Unesco, Unam, Instituto de Investigaciones Jurídicas. Consulted at www.bibliojuridica.org/libros/4/1666/7.pdf .

Tomás de Aquino (1988-1994). *Suma de Teología,* Regentes de EPDE (ed.), Madrid, BAC.

Complexity as a metatheory on relations between Law and sustainable development

Prof. Dr. André Folloni

Abstract: Traditionally, legal disciplines close themselves in the descriptive study of normativity, restricting their work to mere exposure, although critical, of the legal rules governing a particular field of legal expertise. There is this legal cognition formed in previous period to contemporary constitutionalism that simultaneously delivers new functions to the state apparatus and society, founded in axiological choices that become determinants, and complexificates law, receiving inputs from other areas of study. The theories and metatheories are built before contemporary constitutional moment, when the constitutions were restricted to protecting individual rights and organize the state, so they face difficult or impossibility while dealing with this new law. There is a dysfunction in the relationship between legal science and the transdisciplinary content that run throughout the legal system. In developing societies, one of these contents is sustainable development – that in Brazil is a constitutional determination and one of the fundamental goals of the Republic. The relationship between this subject and the specialized legal disciplines remains unknown when it restricts the possibilities of legal theories to mere description of the supposedly isolated legal system. The new constitutionalism, especially in Latin America and Brazil, demand epistemology and hermeneutics legal that permit dialogue between legal disciplines and between law and the knowledge produced originally in other areas such as Economy, in the case of development, or Ecology, in the case of sustainability. Law, Economy Ecology – as well as other knowledge – are fragmented views that perceive the same complex reality under different and isolated viewpoints. The difference and isolation, however, are more in the study that is done to reality than in reality itself, which consists of all these aspects together. Satisfactory knowledge of contemporary law depends on the recognition of this inherent complexity of social realities and the creation of forms of cognition that are appropriated to face complexity, instead of the traditional disciplines founded on reductionism. The epistemology of complexity presents itself as an appropriate way to deal with the complex reality, conscious of his

own limitations, but also their possibilities when reality is faced considering its interconnections. The epistemology of complexity, as developed by Edgar Morin and others, presents categories able to produce legal knowledge closer to reality, such as recursive systems, organization and disorganization from interior and around, dialogy, individuality, diversity, event, ideality, racionalization, reflexivity, and solidarity.

Keywords: Complexity; Law; Sustainable development.

1. Introduction

Traditionally, legal disciplines close themselves in the descriptive study of normativity, restricting their work to mere exposure, although critical, of the legal rules governing a particular field of legal expertise. There is this legal cognition, formed in previous period to the contemporary constitutionalism that simultaneously delivers new functions to the state apparatus and society, founded in axiological choices that become determinants, and complexificates law, receiving inputs from other areas of study.

The legal theories and metatheories are built before contemporary constitutional moment, in those times where the constitutions were restricted to protecting individual rights and organize the state, so they face difficult or impossibility while dealing with this new law.

This article is about the foundations of the modern model of legal science, including its basis on the ancient modern sciences and its main philosophers – Francis Bacon and Rene Descartes. It goes on trying to understand how these conceptions of science – and also later ones like the Vienna's Circle – influenced the Philosophy of Law of the 20th century, Hans Kelsen's in particular. This paper relates these models of science with the modern Constitutions in the first half of the 20th century and suggests that maybe those models were appropriate to that period of constitucionalism.

Going on, the article exposes how the western Constitutions change in Europe and Latin America after the Second War, becoming much more complex than the ancient Constitutions. So the article shows how inappropriate are those old models of science to face the new complex reality of a Law that does not apart itself from Moral anymore, and assumes the function of somehow influencing social and economical development. When Law complexificates itself, science must assume its

need to understand and work with complexity and not to reduce it or try to escape from it.

2. The Model Of Science Of The Early Modernity And Its Influence In Theory Of Law

Among Law theory's objectives during the first half of the 20th century was the construction of a pure theory of Law. It would be an independent Science of Law that would make itself distant from Politics, Economics, Social Sciences and Ethics. The goal was to achieve a true science of Law, according to the model of science in which the early 20th century believed.

The most notorious legal philosopher working in this direction was Hans Kelsen. Kelsen called his theory a "pure theory of law" because of basically two reasons. The first is that law theory should only describe norms as ought-statements, while other sciences describe facts in is-statements – the classic dualism between is and ought, *Sein* and *Sollen*: "…the Pure Theory of Law separates jurisprudence, describing norms in *ought*-statements, from natural science describing facts in is-statements". Law science is a science of the norms and only of the norms, and nothing else. Kelsen continues: "The second reason is that it [the pure theory of law] separates jurisprudence from ethics". Ethics is the other science that works with ought-statements, but it should describe moral norms and not legal norms.[1]

While working in this method, legal scientists would restrict their work. They would be only allowed to describe normativity, the mere exposure, although sometimes critical, of the legal rules governing a particular field of legal expertise.

That kind of law theory is justified in an epistemology of the reductionism, the one that takes knowledge as the work of dividing its object and reducing it to its minor part, reducing complexity.

This science model is related to the modern science of the 19th century, which is an evolution of the ancient science that began in the 15th and 16th centuries and theorized by Francis Bacon and Rene Descartes.

Francis Bacon's work was destined to create a secure knowledge about the nature. In his opinion, the knowledge that began with the Greek tradition, Socrates and Plato, was insecure because was based

[1] KELSEN, Hans. What is the pure theory of law? Tulane Law Review, 34 (1960): 269-76.

mostly in the opinions of the philosophers and not in nature itself. And it was an useless knowledge since it was not enough to dominate nature and make it serve humankind. According to Bacon's thought, science was supposed to control nature and to make human beings its lords or masters. So Bacon began what would be later considered as the paradigm of disjunction. He separated philosophy and science and separated facts and values.

It's interesting to realize that the modern science of Law developed in the 19th and 20th centuries is influenced by Bacon's model and follow its steps in a lot of relevant aspects.

One of the main influences is the wish of provide security to Law knowledge. When legal science claims that the scientist is only allowed to describe Law and not to expose opinions about it, it intends to create an objective knowledge that won't change depending on the values of the scientist himself. An objective and stable science is able to provide law some security and to dominate it.

Also, Bacon's science was empirical.[2] That means that knowledge must be grounded and justified in the facts of nature. So the scientist must do experimentation and create his theories from experiments. There's this need of a experimental basis on which science can be constructed. Based on experimentations, science could provide a definitive knowledge and the absolute truth about nature. Legal science needs an experimental basis as well. When legal science focuses only in legislated law, this law acts as some kind of experimental basis. Knowledge would only achieve science dignity if it is made about legislated law, which is the same to every scientist that describes the law of the same country and so enable every scientist to test law theories.

Bacon's kind of science is meant to be able to discover all the laws that rule the universe and the nature. Once humankind knows the rules of the universe, and since those are eternal and universal rules, human beings can absolutely dominate nature.

Later, Rene Descartes would develop his theories about science that influenced legal science as well. He would create his own science method that influenced not only legal science but every science made after him. Descartes' science was based in reason and rationality, in the constant question of all truth that came before, in the mathematical way of reasoning and in the reduction of complexity.

Modern legal science also is based on reason and rationality. Le-

[2] BACON, Francis. Novum organum. São Paulo: Abril Cultural, 1979, p. 30.

gal scientists must guarantee that their work is not influenced by any of the irrational aspects of human life. In Law it is even more important because it is common that legal scientists are also lawyers and judges. So no interest must direct the work of the scientist except finding the truth about law. That includes questioning truth that came before because it's suspected if not made by an objective scientist working under the scientific method.

But the main feature of Descartes' scientific method to the objectives of this paper is the mathematization and the reductionism as a method.[3]

The mathematics way of reasoning that rules science method put aside any value questioning and excludes values from legal science. To talk about values is to get away from scientific precisianism and rigorism. So if law theory intends to keep itself a real science it must give up on thinking about values. Only the quantitative and structural aspects of law can be treated in the way modern science functions. So law theory develop theories of law rules and norms and of the whole normative system, describing what is a norm and its structural elements and what is a normative system and its structural elements as well. Norm is seen as the connection between an hypothesis and a consequence, and normative system is understood as groups or series of norms related to each other in definite ways. The large use of logic among the legal scientists was very important in that period and still today it is practiced.

Also, if all these norms or the normative system itself are good or bad is a problem that science of law can not solve since it is not able to talk about values. Law theories made in the 19th and in the 20th centuries take the form of general theories, like those "*Allgemeine Theorie*" that were famous on that period.

Descartes' method was based on reducing reality's complexity as a necessary procedure to comprehend it. So he recommended that the scientist would divide his object of study in many parts as it is possible, based on two principles: first, that knowing the small parts is easier than knowing a complex reality, maybe knowing a small part is the only possible knowledge when a complex reality is supposed to be known; second, that knowing all the small parts would allow the scientist to know the whole reality when putting all these minor knowledge together.

It is following this method that law jurists begin their scientific procedure by separating law from its environment, putting apart Law

[3] DESCARTES, René. Discurso do método. São Paulo: Martins Fontes, 1996, p. 21-25.

from Economics, Politics, Ethics, Religion etc. With this first reduction, the scientists abstractedly create the object of the scientific law theory.

Then, legal scientists separate one portion of law from the others. So, for example, Tax Law is separated from Criminal Law, Civil Law, Economic Law, Procedural Law and others. Legal scientists now have before them an even smaller part of reality, deepening the reducing procedure.

Inside that portion of law that the scientists decide to work with, another separation is made, by isolating one law or a few laws from the others that would be included in that portion. For example, the Tax Code is separated from the rest of the Tax Law and studied as if it was the whole reality to be known.

Than, proceeding in the complexity's reducing procedure, legal scientists focus on one norm, isolated from others. And law theory even studies the pieces of the norm – for example, studying the norm hypothesis, the consequence, the sanction etc.

So, when law theory separates law from its environment or separates one law portion from others, it reveals itself as a theory governed by Descartes' metatheory of the reduction of complexities.

The *Wiener Kreis*, or the Vienna Circle, influenced Law theory during the 20th century as well. It was an association of scientists and philosophers formed around the University of Vienna from 1922 on and leaded by Moritz Schlick. Its philosophy and epistemology were created based on the ideas of Ludwig Wittgenstein's *Tractatus Logico-Philosophicus*. Although the group didn't have any jurist, except for a few participations of Hans Kelsen, it had a major influence in general philosophy and epistemology and in Legal Philosophy as well.

This concept of science was called "logical positivism" or "logical empiricism", expressions that demonstrate the two main aspects of its conception: knowledge must derive from experience, so it must be empirical, and must be made from the logical analysis of the scientific propositions. If the logical analysis perceives that some statement is not empirical, logical positivism takes it as a meaningless and irrational statement. So a lot of traditional philosophic problems, such as the ones in metaphysics, were reclassified as false problems because of its supposed absence of meaning. Besides the analytic statements made *a priori* from the experiment, such as the ones from Logics and Mathematics, only the *a posteriori* empirical statements had the scientific dignity.[4]

[4] CARNAP, Rudolf. Empirism, semantics, ontology. Revue Internationale de Philoso-

This important conception of science influenced law theory that was made by strictly describing the norms or the normative system. Since the norms or the normative system could be understood as facts, as empirical realities, science made by describing them could be classified as a true science in logical positivism's conception of science. But any valuation of the norms or the system, such as naming them fair and unfair, was not an empirical statement but a metaphysic statement and, in that condition, meaningless and non-scientific. So the traditional problems of Legal Philosophy were excluded from a legal science that could properly use that name.

So the first half of the 20th century saw the rise of a legal science model based on the modern science, including Francis Bacon and Rene Descartes, and the logical empiricism of the Vienna Circle. Somehow Hans Kelsen's theory and metatheory of Law is a peak of this model of science philosophy.

3. The function of the constitutions in the 19TH and early 20TH centuries

This method of law studies is somehow appropriate when law separates itself from its environment. It is explained when we remember that the theory of economic liberalism that was strong in the 19th century recommended the separation between law and state, in one side, and the operation of economy in other side. It is somehow appropriate also when Law, the States and its Constitutions were mainly destined to the conservation of individual rights that must be guaranteed, such as life, property and liberty, and in the limitation of the State power, establishing, for example, de separation of the state functions in different organs – Executive, Legislative and Judiciary – in that well known system of checks and balances.

This is how article 16 of the *Declaration of the Rights of Man and Citizen* (*Déclaration des droits de l'Homme et du citoyen*) of 1789 defines a country with a Constitution: "A society in which the guarantee of the rights is not assured, nor the separation of powers defined, has no constitution at all".

The Constitution would then have to guarantee certain civil rights to individuals and, within the state apparatus, to impose the sepa-

---

phie 4: 20-40; Scheinprobleme in der Philosophie. Berlin: Weltkreis-Verlag, 1928, p. 23 – disponível em http://www.blutner.de/philos/Texte/carnap.pdf, acesso em 13/01/2014.

ration of powers or functions. Both aspects denote clearly the intents of modern constitutionalism: protect citizens from those who exercise state power, so that power is neither exercised without internal constraints, even without external constraints. Internal constraints because power would be exercised by the separation of powers, that involves a major system limitation and mutual surveillance among state agencies – the famous checks and balances system. Thus, inside the state power, the person who creates the abstract norm does not apply it to concrete cases, the person who applies the law to specific cases does not create the abstract norms. If the applicator extends beyond his competence, creating standards, a third one judges such conduct as unlawful. Also, the legislature moves away from its duties to deal with individual cases, the illegality of this behavior will be measured and declared the third one – the judiciary. This system separates the state functions of legislating, administering and judging, and delivery to organs that should be both independent and harmonics. A system of internal constraints. On the other hand, to guarantee rights is a system of external limitations: concerns on the relations between the authorities and the citizens who support the exercise of that power. The power may be exercised up to a point, from which it becomes illegal. This point of limiting the power is found in the rights that the Constitution enshrines and protects. For example, the state power cannot confiscate the property of a citizen or imprison him on a subjective persecution. Property and freedom are rights enshrined in the Constitution and may be opposed to the exercise of power, limiting it and shaping it. These rights can only be overcome in situations where the Constitution admits it.[5]

A historical hermeneutic of that system of internal and external constraints on the exercise of power highlight the situation in Europe of the 18th and 19th centuries, with the rise – social, political and economic – of a new bourgeois class of merchants. This social group would no longer admit unlimited and absolute power, which could suppress their business and projected growth of wealth.

This system of limitations would then be seen philosophically prior to power and legally able to constraint it. It is the Constitution that now allows and regulates the exercise of power. The power ceases to be absolute and self-referential to be relative, conditioned, limited by the Constitution, though there still was quite a wide and extensive presence

[5] GARVEY, John; ALEINTKOFF, Alexander. Modern constitucional theory: a reader. St. Paul: West Publishing, 1991, p. 238.

of discretion and freedom in the production of rules. This is one of the concepts of "rule of law": a state that not only creates and applies the law, subjecting the conduct of others, but subjects itself to the legal limits of the exercise of power.

The rights guaranteed by the constitution are seen and treated as "civil liberties" or negative rights, which impose abstentions to the State. The Constitution exists to say what power can not do. Outside of that power is allowed to rule in any direction. But the violation of those constitutional rights, the classic "civil rights", is prevented. Constitutionalism protects the citizen of the State. The idea of fundamental rights in this period is a highly protective idea. Fundamental rights, which are confused with individual rights, are rights protecting citizens against the State, which can not commit certain excesses. The Constitution establishes an area of individual freedom within the holders of state power cannot interfere. It is the consecration of what would become known as "the fundamental rights of the first generation".

Furthermore, those who hold power in modern constitutionalism become elected as representatives of the people to whom the regulation would return. This means the decline of power legitimized by transcendent forces or family ancestry. No more tolerance with a State power exercised on the basis of religious or hereditary. It is the age of democracy, which wins the monarchy, and the age of the secular state, which supplants the clergy as a forum for legitimate production of legal norms.

Elected by the people as their representatives, those in the power to legislate are in that part which becomes the only legitimate center of production of rules, since this production is made within the constitutional limits. These limits provide minimum protection of fundamental rights of liberty and property, which are formal boundaries. Legitimacy derives from the notion of competence: the members of the legislature may establish rules, because this power is granted to them by the Constitution. But they can not apply or judge, because this is already competence of other parts.

In traditional constitutionalism, the idea of a formal constitution is predominant. Constitutional rules are the ones put in the constitutional text, and only those are constitutional rules. It is only much later that the possibility of implicit constitutional norms is admitted. If everything that is stated in the Constitution is likewise constitutional, there is no normative or axiological hierarchy among the various constitutional contents: all have the same dignity of constitutional rule, with no pref-

erence for one over the other. And this is also why it is not possible to admit the possibility of unconstitutional constitutional norms: if all that is written in the Constitution is the Constitution, then it cannot be unconstitutional.

The judiciary, in the constitutionalism tradition of the civil law, has a minor function, and ordinarily connected with private law issues, compared to what occurs in contemporary constitutionalism. Judiciary has the competence to give solution for private issues according to the rules created by the legislature, without questioning them, unless the regulation violate the separation of powers and individual rights. The judiciary should be neutral and impartial: it would verify the existence of the law, created by the competent authority and respecting individual rights, and apply it to private labors, without leaning to either party, as a third party that would be perfectly equidistant. Two neighbors conflict about their properties: the Judiciary apply the law created by the Legislature if it, when disciplining these private relations, has not violated the separation of powers or individual rights. The court will apply the law and its job is done.

With the advent of constitutionalism, the role of jurists mutates drastically. This point is of great importance. In the period prior to constitutionalism, legal doctrine was the science of normative development. Norms were dictated by the theoretical excellence and rational capacity of jurists. The medieval law was an essentially doctrinal law, under the influence of both the university and religious doctrine. Create the standard was much more an activity of rationally understanding what would be the best possible regulation, or to obtain transcendental revelation of these possibilities. The doctrine had the authority to create academic and intellectual standards that would govern society. In the constitutionalism, this legitimacy escapes from the hands of jurists and is delivered to the legislature, made up of people not necessarily versed in law. The law is no longer doctrine; it is now rules made by common people. Rationality could no longer create rules because this is now a work of the freedom of the representatives of the people, legitimately elected and endowed with powers also legitimized by the Constitution. The doctrine loses its creative legitimacy, and assumes a secondary and derivative role: it would exercise its work after the creation of the law, not before. It becomes the doctrine of understanding and explanation of the rules put the legally competent ones. And if, in exercising their job of explaining the right position, the doctrine try to create rights where none exists, it will be acting without constitutional legitimacy and,

therefore, illegally. Trying to cover the production of rules as it was its simple explanation is a conduct denounced by modern constitutionalism as a subversion of the possibilities of doctrinal work and even an extrapolation of the limits that republican and democratic constitution imposes. Doctrine is not elected; it is not legitimate to create standards. If under the cloak of science it tries to do that, doctrine acts dishonestly and with illegitimacy. Kelsen insisted that point: there is not a reason that may impose certain constraints of conduct as reasonably necessary and that would overcome the freedom of human beings to rule themselves as they want. Being restricted to a description of the legal system, it is appropriate that jurists work in a logical, analytical and instrumental rationality, which put emphasis on syntactic and semantic aspects of the language.

4. The different functions of the constitutions in the 21ST century and the new role of legal theory

During the first half of the 20th century Law and State rarely had the functions of transforming reality and promoting social rights. So Law was mainly destined to maintain rights, creating rules that would punish who violates private property and liberty (criminal Law) and rules that would regulate the use of property and liberty among the citizens (civil Law). Criminal Law and Civil Law were the most important portions of law back then.

But after World War II, the Constitutions began to create new functions to the States and the Law, especially in the not developed countries. The Constitutions began to bring States the function of not only protect rights that were already effective, but the function to promote effectiveness to rights that were not – and still are not, in many countries. Rights such as health, habitation, education, transport and others demand positive activities from State, and it must interfere in the natural operation of society to correct its contradictions and injustices. So State must create economical conditions and social situations that would not happen without its intervention. And these interventions must be effective, in the sense that the economical and social results must be achieved. In this new conception, law must cause effect on economic and social life, transforming them.[6]

[6] BOBBIO, Norberto. Dalla struttura alla funzione: nuovi studi di teoria del diritto. Roma: Laterza, 2007, p. 13.

Later, when Constitutions around the world began to worry about environment and ecological issues, State and Law begin to be destined to cause also effect on how the environment is preserved and maintained. And many other issues. From now on, Law must influence social, economic and environment realities.

Brazilian Constitution, for example, includes among the "fundamental objectives" of the Brazilian Republic "to guarantee the national development" (art. 3.°, II) and at the same time includes "ecologically balanced environment" among the "rights of all", in a way that it is a "duty of the State and the citizens to protect and preserve it" (art. 225). So this is why legal scientists correctly say that Brazilian Constitution determines that Brazilian State pursues sustainable development.

It is easy to perceive that contemporary law increases its connection with moral. In the traditional constitutionalism, among the few moral decisions converted in law were the protection of individual rights and the restriction of state power. These contents continue present in contemporary Constitutions, but a lot of other moral decisions are admitted by law, such as equality, human dignity, new rights, pluralism, tolerance and others. The Law and Moral are closer now, and the decisions of Legislature are now more restricted because Constitution is now not only formal but also includes material contents that must be respected.[7]

Therefore, Law theories must be made considering this new reality. It is something different than ever before in the history of Law and Law theories. It is easy to notice that law theories based on – and restricted to – subjects like obligation, prohibition, sanction etc., like the ones made until last century, are not appropriate to this new law.

In this new perspective, Philosophy of Law and specific law disciplines begin a new phase in which it is necessary to work with new concepts. One good and important example is the theory of the law principles, its condition of a real legal norm and its relations with other norms, the rules. It is a problem that was absent from legal theories in the 19th century and in the beginning of the 20th century. Some call this new period "post-positivism", but the theories made under this name are very different from each other and sometimes even opposed.

[7] BARROSO, Luis Roberto. Constitucionalidade e legitimidade da criação do Conselho Nacional de Justiça. Revista Interesse público. Belo Horizonte, v. 6, n. 30, mar. 2005.

5. Complexity as a metatheory for the contemporary philosophy of law

This paper suggests that the Epistemology of Complexity, made from the systems and the systemic theories, is a good instrument to deal with this new Law that the 21st century presents. Complexity epistemology brings an interesting vision of reality and of the scientific theories that can be developed to explain and interact with it, and brings as well some concepts and categories that may be useful in law theories. It works as a metatheory, theory of the theories, and a Law Complexity Metatheory can be developed to theorize law theories as well.

Epistemology of Complexity can be based on some statements. One of them is assume that human beings in the 21st century are connected by a new kind of solidarity, since nowadays decisions or actions taken by individuals are able to affect an entire nation and in some cases the whole humanity. We can think of actions that drastically affect environment or cause wars that could kill millions or billions of people, or the whole humanity, like with nuclear bombs. This is a new situation that demands new ethical responsibilities to the scientists – and we can include here the legal scientists. So that choice of not considering values in the scientific activities, which was an important precept in traditional epistemology, is just not acceptable anymore. Scientists must be engaged, which imposes a new approach to scientific procedures.[8]

This new vision of scientific work is especially helpful when legal scientists must act pursuing objectives based on values, such as sustainable development. If the scientific traditional metatheories would maybe be an obstacle for legal scientists to work pursuing the necessity of actualize realities based on values, the Complexity metatheory enable it.

Other important statement is that, differently from what Descartes and the modern science in its traditional form believed, Epistemology of Complexity assumes that it is often impossible to know a totality by knowing its parts than adding them. It happens like this because in a lot of cases some reality, when divided, loses crucial properties that the study of its parts is not able to comprehend, not even when adding it to the study of other parts. These properties are called "emergences" and are not visible when only one or a few parts of reality is focused. That brings scientist to a paradox: it may be impossible to know the totality

[8] MORIN, Edgar. Science avec conscience. Paris: Fayard, 1982, p. 44.

by knowing its parts, but it is as well impossible to know the parts without knowing the totality. It is the famous Pascal's paradox of cognition.[9]

This is also a statement that can be useful in the study of a Constitution that determines that the State pursuits sustainable development. In a reality like this, legal scientists must understand how law, economy and environment interact. The scientist has this challenge beyond him, which consists in trying to understand the interactions among realities formerly studied in isolated disciplines. Disciplinary knowledge traditionally forget what lies beyond disciplines, what is in its frontiers. It is not enough to know law or economics, but there is the need to know the relations between law and economics. Traditional modern science would interdict this kind of work, what would impede legal scientist to actually do what is required from him.

Complexity assumes that reality is formed by elements that, since they are part of a totality, its possibilities and potentialities are reduced. This is because totality often imposes conditions and determinations to its elements so they are not able to realize all of its possibilities and potentialities. In this sense, the addition of isolated elements would be more than the totality itself, because if they were not included and determined by this totally, they would have their potentiality not reduced. In other sense, though, those elements only act the way they do, achieving other potentials, because they are involved in a totality and only if involved in a totality. In this sense, the totality, in which new characteristics emerge, is more than the addition of its isolated elements. Totally is more and less than the addition of its isolated elements.

Since law forms totality along with economy and the environment, this way of thinking can bring new possibilities to legal scientists that are involved with sustainable development issues. Law would probably have more possibilities if it was not reduced by the need and duty of sustainable development, and the legal scientist must be able to identify its possibilities and discard them. Otherwise, law has other possibilities that only appear when we think of it as an instrument to pursue sustainable development, and legal scientist must be able to identify these new potentialities as well.

Another important statement is the one that assumes that reality is an organization permanently subject to be disorganized and then reorganized in a new form. This disorganization can be caused by an internal occurrence or by an external occurrence. That is another reason

[9] PASCAL. Pensamentos. São Paulo: Abril Cultural, 1979, p. 35.

why scientist must be open to consider realities often studied in other disciplines.[10]

When we think of legal science, it is not rare that a disorganization and a reorganization in the economic system is caused by an occurrence in law, and also an occurrence in economy may cause a modification in normative system. This is another reason why legal scientist must be open as well to consider realities traditionally studied in Economics or Ecology.

Things are more interesting than this though. Complex science assumes that the "cause-effect" line is actually not a line, but somehow a circle. Some facts cause effects that function as causes for other effects that affect that first fact, like as if it was a circular "cause-effect-cause" line. Complexity calls it a "recursive circle".

When the notion of recursive circle is applied to the relations between law and sustainable development it can be useful to perceive that sometimes an occurrence in law can affect development and sustainability but also this new configuration can affect law again.

Actions taken by people or operated machines, including the ones taken by legal scientists, have the potentiality of causing effects not foreseen by the player, and event effects opposed to the ones that were intended by the player. Epistemology of Complexity sometimes call this the "ecology of action", and it moves us to think about the effects that our actions may cause when they leave us and enter the incessant game of causes-effect-causes of the environment. Sometimes a norm made to achieve a goal happens to not only not achieve this goal but also to produce a contrary effect. This leads to a new kind of perception of the ethical responsibilities of the legal scientists and the way they interpret rules and principles for its application to concrete cases.

Differently from the general theories that governed science in the 19th and 20th centuries, complexity assumes that sometimes reality does not fit in our scientific models, and than a reality occurrence or fact can be different from every other occurrence that happened before and that is going to happen in the future. So Epistemology of Complexity suggests that scientists must learn to work with individualities that would not fit in the general theories.

As well as other sciences, legal science also produced general theories – Kelsen's pure theory of law was, aside from an epistemology

[10] ALLIGOOD, Kathleen T., SAUER, Tim D., YORKE, James A. Chaos: an introduction to dynamical systems. New York: Springer, 1996, p. 216.

of law, a general theory of law, the norms and the normative systems.

This is also an important statement for legal theory. Jurists now assume that there are some cases that does not fit in previous cases or legal theories and demand a totally new answer, something that would be very difficult to deal with in the general theories' model of traditional modern science.

All these conceptions of the Epistemology of Complexity can be useful to legal philosophy as an appropriate metatheory to enable legal theories about the relations between law and sustainable development. It can offer to legal scientists a secure basis upon which legal theories can be constructed regarding Law, Ecology and Economics, besides other disciplines that would be necessary for the knowledge of the object of the research, enabling an interdisciplinary knowledge of law and the reality in which it is included and take part.

Hart's conception of Law

Diego Fonseca Mascarenhas[1]

Abstract: This article aims to describe the criticism that the legal system is not based solely on the character of the authority coercion. This analysis will be designed from the dialogue held between Austin and Hart in "The Concept of Law". Hart understands that there is diversity in the rules, if taken together, may contribute to the promotion of human rights in the context of democratic societies, given that standards are met by a sense of obligation and not by force.

Keywords: coercive order; morality; legal system.

1. Introdução

The rule of law is very important to establish political legitimacy in democracy. The conception that coercion and law are the same produces distortions in meaning of legal system because it attacks both the human rights as the relationship between morality and norms. Thus, this concept compromises the analysis of this last mentioned relation, since the legal system is used as a coercive instrument to hold the power.

It could be easily mentioned many cases that testify the trouble of authority in countries not provided of democratic regimes, as in North Korea and in Iraq, where dictatorships are effective. Actually, in all kinds of politic regimes, there is indeed a wide sort of troubles between morality and rules. The goal in this paper is to approach the meaning and the influence of state authority in the social system. Thus, the aim converges to clarify the criticisms made by H. L. A. Hart, in the book *The Concept of Law*, around the deficiency of the Austin's legal system. This project requires the approach of coercion and moral as distinct but related social phenomena.

The dialogs between Hart and Austin are presented to research

[1] Master of Law at Universidade Federal do Pará (UFPA), Brasil. E-mail: diegomask_85@hotmail.com..

the perplexities of the legal theory (2); the relationship between laws, commands and orders (3); the perspective of variety of laws (4); and the idea about sovereign and subject (5).

2. The Perplexities of the Legal Theory

In chapter I, Hart arises the question over what is law. He explains that there are different theories concerning the meaning and the working of law. Among them, two answers are more usual: the Natural Law tradition, which links law to morality, and legal positivism, which conceives law exclusively as a coercive order.

Why when we make the question "what it is math?" the answer is so simple, but when we ask "what it is Law?" the response is complex? Maybe it is the fact that mathematics is an exact science, objective, timeless and universal, whereas legal positivism it is temporal, due the fact that it is located in the axis between time and space, where there is a legislative change according to each geographical area which lies range of values and customs in each society or country. But, at the same time in this regard, there is also controversy launched by the natural Law, which states that the right is timeless, ie, valid at any time by virtue of being just and universal because it is an universally valid law and applicable in any space. Furthermore, the object of the Law is society, which consists of men who possess the characteristic of uniqueness and individuality, so the right is subjective in its interpretation to become applicable to your subject.

It could be raised several controversies regarding the implementation of human rights in the legal system, as the case of circumcision of the clitoris which is applied in certain communities in Africa or the application of the death penalty in the United States. But I limit myself to say that it revolves around the ambivalence of human rights discourse, because the right it is in eternal identification and determination and continuous determination so that it is not possible to put an end on a debate that involves par excellence, subjectivity and search of meanings of social facts.

On the Law there are the standard cases and borderline cases. Standard cases are understood as easily identifiable in which the simple application of the legal subsumption logic it is enough to resolve the legal controversy. The problem is in the borderline cases, because these are indeterminate cases, and there is not a clear concept to show the ap-

plication of legal provisions. Hart cites the example of a man with a full head of hair and the bald man. The identification in this case is clear, but what if we faced with the case of a man who has several strands of hair loose and scattered? How we would identify this man? Certainly the search for some definition in this case will be more problematic.

The degree of indeterminacy of Law also derives from the fact of the legal text is a language, nay, a written language open to interpretation. This means that the degree of indeterminacy of law has its source in the language because men recognize the right, but do not know how to conceptualize it.

To do deep analysis on the meaning between law and morality and its impact on the appearance of authority we will approach the perspective of legal positivism and natural Law.

The Positive Law examines the meaning of the statutory Law, produced by the man who put in it any content regardless of the moral aspects. It is the analysis of the real right being the Law actually existing encodings, which seeks to answer how they operate. It is noted that there are several theories of Law, each of which is divergent as their interpretations.

The Positive Law is opposed to the natural Law, because it lays down the Law in a direct relation with Morals and Justice. The theory aims to support Law in a moral basis, putting mandatory standards because they are morally correct and carry with them a moral obligation that must be met in the community.

Natural Law aligns with the hypothesis of a dual reality set both in a real plane as in an ideal plane. Natural Law is an ideal right that should always be covered by law. In this sense, Natural Law would be a just right, where all the rules are correct and moral. Therefore, a rule could only be positively valued if it coincides with a natural law. The rule is then considered fair when this convergence occurs.

On the other hand, the prospect of Legal Positivism presents the thesis that there is only one Law, the Positive Law, eliminating the dichotomy of Real and Ideal Law. In this perspective, it is also possible to establish legal validity without adopting any conception of justice. Thus, the Positivism makes Law and Justice autonomous and disconnected. Then, if Law and Moral converges, it would be nothing more than coincidence.

Austin's thoughts are developed over the approach of Legal Positivism. Then, the debate about the reasons that lead to obedience of legal rules arises. In Natural Law, the answer is in the justice of the rule.

In other words, the rule is obeyed for being fair. However, even assuming the answer of Natural Law, how there would be obedience of unfair rules? Positivism conceives a new foundation for this, the coercion. The discussion between Austin and Hart is held in this context.

3. The Relationship between Laws, Commands and Orders

In Chapter II, the author's analysis builds robustly the theory of Austin, in order to enable its refutation in the following chapters, by indicating the impossibility of constituting a legal theory of law only by commands and threats. In Austin`s thought, the legal positivism is developed on the basis of strength, featured in the will of the authority to determine the content of the rule and in the coercive power as a complement to the will. The description of Austin's theory can be viewed on the command to deliver cash, executed by an armed robber for the employee of a bank under threat of fire. Initially there is a order for the money to be delivered. Then, there is a threat or a punishment, depending on the employee's response to the command. According to Austin's thoughts, there would be no difference between the law and the relationship of the bank clerk and the bank robber, since both would have command and punishment for noncompliance with the described content.

According to Austin, the relationship of legal positivism with strength is established between will, power and violence, related to each other in a complementary way. Holding the power, the authority determines the content of the rule according to its will. Thus, the legitimacy of the rule does not derive from its content, but from the power that emanates of the authority. Power is understood as complementary to the will. The holder of the authority to dictate the rules has means to compel anyone to not violate the rules. It should be noted, however, that there is also a certain relation concerned to respect, from a kind of natural authority, that explains that this obligation could be not exclusively guided by fear. When the possibility of obedience does not occur for respect, power is also complemented by violence. Therefore, violence is exercised by the state monopoly, and the state is the only one capable of influencing the individual so that his will becomes law and is subsequently followed.

Waldron (2008, p.5), in this regard it really is not much different from the casual positivism of earlier generations of jurists stretching back through John Austin and Jeremy Bentham all the way to Thomas

Hobbes: law is any system of command with the power to dominate all other systems of command in a given society, where the chain of effective command can be traced to a single politically ascendant source.

Indeed, it is characteristic of the modern state to be the only endowed with power, and to be the only who has a monopoly on violence. In this sense, the violence committed by the individual, however just, would be a crime, because the state punishes the whole exercise of violence which is not carried out by it.

In other words, from Austin's perspective, the monopoly of violence has therefore the meaning of monopoly of power. All would then be submitted to the State hostages and victims of violence in a manner similar to the act committed by the bank robber. Since positivism conceives obedience to the law enforcement, then the state would be the only one able to produce the right and the only one with the power to concentrate violence.

The concept of rule as combination of command and threat supports Austin's hypothesis. However, Hart identifies four critical additions to this concept, stating that rules should be understood as a combination of general orders, standing orders, general habit of obedience and sovereignty. Hart's goal is to point out that it is impossible to provide a theory of law based exclusively in commands based on threats.

Legal rules are characterized by being general orders because, as a rule, it is not possible for the State to establish orders directed individualized for each person. However, the exception can be seen from this example of the traffic cop when he issues the command to reduce the car speed in order to check the documentation of the vehicle. On the other hand, the bank robber orders are always personal because they intend to be directed always face to face the other person.

Another feature of the rules is that they are permanent, since the individual's relationship with the State is not extinguished, because orders are not specific and momentary, or persist over time. The relationship between the robber and the cashier is temporary and provisional; it will vanish with the end of the assault.

Continuing, the standards also include the feature of having the general habit of obedience, since the number of compliance with the laws is bigger than its noncompliance, because people present an obedience routine to the Law. Otherwise it would be impossible to preserve the life in society. What provokes the question of whether the Law is also based on the parallel threat it is when there is the perception that the Law would be obeyed in their impending inspection and punish-

ment. In this vein, the penalty would not only be the sole reason for the phenomenon of obedience to the Law.

On the other hand, the bank robber case cannot be compared with the structure of the legal system, given that his commands are obeyed only by the victim because of threats of firing the firearm. The orders in this case, are not met by a sense of moral obligation, but by coercion.

Himma (2012, p.5) argues that as these obligations arise under *law*, they are thought to be *legal* in source and character. This, of course, is not to suggest that moral obligation is irrelevant to ordinary talk about legal obligation; it is simply to assert ordinary legal talk and practice presupposes the existence of *legal* obligations analytically distinct from *moral* obligations. Although the content of law and the content of morality frequently converge, they frequently diverge as well; in such cases, however, the law defines a legal obligation if not a moral one.

The last feature of the standard is the aspect of the sovereign who has the power. Within the state, there are several authorities and institutions that wield power over the individual, yet they undergo a hierarchical impersonal organization that has at its top of the hierarchy the sovereign power that is constitutionally limited in modern democracies, but at the same time also prove the assignment of their power. In the case of the robber his commands are personal and sovereign conception is mistaken in just have the monopoly of violence.

4. The Perspective of Variety of Laws

In chapter III, Hart refutes the idea that legal rules should not be reduced to a single model of commands based on threats. Actually, there happens a meeting of different forms of legal rules that talk to each other. Thus, Hart defends the conception of the variety of laws, noting that there is, in the legal system, rules with characteristics of permission, authorization and organization.

Hart points out three main objections to Austin's thesis, aiming to discuss that legal rules can not be reduced to commands based on threats. The first objection is based on the fact that not all rules are impositive, since there are also authorization and organization rules in the legal system. The second objection is concerned to the fact that, unlike the commands, rules also link their creators, the legislators. Finally, the third objection is the existence of standardized behavior by customs without the necessity of a legal command describing them.

On the first objection formulated by Hart at the thought of Austin to counter that all legal rules are commands it would be initially required that all standards were prohibitive.

Thereby, Austin falls in mistake to assimilate that the legal void has the same effect of the sanction. For example, if a will is not made under the legal rules, like in the case of not being present two witnesses in the celebration of the marriage contract. This nullity is seen by Austin as its sanction.

According to Austin, the nullity is perceived as a loss for the individual that is applied by the State due to noncompliance with certain legal norm. In this sense, the standard that establishes the need for two witnesses to the will, as well as other contract validity conditions would be the command.

Deal with sanction as if it were nullity is a mistake, given that sanction is a step that is taken by the public as a result of the disobedience of certain legal norm, while nullity as a sanction would be understood as a lack of requirement for constitute the legal act which would render null.

The standard that establishes the obligation of the two witnesses in a will does not carry with it an obligation for a particular person, but establishes a condition to the intent that can produce legal effects if properly entered into the constitution of a will. So the difference is that the sanction is complementary and not essential to the standard, due to provide efficacy in cases where it is not obeyed; as in "contracts", the absence of nullity removes the very purpose of the rule because it would lose sense of how to prepare the said agreement, by virtue of being seen imprecisely compliance with the requirements of its procedures for the constitution / realization of a particular right.

With regard to the second objection that legal rules are not limited to be commands, that consists in the fact that the rules also link their creators, once the legislature may edit rules that apply to himself as a legislator, as can be found in the legal rules that stipulate the legislative procedure for the formulation of new laws in the legal system. On the other hand, commands are always unidirectional, just as standards require, including those that create them.

Moreover, Hart also argues that should be considered the aspect of interpretation of legal norms, because the meanings extracted from the legal text do not detach nor limited the legislature's intention, given that the rules can be interpreted in various ways, which the legislature did not foresee.

Finally, Hart formulates the third objection to the Austin conceptions to question that the customs establish behavior standardization in society just like the norm, but does not establish a command relationship between people, but it is a social practice that has been repeatedly repeated in society and ends up providing a sense of obligation to their continued compliance.

Moreover, Austin tries to refute this conception of the law in relation to custom, stating that since it does not contemplate compulsory provided by law, it cannot be seen as a Law source.

Raz (1997, p. 37) suggest that the customs and laws of previous sovereigns present a further problem, since their apparent direct legislator cannot be regarded as the sovereign's agent. Custom is not made by legislation at all, not being command in Austin's sense or in any recognized sense, and previous sovereigns cannot be subordinates of the present sovereign. It may be attempted to modify Austin's explanation of the creation of these laws, in order to by-pass the objections just mentioned, as follows: customs are not law until they are legislated by the courts, and laws of previous sovereigns are legislated for a second time by the courts of the present sovereign, thus becoming his laws. The courts, however, do not legislate them in the ordinary way, i.e. by expressing their wish that some persons should behave according to custom, etc. So they are said to legislate them tacitly, that is by (1) enforcing them while (2) being at liberty not to enforce them.

Thus, custom can only be seen as a Law source if there is legal permission or if it is adopted the precepts and practice in the standard itself. Thus, fulfilled the obligation to be admitted into law, the custom then becomes legal source. However, Hart notes that the legislature does not have the knowledge of all customs realized in social practice, then your "not watching" it comes to omissions which may be understood as tacit permission to the legal system.

5. Sovereign and Subject

In chapter IV, Hart concludes his criticism about the Austin's theory approaching the conception of sovereign and the habit of obedience. For him, obedience is by sense of obligation rather than by threat.

Hart conceives again three objections to the thought of Austin. The first one states that habits are different of rules; the second is related to the fact that habits of obedience are not able to explain neither the

continuity of the authority of the legislator nor the persistence of norms; the third objection is that the assumption of a sovereign is not necessary to give sense to the notion of law, since the idea of binding authority is compatible with the idea of limited authority.

The first objection surrounds the question that habit cannot be confused and assimilated as if it were equal to the rule even if both provide repeated and obeyed pipelines in different situations in order that the disobedience to the habit is no reason to criticize how the breach occurs in a particular rule. For example, it is a habit to remove the hat when entering the church which if not met will not entail problems.

In the same line of reasoning, the deviation from the established pattern of the habit is accepted, since there is a good reason to justify the change in behavior, while a rule does not allows you to breach it.

Beyond that, another factor that culminates in the confusion of differentiating between habit and rule occurs when there is no knowledge between the internal senses of the rule. Hart mentions that in the perspective of an observer which has no prior knowledge of what are the relevant rules of a given society, the subject is not part of shared social practices in society. So, this subject will not be qualified to realize what would be the internal sense of the rules, but merely just visualize what can be observed, while the prospect of an inner observer who is a member of the community, he will identify what the internal senses of all the rules involved. Illustrating, in a game of chess, from the perspective of an outsider who cannot tell if the parts were moved correctly or incorrectly; if the other person does not react negatively to the movement, it is assumed that the movement is correct. However we could not believe absolutely in it, because it is not known if the motion is required or if the participant would have other options. Only the participants would understand the actions of the game. Thus, the observer perspective could at most describe what is observed. After all, a practice governed by rules would only be understood by understanding the rules that are clear from the participant's perspective in the game.

The second Hart objection is that the habit of obedience is not able to explain the continuity and persistence of standards, as habits of obedience are personal, transmitted by a particular person to another particular person, but standards still exist and are mandatory, regardless the permanence of their creators or recipients.

Finally, the third Hart objection is that, in modern democracies, is not necessary the state sovereignty to be associated with absolute authority, because the current understanding of sovereignty is understood

in the internal supremacy where all are subordinate to the law of the State within its territory and external independence, by virtue of it not being subjugated to any other State in the International.

Modern states authority is impersonal, and belongs to the office or position, not the person. The state power is organized and distributed by the legislature, executive and judiciary, all being regulated by norms and obligations, but all having the authority. The concept of rule of law is the situation in which the ruler has absolute power, governed by rules that set limits and obligations. In other words, the state cannot go beyond the law and the concept of absolute sovereign who ruled the Absolutists states is dispensable to characterize the current law in democracies.

Therefore, the power of the State is not only limited by the laws because state power is also made from legal norms. Thus, the judiciary has the authority, but only within the sphere of its competence and its territory, as well as the magistrate only has power to act on social controversies when provoked court. Thus, the conception of absolute sovereign is dispensable to characterize the current law in democracies.

6. Conclusion

Obedience of rules is not focused exclusively on coercion, but derives, in its reason of existence, from the sense of obligation and respect to its observance.

It is poor the analysis of democracy based on the distorted conception that the only basis of validity of the legal system is founded on the strength, cause this position ignores other features in the legal system. It is not uncommon the belief that, to ensure the spirit of obedience to the laws, in the democratic state, it is enough to formulate laws with harsher penalties. Obviously the problem will not be solved if laws do not continue to be properly applied.

The pluralism of the legal system should always be analyzed in order to avoid the occurrence of the dangers produced by the radical betting on the centrality of state's violence monopoly, since states can repress, via institutionalized instruments of coercion, individuals' free speech, to actively influence the public context. The legitimacy of state authority is in the assurance of a freedom structure, where people can share opinions about political issues surrounding democracy, in order to maintain the meaning of the law as a product of the social fact that is

in constant enhancement.

References

Hart, H.L.A. *The Concept of Law,* New York: Oxford University Press, 1994.

Hart. H.L.A. *Positivism and the Separation of Law and Morals,* Cambridge: Harvard Law Review, 1958, vol. 71, pp. 593-629.

Himma. K. E. *Hart and Austin again for the first time: coercive enforcement and the Theory of Legal Obligation,* Oxford: Oxford University Press, 2012.

Raz, J. *The Concept of Legal System*. New York: Oxford University Press, 1997.

Waldron, J. *The Concept and Rule of Law,* New York: New York University School of Law Public Law & Legal Theory Research Paper, 2008.

The influence of Ethics in the concept of Law:
Questions about actual stage of the "Hart-Dworkin"

Leonardo Figueiredo Barbosa

Abstract: This work intends to question the role that ethics plays in the identification of the concept of law. With this purpose we established a theoretical specific point: It will start with an analysis of the debate between Herbert Hart and Ronald Dworkin, focusing on relevant points to the study of the relationship between law and morality. Notwithstanding the debate called "Hart-Dworkin" has started in the 70's and has more direct origins in the debate initiated by Lon Fuller and Hart in the 50's, remains relevant to this day as it can be seen both in the last few books published by Dworkin before his death in 2013 - Justice in robes (2006) and Justice for hedgehogs (2011) - as in the current discussion between proponents and detractors of theories where the connection between morality and law is the focal point of divergence.

Keywords: Hart-Dworkin Debate. Concept of Law. Ethics

Introduction

This presentation is derived from an ongoing research that intends to question what is the role moral values[1] may play in identifying

[1] Although there is an extensive literature discussing the existence, or not, of differences between the ethics and morality concepts, we will not review such discussion in the development of this project and we will take the terms as synonymous. This decision is due to two reasons: first of all, because the objective of this work is to evaluate whether there is a required relation between the moral values and the legal system, whether such axiological standards refer to a specific person, group or society or to supposedly global or globalizable values because they can be discovered by the reason or through the idea of dignity. Secondly, because the existing divergence on the subject would require a more detailed analysis, as well as explanatory notes each time one of the terms was quoted, what would deviate from the scope of work and would make it more tiring than necessary. Just as an example to show the diversified handling of the terms: Hart, The Concept of Law (1994, pp. 168 and 184) deals with ethics and morals as "associated or nearly

the concept of Law and, specifically, the role of such values in decisions taken by the Judiciary Branch in current democracies, that is, at the current moment of construction of judicial decisions. A specific theoretical section has been established with this objective: this problem shall be analyzed from the discussion between the theories of Herbert Hart (1907-1992) and Ronald Dworkin (1931-2013).

The Theses Of Hart and Dworkin

Presenting the main points of a debate that lasts nearly five decades can be a risky task; in spite of this, we seek to summarize below, in a logical chain of ideas, the main points in the debate between the binding and separation theses between law and morals.

Hart's theory

Hart's work search focus on the structural issue of the law, trying to point out the common elements that this social construction would have in any contemporary community and, therefore, that could be identified by any reasonably educated person, as "important points of similarity between the different legal systems" as listed below:

> (i) rules forbidding or enjoining certain types of behavior under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones. (HART, 1994, pp. 3).

Later, along the work, Hart would summarize these five **characteristics of the similar structure** *that the several contemporary legal*

synonymous terms", although making a distinction between the "accepted morality" and the critical moral that can be opposed to the former. Dworkin, Justice for hedgehogs (2011, pp. 13), however, in his latest work – Justice for hedgehogs – understands that ethics is the study on how to live well, while morals would be the study on how we must treat others: "I emphasize here and throughout the book the distinction between ethics, which is the study of how to live well, and morality, which is the study of how we must treat other people".

systems present into two different types of rules: primary (that determine that the individuals do or do not do something) and ***secondary*** (that allow the creation of new primary rules, extinction or modification of old rules; determine its incidence and application; and identify the aspects or characteristics able to define which law rules are valid), the interaction of which is considered by the author as the "key for the law science". Therefore, Hart elects as the central or paradigmatic case for his project of identification of the law concept, the combination of primary and secondary rules, arguing that their correct observation and description could clarify a number of issues that were not adequately explained by imperative theories of law (such as John Austin's theory).

Obviously, all theoretical assumption has some consequences and that would not be different here. Among the various consequences resulting from the selection of this paradigmatic case, we can point out the following ones:[2]

a) Social sources of law –The idea that **the law is** comprised of a set of standards – regardless whether they are rules or principles – that may be **identified through the observation of the social practice**, raising the argument that the ultimate criterion of legal validity derives from the courts' practice to accept what Hart called as "a rule of recognition".

b) Judicial discretion - If law can be characterized, at least in central cases, as this set of primary and secondary rules, this means that there may be cases not covered by these rules. In addition to the possible absence of rules, Hart admits that the incompleteness of law may also derive from limitations derived from human language itself, as well as the relative ignorance of fact and the relative indefinite purpose that are typical of any undertaking that aims to influence future behaviors-resulting in what the author calls **open texture of law**. Due to all this, it is reasonable to say that the law is partially incomplete or indefinite - in cases where there are no rules that are clearly applicable (either because this fact has not been anticipated or because the rules created incur in the open texture of law), there is no "law" previously established – and, in such case, if the Judiciary Branch need to make a decision, it is up to the magistrate to exercise a discretionary power - since there is no applicable legal rule and, therefore, there is no compulsory binding rule (for the positivists, only the statutory law is required to be complied with) - for the creation of a law for that specific situation.

c) Conceptual separation between law and morality - Ultimate-

[2] (Hart, 1980).

ly, if it is possible to identify the law based on the impartial observation of these rules that occur in social practice, **there would not exist any required relation between morality and legality** (for others, between what the law is and what it should be, between ethics and law, between validity and justice) - although there may exist contingent connections in certain communities –, that is, the existence of the law is one thing; its merits or demerits, is another.[3]

Therefore, these three pillars of Hart's positivism would be logical consequences of his theoretical assumption, that is, that the heart of law is constituted by the gathering of primary and secondary rules that can be objectively identified by a descriptive methodology.

To this work, one of the most important consequences of Hart's assumption is the impossibility to evaluate the value, within a purely descriptive science, since the methodology aims solely at observing and describing the elements listed above. This does not mean that the community's values (included the internal point of view) cannot be present among the elements that will be described – it is in this direction that Hart (1994, pp. 244) states that "description may still be description, even when what is described is an evaluation". Here, the author intends to defend that the descriptive approach not only makes prevents the consideration of values that may be present in the object of study, but, also, that the reporting of these values does not mean researcher's acceptance of the values reported. MacCormick (2008, pp. 203) – in order to defend the reasonableness of Hart's vision – states that it is possible to consider "important for the improvement of understanding to study a particular object, institution, or set of institutions without ascribing particular moral value to the object or institution(s) studied ", which, in turn, does not mean to say that what has been described is not subject to moral evaluation; it only means that such evaluation shall not be made

[3] This statement, which is the true mantra of legal positivism up to present time — or, as Hart would say (1994, pp. 207), evidences the battle-cries of legal positivism – is based on Austin's work, originally published in 1832, The Province of Jurisprudence Determined: "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume". (AUSTIN, 2007, pp. 157)

within the science sphere (or, at least, within the project sphere) but that it only intends to be descriptive and not evaluative.

This does not mean that Hart does not see the possibility of influence of ethics on law. Since the original version of "The Concept of Law", in 1961, Hart had already recognized several possibilities of connection between both of them (Chapter IX, Section 3), however, for the author, all these relationships would be merely contingent **or** would not have as a consequence the required inclusion of morality as a criterion for validity of legal rules, what would allow us to state the existence of morally wicked rules.

Once again, after this particular context is explained, it is possible to consider intelligible Hart's statement that his project "is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law"[4] and, therefore, is an undertaking radically different from Dworkin's theory of law, which is envisioned as evaluative and interpretative.

Such statements indicate that the characterization of Hart's theory as something that seeks to define the law only based on the linguistic or semantic use of the word may be a frivolous accusation – notwithstanding the issue of the philosophy of language being actually crucial for Hart's works. However, it is important to clarify that although Dworkin (2006, pp. 165) continues featuring Hart's thesis of social sources as a "semantic statement", the U.S. professor also recognizes, at least in more recent works, that "Hart did not mean, of course, to offer a simple dictionary definition or set of synonyms for any particular word or phrase".

However, even if Hart's project is not solely about the search of the concept of law through an analysis of the use of the word "law", but rather is characterized as a proposal for identifying a social concept through a descriptive methodology that focuses on central or paradigmatic cases, characterized by the gathering of primary and secondary rules, there still remains the question on whether the assumption adopted by Hart is true or if it is the best option in the identification of the concept of law, as well as whether the methodology adopted based on this assumption is appropriate and why it would be a better project than the evaluating and justifying alternative proposed by Dworkin.

To take a position on this question, we will use the path suggested by Hart to compare different concepts, although this suggestion

[4] (HART, 1994, pp. 240)

is also used here to compare the different methods to achieve the definition of a concept:

> For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both. (HART, 1994, pp. 209).

Therefore, we must question whether a solely descriptive methodology complies with the mission to find the concept of law, than a methodology that also adds an evaluative and justificative dimension of that institution (*value dimension*) stating that there are goals to be achieved and assessing which, among the interpretative options, match the actual practice, can be considered the best methodology from the moral point of view. In addition, there should be made an analysis on the assumption that the central or standard case of law would be characterized by the set of primary and secondary rules regardless of the moral values.

Dworkin's theory

In this presentation, it is assumed that the initial discussions – on whether the law is composed only by rules or by principles as well and whether the rule of recognition is able to deal with these new standards – are relatively overcome. This work will not analyze these oppositions, since we will focus on the latest arguments which, even according to some positivists (SHAPIRO, 2007, pp. 27), still represent an "extremely powerful objection" to the legal positivism. [5]

Dworkin's subsequent arguments, mainly after his book "Law's Empire", focus on stating that positivism is not able to explain the occur-

[5] "Indeed, it is one of the great ironies of modern jurisprudence that in spite of the huge amount of ink spilled on the Hart-Dworkin debate, so little attention has been paid to this second, more powerful objection. To be sure, legal positivists have relentlessly attacked Dworkin's positive theory of constructive interpretation. Yet they have made almost no effort to defend their own theory against Dworkin's negative arguments in Law's Empire. They have made no attempt to show how theoretical legal disagreements are possible".

rence of situations that Dworkin refers to as "**theoretical legal disagreements**". These would be cases where people, although not disagreeing on historical facts relating to a particular situation and not even on the existence of certain provisions of law (which would drain the veracity conditions of law, according to positivists), still disagree on the application of the law to the case under analysis.

In order to understand this criticism, we must first consider the main argument of the "Law's Empire" (DWORKIN, 1986, pp. 190, emphasis added): "the concept of law [...] **connects law with the justification of official coercion**. A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state". This argument seems to be grounded not only in the opinion many jurists would have about law – at least in the contemporary democracies –, but it also seems to reinforce the position defended by Dworkin since the work "Taking Rigths Seriously": rights as political assets that the citizen has against the State.

Once again, as noted in the explanation on Hart's theory, all theoretical assumption has consequences:

a) If the law has a ***purpose***, this means that its identification and application are, at some extent, associated to such purpose. This is why the law consists of an **argumentative practice**, that is, it is characterized by understanding that the participants need to submit **reasons** so that the legal propositions they defend are understood as true by other participants of this practice. Consequently, any proposal on what law means **must be an interpretation** that considers the intentionality and purpose (*value dimension*) assumed by the practice.

b) Any interpretation of a social practice, exactly because it has an evaluative dimension, is characterized partially by more abstract propositions that are shared by the members of the Community (**concept** - consensual part), but from that abstract level of consensus, it is possible to propose sub interpretations of that more abstract and consensual idea (**conception** - non-consensual part). Therefore, to Dworkin (2006, pp. 10-11, emphasis added), law would be an **interpretive concept**, that is, one of those concepts that people share, despite acute differences on the criteria (there is no consensus) for concept identification and application (e.g. winning a round in boxing). Such concepts "encourage us to **reflect on** and contest **what some practice** we have constructed **requires**. […] the answers to these questions turn on the **best interpretation** of the rules, conventions, expectations, and other phenomena [of social practice] and of how all these are best brought to bear i0n making that deci-

sion on a particular occasion".

c)Therefore, it would not be possible to define an interpretive concept perfectly through a **purely descriptive methodology**: (i) either because there is no perfect consensus on the criteria to be used to define/identify the concept; (ii) either because such concepts require an interpretation and not simply an account of what occurs or has occurred throughout history. This does not mean that the descriptive methodology is not important and even necessary; however, it is not sufficient in these cases, because an evaluative methodology is also required.

Maybe, after developing Dworkin' line of reasoning, it is now easier to understand why he accuses the *hartian positivism* of being unable to explain the "theoretical legal disagreement". If the law can be explained simply as a descriptive form from its structural elements (factual elements), why people disagree on what the law determines in cases where, apparently, everyone agrees about the existent facts and legal texts?

Dworkin (1986, pp. 3-6) proposes that in order to understand the true nature of the disagreements that exist when the legal experts differ on law, we need to understand two basic concepts:

(a) **propositions of law** are those claims that indicate what law allows, authorizes or prohibits – which can be true or false - and the truth, or not, of these propositions depends on what he calls;

(b) "**grounds of law**" which are "other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic", and that specify when these propositions of law "should be taken to be sound or true" (DWORKIN, 1986, pp. 4 and 110 respectively). That is, ultimately, what 'the law really is' depends on what we consider as *grounds* for the identification of the law. [6]

Therefore, for Dworkin (1986, pp. 5) "they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law" as well as on the corollary of this divergence: If these elements do not exhaust the grounds of law, what else could be considered as an element able to make legal propositions true?

Dworkin (1986, pp. 5) declares that the disagreements on the veracity of what is determined by law - propositions of law - can occur in two ways:

a) **empirical disagreement** – people can have the same vision as

[6] These two concepts are critical for Dworkin's recent proposal - in Justice in Robes - about the different meanings that the word law can have.

to the fundamentals of law, but they differ with regard to the effective factual occurrence of such grounds in a case (it would be a ?);

b) **theoretical disagreement** – people may disagree exactly about the identification of the grounds of law, that is, which are the arguments that make a proposition of law true, although agreeing on the facts, "even when they agree about what statutes have been enacted and what legal officials have said and thought in the past"[7]. They are disagreeing about what must take place in their legal system before a proposition of law can be said to be true or false.

For Dworkin, Hart's positivist theory could only explain the empirical differences because it assumes, based on the rule of recognition - accepted by the community as the last rule of the system, which allows the criteria through which the validity of the other rules of the system is evaluated –, that the grounds of law are fixed by consensus among legal officials. So, for the positivists, in general, they either simply disregard the existence of theoretical differences or simply disqualify this kind of disagreement stating that this is nothing more than an illusion, it makes no sense or is it just a disguised policy (DWORKIN, 1986, pp. 6-11).

Despite of that, the observation of cases decided by the courts – at least in Western democracies – and the understanding that jurists themselves have of their practice is sufficient to say that the theoretical disagreement effectively occur: in several cases, jurists, although agreeing about factual issues and on what legal texts say, disagree on what the law determines for that specific situation.

Conclusion

While recognizing the merits of Hart's theory, in particular concerning the evolution that represented to the positivism, we consider that Dworkin's theory corresponds more to the judicial practice accomplished in the democratic countries.

Hart's theory – even considering that it is a purely descriptive proposal - seems to disregard that there are concepts that can only be fully understood through an analysis that does not end with the observation of what occurs in social practice, but that also positions itself on the aims and objectives of this practice (see the epilogue that MacCormick includes, in 2008, at second edition of his book H. L. A. Hart). Some examples in the history of mankind can help clarify this argument:

[7] (DWORKIN, 1986, pp. 5).

One thing is to describe the differences that the concept of "citizen" suffered throughout the history of mankind, another thing is to defend the conception that is considered appropriate to the assumed purposes of this concept; one can define the concept of "equality of opportunities" based on the idea that everyone should be treated in a formally equal manner, in another case, in a manner substantially equal; the concept of "marriage" - if we were to adopt a purely descriptive methodology based on its occurrence in the West after the middle ages - could not have evolved to encompass the same-sex unions, as it has occurred in several countries. Each of these examples, although considering elements of a descriptive methodology (the observation and description of different social systems throughout the history of mankind), at some point, goes beyond the mere description and positions itself on its own merits and demerits.

It is true, however, that Hart does not exclude the possibility and even the need for an assessment of the merits of the law, but he claims that the validity (either of individual rules or the legal system as a whole) does not depend on such evaluation, as this would be made externally to the concept of law. Hart may be right in saying that the consideration of moral values is a political choice, however, he seems to be wrong when he gives the impression to suggest that it is possible to identify political concepts or any other social concepts as if we were archaeologists looking for something that is just waiting to be disclosed.

References

AUSTIN, J. *The province of jurisprudence determined*. Cambridge: Cambridge University Press, 2007.

DWORKIN, Ronald. *Justice for hedgehogs*. Cambridge: The Belknap Press of Harvard University Press, 2011.

_____. *Justice in robes*. Cambridge: Harvard University Press, 2006.

_____. *Law's Empire*. Cambridge: The Belknap Press of Harvard University Press, 1986.

_____. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1978.

GUEST, Stephen. *Ronald Dworkin*. Translated by Luís Carlos BORGES. Rio de Janeiro: Elsevier, 2010.

HART, H. L. A. El nuevo desafío del positivismo jurídico. *Sistema: Revista de ciencias sociales (Madrid)*. May 1980, nº 36, pp. 3-18.

_____. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994.

MACCORMICK, Neil. *H. L. A. Hart*. 2nd ed. California: Stanford University Press, 2008.

SHAPIRO, Scott J. The "Hart-Dworkin" Debate: a Short Guide for the Perplexed. In: A. RIPSTEIN, ed. *Ronald Dworkin*. Cambridge: Cambridge University Press, 2007, pp. 22-55

Analysis and criticism of Kelsen's arguments for a necessary relation between law and coercion[1]

João Vitor Penna e Silva[2]

Abstract: Hans Kelsen argues that law and coercion have a necessary relation based on three arguments: a) in all known legal orders law and coercion are linked; b) without coercion a normative order would not have efficacy; c) normative orders are not legal orders without coercion. Such arguments have different natures and statuses: "a" takes a descriptive (the Law is linked to coercion) and a factual approach (concerning how things are), while "b" takes a normative (the Law ought to be linked to coercion) and a counterfactual approach (concerning whether things could be otherwise); "c" apparently makes a stipulative concept of law (a concept chosen by the scientist before the research, not as a result of it), in opposition to a real concept. This paper aims to list and analyze the arguments in favor of Kelsen's concept of law as coercive order and then see if they are suitable for what he intended to prove. We summarize those three arguments, confront them to each other and present a critique exposing the conceptual possibility of a legal order without coercion. We conclude that the thesis, in Kelsen's terms, cannot be valid.

Keywords: Kelsen – coercion – concept of law

1. Introduction

The kelsenian jurisprudence develops a theory about the Nature

[1] This paper was first presented at IVR's XXVI World Congress of Philosophy of Law and Social Philosophy, at Special Workshop "Concepts and Conceptions of Law". I would like to thank Professor André Coelho for the orientation and suggestions and my friends of study group, especially Filipe Rodrigues, Gabriel Lima, Matheus Baraúna and Vitor Marcellino, for their friendship and support in this challenge we did together.

[2] Undergradute student in Law of Federal University of Pará (UFPA), Brazil. E-mail: jvitorpenna@gmail.com.

of Law that links necessarily law and coercion. In short, Hans Kelsen's concept of law states that law is a coercive order of human behavior, containing socially immanent and organized sanctions.

Kelsen affirms that an order is a system of rules. When a system like that refers to human behavior, it is called a social order. Law, morality and religion are examples of these social orders. A social order prescribes certain behaviors considered desirable and usually establishes sanctions for individuals who act in opposite way. According the author, sanction is the element that differentiates a social order from the others.

Law is different from morality because is law itself that enacts its measures of coercion and establishes them in a socially organized form. In Kelsen's terms: *"[…] the great distinction still remains, that the reaction of the law consists in a measure of coercion enacted by the order, and socially organized, whereas the moral reaction against immoral conduct is neither provided by the moral order, nor, if provided, socially organized*" (2005, p. 20).

On the other hand, religion enacts its measures of coercion as sanction, but these are of a different kind from the law or morality sanctions. Religion uses transcendental sanctions, i.e., that are realized outside of human's world, established and applied by superhuman entities. In the opposite, law uses socially immanent sanctions, i.e., that are realized in the human's world, within the society, established and applied by humans to humans themselves.

Another important characteristic of law, that differentiates it from other social orders, is the form how the legal obligations are created. A conduct becomes binding and individuals becomes legally obliged exactly in the moment that the legal order creates a measure of coercion to be applied to whom acts in opposite way. That is because, according to Kelsen, the legal order is directed to officials, authorizing them to apply sanctions when certain conditions are present. The "ought" is not in the behavior, but in the application of the sanction. On the other hand, the morality, for example, creates a moral obligation only by prescribing a behavior, staying sanctions only as consequences of the opposite conduct. Moral sanctions do not have the nature of creating obligations; the existence of a norm is what creates it.

However, to maintain the idea that the law is a coercive order, Kelsen is obliged to establish some important consequences for the theory. He needs to accept, for example, that certain norms, like power-conferring norms, are not norms in a complete sense, whereas they do not create legal obligations. Complete norms are norms that create legal

obligations, as we said, justly when establishes measures of coercion against the individuals whom act in opposite way of the prescribed. Power-conferring norms, as incomplete norms, are mere fragments of these complete norms, being called dependent norms.

Because of it, Kelsen was placed by contemporary jurisprudence in the group of authors, in which John Austin is the main name[3], criticized by H. L. A. Hart in the first chapters of "The Concept of Law", understanding that Kelsen's thesis in favor of the coercive orders does not obtains success exactly by the same reasons whereby Austin's thesis of commands backed by threats fails.

This paper will investigate which arguments Kelsen uses in favor of the thesis of the necessary relation between law and coercion, trying to expose what is the central idea behind this thesis, and then try to make some critical considerations. To begin, we will list, as a hypothesis, the possible arguments in favor of Kelsen's thesis, summarize and analyze them to see which corresponds to his intentions. Then we will make an analysis of the consequences of these arguments when related and, after, present a possibility of critique showing why the thesis of the necessary relation, as formulated by Kelsen, cannot be valid.

2. Arguments for the Necessary Relation Thesis

In Kelsenian theory, the search for which arguments support the thesis of the necessary relation between Law and coercion and, therefore, the concept of law as a coercive order, takes us to three possibilities:

Argument A: There is a necessary relation between law and coercion because in all known legal orders Law and coercion are linked.

This is a classical argument in Kelsen's theory. He believes that, irrespective of the great differences between the legal orders of ancients and the law practiced today, there is a conceptual core that allow us to recognize what is legal or not in all human societies. Kelsen wanted to create a general theory that could be applied to all known legal systems in history of humanity. To do that, he needed to create a general con-

[3] Austin is Hart's major theoretical opponent, but we have to remember that, in certain moments, Hart criticizes Kelsen directly, in points he believes that Kelsen's theory is different from Austin.

cept, applicable in all system of rules commonly called law.

In that sense, one of the elements he verifies as presents in all known legal orders is the coercion, and it is a good reason to believe, he thinks, that law is conceptually linked to coercion.

Kelsen affirms: *"The first characteristic, then, common to all social orders designated by the word "law" is that they are orders of human behavior. A second characteristic is that they are coercive orders. This means that they react against certain events, regarded as undesirable because detrimental to society, especially against human behavior of this kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil — such as deprivation of life, health, liberty, or economic values — which, if necessary, is imposed upon the affected individual even against his will by the employment of physical force"* (2001, p. 33). And also: *"History presents no social condition in which large communities have been constituted other than by coercive orders"* (1941, p. 82).

Argument B: There is a necessary relation between law and coercion because a legal order without coercion would not have efficacy.

The argument B arises when we go beyond, asking if a legal order without coercion is possible. Kelsen works with this possibility in his article "The Law as a Specific Social Technique".

First of all, the binding character of an order without coercion, Kelsen says, results directly from its content, being, thus, a kind of Natural Law. This order would have to be just and make humans happy as no other can make. The individuals would obey this order because they know that prescribed behaviors are those that will make them happier, and *"there is no need to compel people to their own happiness"* (1941, p. 83).

Kelsen denies the possibility of existence of an order like that. The law is linked to coercion because there is no other effective form to compel individuals to act in desired way. In that sense, he says: *"On the basis of our knowledge of human nature it must be considered very unlikely that any social order, even one which, in the opinion of its creators, assures to individuals every desired advantage, runs no risk of being violated, and hence need take no precautions to prevent such violations against the will of actual or potential violators, that is, by measures of coercion"* (1941, p. 84). Thus, Kelsen argues that, without coercion, the legal norms would not be obeyed, in other words, would not have efficacy.

This idea derives from Kelsen's unbelief on human nature, in his

conviction that the human is not "by nature" good. The existence of an order without coercion would allow individuals to do whatever they wanted, without suffer consequences of their conduct. This kind of order reestablishes a "state of nature", that is, in other words, a "state of anarchy", and for that we have to suppose that human is "by nature" good, what is unreal, he thinks, at least by our knowledge of the human nature. Accept this hypothesis would ignore *"the innate urge to aggression in men"* and *"the fact that the happiness of one man is often incompatible with the happiness of another"* (1941, p. 84).

Therefore, supposing that law must at all costs avoid violations and try to be more effective as possible, Kelsen says that law needs coercion as a way to obtain the desired behaviors, i.e., as a way to be effective. It only makes sense, of course, because he thinks that coercion is the most relevant and effective technique of motivation that law may have.

Argument C: There is a necessary relation between law and coercion because normative orders without coercion are not legal orders.

When Kelsen denies, categorically, the existence of legal orders without coercion, one can think in a hypothesis that he is delimiting the concept of Law to a certain point and saying that he will not consider legal what does not fit in this concept, all for a mere theoretical choice.

In this sense, the argument C appears to have a purely conventional concept, in which Kelsen would have linked law and coercion by a theoretical convenience. The form and characteristics of that argument will be more clear next, when we consider the stipulative concepts, enabling us to show why this possibility is not valid. But, anyway, it is important to think about that, because if we admit it as true, the discussion about the relation between law and coercion in Kelsen's theory becomes completely invalid and useless.

3. Analysis of Kelsen's arguments

Before we start to study of these arguments, let's first turn our attention to some concepts derived from the theory of definition that will help us in our analysis Kelsen's concept of Law.

First, let's work with the distinction between real concepts and stipulative concepts. A real definition shows how a phenomenon is

manifested in its current use, in other words, how it is usually used in the language. It is established as a result of the research. Thus, can be true or false, and can be rectified. A "real definition" is true when corresponds to the current use of the term, and is false when diverges.

In other side, a stipulative definition gives a definition for an object X in order to distinguish it from non-X, by utility and convenience criteria established by the researcher. The main characteristic here is the freedom that the scientist has to stipulate the meaning of the term, according to your convenience. Thus, a concept is chosen before the research, not as a result of it. That is why the stipulative definition cannot be said as true or false and, thus, cannot be rectified, since there is no previous use of the term that the scientist have to respect.

With that explanation we can see that the arguments A and B presents a real concept of law, since they want to show a characteristic that the law always has, while the argument C presents a stipulative concept of law. In this sense, the argument C is quite different from the others. Is saying that the Pure Theory of Law uses coercion to define a normative order as legal order, and this is a choice of the author to establishes the difference between law and other normative orders, and, therefore, this theory will only accept to recognize a normative order as a legal order if it is coercive.

Accept the hypothesis of a stipulative concept of law, however, contradicts the persistence of other real concepts, for two reasons: 1) if, by stipulation, we establish that a normative order without coercion is not legal, would become irrelevant verify that in all known legal orders the coercion is present (as in the argument A), because would be impossible to find any legal system that was devoid of coercion, 2) would be impossible to say that a law would not be effective without coercion (as in the argument B) because the legal character of this order would have been excluded in principle by definition.

Adopting the hypothesis of argument C would nullify the other arguments, which contradicts Kelsen's own writings, in which these arguments are present. Moreover, adopting a stipulative concept would contradict the author's interest in describing the legal system as it *is* (and not as it *ought to* be), which corresponds better to a real definition of law than a stipulative definition. The argument C is not a good reading of Kelsen's theory. Therefore, we have to exclude the hypothesis that the concept of law as a coercive order is a stipulative concept of law, having to be understood as a real concept of law.

Excluded the hypothesis of the argument C, we must analyze

the arguments that brings a real concept of law, namely, the arguments A and B. Before, let's make again a previous analysis on the nature of definitions, emphasizing now, some kinds of approach that a concept can appeal to justify yourself.

We will begin with the distinction between descriptive and normative approach. A concept links the object that will be defined, called *definiendum*, with the elements arranged in concept, called *definiens*. A descriptive approach states that these two elements *are* linked, while a normative approach states that *definiendum* and *definiens ought to* be linked to the object be presented in a better form, even if this links actually exists or not.

Next, we will show the distinction between factual and counterfactual approach. One approach is factual when it takes account how things are, while a counterfactual approach takes account, besides the way things are, whether or not they can be different.

With this clarifications, we can observe that the argument A ("in all known legal orders law and coercion are linked") presents a factual and a descriptive approach. The approach is factual because takes account how things are, only affirming that the relation between law and coercion currently exists. Is also descriptive because affirms that, in all known legal orders, that the Law *is* linked to coercion.

In the other hand, the argument B ("a legal order without coercion would not have efficacy") presents opposed approaches. Uses a counterfactual approach because not only says that law and coercion are necessarily linked, but questions if it could be different.

Presents also a normative approach because affirms that law *ought to* be linked to coercion. This assertion needs more explanations. To say that, Kelsen uses these arguments: if the law *ought to* be effective, and if an order can only be effective imposing measures of coercion against violators, so the law *ought to* have coercion. Every point of this formulation is important and requires our attention.

First, law ought to be effective because efficacy is a contingent element in law, for more useful and important as it is on practice. This is because the *existence* of a system of coercive rules directed to human behavior does not imply that this system will be obeyed. At least conceptually, according to the concept established by Kelsen, the law is not necessarily effective, then, it *is not* effective, but *ought to* be effective.

The second point is even more controversial. For quite obscure reasons, Kelsen links the efficacy of an order directly to the presence of measures of coercion. The coercion is a necessary condition to law's

efficacy. For him, could not exist an effective order based only on other technique of motivation, like rewards. In social reality, the punishment technique has more important role than rewards, and because of it are largely verified in known legal orders.

This thesis has been criticized by some authors against the idea of a necessary relation between law and coercion. In truth, its not clear what makes Kelsen think in this way, not going beyond the empirical observation. The question still remains: why a social order, with all basic characteristics of law, but only based on rewards as sanctions, cannot be said as legal, at least conceptually?

However, if we think this way, an important consequence for the theory becomes evident. If we take account that Kelsen is using a normative approach, the assertion that his theory is purely descriptive becomes false. He might answer this question by attacking the first point: saying the law *is* linked to coercion, not *ought to* be linked, as we said. But, for that, he has to argue in a way to introduce efficacy in the concept of law, i.e., has to say that we cannot imagine the existence of an ineffective legal order. The kelsenian concept do not appears to include that.

The problem in defending this hypothesis is that would give more force to an old problem pointed by critics: if Kelsen's theory wants not to reduce law to matters of fact, keeping it in a plain purely normative, how the concept of law could depend on efficacy, that is purely factual? This problem was already pointed to validity of legal norms, whereas, for him, the efficacy is a requisite of validity. But, now, this problem is been brought to the concept of law. Or not; this problem may have been there before. We are not certain that is possible to establish a distinction between validity and legality in Kelsen's theory, because this is not clear in his texts, as well as the concept of validity itself is not clear and have been causing great discussion in the debate of the theory.

The concept of law, as we introduce in the beginning of this paper, do not appears to require neither the efficacy, nor the validity. In truth, Kelsen already develops a distinction between a static and a dynamic concept of law, reinforcing the primacy of the static concept: *"According to this concept, law is anything that has come about in the way the constitution prescribes for the creation of law. This dynamic concept differs from the concept of law defined as a coercive norm. According to the dynamic concept law is something created by a certain process, and everything created in this way is law. This dynamic concept, however, is only apparently a concept of law. It contains no answer to the question of what is the essence of law, what is the criterion by which law can be distinguished from other social norms. This*

dynamic concept furnishes an answer only to the question whether or not and why a certain norm belongs to a system of valid legal norms, forms a part of a certain legal order" (2005, p. 122).

With these explanations it is clear that we are facing very different arguments, that were constructed with very different strategies, which want to prove the same thing. Such arguments are different, but only relatively independent. They do not need each other to exist and be real, but they need each other to produce the result they want, which is to prove that the Law is conceptually linked to coercion. It is not difficult to show how they can exist and be true even separated. The counterfactual approach of the argument B can be said as true even denying the argument A, we only need to say the Law never used coercive acts, but that is possible and would be recommended. The opposite, more plausible, is also entirely possible. We can say that B is incorrect, without denying the truth of A, in other words, we can say that all known legal orders have coercion, but that does not mean that law and coercion are conceptually linked, because a legal order without coercion is possible too. This way is usually followed by the critics of this position about the coercion in law.

However, the relative dependence between those arguments brings important consequences for the analysis of the thesis. As we only can say that something may or may not be different from what it is using a counterfactual approach, as the argument B, and we only can make a generalization about link theoretically two elements if we are certain that those elements never can be disconnected, then we conclude that, more than a factual approach, a counterfactual approach of a argument is necessarily to establishes the elements of a concept. In this sense, the argument B won a great importance and gives support to the assertion of A.

Thus, we can argue that denying the argument B, we can also deny the thesis of the necessary relation between law and coercion, even considering the argument A as true. Taking this account, the argument A does not require our attention, because it presents a fact that, in the limits of this work, we will not question, which is that in all known legal orders the coercion is, in some form, present.

4. Is a legal order without coercion really impossible?

Moving our analysis to argument B, we verify that it arises from

the observation of the difficulty of theory to answer that question: what if we found a society in which individuals live peacefully, guided by a system of non-coercive norms, with general efficacy, this system of norms would be an example of a legal order?

To answer that problem, we can make three statements: a) this is a legal order without coercion, in which needs the revision of Kelsen's concept; b) regardless of this fact, it is not a legal order; c) this is impossible to be verified. Kelsen would avoid the response "a" at any price and the response "b" would be only compatible with a stipulative concept, already previously denied. Kelsen adopts the answer "c" when developing his argument B. The author states that a legal order without coercion would not have efficacy and, with it, assumes that the legal system has efficacy as a goal. Therefore, no legal system would stop establishing coercive acts, making it impossible to verify that situation.

Kelsen is saying here that the Law is not "suicide". The legal order know that individuals need coercion to, ultimately, act as the norms requires and, therefore, the legal order will not born with hope that individuals would follow norms without presence of coercive acts. An order that tries this would "die" by losing efficacy.

Kelsen answers why individuals would not follow norms without coercion, and why that order would not have efficacy, linking it with his your skepticism about human nature. He states, for example, that man is not "by nature" good and has innate aggressive impulses, putting their personal interests ahead of the collective interests. With this, he develops a theory about the nature of law linking it with a theory about human nature, with a theory that is many degrees more difficult and problematic.

This thesis is the Kelsen's central argument and should be the focus of a criticism of the concept of law as a coercive order. However, there are no sufficient elements in theory that enable us to discuss or adopt this position, because the arguments in favor of it are very unclear.

But let's take a hypothesis: a group creates a system of rules without sanctions, inside an organized and recognized structure, creating also institutions that helps or makes possible obey these norms. They are followed by the whole group, and there are no reasons to believe that it will change. The group is formed by people who believes that the best way of living is obey these norms, not by fear of a coercive act (kelsenian positivism) or by faith that these desired behaviors are those that produce the best life (natural law, in Kelsen's vision), but by the belief that if everyone follow these norms, the life of all will be better. The only ele-

ment that compels them is their moral obligation to follow these norms.

Kelsen affirms that, even if individuals have the interest and feel morally obliged to follow norms, the legal system still would has the risk of being violated and, because of it, a legal system would have to use coercion as a way of discourage violators. Answering in this way, Kelsen does not deny the possibility of existence of a legal system without coercion, only says that this hypothesis is improbable, not impossible.

In fact, a situation like that is empirically difficult to be verified, a great utopia. However, if it existed, firstly, the people who are part of the group would continue being considered humans, even without violator interests or innate aggressive impulses. Second, there would have no reason to consider that these order would not be understand as a kind of law by the group, and by the officials that command the institutions of that society or by members that have authority to create these norms.

This hypothetical situation exposes a important point. Appears not to have in concept of human something that determines if he is good or bad. Thus, conceptually, we cannot say that a legal order without coercion will not have efficacy because it is not in the nature of men obey norms without coercion. Appears to have no conceptual impediment for the existence of an effective legal order without coercion. No doubt, it is only a conceptual possibility, which Kelsen could not say that is impossible, no matter how unlikely.

In this way, we could think that if we adopt Kelsen's view about human nature, a skeptical view, we would have to accept his argument in favor of the thesis of the necessary relation between law and coercion. However, this is not true. Let's take another hypothesis. Kelsen is concerned in how the law tries to motivate individuals to follow its norms and not in the reason why individuals follow them. So, we cannot say that is impossible that a legislative authority creates a system of legal norms without coercion. As we states, this would be a "suicide" legal order, according to Kelsen, since would "born" with a great probability to die by losing efficacy. However, to be effective or not, a system must have validity and be binding by a certain time, so that individuals can follow or not. In this certain time, we cannot deny that these norms are legal, so we have to characterize them as a legal order without coercion.

Based on all points exposed above, the Kelsen's argument B can be said as false. Argument A remains true, but cannot, alone, deny the possibility of a legal order without coercion. In this way, denied the argument B, we conclude that the thesis of the necessary relation between

law and coercion in Kelsen's theory fails.

References:

BRANQUINHO, João, Desidério MURCHO and Nelson Gonçalves GOMES. *Enciclopédia de termos lógico-filosóficos.* São Paulo: Martins Fontes, 2006.

COPI, Irving M. and Carl COHEN. *Introduction to logic*. 8th ed. New York: Macmillan Publishing, 1990.

HART, H.L.A. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994.

KELSEN, Hans. *General theory of law and state*. With a new introduction by A. Javier Treviño. New Brunswick: Transaction Publishers, 2005.

KELSEN, Hans. *Pure theory of law*. Translation from the second (revised and enlarged) German edition by Max KNIGHT. Clark: The Lawbook Exchange, 2001.

KELSEN, Hans. The Law as a Specific Social Technique. *The University of Chicago Law Review*, 1941, 9 (1), pp. 75-97.

PAULSON, Stanley L. The Neo-Kantian Dimension of Kelsen's Pure Theory of Law. *Oxford Journal of Legal Studies*. 1992, 12 (3), pp. 311-332.

Compatibility between content-based judicial review and the dynamic principle in Hans Kelsen's theory[1]

Gabriel Santos Lima[2]
Vitor Marcellino Tavares da Silva[3]

Abstract: This paper aims to show that the exercise of the judicial review, even in it content-based version, does not involve violation of the Kelsen's conception of law as a dynamic system of norms. In the Pure Theory of Law, Kelsen defends the idea that the legal system is ordered based on the dynamic principle, commonly understood as a source of creation of norms. This conception provides the challenge for Kelsenian theory to explain the concept of content-based judicial review, in which certain laws and administrative acts are declared invalid because they are materially incompatible with the Constitution. The argument is that a purely formal concept cannot explain satisfactorily this review, all because the dynamic principle is not based on the content-based relation. The work begins whit that mischaracterization of the dynamic principle as a source of creation of norms, replacing it with the idea of a chain of authority. This exchange is justified on the basis that Kelsen characterizes the dynamic principle as assignment of power to a legislative authority that, in turn, gives rise to the creation of norms, in the manner and within the material limits in which its jurisdiction is conferred by the higher norm. Surpassed this obstacle, it will be demonstrated how this concept based on authority is compatible with the main features of the modern constitutional theory. It will be shown that

[1] This paper was first presented at IVR's XXVI World Congress of Philosophy of Law and Social Philosophy, at Special Workshop "Concepts and Conceptions of Law". I am grateful to Professor André Coelho for his precious lessons and to my friends Breno Cavalcante, Darlison Santiago, João Penna, Filipe Rodrigues, Gustavo Queiroz, Matheus Baraúna and Victor Russo for their friendship.

[2] Undergradute student in Law of Federal University of Pará (UFPA), Brazil. E-mail: gabrielsantoslima@live.com

[3] Undergradute student in Law of Federal University of Pará (UFPA), Brazil. E-mail: vitor.marcellino@hotmail.com.

content-based judicial review is nothing more than a checking of lower norms, verifying whether they are formally and materially restrained within limits that have been settled by the Constitution for the ordinary legislator. In other words, whether these standards are within the spectrum in which the legislative was authorized by a superior rule to legislate, a situation explained by a dynamic principle understood as a chain of authorizations. Therefore, content-based judicial review becomes compatible with the Kelsenian theory of law only with the aggravating factor that it emphasizes descisionism, since the judge in charge of the review has to deal with general clauses, with no other option than resorting to extra-legal criteria. So, all the possible interpretations searching for justice to concrete case can be taken.

Key-words: Judicial Review; Dynamic Principle; Authority.

1. Kelsen's Normative Theory

According to Hans Kelsen, the Law is a normative system. To be composed solely of norms, the legal order needs to establish its validity in the norms. For this, Kelsen argues that the validity of an individual norm is only based on another norm, which is superior than the first one. Kelsen maintained the distinction between the *is* and *ought* to intact, and also avoid factual or metaphysical foundations for the law. The creative action by the legislators for example, have to be based on other norms that confer competence to them. The entire legal system is based on norms and in the relations between them.

But, this search for the foundation of validity can not be followed to infinity. At some point of the legal order, some norm has to be regarded as presupposed, serving as a condition of possibility for the existence of the entire legal system. As a presupposed norm, its validity can not be questioned. Therefore, the entire chain of legal validity and the whole relationship between the rules is based on this norm presupposed, taken as a fundamental norm of the legal system.

From the assumption that exist one basic norm, Kelsen notes that all system of rules can be constructed according to two principles: dynamic and static. These principles determine the relationship between the norms. According static principle, the norms are organized according to the content of the basic norm. In turn, the dynamic system is characterized by the fact that the relationship between the norms is not de-

pendent of the content, but just by the fact that all of then has the same basic norm as foundation. The basic norm is the point of union of all the norms. In this sense, the basic norm, presupposed, is one norm of competence, which would delegate powers to a legislative authority to create a Constitution.

From the creation of the Constitution would be created new norms of delegation of powers to the new legislative authorities to create other norms of the system. Consequently, the norms would be related to each other because of all of then were created by the same procedure established in the basic norm.

For Kelsen, the dynamic principle is the principle who regulate the legal order. Thus, is possible to concludes that a legal norm is not valid because of it's content, but in order to being created in a specific way, which ultimately obeys the basic norm.

2. The Revolution of the Concept of Judicial Review and Kelsen's Theory

The concept of judicial review come from double origin. Primarily by American constitutionalism in the famous case *Marbury VS. Madison*. This case generated the embryo of what would later be known as incidental judicial review and culminated in the widespread use of the principle of stare decisis. At European level, the judicial review was designed by Kelsen, as a concentrated control, through a special tribunal created specifically for the purpose of protect the Constitution.

The judicial review would be the main task of the Constitutional Court. But, when construct the idea of the judicial review, Kelsen seems to limit the review to the formal analysis of the norms. By the fact of the legal order is governed by dynamic principle, then, from this perspective, the Constitutional Court should be responsible for make sure that the norms were created in the way stipulated by the Constitution.

Occurs that the period after the Second World War caused changes in the Constitutions. The Constitutions began to integrate into their texts fundamental rights and guarantees of these rights, like the Judicial Review. After it, the norms started to be confronted with the fundamental rights and values, and these norms began to be controlled by the Constitution not only formally, but also apparently materially and evaluatively ways too.

The Constitution turned to be important in two ways: a) in create

a structural system and formal legal order; b) impose axiological limits to the content of all ordinary legislation.

From this new interpretation of the Constitution, the traditional doctrine began to discredit the Kelsen's theory, since it sustained that the Law as a system of norms governed by dynamic principle, and not by the static one. After all this processing, for the traditional theory, the Constitutions started to link materially the ordinary legislation, and this axiological link that could not be explained by the dynamic principle. Therefore, a material judicial review would be the ultimate expression of the incompatibility between Kelsen's theory of law and this new juridical reality.

The dynamic system would be incapable of understand the judicial review of content-based unconstitutionality, since it is precisely incompatible with the characteristics of most modern legal systems. These modern orders established the fundamental rights in the constitutional norm and required that all the ordinary norms followed the principles established in it.

3. The Compatibility of Kelsen's Theory and the New Theories of the Judicial Review

Based on the dynamic principle Kelsen establishes that a legal norm is valid because it is created in a specific way, which ultimately obeys the fundamental norm. However, this basic norm does not provide the foundation of the latest positive norm of the system. That foundation is simply that "In short: One ought to behave as the constitution prescribes" (2005, p. 201). So, two conclusions can be taken from it: 1) is not any material content that derive from the basic norm to the others, 2) there is nothing that gives to the first positive norm compulsory basic content from which it derives other standards.

The normative pyramid makes that the legal order institutes the special process of creation of norms. Basically, it works in the following structure: a) authorities are competent to establish valid norms b) valid norms only have validity in the ground of other norms c) Therefore, the authority is derived from a norm.

The basic norm is the starting point for the creation of norms and is it who allows that establishes authorities. Through the norms is allowed that someone gives rise to the creation of other norms. However, the authority can not create any type of norms. Exist two very clear limi-

tations: a formal and a material one.

The formal limit establish a specific form for the process of creation of norms. The act of creation have to have a peculiar manifestation, or an exact number of votes, for example. The material limit establish the limits of content that one norm could have.

The judicial review consists in verify if norm agrees or not with the formal and material limits stipulated by the Constitution. The judicial review of content-based unconstitutionality of the legal orders aims to extinguish those laws that legal order beyond the material limits set by the Constitution. It is a factual verification by a competent authority if an authority created a norm in the limits of content that are constitutionally defined. If the norm is inside the field which could be set, this will be Constitutional.

What is operated as judicial review of content-based unconstitutionality does not seem very far from the Pure Theory of Law. According to Kelsen, the Constitution is crucial to establish the competent authorities, the legislative process and the limits of the competence of the legislators. The norms that are created by the legislators eventually can not respect the limits imposed by the Constitution. It is common, for example, that some act that do not correspond to the limit of freedom established by the Constitution. In this occasion, must have a control to protect the Constitution against these violations of competent.

The moderns Constitutions had created clauses to protect fundamental rights exactly because the process of creation of norms could origin some norms that are beyond the competence of the authorities, in order words, that could not be created for the legislators. Such material clauses, unlike defend the traditional doctrine, not bind the content of the infra-constitutional norms, but only establish a limit in the competence of ordinary legislators. So, they do not have sufficient authority to create laws that unjustifiably and disproportionately restrict these rights.

The judicial review of content-based unconstitutionality in view of the traditional doctrine is one way that judiciary power uses to control the activity of the legislative power, verifying if the norms produced by this last power are or not in accordance with the content established in the Constitution. But, in truth, what is been analyzed is just the competence of the legislature to legislate on certain matters.

Thus, if the material limitation of the norms is merely a question of limitation of competence, is clear that the dynamic principle can easily explain this phenomenon. In fact, this implies, as Kelsen had already

anticipated, that the legal systems never worked based on the static principle, in which a specific provision is declared invalid by the fact that it has certain content. If there is a declaration of invalidity based on a violation by some specific content, this in fact is merely apparent. In truth, what is being analyzed is the competence of the authority that created the standard.

Therefore, the judicial review of content-based unconstitutionality is perfectly explained by Kelsen's theory. The traditional doctrine just read the legal situation in a wrong way, implying that the norm would be governed by the static system. In fact, what happens is a reaffirmation of the dynamic system, by the formation of a Constitutional Court which objective is the defense of the Constitution and of the materials and formal limits of competence established in it.

4. The Consequences of a Conclusion

Definitely, the judicial review of content-based unconstitutionality does not seems to be so far from the idea propose by Kelsen in his Pure Theory of Law. The idea of control the norms is something very characteristic of the dynamic theory itself. The analysis of the formal limit obeys all the times the idea of chain of authority, and the analysis of the material limit does. However, adopt the compatibility of the exercise of the judicial review of content-based unconstitutionality has a high price: it accentuates the decisionism of the courts.

According to Kelsen's decision theory, the exercise of law enforcement involves an immanent interpretative activity. In any cognitive exercise, like the legislature process of creation of norms for example, there is always an act of knowledge that comprise all possible meanings inherent in a particular normative text. However, above this act of knowledge, there is another act, an act of will, since all directions are equally possible. So what justifies the choice is the authority of the legislator, it makes his will be materialized in the sense attributed to a particular text, have binding force.

Analyzing any decision of a constitutional court, could be observed that in many cases to decide if a norm is or is not entered in the field of competence of the Legislative Power, the Courts have a very wide space to decide. In Kelsenian language, the Court has a very wide frame. To verify this fact, we just have to remember that the fundamental rights have been constructed in the form of legal principles, which,

understood as rights or as optimization commands, are open clauses by which the Court has almost unlimited power to determine where are the limits of competence of the Legislative Power.

Therefore, in consequence of the large margin of decision given by the structure that were constructed the fundamental rights in the modern constitutions, the Constitutional Court have a real liberty when is deciding and establishing the powers of the Legislative power. In this case, the authority in at least two senses would explain the exercise of the judicial review of content-based unconstitutionality: 1) analysis of the authority of the legislators; 2) the authority of the Constitutional Court, as every legal decision, which will legitimize the established interpretive choice in the sentence or judgment.

The decisionism ends up being a consequence inherent to the exercise of the judicial review of content-based unconstitutionality, which, on one hand impose a limit to the legislative powers of create laws, but increases the competence of the Constitutional Court when it judging the constitutionality of the norms. Despite the mentioned side effects, there is no doubt that the judicial review of content-based unconstitutionality is perfectly explained by the dynamic principle of the Pure Theory of Law and its chain of authority. This became obvious since what is ordinarily understood as a material binding in the infra-constitutional norms, actually is an analysis of limits of competence and no more than that.

References:

KELSEN, Hans. *Jurisdição Constitucional*. São Paulo: Martins Fontes, 2003.

KELSEN, Hans. *Pure theory of law*. Translation from the second (revised and enlarged) German edition by Max KNIGHT. Clark: The Lawbook Exchange, 2001.

The Pure Theory of Law: the transcendental argument and the criticism to reductivism

Filipe A. O. Rodrigues[1]

Abstract: My objective in this work is to provide an analysis whether the pure theory of law really sustains its fundamental principle of purity. With that in view, I do an analysis of the basic norm, evaluating whether it compromises the intended purity. According to Stanley L. Paulson, in his article The neo-Kantian dimension of Kelsen's pure theory of law (1992), the Pure Theory searches for a solution to the antinomy between empiric and normative Reductivism. A successful answer would need the basic norm, for it has the function of taking the law from the realm of fact into the realm of ought. Paulson shows that Kelsen only uses a regressive version of transcendental argument, that, in the end, fails, which does not destroy the theory, but makes it necessary to seek another foundation. Paulson gives us an alternative in Joseph Raz's view, of the basic norm as a point of view. I believe that Raz does more than putting the basic norm as a possibility.

In The concept of a legal system (1980), Raz diminishes the importance of the basic norm, defending its uselessness for explaining the conditions of identity. His argument is that we can only understand the acts of creating norms if we already know how an already established legal system works. Another point is the fact that we cannot explain, by means of the Pure Theory, a situation where a norm of certain legal system creates the constitution of another legal system, which lacks a different basic norm. Concerning the conditions of validity, Raz criticizes the Kelsenian argument that there must exist a presupposed norm to base the originary constitution, answering with the possibility of rules that regulate their own existence, argument that could be understood better with the article Kelsen's theory of the basic norm (1974), for Raz explains the unnecessity of a basic norm through the concept of social normativity, where people obey the law because of some social facts. Raz's arguments change a core point to the understanding of law as a system of norms by Kelsen, initially into something less important, and later into something unnecessary to the Pure Theory, leading us to the conclusion that Hans Kelsen did not sustain his transcendental

[1] Undergraduate student in Law at Federal University of Pará (UFPA), Brazil. E-mail: filipe2809@gmail.com.

argument or justify the basic norm, failing in the purpose of providing a successful Pure theory.

Keywords: Pure Theory of Law; Reductivism; Basic Norm.

1. Preface

My main objective is expound my text, entitled "The Pure Theory of Law: The transcendental argument and the criticism to Reductivism", that was presented at IVR2013. I shall explain through an analysis about the basic norm, proving how this element, which should support the system´s normativity, harms Kelsen´s proposition and forces him into one of his own criticisms, the reductivism. Along this text, I´ll show the most fragile aspects and some alternatives to the Kelsenian thought. I will work specially in the ideas expressed in the PTL, however, it will be necessary to go beyond Kelsen´s greatest work to achieve a better understanding, also using the works of two different authors, Joseph Raz and Stanley Paulson.

It´s a well-known fact, that the debate about the "ground norm" was one of the richest subjects in Kelsen´s theory. In its most active age, it was both criticized and supported by several authors. The basic norm have two functions, that Kelsen asks about in the start of the chapter 5, he says:

> "If the law as a normative order is conceived as a system of norms that regulates the behavior of men, the question arises: What constitutes the unity of a multitude of norms – why does a certain norm belong to a certain order? And this question is closely tied to the question: Why is a norm valid, what is the reason for its validity?" (1960, p.193)

He answered this question, understanding that the basic norm was made to be the basis of validity for a norm, and would be the foundation of a unit based on a pluralism of norms, solving the questions initially proposed by him. Primarily, I will focus my presentation in the second question, the validity of a norm. The basic norm must immediately act as a standard that provides the law´s understanding, not as a simple act of will, but acts of will responsible for the creation of an objective norm, if it has authority for itself. Its existence, presupposed,

not positive, must avoid Law becoming a matter of fact, restricted to the being, and guarantee the effectiveness of it. Nevertheless, it does not, as I will demonstrate, accomplish its objective.

I would like to take some time to acknowledge the kindness and patience of Professor André Coelho, whose work inspired a young group of Law students and gave them perspective not only about the law´s field itself but how rewarding a devoted academic life can be; To all my friends, especially those who went with me to IVR 2013, for not sharing only amazing experiences that week, but also for being victims and roommates of my usual mess; All the members of "Pura Teoria do Direito" study group, we improved not only our presentations together, but our strength to pursue opportunities; My girlfriend Roberta Dinelly whose love and companionship helped me through many obstacles, not just the translation of this paper; God, Who always saves me, my mother, whose love and concern are always there to remind me of deadlines and papers.

2. One defender of purity

In Hans Kelsen´s historical paradigm, The Pure theory of law experienced a conflict between the positive-empiricist theory and the Natural Law Theory. The PTL begins exactly expressing this reality with clarity and enforcing the purpose of purifying the Legal Science, transcending those theories. As Kelsen says at the first chapter of the book:

> "It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory
>
> Such an approach seems a matter of course. Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law" (1960, p. 1)

Many interpretations ascended from these particular points,

most of them created an amount of prejudices and divergent points of view that did not fit in the essence and main goal of the PTL.

The idea of purifying the science can be seen as the result of influence from the Marburg School. Kelsen establishes, in correspondence with Renato Treves, the importance of reading Kant from Hermann Cohen´s point of view, considering her the philosophical foundation of the PTL (2010, p. 204). Cohen uses as basis Kant´s *theory of knowledge* or cognition and makes a new approach on the original solution. According to Edgar Scott, Cohen disagreed with Kant´s classical interpretation. Hermann Cohen tried to find the purity inside the *knowledge considering it as a logical argument. Therefore, the purity shown in the PTL is meaningful to fully understand why Hans Kelsen did not want to be considered a reductionist and strongly denied the engagement between other sciences in several subjects that the Master of Vienna passionately believed to be an exclusivity of the Legal Science.*

3. The Jurisprudential Antinomy

Stanley Paulson, however, brings a different enlightenment to the matter when he is analyzing the PTL. According to the aforementioned author, the Theory of Law experienced what he called a "jurisprudential antinomy". This antinomy was characterized by an overlap of two thesis and two deliberations: The morality thesis, always portrayed as a subject-matter of the Natural Law and the separability thesis between Law and morality, usually seen as an argument of empirical positivism. The aforesaid superposition could lead to a state where the plain existence of any other theory would be impossible. Still, Hans Kelsen did not accept either sides. Both the Natural Law and the Empirical positivism had, in his opinion, problems that needed to be urgently solved.

Considering that the sample space had both theories above-mentioned to sustain the paradigm´s passage, Kelsen searched for a way out beyond those possibilities, but there was a missing connection between Law and fact. Just to remind you that we are exhibiting just one focus of the relationship among Law and morality. Traditionally those theories had not debated together that element. Knowing that, we can only assume that there are four theses and not two as we had argued. The two theses which are an outcome of the Law-fact approach are the reductive and normative thesis. The reductive thesis states that Law, ultimately, is explained by factual terms. The normative thesis ponders that there is a

difference between Law and fact. The first one was considered as part of the empirical positivism Law and the second was, in Paulson´s words, an implication of some aspects of the Natural Law. In short, theoretically speaking, there are two theories with four options, where the Natural Law would have both theses the normative and the morality, and the empirical positivism would be appreciated by the reductive thesis and the separability one about the dispute among Law and Morality.

Hans Kelsen attempts to give rise to an alternative beyond the elements aforementioned, this specific endeavor is basically the defense of a position that endures the separation between Law and Morality, as well as among Law and factual points, so it makes the basic norm shows itself more necessary than ever. As it was already said, the "ground norm" supports the system´s normativity, segregating it from a simple factual question as well as moving the reductivism away from that matter. Stanley Paulson says that:

> "In other words, Kelsen's answers to questions (ii) and (iv) suggest the hypotheses with which he begins-the normativity thesis without the morality thesis, and the separability thesis without the reductive thesis. But can he make his case? Having precluded an appeal either to the morality thesis or to the reductive thesis, he faces an especially difficult task in defending his alternative."(p. 322)

4. The alternative to solve the antinomy

Kelsen demonstrates a new approach from Kant´s transcendental subject to sustain the basic norm. The Neo-Kantian position focused on Kant´s theory of Knowledge, but did not have an overall uptake from the philosopher's work, so we shall not search for a common ground in these aspects directly in Kant´s theory of Law. The German sage solved the first mathematical antinomy, which was the juxtaposition between the dogmatic rationalism and skeptical empiricism, applying the transcendental analysis and, likewise, Kelsen pursued the solution for the jurisprudential antinomy. However the question argued by the Master of Vienna did not involve the whole theory of Knowledge, but only the law specifically, which is possible, according to his thesis of the legal positivism, as object of cognition and object of the Law science.

Hans Kelsen´s transcendental argument, as Paulson shows, is

progressively structured; he tries to reach a conclusive category by using a statement already given. The basis is a well-known assertion about the Law, understood as a normative system, and the main conclusion is the need of a basic norm. This new meaning to Kant´s argument, turning his thought into a regressive and not progressive form, as Paulson endorses, comes from the neokantian authors. However, also according to Stanley Paulson, the transcendental argument adapted to the scope of Law and explained by Hans Kelsen does not sustain itself. One of the reasons for this lack of success is exactly the switch-over to a regressive argument or even the maintenance of the classical progressive position, what makes it not to have enough strength of attraction, leaving the initial arguments too demanding to be accepted, then the basic norm becomes too weak and more dependent on the person and her acceptance than from a logical presupposition. Even the non-regressive version, could work, Paulson says that:

> "Thus, Kelsen would face a problem with either version of the transcendental argument. As we have just seen, the progressive version takes as its point of departure a premiss that is simply too weak to be of any help in meeting the sceptic's challenge, rendering this version of the transcendental argument utterly useless to the legal philosopher. The regressive version is more congenial to the legal philosopher, but it claims too much in its second premiss, as though the only way to support a normativist legal theory were by way of the category of imputation. More precisely, the second premiss claims too much unless it can be shored up by appealing to the progressive version, which brings us full circle, back to the unworkable progressive version. The conclusion is inescapable: neither version of the transcendental argument works for the legal philosopher." (1992, P. 331)

In this point, I close the first part of my presentation and, to put it briefly, it was shown basically how Kelsen considered significant the maintenance of the purity in his theory and then I explained the way that the basic norm theory at first cannot fulfill its function even taking in consideration many of his theoretical presuppositions. Now, in the second part, I will introduce how Joseph Raz proves Kelsen´s theory and how he argues that Kelsenian concept of normativity does not accomplish its role, leading the PTL to a reductionist form according to the kelsenian standards.

5. The reading of Hans Kelsen by Joseph Raz

Joseph Raz, in many academic pappers, debates Kelsen´s work and his main thoughts. In the book The Concept of a Legal System (TCLS) and in the papers "Kelsen´s Theory of the basic norm" and "the purity of the pure theory", Raz does not write about the basic norm, but it is one of the main points of the criticism about the legal systems. Considering the first part of this text, and Paulson's arguments, the basic norm could be embraced as a point of view, because it demands acceptance. However, even offering itself as possible theory for the ones that adopt the concept of the Law as a normative theory, it does not have a solid structure to justify its own attributions.

The Razian understanding of the Kelsen's Theory is different from the initial posture that was shown in this assay, inasmuch as it is a less influenced neokantian analysis and more directed to a global vision of Kelsen´s work, without highlighting the theoretical bases that Kelsen believes when he write the PTL. This fact about his methodology can be both a strongest point of Raz´s argument as much as it represents a weakness.

Raz, during the paper "Kelsen´s theory of the basic norm" and also through the books "Normativity and Norm" and "The authority of Law", criticizes directly the kelsenian normativity concept. However, the arguments now are totally different than those made by Stanley Paulson. Raz divides his arguments on two points, in the first he attacks the first function of the basic norm (unity of the system), after, in the second, he does an analysis about the "validity question", or how he calls, the "normativity question".

6. The unity of the legal system

Joseph Raz understands that two axioms about this function must be true, they are totally independent, but, one failure will expose the impossibility of this first function. The first one is that if a group of norms are on the same chain of validity, they are on the same legal system. He says that: "If this axiom were correct, certain ways of peacefully granting independence to new states would become impossible". (1974, p.98) At this point, Raz did not use his classic example about Canada, but developed only a synthesis about the same argument.

The second axiom is that all the laws of one system belong to one

chain of validity. Raz considers that we cannot agree with this axiom too. In his interpretation, we could found the basic norm only when we know the legal system, and we only could know the legal system when we now the basic norm, so we are locked. Joseph Raz add other example after, explaining what could happen if happen a situation that we have two basic norms, one customary and other enacted. He writes:

> There is nothing in the theory to prevent two legal systems from applying to the same territory. Everything depends on the ability to identify the basic norm, but it cannot be identified before the identity of the legal system is known. Therefore, the basic norm cannot solve the problem of identity and unity of legal systems, and Kelsen has no other solution. (1974, p.99)

Joseph Raz works with these arguments In "The concept of the Legal system" (1980). In that book, Raz diminishes the importance of the basic norm in many points; one of them is when he defends its uselessness for explaining the conditions of identity, as we explained above. His argument is the same; he considers that we can only understand the acts of creating norms if we already know how and have already established the legal system Work. For him, these points are clear in the PTL, when Kelsen deliberates about revolutions, but considering this, we must accept that his theory cannot hold an explanation about what is law, or not. Another point is the fact that we cannot explain, by means of the Pure Theory, a situation where a norm of a certain legal system creates the constitution of another legal system, which lacks a different basic norm.

After these criticisms, Joseph Raz passes to the second main function of the basic norm, the guarantee the validity of the legal system.

7. The normativity question

Remembering the point about the must-be-accepted basic norm, Raz believes that is unnecessary to have a basic norm combined with the concept of social normativity, he uses this point to defend his own position, but we shall focus less in his particular matter, and more on Kelsen´s position.

For Joseph Raz, there are two notions of the Law´s normativity, one is called "justified" and the other is mainly social. In the first conception, the normativity is basically justified, whenever it follows objective

and universal reasons and, according to the author, they need to be intuitively accepted as a mandatory subject. On the other hand, considering the social normativity, the only pattern of behavior that is essentiality relevant is the one related to rules and not the content of them. As it was expounded in the first section of paper, it is required to go back to the division in the ambit of antinomy, as normally the theorists of Natural Law admit the initial normativity´s conception, the theorist of legal positivism ordinarily receive the second concept.

As it is expressed in the PTL, the point aforementioned coexists with the rest of the theory, which foment several doubts about the certainty or not of this choice. The most substantial of Raz´s brickbats relies on the much discussed point that the Law should not be seen as a normative system as the basic norm could not be obliged to an anarchist. The author uses that particular excerpt from the PTL to express the existence of diverse interpretations to the legal system. However, Kelsen answered this critique assuring that the anarchist´s point of view would never be imbued with legality and could not provide normativity to Law itself. Therefore, Hans Kelsen claimed that the sociological form is not a legal reading.

If Kelsen denies the concept of social normativity, the only remaining aspect is the justified normativity. It may seem nevertheless quite odd and Hans Kelsen himself leaves a trace of uncertainty on it. We can assume, in order to realize Law as a normative system, that the kelsenian basic norm is objective and universal. To justify this, we also must consider that Law can act as an ideology, thereby; it will be seen as a good element for those whom consider it normative.

8. The Legal Science's point of view

In the attempt of escaping from the analysis based on the common sense´s point of view, that was criticized before, Hans Kelsen uses during all his work, the argument from the Legal Science´s point of view. The question argued by Raz is, how is it possible that the scientific point of view could be completely free from values at the same time that Kelsen embraces only the justified normativity? There are many hypotheses to this matter, one of them concerns the point of view of the "hypothetical legal men", however, it leads to another query, because Kelsen presupposed this understanding for those who enforce the Law and accept it as something valid, so there is no difference between a ju-

rist discussing about the Law and those who apply it simply on a daily basis. (Just a reminder, Kelsen differences the application of the law by a person or by a judge, in the matter of interpretation but not in the cognition). Therefore, the positioning of the Legal Science is not just about describing something; it adopts the statement of the "legal men", not in the sense of fairness as the individual character, but in a professional and not necessarily obligatory.

9. Conclusion

It surely became clear, at this point, that the PTL eventually surrenders to the Reductivism, being a matter of fact, depending on a choice of both justice and professional sense for the Legal theory. Raz's arguments change a core point to the understanding of law as a system of norms by Kelsen, initially into something less important, and later into something unnecessary to the Pure Theory, leading us to the conclusion that Hans Kelsen did not sustain his transcendental argument or justify the basic norm, failing in the purpose of providing a successful Pure theory.

However, we could endorse, with Stanley Paulson that the PTL is still extremely important, of course, compared with other normative reductivist theories and no more as a successful purity example.

References:

EDGAR, Scott, "Hermann Cohen", The Stanford Encyclopedia of Philosophy (Winter 2012 Edition), Edward N. Zalta (ed.) [viewed 10 june 2013], available from: <http://plato.stanford.edu/archives/win2012/entries/cohen/>.

KELSEN, Hans. *Pure Theory of law,* translation from the second (revised and enlarged) German Edition by Max Knight, New Jersey: The Lawbook Exchange LTD, 2005 [Vienna, 1960]

MAIA, Paulo. *Forma e unidade como condições de uma ciência pura: a influência do neokantismo de Marburgo no "primeiro" Hans Kelsen*. Seqüência, Florianópolis: UFSC, ISSNe 2177-7055 vol. 60. Year XXXI, 2010.

PAULSON, Stanley L.. *Reflexões sobre a periodização da Teoria do Direito de Hans Kelsen*. In: OLIVEIRA, J., TRIVISSONO, A., org., *Hans Kelsen – Teo-*

ria juridica e Política. Rio de Janeiro: Forense, 2013.

PAULSON, Stanley L.. The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, 12 Oxford J. Legal Stud. 311 1992

PAULSON, Stanley L., PAULSON, Bonnie L. ed. *Normativity and Norms – Critical Perspectives on Kelsenian Themes*, Oxford: Clarendon Press, 1998.

RAZ, Joseph. *Kelsen's theory of the basic norm*, 19 Am. J. Juris. 94 1974.

RAZ, Joseph. *The Concept of a Legal System - An Introduction to the Theory of Legal System*. 2nd ed., Oxford: Clarendon Press, 1997.

RAZ, Joseph. *The authority of law.* Oxford: Clarendon Press, 1983.

Fundamental social rights as subjective rights

Cláudia Toledo[1]

Introduction

Since the Declaration of the Rights of Man and the Citizen, fundamental individual and political rights are considered subjective rights, in contrast to fundamental social rights.

Robert Alexy defines fundamental social rights as rights of the individual before the State, to something that the individual, if had enough means and if there were sufficient offer in market, could also have from particulars: right to health, education, work and housing[2].

A whole social structure or organization is necessary to fulfil these rights. In this article, it is asserted that this organization is a subjective right when it has an immediate importance to the individual, considering his liberty. In order to effectively exercise his juridical liberty, the individual must have the material presuppositions to be able to choose among the allowed options. These presuppositions are the concrete conditions that ensure human dignity, which is the major aim of all fundamental rights. Fundamental social rights grant those conditions.

Once more the matter of the existence of subjective rights arises. Are the fundamental social rights subjective ones? Arguments for and against the positive answer are going to be analyzed, so that fundamental social rights are demonstrated as *prima facie* subjective rights. They turn to be determined as *definitive* in the concrete case, after *pondering*

[1] Professsor at Universidade Federal de Juiz de Fora, Brazil. This article is related to the themes studied in the post-doctorate research developed from September 2011 to December 2012 with Prof. Robert Alexy in the Juristisches Seminar of Christian-Albrechts Universität zu Kiel, Germany.

[2] ALEXY, Robert. *Theorie der Grundrechte*. Baden-Baden: Suhrkamp, 1994, p. 454. See ALEXY. Grundrechte. *Enzyklopädie Philosophie* – hg. V.H.J. Sandkühler. Hamburg: Felix Meiner Verlag, Bd. 1, 1999, p. 525-529. ALEXY. *A theory of constitutional rights postscript*. Oxford: Oxford University Press, 2010.

the favorable and opposing *principles* related to them in specific empirical situation.

I . Definition of Fundamental Social Rights and Subjective Rights

Fundamental rights are the *positivation* of *human rights* (which have a moral character) in the national Law. Although Alexy does not follow the traditional division of fundamental rights into *individual, political* and *social* ones, this is the structure that will be adopted here due to its majority acceptance in the Legal Theory[3].

Since fundamental *individual* and *political* rights were declared, there have never been divergences both in theory of law and in case law that they are *subjective rights*. On the contrary, the definition of fundamental *social* rights as subjective rights is quite controversial.

According to the cited definition, Alexy considers fundamental social rights as rights of the individual before the State, to something that the individual, if had enough means and if there were sufficient offer in market, could also have from particulars: right to health, education, work and housing.

Subjective right is a prerogative established by objective law to the legal subject. This prerogative is assured by legal action.[4]

Subjective rights are *relational*, because they are juridical relations between two or more legal subjects. The structure of fundamental social rights is: *A* has the right *B* before the *State*. The *State* has, in relation to *A*, the *duty* to ensure the necessary organization to comply with the fundamental social right. A *duty* corresponds to every *subjective right*. Once the subjective right is relational, then is the duty. Nevertheless, the relational duty implies another *non-relational* duty: as mentioned, the State has the duty to ensure a certain *organization* (not only to *A* specifically). This way, every *subjective right* implies a *non-relational duty*, but a *non-relational duty*, unlike the *relational duty*, does not imply a *subjective right*.

[3] According to Alexy's thought, fundamental social rights are "stricto sensu rendering rights" before the State.

[4] This definition of subjective right was formulated by two classic authors, both in Germany and Brazil: Rudolf von Jhering (Der Zweck im Recht) and Clóvis Beviláqua (Teoria Geral do Direito Civil).

II . The Justiciability of Fundamental Social Rights

The question in relation to the fundamental social rights is whether the organization required by them can be demanded as a *subjective right*, which is the strongest way of protection, since it is *justiciable*.

The answer depends on the importance that such organization immediately has either (i) to *individual*, considering his interests and *liberty*, or (ii) to *collectivity*, considering collective goods and interests. The arguments used in the first case present a *subjective* justification and those used in the second case have an *objective* one.

Objective norms come from an *objective* justification. Nevertheless, there is also the understanding that not only *subjective norms* come from a *subjective* justification – *objective norms* can also derive from it. This would happen in two cases:

1. If a difference between fundamental rights' *interest* and fundamental rights *themselves* is established and organization norms are supposed to ensure only the individual's *interests*. *Objective* norms are then sufficient for their assurance;

2. If the organization required by fundamental rights is supposed to be always devoted to the *individual*, because he is a *member of the collectivity*. *Objective* norms would then also be enough.

On the other hand, the two counter-arguments are:

1. In relation to the first statement above, indeed, the *importance* of the individual's *constitutional protection* can be so *small* and/or the *effects* can be so *indirect* to individual, that the simple *objective* protection is enough. Nevertheless, in principle, a *subjective right* has to be recognized;

According to the second statement, when *everybody* is affected in the same way, it is not possible to talk about an *individual* effect which generates a *subjective right*. However, the thought must be the opposite: it is because *everybody* is affected, that *each individual* is affected, situation that keeps the organization as a *subjective right*.

Alexy ends this matter with the relevant assertion that taking fundamental rights *seriously* as individual's rights excludes every form of *collectivity* argumentation.[5] The collectivity argument can not affect the thesis that fundamental rights protect individuals through subjec-

[5] ALEXY. Theorie der Grundrechte, ref. 1, p. 451-453. The Bundesverfassungsgericht has the same position, considering fundamental rights as subjective rights. BVerfGE 50, 291 (337).

tive rights that ensure their liberty.

Liberty is a concept intrinsically related to *dignity*. The dignity's assurance is the aim of the totality of *fundamental rights*. Among these, the rights substantially related to *human dignity's* concept are the fundamental *social* ones, because only with their exercise the real fruition of the other fundamental rights is possible. This is because fundamental social rights are the first ones responsible for the human being own survival and his real formation as human: right to *health, education, work* and *housing*.

Dignity is a *semantically open* concept, that is, a concept that does not allow an exhaustive definition. There are a lot of subjective rights related to it: *life, liberty, equality, physical integrity, privacy* and many others[6]. Because of this, Alexy synthesizes the wealth of adjectives and nouns related to the concept of dignity which, although exuberant, do not formulate a definition, due to the randomness of their choice, saying that dignity can be expressed by a *joint of concrete conditions*, which must be present for its assurance. It is certain that the content of this joint is not unanimous, but it is not completely distinguishable either. There is convergence of many aspects, so that many times their differences are related only to the *weight* given to some conditions of the same joint or to the *degree of the importance* given to each element that is different according to the historical-social context.

These *material prerequisites* for the *assurance* of *human dignity* are the object of fundamental social rights. In other words, fundamental social rights act like the basis for the exercise of the individual rights that assemble the concept of dignity.

III . Arguments in favor of and against fundamental social rights as subjective rights

As stated above, these fundamental social rights make feasible the true fruition of fundamental individual rights. And then the question comes again: are fundamental social rights subjective ones? There are arguments *for* and *against* their definition as *subjective rights*. They can be summarized as follows.

The main argument *pro* is based on *liberty* and the main one *against* is the so called *formal argument*, even though there are also the

[6] These rights are mostly fundamental individual ones. This makes clear the close relationship among all fundamental rights, which demand the vision of their indivisibility.

substantial ones.[7]

In relation to liberty, there are two thesis:

1. Juridical liberty, that is, the *juridical permission* to do or not do something has no value without the *factual* liberty, i.e., the empirical possibility to *choose* among allowed alternatives, which presupposes the possession of the necessary *material* and *intellectual goods*. In turn, *factual* liberties are not a matter of *all-or-nothing*, but a matter of *degree*;

2. Factual liberty of a *huge number* of holders is not possible to be implemented by themselves, but depends on *State activities*. So, State *positive actions* are required.

The *formal* argument against the stipulation of fundamental social rights as subjective rights is actually formed by two principles: principle of *democracy* and principle of *separation of powers*. According to both, the *legislator democratically elected* is the one who has the *decision-making competence. Legislative and Executive Powers* are the ones that have *legitimacy* to formulate *public policies*, without any interference of another power, because of the *tripartite* model.

Substantial arguments against the consideration of fundamental social rights as subjective ones refer to the *material* principles of *juridical liberty of the third party*, the *other's social rights* and the *collective interests*.

The *principle of juridical liberty of the third party* states that fundamental social rights would *collide* with *liberty* rights, because they are highly expensive, so that the State can only accomplish them with a huge *taxation* on those who are not demanding them, that is, the *property owners*, whose liberty would then be affected.

According to the *principle of the other's social rights*, if *everyone* demands *equal* exercise (in the same degree) of fundamental social rights, these rights themselves became unfeasible, because State can not bear the costs of the exercise of fundamental social rights by everybody in the same measure, as high as possible, that is, with the highest patterns of education, health, housing and work.

Finally, the *principle of the collective interests* considers that there would be a preponderance of the individual's interests – especially if many individuals demand the exercise of fundamental social rights – in detriment of the whole society's interests, of the collective good.

Dealing with the complexity of the situation demands the necessity of *pondering* the *principles* for and against the stipulation of fundamental social rights as subjective rights, so that it is possible to formulate

[7] ALEXY. Theorie der Grundrechte, ref. 1, p. 458-465.

their concept.

IV . Fundamental Social Rights: *prima facie* subjective rights

Alexy[8] proposes a conception that takes into account both arguments for and against. Fundamental social rights are *prima facie subjective rights*. As *subjective rights*, they are *biding* and not mere programmatic statements, even though there is no previous determination of which of them are *definitive rights*. The presentation of fundamental social rights as *binding* is in German Constitution (*Grundgesetzt*, art. 1, § 3º)[9]. The *biding clause* denies exactly their *programmatic* character, declaring their *immediate application*.

What is *prima facie* mandatory is always *wider* than what is *definitively* obligatory. The process of determination of a definitive right is done by the *restriction clause*. Restriction clause is the *possible reserve clause*, which means that what is due as an *individual's* subjective right can only be something that can *reasonably* be demanded from the *society*. This is especially directed to fundamental social rights, because, even if they are only minimally considered, they have a major *financial effect* when many individuals need them. However, this situation does not withdraw the effectiveness of these rights, because "the strength of the principle of legislator budgetary competence is not unlimited"[10]. This principle, as any other one, is not absolute. It is clear that the process of pondering the collisions of principles can lead, in different circumstances, to different definitive rights. As known, changing the concrete case, the juridical consequence attributed to it can also change.

The possible reserve clause does not lead to an *emptying* of the right, but to the necessity of pondering it with other rights[11]. This is an aspect in which *every* fundamental right is similar, in order to determine which one is *definitive* in an empirical situation. A fundamental social

[8] ALEXY. Theorie der Grundrechte, ref. 1, p. 465.

[9] "The following rights [fundamental rights] bind Legislative, Executive and Judiciary Powers as immediately applicable rights". See ALEXY, Robert. Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie. Frankfurt am Main: Suhrkamp, 1995, pp. 264-267.

[10] See Alexy, Theorie der Grundrechte, ref.1, p. 466.

[11] Among others, see ALEXY, Robert. Derechos sociales y ponderación. Madri: Fundación Coloquio Jurídico Europeo, 2007.

right is definitive if[12]:

1. The principle of *factual liberty* demands it urgently;
2. The principle of *separation of powers* and the principle of *democracy*, as well as the colliding *material* principles (especially those related to the *juridical liberty* of the other) are affected by the constitutional assurance of fundamental social rights in a relatively *small* measure.

The determination of a definitive right in concrete cases demands *justification* according to a *rational argumentative structure*. This is a pondering process and its guiding notion is the pondering rule, according to which "the mayor the non-satisfaction degree of a principle is, the mayor the importance of the other principle must be"[13].

V . Existential Minimum

The case law position both in Germany and Brazil – although the treatment of this matter is more solid in the first country – is that the single *a priori definitive* fundamental social right, i.e., the only immediately demandable one is the right to the *existential minimum*[14]. *Existential minimum* is the core of *minimal* fundamental social rights oriented by the idea of *factual equality*, which empirically enables the *juridical liberty,* ensuring then the respect for *human dignity.* As a definitive right, the *existential minimum* demands its *immediate compliance* by the *Public Power*. However, its *content* is not pacific yet. Alexy understands it as compounded by the right to *simple housing, fundamental education and a minimum* level of *medical assistance.*[15]

The fact that fundamental social rights many times depend on

[12] ALEXY. Theorie der Grundrechte, ref. 1, p. 466.

[13] ALEXY. Theorie der Grundrechte, ref. 1, p. 146.

[14] The precise detailing of the amount of money that corresponds to the existential minimum and must be paid by the State to the individual, according to each specific factual situation , was done in the long and elaborated decision BVerfGE125, 175 (February 9th, 2010).

[15] Ibid, p. 466. Alexy considers as definitive the right not only to fundamental education and high school, but also to the technical education. This situation does not correspond to Brazilian reality, where only fundamental education is part of the existential minimum, whose content varies according to the cultural, local, economical and historical context where it is applied.

the *infraconstitutional regulation* does not distort them as *prima facie* subjective rights and does not bring anything new to the juridical structure, because the assurance of fundamental *individual* rights, such as the right to come and go safely and freely, e.g., also demands a lot of infra-constitutional rules and ordinances. If they are *prima facie subjective rights*, they are *justiciable*. It is not the existence of a right that stems from its justiciability, but it is its justiciability that stems from its existence.

This way, there is no *incompetence* of the Judiciary Power in case of legislator's *omission*. As far as the Public Administration in a Democratic Legal State is regulated by the principle of *non-obviation of Judiciary jurisdiction*, the *controllability* of the other Powers' actions (or omissions) rests with the Judiciary Power.

The *exceptional* competence of Judiciary Power can be "a simple ascertainment of an *unconstitutionality,* passing through the establishment of a *term* in which a legislation according to Constitution must be done, until the *direct judicial determination* of what is mandatory due to the Constitution".[16]

This way, *Legislative and Executive Powers* have *original* competence to *formulate* and *execute public policies*. However, the *Judiciary Power* is *exceptionally* competent to determine that those public policies must be carried out, especially when this is defined by the *Constitution* itself. In case of *omission*, it is then considered that the competent public bodies are failing to comply with the *political-juridical charges* they mandatorily have, so they are compromising the *effectiveness* of fundamental social rights and the Public Power can not prevent the exercise of a subjective right. Only its holder, the legal subject, can choose to exercise it or not, once the right is a beneficial prerogative of him.

So the *Judiciary Power* is competent to determine the compliance with fundamental social rights in case of *abusive behavior* of State, such as *State inertia*, *unreasonable procedures* or procedures with clear intention of to *neutralize* the *effectiveness* of fundamental social rights. This is because neither the *legislator's conformation liberty* nor the *Executive Power actions* are *absolute*. They have a *relative* character. In this manner, if there is *State arbitrariness* towards the accomplishment of fundamental social rights, then legitimacy and legality are withdrawn from the *discretionary power*. After all, the Public Power is subordinated to a *legally biding* constitutional mandate, which represents a *limitation* of the political-administrative *discretion*.

[16] ALEXY. Theorie der Grundrechte, ref. 1, p. 467-468. (emphasis added)

The discretion is in the core of the pondering problem between the *material* principles of *fundamental social rights* and the *formal* principles of *democracy* and *separation of powers*. Although the *legislator democratically legitimated* has the decision-making competence, the *public spending* with *public policies* is submitted to the *convenience and opportunity judgment* of the administrator, but not to his *arbitrariness*.

Indeed there is *political dimension* in *constitutional jurisdiction*, which ultimately controls the subordination of the whole State's actions to Constitution. Constitution is exactly the materialization of the encounter of *Politics* with *Law*. The observation and compliance with fundamental rights are precisely the result of this Public Power subordination to constitutional norms.

VI . Concluding Remark

As conclusion, what is left clear in relation to fundamental social rights is that their *effectiveness* depends on the way the individual is seen by the society to which he belongs: as a *legal subject* or as an *object* of the juridical order[17]. The countries, looking for the establishment of *democracy* – that always happens as a *process*, typically compounded by a forward and backward movement, increasingly consider individuals as *holders* of *subjective rights* and no longer as an *object* of *public interest* to be treated by the State's *social assistance service*, so that *public security* and *social order* are ensured. In other words, individuals who are always presented as *inconvenient objects*. Individuals not endowed with *self worth*, but seen as "social problem" to be solved. In short, to respect individual's fundamental rights means "to take individual seriously".

In the wake of this clarity, Alexy is incisive in summarizing that "*non-justiciable* fundamental rights are a *lie*"[18]. Specifically in relation to fundamental social rights, he states that their justification, their reason of being is to promote to those who were not lucky to be born in a family with reasonable economic situation, the *access* to similar opportunities and material goods.

---

[17] Rodolfo Arango, Der Begriff der sozialen Grundrechte. Baden-Baden: Nomos Verlagsgesellschaft, 2000, p. 29-20, 50-55. See ARANGO. Basic Social Rights, Constitutional Justice and Democracy. Ratio Juris, vol. 16, 2003, p. 141-154.

[18] Robert Alexy, Staatsrecht II, Vorlesung, Christian-Albrechts Universität zu Kiel, April 5th, 2012.

References

ALEXY, Robert. *Theorie der Grundrechte*. Baden-Baden: Suhrkamp, 1994, p. 454.

---. *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie*. Frankfurt am Main: Suhrkamp, 1995.

---. Grundrechte. *Enzyklopädie Philosophie* – hg. V.H.J. Sandkühler. Hamburg: Felix Meiner Verlag, Bd. 1, 1999, p. 525-529.

---. *Derechos sociales y ponderación*. Madri: Fundación Coloquio Jurídico Europeo, 2007.

---. *A theory of constitutional rights postscript*. Oxford: Oxford University Press, 2010.

---. *Theorie der juristichen Argumentation*. Frankfurt am Main: Suhrkamp, 7. Auflage, 2012.

ARANGO, Rodolfo. *Der Begriff der sozialen Grundrechte*. Baden-Baden: Nomos Verlagsgesellschaft, 2000

---. Basic Social Rights, Constitutional Justice and Democracy. *Ratio Juris*, vol. 16, 2003, p. 141-154.

BEVILÁQUA, Clóvis. *Teoria geral do direito civil.* Rio de Janeiro: Livraria Francisco Alves, 1928.

JHERING, Rudolf von. *Der Zweck im Recht*., Leipzig: Breitkopf & Härtel, v. 1, 1877.

GERMANY. Bundesverfassungsgericht. BVerfGE 125, 175, February 09th, 2010.

GERMANY. Bundesverfassungsgericht. BVerfGE 50, 291, 1979

Judicial procedure and argumentation:
How much discursive is the legal discourse?

André L. S. Coelho[1]

Abstract: The paper aims to point out the shortcomings of Habermas's approach to the judicial procedure and to propose a reformulation of that approach. With that in view, it explains the notion of tension between facticity and validity as formulated by Habermas in Between Facts and Norms and as applied both to law in general and to the judicial procedure in particular. Next, the paper shows that Habermas's approach is exposed to several objections, has a serious deficit in its choices for the facticity pole, omits the external tension (never confronting the idealization of the judicial procedure with its empirical reality) and is impotent to give an actual diagnosis of time that takes a critical position about the contemporary trends in procedural law. Then, the text proposes a reformulation of Habermas's approach, where the elements that occupy both ends of the tension in the judicial procedure are rearranged, covering the deficit in the facticity pole, and an external dimension to the tension is added, giving space for a dialogue with the criticism of the judicial procedure from the point of view of the social sciences and tools for a diagnosis of time concerning contemporary trends in the judicial procedure.

Key-Words: Habermas – Judicial Procedure – Legal Discourse

1. Introduction

In *Between Facts and Norms* (BFAN), Habermas gives little consideration on the judicial procedure. The issue makes its first appearance in Chapter V, where it plays the role of a discursive substitute for Dworkin's monological judge Hercules, and comes again for a discrete farewell in Chapter VI, where problems of the separation of powers and the open character of the constitutional project stand out as the main subjects of concern. In both cases, the judicial procedure is depicted as a discourse that must have place within the constraints of a legal order

[1] Master and PhD student in Philosophy at Federal Univerisity of Santa Catarina (UFSC), Brazil. E-mail: andrescoelho@uol.com.br.

and of factual limitations. This approach is not only insufficient to deal with the vast complexity of the issue, but also idealized and impotent to the point where its critical-theoretical key becomes barely recognizable. The conception of the judicial procedure as involving a tension between correction and consistency in one side and between argumentation and regulation in the other side is too simplistic, narrow, and naïve, in serious need of a reformulation.

The aim of this paper is to point out the shortcomings of Habermas's approach to the judicial procedure and to propose a reformulation of that approach. As both our criticism to Habermas's treatment of the subject and our proposal of reformulation will be grounded on the idea of the tension between facticity and validity (TBFAV) as a critical-theoretical scheme of investigation, we consider necessary to explain the central role of the TBFAV in the structure of BFAN as a whole, then to detail the elements of the TBFAV both in law in general and in the judicial procedure in particular. Next we list and explain the shortcomings of Habermas's approach, in a way that already makes clear what we think a suitable reformulation should bring to the table. After that, we present our proposal of reformulation, where we change the elements of the TBFAV in the judicial procedure both in the internal and the external sides of the tension. In the end, we try to justify our proposal in terms of a critical theory where concepts satisfy at the same time the history of the theory and the potential for a diagnosis of time.

2. Structure of BFAN

BFAN is composed by nine chapters and can be divided in four main parts. In the first part, corresponding to Chapters I and II, Habermas presents the notion of the TBFAV as passing from language to law and formulates the kind of critical-theoretical methodology that he deems appropriate for the study of law and democracy. In the second part, corresponding to Chapters from III to VI, Habermas deals with the internal TBFAV and provides a rational reconstruction of the self-understanding of the modern legal orders, concentrated in the conception of human rights and popular sovereignty and of their relationship from the point of view of a discursive theory. In the third part, corresponding to Chapters VII and VIII, Habermas deals with the external TBFAV and confronts the highly idealized version of the relationship between law and democracy provided in the second part with empirical models

of legislation and of the public sphere capable of sustaining the realistic character of those idealizations. Finally, in the fourth part, corresponding to Chapter IX, Habermas provides what he takes to be his diagnosis of time, where he describes two social visions of society (the paradigms of law) that have informed the relation between law and democracy to the moment and perceives the rise of a new paradigm of law, the procedural one, where the co-originality of private and public autonomy would be taken seriously and the struggle for human rights would take the form of a struggle for participation in the self-legislative process.

As we can see, the idea of the TBFAV not only is important for the explanation of that historical-sociological scheme of the four main characteristics of modern law that Habermas names as the "legal form" and plays a very important role in many of the arguments of the second part of the book, but also is an organizing idea for the structure of the book as a whole. For the project, exposed in Chapter II, of explaining the relation between law and democracy from the point of view of a theory that integrates ideas and interests in the social order, instead of separating the normative and the empirical or confronting them as separate reigns, can be fully realized only by a conception of law and democracy that already conceives of both the normative idealization and the empirical reality as integrating ideas and interests. That's why the TBFAV cannot but permeate every level of the argument throughout the whole book.

3. TBFAV in Law

In Chapter I Habermas explains the TBFAV as passing from language to law. In language, the tension arises from the fact that both meanings in the semantic level and validity claims in the pragmatic level are at the same time connected to their contexts of enunciation and committed to idealizations that overcome every possible context. So words and statements on one hand bring idealizations to reality, giving ideas a concrete and particular existence in time and space, but on the other hand they commit reality to idealizations, leaving room for every realization to be criticized in face of the exceeding value it always fails to realize. This dynamics creates a sort of dialectical "push-and-pull" movement between reality and idealization, which Habermas calls a "tension between facticity and validity", that appears even in the German title of the book.

According to Habermas, modern law, inasmuch as lost connec-

tion with tradition, needed to be based on discourse and reasons, and that's why the TBFAV that exists in language manifests itself also in law. However, when Habermas formulates the version of the TBFAV that shows in law, he does not indicate elements, as those of language (meanings and validity claims) that are linked to reality and idealization at the same time, but now he presents pairs of concepts in law that have between them the same kind of TBFAV that meanings and validity claims have within them in language.

What these pairs of concepts do have in common with meanings and validity claims is that one of the pairs relates to the equivalent of the semantic level (the level of product, that is, to norms themselves) and the other one with the equivalent of the pragmatic level (the level of process, that is, to the production of norms). At the level of product, the first conceptual pair is freedom and coercion. Habermas recurs to Kant's formula that legal laws must be at the same time laws of freedom and laws of coercion, that is, laws that protect freedom but are allowed to employ coercion for that very protection of freedom. At the level of process, the second conceptual pair is positivity and legitimacy. As the context of modern law is post-traditional and post-metaphysical, the laws must result from fallible and alterable decisions of some men empowered with authority but have to meet the rational demands of subjects that are not willing to obey to just any laws put upon them. Modern law must find out a way to be at the same time humanly and timely produced and rationally acceptable, that is, positive and legitimate. Those are the double axis of the TBFAV in law, namely the tension between freedom and coercion and the tension between positivity and legitimacy. But they do not cover all the aspects of the TBFAV that concern to modern law. There is another aspect.

Both the tension between freedom and coercion and that between positivity and legitimacy emerge in the very idea of the modern law. They do not emerge *from* the idea of law, because Habermas explicitly says, while talking about the legal form, which comprises as elements the four poles of the two tensions referred above, that it cannot be conceptually (or transcendentally) deduced and results from a social-historical process of societal modernization. But they emerge *in* the idea of law, because they form part of the self-understanding of modern legal orders. This self-understanding must be confronted with empirical explanations of the functioning of democracy, especially with those that raise doubts about the reality of the classic idealizations in democratic thought. This confrontation between self-understanding and empirical

models brings about a second kind of TBFAV, that Habermas calls "external tension" and is the main subject of Chapters VII and VIII.

For the aims of our paper, it doesn't matter how Habermas tries to develop and resolve those tensions, but it does matter the role that said tensions play in the structure of the method and argument of BFAN. It matters because we will, in point 5, insistently compare with that more advanced treatment of the TBFAV the considerably more simplistic and naïve version of it that Habermas applies to the judicial procedure, that we will now present in point 4.

4. TBFAV in the Judicial Procedure

As we said in the Introduction, the judicial procedure makes its first appearance in BFAN in Chapter V, dedicated to the indeterminacy of law and the rationality of jurisdiction. At that point, the judicial process is invoked as the discursive substitute of Dworkin's monological judge Hercules, the dialogical process capable of setting him free from his argumentative solitude and theoretical autism. Habermas's argument goes like this: judges must apply the law respecting the deontological character of the subjective rights and reinterpreting law as a whole in search for the only right answer – Dworkin is right about that; but they must not rely in a contextual substantial liberal morality neither construct, compare and select imaginary interpretive theories about legal rights – Dworkin is wrong about that; instead, they must rely on the discursive character of the judicial procedure and recur to pre-interpretations of rights in the paradigm of law that they belong to – that would be Habermas's reformulation of Dworkin, taking Hercules away and replacing him with the legal discourse in a micro (judicial procedure) and a macro (paradigms of law) level.

The judicial procedure, therefore, places Dworkin's interpretive practice into a discursive frame. The fact that the judicial procedure plays the role of a discursive corrective and counterbalance in Habermas's argument of Chapter V explains why the TBFAV that Habermas applies to the judicial procedure in particular is far less demanding and critical than the one that he applies to law in general. When he says something about the TBFAV in the legal procedure, that is what he says:

In the administration of justice, the tension between the legitimacy and positivity of law is dealt with *at the level of content*, as a problem of making decisions that are both right and consistent. This same tension,

however, takes on new life at the pragmatic level of judicial decision making, inasmuch as ideal demands on the procedure of argumentation must be harmonized with the restrictions imposed by the factual need for regulation (BFAN 234, emphasis in the original).

So, similarly to what happens with law, the judicial procedure presents two internal tensions: at the level of product (that Habermas refers to as the *level of content*) the tension is between correction and consistency; at the level of process (that Habermas refers to as the *pragmatic level*), the tension is between argumentation and regulation. Besides, Habermas treats the first tension in the judicial procedure (at the level of product), that is, that between correction and consistency of the final decision, as resulting from the second tension in law (at the level of process), that is, that between positivity and legitimacy. Although Habermas says nothing further, we can suppose that what he meant is that the demand for the law to be rationally acceptable (legitimate) converts into the demand for the judicial decision to be rationally acceptable (correct), while the need of law to be determinate (positive) converts into the need of the judicial decision to be corresponding to the existing law (consistent)[2]. At the level of process, Habermas brings about a new tension, now between argumentation and regulation. The judicial procedure is conceived of as a discourse, not idealized and diffuse, but actually realistic and institutional. Because of that, the judicial procedure must take the form of a regulated discourse, with the regulation at the same time embodying and limiting the ideal conditions of discourse with its temporal, social, and material determinations. That tension ends up being between normatively ideal and empirically possible.

5. Shortcomings of Habermas's Formulation

We said that the role of discursive corrective and counter-balance that the judicial procedure plays in Habermas's argument in Chapter V

[2] There is no explanation of why the level of product of the judicial procedure is not related instead to the level of product of law, that is, to the tension between freedom and coercion; one might think that the judicial decision, in order to be correct, ought to be freedom-protective, that is, right-based, while, in order to be efficacious, ought to be coercive, for a judicial decision is nothing but a norm, one with strict limits of content given by the laws; Habermas, however, gives no account for that relation between the level of product of the law and that one of the judicial procedure neither appears to take seriously the consequences of the fact that the judicial decision is also a norm.

of BFAN explains why the TBFAV applied to the judicial procedure in particular is far less demanding and critical than the one applied to law in general. In the current section of the paper, we will make more clear many of the shortcomings of Habermas's formulation of the tensions typical to the judicial process.

First, Habermas's approach depends on the controversial claim that the judicial process is a discourse. Habermas argues that, although the plaintiff and defendant are invested in pursuing their own interests, they have to formulate their claims and arguments *as if* they were contributions to the discovery of the right answer and the judge, as an uninterested part, has to consider their speeches only from the point of view of that cognitive value. Apparently, the interaction between plaintiff and defendant is something like a strategic relation that is institutionally constrained to take the form of a communicative relation and that has their contributions taken and evaluated *as if* that performative cooperation were true.

Well, we now see that, if the judicial procedure is to be taken as a discourse, that means that the conception of discourse employed here is far away from (not to mention at odds to) that cooperative search for the truth with intelligibility, sincerity, freedom, and equality that turned Habermas's discursive ethics worldly known in the 70's. For this discourse that we find here is not only institutionally limited and constrained, but also open to all kinds of manipulation, falsification, coercion, and inequality under its pompous veil of discursivity. But nothing of that appears to be a serious obstacle for the classification of the judicial procedure as a discourse, as long as the parties play their characters and the impartial judge redeem the relation from all its sins by simply and naively taking seriously its make-believe.

The objections against that claim are many and from different kinds. In the judicial procedure, the speakers don't try to convince each other, but a third party, and the decision is not the product of their learning and consensus, but an act of decision and authority taken by the judge. In the judicial procedure, the parties have most of the time formally the same opportunities and terms, but material differences of means and of judicial bias produce serious distortions and inequalities. In the judicial procedure, the real parties, plaintiff and defendant, barely understand the language in which the debate is given and the measures that their counselors take throughout the process. In the judicial procedure, the parties retain evidences or facts that the other cannot prove to exist or be true, they rearrange their testimonies to make them suitable

to their interests, they omit, distort, simplify, amplify, seduce, manipulate, mislead, deceive, pretend and give the facts so many faces and cuts to the point where truth ceases to exist, or to be recognizable, or even to matter. Some of those distortions are possible within the law, some of them are possible despite the law, but all them are possible with the knowledge, acquiescence, and connivance of the law. That makes very difficult to defend that the judicial procedure is a discourse.

The second shortcoming of Habermas's formulation is that the TBFAV in the judicial procedure suffers a *deficit of facticity*. Looking back at the TBFAV in law in general, we see two poles of facticity, that is, coercion and positivity, that represent non-normative, factual features necessary for the certainty and efficacy of the law and solid limitations to the normative claims of freedom and legitimacy. They are factual conditions that are also factual limits, a sort of resistance against the claims of validity from the part of *rival* claims. But, if we look ahead again at the TBFAV in the judicial procedure, the two new poles of facticity, that is, consistence and regulation, are not non-normative, factual features and do not raise a rival claim. On the one hand, consistence is agreement to the law, which, in modern law, is not a limitation on the correction of the final decision, but is rather a part of what means for a legal decision to be correct. *Legal* correction demands consistence, for a legal decision would be *less* (not more) correct without its agreement to the law. Consistence is more of a *component* of legal correction than a rival claim against it. On the other hand, regulation might be considered a genuine limit on the logic of argumentation, for the argumentation would be more realized if the regulation did not impose limits of time, space, themes, persons, and evidences and the debate could take whatever form it needed to and keep going for as long as it takes. By limiting the factual argumentation, regulation comes as a condition for the judicial procedure to have an institutional realization and to provide the parties with a solution for their controversy. It is not that regulation satisfies any purpose other than understanding itself, but rather that it gives argumentation the necessary conditions and limits for an empirical manifestation. In that sense regulation is not a rival claim, but rather a limit on the normative claim as a factual cooperative condition to make it happen in the world. Being consistence a normative requisite and being regulation a factual cooperative condition, both poles of facticity in the judicial procedure exhibit, comparing to the ones in law, a serious deficit of facticity.

This problem of a deficit of facticity is aggravated by a third problem, which is the lack of an external TBFAV. In law, both the tension

between freedom and coercion and the one between positivity and legitimacy are aspects of the internal TBFAV, that in turn is complemented by another tension, that Habermas calls "external": the tension between the self-comprehension of the modern legal orders and the empirical realization of democratic processes. This external tension is crucial for a critical-theoretical approach that seeks to go beyond both a normative philosophy detached from reality and an empirical realism blind to the normative aspects of the social (BFAN, Ch. II). By reconstructing the self-comprehension of modern law, Habermas makes the discourse theory to fill the gaps of the false dichotomies that the tradition deemed insoluble. By providing the self-comprehension of modern law with a believable conception of the empirical functioning of democratic processes, Habermas inbreathes the theory with some plausibility. But that concern is absent from Habermas's treatment of the judicial procedure. There the tensions within the self-comprehension of the modern law are all that he deals with. Apparently, one century of philosophical criticism and empirical denunciation against the idealized conception of the judicial procedure as an impartial and rational decision-making have not sufficed to warn Habermas against the perils of taking the self-comprehension of the judicial procedure to be true without proper evidence. Habermas trusts in the argument of the discursive character of the judicial procedure more than would be advisable or justified for a critical-theoretical approach.

Finally there is a fourth problem with Habermas's formulation of the TBFAV in the judicial procedure, which is its *diagnostic deficit*. A critical theory is supposed to give a diagnosis of time, spotting trends of domination and potentials of emancipation in a concrete epochal context. Now Habermas's formulation is not a complete critical theory of the judicial procedure, so it seems inappropriate to demand from it diagnostic power. However, in a critical theory the theorist must formulate a concept or treat a phenomenon taking account of its implications for a social diagnosis. That's why we should consider unsatisfactory conceptual choices that, when faced with the social context in question, appear to give no critical standpoint to evaluate its scenario and trends. In the case of the judicial procedure, the major trends of our time are, as far as we see it, the standardization of jurisprudence, the turn to forms of alternative dispute resolution (ADR), and the judicialization of politics (which we will speak about in the next section of the paper), none of which not even begin to be critically analyzed by the tensions between correction and consistence and between argumentation and regulation.

6. Proposal of Reformulation

Considering the above explained shortcomings of Habermas's formulation of the TBFAV, we find necessary to depart from a reformulated version of it. In this section of the paper we will present our proposal of reformulation and show how, in our opinion, it surpasses Habermas's in every one of the indicated shortcomings.

For solving the problems of the naïve assumption of the discursive character and of the facticity deficit, we propose to replace the poles of the TBFAV in the judicial procedure. At the level of the product, instead of a tension between correction and consistence, we propose a tension between *legal correction* (that includes consistence) and *social functionality*. With *legal correction* we mean that the final decision is supposed to be the most rationally acceptable solution for a particular case within the limits of the existing law. It does not insist in the false opposition between correction and consistence, but rather takes consistence as a component of the legal correction. With *social functionality* we mean the extralegal political, social, and economic consequences of the decision that can be taken in account by the judges and the public as a competing claim against legal correction, that is, as a extralegal reason not to make the most legally correct decision. By conceiving of the social functionality as grounded in extralegal consequential reasons, we provide the judicial procedure with an anti-discursive force and a feature heavier in facticity. With the idea of a tension between legal correction and social functionality we refer to the tension between (a) the decision as a sole result from the elements within the existing law and the case in question and (b) the decision as a means to effect some ends in a particular way rather than other. In a way, this tension mirrors that one in Austin and Searle's speech acts theory between illocutionary meaning and perlocutionary effect, which in Habermas is related to the dichotomy between strategic and performative use of language.

At the level of the process, instead of a tension between argumentation and regulation, we propose a tension between *institutional argumentation* (that includes regulation) and *institutional decisionism*. With institutional argumentation we mean the purpose of the judicial procedure to be a cognitive search for the correct answer within the institutional limits of legal regulation. Again, instead of insisting in the opposition between argumentation and regulation, we take regulation as a necessary condition for the sort of argumentation that takes place

in institutional contexts. With institutional decisionism we mean the claim of the judicial procedure to be an authoritative exercise of political power to say the last word and put end to a social conflict. By conceiving the institutional decisionism as related to political authority and power, we provide the judicial procedure with an anti-discursive force and a feature heavier in facticity. With the idea of a tension between institutional argumentation and institutional decisionism we refer to the tension, much known in the history of the theory of the judicial procedure, between knowledge and power, *cognitio* and *voluntas*, truth and authority, that is, between (a) the judicial procedure as a search for justice and (b) the judicial procedure as an exercise of power. Now the closest relation would be with Habermas's dichotomy between communicative and administrative power (BFAN, Ch. IV), both of which must be recognized to be present in the judicial procedure.

Still in our reformulation, we would add to both internal tensions an external one: between the self-comprehension of the judicial procedure and its empirical realization. Here we would have the proper space and chance to welcome criticisms and denunciations against the idealized conception of the judicial procedure formulated by both the legal realist movement and the social sciences. It would be necessary to respond to such challenges by proposing a believable empirical model of the judicial phenomenon capable of retaining the constitutive force of the idealizations without losing grip of the critical point of view on the subject. We must not dismiss at the outset the critical studies by using something like a trick of words, sustaining that they have not understood correctly the discursive character of the judicial procedure. Instead, we must distinguish which of those studies can be incorporated or translated to a critical-theoretical point of view and which are too dependent on reductionist behaviorism, raw realism, and blatant noncognitivism. Themes such as unequal access to justice, judicial bias, jury manipulation, and the preservation of the judicial status quo cannot be ignored by any serious attempt of critical theory on the subject.

Last, but certainly not least, is the diagnostic power of our reformulation. As we said briefly earlier, there are three contemporary phenomena that we consider to be the major trends concerning the judicial procedure in our time: the standardization of jurisprudence, the turn to forms of alternative dispute resolution (ADR), and the judicialization of politics. Our demand was that the formulation of the TBFAV in the judicial procedure provided at least a critical standpoint to evaluate each of them. Now we will speak of them and of how our reformulation helps

to assess them from a critical-theoretical point of view.

The standardization of jurisprudence is a trend, observed in legal systems both in the common law and in the civil law traditions, to submit the judicial decisions of lower courts to standards previously established by higher courts. The aim is to reduce the time spent with repetitive cases and to prevent scenarios where the decision made by the lower court would have no chance of prevailing in the appeal stage given the already solidly established decision standard of the higher courts. That saving-time policy is usually justified by saying that equal cases must have equal decisions and that a late justice is another form of injustice. Translated to the language of rights, those reasons would be formulated as the right, belonging to the parties, to be treated equally and to have their cases decided as soon as possible. A critical theory of the judicial procedure must give tools to evaluate this trend and its alleged reasons.

We consider that the tension between argumentation and decisionism has something to say about that trend. From the angle of argumentation, a legally correct decision must treat parties in equal cases equally, providing, in the ideal scenario, equal responses for their claims. However, the correction of the decision depends on the consideration of the arguments raised by each party in each case. The standardization of decision provides equality of results, but not of opportunity to interfere in the final decisions. The arguments of some parties will be heard, but the arguments of others will simply be assumed as not more relevant than the first ones and will remain unheard. By standardizing the decision for a type of case, the courts freeze the state of discussion in a particular point of the flow, denying the nature of open learning process implicated in the constant retake of the case. At the same time, from the angle of decisionism, solving multiple cases with a single decision-making is valued, with the standardization of decision representing a fantastic means to that end. Although the subject requires further examination, the appearance that we are before a case of celebration of decisionism over argumentation is very bright and transparent.

As for the turn to forms of alternative dispute resolution (ADR), we refer to the welcoming of methods of conflict-solution diverse from the regular jurisdiction, such as arbitration, mediation, conciliation, negotiation etc., in many legal systems in the world. Although these ADR's have many differences among them, they all have in common the preference for a type of solution negotiated and consented by the parties themselves, with or without a third party, instead of by the judge

through the mere application of the existing law. The justification for the turn to the ADR's consist in criticisms (functional and normative) to the regular jurisdiction, functional arguments about costs, time, and efficacy, and normative arguments about participation, dialogue, and consent. Not all the arguments listed can be translated to the language of rights. But some of them, if translated, would result in the following claim: citizens, even before being converted in parties in a judicial procedure, have the right to negotiate their interests with each other and to settle their own conflicts in the way they find is best. Put that way, the claim that supports the ADR's sounds not only plainly acceptable, but also an important increment to the discursive and inclusive character of the legal decision-making.

But the scenario changes dramatically its colors as soon as the trend in question is examined from the point of view of our proposed tension between correction and functionality. From the angle of correction, a decision must be the most rationally acceptable solution for a particular case within the limits of the existing law. So the problem an ADR creates is double: on one hand, it disconnects the solution for the case from the existing law, cutting off the link between the decision in a particular case and the democratic will embodied in the laws; on the other hand, it embraces a strategic use of reason and language, for the "dialogue" that it promotes is not a cooperative search for the correct answer, but an exercise of negotiation with the advances and retreats typical of the calibration of interests. In lieu of the most rationally acceptable solution for a particular case within the limits of the existing law, it invites the parties to come to an agreement that is not a consensus, but rather a compromise. From the angle of functionality, the ADR's are not only sustained on extralegal reasons like costs, time, and efficacy, but encourage the very parties to deploy functional, extralegal reasons to come to an agreement about their particular interests. Again, although the subject requires further examination, the conclusion that in this turn towards the ADR's there is a risk of functionalization of law appears to be very likely.

From the three trends in question, the judicialization of the politics is maybe the most tortuous to be dealt with. In the sense that is most relevant for our debate, this phenomenon consists in the search for the judicial procedure to impose on the state the concrete obligation to promote a certain public policy or to realize for the individual in a particular case the abstract right that he or she would have had satisfied only by means of a public policy. The justification of this trend is normally

made on the basis that the constitutional lists of rights make promises to the individual citizen which the state is charged to fulfill and that, owing to deficits of political representation, this individual citizen finds less and less in the traditional political channels and institutions efficacious means to make it happen. The judicial power would have the opportunity and the duty to make democracy more democratic by deploying its armed hand to coerce the state to be all its subjects deserve and expect it to be. In the language of rights, citizens cannot have the right to the end without having the right to the means to make it happen, if not through political methods, through judicial ones. Having a right would bring within itself the possibility of judicialization in case of repeated refusal.

Now we think that both the internal tensions in the judicial procedure have some saying about the judicialization of politics. Besides the political problems of violating the separation of powers and of transferring from politics to law the decision on public resources and ends of the community, the judicialization of politics implies, from the angle of correction, the submission of issues linked to the realization of ends to the language of rights and duties and, from the angle of argumentation, the treatment of issues of general interest in a discourse that does not contemplate different voices and competing demands and does not gather neither listen to all the affected subjects. It would be a distortion of the type of discourse employed and a violation of the rule of consulting all the affected. On top of that, the trend to judicialize political debates would be explainable from the angle of functionality and decisionism: what makes the judicial courts appealing for the politically misrepresented citizens is that, by resorting to functional, extralegal reasons, the legal discourse opens up for the wide range of motives in the argumentative spectrum of politics, while, by relying on authoritative decision-making, it gives the individual citizen the kind of power he or she usually feels deprived of in modern mass democracies. So, despite the obvious complexity of the subject matter, our reformulated version of the TBFAV in the judicial procedure gives clear signs of its diagnostic potential regarding this phenomenon in particular.

Certainly, much is still to be done in refining and developing our proposal of reformulation to Habermas's approach to the judicial procedure. From our point of view the TBFAV is a key concept for understanding and evaluating critically the judicial procedure in general and its contemporary trends in particular. But, precisely because of this crucial relevance, it requires a formulation that exempts it from the criticisms that Habermas's is vulnerable to and enables the critical-theoret-

ical thinker to have a relevant saying about some of the major trends of our time.

References:

BAXTER, Hugh. *Habermas: The Discourse Theory of Law and Democracy*, Stanford, CA: Stanford University Press, 2011.

DEFLEM, Mathieu. *Habermas: Modernity and Law*, London: SAGE publications, 1996.

DWORKIN, Ronald. *Law's Empire*, Cambridge MA: Harvard University Press, 1986.

HABERMAS, Jürgen. *The Theory of Communicative Action. Vol. I: Reason and the Rationalization of Society*, T. McCarthy (trans.). Boston: Beacon, 1984. [German, 1981]

HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg (trans.). Cambridge, MA: MIT Press, 1996. [German, 1992]

ROSENFELD, Michel; ARATO, Andrew. *Habermas on Law and Democracy: Critical Exchanges,* Berkeley CA: University of California Press, 1998.

Law and Music
Human Rights protection and the song "Dom Quixote"

Ariane Shermam Morais Vieira
Rosana Ribeiro Felisberto

Abstract: Just like Don Quixote, fighting windmills for the love for the causes he believed in, even if they were lost, Law also fights for ideals of solidarity and implementation of fundamental rights, which, today, permeate the Brazilian Constitution. Trough the story of the knight-errant, the song "Dom Quixote", from the Brazilian band Engenheiros do Hawaii, portrays its title character as someone outside the social context or the reality that surrounds him, a kind of "fish out of water." Notwithstanding the lost causes he fights for, sometimes the character Don Quixote realizes that the Giants are just windmills. In this context, Don Quixote, the character, can be related to issues and problems faced by the fundamental rights. The situations in which the fundamental rights and their defenders are faced with obstacles and realities that differ from their ideals are not rare, but they persist in the pursuit of their goals, even knowing that the fight, at that particular moment, will not bring an immediate result. The daily fight against the imaginary giant reflects the conservatism and immobility of ideas from institutions and legal institutes present in our juridical order. Some faithful squires still remain by the "juridical Quixote"' side, allowing him to fight legal battles and follow his path in pursuit of his ideals, without completely leaving reality, transforming it (the reality) without losing the soul of a knight.

Key words: Human rights protection. Music.

1. Introduction.

The theme of Human Rights has gained increasing importance nowadays. The international covenants and treaties celebrated to implement and consolidate human rights are increasingly numerous and comprehensive, involving more countries and non-governmental organizations around the world.

Given the attempt to extend and expand Human Rights around

the world, some questions arise about its real effectiveness. The claim to universality, despite the dialectical discussion between universalism x relativism, attaches great importance to the issue, bringing out efforts to implement human rights in places and communities that do not recognize them consistently.

The struggle for the realization of human rights, however, cannot enforce arbitrary impositions, because it would be acting against its own essence. Thus, the role of organizations and institutions that defend and expand the application of human rights remain in a constant struggle, often without great possibilities of real change in the factual situation. Still, just like Quixote, hopeful and hungry for achieving his acts of bravery and heroism, these entities face, in a daily basis, the giant windmills that prevent the development of Human Rights.

2. Human Rights.

Boaventura de Sousa Santos (1997), before the emergence of what he calls "emerging paradigm", proposes a new approach of Human Rights, so that they can be implemented in a cosmopolitan project.

According to the aforementioned author, human rights should be viewed from a multicultural conception, within which different cultures are taken into consideration, not just tolerated, so that interculturalism can be built.

Given this perspective, the author lists some assumptions for the implementation of a cosmopolitan vision of Human Rights. Among these assumptions, the author cites the overcoming of relativism X universalism debate: all cultures have notions of what is human dignity, although not all of them deal whit it in terms of human rights; all cultures are incomplete and problematic; all cultures tend to distribute individuals into groups of equal and different.

Continuing his explanation, the author points out that, from the assumptions cited above, one can think of an expansion of human rights and thus on its implementation in more locations. Hence, he proposes the possibility of universal human rights, understood as having a multicultural facet.

Additionally, the internalisation of the idea that human rights are multicultural and that no culture is superior to another, given the existing differences between them, would allow the achievement of a "counter-hegemonic globalization", to the bottom-up, and not vice ver-

sa, as we see nowadays .

As can be seen, the considerations made by the Portuguese author reinforce the idea brought by Bobbio (2004), that the great problem of human rights today is not exactly its fundamentals but, mainly, its effectiveness . This would be visible by the fact that human rights are widely accepted by various international covenants and treaties and turned into rules by the constitutions of many states. This acceptance of human rights, however, does not guarantee its implementation.

3. Human Rights' Background and Implementation.

The need to implement and expand human rights led to the creation of international and legal mechanisms, to allow the supervision and promotion of said rights. It is with this objective that international agreements are signed and systems of protection and defense of human rights are created.

Among the international human rights treaties, the following can be highlighted, given their importance: Convention against Torture; Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Indeed, to implement the rights contained in the covenants and treaties on human rights, protection systems were created, among which we can highlight the International System of Protection of Human Rights, which involves the creation of international courts and the creation of mechanisms for international monitoring on the subject. Regional systems, such as the Inter-American System of Human Rights, and locations for the promotion of human rights were also created.

These systems of protection and defense of human rights also rely on states' responsibility to create internal bodies whose goals are to monitor and promote human rights and to expressly adopt domestically standards that are consistent with international human rights system.

For instance, agencies, observatories and non-governmental organizations play an important role in the defense and promotion of human rights, acting directly to implement them or watching over their implementation, reporting and denouncing disrespect for human rights to the competent authorities, so that they are able to adopt the appropriate measures.

Internally, in Brazil, in addition to the international covenants

and treaties celebrated, the Constitution of 1988 expressly establishes, in the third paragraph of its fifth article, that any pacts or treaties signed by the country regarding human rights will be equivalent to the constitutional amendments and, therefore, will not be subjected to revision, being placed above the ordinary law. It should be noted that Brazil also has government agencies and non-governmental organizations working in the defense and promotion of human rights.

The country also develops what is called "Multi-Year National Plan on Human Rights", according to which the guidelines and policies to promote the protection and implementation of human rights are set .

Despite all the positive legal predictions in Brazil, regarding the implementation of human rights, the reality shows that there is still a lot to be done to achieve a satisfactory level of implementation of human rights in the country. The permanent, though often precarious, performance of non-governmental organizations is revealing in this respect. These entities face great obstacles to the implementation of human rights in the country.

4. The song.

The song chosen to illustrate the status of the implementation of human rights in Brazil "Don Quixote", form the Brazilian band Engenheiros do Hawaii.

The song title is the same as the literary work of the writer Miguel de Cervantes. The identical names are not mere coincidence. The musical work portrays a character full of ideals, who lives on a journey seeking to achieve great heroic deeds.

The main character and his actions, however, do not fit the reality of the world around him. The Quixote from the aforementioned song, just like the Quixote created by Cervantes, is a "fish out of water", a "butterfly in the aquarium", a person "who lives battling "giants (windmills)." As the song says:

Muito prazer, meu nome é otário
Vindo de outros tempos mas sempre no horário
Peixe fora d'água, borboletas no aquário
Muito prazer, meu nome é otário
Na ponta dos cascos e fora do páreo
Puro sangue, puxando carroça

Um prazer cada vez mais raro
Aerodinâmica num tanque de guerra,
Vaidades que a terra um dia há de comer.
"Ás» de Espadas fora do baralho
Grandes negócios, pequeno empresário.

Muito prazer me chamam de otário
Por amor às causas perdidas.

Tudo bem, até pode ser
Que os dragões sejam moinhos de vento
Tudo bem, seja o que for
Seja por amor às causas perdidas
Por amor às causas perdidas

Tudo bem... Até pode ser
Que os dragões sejam moinhos de vento
Muito prazer... Ao seu dispor
Se for por amor às causas perdidas
Por amor às causas perdidas

(Quixote – Engenheiros do Hawaii)

As can be seen, the constant struggle of the main character puts him in an adverse position, since he fights for the "love of lost causes". The obstacles this character face may not be real, but he still fights them. Heroism, here, has much more to do with picking up fights than with overcoming and defeating all the ordeals that arise.

Likewise, the human rights defenders mentioned in this essay face "windmills", especially when it comes to expanding and making their ideals effective.

5. Human rights protection and final considerations.

The protection of human rights has expanded in recent years. Internationally, treaties and covenants become increasingly important. The number of organs and organizations destined to protect human rights has also grown lately. But despite the increase in defense agencies and dissemination of human rights, its implementation still leaves much to be desired.

Reports on Human Rights observatories constantly point out

transgressions and serious disrespect for human rights around the world, frequently mentioning Brazil.

The claim of universality of human rights is also recurrent, but its effectiveness does not reach a significant number of victims to daily transgressions.

Given the considerations above, it becomes clear why the defenders of human rights are compared to the character Don Quixote in this essay. Theses defenders constantly struggle against a number of factors and human rights transgressions, guided by the ideal of defending the vulnerable, without, however, being able to achieve their goals in terms of effective and universal implementation of human rights .

The universalization of human rights seems to remain as an ideal, without practical meaning. Nevertheless, the defenders of human rights continue to fight against the lack of resources and lack of effective mechanisms to implement their objectives.

Indeed, the human rights defenders struggle daily against " windmills ", just like " butterflies in the aquarium", in the search of a world that still needs to commit to the achievement of human rights protection systems outlined in the national and international legislation .

References

BRASIL. Constituição (1988) Constituição da República Federativa do Brasil. Brasília: Senado, 1988. Disponível em <www.presidencia.gov.br> Acesso em 20 set. 2013.

BOBBIO, Norberto. *A era dos direitos*. Tradutor: Carlos Nelson Coutinho. Nova ed. Rio de Janeiro: Elsevier, 2004. 232p.

_____ *As Ideologias e o Poder em Crises*. Tradutor: João Ferreira. Brasília: Editora Universidade de Brasília: São Paulo: Polis, 1998. 240p.

BONAVIDES, Paulo. Ciência Política. 11. ed. São Paulo: Malheiros, 2005.

CANÇADO TRINDADE, Antonio Augusto. A proteção internacional dos direitos humanos. São Paulo: Saraiva.

COMPARATO, Fábio Konder. A afirmação histórica dos direitos humanos. SP: Saraiva.

PIOVESAN, Flávia. Direitos Humanos e Jurisdição Internacional. São Paulo: Saraiva.

GUSTIN, Miracy Barbosa de Sousa. Das necessidades humanas aos direitos: ensaio de sociologia e filosofia do direito. Belo Horizonte: Del Rey, 1999. 230p.

OST, François. O tempo do direito . Trad. Élcio Fernandes. Bauru, SP: EDUSC, 2005. 409p.

PIZZORNO, Alessandro. Introduccion AL Estúdio de La Participacion Politica in PIZZORNO, Alessandro; KAPLAN, Marcos; CASTELLS, Manuel. Participacion y cambio social en la problematica contemporanea.Buenos Aires: Siap-Planteos, 1975. 173p

The pursuit of recognition of deficient citizens:
The privileged example of the (lack of) urban mobility

Álvaro Augusto Lauff Machado[1]
Adriano Sant'Ana Pedra[2]

Abstract: A disabled citizen - jettisoned of the social environment not only because of their biological conditions, but especially by a selfish-individualistic posture of Brazilian society - finds, in the current context, an entire normative content that brings the guarantee that its inclusion is a fundamental right, valuing himself/herself, in this test, the guarantees forecasts and expressed of urban mobility as a means of promoting of this recognition. However, the right, while the recognition phase, it is not sufficient to satisfy such guarantees to the person with a disability, should be associated with stage of solidarity, both studied by the theory of recognition of Alex Honneth. Nonetheless, given the poor understanding of the rights this bond is not established, reason why it will be sought to introduce constitutional hermeneutics, philosophical-oriented, as a bridge to set up this link and make the guarantees of the right, under an optical sympathizing, finding ways to be fully implemented and not justifying, with this, the observed deficit of urban mobility measures in Brazil.

Keywords: Disability, urban mobility; Recognition; Application; Hermeneutics.

[1] Master applicant in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Post-graduate degree in Tax Law (FDV). Lawyer. E-mail: alvaro@appa.com.br. Curriculum Vitae: http://lattes.cnpq.br/9507558208232675.

[2] PhD in Constitutional Law (Pontifícia Universidade Católica de São Paulo – PUC/SP). Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Professor of Constitutional Law at Faculdade de Direito de Vitória – FDV (bachelor, master and doctoral program). E-mail: adrianopedra@fdv.br. Curriculum Vitae: http://lattes.cnpq.br/0637600349096702.

1. Introduction

The physical and biological condition of the human being has always been, throughout history, a factor considered for his/her inclusion or exclusion in the society. One who holds some kind of disability suffers from barriers and limitations to exercise his/her citizenship, not there only comprised as political rights, but as a proper means of externalization of his/her human dignity. He/she does not have full access to the work, because it is not believed (neither it´s offered means for it) that he/she is able to do it, nor does he/she have access to a variety of public spaces, by the very absence of ways to its accessibility, among many other negative.

It can be said that it is promoting a jettisoning of the people who do not enjoy their full motor capacity, sensory and mental health and are therefore not recognized by any kind of law, civil and / or political.

It happens that this perception of the disabled as a naturally excluded human being, has been mitigated and tackled in the course, especially in the last century, from which time began to emerge on the international scene (at least) a political-social-economic agenda oriented to the study of inclusive measures that could break the previous paradigm.

This occurs, first, because of the natural medical science advancement that can bring new explanations for the various disability forms and also begin to promote researches diagnosing the public and private *deficit* in the actions that should be adopted in the benefit of those citizens.

Second, and in a follow up of the new paradigm that forms, it begins to emerge normative forecasts of international law and domestic law which entail the assignment of disabled guarantees, especially the advent of the 1988 Constitution.

Here it is, then, the research scenario: individuals who naturally lived in a context of exclusion now have warranties, formal, of citizenship in which, reflex pathway, should correspond to an entire social performance, public and private, in favor of their inclusion, promoting therefore their recognition as a citizen.

But the normative predictions, even diluted in various "sources of law", by itself, do not bring, automatically, the guarantee of this recognition on citizen behalf, whereas, although the guarantees for the disabled inclusion are established in the programmatic content of the paternal order, they are still not present in the sociopolitical agenda of

such theme.

Hence the first discussion about the (in) sufficiency of law such as (second) stage of recognition, and the need for its analysis dialogued with solidarity, the next step, and last, of the struggle for recognition, following the work of Axel Honneth.

This is because, it turns out that the lack of recognition of disabled citizen derives not only, of course, from legal issues, but mainly from a deficit prestacional of the State and of all the society, is, thus in a social conflict that underlies the need that this guy, carrying biological limitations, has to insert himself into everyday life in a society which he can be part, without those same biological limitations exert any harm in his exercise ability of citizenship.

Thus, the analysis of this social conflict goes, because, by the overcoming of mere legal perspective, being fundamental the solidarity and community understanding that should meddle in the interpretation and application of all guarantees provided on disable behalf.

Then, carried out an analysis of the relevance of the association of solidarity to the right for an effective disabled inclusion and overcoming of their recognition deficit as a citizen, we verify that a reading from a model liberal-individualist-normative law and society itself are not sufficient to meet such intent.

There is a need, then, to identify a way which can then establish this link between law and solidarity and that surpasses the understanding of the actual dogmatic normative legal sciences.

By virtue of this, we try to enforce the constitutional hermeneutics, philosophical-oriented, as a vector that can be promoted to an interpretation, understanding and application of the guarantees of disabled citizens by establishing a bridge between the right and solidarity, aiming to a means of overcoming, at least perambulating, the crisis of recognition that it is established.

Framing up, so the question to be tackled: recognizing the deficit of urban mobility and intermittent struggle of disabled citizens seeking for their recognition, despite formal guarantees provided by the law, can a bridge between the right and solidarity be established as stages of this struggle for recognition, from the philosophical hermeneutic-oriented as a means to bring more efficiency to these guarantees?

It is noted, at least in this introduction, that, since then from the hermeneutics it can be promoted a constant (re)questioning from the right front of the other issues that involve their own social, political, economic life, and why not biological, of the human being. And in these

cases, where there is a clear deficit of recognition, evident that the entity and objectiveness postures of law do not meet the preferring problem, on the contrary, ignore it.

2. Disability and the deficit policy for urban mobility in Brazil

The deficiency, whether it is physical, sensory or mental, brings to the human being, for natural reasons, limitations that non-carries people would not have. But that, by itself, is not a logical corresponding to say that they cannot (ou can not) also have a regular social life.

Rather, the problem of disability is not in the disabled himself, but in the (not) eyes of the other that, in a indifference posture, lack to check that it can be promoted measures for citizen insertion, although he may not enjoy his full biological capacity .

Thus, before the issue of disability was seen from the biological structure which did not recognize any measure of achievement and the disabled inclusion, eternally hostage to its inability, today the issue of lack of recognition and affirmation of the disabled inability do not get more on the level of medical science, but from the very social understanding about disability. Foucault asserts that

> If, in the 19th century, the biomedical discourse represented a redemption to the body with impediments in front of religious narrative of sin or the divine wrath, today is the biomedical authority that sees contested by the social model of disability. (2004, p.18)

The condition of people with disabilities, in this perspective brings with it a distancing of citizens among themselves, in a clear (conflict) social exclusion process. This takes place from the formation of individuals *standardizing* model in a true physical standards, aesthetic and intellectual worship. One who avoids this pattern, albeit with minimum levels, suffers from a species of jettisoning which therefore becomes even more evident when this difference is due to a physical disability.

It is the object prestige while thing, leaving to observe himself another, as individuals. The absence of a citizen Community posture among themselves that, within the present liberal-individualist-consumerist model, concentrates all their interests only to the object. Baudrillard (1981, p.15) asserts that

> We live in the time of objects: I mean we exist according to their pace and in line with its permanent succession. Currently we are the ones who see them born, producing themselves and die, whereas in all other previous civilizations the objects, instruments or perennial monuments, were the ones which survived to the human generations.

This reading is done in the foreground, to observe that the exclusionary posture happens whether somewhat natural in this context, promoting a shift away from the disabled, not by biological issues, but, on the contrary, by socioeconomic and cultural issues.

The disability then gain an understanding that reveals, thereafter, that the reduction in its "limitations" involves the need of warranties and a sympathizing reading. It is not the nature that limits citizens with disabilities, but the cult of normalcy that makes this individual, deficient, be conceived as an undesirable body.

Hence there is the assertion that

> What defines a disabled person is not the lack of a member nor the reduced vision or hearing. What characterizes a person with a disability is the difficulty of relating, the difficulty degree to integrate in the society. The difficulty degree for social integration is to define who is or not a disabled. (Araújo, 2012, p. 01)

The disabled exclusion and, especially, the suffering that a disabled citizen might have is, first and foremost, in the absence of accurate recognition, hence the need to be optimized measures that overcome these problems.

That's because, the studies addressed to such questions have always been ignored from the political and especially legal perspective, punctuating Débora Diniz, Livia Barbosa and Wederson Rufino dos Santos (2004, p. 65) that

> Inhabit a body with physical, sensory or intellectual impediments are one of many ways of being in the world. Among the narratives about inequality that are expressed in the body, studies that are expressed in the body, disability studies were those that later emerged in the field of social sciences and humanities. [...]
>
> The normality, understood either as a biomedical expectation functioning pattern of the species, now as a moral precept of pro-

> ductivity and suitability of social norms, was challenged by the understanding that disability is not only a biomedical concept, but the oppression by the body with variations of operation. Disability therefore translated oppression to the bodies with impediments: the concept of a disabled body or a disabled must be understood in political terms and not more strictly biomedical.

Thus, in political terms, it has to be one of the ways of inclusion and therefore of recognition of this citizen is the promotion of effective measures that pays attention to urban mobility. Through these inclusive policies it will be able to establish the first and indispensable guarantee to disabled citizens: their ability to move and thus independence and autonomy.

This remained evident in a study published by the School of Nursing Journal USP (PAGLIUCA et al, 2012, p. 587) who identified architectural barriers in internal areas of hospitals in sharp injury to the disabled, having concluded that the research is truly committed displacement to disabled people in Sobral public hospitals, CE (cut geographical research), checking for even the simplest forms of accessibility did not exist at the locations, such as ramps and adequate furniture. Random it did not exist such physical impediments, it was concluded that it would be very privileged the integration of disabled people in that environment.

The same conclusion was obtained by researchers in the field of Physiotherapy of Paraíba Federal University (Amaral et al, 2011, p. 1838), which, in a study with 532 people with disabilities, also analyzing the mobility of public hospital spaces, realized the need for expansion of services involving the promotion of urban mobility, as a guarantee of their own health and, in some cases, rehabilitation.

Regarding the relevance of urban mobility as a way of providing guarantees to the disabled, it says that

> Ensure the elimination of architectural barriers and duty regulations regarding construction of public parks and public buildings as well as the manufacturing of transportation vehicles is a matter of fundamental importance to people with disabilities, behold adequate access is literally the next step to achieve the other rights. (LENT, 2008, p. 937).

However, despite the urban mobility policies being fundamental and basilar ways for inserting the disabled in a social and community

context, there is a huge deficit of service provision, both public and private, in their promotion.

This, in addition to the evidence found in the aforementioned scientific research, is present in a daily reality of Brazilian citizens with disabilities, that suffer limitations since the time they go through the door of their home, go by the sidewalks and streets of the various cities of this country.

There are countless news published[3] in the most varied communication media reflecting the deficit of service provision of urban mobility in Brazil, and therefore the absence of (pre)occupation in solving such issues, whether in public environments, and even in private environments but which have, naturally, spaces for public access and common.

These are cases which occur throughout Brazil with people falling into holes, people with difficulties asserting their right (and duty) to vote, problems to access public transportation system and even physical impediments so that the person can have access to their own residence, especially in residential buildings.

One sees, therefore, that the exclusion of the disabled person is, today, eminently associated with sociopolitical issues, and not on account of its own biological limitation.

One of the ways of facing this question is with the implementation of public policies, which, in the Brazilian reality, are scarce. It is this deficit of service provision which leads to lack of recognition of these citizens. Therefore, "[...] as well as the racial issue, generational or gender, disability is essentially a human rights issue. [...]. "(Diniz, 2007, p. 79).

However, the provision of public policy on urban mobility does not depend solely, on prediction rules; it is not the right, that will solve, only in itself, the problem identified. It is necessary to check other issues

[3] By way of illustration attach to the following news from different electronic media:
a) http://noticias.r7.com/rio-de-janeiro/noticias/deficientes-fisicos-enfrentam-mais-de-10-obstaculos-diariamente-para-fazer-atividades-cotidianas-nao-editada-20450627.html;
b) http://noticias.terra.com.br/brasil/politica/eleicoes/sp-eleitores-deficientes-encontram-dificuldades-ao-votar,c7ba9782ac66b310VgnCLD200000bbcceb0aRCRD.html
c) http://m.g1.globo.com/espirito-santo/noticia/2013/01/deficiente-visual-cai-em-calcada-de-2-metros-de-altura-em-praia-do-es.html?hash=3
d) http://g1.globo.com/ceara/noticia/2012/09/deficientes-fisicos-nao-tem-acesso-ao-transporte-publico-em-fortaleza.html
e) http://g1.globo.com/bom-dia-brasil/noticia/2010/04/deficientes-fisicos-reclamam-das-dificuldades-no-brasil.html

that should be associated with the law as a means to promote the recognition of disabled citizen.

3. Disability as social conflict and the search for recognition: The right as a stage of recognition and an analysis of (crisis of) solidarity

Starting from the understanding that the disabled exclusion is given, nowadays, no longer just in virtue of his own biological limitation, but mainly because it does not adjust to the established *standards* of normality in society, it ends up revealing itself as a form of social conflict that leads to seeking for recognition of these citizens. After all, "the struggle for recognition is at the basis of all social conflicts" (SMITH, 2010, p. 53).

However, on the other hand, it is undeniable that the current historical context honors the maintenance of this conflict, fomenting, inevitably, the exclusion of those who can not be inserted in the current capitalist-individualist perspective. That's because "the social model holds that originally a body with impairments would not be able to exploration and production regime of capitalism" (Barton et al, 1997, p. 43).

Thus, the need for such recognition goes, therefore, through the search for a social integration, and more than that, "the struggle for recognition should then be seen as a pressure, under which permanently new conditions for participation in the public formation will come to light "(SAAVEDRA, 2006, p. 280).

The exercise of citizenship is one of the fundamental ways to the disabled recognition, but this struggle needs that new models are always (re)invented for the participation and enjoyment of this right (citizenship) keep afloat.

However, it is essential to recognize, first of all, that recognition presupposes a complex set of intersubjective relations. The recognition of the individual undergoes by one dimension, first, individual (self), and then advances to the intersubjectivity to be established with other individuals, in other words, with the other.

The individual understands himself so then establish a relationship with the other, seeking his understanding (intersubjectivity), being from that intersubjectivity that will promote recognition, which depends, therefore, of a social integration. Axel Honneth (2011, p. 155) states that

> [...] The reproduction of social life takes place under the imperative of mutual recognition because the individuals can only reach an autocorrelation practice when they learn to conceive themselves, from the normative perspective of their partners interaction, as its social recipients.

Honneth (2011, 155/213), in its turn, will establish that there are patterns and stages of recognition within this perspective of intersubjectivity. In response to this, Nelson Moreira Camata (2010, p. 57) states that

> The intersubjective recognition patterns occurs in three stages: (a) firstly, in the sphere of primary relationships, the way of recognition relates to love and friendship, (b) in the second, in the dimension of legal relations, the recognition identifies to the right, and, finally, (c) valuing community, the way of recognition is solidarity.

Thus, this intersubjective relationship, that promotes the recognition occurs since the earliest form of relationship that is love. The parents love with their children, the friendship. However, in this paper, we will overcome such analysis facing up, forward, two subsequent steps as ways of promoting the disable recognition under the optics of public policy for urban mobility.

The right, second stage, is verified as stage and way to promote the recognition from the time they are granted protection guarantees of citizens in their relations under the legal perspective. So

> The way of recognizing the right corresponds to the way of disrespect entitled deprivation of rights (Entrechtung) and in this sphere of recognition the component of personality that is threatened is that of the social integrity. (SAAVEDRA, 2006, p. 283).

The right, then, as a stage of recognition occurs to the extent that there are normative guarantees so that the social actor can postulate and require his recognition. The individual needs to realize, himself, as a holder of rights that enable his participation in public life. This is because, the social sphere is constructed from legal relationships.

In the recognition, from the law, are established bases for social relations (conflicts), to the extent that each individual respect, and is aware of the claims of other individuals can be legitimately exercised

and vice versa. It is an environment which exists a tension of intersubjectives claims, which can erupt at any time.

However, the normative prediction for the exercise and the legitimacy of such claims, in the disabled case, are already well established both in international law and domestic law, especially concerning the prestige to the urban mobility as a way of disabled insertion and, finally, their recognition.

The right to the disabled begins from a foundation of the Federative Republic of Brazil: citizenship (art. 1, II Brazilian Federal Constitution). This is because, from then, it is expected that there should be no restriction on political rights of any citizen, which reflex pathway, corresponds to a way of promoting human dignity and assure a life in society.

In the course of Constitution there are several predictions that guarantee rights to the disabled. The art. 7, XXXI prohibits disabled discrimination in the workplace; Art. 23, II provides for the common responsibility of federal agencies to treat health, public assistance, protection and disabled guarantee; Art. 37, VIII provides for the jobs reservation and government jobs for the disabled; Art. 203, VI provides social assistance to the disabled even for their rehabilitation and integration into community life as Art. 208, III foresees the need of specialized education to disabled.

The art. 24, XIX, in its turn, provides on concurrent jurisdiction of the Union, States, Federal District and municipalities to legislate on protection and social disabled integration while the art. 227, § 2 states that the law should avail on way to ensure accessibility to disabled.

There are, in its turn, federal ordinary law (Law No. 10.098/00) which establishes general standards and basic criteria for the promotion of accessibility of persons with disabilities or reduced mobility, which is also predicted in the most varied state and municipal normative vehicles. In the latter case, the very urban master plans of Brazilian municipalities already include urban mobility issues in favor of the disabled.

There is, therefore, in legal dogmatic, constitutional provision and infraconstitucional establishing more than enough ways so that urban mobility policies can be promoted for the disabled. This agenda is also present in discussions of international law, particularly from the International Convention on the Rights of Persons with Disabilities and its Optional Protocol thereof, both signed in New York, United States of America on March 30, 2007, which Brazil was a signatory and which was approved in accordance with the constitutional provision (art. 5, § 3 of Brazilian Federal Constitution), giving rise to the Decree No. 6.949/2009.

This international law instrument brings expressly the requirement that States Parties shall adopt all measures to the persons with disabilities their personal mobility with maximum independence as possible.

In other words, the law provides in an incisive way legitimate ways of exigibility of public policies for urban mobility for the disabled, but will that by itself, be revealed in the recognition of this individual? It is stated that not.

As demonstrated in previous topics, the prestationals deficits topic in detriment of the disabled are numerous, having not even a minimal structure in public hospitals to accept such citizens. Thus, the stage of the law, even if it establishes a tension of these intersubjectives claims, is incipient to recognize the disabled.

This is because, in spite of deprivation of disabled rights (*Entrechtung*), there´s no sufficiency of law, itself, in the solution of this question. This leads to recognize the need to advance to the third stage of recognition so that we can check all its importance in this process of disabled insertion: solidarity.

Giovani Agostini Saavedra (2006, p. 284) states that

> [...] The individual is always linked in a complex network of intersubjective relations and consequently it is structurally dependent on the recognition of the other individuals. The experience of disrespect, then, must be such as to provide the motivational basis of the struggle for recognition, because this emotional tension can be overcome only when the social actor is able to return to have a healthy and active participation in society.

It's the citizen´s return to the social participation motivating therefore the struggle for recognition. But the viability of that return, as seen, not enough from the law stage, necessary to establish an attitude of solidarity, breaking with the current context of low understanding of solidarity (solidarism).

The solidarism and understanding that the prestige of urban mobility policies matter in a community posture in favor of the disabled find barriers in the modernity model guided by the capitalism individualist. The solidarism by its turn, goes beyond this duality and, as stated by Bolzan (1996, p 125): "[...] the core of the law is no longer the law individual selfish and becomes predominantly collective - and diffused - where socialization and collectivization has fundamental role".

Axel Honneth (2011, p. 190), in its turn, says in his work that

> [...] Only with the decoupling between the individual legal claims and social attributes linked to status arises the principle of universal equality, which henceforth will submit all legal order to postulate of not admitting any more, in principle, exceptions and privileges. Since this requirement refers to the role that the individual holds as citizen, with it the idea of equality assumes the same time the meaning of being member "with equal value" of a collectivity policy: regardless of differences in the disposition of economic degree, fit to every member of society all rights which give equal exercise of their politicians' interests.

Thus, one can then verify that the recognition form of the solidarity part of the "disregard of moral degradation (*Etwürdigung*) and injury (*Beleidigung*). [...] The dimension threatened is that the dignity (*Würde*) "(SAAVEDRA, 2006, p. 283). As a result of that, for the recognition to be established as from this stage should be a mutual acceptance of the personal virtues of the individuals within that intersubjectivity complex.

From this acceptance will be generated acceptance and reliability for the individual recognition as a member of the community. It is a set of social values (and solidary) that within this intersubjective structure promotes, therefore, mutual recognition.

It is the valuation to social and community debate so that the barriers which prevent recognition are exceeded. In a reading about communitarianism and solidarity as a legal category. NABAIS (2012, p. 31) states that "the concept of man which underlies the current constitutions [...] is not a mere isolated or lonely individual, but a solidary person in social terms".

Humans need to realize that living in society requires an understanding of solidarity, breaking with the capitalist, selfish and individualistic model force. The society only becomes free from a high understanding of solidarity, understanding themselves then, the freedom, as a result of a disabled inclusion process and ensuring their citizenship.

The deprivation and the limitations imposed on disabled is what feed the social crisis which, in its turn, is foundational on the struggle for recognition. Thus, despite the innumerable list of normative programs, constitutional and infraconstitutional, in favor of the disabled, is in the experience of their own limitations restriction of these rights is where there is their exclusion.

Axel Honneth (2011, p. 217) says that "[...] the experience of deprivation of rights is measured not only by the degree of universality, but also by the material scope of the rights institutionally guaranteed".

This conflict, however, is established under the individualistic social model that is anchored in an understanding of state and society valued in person, while individual, and not from a community perspective, also humanitarian and collective.

There is, finally, the need to be materialized and effected these "normative intentions" of right, which requires the need for a (high) understanding of solidarism. But how to establish a link between what the right provides and solidarity understanding, with the pursuit and realization of the disabled recognition? The answer, to be worked on in this essay is: from hermeneutics. Hermeneutics is able to draw a bridge between the law and solidarity to the disabled as a way to fight for recognition.

4. The hermeneutics as a bridge between the stage of lae and the stage of solidarity in the struggle for regognition

It has evidenced the deficit of public policies for urban mobility and its impact on the disabled insertion to the right exercise of its warranties as a citizen, which establishes a social conflict that gives rise to their search for recognition.

The pursuit of this recognition, under the optics of the stage of law is incipient, given that, in summary, there are already legal predictions that address, even with exhaustion, the issue of urban mobility as a way of disabled inclusion.

Moreover, from the perspective of the solidarity stage, it is verified that there is a low understanding solidarism, implying a lack of awareness, from a look at the other, but not the other as different and yes the other as member of a society, with respect for differences, as well as within a communitarian context in which may be improved mechanisms described in the normative already established, so that this recognition can be promoted.

Even because, "[...] the notion of law, that produces in the individual the sensation of his own dignity, can be deepen from the idea of other generalized" (Souza, 2000, p. 177).

However, to overcome the deficit of effectiveness of normative forecasts for the disabled and at the same time promote their effective-

ness in the context of (high) solidarism understanding, establishing a bridge between the right and solidarity, it is necessary to take advantage of hermeneutics, of philosophical drafted, given the impossibility of promoting such analysis from the known dogmatic-traditionalist model.

The recognition of the disabled, from the urban mobility promotion, needs, therefore, of a hermeneutic analysis for an application with effectiveness of the right, within a perspective of solidarity. It is the approach of the stage of right with the stage of solidarity.

It is the approach of the realities that are being experienced in social life of the right. You see, as previously stated, the disabled exclusion and the absence of an effective of minimum accessibility policies as a social conflict. So

> [...] The refusal to employ the methodology of philosophical and sociological sciences in the law can induce the lawyer to an error, to produce descriptive statements of a reality that only exists in the cold letter of the legal texts, apart from society and its problems. (FRANCE, 2002, p. 191)

The search for ways of enacting and implementing the constitutional norms, particularly for promoting the citizenship (and dignity) goes, therefore, by new basis of constitutional hermeneutics. Thus, changes the constitutional scientific discourse in force to a new model, stating that

> Hence the obligation to propose the discussion of the "crisis of paradigm," delimiting the understanding space of the crisis in the specific sphere of legal phenomenon. The crisis, therefore, under the right sphere, means the exhaustion and the contradiction of the theoretical-practical liberal-individualist paradigm which can no longer provide answers to new emerging problems, thereby favoring different ways that still lack adequate knowledge. (WOLKMER, 2003, p. 2).

It is then necessary to promote the significance of constitutional norms so that they can, then be effectively interpreted, understood and applied to the disabled guarantees. Ernildo Stein (1997, p. 86) states that "[...] access to something will no longer be in a directly and objectifying form; the access to something is by the mediation of the meaning and sense".

There is no access to things without mediation of meaning. This represents, therefore, the need to promote the look for the Constitution an its standards, in casu, the disabled rights, from the lens of constitutional hermeneutics.

It is supposed, starting again from the stages of recognition, to establish an interaction between law and solidarity, and to verify that the problem is not in the absence of standards that provide for urban mobility policies but in the lack of culture and in the (low)understanding of these laws. The law (mobility) exists, but it needs a sympathetic understanding.

Therefore, analyzed under privileged object adopted in this paper, it does state that the constitutional standards which provide guarantees a promotion of urban mobility in favor of the disabled must exit the law level, while pure forecast (recognition that has been already absorbed) and find its application in its most peculiar aspect: enforce life (world of being which interprets), what are interpreted and understands it in the legal texts.

And this process presupposes not only, as it is to say, a dogmatic traditionalist reading of the constitutional standards, but to establish a way of its interpretation, understanding and application, in a single conjunctive process. Gadamer (2005, p. 356), in his work, says

> Anyone who wants to understand one text, always performs a project. As soon as the first direction appears in the text, the interpreter provide guidance on a sense of whole. Naturally the sense is only manifested because who reads the text reads from certain expectations and in particular sense of perspective. The understanding of what is put in the text consists precisely in the elaboration of this previous project, which obviously, has to be constantly revised based on what happens according to its advances in the penetration of sense.

Then, adds to that "the person who wants to understand can´t give himself away beforehand the will of his own previous opinions. [...] Who wants to understand a text must be willing to let this person tell him something " (GADAMER, 2005, p. 358).

The author states in his book that the hermeneutic process was divided into three distinct stages: understanding (*subtilitas intelligendi*), interpretation (*subtilitas explicandi*) and application (*subtilitas explicandi*). There are three moments that make up the achievement of understand-

ing. However, Gadamer will establish, as elucidated Lenio Streck (2011, p. 265), that the hermeneutic process will assume, in fact, that the three acts take place in one (*applicatio*).

Lenio Streck (2011, 167) provides a cyclic dimension of these moments to say

> Now, there is no interpretation without understanding, without understanding there in no explanation. Except that all this only occurs in a circle (the whole to the part and the part to the whole), so no-universalizing abstract categories which one can make deductions or subsumptions. It is in this space that gives no split between interpret and apply, because there are no concepts (or meaning attribution) "without things".

From the understanding of hermeneutic perspective it will be promoted a new analysis of the constitutional standards that will ensure the effective promotion of the disabled public policies. This is because it not only projects itself over the text with an abstract and generic look, devoid of content, but instead, it extracts from the law its application to the world of life, and from of pre-understandings that exist from this very world. There is a personality in the process that can print on it course all the issues surrounding the disabled problem and, from there, seek an effective exercise of their guarantees, rejecting the model of exclusion.

This expansion of hermeneutics "carries a pretension of universality. [...] We can interpret this universality as a way of creating a discipline that encompasses any and all activities in the field of human interpretation" (STEIN, 2011, p. 12).

With this hermeneutic turn, we overcome the constitutional reading propped up on methods that could confirm the legal certainties (dogmas). With the hermeneutic the interpretation promotes a language as it develops itself. The world is measured from the dimension that it give to the language. Therefore we state that

> [...] If beating the alleged of a consciousness philosophy, leads the human condition as a linguistic condition, discursive, hermeneutic will see that our own everyday "reality" and unremovable is permeated of idealities, of idealizing pretensions, constitutive language capacity such as (CARVALHO NETTO, 1999, p. 474).

It is not enough to exist constitutional provision contemplating measures of disabled insertion not even spectacular laws, "lovely" decrees, if it's all just rhetoric, meaningless. It´s needed a critical reading and imbued with its own reality of what it interprets.

For a proper text understanding, one should "understand it according to the pretensions that it presents itself and, we must also understand it every moment, or understand it in every concrete situation in a new and distinct way. Here understand is also to apply "(GADAMER, 2005, p. 408).

From this hermeneutic process, then, you can (should) establish a link between the law and the social reality. The guarantees provided for the disabled must, therefore, enjoy the effectiveness from, notably, a solidarity optical. The interpretation, understanding and application of these standards should be taken under the abstract and generic perspective, but as an effectively promoting recognition of each disabled citizen.

Promoting public policy of urban mobility is not an abstract standard, instead, is a constitutional mechanism to bring to reality a way of insertion of each disabled in to social context. This happens from a sympathetic look of the law and that effectively requires an overcoming of the dogmatic-traditional model for an hermeneutical application.

The stages of recognizing (referring to those worked in this assay) as well as its hermeneutic process should not be individualized, but associated from a cyclical perspective, where all steps occur at once. The law and solidarity happen as their own hermeneutical process, in a single moment. That´s why

> [...] Philosophical hermeneutics leaps ahead of other interpretation forms, to the extent that it recognizes that is done in facticity, in life, in existence, in reality. So, it's asserted that the interpretation is not an autonomous application. [...]
>
> Fundamental rights must be experienced by the interpreter, ie, must be in the condition of the one who applies. It hence, the problem of "low understanding of fundamental rights", embodied in the largest dimension and still more degrading to society is characterized as "low understanding of the Constitution" (MOREIRA, 2012, p. 170/171).

The disabled fundamental law should, then, be present in the experience of the interpreter. It should, repeat itself, from an interpreta-

tive sympathizing action, verify what are it's experienced the disabled condition and then verify the relevance of urban mobility policies.

The right goes out of his locus already established and uses the environment of life, of the world which is constantly interpreted, so that we can promote the guarantees that it establishes.

5. Final considerations

It´s undeniably the public and private deficit of benefits for effecting urban mobility measures in Brazil. The disabled is still part of a process of exclusion, but of social origin and not merely biological. The natural limitations of that citizen, although not representing any kind of impediment to his life in society, even legitimize a life of exclusion.

Architectural barriers found throughout Brazil match the reflection of low solidarity understanding existing in the current national context. This, especially, is considered the validity of a capitalist-individualist egoistic model, in which the human being overrides his values in the objectification of things and the cult of consumption. It ignores, so, the look for the other, even more so when this individual does not have standard patterns of biological normality.

This apparent exclusion process, however, is not in tune with Brazilian legal-constitutional reality, given the existence of numerous constitutional and infra-constitutional normative statements, inclusive rules of international law absorbed by the parental ordering, dealing, specifically of disabled inclusion through urban mobility, as a way of providing dignity.

Hence, then, the necessary search of how to implement and carry out the recognition of that citizen. Starting from the stages analysis established by Axel Honneth, gird up by the last two (law and solidarity), there is the failure of the right to resolve such issues since, as an instance of recognition, presupposes the tension between intersubjective claims. However, given the low understanding of the disabled guarantees, there is a total lack of concern to actualize effective measures to promote urban mobility policies.

On the other hand, the obvious conflict established by the disabled social exclusion, presupposes that valuing a social posture, communitarian, to undertake efforts to assist the other. That's because, promoting disabled recognition, is nothing more than, a way of ensuring the dignity of those own citizens.

However, recognizing the need to bring the efficiency to the law at it's needed and its association with a solidary perspective, emerges, finally, the question as a means to provide such a condition, aiming at the realization of urban mobility measures for the disabled recognition.

The response was established by constitutional hermeneutics, given that, so this way, it was allowed to promoted intensive (re)questioning of the law and, above all, of all the issues that are inherent to it, and have always been denied by dogmatic-traditionalist culture: the social, political problems etc.

It is from a new perspective of the law, especially the constitutional rules, that - experiencing not the reality of originating legislator, but having the interpreter to be part of the reality of it is recipient of the norm, beyond of insert, in the process, also, your own reality - shall form a right to answer and answer the questions that emerges in various social situations as, *in casu*, the deficit of urban mobility policies.

The law must leave its status, already known, and exercise an effective application in life, in the world of who it interprets, knowing, also, that language is not a tool, but an intrinsic part of this process. Through this new way of applying the law, not limited to the classical subsumption rule, but rather understood as a complex process that integrates the understanding, interpretation and application of a single act, we can promote a bridge between the law effectiveness, out of an sympathizing optical, that meets the disabled citizen guarantees, especially running the established predictions, but unfulfilled, of urban mobility.

6. References

AMARAL, Fabienne Louise Juvêncio dos Santos; HOLANDA, Cristina Marques de Almeida; QUIRINO, Maria Aparecida Bezerra; NASCIMENTO, João Paulo da Silva; NEVES, Robson da Fonseca; RIBEIRO, Kátia Suely Queiroz Silva; ALVES, Simone Bezerra. **Acessibilidade de pessoas com deficiência ou restrição permanente de mobilidade ao SUS.** Revista Ciência e Saúde Coletiva. Rio de Janeiro, 2011.

ARAUJO, Luiz Alberto David. **A proteção constitucional das pessoas portadoras de deficiência.** Disponível em: <http://www.mp.rs.gov.br/dirhum/doutrina/id248.htm>. Acesso em 30 de janeiro de 2012.

_____. **A proteção constitucional das pessoas portadoras de deficiência:** algumas dificuldades para efetivação dos direitos. Capítulo do livro IGUALDADE, DIFERENÇA E DIREITOS HUMANOS. ORG. SARMENT,Daniel; IKAWA,

Daniela e PIOVESAN, Flávia. Ed. Lumen Juris, Rio de Janeiro, 2008.

BARTON, Len; OLIVER, Mike. 1997. **The birth of disability studies.** Leeds: The Disability Press, 1997.

BAUDRILLARD, Jean. **A sociedade de consumo.** Lisboa: Edições 70, 1981.

BOLZAN DE MORAIS, José Luis. **Do Direito Social aos interesses transindividuais.** Porto Alegre: Livraria do Advogado, 1996.

CARAVALHO NETTO, Menelick de. **Requisitos pragmáticos da interpretação jurídica sobre o paradigma do Estado Democrático de Direito.** Revista de Direito Comparado. Belo Horizonte, v.3, n. 5, 1999.

DINIZ, Debora. **O que é deficiência.** São Paulo: Editora Brasiliense, 2007.

DINIZ, Débora; BARBOSA, Lívia e SANTOS, Wederson Rufino do. **Deficiência, Direitos Humanos e Justiça.** Revista Internacional de Direitos Humanos. V. 1, .n 1, jan. 2004, São Paulo.

FOUCAULT, Michel. **O nascimento da clínica.** São Paulo: Editora Forense Universitária, 2004.

FRANÇA, Vladimir da Rocha. **O Problema da Delimitação do Objeto da Ciência do Direito.** In Revista da FARN, Natal, v. 1. n. 2, 2002.

GADAMER, Hans-Georg. **Verdade e Método I**: Traços fundamentais de uma hermenêutica filosófica. 7. ed. Vozes, 2005.

HONNETH, Axel. **Luta por reconhecimento:** a gramática moral dos conflitos sociais. 34. ed. São Paulo, 2011.

KRUSCHEWSKY, Eugênio. **Um diálogo entre Gadamer e Ross.** Revista do Programa de Pós-Graduação em Direito da Universidade Federal da Bahia. Salvarod, nº 14, 2007.

MOREIRA, Nelson Camatta. **Direitos e Garantias Constitucionais e Tratados Internacionais de Direitos Humanos.** Belo Horizonte: Forum, 2012.

_____. **Fundamentos de uma Teoria da Constituição Dirigente.** Florianópolis: Conceito, 2010.

NABAIS, José Casalta. **O dever fundamental de pagar impostos:** contributo para a compreensão constitucional do estado fiscal contemporâneo. Coimbra: Almedina, 2012.

OLIVEIRA, Murilo Carvalho Sampaio. **A dialética na hermenêutica gadameriana.** Revista do Programa de Pós-Graduação em Direito da Universidade Federal da Bahia. Salvador, n. 13, 2006.

PAGLIUCA, Lorita Marlena Freitag; ARAGÃO, Antônia Eliana de Araújo; ALMEIDA, Paulo César. **Acessibilidade e deficiência física: identificação de barreiras arquitetônicas em áreas internas de hospitais de Sobral, Ceará.** Revista da Escola de Enfermagem da USP. São Paulo, n. 3, 2007.

QUARESMA, Regina. **A pessoa portadora de necessidades especiais e sua inclusão social**. In SARMENTO, Daniel; IKAWA, Daniela e PIOVESAN, Flávia (orgs.). Igualdade, Diferença e Direitos Humanos. Rio de Janeiro: Lumen Juris, 2008.

SAAVEDRA, Giovani Agostini. **Hermenêutica Constitucional, Democracia e Reconhecimento:** desafios da teoria da constituição contemporânea. Revista Brasileira de Direito Constitucional. São Paulo, n. 7, v. 1, jan./jun. 2006.

SANTOS, Rafael Amorim. **A fundamentação dos direitos das pessoas com deficiência a partir da teoria da justiça de John Rawls.** Revista ARGUMENTA. Paraná, n. 13, jul.dez. 2010.

SIQUEIRA, Dirceu Pereira; SANTOS, Murilo Angeli Dias dos. **Estudos Contemporâneos de Hermenêutica Constitucional. São Paulo, 2012, Ed. Boreal.** In RIBEIRO, Fernando José Armando; BRAGA, Barbara Gonçalves de Araújo (orgs.). A aplicação do Direito na perspectiva hermenêutica de Hans-Georg Gadamer. Revosta de Informação Legislativa. Brasília. Ano 45, n 177, jan./mar. 2008.

SOUZA, Jessé. **A dimensão política do reconhecimento.** In: AVRITZER, Leonardo; DOMINGUES, José Maurício (Orgs.). Teoria Social e Modernidade no Brasil, 2000.

STEIN, Ernildo. **A caminho de uma fundamentação pós-metafísica.** Porto Alegre: EDIPUCRS, 1997.

STEIN, Ernildo; STRECK, Lenio (organizadores). **Hermenêutica e Epistemologia:** 50 anos de verdade e método. Porto Alegre: Livraria do Advogado, 2011.

STRECK, Lênio. **Hermenêutica Jurídica e(m) Crise:** uma exploração hermenêutica da construção do Direito. 10. ed. Porto Alegre: Livraria do Advogado, 2011.

WOLKMER, Antônio C. Pluralismo jurídico: novo paradigma de legitimação. 2003. Disponível em <www.mundojuridico.adv.br>, acesso em 22 d

The relation between legal pluralism, lack of human rights and crisis of the social State

Adriana Goulart de Sena Orsini[1]
Natália de Souza Neves[2]

Abstract: This article addresses the relationship between the emergence of legal pluralism and forms of domination that permeate the urban space and the growth of economic and social inequality in the cities. From the crisis of the welfare State, in which the State shall help ensure minimum conditions for survival and structuring of the various groups that make up the cities, these groups start to articulate through structures, forms of power and domination that they own, and manifested, among other ways, through the speech. Given this fact, in addition to state law, other forms of law emerge. It should be noted that the legal plurality, however, cannot be seen under an eminently negative bias, since cities are plural, constituted of several heterogeneous groups that have cultures, knowledge and practices that are her own. Ignore these forms of law and the complexity of the relationships that underlie them constitutes a misconception; Furthermore, it constitutes a removal of the identity and the heterogeneity of groups that make up the social fabric. However, the intention is to address the relationship between the degradation of State services and the inefficiency of the State to guarantee human rights, basic rights for citizens, and the emergence of groups that have forms of domination and structure peculiar to them, approaching or distancing from State law. Some groups legitimize themselves by democratic processes within their community, while other groups were auto-legitimam, despotic and arbitrary through forms of acting, creating

[1] Adriana Goulart de Sena Orsini is an University Professor of the Faculty of Law of UFMG, Structuring Project Coordinator of the Graduate Program of Faculty of Law of UFMG called "Public Governance, Access to Justice, Effectiveness, Consensuality and Procedural Dimension of Human Rights," Federal Labour Judge, Member of the Steering Committee of Conciliation of CNJ and Auxiliary Judge of Access to Justice's Committee of CNJ from 2009 to 2013. E-mail: adrisena@uol.com.br

[2] Natália de Souza Neves is a Master's degree student of the Faculty of Law of UFMG. E-mail: nataliasneves@yahoo.com.br

justice and codes of law which they own, triggering conflicts and intensifying the complexity of relationships in urban space.

Keywords: Legal pluralism. Rights.

1. A brief overview on the situation of inequality in western capitalist societies

According to extracts of the Human Development Report 2013, from the United Nations Development Programme (UNDP), considering the current geopolitical developments, emerging issues, as well as the new actors that participate in the panorama of development, all countries stressed their progress in the area of education, health and income, once observed increase in the human development index (HDI) of nation States. None of the countries on which there is 2012 data presented in this document, HDI value lower than that of 2000, which corroborates the information above.

The HDI is a composite measure regarding three aspects: longevity, years of study and average expected years of schooling and *per capta* GDP (UNDP, 2013). It was created to contrast to GDP (gross domestic product), which is an index used to evaluate the economic growth of the countries. The criticism one can make in relation to GDP is that this reflects

> market prices in monetary terms. Those prices quietly register the prevailing economic and purchasing power in the system – but they are silent about the distribution, character or quality of economic growth. GDP also leaves out all activities that are not monetized – household work, subsistence agriculture, unpaid services. And what is more serious, GDP is one-dimensional: it fails to capture the culture, social, political and many other choices that people make. (Haq, 1999, p. 46).

In this perspective, in the quest to produce a measure that could consider developing countries not only in the economic dimension, but also in other dimensions, whether cultural, social, and political the economists Amartya Sen and Mahbub ul Haq developed in 1990 this index, the HDI. This index was used by the plan of the United Nations Development Programme (UNDP) in 1993, in its annual report.

There was, according to the Human Development Report 2013,

an increase of the HDI more incisive in countries with low and medium HDI, highlighting the significant progress of some countries, what was referred to as "Southern rise". Countries, such as Brazil, China, India, Indonesia, Turkey and South Africa, as well as smaller economies, such as Tunisia, Rwanda, Chile, Ghana and Mauritius demonstrated substantial progress. Product specific growth *per capita* of Brazil, China and India is so surprising that until 2050, it is expected, when it comes to purchasing power, these three countries together are responsible for 40% (forty percent) of the world product (UNDP, 2013).

However, with regard to the northern countries the situation is discrepant. The high levels of unemployment, low economic growth and austerity policies impose harsh conditions of life of the population, which threatens the maintenance of high levels of human development there (UNDP, 2013).

In spite of the rise of the southern countries, it is observed that there has been an increase in inequality in these countries and also among them, considering the so-called developed countries or those in development, which is a limiting factor of poverty reduction. The report also expresses concern that economic growth is guaranteed for southern countries in a sustainable manner, safeguarding the environment, because the environment is the interest of all Nations, especially when you think in terms of water and energy resources.

In terms of social inequality,

> Indeed, one can go further and state that there is a "south" in the North and a "north" in the South. Elites, whether from the North or the South, are increasingly global and connected, and they benefit the most from the enormous wealth generation over the past decade, in part due to accelerating globalization. They are educated at the same universities and share similar lifestyles and perhaps values. (UNDP, 2013, p. 2).

In this tuning fork, it is observed that even though economic growth has prevailed in some countries, this has not been accompanied by the reduction of economic and social inequality, which raises the need to evaluate the development of the States not only based on individual perspective, *per capita*, but also through other perceptions and dimensions of society.

In Brazil, poverty and unequal access to health, education and other public services has always been a reality within society, according to the Syn-

thesis of Social Indicators - An analysis of the living conditions of the Brazilian population, from the Brazilian Institute of Geography and Statistics[3] (IBGE, 2012). According to this study, in the decades after World War II, despite the great economic growth in Brazil, there was an increase of social inequality. The Decade of 1980, in turn, was characterized by the concentration of income, by the increase of urban violence and the growth of slums, despite the reduction of some indexes, like infant mortality. In the decade of 1990, despite the democratic stabilization and the movement towards the consolidation of democracy in Brazilian society, social inequalities have diminished very little (IBGE, 2012).

Different from the previous decades, the decade of 2000 showed a decrease in the incidence of poverty by income transfer policy and the valorization of the minimum wage (IBGE, 2012). According to the "Synthesis" referred to above, the poorest population increased its share of the total income earned in the country between 2001 and 2011. However, despite this improvement, inequality still permeates the Brazilian reality, requiring important steps so that it can be eliminated or mitigated.

Considering the panorama of inequality in Brazil, it is important to analyze the "collateral damage" experienced by the poorest, exactly in contexts where social inequality prevails.[4]

2. Social inequality and the collateral damage

Although the Human Development Report 2013 of the United Nations Development Programme (UNDP) highlights the need to examine a country's development considering not only the individual income of the people and access to education, health and other public services, but also the different social dimensions, such as the quality of the environment and the social inequality, it is observed that, in reality, when it evaluates a country's development, what is considered is the average income of its members (Bauman, 2013, p. 9). Thus, little sticks to real inequality levels within these societies, as well as to the real gap between the different strata of which they are composed.

[3] In Portuguese, the translation of the name of this institution is Instituto Brasileiro de Geografia e Estatística (IBGE).

[4] According to Zygmunt Bauman "The term 'colateral (or damage or victim) low' was recently coined in the vocabulary of expeditionary military forces and popularized by newspaper reports concerning the action of these forces to denote unintended, unplanned, 'unforeseen' effects, some would wrongly say - that, nevertheless, are pernicious, painful and harmful." (2013, p. 11, our translation).

Thus

> the increase in inequality is often considered a sign of anything besides a financial problem; in the relatively rare cases, in which there is a debate about the dangers that this inequality represents for society as a whole, in general it only happens when there's threat to law and order; hardly ever risks for the fundamental ingredients of the overall well-being of society, such as physical and mental health of the population, the quality of daily life, the sense of political engagement and the strength of links that integrate into society. (Bauman, 2013, p. 9, our translation).

Much has been discussed in the economic and political field on how to increase the average income of the population, the GDP[5] of a country. However, in these discussions, the levels of inequality, as well as the opportunities experienced by people in their lives, related to work, study, among others, are not considered. Little is reflected about the quality of life of people, their state of physical and mental health, as if the income improvement could represent itself the ultimate goal of any person and on any society of the globe.

The vehement defence of economic growth as a factor responsible for the happiness of people in contemporary societies is something that should be questioned. As emphasized by Amartya Sen (2011, p. 306), "there is considerable empirical evidence that, in many parts of the world, even when they become richer, with incomes much higher than before, people do not feel particularly happy."

If happiness is not necessarily achieved by increased wealth, what about the reality of people who, far from being at the top most developed societies, comprise the fringe of these societies?

For some people the ones who don't contribute to society because they do not contribute to its growth, do not belong to any class and would constitute obstacles to their development. In turn, they would occupy the position of "subclass" (Bauman, 2013, p .9-10). This position would be occupied by people who do not contribute with what

[5]GDP is an indicator used to measure the economic activity of a country. It is noteworthy that according to economists, it is important to measure growth, but not development of a country, as this requires the inclusion of other data, such as income distribution, investment in education etc. Available from <http://economia.estadao.com.br/noticias/economia-brasil,entenda-o-que-e-o-pib-e-como-ele-e-calculado,82627,0.htm> . Acessed on 22 Sept. 2013.

might be expected of them in the social system, in case they belonged to some class. As examples, the homeless and illegal immigrants (Bauman, 2013, p. 10). Those are people devoid of rights and duties, outside the democratic processes, whose contribution and participation in society is minimized and excluded due to their condition.

This subclass is the biggest victim of the "collateral damage" of globalization, an expression used by Zygmunt Bauman and referred in that context to consequential damages and detriments of determined action.[6] As this author mentions, "thinking in terms of collateral damage is tacitly assuming *pre-existing unequal rights and opportunities* and at the same time accepting *a priori* the unequal distribution of the costs of the action undertaken [...]" (2013, p. 12, italics added, our translation). At this point, it should be stressed that such presumption cannot be assumed as implied and even less admitted.

The population that occupies the position of subclass, in this perspective, suffers from side effects from the economic and social logic deriving from contemporary societies whose consumerism instilled and absence of perspectives and opportunities for the poorest do stir conflicts and disputes. The collateral damage suffered by the subclasses, as stated by the author, may be a result of both natural disasters and human actions, "[...] although in both cases the damages are declared unintentional and unplanned" (Bauman, 2013, p. 12, our translation).

The complexity of the conflicts that emerge at the heart of societies, mainly at the poorest levels, is notorious (Gustin, 2005, p. 196-197). These pertain to several dimensions, whose reasons do not reside, in turn, only on the economic issue, bypassing issues of ethnic, cultural and religious differences.

It should be noted, however, that these conflicts are enhanced, among other factors, by the economic and social inequality, but also by the cult to consumerism, which reinforces the visible differences between the groups that make up societies. The cities, in its turn, are divided between the "formal cities"[7], on which there is the offer of jobs, public services, even though they are not of good quality, infrastructure; and the outskirts or fringes, in which an environment of violence, absence of

[6] See footnote n.º 4.

[7] The term "formal city" is used by the author Erminia Maricato in a paper called "It's the urban question, stupid!" (our translation), published in the book Cidades Rebeldes: passe livre e as manifestações que tomaram as ruas do Brasil. São Paulo: Boitempo: Carta Maior, 2013, p. 19-26.

public policies and urban mobility prevails.

Due to this reality, despite the existence of public policies or actions of groups that try to mitigate these social and economic discrepancies, leading the notions of respect and citizenship to the outskirts and to schools, it becomes a Herculean task to refute values based on exacerbated materialism, in individualism, in what is external, plastic.

The conflicts, in this scenario, are multifaceted, multiforms. Present in all societies, they acquire different dimensions and reasons, among them the struggle for recognition (Honneth, 2003). This is sought by groups that, in addition to being on the fringes of society, constituting subclasses as referenced above, are also disregarded and violated by other issues, historical and/or ideological. Among them, for example, racism, prejudice against women and intolerance against homosexuals, indians and immigrants.

The social vulnerability of the poorest population, victim of collateral damages caused by capitalism, among them the opportunity to make an offence, is patent. It should be noted that the term social vulnerability, in this article, is used to designate the family's ability to react to unexpected events, according to the definition found in the Discussion Paper 1835, from the Institute for Applied Economic Research[8] (IPEA). The presence of infants, children, seniors, and persons with disabilities makes family more vulnerable to resist to these events (IPEA, 2013, *apud* Sánchez; Bertolozzi, 2007). The absence of a spouse or the presence of a child who does not live with his mother, as a factor influencing negatively the rate of vulnerability of families (IPEA, 2013).

Studies conducted by IPEA (2013) on the index of the vulnerability of families in Brazil demonstrate that, from the responses to demographic census of 2000 and 2010, there was decrease in this index. The data was gathered from family environment. It should be noted, however, that

> this reduction of the vulnerability of families occurs unevenly and unequally between the dimensions of analysis and, especially, between the regions of the country, the Federative Units, their cities and, of course, between portions of the municipal territory. (IPEA, 2013, p. 7, our translation).

[8] In Portuguese, the translation of the name of this institution is Instituto de Pesquisa Econômica Aplicada (IPEA).

It should be highlighted that, in relation to social vulnerability, there has been an increase in the indexes that compose this dimension of research. The greater presence of elderly people, the largest number of households with absence of a spouse, as well as the increase of households in which there are persons with disabilities, probably by improvements in the notification of these cases (IPEA, 2013) generated such an effect in the indexes of social vulnerability.

In this sense, the increase of family social vulnerability in the country remains worrying, helping making these families more susceptible to suffer with unexpected events, enabling their dismantling. Thus, we must think how the presence of the State can change and improve the observed situation.

3 The presence of the state as guarantor of public policies

The 2013 Human Development Report from the United Nations Development Programme (UNDP) demonstrates the need of States to focus their actions with a priority in the people, in order to promote human development and invest in their capabilities. Thus, to invest in the capacity of people, through access to health services, education, and other basic public services "is not appendage of the growth process but an integral part of it." (UNDP, 2013, p. 4). Therefore, a State which performs public policies which are development-oriented through investments in basic services is fundamental to the reduction of social inequality and poverty is an effective reality.

According to the report mentioned above, public investment applied in infrastructure, health and education is a condition *sine qua non* for the promotion of sustainable human development. Therefore it's essential that equal opportunities are offered, so that everyone can benefit from economic growth. (UNDP, 2013).

In a diametrically opposed way, as the thinking advocated by Washington Consensus, economic growth would occur due to the existence of correct economic basis aligned with the centrality of capital, considering that the other improvements in the economic plan would be consequences of this growth. Such a line of reasoning gives priority to the development of the economy at the expense of improvement of life of the population. To its defenders, the improvement of the quality of life would come after economic development. However, from the perspective of human development, the improvement of life of the least

favored population cannot be postponed, further more considering the economical option in the foreground at the expense of the social (UNDP, 2013).

It should be emphasized that the population which lies on the fringes of economic development, because it is more socially vulnerable, is the one that suffers from the "collateral damage" from the capitalist system. It is necessary, therefore, that States adopt an active position in relation to social rights geared to its effectiveness, this posture committed to the achievement of the fundamental rights to the entire population, especially the most needed and deprived of the opportunities that classes with highest income have.

The ineffectiveness and inefficiency of States in enabling the reduction of social inequality and improving the distribution of income for the population has driven the economic order and social conflicts of significant proportions, since

> the explosive mixture of growing social inequality and increasing volume of human suffering relegated to the status of "collaterality" (marginality, exteriority, "removability", not to be a legitimate part of the political agenda) has all the signs to become potentially the most disastrous of problems that mankind will be forced to confront, manage and resolve in the current century. (Bauman, 2013, p. 16).

Conflicts arising from economic discrepancies have spread over several countries, such as Irã, Iraque, Afeganistão, Paquistão (Santos, M., 2011, p.152). There are several manifestations of dissatisfaction with unemployment and the economic crisis, in countries of Europe, such as Spain, according to Radio France International (RFI, 2013).

Milton Santos (2011, p. 152, our translation) highlights the numerous manifestations of irredentism also in virtue of the economic framework and new dependence of the underdeveloped countries, whose social deficiency and poverty lead them to a situation of ungovernability. The author also points out the social disorder in Brazil, mentioning the difficulty in maintaining the economic model sustained by the globalization and at the same time to calm the population dissatisfied (Santos, M., 2011, p. 153, our translation).

The public demonstrations in Brazil, which began in June 2013 referring to the public transport ticket costs, but ended up incorporating an agenda of broader claims, such as claims in respect of expenses for

the World Cup, represent the dissatisfaction of the population with the social structure in the country. In the opinion of some, these movements are associated with the current condition of the cities. Erminia Maricato (2013, p. 19-20, our translation) adduces as

> Cities are the main venue where there's reproduction of the labor force. Not every improvement of living conditions is accessible with better wages or with better income distribution. Good living conditions often depend on urban public policy – transportation, housing, sanitation, education, health, recreation, street lighting, garbage collection, security. Namely, the city does not provide just the place, the support or the floor for this social reproduction. Its features and even the way they are presented make the difference.

Although public policies are carried out aiming at the promotion of human rights in Brazil, they are still insufficient to reach all social levels satisfactorily (Sena; Silva, 2012). In this perspective, the population also requires improvements, organization and better distribution of public and private services and equipment in the cities.

The lack of access to these services is responsible for the outbreak of conflicts of various hues. Not only the world's poorest countries, but also those suffering from the consequences of neoliberal exclusionary economic policies, although poor countries are still the ones who suffer the most "for having accumulated historically huge social segments of poverty and destitution." (Gustin, 2005, p.36, our translation).

The flexibilization of labor relations, unemployment, allied to poor organization of urban space, are issues to be faced by the Government and by society as a whole, which is more complex and stratified.

4 Conflicts in a plural society

Contemporary societies are characterised by a plurality of legal systems, as well as forms of knowledge and power (Santos, B.S., 2009, p. 261). They're complex societies, driven by heterogeneity, manifesting through customs, ideologies, religions, knowledge, and legal systems. (Gustin, 2005, p. 25).

This article describes a plurima conception of law, on which this

> Is a body of regularized procedures and normative standards, considered justifiable in a given social group, which contributes to the

> creation and prevention of disputes, and to their solution through an argumentative speech, articulated with the threat of force. (Santos, B.S., 2009, p. 290, our translation).

According to Boaventura de Sousa Santos (2009) State law tends to consider as legitimate form of manifestation of rights only when it comes to the law edited by the State, regardless of its relationship to other forms of law that permeate society. He stresses that this tendency is greater "as we move from the periphery to the center of the world system." (Santos, B.S., 2009, p. 291).

The author, considering the existence of a plurality of legal systems, enumerates six relevant fields, based on structural sets of social relations. They are: the domestic law, the right of production, the Community law, the State or territorial law, the right of return and the systemic right. (Santos, B.S., 2009, p. 291)

Domestic law is the set of rules, normative standards and dispute resolution mechanisms that result from, and in, sedimentation of social relations in the household. (Santos, B.S., 2009, p. 292). The right of production represents the law, regulatory standards or factory or the company organizing the relationships that get along in this space, through codes of conduct of employees, regulations of the production line, among others (Santos, B.S, 2009, p. 295). Community law, in turn, has as its main characteristic its complexity, since "Can be invoked either by the hegemonic groups or oppressed groups, it can legitimize and reinforce aggressive imperial identities or, on the contrary, subaltern defensive identities." (Santos, B.S., 2009, p. 298, our translation). The State law, at its turn, presents itself as the central law in modern societies. The political and legal science liberalism tried to build it as the only way of existing law in society (Santos, B.S., 2009, p. 299). Systemic law "is the right form of world space, the set of rules and regulatory standards that organize the centre/periphery hierarchy and the relationships between nation States in the intergovernmental system" (Santos, B.S., 2009, p. 300, our translation). The right of return is the law of the market, its customs, the rules governing trade between producers, between producers and traders, among merchants, and also between producers and traders, on the one hand and consumers on the other. (Santos, B.S., 2009, p. 297-298).

It is understandable that the inefficiency of the State to ensure social benefits is also responsible for low and lower insertion of State law in societies as a whole. Social and economic inequality that permeates

and constitutes the capitalist societies, and the disbelief of the population in the State while guaranteeing access to basic services makes the rules guide the activities of the groups that make up those societies, but also to govern social relationships of persons in these groups.

People living in the outskirts of urban centres, in the so-called slums, whose organization and everyday law is different from State law, even though they mix and interface, is a clear example of spaces marked by other rules, rules of conduct and relationships. The State law has weaker normative force because it is not able to provide by itself to the population living in these locations, infrastructure, dignified housing, quality urban mobility, among other fundamental human rights. In this scenario, how to ensure predominance of citizenship and mutual respect, peace and solidarity, when violence becomes a form of guarantor power of prestige, of legitimation, of recognition and access to material goods, as for example with violence involving drug trafficking?

It is important to highlight that it is not intended to devalue any of the rights, the State, or non State. Legal plurality is the reflect of a cultural diversity present in contemporary society. Different ways of producing knowledge should be valued, given the wealth of these multiple knowledge and cultures of those social groups and the constitutive relationships that carry them. Thus, inexorably, the ineffectiveness of the State in providing the required services to the population (including services which it undertook) and the weakening of State law and the State itself as an institution responsible for providing the necessary conditions for human development, offering opportunities for the full exercise of individuals ' capacities, of equality of opportunity and fairness.

Conclusion

Despite the economic growth of the countries of the southern cone, nicknamed "Southern rise" by the 2013 UN Development Report, it can be observed that economic and social inequality in these countries still persevere, and even enhances, and that the elites appropriate higher proportion of wealth produced in those countries. Social vulnerability, in Brazil, however, has not yet shown the expected improvements, meaning that social policies, still haven't been able to reach effectively part of the needy population, the "subclasses". Income transfer policy and the valorization of the minimum wage, which presented positive results in Brazil, still can't achieve the greater portion of the population,

despite the economic inequality indexes have declined.

The ineffectiveness of the State to support the needy population and cope with the collateral damage of capitalism is patent. This inefficiency leads to the disbelief of the population vis-à-vis the State and the Government, and the State law is no longer legitimate, because it does not guarantee fundamental rights constitutionally guaranteed. In this sense, the pluralism of legal orders multiplies, especially on the outskirts of major urban centres.

In face of this scenario, it becomes imperative that the society and government think about opposing economic and social inequality, so that the State policies also target to subclasses, with the necessary and expected effectiveness, enabling their emancipation, its recognition and its integrity.

References

BAUMAN, Z. **Danos colaterais: desigualdades sociais numa era global**. Tradução de Carlos Alberto Medeiros. Rio de Janeiro: Zahar, 2013.

BOBBIO, N. **A era dos direitos.** Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

CAPPELLETTI, M.; GARTH, B. **Acesso à Justiça**. Tradução de Ellen Gracie Northfleet. Porto Alegre: Fabris, 1988.

GUSTIN, M. B. de S. **Resgate dos direitos humanos em situações adversas de países periféricos**. *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, 2005, n. 47 p. 196-197. Available from <http://www.direito.ufmg.br/revista/index.php/revista/article/view/227/208>. Accessed on: 02 Sept. 2013.

HAQ, M. u. **Reflections on Human Development**. India: Oxford University Press, 1999.

HOLANDA, S. B. de. **Raízes do Brasil**. 26. ed. São Paulo: Companhia das Letras, 1995.

HONNETH, A. **Luta por reconhecimento: a gramática moral dos conflitos sociais**. Tradução de Luiz Repa. São Paulo: Editora 34, 2003.

INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. **Síntese de Indicadores Sociais – uma análise das condições de vida da população brasileira – 2012**. Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística, 2012. Available from: <ftp://ftp.ibge.gov.br/Indicadores_Sociais/Sintese_de_Indicadores_Sociais_2012/SIS_2012.pdf>. Acessed on: 02 Sept. 2013.

INSTITUTO DE PESQUISA ECONÔMICA APLICADA. **Texto para discussão 1835**. Rio de Janeiro: Instituto de Pesquisa Econômica Aplicada, 2013. Available from: <http://ipea.gov.br/portal/index.php?option=com_content&view=article&id=18165>. Acessed on: 02 Sept. 2013.

MARICATO, E. É a questão urbana, estúpido! In *Cidades rebeldes*: Passe Livre e as manifestações que tomaram as ruas do Brasil. São Paulo: Boitempo: Carta Maior, 2013.

RADIO FRANCE INTERNATIONAL. **Desemprego atinge novo recorde histórico na Espanha.** 2013**,** Available from <http://www.portugues.rfi.fr/europa/20130425-desemprego-atinge-novo-recorde-historico-na-espanha>. Accessed on: 02 Sept. 2013.

SÁNCHEZ, A. I.; BERTOLOZZI, M. R. **Pode o conceito de vulnerabilidade apoiar a construção do conhecimento em saúde coletiva***? Ciência & saúde coletiva*, v. 12, n. 2, 2007.

SANTOS, B. de S. **Para um novo senso comum: a ciência, o direito e a política na transição paradigmática.** 7. ed. São Paulo: Cortez, 2009.

SANTOS, M. **Por uma outra globalização: do pensamento único à consciência universal**. 20ª ed. Rio de Janeiro: Record, 2011.

SENA, A. G. de; SILVA, N. F. da. **A mediação como instrumento de efetivação dos direitos humanos e de promoção da cidadania**, 21, 2012. In: XXI Encontro Nacional do CONPEDI, 2012. *Anais*... Florianópolis: Fundação Boiteux, 2012.

SEN, A. **A ideia de justiça**. Tradução Denise Bottmann e Ricardo Doninelli Mendes. São Paulo: Companhia das Letras, 2011.

UNITED NATIONS DEVELOPMENT PROGRAMME. **Human Development Report 2013**. 2013. Available from: http://hdr.undp.org/en/content/relat%C3%B3rio-do-desenvolvimento-humano-2013. Accessed on: 11 Feb. 2014.

Popular participation in the Municipal Housing Council of Belo Horizonte, Minas Gerais, Brazil

Maria Tereza Fonseca Dias[1]

Abstract: The complex housing problems of the metropolis constitute big challenges for orthodox municipal management. This paper explores the goals of policymaker councils in its association to different groups in order to jointly experience the city and take part in building it. Since Brazilian Constitution of 1988, society is expected not only to demand solution to city's problems, but to participate actively in reaching these solutions. This is because this Constitution is founded on the paradigm of democratic rule of law which implies right to housing and social function of property. Social movements for urban reform forced both the inclusion of a chapter on urban policy in the Brazilian Constitution as well as the approval of the City Statute Act, in 2001, which provides the system of democratic management of the city. This management can't be seen only as a guideline for the planning and development of cities, but requires direct participation of citizens and social groups in decision making processes, legitimizing urban planning through democratic participation. Fitting these Special Workshop proposals, this paper aims to investigate the structure and activities of the Municipal Housing Council of Belo Horizonte, from 2012 to 2013, in an attempt to understand their mechanisms of action. The methodology used in the research was the study of statutes concerning the Council; the monitoring of its meetings; documentation of gathered data; questionnaires and interviews with council members. The surveying of empirical data used variables employed in Faria and Ribeiro's (2010) evaluative study concerning the degree of institutionalization, representation and democratization of 123 Councils in 57 Brazilian cities. In the Municipal Housing Council of Belo Horizonte, we also applied those same criteria. The data collected and analyzed so far indicate a deficit of legitimacy in this Council. This is because no frequent meetings were held during this institutionalization period. And those that took

[1] Public Law Professor at Minas Gerais Federal University (UFMG). Research at CNPq.

place were not extensively disclosed in mass media. As for its composition, the Council is not balanced, with a prevalence of public sector. After 20 years of its creation, it is necessary to reflect on their internal structures, eliminating flaws and mistakes in order to make it an instrument of representation of popular will. These changes are necessary to understand the dynamics of contemporary metropolises and the conflicting interests of its citizens, especially regarding the exercise of the right to adequate housing.

Keywords: councils policymakers; right to adequate housing; legitimacy.

1. Urban issues and housing shortage in Brazil

Brazilian Census Bureau, in 2010, reports indicate that several decades of rapid urban growth in Brazil as a result of rural–urban migration or natural increase in cities. In 1940, 18,8 million people lived in urban areas, representing some 26.3 per cent of the city's total population. In 2010, 138 million people lived in urban areas, representing some 84.5 per cent of the city's total population. (Brasil, 2007) During this period (sixty years), while Brazilian population increased fourfold urban population faced a tenfold growth.

According to João Pinheiro Foundation (Minas Gerais, 2005) and Brazilian Institute of Geography and Statistics (IBGE; Brasil, 2013) estimate, recent housing shortage is around 5,8 million units, mostly concentrated among those earning less than **three** minimum wage (90%) and living in urban areas (82%). On this issue, the Ministry of Cities concluded that in the last ten years the increasing population with lack of access to shelter is wider than Brazilian population growth (Brasil, 2004; 2013). In the main cities of Brazil, between 40% and 70% of the urban population is living in illegal settlements, and this process has increasingly taken place also in middle-size and small cities. (Fernandes, 2007, p. 138)

As stated by João Pinheiro Foundation, more than 150 million people in Brazil live in urban areas and more than 4,7 million lives in deficient or precarious housing conditions, including squatter settlements and other informal communities (urban slums). The point is that a large proportion of lower-income people live in poor housing due to inadequate measures in managing urban growth, and that this deficit increases every year (Martine & McGranahan, 2010, p. 35)

In the last decades, investments in residential construction are concentrated among people earning more than five times the minimum wage.

This is possibly exceeded by the number of units with good services and infrastructure standing empty in the center of larger cities as a result of speculative real-estate practices (Rolnik, 2008; Cavenaghi & Alves, 2008).

Many of social and environmental problems affecting Brazil's urban areas stem from lack of attention to the housing needs of the poor. (McGranahan, 2010, p. 33)

Failure at taking a proactive approach to housing needs reflects more than mere apathy about the plight of the poor among Brazil'surban policymakers: it has been part of an explicit and systematic attempt to obstruct settlement by poor people in Brazilian cities. (Martine & McGranahan, 2010, p. 38)

The major challenges of Brazilian housing policy in the coming decades are related to a whole range of urban problems, including transport, shortage of land, environmental pollution, sanitation, education and other issues that impact on urban life.

The purpose of this paper is to explore if civil society and poor people can influence public housing policy in the Municipality of Belo Horizonte in order to change this situation.

2. Urban Policy regulations in Brazil and Democratic management of cities

In the context of Brazil's federal system, the lack of a proper constitutional treatment of urban and territorial jurisdiction issues has controversies and conflicts between federal, federated-state and municipal governments concerning the power to enact urban legislation and implement urban land policies. (Fernandes, 2007, p. 140)

In the 40's, discussions began on the necessity of establishing an urban policy on immigration and industries. The country has a long and varied history of attempted government interventions on spatial distribution in general, and urban policy in particular. Between 1940 and 1980, urban population was virtually excluded from law- and decision-making processes on urban questions at all levels.

The increasing social mobilization in urban areas since 1970 can be seen as an answer to government and policymaker, whom kept legal-

political reform in a slow pace throughout the 1980s and 1990s, given the complexity of diverging social, political and economic interests involved. (Martine & McGranahan, 2010, p. 45) Social movements have been fighting for social and urban justice.

The innovative constitutional chapter on urban policy, which resulted in a most significant improvement in conditions for political participation of urban population in law- and decision-making processes, also resulted from a process of intensive social mobilization. The 1988 Constitution contains a more coherent approach to urban development process as a whole, defining the notion of "social function of urban land" as the very condition for the recognition of individual property rights in urban areas. It also improved the conditions of legal, political and financial autonomy of the local state. (Fernandes, 2007, p. 141-142) In 2000, by amendment, the Brazilian Constitution recognizes the social right to housing.

The core of the new democratic approach to urban planning in Brazil is undoubtedly the Statute of the City (Estatuto da Cidade), which regulated two critical articles focused on urban issues approved by the 1988 Federal Constitution (the social function of urban land and squatters' rights) (Martine & McGranahan, 2010, p. 48)

The Statute of the City introduced instruments for democratic approach to urban planning in Brazil like policies councils, urban conferences, public hearings, public consultations, debates, popular amendments, participatory budgeting, among others. That it is a truly participatory and inclusive decision-making process at all levels.

Urban reform requires a fundamental renovation of the overall decision-making process, so that traditional mechanisms of representative democracy and new forms of direct participation are combined. The democratization of access to land and housing depends on the democratization of political process as a whole. (Fernandes, 2007, p. 165)

The construction of urban public policies involves a much more complicated process of state and civil society collaboration and, nowadays, social participation is a requirement of legitimacy of public housing policy. (Chevallier, 2008)

Urban governance requires new strategies for urban management based on new relations between state (especially at local level) and society, renewed intergovernmental relations and the adoption of new forms of partnerships between public and private sectors, within a clearly defined legal-political framework. (Fernandes, 2007, p. 165)

3. Municipal Housing System and Municipal Housing Council of Belo Horizonte (CMH)

Federal Constitution conferred on municipal authorities power for the enactment of local ordinances on land use and development of urban space, in order to guarantee the "full development of the city's social functions" and the "welfare of its inhabitants". (Fernandes, 2007, p. 142)

Based on this statement, the city of Belo Horizonte created the Municipal Housing System and the Municipal Housing Council – a policy council.

Policies councils had been created in Brazil, first of all, in the health area. They are tools for democratic and participatory planning to legitimize public policies. Councils promote active participation and social mobilization, and generates baseline information and indicators that enable citizens to monitor the impact of public sector initiatives and thus improve government efficacy and transparency, irrespective of their political party. (Martine & MacGranahan, 2010, p. 53)

This paper examines the results achieved by the Municipal Housing Council of Belo Horizonte to fulfill demands of civil society and realize that its performance has several flaws.

Unlike major cities like Rio de Janeiro or Sao Paulo, Belo Horizonte was a city planned and built in 1897 to be the political and administrative center of Minas Gerais State. It was built to house the civil servants and it was not planned with local trade or for the establishment of the working population, as this segment was considered temporary. (Guimarães, 1992, p. 1)

The whole history of Belo Horizonte was highlighted by the struggle of the state against hundreds of shacks and "cafuas" that proliferated, at first in the center, and then on the boundaries of the city. The city grew from outside to inside: while land within the original plan of the city was unavailable, people who came to the capital in search of new opportunities, formed slums at its surroundings. Belo Horizonte's planning and construction of did not predict social dynamics that would guide the cities growth and transformation. Especially, this segregation process will lead to the emergence of social movements in defense of housing and slums.

Due to the strength and organization of the shantytowns, the Municipality of Belo Horizonte begins to treat the problem as a social

issue and, therefore, should be addressed through public policy and not police power.

Prior to the 1988 Federal Constitution, and in the absence of a national policy, from the struggle of social movements, which aimed urbanization and regularization of slums, Belo Horizonte made a experience Program, named "Pró-Favela", combining physical upgrading and legalization of the illegal settlements in the mid-1980s. (Fernandes & Dolabela, 2010).

After 1988 and from the assumption that public interest is broader than governmental policies, Belo Horizonte restructured its urban policy in a democratic and participatory platform that was intended to allow the direct participation of the population in urban issues in the city.

Urban planning is a most powerful process; if urban participatory tools have long been capitalized by certain economic groups and thus directly contributed to the process of sociospatial segregation, the promotion of urban law reform may substantially contribute towards creating the conditions for more inclusive and fairer cities. (Fernandes, 2007, p. 164)

In 1993 was created the Municipal Public Housing Fund, the first legislative framework for the Municipal Housing System, that have functions of urban planning, housing finance, formulation and implementation of public policies on housing. Its administrative structure is complex because it is composed of diverse public organizations and entities, such as Municipal Public Housing Fund, financing urban policy enforced by the municipality; Urbanization Company of Belo Horizonte (URBEL), responsible for the implementation of urban plans and projects; Municipal Departments, Participatory Budgets and Housing and Municipal Housing Council.

The Municipal Housing Council ("CMH") is the main participatory urban management process of the Municipal Housing System because it allows the participation of civil society and local government in the formulation of municipal housing policy.

CMH was conceived as deliberative council and it is responsible for reviewing, discussing and approving plans, objectives, policies and priorities of the municipal housing policy.

This paper aims to investigate the structure and activities of the Municipal Housing Council of Belo Horizonte, between April 2010 to June 2013, in attempt to understand their mechanisms of action to achieve a democratic approach to adequate housing rights. At this point,

the study will comprehend the institutional structure of the Municipal Housing Council (MHC), in order to assess how the structural flaws of the Council hinder or prevent its participatory and democratic approach.

4. Methodology and results

The methodology used in this research was the study of urban law regulation, in particular the legislation about the Council; the monitoring of its meetings and records; data collection documentary; questionnaires and interviews with its advisers (council members). In empirical data collection were used the variables studied by Faria and Ribeiro (2010), who studied 123 Councils in 57 Brazilian cities and evaluated them: the degrees of institutionalization, representation and democratization in decision-making of these councils. In the Municipal Housing Council of Belo Horizonte, we also analyzed those same criteria.

Regarding institutionalization degree criterion, it was found in regulations and internal rules (bylaws) that the Council is well structured and the information about its composition and participation process and decision is easily accessible. The Council was created in 1994; its internal rules (bylaw) dates of 1996. It has two Technical Teams with the purpose to clarify technical and administrative complexities of housing and urban issues and an Executive Secretariat to assist its work. Meetings take place every month. On this last point, the monitoring of 41 meetings and its records showed that meetings not occurred in nine months, mainly between the period of July 2010 to April 2013. It was observed that in between these 10 months, there were only two meetings. This period coincides with municipal elections and the start of the new term of the re-elected mayor.

Regarding democratization degree criterion, we analyzed three indicators: board composition, ie, who are the members (to assess whether it has plural and proportional representation); criteria for defining the agenda of the meetings, and how is disclosed and published the dates of meetings, to promote the participation of civil society that integrates the Council, other social movements, groups and citizens. As for its composition, the Council is not balanced, with a prevalence of public sector. There are 9 civil society representatives and 11 representatives from the public sphere (2 Legislative Branch [city councilman] and 9 Executive Branch [Government]). This composition can generate serious problems of favoring the government's interests over the demands

of civil society, biasing the participation process and the discussions results. There were no pre-established criteria to define the agenda of meetings because the agenda is designed by the Secretariat with the aid of the President of the Council and voted at the beginning of each meeting. About disclosure and publicity of the meetings, to the members of the Council they shall be convened by fax, telephone, telegram or letter. To the general public there is no formal means used, ie, meetings are not disclosed in extensive media and it was considered serious democratic deficit identified in decision-making process of this Council. Enacting democratic procedures such as Councils presupposes an organized civil society and an informed and interested citizenry. (Martine & MacGranahan, 2010, p. 51)

Regarding representation degree criterion, were evaluated how is defined which entities can apply for a vacancy on the Council, the number of seats - per sector or social movement - and how members are chosen. The 11 members of the public sector vacancies are indicated by the Government (9) and the Legislative Branch (2). To fill one of the 9 places, each civil society entities should sign up in (URBEL) in order to display and vote for candidates who will be eligible to this vacancy. As to these places, it was identified that the regulation does not establish procedures that will be used to select these members. Nowadays these members are chosen in open plenary voting on the sign up entities.

At the end we conclude that data collected and analyzed until now indicate that there is a deficit of legitimacy of this Council that hinder their participatory and democratic approach. After 20 years of its creation it is necessary to reflect on their internal structures, eliminating flaws and mistakes in order to make it an instrument of representation of popular will. These changes are necessary to understand the dynamics of contemporary metropolises and their conflicts of interest, especially regarding the exercise of the right to adequate housing.

Progress in participatory instruments, like policies councils, and implementing the new democratic approach to urban management was understandably slow and irregular. This slowness was due to the complexities of the issues, lack of practical experience, and the differentiated capacity of social sectors to participate effectively in deciding the affairs of the city.(Martine & MacGranahan, 2010, p. 49)

Urban management in large and heterogeneous cities is extremely complex even in the best circumstances, and is apparently impervious to 'perfect' solutions. What has been achieved should be viewed in more positive terms, at least in some cities: as a contribution to the formation

of a more enlightened citizenry, the reduction of clientelistic practices and the provision of an effective voice for the poorer segments of the population. More canal ways be done. (Martine & MacGranahan, 2010, p. 53)

References

BRAZIL. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE). *Tendências demográficas:* uma análise da população com base nos resultados dos censos demográficos 1940 e 2000. (2007). [on line] Available from: http://www.ibge.gov.br/home/estatistica/populacao/tendencia_demografica/analise_populacao/1940_2000/analise_populacao.pdf [Acessed: July 2013].

BRAZIL. INSTITUTO DE PESQUISA ECONÔMICA APLICADA (IPEA). *Estimativas do Déficit Habitacional brasileiro (PNAD 2007-2012)*. (2013). [on line] Available from: http://www.ipea.gov.br/portal/images/stories/PDFs/nota_tecnica/131125_notatecnicadirur05.pdf [Acessed: 12th February 2014].

BRAZIL. *MINISTÉRIO DAS CIDADES*. SECRETARIA NACIONAL DE HABITAÇÃO. *Política Nacional de Habitação- Sistema Nacional de Habitação. 2004.* [on line] Available from: http://www.jbnn.com.br/planodiretor/arquivos/politica_nacional_habitacao.pdf. *[Acessed: 30th January 2013].*

CHEVALLIER, J. (2008). *L'état post-moderne*. Paris: LGDJ.

FARIA, C. F.; RIBEIRO, U. C. (2010). Entre o legal e o real: o que dizem as variáveis institucionais sobre os conselhos municipais de políticas públicas? In: Avritzer, L (ed). *A dinâmica da participação local no Brasil*. São Paulo: Cortez.

FERNANDES, E (2006). Main aspects of the regulatory framework governing urban land development processes. In: World Bank. *Brazil*: Inputs for a Strategy for Cities - A Contribution with a Focus on Cities and Municipalities. New York: World Bank. (Report Nº 35749-BR). [on line] Available from: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/12/05/000090341_20061205145849/Rendered/PDF/357490v1.pdf. *[Acessed: July 2013].*

FERNANDES, E.; PEREIRA, H. D. (2010). Legalização das favelas: qual é o problema de Belo Horizonte? *Fórum de Direito Urbano e Ambiental*, 9 (51), p. 234-245.

SANTOS, M. (2005) *A urbanização Brasileira*. 5 ed. São Paulo: Editora Universidade de São Paulo.

GUIMARÃES, B. M. (1991) Cafuas, barracos e barracões: Belo Horizonte, cidade planejada. A Thesis Submitted in partial fulfilment of the Requirements of Instituto Universitário de Pesquisas do Rio de Janeiro for the Degree of Doctor

in Human Sciences. Rio de Janeiro: Instituto Universitário de Pesquisas do Rio de Janeiro.

MARTINE, G; MCGRANAHAN, G (2010). *Brazil's early urban transition:* what can it teach urbanizing countries? New York: United Nations Population Fund (UNFPA) [on line] Available from: http://www.iied.org/pubs/display.php?o=10585IIED *[Acessed: July* 2013]

MINAS GERAIS. FUNDAÇÃO JOÃO PINHEIRO. (2005) *Déficit habitacional no Brasil*. Belo Horizonte: Centro de Estatística e Informações.

MINAS GERAIS. (2010) Governo anuncia redução de déficit habitacional no País. FJP na Mídia. (Março de 2010). [on line] Available from: http://www.fjp.gov.br/index.php/banco-de-noticias/35-fjp-na-midia/1020-governo-anuncia-reducao-de-deficit-habitacional-no-pais. *[Acessed:* 22th October 2012].

The street carnival of Rio de Janeiro as an exercise of the right to the city

Gustavo Silveira Siqueira
Pedro Henrique Ramos Prado Vasques

Abstract: The present paper intends to discuss how Rio de Janeiro city's carnival, more specifically the carnival parades placed in the streets, which occurs in a great part of the town, can be seen as an exercise of the right to the city. At the same time carnival brings together thousands of people in the streets ("Cordão do Bola Preta" Parade reached in 2013 2.5 million people in the downtown area) it brings waste, disturbs traffic and spreads a kind of "chaos" in the city. But it also brings benefits such as trade increment, expansion of popular culture, and leisure to people. Thereby, discussing carnival made in Rio de Janeiro's streets becomes an essential theme to understand the right of access to the city in Brazil.

The street carnival of Rio de Janeiro is an eminently popular celebration. The party is free and the City Hall forbids the creation of private (i.e., paid) areas or cabins on city streets where carnival happens. So, in theory, anyone can join in the crowd. With the parades sponsored by third parties and others maintained by the own people, street carnival changes the city. During carnival, traffic is replaced and the streets become occupied by people. The noise of vehicles is substituted by songs – mostly – traditional ones. Streets are no longer just a pathway to a place, they become the place itself.

Therefore, even leading the "chaos" along with the music and culture, street carnival experience, as traditional Brazilian popular celebration, becomes clearly a public exercise of the right to the city since the gentrification process is momentarily neutralized – which means everyone can access the city during this period – and the intervention of government should be limited only to facilitate and enable a peaceful coexistence and never to forbid.

Key-words: street carnival, right to the city, territory occupation

"A praça é do povo, como o céu é do condor"
Castro Alves

Introduction

This paper aims to discuss how the carnival in the city of Rio de Janeiro, more specifically, the carnival street blocks, which occupy considerable area in the city, can be seen as an exercise of the right to the city. At the same time street carnival brings together thousands of people in the streets, it also carries, dirt, noise, tumult, spreading a kind of "chaos" into the urban space. On the other hand, it also brings benefits, greater enjoyment of commerce, the expansion of popular culture, leisure participants etc. Therefore, discuss Rio's carnival becomes essential to understand the right to access the city itself.

Thus, to better present all issues discussed here, we divided this work into three stages. At first, we draw, albeit superficially, an examination of urban planning and the right to the city, pinching this theoretical elements that help us understand the issue just outlined. In the following section, we specifically analyze a key element in the perception of Carnival in Rio de Janeiro, which is the street. Finally, two main understandings of urban planning are counterposed and street carnival is also comparatively analyzed through these two perspectives, highlighting also regulations, organizations and verified behaviors aiming to contextualize these approaches.

Finally, even within the last topic, we present, under the the authors' perspective, the understanding of how the street carnival in the city of Rio de Janeiro can be perceived through urban planning, and also on what details we should being attentive to minimize the chances of it be fully appropriated by enterprising capitalist logic.

1. Urban planning and the right to the city

In the context of the city development, urban planning emerges as an intervention of the government in the territory. This condition occurs at the time of flowering of industrial capitalism, in which the jobs in the primary sector were insufficient to maintain a significant portion of

the population in the field. This increasing concentration of population in urban areas has led to several new and complex social demands (e.g., sanitation, housing and mobility).

Although, initially, be identified as a hygienist public policy, urban planning was used as an instrument for expansion and / or creation of new cities. As explained by Santos (2006), it becomes evident that at this moment a new sociability emerged. Which means to perceive new forms of political representation of the urban phenomenon, especially considering the chaos of big cities.

From the scenario that was developed after the consolidation of the capitalist economic system, the conditions of social reproduction in cities would make the conflict between labor and capital to be coated in a territorialized dimension. In other words, the control over urban land and urban infrastructure policies happened to be constituents elements to the "right to the city". Such evidence calls into question the subsequent technicist approach of urban planning - which replaces the first hygienist point of view - and brings out the struggle for social participation in urban policies.

In this context, that the need for popular intervention is perceived by the Government and claimed for its townspeople, the content of the "right to the city" came to include the access to diffuse and social rights. In Brazil, these rights were especially highlighted after the promulgation of the Federal Constitution of 1988, as in the case of the environment, education, health, social care and housing rights.

From the perspective of the need to popular interaction with the formulation and implementation of urban space, the creation of the UN/Habitat Agency proved to be an important tool for the dissemination of new and expanded rights agenda of the residents of the urban cities. For example, the right to housing, whose origin is in the establishment of the United Nations in 1948, would gain a precise sense, as "adequate housing". That concept therefore includes not only the building habitable houses, but also the regularization of the land where the house is built, as well as access to infrastructure necessary for everyday life, networks of energy, sanitation and transport.

Given these transformations, urban planning, once again, goes through a process of reconstruction of its purpose and is no longer associated with a vision that seeks to build new cities or architectural idealized projects displaced from social and economic dynamics in the emergence of "urban issue". However, urban planning cannot renounce to have a vision of the future, if it aims to remain as a guiding instrument

of expanding cities.

In this context, two views disputes the meaning of the urban planning: the approach of "social urbanization" and "urban entrepreneurialism". The first is associated with the implementation of a grammar of rights, which implies not only redistributive policies, but also in recognition actions in the urban environment (eg, identification of "favelas" as part of the city), materialized through what we call the right to the city. The second, which is predominantly in the administration of big cities, in particular, the metropolises, such as the city of Rio de Janeiro, which is undergoing intense transformation process socioterritorial supported the project to host megaevents until 2016 (eg, World Day Youth, Olympic Games, FIFA World Cup, etc..).

Despite the pejorative perspective entrepreneurial viewpoint is taking - especially for the most vulnerable residents in the city of Rio de Janeiro - each highlighted urban planning views current illuminates different parts of the complexity associated with urban demands. The social urbanism refers to the need to manage the city in order to make it accessible to its residents, that is, allowing them access to land, urban infrastructure and recognizing them (also) as "belongers" of that urban space. In the other side, planning by projects – ie, the entrepreneurial view - facilitates the mobilization of sufficient financial resources to implement large-scale investments in urban infrastructure.

Done such comments about both urban planning theoretical views, we must also remember that city arrangement also involves different dimensions, such as the regulation of land use and promote to urban development.

The city regulation is represented by laws aimed at controlling the use and expansion process, towards the achievement of the social function of property, currently covered by the interest in the promotion of the right to social and environmentally sustainable cities. In this sense, it is a negative dimension of law, which has the power to prevent uses and appropriations of the territory in favor of maintaining the collective interest.

On the other hand, fostering urban development is associated with the provision of services by the Government, ie, allocating resources to finance the expansion of the city's infrastructure. In a context of extensive growth of urban sprawl – spilling over to other municipalities and creating more complex cities than its former central towns –, public interventions becomes necessary to facilitate the production of public goods, as in the case of roads and sanitation networks. Such heavy in-

vestments tend to produce vectors of urban expansion raising the real estate market responses. This relationship between the implementation of public services and the appropriation of urban spaces by the private sector and consequent growth of the city ends up generating more demand for urban infrastructure, which, in turn, raises the need for more investments. The result tends to involve more "financial engineering" to administer a city whose appointments are not just simple local management, but significant portions of the economy of the country.

As the Annual Reports on the State of World Population produced by the UN highlights, it is possible to identify, within the major cities of the globe, a process of concentration of the population in these areas. These large urban places congregates a significant portion of the national GDP, and much of the population of their countries. Accordingly, these cities become economic centers and their rulers take great role in the national scene (Santos, 2012a).

A similar phenomenon, although on a smaller scale, occurs within Brazilian federation. In each of these units of the federation, there is a network consisting of urban cities of different demographic and economic weight, and the most important tend to become agents who articulate the state territory. Managing these cities requires that local authorities take responsibility for the living conditions of its population, but also to ensure that the proper integration of local economies networks, maximizing their financial potential. It is not competing goals, but they should be complementary.

In Brazil, Law No. 10.257/01, known as the "City Statute", regulates arts. 182 and 183 of the Federal Constitution and defines the Comprehensive Plan as the legal instrument through which municipal governments set their goals for urban policy. Such objectives should be subject to the principles of Brazilian Law, emphasizing the "social function of property" and "social function of the city", thereby introducing guidance for municipalities to undertake, among others, with the regularization of urban space.

The Comprehensive Plan is not limited to regulate urban land use, but also includes guidelines for the development of the municipality as a whole. This inclusion of the rural area in this Plan results in a more directly perception of the territorial development issue, which may or may not be restricted to municipal boundaries.

Here we introduce the question of the legal form of land use planning nationwide. According to Article 182 of the 1988 Constitution, the municipality is the federal entity responsible for urban policy. The

federal government remains only with the responsibility to establish general standards of urban policy (and did by editing the City Statute) and leaves to the states the responsibility for residual issues (those that are not exclusive to the federal government or municipalities).

It is worth remembering that progress in social rights included in the Constitution, extended the understanding of the most important constituent elements of urban planning, that is, the right to housing, which is now defined as "adequate housing". As previously mentioned, it is not just the building, the housing unit itself, but a regular (legally) house connected with urban infrastructure networks. Therefore, the commitment of municipalities with urban planning progressed far beyond the traditional urban regulation, since it now includes heavy investment in infrastructure networks whose funding is also well beyond the municipal financial autonomy (Santos, 2012B).

Accordingly, the enormous legal advance that National Movement for Urban Reform succeeded with Federal Constitution and with Cities Statute is only part of the challenges of current urban policy. It is still necessary to develop municipality law, as well a better coordination between federal entities to cooperate on solutions for territorial public policies whose impacts go beyond the municipality.

2. The street and its appropriation from the perspective of the right to the city

In the course of the history of urbanism, the street was at various times overlooked or underused, coming to be defined by Le Courbusier (2000) *as a masterpiece of civil engineering and no longer a job for navvies.* It is possible to highlight meaningful historical moments of relevance that the street was also used as a strategic instrument for control and domination of urban space, such as in the case of urban reforms of Paris conducted by Georges-Eugène Haussmann between 1852 and 1870 which resulted in the creation of wide, large and linear boulevards in order to extinguish the ancient alleyways and winding that prevented Napoleon's armies to pursue and dominate the Parisian area and facilitated the setting up barricades and other forms of resistance during popular revolution of 1848 (Hall, 1995). From a similar perspective, also modeled by a hygienist bias, we can stand out the reforms conducted by Pereira Passos in Rio de Janeiro downtown[1]. Such modifications also

[1] While held the office of Rio de Janeiro's mayor (1902-1906), Pereira Passos led several

aimed at the extinction of colonial alleys to build broad linear pathways that would tie the two ports of the central area (Abreu, 1987).

The street is again to have a prominent position in the study of urban planning only after the 1960s with the production of the work entitled "The death and life of great american cities", by writer and political activist Jane Jacobs Butzner. Her work gained prominence and impact due to its intense fight against urban reforms intended by the chief engineer of New York City, Robert Moses. It is believed that the greatest collaboration of Jacobs, who fought a process of urban renewal in the neighborhood in which he lived, can be identified in her peculiar way of analysis of the urban environment. Under an innovative perspective at the time, Jacobs sought to humanize the process of planning and implementation of urban territory. In other words, she argued that communities themselves should build your social project of the urban environment. In this sense, Jacobs was an opposition to planification excesses that dwindled the potential for development of relations in the construction of the territory (2007).

This opposition from Jacobs can be identified, for example, in the trivial perception of the amount and functionality of the streets and its intersections. While Le Courbusier (2000) understood that the number of streets should be reduced by two-thirds since the crossroads are the enemy of traffic, Jacobs argued exactly the opposite (2007). For the author, the existence of short blocks and therefore more crossings would be essential to prevent the neighborhoods stay isolated, separated and unassisted by the population itself. For her, these long streets would produce an self-isolating effect that would inhibit even the local economy. That is, long and separated paths, according to the author, would prevent the formation of a combination of economic uses of urban space. Thus, Jacobs identifies the street as a fundamental space for generation of diversity. For the author the multiple of uses of that part of the territory would be essential, among others, to integrate its people and to build a network of local eyes responsible for collaborating with the safety of the neighborhood.

Although Jacobs spend a good part of her book defending the role of the streets in the construction of a plural urban space able to meet the needs of its inhabitants, she does not explore exhaustively - but also doesn't want - other potential and possible uses of streets in urban

---

urban interventions in the city, inspired by the reforms made by Georges-Eugène Haussmann in Paris during the XIX century.

environment as in the case of large-scale cultural events, exemplified by street carnival of Rio de Janeiro, the main focus of this work. However, it is possible to extract from the work of Jacobs that the street has characteristics of a potential catalyst for the production (creation or modification) of urban ambiences. Ie, the street, as an essentially public good, comprehensive, accessible and, depending on their primary purpose (to serve as a way of driving townsmen), is able to absorb the appropriation given to it at any given time and, consequently, transform itself. Hence the crucial importance of the street in the construction of the urban environment. While the private environment will remain, at least in theory, restricted, absolute, individualized and immutable, the public space, represented here by the streets, has a mutational capacity, aggregating plural elements capable of producing significant change in the construction of the territory. According to Bauman (2009) *public places are the crucial points on which the future of urban life is decided right now*.

In order to exemplify, it is possible to illustrate the above statement with some observations about the use of this public space: the street, (i) in their ordinary condition, is the way, a part of the urban infrastructure used to conduct people who share that territory. In this condition, the street **is** the path, since **it** **is** used with that specific purpose by those who seek to transit in the urban environment; However, (ii) when it is adapted for a situation different from ordinary, its condition of being an instrument of urban infrastructure oriented to provide mobility within the city stays in the background. In this extraordinary condition, the street **can** be - among others - the stage (not only a pathway anymore). It **can** be used as such by those who seek, for example, to claim rights or celebrating any public festival, as the street carnival city of Rio de Janeiro.

Thus, as shown, public space - well exemplified by the street in this study - shows up as one of the possible tools in the construction of an urban space diverse and inclusive, and consequently, in the exercise of the right to the city. This perspective pluralistic and democratic about urbanism, ie defending the above-mentioned function for the public space, is opposed to a privatist view of the city.

Since the rise of the values propagated under the Renaissance Enlightenment, the ideals of private property and in particular the right to privacy associated with this individual space contributed to the production of the territory and, more specifically, to the way of appropriation of the urban. The appreciation of the intimate private space at the expense of the public square are remarkable features associated with

these values.

In this sense, the defense, by some urban planners, of the private environment prevalence at the expense of the diversity experienced in the public space gave rise in several cities in the west side of the globe - including the city of Rio de Janeiro - the construction of large gated communities and almost self-contained apartments, equipped with an extensive range of services and infrastructure to cater to (almost) all private needs of its condominium members, exposing them to the city as little as possible. This neglect of the public environment - which, ultimately, exile the townsman in their closed environment - also means depart this group of individuals, as stated by Bauman (2009), from a potential contact with diversity, distancing them from diversity creativity and its ability to make life more intense, which, in turn, aims to encourage differences to produce a meaningful dialogue. Thus, this reduction in the possibilities of forming a complex social network, developed through contact with strangers (anonymous) which exist in the public space, inhibits social recognition of diversity, which is a fundamental prerequisite for the development of public policy for the recognition .After all, the recognition – to be "discovered" – depends on the interaction with others. This contact occurs largely in the public space, for example, on the street. The escape from the bourgeois private setting is then fundamental to this.

It is in the tension between the instability associated with the 'unknown' that the street itself brings and the security and soundness of the private space that the control and use of the territory is perceived here. To live the street therefore means outbreak the urban in search of its associated attractions. However, the possibility to enjoy this experience is necessarily related with the absence of insecurity. This is because fear - fed by an unsafe urban environment - makes disappear from the streets, as stated by Bauman (2009), *spontaneity, flexibility, the ability to surprise and adventure offers*. According to the author, the alternative to security is not the beatitude of tranquility, but the curse of boredom. Thus, in a scenario - as the urban - whose contact with "foreign" is constant, being in touch with diversity becomes necessary not only to think about recognition public policies, but also to mitigate the condition of this strange-foreign and make it a neighbor, removing any sense of insecurity provided by them. It is, therefore, by creating this unique network, heavily produced by the way we use and control urban space, which Jacobs (2007) considers it possible to create many inclusive and secure territories, produced from the interests and needs of the social

group who inhabits.

All arguments previously developed aims to ballast part of the analysis of a particular mode of appropriation of the street, which is the street carnival of Rio de Janeiro. As it seeks to present in the following, that cultural manifestation has fundamental characteristics that may be used, in cases of an urban entrepreneurialism, to serve the interests of private capital in the construction of a "spectacle city". Or, if appropriated by social urbanism, as a way of building a diverse and inclusive ambience from a participatory perspective toward its own inhabitants.

3. Carnival as a form of appropriation of the street and guarantee the right to the city

As shown throughout this work, the street carnival in Rio - materialized by several street blocks simultaneously organized by the city - is essentially democratic, since, besides being experienced on the street during that period becomes the public stage, its free. However, even owning a precious inclusive potential able to produce diversity, we can not avoid thinking about this issue through the processes of gentrification added to the outcomes identified in the production and appropriation of urban space during carnival festivities in the light of the guidance given by the Government, especially regarding the way in which the event are planned and executed.

We believe it is possible to associate goers of the street blocks and the locations in which they occur in the city with the level of interaction between different social classes in the production of diversity. Despite the eminently democratic condition identified in carnival festivities, there would be a force capable of potentially improve the effects produced by geographical segregation which materializes socioeconomic differences in metropolitan Rio. Thus, it is believed that, at the same time it is possible to identify places where there is high interaction of different social groups during this period, it is also possible to verify that small public space areas are used by smaller groups to project their private space in the street.

Carnival in the city of Rio de Janeiro is not just that the samba schools that parade on cars, costumes, props and sambas. Much of the celebration of Carnival in Rio de Janeiro, happens on the street, in the traditional street blocks. According to information from RioTur (the Tourism Company of Rio de Janeiro Municipality), in 2013, about 5 mil-

lion people marched in the city within 492 street blocks, during the 5 days of the official party.

Those street blocks - some with almost 100 years of history - are multiple and often themed. They consist of musicians and walk through the city streets playing music and inviting people to join the party. Usually, with authorization from City Hall, the blocks occupy the main streets and avenues of the city of Rio de Janeiro. The city stops to see the blocks pass by.

Admission in the blocks is free. It is just necessary to keep following the block through the city. Unlike other Brazilian cities - such as Salvador, Bahia -, where ropes separate those who pay to stay with some blocks (something like a box on the street) from those who do not pay, in the Carnival of Rio de Janeiro there are no boxes or ropes that divide people. All revelers are forced to share together - if they wish to participate - Carnival. In 2013, when the practice of creating boxes and ropes to segregate people was contemplated, the City Hall has manifested itself through a Decree prohibiting the establishment of any kind of separation between people[2].

[2] Rio de Janeiro's Secretary of Tourism, Antonio Pedro Figueira de Mello, says he does not tolerate the string: "It does not fit with the Rio carnival. Rope is only for the musicians. The street is of the people and we can not allow its commercialization. The space where the blocks parade is public. And the municipality is the one which legislates on this space. " In addition, Rita Fernandes, president of Sebastiana - association which represents 12 blocks - condemned the "Carnival of privileged places": "The block which starts to allot VIP areas with ropes and shirts is not street carnival. May be in another state than ours. (...) It defines as a commercial mold. No matter the musical language, it is the intention. A company that creates a block to sell shits (abadás) is making an appropriation. This entertainment, not Carnival."

(Source: RIOTur)

As it is possible to realize from the brief lucubrations above, the street carnival has significant potential for the use and control of the city. Although this particular form of appropriation of the city occurs for about a month during the year (considering that the blocks start before and continue to occur after the carnival official holiday), the interaction with the public space, the abandonment of the private environment aiming to live the territory and all the uncertainties and expectations that he is able to offer are crucial to build on its inhabitants the feeling of belonging to the city. We believe this particular circumstance, responsible for generating the desires of owning the right to live and enjoy the city, belonging to a territory legitimately democratic and absent of fear, has been one of the key drivers that have shaped and strengthened the manifestations observed in Brazilian streets, especially during June 2013. It can be concluded, therefore, that the results obtained through the claims were potentially on the streets. This targeted use of public space to serve as a stage for popular demands - associated with predominantly urban issues - can be identified as counterparts of the experience lived by revelers during the street carnival in Rio de Janeiro[3]. That's because, though

[3]In the city of Rio de Janeiro is common to see streets closed for car use. It is tradition in

both are presented in a seemingly opposite desires, in fact, we believe the two situations fit the singular form, because, according to this understanding, responsible for making their potential hatch, leading revelers/protesters to the streets was the pursuit for the right to the city, which means a democratic, inclusive and diverse urban space, capable to meet the demands of its inhabitants.

Clearly, Rio's carnival, which takes place in the public space by essence, which is the street, can not establish private or social distinctions. The president of Sebastiana[4], criticizes even the commercialization of carnival. If the practice of street carnival is a cultural heritage, it may not be appropriate or privatized.

The culture industry can represent *the way in which the artistic and cultural production is organized within capitalist relations of production* (Machado, 2009). In this sense, the production becomes a commodity and is now evaluated according to its market price, not for the "*intrinsic value it may have as scientific, literary, philosophy, etc..* " (Machado, 2009) Thus, the recipient is just a consumer of the work and no longer a participant, a creator: *it is a good to be purchased, but not to be produced by the individual; to be used temporarily, but not to embed itself definitively to formation of the subject* (Machado, 2009)

Somehow the carnival of Rio de Janeiro fight against total submission to the cultural industry. However it suffers from the influence of sponsors and from the entire capitalist system that revolves around the party, it can still be measured by intrinsic value. It is still possible to fill spots where the industrial culture does not penetrate or some places where the input of cultural industry does not prevent other people who do not want or can not consume the products sold, take part in the carnival, which is still open and free. It is clear that the consumption of goods creates a differentiation in all events, but it do not lead to a necessary exclusion.

On the other hand, the carnival is still produced by individuals. It is common to see people who have made their own costumes, which create new blocks and which incorporates the parties to the day-to-day, whether as builders, as musicians or mere participants. The fact that is an open and completely free party can be a factor that prevents the total domination by industrial culture.

---

the city, for example, the closure of some streets on Sundays so that residents possoam use of public space. Unlike other cities, the street is part of the life of the dweller in Rio.

[4]Sebastiana is an local association which represents 12 street blocks in Rio de Janeiro.

3.1. "Rio is not Salvador"

It was common to see groups in 2010 carnival who wanted to build cabins or "VIP areas" in Rio. A movement called "Rio is not Salvador" which set posters in the city until 2013 made the defense of a carnival with "no ropes, no boxes."

The famous carnival of Salvador, also occurs on the streets of Bahia, however with many divisions. According to Professor Marilia Veloso (2012) are three: (i) the famous people stays in the boxes above the street, (ii) the whites ones who are protected by ropes in the street and (iii) the blacks accompanying the parade in the free area. Veloso names the Salvador carnival as "apartheid" and realizes an "island of white surrounded by a string of black people." Are blacks who hold the strings that make the separation between whites within "cornas" - a sort of VIP area next to the singers.

The photo below makes it possible to realize the separation of the groups in Salvador street carnival. A uniformed group (with so-called "abadás") within the string, protected by another group of employees also uniformed. Beside, the boxes are located.

Source: globo.com)

What can be said is that the most diverse groups of Rio's Carnival want to avoid a separation of people, as it happens in Salvador.

The attempt is to keep the city, which unfortunately is a space of

exclusion and differentiation, at least a bit a more plural, colorful and diverse. The fight is for the Carnival of Rio does not turn into something like Salvador's street carnival.

3.2. Street carnival and the urban chaos

The occupying the streets of Rio de Janeiro, Carnival carries problems arising from a large group of people. Already on Friday, (the party officially starts on Saturday and ends on Tuesday) main downtown streets are blocked. Unofficially the party starts traditionally on Friday noon.

Tons of garbage are left throughout the city. The traffic is unworkable in the center and in some neighborhoods. The number of reported thefts increase significantly. A little chaos ensues on the city streets. Noises and cars are replaced by people and music. The streets are occupied by people. Maybe they resume the place that is rightfully theirs. The cars are driven. The sound is different.

This substitution has its costs. But it carries with it the joy and the participation of millions of people. A bit of a culture is forged on the asphalt of the city.

(Source: RJTV, Globo)

3.3. The clown and the goat

Carnival is a plural celebration. Whether the plurality of persons, either plurality of forms of manifestation. The coexistence often rough and hurried of the day-to-day, for a few moments is replaced by moments of living differently.

The police, present in some blocks, to (theoretically) protect people and guarantee the safety of the event, may possibly also join the party. If the police violence, for example, is a phenomenon that marks life in Brazilian cities, in carnival, even briefly, the relationship between the police that arrests, and the citizen who is arrested or is the victim of a bandit undergoes changes.

(Source: Agência Brasil)

The photo shows the fun of a clown with the police. It is also common to see - as in other Brazilian cities - men dressed as clowns, during the carnival, stopping car traffic "to move the block."

It is not possible to forget that the thefts of small goods such as mobile phones and wallets, multiply in carnival, like any great popular celebration. Was there the police to curb such practices. But in carnival, other possibilities are feasible, and the soldier also ends up turning into

a prop.

It is worth to remember that police violence does not disappear from one day to another. The crime increases. But such relationships in a small measure, are softened by the relations in carnival. It is an opening of a gap, a new possibility, that adorns the hearts of men and women.

However Carnival is also politics. It is very common to see protests, banners and posters calling for services or criticizing the actions of the municipality or the state government. The carnival of 2013, for example, was marked by several protests in the neighborhood of Santa Tereza which had traditional trams - one of the leading and most traditional means of transport in the neighborhood - deactivated by the local government. In the midst of music and the dancing clowns, you could see people with banners and t-shirts, remembering the promise, still unfulfilled by the municipality, to reactivate the service.

(Source: Portal R7)

Brazilian and foreign personalities are routinely imitated in carnival. Clowns live with someone dressed as Spiderman, Batman, Superman etc. But people also fantasize up of politicians, presidents, gov-

ernors, buses collectors, street sweepers, singers. Some with political overtones, to criticize, others just for fun among the people. There is not a right rule in the same way that there are rules.

3.4. The appropriation of street carnival by public managers

Made those remarks, complies to briefly analyze – from the perspective of current urban planning viewpoints presented above, aimed at the redefined role of local government after the 1988 Federal Constitution (Santos, 2006) – how the street carnival in Rio can be appropriate by municipality government and the possible verifiable consequences from the adopted orientation. After that, from the application of the two urban planning currents, we present the management model that has been adopted within Rio de Janeiro in the past few governments and the consequences already verifiable due to the adoption of this guidance.

Through the perspective sustained by urban entrepreneurialism, ie the one that defends the possibility of the Government - with the purpose of financing urban infrastructure works - manage city through potential projects to be executed jointly with the private sector (Compans , 2005), Carnival (either the parade or the street one) is identified as another major event which is designed to fill a menu of activities that, on one hand, can be consumed in the "show-city" and, on the other can serve strictly for funding to be invested in the city itself. This entrepreneurial perspective, whose origin is associated with the end of the Welfare State - when the application of economic austerity measures forced states to reduce investments in urban infrastructure - at least in theory, is meant to serve as an instrument for funding urban equipment which have significantly high cost.

However, the construction of urban space in order to adjust it to the international consumer model - to then fund raise - can produce consequences of the most diverse and negative in the urban environment, especially for the most vulnerable groups. This changes redefines the territory and conducts an intensive process of urban renewal. Among the unwanted effects for the inhabitants of this city is possible to highlight gentrification processes (Smith, 2006) originated of appropriation and exploitation of some spaces in the city which, in turn, ends up going to serve the interests of private capital, on the grounds that such modifications are necessary to finance other urban facilities.

In these cases it is possible to observe even more perverse ef-

fect with respect to this production model of urban space, namely, the transformation of the "city to live" into "a town to be consumed", that is, the "show-city". An excessive use of entrepreneurial strategies in urban space can lead thus distortion of the purpose of this proposal, producing an environment that, in fact, serve mainly the interests of those who come there to consume and / or invest, ignoring the needs of those inhabiting that territory.

On the other hand, from the perspective of social urbanism, it is intended that the urban space is produced through the productive mobilization of the territory, ie, through a link between social aspects with the production and generation of value by combating inequality and exclusion through the socioeconomic dynamics (Silveira, 2001). In this case, in addition to provide social inclusion measures, this urban planning viewpoint aims to also consider environmental criteria. Therefore, according to this perspective, it is believed that Carnival would be inserted in this dynamic urban production as a form of integration among different social groups in order to aggregate the inhabitants of the metropolis and produce diversity. This articulation would walk beside inclusive measures to generate income that, in turn, would not be tied to a model of space production whose main thrust would be dictated by private capital.

While this production model intends to become more inclusive, since it foresees the construction of the territory by those who inhabit it, enabling the city, especially urban infrastructure works of great magnitude disregarding the alternative to rely on perspectives of urban entrepreneurialism can become an unreachable goal. Thus, we believe that the combination of both urban planning viewpoints in appropriate measures can result in advances in the production of a diverse and inclusive urban space.

In the case of the city of Rio de Janeiro, since 1993, with the preparation of the Strategic Plan (Compans, 2005), the municipality has adopted an entrepreneurial governance way. Currently, this feature reaches a high degree of institutionalization, with the accomplishment of huge urban projects in order to meet the requirements to hold the mentioned mega-events in the city. In recent years we observed also genuine overhaul of the municipal structure, the redistribution of competencies, development of new standards and policies, establishment of public-private partnerships and the creation of new urban tools (Vainer, 2011). Accordingly, by analyzing this situation through Harvey's (2006, 2011) point of view, these changes in geography and in the municipal-

ity structure, may indicate that what is being stimulated in the city is currently the development of the local capacity of capital growth, as do tourism, spectacle and mega-events.

To the "show-city", it is undesirable to give visibility to the social ills and to the urban "disorder": a new aesthetic is imposed, and requires the expulsion of the low-income population to outlying regions of the city, unattractive to capital property. Thus, therefore, are evident risks of incorporating, in urban planning, reified concepts of other cities in the world - as in this case, in which the city of Barcelona was the model to be studied for the purpose of designing urban projects for the city of Rio de Janeiro, - which tend to drive the urban entrepreneurialism to a process of "negotiating urbanism" with objectives more economical than urban (Maricato, 1997).

Specifically about the street carnival in Rio, it is possible to verify that, currently, this was also appropriate by the entrepreneurial perspective. Although the municipality have flagged that would prevent any form of privatization of the blocks - prohibiting the imposition of charges[5] - the street carnival in Rio de Janeiro, is considered one of the more major projects conducted by the City Hall. It happens that, despite the celebrations carry an entrepreneurial dimension, maintaining its essential characteristics - ie, to be conducted in the street and to be free - does not significantly inhibit the effects able to be extracted from the analysis of the street carnival in the perspective of achieving the right to the city.

Conclusions

Although the free street carnival is not an unique feature of the city of Rio de Janeiro, this condition, in this case, it is crucial to realize that this phenomenon is capable to allow those who live it an experience of the urban. Thus, this popular carnival legitimate, albeit short time, a reinterpretation of certain areas of the city (as in the case studied, the street). During the festivities this public space is no longer perceived only as pathway, but the destination itself. This transformation, even if temporary, provides its inhabitants the possibility of these being at the center of a whirlwind of experiences that ultimately concentrate the capability to surprise and offer adventure in urban space.

The perception on the use of the street as purpose (stage), the

[5]http://g1.globo.com/pop-arte/noticia/2013/02/grupo-de-blocos-se-rebela-contra-privatizacao-do-carnaval-de-rua-carioca.html (last acessed 05.13.13).

interaction with public space and the abandonment of private environment are valuable elements to build a belonging feeling in the inhabitants the territory. Thus, the street carnival can be seen as an exercise of the right to the city. So, by thinking about these components we advocate the need to be alert to prevent urban entrepreneurialism not to erupt lawlessly transforming street carnival in a spectacle to be consumed, decharacterizing street carnival from its popular features. Thus, among others, is essential to maintain the current feature of full and unrestricted access to the street festivities for us to perceive them as instruments of exercising access to the city.

References

ABREU, Maurício. **A evolução urbana do Rio de Janeiro**. Rio de Janeiro: IPLANRIO; Zahar, 1987.

BAUMAN, Zygmunt. **Confiança e medo na cidade**. Rio de Janeiro: Zahar, 2009

COMPANS, Rose. **Empreendedorismo urbano**: entre o discurso e a prática. São Paulo: Editora UNESP, 2005.

HALL, Peter. **Cidades do amanhã**. São Paulo: Perspectiva, 2007

HARVEY, David. **O Enigma do Capital e as crises do capitalismo**. São Paulo: Boitempo, 2011.

_____. **A produção capitalista do espaço**. São Paulo: Annablume, 2006.

JACOBS, Jane. **Morte e vida de grandes cidades**. São Paulo: Martins Fontes, 2007

LE COURBISIER. **Urbanismo**. São Paulo: Martins Fontes, 2000

MACHADO, Antônio Alberto. **Ensino jurídico e mudança social**. São Paulo: Expressão Popular, 2009, p. 102

MARICATO, Ermínia. Brasil 2000: qual planejamento urbano? **Cadernos IPPUR**. Ano XI, n. 1 e 2. Rio de Janeiro: IPPUR, jan.-dez. 1997.

SANTOS, Angela Moulin S. Penalva. Finanças Públicas: uma análise da autonomia financeira dos municípios brasileiros na primeira década do século XXI. **Revista do Tribunal de Contas do Estado do Rio de Janeiro** vol. 7, n. 1, Rio de Janeiro: O Tribunal, jan./jun. 2012.

_____. Planejamento urbano: para quê e para quem? **Revista de Direito da Cidade**. n. 1, vol. 1, Rio de Janeiro/UERJ, 2006.

SMITH, N. A gentrificação generalizada: de uma anomalia local à "regeneração" urbana como estratégia urbana global. In: BIDOU-ZACHARIASEN, C. (Org.). **De volta à cidade**. São Paulo: Annablume, 2006.

VAINER, Carlos. Cidade de Exceção: reflexões a partir do Rio de Janeiro. In: **XIV ENCONTRO NACIONAL DA ANPUR**, 2011. Disponível em http://www.opp.ufc.br/urbano04.pdf (Acesso em 12.05.2013)

VELOSO, Marília Lomanto Veloso. **Carnaval de Salvador: "apartheid" e seletividade em uma ilha de brancos cercada por uma corda de negros**. *In:* http://racismoambiental.net.br/2012/02/carnaval-de-salvador-%E2%80%9Capartheid%E2%80%9D-e-seletividade-em-uma-ilha-de-brancos-cercada-por-uma-corda-de-negros/ (last acessed in 05.21.2013)

SILVEIRA, Caio Márcio. **Miradas, métodos, redes – o desenvolvimento local em curso**. *In: http://www.iets.inf.br/biblioteca/Miradas_metodos_redes_o_desenvolvimento_local_em_curso.pdf* (last acessed in 05.13.13)

The city as a mosaic:
Law, otherness and dialectic perspective

Maria Coeli Simões Pires[1]
Mila Batista Leite Corrêa da Costa[2]

Abstract: The city, especially in a democratic postmodern framework, appears as a shared background where the interaction and sociopolitical, economic, cultural and symbolic relationships occur. Extrapolating the physical scope and the contextual composition, the city presents itself as a crucible of exchange, reactions, functionalization of their componential elements and, above all, the city is consolidated as a baseline of universal access to rights. The urban space therefore hosts the citizenship universalization, and needs to be observed and evaluated by the concept of plurality and diversity that form the town mosaic, always susceptible to changes in process, social actors dialogue, and multiple variables that are drawn by "dialectic of look" about the city. In this line, Law plays critical role – with their regulatory systems – in the dynamics of "networks of meaning" assimilation and in the perception of differences inherent to the complexity of the city. Accordingly, it is necessary to adopt a self-reflective and dialogic methodology able to translate reality – object of juridical regulation – with fidelity. The urban setting requires a systematic set of rules and representations erected not in the portrayal of a society artificially conceived as homogeneous, but in the heterogeneous, plural and pulsating conformation of social and symbolic manifestations immersed in urban space. The city as a locus of interaction and behavioral/discursive molding therefore allows degrees of learning accumulation to individual and collective formulation of social practices, constituting itself as a composition field of argumentative and symbolic forces related to many actors. All imbued with the need to build consensus, but guided by diversity and plurality that characterize the composition of a

[1] Master and PhD in Law. Associate Professor of Administrative Law at Federal University of Minas Gerais. Lawyer. Secretary of Office of the Chief of Staff and Institutional Relations for the Governor of the State of Minas Gerais. E-mail: coeliserro@gmail.com

[2] Graduated, Master in Law and PhD stundet at Federal University of Minas Gerais. Postgraduate degree in Public and Labor Law. Graduated in International Affairs at Pontifical Catholic University of Minas Gerais. Advisor of Office of the Chief of Staff and Institutional Relations for the Governor of the State of Minas Gerais. E-mail: milableite@hotmail.com.

collective space regimented from individualities – sustained in everyday life of ordinary men, disseminated characters, innumerable walkers, according to Michel de Certau. The adherence of the analysis of urban space to the "Anthropological Blues" assumptions in accordance with Roberto daMatta's thesis and the Habermasian theoretical model extends the perception of discursiveness and communicative flows around its object. The paper seeks to analyze the city – as theoretical and qualitative research – using an anthropological perspective, the Habermasian discursive support and Pierre Bourdieu's sociology, conceiving the urban space as a "field", a space where actors have specific positions on referrals of symbolic dynamics. An interpretation of the city methodologically concerted requires an architecture of concepts and practices endowed with the plasticity able to provide the juridical redefinition of science as an instrument of intervention in reality.

Keywords: City; Law; Discursiveness.

1 Introduction

Uma cidade é imperativo
a um tempo humano e desumano.
Palácios presídios
asfalto cavernas
elevados e subterrâneos
teia de virtudes e crimes.
Uma cidade é sinfonia
com ásperas dissonâncias.
É um ser total de osso e carne,
tem nervos, músculos e sangue:
o sangue de seus habitantes
os nervos de seus habitantes
a própria força e fraqueza.
[...]
A expressão de uma cidade é múltipla.
A beleza de uma cidade é instável.
Uma cidade se assemelha às outras
Porém, se a amamos, é única.
(Henriqueta Lisboa)[3]

[3] LISBOA, Henriqueta. Belo Horizonte – bem querer. Belo Horizonte: EDDAL, 1972.

Postmodernism[4] is characterized by the remodeling of dominant scientific paradigm – traditionally guided by a rationality closed on its own epistemological limits.[5] In this framework, new foundations to support the theory and the scientific practice are structured from the displacement of the Newtonian-cartesian paradigm, erected over causal relations and based on the maintenance of an orthodox methodological framework composed of pre-established formulas and assumptions, without accurate translation of reality.

In the midst of the postmodern debate, therefore, highlights the redefinition of scientific method and the redrawing of legal science itself, through understanding the "hypercomplexity of everyday life"[6] and the conformation of a new Law, in turn directed to the replacement of the notion of "stability" for the "suitability", due to their inability to satisfactorily respond by itself "to the demands of pluralism regulation, justification and understanding of social reality in all its density, extent and depth [...]".[7]

The city, in this scope, object of analysis of this work, needs to be understood, in a scientific conception, as a *locus* for construction of social plot, permeated by the symbolic interactionism's layouts – using Goffmanian[8] reading – and by the behavioral and discursive molding that allows degrees of learning accumulation for individual and collective formulation of social practices.

The urban space, analyzed by postmodern democratic bias, is constituted as a composition field of argumentative and symbolic forces of various actors and as a shared backgrounds where the sociopolitical, economic, cultural and symbolic relationships happen.

The article defined as its central object the treatment of the city in

---

[4] The text will adopt the concept of modernity proposed byAnthony Giddens who defines it as the style, life's custom or social organization which emerged in Europe about the sixteenth century and that subsequently became worldwide known from the expansion of the model. GIDDENS, Anthony. **As consequências da modernidade**. Tradução Raul Fiker. São Paulo: UNESP, 1991.

[5] SANTOS, Boaventura de Sousa. Um Discurso sobre as Ciências. Porto: Edições Afrontamento, 1988.

[6] FAGÚNDEZ, Paulo Roney Ávila. O Direito e a Hipercomplexidade. São Paulo: LTr, 2003, p.15.

[7] Own translation. PIRES, Maria Coeli Simões. Direito adquirido e ordem pública: segurança jurídica e transformação democrática. Belo Horizonte: Del Rey, 2005, p.2.

[8] The article does not adopt Goffman's subjectivist theory of action as a theoretical framework, but recognizes its relevance for the analysis of the proposed cut.

a perspective that goes beyond the physical and contextual composition scope, presenting itself as a crucible of exchange, reactions, functionalization of their componential elements and, above all, the city is consolidated as a baseline of universal access to rights.

The role played by Law in this way – permeated by their normative systems – is critical in the dynamics of assimilation of networks of meaning and of differences inherent to the complexity of the city, necessitating the adoption of a self-reflexive and dialogical methodology capable of translating with fidelity the reality object of juridical regulation.

The urban setting requires a systematic set of rules and representations erected not in the portrayal of a society artificially conceived as homogeneous, but in the heterogeneous, plural and pulsating conformation of social and symbolic manifestations immersed in urban space.

2. Urban Space: A Juridical-Dialogical Look

> Caminha-se por vários dias entre árvores e pedras. Raramente o olhar se fixa numa coisa, e, quando isso acontece, ela é reconhecida pelo símbolo de outra coisa: a pegada na areia indica a passagem de um tigre; o pântano anuncia uma veia de água; a flor do hibisco, o fim do inverno. O resto é mudo e intercambiável – árvores e pedras são apenas aquilo que são (Ítalo Calvino).[9]

The city, especially in a democratic context, appears as a locus where the interaction and locking of sociopolitical, economic and cultural relations occur. Extrapolating the physical scope, the city presents itself as a space of material and symbolic exchanges, dialogic interaction and, especially, access to rights.

The urban space, in this way, needs to be observed and evaluated using as baseline the changes in process, the dialogue of the social actors and the multiple variables that are drawn by the dialectic of the looks on the space, analyzed from the perspective of the transversality of functional-democratic treatment given to cities and to the use of land, permeated by the debate about the main collective rights related to urban order.[10]

[9] CALVINO, Ítalo. As Cidades Invisíveis. 2. Ed. São Paulo: Companhia da Letras, 2002, p. 8.

[10] To Edésio Fernandes, this collective right includes "the right to urban planning, social housing rights, right to environmental protection, right to capture the urban capital gains

The contour lines of the city in Pierre Bourdieu's sociology can be understood as a "field" – the place occupied by actors in the dynamics of symbolic referrals – with cutouts of urban reality. In the "field", the "habitus" influences the interpretation of the urban space and its results and, therefore, the Law plays with their regulatory systems a fundamental role in the dynamics of assimilation of diversity and differences inherent to complexity of "urban".[11]

The "habitus", defined by Bourdieu as a list of behaviors that shape the everyday social relations, causes inclination for dynamic learning, responsible for interpreting reality and allocation of the actors in the processes of social composition. The "habitus" and social dynamics are present in the construction of urban space and should tune the discourses of Law and Public Administration with the assimilation of networks of meaning, so that the city – with its collective facilities – effectively turn itself into a locus of citizenship and a "field" of democratic regimentation, given its social function, constitutionally established.

3 The city and the law: vocation and anthropological bluesS

> Entre esses direitos em formação figura o direito à cidade (não à cidade arcaica, mas à vida urbana, à centralidade renovada, aos locais de encontro e de trocas, aos ritmos de vida e empregos do tempo que permitem o uso pleno e inteiro desses momentos e locais, etc.) (Henri Lefebvre).[12]

The postmodern model of rationality imposes the need for revising methods and epistemological bases – by overcoming addictions of language and behavior[13] – so that the juridical regulation become able to promote the anthropophagic assimilation of elements from constitution-

---

and the right to regularization of consolidated informal settlements". FERNANDES, Edésio. A nova ordem jurídico-urbanística no Brasil. In: FERNANDES, Edésio; ALFONSIN, Betânia (Org.). Direito urbanístico: estudos brasileiros e internacionais. Belo Horizonte: Del Rey, 2006.

[11] The nonlinearity is an attribute of social relations processed within symbolic processes. BOURDIEU, Pierre. Questões de sociologia. Rio de Janeiro: Marco Zero, 1983, p. 90.

[12] LEFEBVRE, Henri. O direito à cidade. São Paulo: Centauro, 2010, p. 139.

[13] COSTA, Mila Batista Leite Corrêa da; SENA, A. G. O. Whatever Works: Direito, Ciência e Hipercomplexidade. In: José Luiz Quadros de Magalhães; Juliano Napoleão Barros. (Org.). Direito e Cinema. Belo Horizonte: Arraes Editores, 2013, v. 1, p. 37-52.

al plot and of axiological variables immersed on democratic structure.[14]

> The ecological transmodernity paradigm [...] implies the proposal of transformation of an entire model of culture, another conception of the political, of economic, of Law, of subjectivity and of desire, of word, of production of knowledge (science and epistemology), of aesthetics, of health, etc (own translation).[15]

In the analysis of cities, a new paradigm for Urban Law, therefore, requires management aiming constitutional effectiveness, use of a democratic and dialogic rationality, rescue of the "waratian" subjectivity and fundamental rights' concreteness; needs to encompass instruments to ensure the right to good administration and to inclusive management to civilizing spaces, leaving the simulacrum[16] of empty speeches to build an architecture of concepts and practices for sustainable development, based on social function of the city, on transparency, democratic participation and shared responsibilities.[17]

Along this line, new institutional and sociopolitical bases was inaugurated with the 1998 Brazilian Constitution, especially with regard

---

[14] The regulatory system must be established by means of construction of mechanisms for dialogue with civil society, for the aeration of administrative system in the structuration of your prestacional or emancipatory profile, to ensure elementary conditions of existence to common citizen and also to recognize a myriad of public interests and multiple postmodern democratic desires inherent to hypercomplex societies.

[15] Luis Alberto Warat invented the term "transmodernity" meaning, in a way, "dangers and discomforts that go by all the social, death of identity, a hyper-reality that makes the framework of simulated elements a much more sophisticated level of alienation [...] (own translation). In WARAT, Luis Alberto. Territórios Desconhecidos: A Procura Surrealista pelos Lugares do Abandono do Sentido e da Reconstrução da Subjetividade. Vol. 1. Florianópolis: Fundação Boiteaux, 2004, p.403.

[16] SANTIAGO, Silviano. O Entre-lugar do Discurso Latino-americano. In: SANTIAGO, Silviano. Uma Literatura nos Trópicos. 2. ed. Rio de Janeiro: Rocco, 2000, p. 9-26.

[17] The metropolis' management, particularly in the context of Federations, demands "vertical and horizontal mechanisms, aimed to preserve the autonomy and effectiveness of federal cores of power remaining and at the same time, to adequate public regulation of territorial urban order" and the formulation of public policy (own translation). PIRES, Maria Coeli Simões. Governança metropolitana em Minas Gerais e implementação do novo arranjo institucional de gestão. Fórum de direito urbano e ambiental, Belo Horizonte, v. 7, n. 37, jan. 2008. Disponível em: http://bdjur.stj.jus.br/dspace/handle/2011/31792.

to the instruments of urban and regional planning,[18] guided to a conception of governance committed with the diffusion of access to rights. The realization of the social functions of the city and guarantees of welfare was ensured by Brazilian Constitution, on art. 182, and regulated by the City Statute – Law nº. 10,257, of June 10, 2001.[19]

The concept of the social function of property was invigorated by the new legislative treatment; and new mechanisms of popular participation were conceived, the basis for the design of a democratic urban planning distant from technocratic practices that characterized the exception period. The City Statute was created – in this social and democratic setting – to establish general guidelines and tools for urban management, defining that "urban policy aims to order the full development of the social functions of the city"[20] by "ensuring the right to sustainable cities, understood as the right to urban land, housing, environmental sanitation, urban infrastructure, transportation and public services, work and leisure for present and future generations".[21]

The Brazilian Constitution and the City Statute, in the sphere of

[18] MONTE-MÓR, Roberto Luís de Melo. A questão urbana e o planejamento urbano-regional no Brasil contemporâneo. In: COSTA, Geraldo Magela; MENDONÇA, Jupira Gomes de. (orgs). Planejamento urbano no Brasil: trajetória, avanços e perspectivas. Belo Horizonte: C/Arte, 2008.

[19] PIRES, Maria Coeli Simões. A função social no direito urbanístico e na política urbana: uma nova ordem de sustentabilidade das cidades. In: PEREIRA, Flávio Henrique Unes; DIAS, Maria Tereza Fonseca (Org.). Cidadania e Inclusão Social: Estudos em Homenagem à Professora Miracy Barbosa de Sousa Gustin. Belo Horizonte: Fórum, 2008, p.377-405. To assess the significance of urban planning in a broader dimension, understood as a social right, as proposed by the Urban Reform, presented in 182 and 183 articles of Brazilian Constitution and in City Statute, see COSTA, Márcia H. Batista C. As políticas urbanas e o exercício de uma nova esfera pública na gestão das cidades. In: MONTÚFAR, Marco Córdova. (Org.). Lo urbano en su complejidad. Una lectura desde América Latina. Quito: Flacso, 2008.

[20] Own translation. Art. 2º. BRASIL. Estatuto da Cidade. Lei n. 10.257, de 10 de julho de 2001. Regulamenta os arts. 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências. Diário Oficial da União, Brasília, 11 jul. 2001. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10257.htm. Acesso em: 4 mar. 2010.

[21] Own translation. Art. 2º. BRASIL. Estatuto da Cidade. Lei n. 10.257, de 10 de julho de 2001. Regulamenta os arts. 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências. Diário Oficial da União, Brasília, 11 jul. 2001. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10257.htm. Acesso em: 4 mar. 2010.

planning and management of urban space, are important components of an advanced legal-urban framework for achieving the full access to urban facilities, as mentioned in the State of Minas Gerais' Constitutition,[22] and a "new urbanism , of the healthy cities".[23] Consequently, the city juridically concerted, designed over the mentioned regulatory requirements, depends on proactive behavior of Public Administration and Law itself, in order to enable strategies of insertion and intervention in "urban", supported on "the perspective of collective and democratic building of a shared management between government, societal and private sector actors".[24]

The new regulatory framework, as a means of enforcing rights, plays a key role in the urban design process because it has the power to break with perverse links between planning, rigid management and one-dimensional urban development. The postmodern urban regulations must assume a systematic set of representations and norms erected not in the portrayal of a society artificially conceived as homogeneous, but in the heterogeneous, plural and pulsating conformation of social and symbolic manifestations that compose the space: "[...] people are equal before the law but they have different needs, capacities and desires".[25]

In addition, it is urgent the incorporation, especially by urban juridical methodology, of what is most extraordinary, more human and less uneventful in the city analysis: the look of otherness – "Anthropological Blues" – that recognize the other beyond the rigid antagonism I/other, civilized/barbarian, questioning the intellectual space of Law and incorporating "in the own field of official routines [...] those extraordinary ways, always ready to emerge in every human relationship [...]".[26]

---

[22] Constituição do Estado de Minas Gerais. 1989. Minas Gerais (Diário do Legislativo), Belo Horizonte, 22 set. 1989. Disponível em: http://www.almg.gov.br/consulte/legislacao/completa/completa.html?tipo=CON&num=1989&comp=&ano=1989. Acesso em: 4 mar.2012.

[23] FREITAS, Juarez. Sustentabilidade: Direito ao Futuro. Belo Horizonte: Forum, 2011, p.38.

[24] Own translation. PIRES, Maria Coeli Simões. Governança metropolitana em Minas Gerais e implementação do novo arranjo institucional de gestão. Fórum de direito urbano e ambiental, Belo Horizonte, v. 7, n. 37, jan. 2008. Disponível em: http://bdjur.stj.jus.br/dspace/handle/2011/31792. Acesso em: 4 abr. 2012, p.3.

[25] Own translation. SEN, Amartya. A Idéia de Justiça. São Paulo: Cia das Letras, 2011.

[26] Own translation. DaMATTA, Roberto. O Ofício de Etnólogo ou Como Ter 'Antropological Blues'. In NUNES, Edson O. (Organizador). A Aventura Sociológica: Objetividade, Paixão e Improviso e Método na Pesquisa Social. Rio de Janeiro: Zahar, 1978,

> Hades: the Platonic cave, the contemporary metropolis where the eyes "look without seeing." [...] the progress and the modernity require the "dialectic of look" that is the transformation of mourning into playful, because only the look that improves itself according your objects of contemplation makes men better.[27]

The guarantee of the right to the city by juridical and methodological otherness empties the proposal of "company-town",[28] commodified, guided by managerial or operational logic, marking the need for consolidation of basic rights starting from consolidated scopes of property functionalized, social-environmental sustainability of the urban space and systematic and principled interpretation of new legal frameworks.

4. Conclusion

Urban space hosts the universalization of citizenship and it needs to be observed and evaluated by the nuances of plurality and diversity that compose the mosaic of the city – mixed of subjectivity – always susceptible to the changes in process, to the dialogue of the social actors and to the multiple variables that are drawn by the dialectic of looks over the city.

The regulation of the city is usually dictated by arrogance. It is necessary to respect the languages; and to read between the lines of a pluralistic order. The pragmatic challenge is to overcome the traditional technicist normative model to achieve a democratic planning, management and control of the city: a reading constitutionally proper of all normative basis needs to endorse solutions that communicate with the multiple dimensions of urban system and public policy.

The logic of production and consumption in the cities and the space and urban infrastructure's commodification, marked especially by center-periphery segregation, need to be rethought and receive new meanings in the light of a multidimensional perspective and the "Anthropological blues". This civilizing level, beyond the legal and business

---

p.27-28.

[27] BUCK-MORSS, Susan. Dialética do Olhar: Walter Benjamin e o Projeto das Passagens. Belo Horizonte: Editora UFMG, 2002, contracapa.

[28] VAINER, Carlos. Pátria, Empresa e Mercadoria. Notas sobre a Estratégia Discursiva do Planejamento Estratégico Urbano. In: MARICATO, Ermínia; Vainer, Carlos; Arantes, Otilia. A Cidade do Pensamento Único: Desmanchando Consensos. Petrópolis: Vozes, 2000, p. 75-103.

plan, will be built from the dialectic of the look; the one that sees, not blind, as in Plato's conception.

The city and urban, in a postmodern conception , therefore, must be understood within the scope of economic, social, political and cultural global processes that reshape urban space – and influence the times, spaces, reinterpretations of social relations and transformations of everyday life. The city became, at the same time, the place and the means, theater and arena of these complex interactions.

References

BOURDIEU, Pierre. **Questões de sociologia**. Rio de Janeiro: Marco Zero, 1983.

BRASIL. Estatuto da Cidade. Lei n. 10.257, de 10 de julho de 2001. Regulamenta os arts. 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências. **Diário Oficial da União**, Brasília, 11 jul. 2001.

BUCK-MORSS, Susan. **Dialética do Olhar:** Walter Benjamin e o Projeto das Passagens. Belo Horizonte: Editora UFMG, 2002.

CALVINO, Ítalo. **As Cidades Invisíveis**. 2. Ed. São Paulo: Companhia da Letras, 2002.

COSTA, Márcia H. Batista C. As políticas urbanas e o exercício de uma nova esfera pública na gestáo das cidades. In: MONTÚFAR, Marco Córdova. (Org.). **Lo urbano en su complejidad**. Una lectura desde América Latina. Quito: Flacso, 2008.

COSTA, Mila Batista Leite Corrêa da; SENA, A. G. O. Whatever Works: Direito, Ciência e Hipercomplexidade. In: José Luiz Quadros de Magalhães; Juliano Napoleão Barros. (Org.). **Direito e Cinema**. Belo Horizonte: Arraes Editores, 2013.

DaMATTA, Roberto. O Ofício de Etnólogo ou Como Ter 'Antropological Blues'. In NUNES, Edson O. (Organizador). **A Aventura Sociológica**: Objetividade, Paixão e Improviso e Método na Pesquisa Social. Rio de Janeiro: Zahar, 1978.

FAGÚNDEZ, Paulo Roney Ávila. **O Direito e a Hipercomplexidade.** São Paulo: LTr, 2003.

FERNANDES, Edésio. A nova ordem jurídico-urbanística no Brasil. In: FERNANDES, Edésio; ALFONSIN, Betânia (Org.). *Direito urbanístico*: estudos brasileiros e internacionais. Belo Horizonte: Del Rey, 2006.

FREITAS, Juarez. **Sustentabilidade**: Direito ao Futuro. Belo Horizonte: Forum, 2011.

GIDDENS, Anthony. **As consequências da modernidade**. Tradução Raul Fiker. São Paulo: UNESP, 1991.

LEFEBVRE, Henri. **O direito à cidade**. São Paulo: Centauro, 2010.

LISBOA, Henriqueta. **Belo Horizonte** – bem querer. Belo Horizonte: EDDAL, 1972.

MONTE-MÓR, Roberto Luís de Melo. A questão urbana e o planejamento urbano-regional no Brasil contemporâneo. In: COSTA, Geraldo Magela; MENDONÇA, Jupira Gomes de. (orgs). **Planejamento urbano no Brasil**: trajetória, avanços e perspectivas. Belo Horizonte: C/Arte, 2008

PIRES, Maria Coeli Simões. **Direito adquirido e ordem pública**: segurança jurídica e transformação democrática. Belo Horizonte: Del Rey, 2005.

PIRES, Maria Coeli Simões. A função social no direito urbanístico e na política urbana: uma nova ordem de sustentabilidade das cidades. In: PEREIRA, Flávio Henrique Unes; DIAS, Maria Tereza Fonseca (Org.). **Cidadania e Inclusão Social**: Estudos em Homenagem à Professora Miracy Barbosa de Sousa Gustin. Belo Horizonte: Fórum, 2008, p.377-405.

PIRES, Maria Coeli Simões. Governança metropolitana em Minas Gerais e implementação do novo arranjo institucional de gestão. **Fórum de direito urbano e ambiental**, Belo Horizonte, v. 7, n. 37, jan. 2008. Disponível em: http://bdjur.stj.jus.br/dspace/handle/2011/31792.

SANTIAGO, Silviano. O Entre-lugar do Discurso Latino-americano. In: SANTIAGO, Silviano. **Uma Literatura nos Trópicos**. 2. ed. Rio de Janeiro: Rocco, 2000.

SANTOS, Boaventura de Sousa. **Um Discurso sobre as Ciências**. Porto: Edições Afrontamento, 1988.

VAINER, Carlos. Pátria, Empresa e Mercadoria. Notas sobre a Estratégia Discursiva do Planejamento Estratégico Urbano. In: MARICATO, Ermínia; Vainer, Carlos; Arantes, Otilia. **A Cidade do Pensamento Único**: Desmanchando Consensos. Petrópolis: Vozes, 2000.

Public participation and recognition:
An analysis of Vila Viva program[1]

Aline Rose Barbosa Pereira[2]
Thaís Lopes Santana Isaías[3]

Abstract: This paper presents partial results of a research carried on within the research project Cidade e Alteridade (City and Otherness) concerning the impacts and effects of a slum urbanization program in the city of Belo Horizonte: a public policy called Vila Viva (living village). The program is undertaken by Urbel, the urbanization company of the city of Belo Horizonte, and focus on problems like infrastructure; housing and land regularization on large scale, affecting directly 193.000 slum dwellers. We describe the flaws on the participatory model used by Urbel, attempting to explain why they have occurred, focusing on the local conditions and suggesting the model's inability to cope with the residents' needs. We also problematize the resettlement model available for the evictees and suggest that it cannot recognize the variety of ways of living demanded by the residents' plurality, thereby imposing a way of living in a top-down approach.

Keywords: slums urbanization, "Vila Viva", participation, recognition and right to the city.

---

[1] The logic of capital has also not allowed us to assure our colleagues Ananda Martins Carvalho, Lívia Bastos Lages and Luana Xavier Pinto Coelho the place they deserve for their precious contributions to this text. Herewith we acknowledge their work and thank them, as well as the Núcleo Reassentamentos Urbanos and the Cidade e Alteridade program

[2]Aline R. B. Pereira. Junior Researcher at the Center For Development Research, University of Bonn. Master's Degree in Philosophy of Law at the Federal University Minas Gerais (UFMG). Graduated in Law at UFMG. Researcher of the Project Cidade e Alteridade, from UFMG.

[3.] Thaís Lopes Santana Isaías. Graduate in Law by Federal University Minas Gerais (UFMG). Researcher of the Project Cidade e Alteridade from UFMG.

Introduction

During the last two years, a group of researchers from different areas (namely law, sociology, anthropology and social communication) has gathered on the project "Cidade e Alteridade: convivência multicultural e justiça urbana" (City and Otherness: multicultural coexistence and urban justice). The project encompasses a variety of themes concerning urban development, from the precarious situation of slums and outskirts to the necessity of more democratic and effective tools for urban planning, from the access to rights that groups from different cultural or ethnic backgrounds (should) have, especially the right to the city (Lefebvre, 2001), to the interaction between the urban and the rural areas (a dichotomy that is also questioned by the project).

This paper presents partial results of a research carried on within this bigger project (Cidade e Alteridade) concerning the impacts and effects of a slum urbanization program in the city of Belo Horizonte: a public policy called Vila Viva (living village). The program is undertaken by Urbel, the urbanization company of the city of Belo Horizonte, and focus on problems like infrastructure; housing and land regularization on large scale, affecting directly 193.000 slum dwellers[4].

Some objectives of this research were to investigate what dwellers understand as adequate housing, the participatory processes during the program's conceptualization, the elaboration of the "*Plano Global Específico*" (PGE) – "Specific Global Plan" – and implementation, as well as the community acceptance of the urbanization model brought by the municipality.

Our choice was for qualitative data, since the study objectives would hardly be achieved by quantitative methods. In order to be able to capture the perceptions of the dwellers on the analyzed questions, it was necessary to have deeper and more direct contact to them, without the limitations of data collection through surveys or closed-ended questions, for example. We have also sought to compare these perceptions to the institutionalized discourses about the Vila Viva, both through the material made public by the municipality on its website and by interviewing employees who are responsible for accompanying the design and implementation of the projects. Data was collected through in-depth interviews with semi-structured scripts. Given the scope of the research,

[4]Avalilable at http://portalpbh.pbh.gov.br/pbh/ecp/comunidade.do?evento=portlet&app=urbel&tax=8178&pg=5580&taxp=0&. Accessed on 5th September 2013.

the methodological option was to work with a non-probabilistic sample, collecting testimonies of people who would be regarded as typical representatives of their sample group.

This paper describes the flaws on the participatory model used by Urbel, attempting to explain why they have occurred, laying the focus on the local conditions and suggesting the model's inability to cope with residents' needs. We also problematize the resettlement model available for the evictees and suggest that it cannot recognize the variety of ways of living demanded by the residents' plurality, thereby imposing a way of living in a *top-down* approach.

General features of the Vila Viva policy

Vila Viva is defined institutionally as a multidimensional and intersectional public policy aiming to promote a sustainable land regularization process in the slums, which encompasses legal interventions (land regularization itself), urban reform (sanitation, removing families from hazardous areas, widening and paving streets, etc.), social policies (towards education, health, transport, security, leisure, culture, labor) and environmental interventions. Vila Viva proclaims itself as a participatory policy - this is one of its key legitimation claims - and is based on the implementation of a previous plan, said to have been elaborated together with the dwellers affected by the intervention, the so-called "Plano Global Específico" (PGE) - Specific Global Plan.

Two case studies were carried on in order to investigate the impacts and effects of the Vila Viva program: one at Aglomerado da Serra, one of the biggest slums of Belo Horizonte, where the first stage of the intervention finished in 2005; and one at Vilas São Tomás and Aeroporto, where the intervention is currently taking place.

Although such a policy represents a major change on the standard budget historically addressed by the government to squatter settlements, it also presents a set of contradictions and deleterious effects. The intervention in Aglomerado da Serra together with the one in Vilas São Tomás and Aeroporto had a high number of evictions: around 3,800 families, according to Urbel. Even though a portion of these families has been resettled in apartment buildings close to the original area (not rarely inappropriate to the sizes of families and their lifestyles), a large proportion of families has been indemnified by Urbel. Among these families, many had to move to remote areas due to the low indemnities offered,

insufficient for relocation within their original settlement. Thus, several people were unable to stay in their original places, moving to other informal settlements, usually more precarious than the ones where they lived before, reinforcing the cycle of illegality and deepening exclusion.

Improving accessibility and mobility has been one of the priorities of the program: most slums have grown spontaneously, highly dense and with access granted through narrow alleys. Opening streets, avenues and roads has been the main cause of evictions, since the density does not allow changes in infrastructure without reconfiguring the region's population. However, those decisions upon priorities have not taken into consideration the communities' demands. The choices were made so as to adapt the territory configuration to the urban tissue (large avenues, apartment buildings, etc.). Therefore it remains ignored that the urban grid is different for a reason: it holds diverse lifestyles and varied living cultures.

From the lack of recognitions to its consequences towards participation

Boaventura de Sousa Santos conceptualize the *abyssal thinking* as the thinking that creates the segregation in a way that assures that everything produced "on the other side of the line" remains as invisible and nonexistent to those of the "legitimate side of the line", as "not existing in any relevant or comprehensive way of being" (Santos, 2007: 45). Thus, the space produced in a slum, as well as the lifestyles, are disregarded as legitimate or as containing a proper logic that should be understood and respected. Produced "on the other side of the line", those spaces lack meaning and recognition. During a process of reform, therefore, people living there must accept an imposed model, the one produced "within the line", therefore legitimate. This understating of how the State and a considerable part of society see the slums, as indecipherable spaces, also shed some light on the logic of exclusion reproduced on the (supposedly) participatory spaces.

According to the official discourse of the municipality of Belo Horizonte, one of the key features of Vila Viva is its participatory character. In the institutional website of the program we can read: "The plan is a profound study of the reality of the villages and slums of Belo Horizonte, *with direct participation of the community.*"[5] Considering the content

[5]http://portalpbh.pbh.gov.br/pbh/ecp/comunidade.do?evento=portlet&app=urbel&tax

of the interviews, as well as the observations during the public hearings the research team has joined, though, the advertised participatory character of this public policy cannot be assumed without further questions, as the following excerpts of interviews illustrate:

> A - "Female dweller: Look, I've walked twice... it were twice.. I... when they would announce, talk, warn, I'd go, I went there twice or thrice, at the hangar, twice at the hangar... when it was too far, I had no way to go...
>
> Interviewer: But for what were these meetings, what have they said?
>
> Female dweller: Ah, they were bullshitting, sometimes we could not decipher it to the ones who were not there, right?
>
> Interviewer: Couldn't you understand it?
>
> Female dweller: No… no. I have no literacy. We, who have no schooling, there are many things that we hear but don't understand well, right?"[6]

The cited dweller calls attention to a very practical aspect regarding the organization of the hearings. She mentions that, depending on the place where the hearings would happen ("the hangar"), she would attend or not. The importance of accessibility to the meeting place is broadly known. If the chosen place is in a central area of the community or if it is in its outskirts and, in this case, whether there are transport facilities (like a bus), if people have to pay for the trip or not, will influence the attendance.

Also the time and length of the meetings, as well as *when* they were communicated (one week, one day or some hours before the event) play a role. Most of the adult population works during the day, which would qualify a meeting in the middle of the day at least as demobilizing, since a great part of the interested public could not take part on it. For the same reason, meetings of unlimited length could discourage

=8178&pg=5580&taxp=0&. Accessed on 16th September 2013 "The plan is an profound study of the reality of the villages and slums of Belo Horizonte, with direct participation of the comunity"

[6]Interview with female dweller on 2ndof February 2012.

participation - the working population would still have to wake up early and make its way to work the next day, not to mention the situation of women, who are still usually responsible for housework, taking care of children and cooking meals. This emphasizes the importance of a well-organized and previously publicized schedule. If the hearings would take place in a regular basis (always on the same day of the week, at the same time, Tuesdays at 18:00, for example), it would be easier for the interested ones to organize themselves in order to attend. But among the interviewed dwellers there were reports of last minute communications about hearings that would happen, as well as of no previous information at all, as shown in this excerpt:

> B- Interviewer: And do you remember how far in advance they'd inform [about the hearings]? Would it be on the same day, a week before...
>
> Female dweller: that they used to inform us?
>
> Interviewer: Yes, that a hearing would take place...
>
> Female dweller: ah, girl, they used to inform us on the same day of the hearing, on the day of the hearing they would tell that there would happen a hearing… sometimes my neighbor would come and tell me and I couldn't even go… many times I didn't go because I couldn't go. Because they'd inform you just in the last minute, you're cooking dinner, and have a husband, you can't just… because that's how I am, I never liked… to give people reason to talk, to argue with husband, because I leave the food ready, you know, then when they'd tell only on the last minute I never could manage to go… sometimes, when they'd tell, If I could go, I'd go, you know… so there are many things that I don't have any idea about there, I don't know… because I hardly ever would go to these hearings, I could count five or six.[7]

Some relevant aspects to be taken into consideration are, thus, the frequency, time and length of the meetings (a well organized schedule), as well as their regularity, previous disclosure of the schedule and accessibility to the places where the hearings will happen - all amounting to the responsibility of the public power to invest in the participatory process itself if they do consider participation important as they

[7]Interview on the 3rdof December 2012

constantly state.

The interview excerpt A, above mentioned, also refers to the lack of understanding about the content of the meetings, and this was not an isolated case. Similar references pervaded the answers of many other interviewees. These points to a first reason to doubt there was effective participation possibility during the elaboration of the PGE and implementation of the policy. It is questionable if someone who does not understand the changes proposed in a plan could in any case choose consciously among pre-established possibilities, let alone opine and/or influence the ongoing discussion.

It was also not rare that the dweller who admitted not to grasp the whole questions presented during the hearings would justify himself/herself alleging his/her inability to read or the fact that they did not go to school, as mentioned openly in the passage A above: "we, who have no schooling, there are many things that we hear but don't understand well, right?"

Firstly, one must remember that in spite of recent developments in Brazilian education, the number of illiterate citizens is still high, especially among adults: around 8,6% of the population above 15 years old according to IBGE[8] last data, publicized in 2012, which means that in a total of 195.243.000 inhabitants, 16.790.898 cannot write or read. The number is even more significant if we consider also the functional illiteracy, which amounts to 10,5% on the same period, adding circa 20.500.500 inhabitants to the sum. (Brasil, Ministério do Planejamento e Gestão, 2012: 110-114).

On her extensive research with migrants from rural areas living in a precarious neighborhood in the outskirts of Brasília, the capital of Brazil, Bortoni-Ricardo (1984, 2011) has registered difficulties on verbal communication between interviewers (students of a local university) and interviewees (dwellers of this low-income community). As Bortoni-Ricardo emphasizes, the low-income workers living in the big-cities' outskirts and slums often coincides with rural migrants forced to leave the countryside and look for better living conditions in the cities:

> "The stratification criterion [of the research] therefore overlaps partially with the one of rural or urban antecedents in explaining linguistic variation, for the biggest part of the lowest social strata

[8]Instituto Brasileiro de Geografia e Estatística – Brazilian Institute of Geography and Statistics.

> is formed by the peasantry and rural migrants. In other words, the distribution of several linguistic variables is explained both by the social classes and by the rural/urban origin (Bortoni-Ricardo, 2011: 21)."

One of the reasons for these verbal communication difficulties – and for the lack of understanding at the public hearings, in our case – could be related to the absence of perception about *linguistic variations*: the monolingualism, recognized as an impressive characteristic in a large territorial extension country as Brazil, is often confused with *linguistic homogeneity*. In other words, the phenomenon of linguistic variation within a living language is almost completely ignored by Brazilians (Bortoni-Ricardo, 1984: 29). The pervading idea in Brazilian culture is that there is *one correct Portuguese* (the variations closer to the normative grammar, to which one accedes only through formal education). The variations spoken in rural areas or by people with low or no literacy (visible from the first contact) are stigmatized and considered "wrong"[9].

Among the features pointed out by Bortoni-Ricardo's research we could list: the way some words are pronounced (pronunciation variety), which should not be underestimated; lexical impediments, such as the use of words belonging to more formal registers of the language, with which the dwellers were unfamiliar; certain grammatical variances; but, specially, the lexical differences: "Most of the problematic occurrences in the *corpus*, however, is related to the comprehension of lexical items. Many times the interviewer used certain word characteristic of a more formal register of the language and unknown to the informant" (Bortoni-Ricardo, 1984: 21). But it is also important to note that the awareness of the subjects about these differences was essential to improve the quality of communication, for, granted this awareness, he/she could make an effort to converge on the language of his/her addressee.

Some could object that the analogy with the cited research is not valid in the present case for the difference between the *corpora*, in Bortoni-Ricado's study an "artificial" situation (structured interviews between specific subjects) and in this study the perceptions of the dwellers about real public hearings (with an undefined number of citizens in the position of hearers). About the difference between the situations, as the author points out:

[9]For more on linguistic prejudgmice see BAGNO, Marcos. Preconceito Linguístico: o que é, como se faz [Linguistic prejudgement: what it is, how it is done]. 52. Ed. São Paulo: Edições Loyola, 2009.

> Speech events very similar to the sociolinguistic interview take place quite often in the daily life of the interviewed migrants, as, for example, in a medical appointment, in registering at the secretariat of social services or in agencies of the Ministry of Labor or of the Social Welfare, while proceeding the school registration of their kids, in a police or court interrogation, etc. [...] The difficulty some informants have shown in maintaining a fluent and effective communication with the researchers should not be seen, therefore, as isolated phenomena, but as samples of a routine problem. (Bortoni-Ricardo, 1984: 11)

Considering the different number of subjects involved in each case, the public hearing would be a situation of higher likelihood of misunderstandings, since the audience usually don't even have the chance to express if they understand what is being discussed or not[10], and the back channels – roughly, the reactions of the addressee, visible in direct dialogue, which allow us, to some extension, to check if he/she is still with us or not – are almost absent or too hard to notice. Which makes it even more important that the ones presenting the PGE or the topics to be discussed – usually people who work for the municipality – converge their language to match this audience.

The interview also differs from spontaneous conversations in the power asymmetry between interviewer (who introduce the discussion themes, controls to some extension the time and the turn-take shifts along the conversation) and interviewee (who is expected to attain to the themes addressed him). But the asymmetry would be even more significant in a public hearing than in a dialogue between two subjects. When we think about the structuring of the meeting – who has the right to speak, for how long and according to which rules; who are the ones who can define and influence the discussion agenda, if the affected ones can bring new points to the discussion or only comment on the ones brought by the municipality – we must remember that who detains the control of how a public hearing is structured is undeniably in a position of power (Van Dijk, 2003). Besides that, the municipality employees, who usually

[10]And even if they did so, it is unlikely that they would. Bortoni-Ricardo highlights the linguistic insecurity common among speakers of stigmatized variations of Portuguese (1984: 16-17), as well as Goffman (1981: 26) mentions that when something is not understood, the hearer can convey signals of understanding in order not to admit, among other possibilities, that "[...] one is insufficiently knowledgeable to understand the speaker's utterance [...]".

had access to higher education (basic schooling is often already out of some dweller's reality) and who represent the "voice of the municipality" also speak from a privileged position – an inequality of status in Fraser's terminology (2005).

About the lack of understanding of the content of the hearings mentioned by the cited dweller, it is also important to observe that during these meetings many questions were previously put out of discussion as "technical matters" without any additional explanation. The municipality employees in direct contact with the dwellers not always had the attention to explain the meanings of the technical jargon they often recurred to during the public meetings. This shows not only the unfitness of those workers to deal with the public (the dwellers), but also the underlying idea, common to more traditional democratic theories, that the complexity of modern societies demands the citizens to delegate some discussions and their decisions to the specialists (Avritzer and Santos, 2003: 42), a technocratic view that has been increasingly challenged.

> C - Male dweller: "We have actually never decided what would be done... Always the Urbel (Urbanization Company of Belo Horizonte) would arrive with everything set and present to us. (…)
>
> "About accepting our suggestions, they have never accepted. It was all about their proposals and what they would do. And their proposal was that they would indemnify your house and expropriate you, but they would not hear who wanted to vindicate (…)".[11]

All the factors mentioned above play an important role concerning participation and, thus, social justice. According to Fraser, "Overcoming injustice means dismantling institutionalized obstacles that prevent some people from participating on a par with others, as full partners in social interaction" (2005: 73).

Such obstacles refer not only to provide better conditions for the involved ones to take part in the discussion, which involves the economical field of redistribution and the cultural field of recognition (Fraser, 2005), but also to invest on the participatory process itself, namely, training the employees of the municipality who deal directly with the dwellers at the public hearings to make an effort to improve the quality of interaction and assure understanding on both ways, besides the already cited aspects (scheduling, accessibility). They define ultimately

[11] Interview with male dweller on 14th August 2012

who will speak; when; about what; and this, as stated above, conveys them a great power (Van Dijk, 2003). An important discussion when we think about direct participation experiences would be, therefore, the democratization of the discussion of the participation rules themselves[12].

Still according Nancy Fraser, it is not only the lack of recognition and redistribution that impacts on the participation in public policies as Vila Viva, but also the lack of representation (Fraser, 2005), the third component of her three-dimensional justice theory. The dimension of representation encompasses the political aspect:

> At another level, which pertains to the decision-rule aspect, representation concerns the procedures that structure public processes of contestation. Here, what is at issue are the terms on which those included in the political community air their claims and adjudicate their disputes (Fraser, 2005: 75).

Fraser maintains that the public policy has a previous phase, that she calls "political dimension", when the decisions about the procedure and structure of the participatory process are made. She establishes a connection between the representation and the two other components of justice (recognition and redistribution), related to the cultural and economic dimensions, respectively. She adds that the "political dimension" determines the scenario where the discussions and deliberations about economic and cultural aspects will take place, defining, therefore, how they will be treated during the execution of a public policy.

> The political in this sense furnishes the stage on which struggles over distribution and recognition are played out. Establishing criteria of social belonging, and thus determining who counts as a member, the political dimension of justice specifies the reach of those other dimensions: it tells us who is included in, and who excluded from, the circle of those entitled to a just distribution and reciprocal recognition. Establishing decision rules, the political dimension likewise sets the procedures for staging and resolving contests in both the economic and the cultural dimensions: it tells us not only who can make claims for redistribution and recogni-

[12] This can be illustrated by what happened during the "popular horizontal assemblies" that happened in Belo Horizonte in June/July 2013 along the demonstrations that took place in the city. At the beginning of each assembly, the present people would decide how interventions should be made (usually, through a subscription list) and how long each participant could talk.

> tion, but also how such claims are to be mooted and adjudicated (Fraser, 2005: 75).

Herewith we aimed at problematizing the way representation actually came to be in Vila Viva, highlighting that, unfortunately, the public power (municipality) ended up excluding the affected ones from what would correspond to the political phase of the policy. The dwellers could not take part on the decision-making about the previous questions on the procedural aspects that would define the material dimension. Thus, the structure of participation was limited since its conception, based on the exclusion of many people who should have been regarded as legitimate to present demands for justice, express claims and interfere in the content of the program. If the policy was excluding since this first moment, it is hard to imagine a scenario in which exclusion would not be maintained along subsequent stages.

The municipality of Belo Horizonte, to be more precise, the Urbel, has failed in its official proposal of parity, mostly due to the lack of inclusion of the dwellers in all steps of the Vila Viva. There should have been investments towards effective participation from the very beginning of the process within which the political space of representation is encompassed. When the public power monopolizes the activity of establishing this framework, denying voice to those potentially affected by the policy, it obstructs the creation of democratic arenas where these voices could express themselves and be heard. If this is not granted, the program will result in misrepresentation.

From misrepresentation to the disregard of the inherent plurality of urban slums

The result of these actions pervaded by lack of representation, recognition and bad redistribution is a programs in mismatch with characteristics and aspirations of *favelas'* dwellers. An example of Vila Viva that reinforced this affirmation is the construction and resettlement of favela´s dwellers in flats, vertical buildings that are not in accordance with the traditional way of life typical of these territorialities. Houses with backyards, vegetable gardens and animals are an integral part of the everyday life of many of these dwellers. These practices were abruptly discontinued when they were transferred to the little apartments. References to the negative impact of the resettlement on the dwellers' way of

life and everyday practices were recurrent on the interviews:

> D – I think it is more comfortable [to live in a house], it is calmer, I don't know, you have your little backyard, small areas, you can make a barbecue whenever you want, you know, you can receive friends anytime you want to, without disturbing your neighbors, you know. I think it is much more expedite. If you want to build up, for example, you can. In a flat, how are you going to build up?13

> E – ahh... I like to have space, boy, I need a lot of space… I like, I think everybody is so, right, everybody likes places with plenty of space, a place where you can breath. When we get older, we like a place where we can go out, get some air, ne, having a backyard to sit down…"14

> F – Oh no, God keep me safe from these little flats. I do not accept that, my goodness... Our Family is too big, it doesn't fit in a flat, no.15

> E – There was... there was a mango tree, at the hot season we would stay beneath the mango trees, breathing that air... a lot of people would go to our house in order to stay with us… and in an flat, no… in a flat I'll live locked, ne. If you're in there, you have to lock it, you can't go out. As long as I can take, it's okay, ne, but when I can't take it any longer… on a bed, locked…[16]

> H- You just had to see my backyard full of acerola. There was acerola, there were lemon trees, there were mango trees, cajá-manga trees, pitanga, guava, plum, there was everything there. My backyard was like an orchard. Now my kids don't let me go there. They don't wanna let me go because they say I cry too much when I go there. My kids don't like when I go there, no they don't. After they [Urbel] have demolished my house they [the kids] don't like when I go there, no. "Are you going there to cry? That's nonsense…" Yes, my boy, that's how it is.17

[13]Interview with woman dweller on 13th March 2013
[14]Interview with female dweller on 09th November 2012
[15]Interview with female dweller on 10th September 2012
[16]Interview with female dweller on 09th November 2012
[17]Interview with female dweller on 21th November 2012.

This illustrates the referred lack of consideration about the differences. What we question at this stage is the disregard of specific characteristics of the communities that are affected by the urbanization programs of villages and slums. What happens in Vila Viva is that a *model* of urbanization is imposed. The municipal bureaucracy conceptualizes this model beforehand, without the participation of dwellers. They are also prevented from participating due to barriers related to the inequality itself, as mentioned above. But besides that, the so called "decision-making spaces" are only informative, not deliberative, as one can see in the excerpt C above, as well as in the speech of the employees of the municipality while explaining the researchers how the participatory process was conceived:

> I- Social agent of Urbel: I remember that when we would start the construction there, we had to, even as an obligation due to the founding, we had to reinstall the reference groups, we had the participation of about thirty [dwellers]. And along the execution of the construction we then made another model of participation. In the case of Serra we made a new model of participation there. We aggregated a process of direct participation of the community to the reference group, because, we started to go there, to affect the community in a more direct way, those dwellers in the construction's stretches, where we made numerous assemblies with them in order to prepare them to the process.
>
> Interviewer: directly
>
> Social agent of Urbel: directly in the community, in big assemblies that we made within the six villages to inform, clarify, orient, ne, solving doubts, giving information, making a political discussion about the project… so[18]

All the verbs used by the informant to describe the hearings, except the last, converge to this explanatory character of the assemblies, not to the possibility of deliberation. Taking this excerpt together with the ones cited above into account, no doubts are left about the solely informative function of the hearings (and even that was not done properly, as already described), with the creation of spaces that didn't allow effective participation, with actual possibility of discussion and creation

[18]Interview with social agent of Urbel, on t4th May 2012.

of alternatives to the ideas presented top-down by the municipality.

The imposition of a hegemonic concept of urban life or of what is considered urban is evident. This ideal, seen as superior by the hegemonic groups, delegitimizes the spontaneous ways of creation and organization of the villages and slums. While the Government tries to standardize the urban spaces based on the predominant model, not only it fails to recognize and respect the intrinsic diversity of the city, it keeps these territorialities invisible.

Here it is important to resume Boaventura de Souza Santos's conceptualization of the "abyssal thinking". Modernity and its institutions, including the State, have produced a blindness scale that prevents people from seeing and recognizing territorial spaces that are dissonant from the homogenizing cartography of the National State (Santos, 2010, 2011). Invisibilization, subordination and ridicule are the basis of modern western states (Santos, 2008), which overlook alternative insurgent modernities. A clear separation is established between "*us* and *them*", and this is decisive to determine the way these territorialities and their inhabitants will be treated: without consideration and recognition.

While the dwellers are actually kept out of the decision-making process, the construction of a project that recognizes their expectations, differences and needs is impossible. There is no reason to talk neither about promoting improvements in the quality of life of dwellers nor in the accomplishment of the right to the city without recognizing what they consider as improvement, as quality of life and their perceptions about the urban space.

In the case of Vila Viva Program, many families are being evicted from their homes, from the place where they lived and formed social and emotional bonds along their lifetime. In exchange, they must move in apartments, the formal city model, or leave to even more isolated and precarious outskirts of the city, reinforcing poverty, exclusion and marginality.

Among the most recurrent complains about the new "vertical" lifestyle, are the impossibility of expanding the apartments, the inaccessibility to the second, third and fourth floors (for people with disabilities) and the lack of external areas to grow gardens, vegetable gardens and breed animals. At Vila São Tomás, for example, many workers are carters. A proposal based in vertical constructions neither allows horses breeding, nor the direct contact between the worker and his animal. Thus, the implemented urban policy, while disregarding local lifestyles, ends up eliminating these ways of living from the city.

As Lefebvre points out, the right to the city goes beyond the right to access basic services and urban facilities, encompassing the right to live in the city and to fully enjoy it (Lefebvre, 2001). It embraces the right to take part in the decision-making processes that define how the urban spaces are to be occupied and transformed. Furthermore it comprises the perception of the city as conveying *use value*, not only *exchange value*. The city should be experienced as a common, not a private place, which implies its configuration and reconfiguration embracing its characteristic diversity, and not through the imposition of the ideals of life of one group upon others.

The city as conformed now, obeying strict social, political and economical rules, which is reinforced by urban policies like Vila viva, has lost its essence. Public space has become scarce and the various forms of doing politics were restrained. Cities have lost their quality of being enjoyed by the collectivity in order to serve market purposes, illustrating once again what has happened centuries ago with the emergence of the Modern National State.

This deeply engraved idea of nation presupposes the standardization and systematic denial of diversity (Magalhães, 2012: 119). The motto of the National State has been the standardization of people, equalizing the less different and excluding the most different individuals and groups. The urbanization process, structured from this same logic, is no exception to the rule.

With Lefebvre, we claim that the city, as a unique meeting space of completely diverse peoples, should be the scenario where plurality can be celebrated, where these diverse social groups create and redefine the space in which they live and build their own social, cultural and economical settings. However, what we could verify is that the urbanization process through policies like the Vila Viva has been conducted in an undemocratic way, overlooking diversity and imposing a single way of living and being within the urban environment.

Preliminary conclusions: the denial of plurality in the city through urbanization policies

The Vila Viva Program is not implemented in a random way. On the contrary, it follows a strict ideal of city, which serves certain interests and objectives. Based on the collected data we are convinced that both during the elaboration and execution of the program the priority was

not to listen to the aspirations of the directly affected towards their territory in a genuine participatory process. The dwellers plainly received a pre-conceived project and watched their lives and their surroundings be changed, still being pushed to adapt to these changes.

We maintain that the housing policy carried on by the current administration of the municipality of Belo Horizonte diverges from the principles embraced by Lefebvre's conceptualization of the right to the city. As demonstrated above, the Vila Viva Program, while giving priority to structural interventions such as the construction of large avenues and apartments, without listening to the demands and priorities of affected groups, implements a hegemonic model of city. The peculiar ways of conceiving and occupying the traditional *favela* spaces are disregarded and the history of the dwellers themselves is not respected. Thus, standardized spaces are created in the city, denying the possibility of diversity and emergence of the richness of otherness.

Based on the results, we suggest that the Vila Viva Program, in spite of its noble aims (such as implementing the right to the city, sanitation, housing and land regularization) has not accomplished the purposes it claims to pursue, lacking legitimacy among a considerable number of the affected dwellers.

Based on the field research conducted with intense dialogue with the local communities at Aglomerado da Serra and Vila São Tomás, the research team of Cidade e Alteridade concluded that many of those affected by the program reject the municipality's proposal for resettlement housing. As we understand it, this rejection is based on the standardization model of urbanization proposed, a model still founded in modern ideals of universalization, in a centralized and uniform way, as if the city could be planned and structured independently of the people who inhabit it. As explained by Lefebvre (2008: 39), city planners "do not realize [...] that every space is a product, and [...] that this product does not result from conceptual thinking [but] from the relations of production belonging to an acting group".

References

AVRITZER, Leonardo; SANTOS, Boaventura de Sousa. Introdução: para ampliar o cânone democrático. *In*: SANTOS, Boaventura de Sousa. *Democratizar a democracia: os caminhos da democracia participativa*. Porto: Edições Afrontamento, 2003, pp. 39-66.

BORTONI-RICARDO, Stella Maris. *Do Campo para a cidade - estudo sociolinguístico sobre migração*. São Paulo: Parábola Editorial, 2011.

_____. *Problemas de comunicação interdialetal*. Revista Tempo Brasileiro, 78/79: 9-32. Rio de Janeiro: Edições Tempo Brasileiro LTDA., 1984.

Brasil: Ministério do Planejamento, Orçamento e Gestão - IBGE. *Pesquisa Nacional por amostra de domicílios: síntese de indicadores 2011*. Rio de Janeiro: IBGE, 2012, pp. 110-114

FRASER, Nancy. *Reframing justice in a globalized world.* In: New Left Review, 36, Nov-Dec 2005. pp. 69-88.

_____. *Redistribution or recognition? A political-philosophical exchange* .Nancy Fraser and Axel Honneth. London: Verso, 2003.

MAGALHAES, José Luiz Quadros de (Coord.). *Direito à Diversidade e o Estado Plurinacional.* Belo Horizonte: Arraes, 2012, pp. 156.

LEFEBVRE, Henri [1970]. *A Revolução Urbana.* Belo Horizonte, Ed. UFMG, 2008, pp. 139.

_____. *O direito à cidade*. São Paulo: Centauro, 2001.

GOFFMAN, Erving. *Forms of talk.* Pennsylvania: University of Pennsylvania press, 1981.

SANTOS, Boaventura de Sousa. *Reconhecer para libertar: os caminhos do cosmopolitismo multicultural.* 2 ed. Rio de Janeiro: Civilização Brasileira, 2003, pp. 614.

_____. *Beyond Abyssal Thinking: From Global Linesto Ecologies of Knowledges"*. Review, 2007, 1, pp. 45-89.

_____. *A gramática do tempo: para uma nova cultura política.* São Paulo: Cortez, 3 edição, 2010.

_____. *A crítica da razão indolente: contra o disperdício da experiência.*São Paulo: Cortez, 8 edição, 2011.

VAN DIJK, TeunAdrianus. Discourse, Power and Access in: *Texts and Practices: Readings in Critical Discourse Analysis.*e-library edition. London: Routledge, 2003. pp. 83-104.

Lusophone jurisprudence in Iberoamerican Legal Philosophy

Paulo Ferreira da Cunha[1]

Abstract: Several authors in the field of pure Philosophy have argued the existence of a Luso-Brazilian philosophy. There is even a Luso-Brazilian Institute of Philosophy (Instituto de Filosofia Luso-Brasileira) that develops in alternate years, among other activities and publications, the colloquium Tobias Barreto in Portugal, and the colloquium Antero de Quental in Brazil.

The central idea of our intervention is to apply the same paradigm of inter-national philosophies (based on common language, and lasting dialogue at the cultural heritage level), to the philosophy of law, especially the non-academic one (the academic seems to be more cosmopolitan). Is there a Legal Luso-Brazilian philosophy? And what may be its place in the context of a Latin American legal philosophy?

Some of our previous works, already approached the question, such as our books Temas e Perfis da Filosofia do Direito Luso-Brasileira, Lisboa, Imprensa Nacional-Casa da Moeda, 2000 and Pensamento Jurídico Luso-Brasileiro, Lisboa, Imprensa Nacional – Casa da Moeda, 2006 and the more recent article: Do Jusracionalismo Luso-Brasileiro e da Unidade Essencial do Jusnaturalismo – Reflexão Problemática Filosófico-Histórica, in "Collatio", n.o 12, September-December 2012, pp. 17-30, electronic version: http://www.hottopos.com/collat12/17-30FC.pdf.

So far, the research allows us to conclude that there is a large universe of studies waiting for new scholars.

Key words: Old Iberian Liberties, National Philosophies, Iberoamerican Jurisprudence

[1]PhD Univ. Paris II, Univ. Coimbra, PostDoc University São Paulo (USP). Full Professor, Oporto University, Portugal.Interdisciplinary Juridical Institute, Director.

I. The Old Iberian Liberties

In Iberia (or Hispania), a peninsula which later would expand and give birth to the Iberoamerican (Hispanoamerican) world (and other social and sociological and cultural fruits of other diasporas and new communities), we may very clearly see a strong feeling of honor and personal dignity.

The Portuguese poet and former lawyer Teixeira de Pascoaes, friend and comrade of letters with Miguel de Unamuno and other Spanish writers, called our attention to the fact that, while in Northern Europe countries still made human sacrifices to pagan gods, we already imposed our kings a contractual form: *rex eris si recte facies, si non facies non er*is. And it was not a mere rhetorical formula: it happened that bad kings were deposed and replaced. In Portugal in the XIIIth and XVIIth centuries that concretely happened: kings Sancho II and Afonso VI were deposed, just to give two main examples.

This Idea of honor and dignity (capable, in its negative side, of moments of arrogance and even *hubris* – that are already part of History) are the *principium sapientiae* of a Law really worthy of that name. Eventually with some anachronism or "chronocentrism", we would say these traits maybe seem too modern, or *avant-la-lettre*. In fact, we use to consider those ideas as contemporary or at least modern. But it depends on the style and colours they show... Not always these concepts are very rigourous in the current textbooks and alike. If the old constitutionalism, pre-modern one, is present in those academic books, that fact is that for many years it was almost absent or in the shadows. And the coexistence of Lassalle's historical-universal concept of constitution with some hidden or shadow prejudices against old and material constitutions seemed not to bother anyone.

Let's put some questions to these paradigms. How came into life this specific legal culture, which will even cross the oceans?

Surely it was built from many different materials: Roman law, of course, Christianity (the idea of equality, as it is nowadays remembered for instance by Luc Ferry, is difficult to conceive in cultures long deprived of the Christian legacy or alien to it), and also Visigothic legacy... But a deeper study of how and why this vision of Law was born still seems to await the interest of researchers.

And what is the style proper to the common law of the peoples of the Iberian Peninsula? May we dare to ask that?

We seem to have a constant concern for the practical protection of the rights of every man. This way of seeing people and protecting them is older than the other forms of protection: English, American, French, the other ways of protection, as the constitutional revolutions of modernity put it, and the most epic subsequently recorded by History.

The old Iberian freedoms symbolized by the councils of Toledo, and the major figure of Isidore of Seville, symbolize the seed of humanistic concern with the legal person and his or her rights, freedoms and guarantees. The old Iberian freedoms have not, admittedly, the magnitude or even the rhetorical paradigm shift key. As it is well known, this anthropological revolution in the Western World was wrought by the Kantian *sapere aude* motto, and is commonly expressed by the sacred ternary Liberty, Equality, Fraternity, with which the French Revolution and its daughters would convert the world and built the Modern Liberal Democratic State. And, of course, the Social State, too.

But the Iberian liberties are a significant form of protection of Person, and above all have a concrete sense: practical, and effective. The bureaucratic systems that the world entangled makes this old one (in a sense) contemporary, as a window and an example of another way of protection. Some excess of legal mechanisms make constitutional, civil and human rights and principles (the main juridical forms we have today) almost dead letter. But let's not to confuse abstract bureaucracy with constitutional remedies, that are effective instruments of freedom and constitutionality.

II. The Problem of National Philosophies

From the ancestral practice of respect for the person, care for the dignity of the person, we can move on to the specific philosophical relationship with law.

There are obviously critical positions to the existence of national philosophies. But the problem has also been solved in many cases positively, in all areas where people speak Portuguese and Spanish.

There are, of course, different philosophies *in* different countries: some are totally foreign (the name in Portuguese to an intellectual who denies his ou her roots to became a foreign influenced person is "estrangeirado", and it has often – but not always – a pejorative connotation), but some other are the philosophies *of* those countries (and of continents and of cultural communities, as the Lusophone or Iberoame-

rican).

At least, if there are possibilities for the design of those philosophies as nationally or culturally based, so they exist. This *Cogito* is valid, because they are, by nature, mental constructs. The opposite idea states that philosophy is by definition universal, so it would be impossible to have national or cultural particular philosophies. But what is curious to observe is that, in general, the same who reserve philosophy for universal purpose don't seem to be disturbed with "things" such as Indian philosophy, or Chinese philosophy... Even Ancient Greek philosophy doesn't seem to be a wrong qualification for them. Would it be a precaution against nationalisms? And specifically Western and (of course) contemporary ones? Vain precaution...so it seems.

III. In the quest of specificities

Let's try to approach our subject step by step. What would be specific of the Portuguese philosophy, the one we have more obligation to know, among all these?

It is not easy to answer... Because what seems to be peculiar, could also be vindicated by other countries, probably.

The traditional sense and genuine legal philosophy in Portugal is a constant concern for Justice and Human, which runs through its entire history, with no real interregnum. This coherence can be detected even during a long time, in Middle Ages as in the Modern times. And this seems to be a point to invalidate the theory that advocates a sharp and radical distinction "classic / modern" (especially in the field of Law Natural). So, even very late (even during the Enlightenment period) the law was commonly identified, in line with classical realism, as the *suum cuique tribuere*.

If ideas may not be enough, or may be considered vague, what about blood? Could we consider that the philosophy of a country or of a culture is the one of the people who was born there, that is to say, the one concieved by native citizens? Of course this is a non philosophical criterium.

In many respects, and especially given the mobility and interpenetration of cultures in Europe, crossed by migrations of diverse order, this is not even a practical way of defining legal cultures or legal philosophies.

Baruch of Spinoza (or Bento de Espinosa...) is casually natural

from Netherlands (but it seems that he thought in Portuguese). Shall we consider him a Dutch philosopher by *ius soli* or a Portuguese (or a Jew) philosopher by the *ius sanguinis*? This seem so irrelevant as the quarrel about Colombo's nationality. He was an European, one of the first Europeans. And so was Spinoza... or Espinosa.

But sometimes some country wants the adoption of heroes or philosophers... There are, for example, a mythological and fanciful version on the Lusitanity of Aristotle (he would be born in Lusitania, and then went to Greece: how convenient to Portuguese pride!). This is indicative of the attachment of the Portuguese to the Stagirit. But also it means that this is, at least in some periods and for certain minds, such an important question that it may be falsified, in myth.

In fact, we have not only the *ius soli* or *ius sanguinis* criteria to establish the nationality of a culture. It has been discussed, for example, about the cradle of the first juridical philosophical thinker uncontroverted Portuguese, D. Álvaro Pais (1275/80-1353): was he born in Portugal or in Galicia, in Spain? And, without wishing to claim any portugality, even spiritual, it is known that the master of the second scholastic Francisco Suárez (1548-1619), Doctor Eximius, being Grenadian, had his PhD in Évora, Portugal, taught in Coimbra and died and is buried in Lisbon, in the Church of San Roque. By these examples, Portugal seems fertile in philosophers of law not born in its territory. But they are just two cases.

Breaking the placid traditional line, however, the Renaissance period gave way to another kind of preferences or anxieties, at least in their formulation and explicit style. And after that scientists and technocrats took the fortress of Law. But the decline of the essential concern of legal philosophy and even of its university studies does not mean death. In the shadow and silence, and even resistance, there has always been researchers and thinkers faithful to the tradition of reflexive law.

Legal philosophy, cultivated among us in a non-academic way ('implicit' in the terminology of Miguel Reale) very early (at least since the fourteenth century), was officially introduced in Portugal in its rationalist formula by Pombal's reform of the University (1772), then assuming the name "Natural Law (which, as is well known, in Spain still remained for a couple of centuries). Even in the late nineteenth century, the philosophy of law had between us host among pure philosophers, and was taught at the High Schools, in the discipline of Philosophy. Cunha Seixas, pioneering Portuguese philosophy, who served until his death as a lawyer, did not disdain to write legal philosophical pages for the purpose of teaching in high schools and normal schools. The second

half of the nineteenth century assists in Portugal to a major outbreak: it is the time of positivism and scientism.

In the early twentieth century, however, positivists had succeeded in imposing on curriculum reform, in 1901. It produced a change of name and content in the chair of the first year of law school: it became Sociology General and Philosophy of Law. And integrated into a whole plan that was to precede the study of the positive law of sociological Prolegomena. Not a bad idea, if it was not largely ideological in the sense of propaganda...

The positivist reform plan for law studies, which followed the establishment of the First Portuguese Republic in 1910 (very inspired on the previous Brazilian one), abolished the Philosophy of Law, and soon after created the second Lisbon Law Faculty, a leading school whose name printed on the philosophical conception of its creators: Faculty of Social Studies and Law. Obviously the new institution appeared devoid of legal philosophy. The rallying cry of turning back to the roots emerge from the student of the Faculty of Law of Coimbra (later to become one of the most solid and reputable historians of law), Paul Merea, still in 1910, through a conference, and later two articles (the latter returning to the initial conference, and published in 1913). But it would take more than twenty years that seed bear fruit. Restored in 1936-1937, with Cabral Moncada, companion of studies of Merea, although primarily only experimentally, the discipline has counted worthy successors to the legacy of these masters, although it has been subject to further vicissitudes, never finished because of the anti-philosophical prejudice, nowadays enhanced by prevailing climate of technological cretinism (as the French social scientist Jean Duvignaud puts it).

IV. Non Juridical Jurisprudence

But more interesting than the official Jurisprudence is the reflection on Law by people who are not professional jurists. Poets (like Teixeira de Pascoaes or even Fernando Pessoa), fiction writers (Raul Brandão), essayists (Orlando Vitoriano, Afonso Botelho, Dalila Pereira da Costa) pure philosophers (Sampaio Bruno, Leonardo Coimbra), heterodox thinkers (Agostinho da Silva), etc., although this categories are not frozen (some of them cultivated many literary genres).

It should be noted that one of the appealing and attractive characteristics of Portuguese Philosophy is its "orality" and even a certain

amount of memorialism. There is a patent alive dialogue with the reader, which is made of direct questioning, storytelling that assumes the art of saying what you mean, so often very beautifully (and that Leonardo Coimbra was a master on this: even a master of oral suspense...) but accurate. No fatuous blisters and particularly uncomplicated and purposeful verbal intellectualism.

The ideas of these authors about law, justice, etc. are normally original, and they do not sacrifice to the academic idols. Although the autodidactism sometimes weakens their arguments in the context of an academic debate, of course (one might be tempted to argue that the author didn't study law...). There are a certain esoteric aura in some writings, even more philosophical-political ones (such as in Dalila Pereira da Costa and Sampaio Bruno). New authors of this school, like Braz Teixeira, seem to make a bridge between the non academic and the academic fields. The last idea is the construction of a theory of juridical rationality, opposed to a simple methodology of law...

V. Brazilian Memoirs

The evolution of the Brazilian legal philosophy has had some parallels with the Portuguese one, at some point to be considered 'one of the virtualities of Portuguese philosophy who found a suitable opportunity and ran its course. Eventually this is an ethnocentric statement. And other theoretical solutions could be found...

Let's just recall that, at the level of the aforementioned legal philosophy, the fact that the Jesuits have strongly influenced the colonization period. And they generally marked an essentially Thomistic philosophy, which had repercussions on the traditional Brazilian Philosophy of Law. However, now we have in Brazil as many schools of thought as it would be imaginable, or even more. The creativity is a rule, there, and the intellectual prejudice is almost absent...

Academically, legal philosophy was introduced when creating legal courses in Brazil (São Paulo and Olinda, the latter then transferred to Recife), by the Law of August 11, 1827 (five years after the establishment of the empire) through a chair of third year, Natural Law. But it seems that in São Paulo a interdisciplinary chair opened the classes, mixing Philosophy of law (represented by Natural Law) and Public Law, mainly Constitutional. The professor was a Portuguese, the Judge Avelar Brotero, brother of the Portuguese Professor of Botanics, that poses

to history in Coimbra's botanic Garden. We may see Brotero with Christ cross in a large full body portrait in a main corridor of São Paulo's Faculty of Law.

However, also in Brazil the positivist wave grew during the nineteenth century in reaction to the 'scholastic' tradition, then having represented major role in the Faculty of Law of São Paulo and the one of Recife, whose leader was Tobias Barreto, in the decade 1870, although Tobias was against August Comte's ideas: actually, essentially influenced by Germanic literature. Rui Barbosa, intellectual and tribune which is still a myth, proposed replacing the chair of the Natural Law by Sociology.

And the Brazilian Republic (November 15, 1889), which adopted the Comtean slogan "order and progress", embracing the globe, while quenching chairs of Ecclesiastical Law, replaced coherently Natural Law by History and Philosophy of Law. This chair, however, does not usually constitute more than a precursor (little known, though) of the identification of legal philosophy and legal theory or methodology in formulations similar to those we now know well.

Advocates of legal philosophy in the classic way still existed, of course, like João Mendes Júnior and Soriano Sousa. Although already in 1905 an introduction to law, under the title *The Truth as Rule Actions*, had decisively attacked the already prevailing positivism, only since the 40s, and perhaps especially up in the aftermath of World War II, overcoming positivism at the philosophical level, will be consummated in Brazil.

The permanence of Thomistic thought in Brazil appears to us differently evaluated by the authors. If, for Nelson Saldanha, "his action produced a continuous line that was not interrupted ever leaving their mark on the social and political theory, as well as in the field of law", according to Miguel Reale, even overcoming of positivism, at the beginning in 1940, was made "without going back to the Natural Law of Thomist inspiration ». However, this author finishes significantly its glimpse of Brazilian legal philosophy of the last hundred years with a reference to this current, noting that "it deserves to be remembered significant inspiration of Thomistic studies' that highlights Tristan Athayde (pseudonym of Alceu Amoroso Lima), Edgar Godoi Leonardo da Mata Machado and Van Acker.

Nowadays, in addition, of course, we see the traditional flow and attractiveness of new analytical and neopositivists (the kelsenianism has a certain role too), plus the new wave of "alternative law", postmodern law, legal culturalism, neoconstitutionalism, pluralism, etc.. And even more specifically the legal tridimensionalism, current or confluence of

currents that most associate with the image Brazil Jurisprudence.

But to what extent this last identification is not due to the enormous international prestige Miguel Reale?

VI. What is really in common?

We have to make a reflective pause: how can we say that the specific feature of a Lusophone Jurisprudence is either something politically and culturally common, or parallel pathways after the independence of Brazil? How to identify the Lusophone Jurisprudence? Only with a more European version, or a tropical readapted-Aristotelianism Thomism on law matters? These items seem really scarce and poorly differentiated while national or cultural legal philosophy. That traditional way is not the way...

In our various previous studies on these questions, we followed the trail of a possible specific Portuguese thinking in multiple authors, particularly between the eighteenth and nineteenth centuries. This is not the place to present the findings on each of them. In fact, the most salient elements in non academics (university professors also studied law, but in general seemed to prevail in cosmopolitan eclecticism, or adherence to a foreign idea more or less fashionable or subjective) were not Aristotelianism or Thomism, essentially, but more or less original (sometimes apt to provoke some estrangement between the lawyers, as is the case, among several possible, of the nomenclature used by Delfim Santos and Álvaro Ribeiro). In general, these authors were worrying about what we would call Justice, equity and the like.

But the question, in view of the actual data, is quite strong, and distressing.

The most important doubt is this one: is it fair, and scientifically suitable, acceptable, that someone (certainly acting with the best intentions, we may admit) may make a choice among the different manifestations of juridical philosophy in one country or group of countries, and using his or her own perspective (a subjective one), show subsequently the world a face of that country or culture in what concerns Jurisprudence that may not be shared by many people... in the limit, all the others? Is it fair to make that choice?

Again, the Portuguese evolution may be an illustrative and eloquent example.

We think not to be too far from the reality if we say that before

the work of António Braz Teixeira (correspondent member of the Brazilian Academy of Letters), only a certain kind of works seemed to be admitted as being part of Portuguese philosophy. It seemed that it was a movement, a school, with a certain programmatic and even ideological aim. However, after the studies of this thinker, a contemporary one, it seems that Portuguese philosophy changed: now, it is generally conceived as all the speculative thought exposed in Portuguese, in principle made by Portuguese citizens... Because it cannot be Portuguese philosophy some philosophical works in Portuguese language but by other nationals from other countries... And there are many African countries with Portuguese as official language, apart from the case of Brasil, East Timor and other parts of the world where it is not official language but it is spoken, like Macao, in China (at least partially) or Galicia, in Spain, acording to some observers...

But even this new vision, more wide, more open, seems to bring us some problems.

First, authors like Silvestre Pinheiro Ferreira, Portuguese by language and nationality, but also very close to Brazil (where he lived and ruled as a Portuguese minister of king John the VIth, from 1810 to 1821), wrote sometimes in French, and published books in France. Why should the French works of Portuguese (or Brazilian or others...whose mother Language is Portuguese) be aside Portuguese philosophy? This specific text itself, should it be put away from it, because it is in English? Does the vehicule, the language itself, although nicely emphasised always as "house of being" (Heidegger), is the *mean* more important than the message, the spirit of a national or cultural philosophy? Or may we suspect that the obstination in the language hides a certain vagueness of the substance? Terrible temptation, this last thought.

Secondly, Portuguese language is shared by many countries, as we know. If language is the most important, how can we distinguish a Portuguese philosophy from a Brazilian, an Angolan or a Timorease one? It seems that language is not enough. This leads us to a more complex question: would we prefer a multilinguistic paradigm, for example the bilinguistic one of Hisponamerican Jusrisprudence? Here the criterium would be a cultural one, although Portuguese and Castillan are two very similar languages. The main question, here, seems to be: either to build a step on a Lusohone Jurisprudence with a peculiar being, and then integrate it in a higher and wider Hispanoamerican Jurisprudence, or to connect directly all the different national philosophies or even atomistic philosophers or philosophic movements in a large net. Not a

national one, even nor a linguistic first step. We may discuss the pertinence of this in philosophical, cultural, sociological and even geopolitical terms.

Thirdly, it is quite easy to put into Portuguese (or in Castillian... or in many other languages) with more or less skills and pains, a fully imported philosophy. A Portuguese mental translation of a foreign philosophy (and eventually very strange to the ways of Lusophone people: for example, a cold, purely rationalistic one, if we admit that our peoples are more sentimental, etc.) is of course possible. The question is: would it still be Portuguese, Brazilian, Angolan, etc... Lusophone philosophy?

Our personal answer is negative. But we must go further. We think that it is not profitable to think on a national or civilizational philosophy if it has nothing more than the linguistic common topic. It has to have some peculiar common soul, spirit, idea. The linguistic criterium is not enough at all.

It is possible that a Portuguese, a Mexican, a Brazilian, a Mozambican, a Chilean... write in English, in German or in Chinese. Of course they have to adapt to certain more or less peculiar aspects of the language they must use. But the container doesn't completely change the contained. And let's always remember that Spinoza, even Spinoza itself seemed to have thought in a language different from the languages he used to write. This is very important. One think is to think directly in one language, another one is to translate our own thoughts to another language. And even when the thinker thinks immediately in another language, the background of his or her mother language may be is still there. An hypothesis to the neurolinguists, at least.

We may use another language, but if we are faithful to our cultural roots, they still create their own civilizational centred philosophies.

Finally, if it is true that there are many similarities between some Portuguese and Brazilian philosophical authors, the constitution of a Luso-Brazilian jurisprudence still awaits for its theorists. And even more complicated seems to be a general Hispanoamericam Jurisprudence. Although this empire where the sun shines forever was maybe a version of the Vth Empire in the prophetic philosophy of Agostinho da Silva.

This general common jurisprudence risks to be very vague. But we are of course open to the possibility... Maybe it would be more cautious if we build first our national philosophies (the return to sovereignty seems to regain adepts in a world of impious globalisation), discovering its main features. After that, the next step would be to look for the family ties – first the Lusophone and then the Hispanoamerican.

But never forgetting that some national philosophies may have other connections. For example, the Portuguese one with the Mediterranean thinking, the South European thinking.

In this case, it is not a question of language only. Of course there is Latinity. But Latinity is only a part of the legacy of the old *mare nostrum* of the Roman Empire... Even other bounds are possible. Let's never forget that an agent of the French Convention said Portuguese would be, at the time, French, if they could not be Portuguese. Or let's remember that the best Portuguese elite of all times was from English-Portuguese birth: the sons of the Portuguese John the first and the British D. Filipa, from the house of Lancaster. And that "High Generation" was the seed of Discoveries... Many possibilities are possible, in what concerns social and cultural and sentimental affinities. But what we must have in mind in this context are the philosophical affinities.

Even without the American scene, Portuguese and Spanish thinkers should increase their dialogue, and go further not only in the archeology of freedoms, but also in the analysis of the thoughts.

We are nowadays, in all our countries, too fascinated with what comes from the main poles of the jurisprudence production, Germany and the Anglo-Saxon world. They are excellent, in their ways. But *there is more, Horatio*... Portuguese and Spanish and other languages thinkers have also thinkers. They may be original, and not only comments on those other ones, with more media reverence and best-sellers.

I am not purposing to make a new Tordesillas treaty, by which we Portuguese speakers and Castillan speakers would share the world. But I am certainly suggesting that we may think how to preserve our intellectual and even educational and editing traditions, in a world more and more formatted one way. And the intellectual globalisation is not at all ours, nor even flexible to our way of being and of thinking.

The fact we were supposed to be in Brazil speaking English among us is a very concrete illustration of what is happening to our civilization. A danger already propheticised some decades ago by the Brazilian sociologist Gilberto Freyre.

References

Albuquerque, M. de (with Eduardo Vera Cruz) (1993) *Da Igualdade. Introdução à Jurisprudência*, Coimbra, Almedina.

Almeida Santos, A. de (2008) *Que Nova Ordem Mundial?,* Lisbon, Campo da Co-

municação.

Aristotle *Nicomachean Ethics*

Ayres De Brito, C (2007) *O Humanismo como Categoria Constitucional*, Belo Horizonte, Forum.

Ayres De Brito, C (2006) *Teoria da Constituição*, Rio de Janeiro, Forense, 3.ª reimp. da 1.ª ed.

Baptista Machado, J (1985) *Introdução ao Direito e ao Discurso Legitimador*, reimp., Coimbra, Almedina, 1985

Baptista Pereira, M (1990) *Modernidade e Secularização*, Coimbra, Almedina.

Barcellos, A P (2002) *A Eficácia Jurídica dos Princípios: O Princípio da Dignidade da Pessoa Humana*, Rio de Janeiro, Renovar.

Barthes, R (1957) *Mythologies*, Paris, Seuil.

Baumann, Z (2010) *Legislators and Interpreters (On Modernity, Post-modernity and Intellectuals)*, Cambridge, Polity Press, 1987, Brasil. ed., transl. by Renato Aguiar, Legisladores e Intérpretes, Rio de Janeiro, Zahar.

Baylin, B (1992) *The Ideological Origins of the American Revolution*, 2nd ed., London, The Belknap Press of Harvard University Press.

Bittar, E C B (2005) *O Direito na Pós-Modernidade*, Rio de Janeiro, Forense.

Boff, L (2002) *Fundamentalismo. A Globalização e o Futuro da Humanidade*, Rio de Janeiro, Sextante.

Bonavides, P (2008) *Curso de Direito Constitucional*, 2nd ed., São Paulo, Malheiros.

Bonavides, P (2004) *Do Estado Liberal ao Estado Social*, 7th ed., 2.nd print, São Paulo, Malheiros Editores.

Bruno, S (1983) *O Encoberto*, ed. de Porto, Lello

Calvino, I (2002) *Lezioni Americane – Sei proposte per il prossimo Milenio*, 4.ª ed. Port. transl. by José Colaço Barreiros, *Seis Propostas para o Próximo Milénio*, Lisbon, Teorema.

Cardoso Da Costa, J M M (1999) *O Princípio da Dignidade da Pessoa Humana na Constituição e na Jurisprudência Constitucional Portugueses*, in *Direito Constitucional. Estudos em Homenagem a Manoel Gonçalves Ferreira Filho*, coord. Sérgio Resende de Barros e Fernando Aurélio Zilveti, São Paulo, Dialética.

Carducci, M (2003) *Por um Direito Constitucional Altruísta*, Porto Alegre, Livraria do

Advogado Editora.

Carmen Rovira, M. del (1958) *Eclecticos portugueses del siglo XVIII y algunas de sus influencias en America*, México.

Cassirer, E (1966) *La Philosophie des Lumières*, trad. fr. , Paris, Fayard, 1966

Castro Osório, A de (2008) *A Minha Pátria*, new ed., Preface by Teresa Simões, Sintra, Colares Editora.

Cerejeira, Doutor M. G. (1974) *O Renascimento em Portugal*. I. *Clenardo e a Sociedade Portuguesa*, 4th ed., Coimbra, Coimbra Editora.

Chamon Junior, L A (1972) *Teoria Geral do Direito Moderno. Por uma Reconstrução Crítico-Discrusiva na Alta Modernidade*, 2.nd ed., Rio de Janeiro, Lumen Juris.

Châtelet, F (dir.) (1972) *Les Lumières*, Paris, Hachette.

Chaunu, P (1982) *La Civilisation de l'Europe des Lumières*, Paris, Flammarion.

Constant, B (1980) *De la Liberté des Anciens comparée à celles des Modernes*, nova ed., Paris, Le Livre de Poche.

Dias, J (1990) *Estudos de Antropologia*, vol. I, Lisbon, Imprensa Nacional - Casa da Moeda.

Dias, J (1985) *O Essencial sobre os Elementos Fundamentais da Cultura Portuguesa*, Lisbon, Imprensa Nacional-Casa da Moeda.

Ferreira da Cunha, P (2003) *As Liberdades Tradicionais e o Governo de D. João VI no Brasil. Ensaio Histórico-Jurídico Preliminar*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 32.

Ferreira da Cunha, P (2008) *Do Brasil na Arqueologia das Liberdades*, in *Convergências & Afinidades. Homenagem a António Braz Teixeira*, Lisbon, Centro de Estudos de Filosofia da Faculdade de Ciências Humanas da Universidade Católica Portuguesa e Centro de Filosofia da Universidade de Lisbon, pp. 624-638.

Ferreira da Cunha, P (2008) *Liberdade, Ética e Direito*, Revista "Nomos. Revista do Curso de Mestrado da Universidade Federal do Ceará", vol. 28. 2, Fortaleza, 2008 / 2, pp. 111-138

Ferreira da Cunha, P (1992) *El Derecho y la Razón en Sto. Tomás de Aquino. Para una Relectura Jusfilosófica*, in "Actas del 1º Congreso nacional de Filosofia Medieval" Zaragoza.

Ferreira da Cunha, P (2009) *Geografia Constitucional. Sistemas Juspolíticos e Globalização*, Lisbon, Quid Juris.

Ferreira da Cunha, P (2005) *Aristóteles: Filosofia do Homem – Ética e Política*, in

"Revista Internacional d'Humanitats", Barcelona, ano VIII, n.º 8: http://www.hottopos.com/rih8/pfc.htm#_ftn1

Ferreira da Cunha, P (1999) *Mysteria Iuris. Raízes Mitosóficas do Pensamento Jurídico-Político Português*, Porto, Legis.

Ferreira da Cunha, P (2006) *Raízes das Liberdades – Para um Diálogo Histórico-Constitucional*, in "Revista da Faculdade de Direito da Universidade do Porto", III, pp. 851-868

Gomes Canotilho, J J (1987) *O Círculo e a Linha. Da 'liberdade dos antigos' à liberdade dos modernos' na teoria republicana dos direitos fundamentais (I parte)*, in "O Sagrado e o Profano", Homenagem a J. S. da Silva Dias, "Revista de História das ideias", n.º 9, III, Coimbra, p. 733 *et sq.*.

Jaeger, W (1979) *Paideia, Die Formung des Griechichen Menschen*, Berlin, Walter de Gruyter, 1936, Port. transl. by Artur M. Parreira, *Paideia. A Formação do Homem Grego*, Lisbon, Aster.

Lauand, J (2007) *Filosofia, Linguagem, Arte e Educação*, São Paulo, ESDC / CEMOROC – EDF – FEUSOP / Factash Editora, p. 151 et sq.

Malato, M L (2009) *Manual Anti-Tiranos. Retórica, Poder e Literatura*, Porto Alegre, Livraria do Advogado Editora.

Marías, J (1948) *Historia de la Filosofía*, 4th ed., Madrid, Manuales de la Revista de Occidente.

.

Mota De Sousa, C A / Cury, M / Caso, G (2008) *Direito e Fraternidade*, LTR.

Otero Parga, M (1999) *Valores Constitucionales. Introducción a la Filosofía del Derecho: Axiologia Jurídica*, Santiago de Compostela, Universidade de Santiago de Compostela.

Pereira Menaut, A-C (2004) *Constitución, Princípios, Valores*, Separata de "Dereito. Revista Xurídica da Universidade de Santiago de Compostela", volume 13, número 1.

Pulido Valente, V (2009) *Portugal. Ensaios de História e de Política*, Lisbon, Aletheia.

Quental, A de (1994) *Causas da Decadência dos Povos Peninsulares*, 6th ed., Ulmeiro.

Reale, M (1999) *Invariantes Axiológicas, v.g. in Paradigmas da Cultura Contemporânea*, 1st ed, 2nd print, São Paulo.

Reale, M (1977) *Liberdade Antiga e Liberdade Moderna*, « Revista da Universidade

de São Paulo », n.º 1, p. 5 *et sq*.., *in ex in Horizontes do Direito e da História*, 2.nd ed., São Paulo, Saraiva, p. 17 *et sq*.

Reale, M (1982) *Lições Preliminares de Direito*, décima ed. revista, Coimbra, Almedina.

Reis, A (2002) *Os Valores Republicanos Ontem e Hoje*, in *A República Ontem e Hoje*, org. de António Reis, II Curso Livre de História Contemporânea, Lisbon, Colibri.

Resta, E (2002) *Il Diritto Fraterno*, Roma/Bari, Laterza.

Reys Mate/ F Niewöhner (coords.) (1989) *La Ilustración en España y Alemania*, Barcelona, Anthropos.

Romano De Sant'anna A (2007) *Tempo de Delicadeza*, Porto Alegre, L&PM.

Savater, F (1991) *Ética para Amador*, Barcelona, Ariel.

Vallet De Goytisolo, J (1999) *Esquema Introductivo para una Metodología de la Ciencia Expositiva y Explicativa del Derecho*, Real Academia de Jurisprudencia y Legislacion, Madrid.

Vélez Rodríguez, R (2008) *A Análise do Patrimonialismo através da Literatura Latino-Americana. O Estado gerido como bem familiar*, Rio de Janeiro, Documenta Histórica Editora / Instituto Liberal.

On how law is not like chess:
Dworkin and the theory of conceptual types

Ronaldo Porto Macedo Junior[1]

Abstract: The present article aims to show how the contemporary theoretical legal debate became a methodological debate and how Ronald Dworkin's thinking holds a central position in this debate. Dworkin arguments that law is an interpretive concept, it requires the establishment of an interpretive attitude towards its object. Thereafter, the analogy between chess and law is misleading and inappropriate, precisely for its inability to capture the interpretive dimension of law. As an alternative, Dworkin offers a different analogy, with the interpretive practice of courtesy. With a few changes from how Dworkin presents it, the author describes an argument to help illustrate how interpretive activity for "interpretive concepts" takes place.

The development of the interpretive theory of law as formulated by Dworkin, leads to a refutation of countless conventionalist theories of meaning and introduces a theory of controversy. He understands that conventionalism and the semantic sting are two core elements of the methodological failure that legal positivism represents. Law is an argumentative practice, its meaning as a normative practice depends on the conditions of truth of the argumentative practices that constitute it, it is impossible to engage in such a practice with archimedean viewpoints external to the interpretation itself. External skepticism towards interpretation is unrealistic in face of the inevitability of the interpretive engagement. The interpretive practice is established through three stages of interpretation: the pre-interpretive, the interpretive and finally the post interpretive or reforming stage. All of them with purpose of unveiling the meaning of the point of law's interpretive practice.

Dworkin answer his critics masterfully while incorporating central questions of contemporary philosophy in his theory and by doing, sets a paradigm for and illustrates the theoretical-philosophical problems that have been center-stage in recent years.

Keywords: Dworkin, interpretive, courtesy.

[1] Professor at Direito GV and USP.

I. The contemporary methodological debate

It has become commonplace to acknowledge that the contemporary agenda of debate on legal theory has taken on a markedly methodological nature in recent decades, particularly in the Anglo-Saxon legal intellectual arena. Although this methodological trait fed by post-linguistic turn philosophy of language was already present in the work by H. L. A. Hart, I believe it gained new momentum and direction with the publication of the studies of law philosopher Ronald Dworkin. Dworkin radicalized and deepened some of these methodological topics and took on a leading role in the creation of the legal theoretical agenda of recent decades. The centrality of his work is due not only to its pioneering and the strength of his criticism, but also to the fact that it can be seen as a response to almost every new viewpoint and to many of the methodological subjects that have gained preeminence, even though it is not limited to this. In this sense, Dworkin's work not only makes a significant contribution to the construction of today's legal-theoretical agenda and casts the author as one of the most original thinkers therein, but also sets a paradigm for and illustrates the theoretical-philosophical problems that have been center-stage in recent years.

The Dworkian argument that *law is an interpretive concept* amounts to one of the great and innovative contributions the American philosopher has introduced into the legal-methodological. The view of interpretation he develops, however, is not to be confused with the hermeneutical approach of Max Weber and Herbert Hart.

One of the hermeneutical approach's distinctive traits is the importance it assigns to the issue of the meaning of action. Weber, for example, analyzes this issue by using chess as a preferred illustration. In fact, the analogy between law and chess has fascinated many legal theorists, and methodological positivists in particular. Despite the similarities between Weber's analysis and Hart's criticism of his predecessors, there are some differences between them that justify the comparison made in this paper. They concern how both define the meanings of the *internal and external meaning of rules-regulated action* and of *intentionality*. The Hartian theory of law is seated on an innovative analysis of the concept of *rule* and provides new methodological fundamentals for legal positivism. Notwithstanding, it retains from classic positivism a commitment to some of its basic arguments, particularly in concern with the thesis of the separability of law and morality, and with the descriptive

nature of the theory of law. Ronald Dworkin harshly criticizes Hart's methodological compromise.

Several dimensions of the methodological debate Dworkin's work caused are dispersed across the various stages of the famed Hart–Dworkin debate, which has occupied countless legal theorists in recent decades. I believe that the central themes of the debate are still poorly understood. I believe that the debate established by theses authors, as well as its connection with the contemporary legal theoretical agenda is central for understanding the classic questions concerning the connection between law and morals, the descriptive or normative nature of legal theory and the role of intentionality in interpretative practices of interpretive concepts. Dworkin argues that the analogy between chess and law is misleading and inappropriate, precisely for its inability to capture the interpretive dimension of law. For this reason, he proposes the social practice of courtesy as a better model for understanding law. This shift, which I refer to as "From chess to courtesy," lies seated on a deep conceptual and methodological change that separates Dworkin from Hart and many of his predecessors.

Ronald Dworkin builds an interpretive theory of law. To this end, he deepens a conception of interpretation other than Hart's hermeneutical understanding, although the latter may be seen as a starting point for the former. The distinctive trait of the Dworkian concept of *interpretation* is how, on analyzing interpretive practices such as "courtesy", the theorist poses new and mighty challenges for his contemporaries. For Dworkin, interpretation as a creative and reconstructive endeavor, rather than "conversational" interpretation, or one intended to merely identify the agents' subjective intent, is the best means to understanding the nature of law.

For Dworkin, the correct understanding of grammar in our use of the conceptual language is a vital endeavor to both prevent philosophical misunderstandings and to view the genealogy of such misunderstandings. On the other hand, the distinctions are relevant in practice insofar as they affect how we practice law – in particular, how we interpret it in our everyday practices.

II. Dworkin and the theory of interpretation

> A main cause of philosophical disease - a one-sided diet: one nourishes one's thinking with only one kind of example. (Ludwig Witt-

genstein)[2]

Dworkin understands that conventionalism and the semantic sting are two core elements of the methodological failure legal positivism represents. In his opinion, the challenge of the theory of controversy undermined the assumption of the purely descriptive, non-evaluative, intent of positivist theory of law, even in its Hartian-inspired hermeneutical version.

This central point in his criticism does not, however, completely deplete his methodological objection to positivism[3]. Dworkin offers a broader methodological challenge for several contemporary legal theories, besides legal positivism (such as realism, naturalism, pragmatism and some versions of moral and political skepticism), calling their approaches "Archimedean". As Stephen Guest notes, "You are an Archimedean skeptic if you believe that propositions cannot be true because nothing in the world – a fulcrum – arises due to the fact that the propositions can be shown to be true."[4]. It is based on this concept that Dworkin challenges all unengaged forms with non-evaluative and methodologically detached aspirations found in countless variants of these approaches. For him, it is a methodological error to intend to stand above the substantive and evaluative battlefield, above judgments of moral correctness.

Dworkin's criticism of Archimedeanism is grounded on two interconnected observations. The first states that certain social practices, to include law, are argumentative social practices. This is, for Dworkin, the distinctive trait of law relative to other social practices ("[…] the central and pervasive aspect of legal practice […]"[5]). The second observation concerts the dual – internal and external – dimension through which law can be seen. For him:

> Of course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. *Legal practice, unlike many other social phenomena, is argumentative.* Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions

[2] WITTGENSTEIN, Ludwig. Philosophical investigations. Translation by G. E. M. Anscombe. New York: Macmillan, 1953. §593. .

[3] Cfr. COLEMAN, Jules, 2002b, p. 316..

[4] GUEST, Stephen, 2010, p. 162.

[5] DWORKIN, Ronald, 1986, p. 419.

> that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims. This crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. *One is the external point of view of the sociologist or historian*, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others, for example. *The other is the internal point of view of those who make the claims*.[6]

This internal view of those who make the claims in a complex and argumentative practice (as opposed to other non-argumentative social practices, such as a game of chess) demands a new standard for analog comparison. This is our next topic.

1. From chess to courtesy: a new model for law

At this point, it is worthwhile to return to two non-legal examples to clarify the dimension and meaning of Dworkin's statement. One example concerns chess. The game, as seen by Ross, Kelsen, Weber and Hart, involves a normative dimension. This means that, in order to understand the behavior of a chess player, we must understand that his actions are driven by the rules of the game of chess. For the very same reason, we may only say that an individual makes a chess play, or "plays chess", if the individual takes the rules of the game into account. Clearly, the player may be right or wrong, he may or may not correctly follow the game rules. To make a mistake in the game, however, does not mean not playing chess, unless, of course, the mistake itself is evidence that the game rules are not being taken into consideration at all. Let us now say that a cat walking on a chessboard should move a pawn from e2 to e4. It would be incorrect to say that the cat is playing chess. The animal's involuntary move is not regarded as a chess play, even if the move ("by chance") happens to be in accordance with the game's rules. The reason for this lies precisely in the fact that the animal does not take the normativity of the social practice in to consideration. After

[6] DWORKIN, Ronald. 1986, p. 13. Underlined by us.. DWORKIN, Ronald, 1999, p. 16-17.

all, cats do not *play* chess.

Still on the same case, we might say that one is playing chess when one has mastered the technique of making moves according to the rules of the game as one has learned them (from lessons, observation, repetition, etc.). Knowing how to play is crucial to recognizing the social practice of the game. It is worth pointing out that a player may *know how to play* without ever having read a book on chess theory or even *knowing the theory* of the game at hand.

Unlike authors such as Kelsen, Hart, Weber and Ross[7], Dworkin never argued that the analogy between law and chess was particularly useful or enlightening for the theory of law. This relates in part to the fact that, even in his earliest criticism of the positivist model, Dworkin rejected the description of "law as a rules model". The main reason, however, lies in the fact that although chess is a social practice, it does not usually,

[7] Another exclusivist positivist might be added to the group: MARMOR, Andrei, 2006a. Also available at: MARMOR, Andrei. How law is like chess. *USC Law Legal Studies Paper No. 06-7*. Apr. 2006b. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=897313>. Viewed on: Sep. 7th, 2012. In this intriguing essay, Marmor – after defending a complex conventionalist theory of the rules of the legal game that involves deep conventions and surface conventions – writes: "*As Hart himself seems to have suggested, the rules of recognition are very much like the rules of chess: they constitute ways of creating law and recognizing it as such. Once again, it is not my purpose to deny that the rules of recognition solve various coordination problems*. They do that as well. It would be a serious distortion, however, to miss their constitutive function. The rules that determine how law is created, modified, and recognized as law, also partly constitute what the law in the relevant community is. They define the rules of the game, thus constituting what the game is. […] Let me sum up: the conventional foundation of law consists of two layers. There are deep conventions that determine what law is, and those deep conventions are instantiated by the surface conventions of recognition that are specific to particular legal systems. The concept of law is constituted by both layers of conventions. *Our concept of law partly depends on the deep conventions that determine what we take law and legal institutions to consist in, and partly on the specific institutions we have, those that are determined by the rules of recognition. Basically, this is just like chess. Without the rules of chess, we would not have a concept of chess. But we can only have such a concept, because we already possess the deeper concept of playing competitive games, of which chess is just one instance. Both are profoundly conventional, and in this general insight, I think that Hart was quite right*.", my italics.

at least in its pivotal cases, involve dispute on the interpretive concepts. Quite the opposite, in fact: it is almost natural and intuitive to consider the game based exclusively on its conventionally accepted rules or even rules set by and act of will from the agents.

In a 1965 paper on the thinking of Lon Fuller, Dworkin provides clues to the limitations involved in the analogy between chess and law by stating that:

> "An important qualification is now in order. So far I have been assuming that the *standards* locked in the concept of law are crisp, precise rules, the limits of their authority clear-cut and evident, and I have discussed their logic and their force on that assumption. But, of course, this is a false picture: these *standards* are matters of degree over some range of their application, are to some extent controversial, and are continually redefined in small and imprecise ways by the operations of institution and language which they regulate. In this way they are quite unlike the relatively precise and unmalleable rules of ordinary games. This qualification makes it more difficult, but also more important, to appreciate their special role in legal argument and reasoning. If the concept of law were as clear and uncontroversial as, for example, the concept of a move in chess or a play in bridge, we would not expect by analyzing it to improve our understanding of, or influence on, legal argument, because anything in the concept pertinent to that process would already be obvious to all its participants. There would then be point to the criticism that analysis of legal concepts cannot yield legal arguments, for appeals to the concept of law would be too obvious or too trivial to count as such. Controversies over the meaning of law are significant only because the strands making up the concept of law are difficult to isolate and require judgment to apply." [8]

In reality, unlike other practices such as law, chess does not involve and interpretive question in association with evaluative evaluations (not understood from a conventional evaluative angle[9]). For this

[8] DWORKIN, Ronald. Philosophy, morality and law: observations prompted by professor Fuller's novel claim. *University of Pennsylvania Law Review*, Philadelphia, v. 113, p. 668-90, 1965. p. 682, highlighted by me.

[9]Dworkin, in his essay on Lon Fuller, makes clear the difference, not always recognized by theorists of law, between the moral dimension conventional and

reason, Dworkin's analogy involves an interpretive social practice: courtesy[10]. The analogy with chess reveals a different logical grammar than the one used in the *game* of courtesy. For this reason, it must give way to a new analogy. Dworkin abandons chess[11].

---

proper moral dimension. Commenting on the text of Lon Fuller on the inner morality of law (The Morality of Law New Haven, USA: Yale University Press, 1964. Revised Edition, 1972), notes that: "*The canons of morality, of course, are criterial standards*; they are addressed to those who make moral judgments or arguments and govern their success or failure. Like the canons of law, they may also be pertinent to the question of whether someone has behaved morally or immorally. If I harm you in some way, claiming myself justified because you broke some alleged moral rule which I invoke, then the fact that this 'rule' is self-contradictory or impossible to observe might count as a step in showing that what *I* had done was morally improper. *But a failure to comply with the canons of morality is not, as such and for that reason, a moral fault* [...]". Ao não realizar essa distinção e se valer de um conceito meramente criterial de moralidade, Lon Fuller incorreria num erro categorial que em textos posteriores Dworkin (especialmente DWORKIN, Ronald, 2006b) enfatizará: "If so, he is guilty of two confusions. First, and less important, he confuses related but not identical legal and moral standards. *Second,* and more important, *he confuses criterial standards directed at determining whether some act has succeeded in producing a moral criticism, or a moral argument, with standards stipulating whether some act is moral or immoral, praiseworthy or blameworthy in character.* If he is to establish his claim that compliance with the canons constitutes moral behavior, he must show his canons of law to be moral standards of the latter sort, instead of or as well as the former sort." DWORKIN, Ronald, 1965, p. 685-686, highlighted by me..

[10] DWORKIN, Ronald, 1986, p. 46-49.

[11] GUEST, Stephen, 2010, p. 67. He also observes a similar point when he asserts: "The fastest way to the interpretive concepts is through the idea of something 'having an intentionality' (point). Note that we can describe a practice without making any statement about the meaning or purpose of the practice. Thus, a purely descriptive report of chess game can take various forms, for example, in its simplest form, "pushing pieces on a board of wood" or, in a more refined one 'move pieces of wood in accordance with a set specific rules. A description like this tells us that this is chess, instead of saying that is, let's say, checkers, but fails to describe what many of us might consider some of the vital features of the game. We were short of a 'true' description here? Is anything else necessary? What additional ingredients would be required to make the description of the 'chess game' an adequate or 'true' description? What would make people happy? If I provide the details of the rules and then say that the sense of the game was to win, many people would agree. But I could, as many people do, go ahead and

One of the Dworkin's favorite language games to use as an analogy for law involves courtesy practices. With a few changes from how Dworkin himself presents it[12], the argument might be described as follows. Let us imagine a social normative practice involving an *interpretive concept*. Say that Francisco, a handsome young man, tells his friend Roberto that he invited a young lady to dinner the previous night and that each paid for his or her half of the bill. Roberto then criticizes Francisco, saying that he was extremely *discourteous* towards the young lady, since men are expected to pay the bill when they invite women out to dinner. Francisco disagrees with Roberto and says he was not discourteous at all, as his income is not greater than the young lady's and that he saw no reason for uneven treatment simply because she is a woman. He even argues that, in the past, he willingly paid a friend's bill because the friend in question was in financial trouble. However, he says, that was not the case in the dinner with the young lady.

Let us assume that the disagreement between the two is sincere and authentic and that, therefore, they were not just "shooting the breeze", or taunting one another for fun or to pass the time. They re-

---

say that it is an intellectual game, which requires only intellectual strategies, no strategy how to make an opponent lose by disturbing him with the use of a false beard, for example. Or I could say that point of chess is the development of intellectual skills of the players and that victory was only incidental to that purpose. I could, in other words, offer many descriptions of the 'real' point of chess. Dworkin does not analyze the idea of in-depth description. For him, I think, it refers to a level of description that incurs relatively little controversy. He provides an example of a social practice of courtesy, to bow before a superior. " ":" GUEST, Stephen, 2010, p. 31-32, highlighted by me. It is noteworthy, however, that the assignment of an evaluative "point" to chess game somehow removes this practice of our clearest mental picture about it, since we usually imagine this game as an agreement between players without associating an evaluative "point". MARMOR, Andrei, 2006a, seeks to identify deep conventions presupposed in this practice. However, even if they only report the values (playing a good game) as conventional criteria of moral evaluation and not as moral evaluations per se.

[12] Dworkin, Ronald, 1986, p. 46-49, 68 et seq. In Dworkin, Ronald, 2005a and 1985, Dworkin examines another situation (language game) involving a debate about the objectivity of an aesthetic judgment on a novel by Agatha Christie. I explored a similar example concerning a dispute between friends about the aesthetic qualities of "action movies" Rambo IV and Clockwork Orange in MACEDO JUNIOR, Ronaldo Porto. Just like taking Ronald Dworkin seriously or how to fotograph a hedgehog in motion. In: GUEST, Stephen. Ronald Dworkin. Translation of Carlos Borges. Technical review of Rafael Rabelo Mafei Queiroz. Rio de Janeiro: Elsevier, 2010. p. VII-XVIII. (Collection Theory and Philosophy of Law).

ally had a disagreement "on the level of ideas" or concepts about the courteous or discourteous nature of Francisco's behavior the previous evening. We can imagine that the arguments provided by the young men could multiply and become more sophisticated. Let us imagine that Roberto counters by presenting a concept of "courtesy towards women" as follows: "being courteous towards a young lady means prioritizing her and offering her presents or favors." As paradigmatic examples to support the concept, he mentions the easily observed practice of men allowing women to step out first from, holding the car door open for them, not allowing them to carry suitcases and heavy parcels, offering them flowers and candy before a date, etc. With these examples, Roberto attempts to show that his view is appropriate and well suited to the social facts that he used as reference. Without denying the paradigms, Francisco replies that courtesy towards women involves expressing consideration of and respect to their dignity, a concept that also implies respect for the value of equality. He offers new paradigms in support of his ideas, listing situations where unbounded prioritization could seem offensive and undignified, as it might be symbolically construed as a representation of female inferiority. To illustrate, he mentions professional women who are offended by and deem it discourteous that they are never allowed or asked to carry heavy luggage, or to fully return acts of kindness when in the presence of men. Finally, he argues that his rival conception of "courtesy towards women" is superior to Roberto's, as it is more comprehensive and consistent (or coherent). The paradigm cases the two suggest are a proper fit for their respective conceptions. Roberto's conception, however, does not fit the paradigms Francisco lists. In fact, it challenges them, as *unbounded prioritization* and *non-reciprocity* would be recognized, at least in many paradigm cases, as examples not of courtesy, but rather of the lack thereof.

What is the meaning of this *argumentative practice*? Roberto argues that Francisco breached a rule of *courtesy*. Francisco understands the meaning of his friend's argument and chastisement, but disagrees. The suggested example is not a false dispute where two people disagree because they are speaking of different things. Quite the opposite, the dispute is sincere because each completely understands what the other means to say. However, they disagree as to the best way to understand the *concept of courtesy*.

Analysis of this example reveals the argumentative dimension of this practice. The central question that drives the two friends' argumentative social practice assumes the following question: what condition of

truth would cause Roberto's proposition – "Francisco was discourteous" – to be true or false? Admitting the absence of a condition of truth, that is, that there is no criterion capable of assigning a truth value to the proposition, it would be difficult to understand even the behavior of the two. Of course, they might hypothetically be simply "simulating disagreement" as a means to pass time, to play at insincere taunts, or just to annoy one another. However, as I noted earlier, *this is not the case at hand*, this is not the hypothetical case we are building. In the suggested example, Roberto and Francisco argue about the best *conception* of the *concept* of courtesy[13].

In this case, what correctness criterion might signal that one conception is superior to the other? What might make Roberto's proposition true or false? Another point must be stressed here. Of course the two friends are not arguing over the best conception of the concept of *courtesy* based on a merely stipulative definition. Had it been stipulated that being courteous towards women always implies paying their bills, then there would be no dispute to settle. Roberto would be right by definition or by stipulation. In this context, the concept at hand is not criterial, but interpretive, as we will see ahead. In the case at hand, the dispute emerges precisely because the rule that determines the concept of *courtesy* is a social rule, that is, a rule that is intersubjectively constituted.

Their dispute is about the *concept of courtesy* as socially and normatively understood. In this case, the best *conception of courtesy* is the one that best interprets a real social normative practice, that maintains a certain fit with a set of socially shared practices serving as a metric or paradigm. But how to determine which concept of courtesy best meets the (socially admitted) requirements of what amounts to the "best conception"? The important thing now is not to go to greater depths into Dworkin's answer to the question. Certainly, this is not a conventional compromise, as the very criteria for what amounts to "the best interpretation" also involve an interpretive question. What is important is to realize that the criterion is argumentatively built, by means of reflection and methodologically regulated construction (assuming, for example,

[13] The distinction between concepts and conceptions became common in contemporary philosophical discourse, especially in moral debates. It is widely used by authors such as Hart (Hart, HLA, 1994a), Rawls (RAWLS, John, 1971) and Dworkin (Dworkin, Ronald A Special Supplement: The Jurisprudence of Richard Nixon, May 4, 1972, The New York Review of Books) and was originally highlighted by Gallie, W. B. Essentially contested concepts. Proceedings of the Aristotelian Society, New Series, Hoboken, vol. 56, p.167-198, 1956b.

consistency, non-contradiction among arguments, clarity, leanness, simplicity, etc.) of the best arguments[14]. The arguments of Roberto and Francisco, therefore, will be better the more they meet the requirements of what makes a good argument, that is, the dimensions of fit and of the acknowledgement of the criterion's evaluative appeal. After all, "[…] a plausible interpretation of practice [...] must also undergo a test on two dimensions: it must fit the practice and prove its value or its purpose."[15]. Simply put, in the arrangement proposed earlier, Francisco would have offered a more satisfactory conception of "courtesy towards women," as it was more comprehensive and consistent with its paradigmatic practices.

The trait that sets the social practice or courtesy apart from the social practice of chess is that the former includes an *evaluative-reflective practice on a certain value* from the part of the agents (that is, the *courtesy value*), which is absent in the case of chess. In chess, the rules are made up of shared public standards, or social rules, to use the terminology of H. L. A. Hart. In the case of courtesy, the shared behavior standards are relevant, necessary, conditions, but not sufficient to correctly describe the grammar of the activity. For the Hartian understanding of chess, it would be sufficient to record what the players understood by the rules to which they were subject to be. The example of chess is perfectly appropriate to the understanding of how a *criterial concept* works, but is inappropriate to describe the functioning of an *interpretive concept*. Gerald

[14]. DWORKIN, Ronald, 1986, p. 53: "But we should notice in passing how the constructive account might be elaborated to fit the other two contexts of interpretation I mentioned, and thus show a deep connection among all forms of interpretation. Understanding another person's conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making of what he says the best performance of communication it can be. And the interpretation of data in science makes heavy use of standards of theory construction like simplicity and elegance and verifiability that reflect contestable and changing assumptions about paradigms of explanation, that is, about what features make one form of explanation superior to another. The constructive account of creative interpretation, therefore, could perhaps provide a more general account of interpretation in all its forms. We would then say that all interpretation strives to make an object the best it can be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success." The theoretical framework used by Dworkin are the works of Thomas Kuhn, specially KUHN, T. The structure of scientific revolutions. Chicago: The University of Chicago Press, 1962.

[15] DWORKIN, Ronald, 2005a, p. 239.

Postema points out that Hart does not in fact explicitly exclude the reflective dimension. However, he does not assign to it any relevant meaning in his hermeneutical understanding of social practice[16]. This one of the reasons why he does not believe that comparing law with a game of chess is in any way inappropriate, as the comparison does not miss anything essential, contrary to what Dworkin claims. It is symptomatic that, in *The Concept of Law*, Hart always uses *criterial concepts* for examples, such as baldness, the summit of a mountain, and the *concept of the Paris meter standard*[17], instead of examples involving interpretive concepts.

In an argumentative practice such as the one illustrated by Francisco and Roberto's discussion of courtesy, the propositions of the arguing agents depend on the truth of propositions that only have meaning within that same practice[18]. An argumentative practice's distinctive trait is precisely the fact that it assumes the presence of *arguments about* the practices themselves. However, it is not simply the act of being courteous (in that case, to pay the young lady's bill or not) and the paradigmatic cases of courtesy – from which come the rules that give the participants reasons to act – that must be considered in an argumentative practice. Even the very action of arguing and challenging arguments about and evaluations of courtesy itself is part of the "courtesy game". An argumentative self-reflection exists here. The *argumentation practices* involved in the *practices of courtesy* only gain sense within the argumentative practices themselves, justifying and challenging meaning and conceptions of courtesy. Finally, the arguments about courtesy themselves are also parameters to determine what the best conception of courtesy is.

Gerald Postema accurately points out that

> […] No theoretical account of this kind of social practice can hope to be adequate to the phenomena unless it addresses fundamental questions that arise *within* this discursive activity of offering and assessing reasons. Such a theory cannot stand outside this practice without losing a grip on what is essential to the practice. An ex-

[16] POSTEMA, Gerald J., 2011, p. 422.

[17] HART, H. L. A, 1994b, p. 10, 18-19, 29, 64 (concepto of bald), p. 20 (foot of a montain), p. 120 (Paris' subway). See p. 18-19 about the analysis of criterial concepts produced by social practices. Both examples extracted from WITTGENSTEIN, Ludwig, 2009, § 66-67.

[18] DWORKIN, Ronald, 1986, p. 13. "Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice.".

> ternal theory of the practice would be a theory of a quite different object, just as a purely physical theory of football articulated in terms of velocity, mass, etc. would have a different object than an account of its strategies would have. In particular, no theory that contented itself with reporting what participants took its rules to mean would be adequate.[19]

Therefore, for Dworkin, understanding an argumentative practice about an interpretive concepts involves understanding the meaning that agents lend to the values and arguments involved in these practices and, as a result, understanding the "internal" (pre-practice) interpretation done by the agents. When Francisco and Roberto discuss whether the behavior of the former did or did not breach a rule of courtesy, they do not report to *the meaning they, personally, want to lend to courtesy*, but to the meaning of courtesy in a certain shared social context in which they hold the discussion, which, finally, is embedded and referred to in a certain shared *form of life*[20].

Finally, for Dworkin, a philosophical theory of an argumentative practice will have many central aspects in common with that of a concrete practice. It will, however, *be more abstract*, as it includes an act of interpretation and theorization of the practice itself. It is worth noting that the practice will be normative (because it is governed by rules) and so will the theoretical activity itself. This is because, on the one hand,

---

[19] POSTEMA, Gerald J., 2011, p. 423, highlighted by me.

[20] The approach of the thinking of Ronald Dworkin to a Wittgensteinian reading has already been proposed by other authors. In this sense, see PATTERSON, Dennis (Ed.). Wittgenstein and legal theory. Boulder: Westview Press, 1992; WOLCHER, Louis E. Ronald Dworkin's Right answers thesis through the lens of Wittgenstein. Rutgers Law Journal, vol. 29, p. 43-66, fall 1997, presenting a critical reading of Dworkin;; PATTERSON, Dennis. Wittgenstein and the code: a theory of good faith performance and enforcement under article nine. University of Pennsylvania Law Review, v. 137, p. 335-430, 1988; BIX, Brian. The application (and mis-application) of Wittgenstein´s rule-following considerations to legal theory. In: BIX, Brian. Law, language and legal determinacy. Oxford: Clarendon Press, 1993. p. 36-62; ARULANANTHAM, Ahilan T. Breaking the rules? Wittgenstein and legal realism. Yale Law Journal, New Haven, v. 107, p. 1853-1884, Apr. 1998; PATTERSON, Dennis. Wittgenstein and constitutional theory. Texas Law Review, v. 72, p. 1837-1856, June 1994; SEBOK, Anthony J. Finding Wittgenstein at the core of the rule of recognition. Southern Methodist University Law Review, v. 52, p. 75-110, winter 1999; MORAWETZ, Thomas. Understanding disagreement: the root issue of jurisprudence: applying Wittgenstein to positivism, critical theory, and judging. University of Pennsylvania Law Review, v. 141, p. 371-456, Dec. 1992.

the construction of the best argument, the best justification and the best conception are also governed by rules (concerning what amounts to the best argument). On the other hand, it is also normative because it acts on the practices' normative criteria and, therefore, to a certain extent, regulates these criteria as well. In this sense, it involves a certain degree of self-reference or *circularity*[21]. The circularity, however, is not tautological, but interpretive.

[21] There is an inevitable hermeneutic circularity on Dworkin's thought, insofar as in an interpretative activity about an interpretative concept, we cannot lie completely outside the hermeneutic game. There isn't an exterior to the interpretation, an outsider's look, an Archimedean's point of view that allows us to describe from the outside of and interpretive enterprise carried on in these situations. That does not exclude, as seen in former chapters, the possibility of a hermeneutics' sense of action is exterior to the practice, as it was conducted by Weber. This path, however, does not lend itself to the interpretation of interpretative concepts, governed by a distinct "logical grammar". Cfr. DWORKIN, Ronald, 2011a, p. 123 et seq.; DWORKIN, Ronald, 1986, p. 53 et seq.; GUEST, Stephen. 2010, p. 29 et seq. On hermeneutic circularity, compare : "In any case, we can enquire the consequences that sciences' of the spirit's hermeneutics will suffer from the fact that Heidegger derives fundamentally the circular structure of comprehension from the temporality of presence. Those consequences do not need to be such, as if it applies a new theory to praxis and this last one is exerted in the end, in a different manner, in accordance with its art. They could also consist that the self comprehension constantly exerted has been corrected and depurated art of comprehension. That is why we will turn ourselves back into Heidegger's description about the hermeneutical circle, with the purpose of turning our own purpose into something fecundated the new and fundamental meaning that the circular structure gains here. Heidegger writes: 'The circle must not be degraded to a vicious circle, even if it is a tolerated one. Inside of it veils a positive possibility from a more original knowledge that, obviously, will only be comprehended from [271] an adequate manner, when the interpretation comprehends that its first, constant and last task remains being not receiving beforehand, by one 'happy idea' or by popular concepts, nor the previous position, nor the previous vision, nor the previous conception (Vorhabe, Vorsicht, Vorbegriff), but to assure a scientific theme in the elaboration of these concepts from the thing, itself (Heidegger, Ser e Tempo, vol. I, Petrópolis, Vozes, 1989, p. 210)." GADAMER, Hans-Georg. Truth and method. Traslation from Flávio Paulo Meurer. 4. ed. Petrópolis: Vozes, 2002. v. 1. p. 400. On the theoretical-juridical field this vision holds certain resemblance with the thoughts of Ernest Weinrib, who also recognizes certain circularity in the hermeneutical thought that goes "[…] from the law's content to the juridical immediate comprehension of this content, to an implied form in this comprehension, to the explicit elucidation of that form, to the test of the content's adequation to its form now explicit." WEINRIB, Ernest. Legal formalism: on the immanent rationality of law. Yale Law Journal, New Haven, v. 97, p. 949-1016, 1988. p.974.

2 *Law as an interpretive practice*

For Dworkin, law is an interpretive practice because its meaning as a normative social practice depends on the conditions of truth of the argumentative practices that constitute it. It is not a system or rules *tout court*. It involves a complex web of practical articulations of authority, legitimization and argumentation. Argumentative practices, which are so typical of the daily working lives of lawyers, illustrate how the concept of law is controversial and subject to dispute, as is "the concept of *courtesy* towards women." Furthermore, the concept only makes sense if one can assume a value of truth for the sentences that enunciate it; otherwise, they would be no more than empty rhetoric. Roberto and Francisco disagree because each one believes himself to be right. Otherwise, they would not be actually disagreeing, but playing at disagreement. Likewise, in most cases (and certainly in their focal meaning), court arguments are arguments that must be taken seriously. This means that lawyers, the "players of the argumentative-legal game," acknowledge the meaning and possibility of a truth value for their arguments before the courts. The attitude is more typically and ideally perceived in the judge, as he or she, due to institutional neutrality and assumed absence of a material interest in the claim, more clearly acts according to his or her legal conviction[22]. Therefore, if some legal cynicism may be more commonplace in the "results-oriented" or "mercenary" practice of attorneys, the attitude is probably less frequent among judges. But even among results-oriented attorneys, moral cynicism, the offer of arguments without conviction, is recognized as normatively disputable, or "degenerate", indicating that the ideal of argumentative correctness for such professionals must also abide by a criterion of moral correctness.

It is worth emphasizing that this final point articulates with a second characteristic of the argumentative practice that, according to Dworkin, eludes the Archimedean views of rival theories. For him, legal practices occur within and impact a context. This contextual impact is measured and evaluated in moral terms. For this reason, the concept of

[22] Stephen Guest enlights the conviction's concept rol in Dworkin's interpretativist model: If you cannot not believe in something, repeatedly and fully, you must believe in it. Not […] because your beliefs argument on its own truth, but because you cannot find any other argument that is a decisive refutation of a creed that it isn't even capable of harming. In the beginning and in the end, there is the conviction." GUEST, Stephen, 1997, p. 27 e 169, Cfr. Also DWORKIN, Ronald, 2011a, p. 68-70 e 153-154.

law is a *political concept*[23]. It is important to stress that what makes it political is the presence of a point in reference to a claim for moral legitimacy. This is not about acknowledgment of its political nature simply because it involves an influence from the interests articulated in the form of power[24] or because they report to a public differentiation between friends and enemies[25], bur rather a demand for moral legitimacy of the exercise of power itself. In Dworkin's words, "law is a political endeavor whose general point, if indeed it has a point, is to coordinate social and individual effort, or to resolve social and individual disputes, or to ensure justice between citizens and between them and their government, or any combination of the above."[26]

According to Dworkin, "The concept of law works in our legal culture as a *contested concept* [27], [...] because it provides a focus for disagreement on a certain range of issues, not a repository for what has already been agreed."[28]. Furthermore, "[…] it is a political concept because of the manner according to which it is contested. It acquires meaning

[23] DWORKIN, Ronald, 2006b, p. 162.

[24] Have pointed out, among others, the work of the theoretics WEBER, Max, 2004, chapter 1, §17, p. 34-35; SCHMITT, Carl. The Concept of the Political. Translation from Álvaro Valls. Petrópolis: Vozes, 1992, specially "Estatal and political" (chapter 1, p. 43-50) and "The distinction friend-enemy, political criteria" (chapter 2, p. 51-53); SCHMITT, Carl. Théologie politique: quatre chapitres sur la théorie de la souveraneité. Traduction par Jean-Louis Schlegel. Paris: Gallimard, 1988. p. 11-78. (Brasilian translation: SCHMITT, Carl. Teologia política: quatro ensaios sobre a soberania. Tradução de Elisete Antoniuk. Belo Horizonte: Del Rey, 2006). On the contrary, to Dworkin the political sense is normative political or political philosophical since ir reports itself to justice's value.

[25]For example, Carl Schmitt. I have developed this subject in MACEDO JUNIOR, Ronaldo Porto. Carl Schmitt e a fundamentação do direito. 2. ed. São Paulo: Saraiva, 2011.

[26] DWORKIN, Ronald. "How law is like literature", em DWORKIN, Ronald, 1985, p. 160. Brasilian's translation: DWORKIN, Ronald, 2005a, p. 239.

27 DWORKIN, Ronald. "Reply by Ronald Dworkin", em COHEN, Marshall (Ed.). Ronald Dworkin and contemporary jurisprudence. Totowa, USA: Rowman and Allanheld, 1983. p. 256, mine translation. Dworkin uses the "refuted concept" terminology, which is from W. B. Gallie. Ver GALLIE, W. B. Art as an essentially contested concept. The Philosophical Quarterly, v. 6, n. 23, p. 97-114, Apr. 1956a; GALLIE, W. B. Essentially contested concepts. Proceedings of the Aristotelian Society, New Series, Hoboken, v. 56, p.167-198, 1956b. Republicado em GALLIE, W. B. Philosophy and the historical understanding. Londres: Chatto & Windus, 1964. Dworkin directly discusses it in DWORKIN, Ronald, 1985, p. 70 et seq.

[28] DWORKIN, Ronald. "Reply by Ronald Dworkin", em COHEN, Marshall, 1983, p. 255.

from the use that is made of it: from the contexts of the debates on what law is and *from what turns on which view is accepted*."[29]. The argumentative and discursive nature of law, together with the fact that disputes and controversies are created within it about the best way to conceptualize concepts, lends law an essentially interpretive nature. In other words, the logical grammar of the legal game, in addition to involving a normative social practice, also implies that it is interpretive and not merely conventional.

One of the criticisms leveled against Dworkin's theory of controversy (based on the notion of contested concepts) was articulated by theorists like Leslie Green[30], who understood that the point of law was not moral in nature and merely involved eliminating controversy to ensure peace. This school of thought, which dates back to Thomas Hobbes, Hume and Bentham, understood that the purpose of law was to ensure peace by means of the certainty law provides[31]. For Dworkin, the explanation is not satisfactory because it is unable to explicitly explain legal practices and their assumed points. For him, law is the forum of principle[32], that is, the space for moral-political debate about the topics a community holds relevant. The point of the exercise of political power is driven by the objective of political justice. Note that this is not simply desirable, an ideal and abstract *should be*, but an intentional characteristic embedded in real legal practices. Clearly, this may mean to some that, being a *contested concept*, legal and political action is not intentionally driven by the concept of *justice* or by a specific concept of justice. This clearly may occur and frequently does. However, even if disagreement does arise between conceptions of justice that provide the *telos*, or purpose, of legal practices, this is not to say that the point does not exist. The common situation in contested legal practices is similar to the

[29] DWORKIN, Ronald. "Reply by Ronald Dworkin", em COHEN, Marshall), 1983, p. 256.

[30] GREEN, Leslie. The political content of legal theory. Philosophy of Social Sciences, v. 17, p. 1-20, 1987, apud POSTEMA, Gerald J., 2011, p. 424.

[31] On David Hume's formulation, law's function is "[…] cut off all occasions of discord and contention." (HUME, David. A treatise on human nature. Edited by David Fate Norton and Mary J. Norton. Oxford: Oxford University Press, 2000. p. 322). HOBBES, Thomas. Leviatã, ou, matéria, forma e poder de um estado eclesiástico e civil. Translation from João Paulo Monteiro e Maria Beatriz Nizza da Silva. São Paulo: Nova Cultural, 2004. p. 113-122 (chapter 14).

[32] Cfr. DWORKIN, Ronald. The forum of principle. New York University Law Review, New York, v. 56, p. 469-518, 1981. Reprinted in DWORKIN, Ronald, 1985, p. 33-71.

debate between Francisco and Roberto, where both agree that courtesy is essential at friendly dinners and represents an important aspect of social practice, but disagree as to what conception of courtesy provides the best interpretation of the concept of *courtesy*.

3. Interpretation according to Dworkin: the point of practices and the grammars of concepts

As we attempted to show, Dworkin's methodological criticism of legal thinking in the final decades of the 20th century revolved around the Archimedeanism assumed in the descriptivist approach, an approach conceived "from nowhere" that he assigns to his rival theorists and to positivists in particular. The semantic sting was one of his expressions and the emphasis given to his theory of controversy was one of Dworkin's main arguments in criticizing his rivals. The frame of "Dworkian agenda" would not be complete, however, without presenting the positive theory he proposed on how to overcome the problems Dworkin sees in the theories he criticizes. His response to the *defects* present in semantic theories was crystallized in his interpretive theory of law.

As pointed out earlier, Dworkin starts to build his interpretive theory of law in essays published in-between the books *Taking Rights Seriously* (1977) and *Law's Empire* (1986) and later collected in *A Matter of Principle* (1985). In *Law's Empire*, Dworkin recaps his arguments on objectivity and interpretation and develops them more systematically in a positive formulation of *law as integrity*. For the purposes of this paper, I am interested in more directly showing the discussion of the assumptions of his theoretical construction, his methodological response, rather than his specific, substantive, answers to topics of a moral, legal and political nature[33]. Despite their enormous relevance and the interest they

[33] Dworkin is a public intellectual and that he develops moral and juridical analysis on several themes that occupy the Americans' debate agenda, such as abortion, euthanasia (dominion), affirmative actions, pornography, freedom of speech (DWORKIN, Ronald. A matter of principle. Cambridge, USA: Harvard University Press, 1985; DWORKIN, Ronald. Freedom's law: the moral reading of the American Constitution. Cambridge, MA: Harvard University Press, 1996a; DWORKIN, Ronald. Sovereign virtue: the theory and practice of equality. Cambridge, MA: Harvard University Press, 2000), yonder general political philosophy themes, such as iguality, freedom, individual responsability (DWORKIN, Ronald, 2011a e 2011b), over and above several articles directed to a more ample public, published in New York Review of Books. A complete bibliography of Dworkin's work until 2005 can be found in BURLEY, Justine (Ed.). Dworkin and his

attract, I will focus mainly on the methodological agenda they raise.

Ronald Dworkin says in *How Law is Like Literature*[34] (one of the short texts that, in my opinion, best describe his theoretical project) that legal interpretation can be understood as a particular case of the interpretive endeavor in general. It is very similar to literary interpretation, since in both cases the interpreter drives his or her actions in search of a point contained in the endeavor to be interpreted, be it literature or law. Dworkin writes in his essay that "[…] constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. [...] A participant interpreting a social practice […] proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify."[35].

The excerpt enables realizing that, for Dworkin, legal (and literary) interpretation requires the establishment of an *interpretive attitude*[36], which, as he rather emphatically notes, is *a matter of imposing a purpose on an object or practice*, a notion admittedly borrowed from Hans-Georg Gadamer[37]. This is obviously not about arbitrarily and subjectively selecting and imposing a purpose foreign to the nature of the practice being interpreted. Dworkin is referring to the required engagement of the interpreter with the constructive job of discovering[38], finding, describing and assigning a point to practice.

There is a second important aspect to this engagement that concerns the fact that interpreters "[…] characteristically understand that their practice must serve a constituent value of practice that each on assigns to the standard this value establishes (and not merely their understanding thereof)."[39] This engagement is therefore based on two as-

---

critics: with replies by Dworkin. Malden: Blackwell, 2005. p. 396-405.

[34] DWORKIN, Ronald. "How law is like literature", em DWORKIN, Ronald, 1985, p. 146-166. Brasilian translation: DWORKIN, Ronald, 2005a, p. 217-249.

[35] DWORKIN, Ronald, 1986, p. 52.

[36] DWORKIN, Ronald, 1986, p. 46-47.

[37] Dworkin clearly takes this idea from Georg Gadamer (see DWORKIN, Ronald, 1986, p. 55 e 419-420) and reports himself specially to GADAMER, Hans-Georg, 2002.

[38] DWORKIN, Ronald, 1986, p. 66.

[39] According to Stavropoulos, "The first is the assumption that the practice of courtesy does not merely exist but has value, that it serves some interest or purpose or enforces some principle — in short, that it has some point — that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy — the behavior it calls for or the judgments it war-

sumptions. "[…] The first is the assumption that the practice of courtesy does not simply exist but has value, that it servos some interest or purpose or enforces some principle—in short, that it has some point that can be stated independently of just describing the rules that make up the practice."[40].

Secondly, the requirements of the practice being interpreted (for example, the practice of courtesy towards women, as mentioned earlier), the behavior it demands or the judgment it supports, "[…] are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point"[41]. The remark can be made more concrete by returning to the previous example of courtesy towards women[42]. Firstly, it is easy to see that for both Roberto and Francisco courtesy is a value, a positive value. The statement that Francisco was discourteous therefore takes on the nature of chastisement in the imaginary dialogue. Furthermore, there is a point to courtesy. This point is essential to its correct conceptualization. Mere observation of the conventional rules of courtesy is a useful and important descriptive effort, but not sufficient to properly understand what courtesy is. The more controversial the case, the truer this is. The very non-existence of such a specific rule about *Francisco's courtesy-related obligation of always paying the bill when he goes out with a young lady* are evidence of a point that provides the parameters for the proper determination of the meaning and extent of the rule.

Secondly, the example shows that the meaning of *courtesy towards women* does not purely and simply mean what it meant in the past. The limits and meaning of courtesy towards women are importantly

---

rants — are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or modified or qualified or limited by that point. Dworkin's two components capture two independent conditions, both of which must be satisfied. It is not enough that the practice be thought to serve some value (which would satisfy the first condition); further, the value must be taken to be constitutive of the practice, which is what the second condition amounts to. Together, the conditions have important consequences in respect of the practice's character." STAVROPOULOS, Nicos, 2003.

[40] DWORKIN, Ronald, 1986, p. 47.

[41] DWORKIN, Ronald, 1986, p. 47.

[42] Dworkin himself refers to cortesy as na example of interpretative practice. I've rather qualify this example in the form of men's cortesy to women by understanding that it would gain more "didatical strength".

changed in a world grown morally less sexist and more egalitarian from the angle of gender relations. The point of courtesy therefore plays a crucial role in determining its current normative meaning.[43] This is the means by which one can understand the meaning of *courtesy* in its best light. This second element adds a critical and reflective dimension to meaning itself. The history of the practice constitutes the practice; but its criticism, which now becomes part of its history as well, transcends the past reference. The conceptual reconstruction of practice integrates the very metric used to evaluate and identify the practice[44].

Dworkin emphasizes that these two aspects of interpretation are independent and that not every social practice is interpretive in the strict sense he assigns to the concept. For him,

> The two components of the interpretive attitude are independent of one another; we can take up the first component of the attitude toward some institution without also taking up the second. We do that in the case of games and contests. We appeal to the *point* of these practices in arguing about how their rules should be changed, but not (except in very limited cases) about what their rules now are; that is fixed by history and convention. Interpretation therefore plays only an external role in games and contests. It is crucial to my story about courtesy, however, that the citizens of courtesy adopt the second component of the attitude as well as the first; for them interpretation decides not only why courtesy exists but also what, properly understood, it now requires. Value and content have become entangled.[45]

This excerpt clearly indicates *the strict meaning of interpretation* (which Dworkin will thereafter refer to as "*interpretive*" instead of "*interpretative*") that he finds in some practices – but not in others such as games and contests – that are similar to legal practices. The grammar of legal practices is not well described, as I noted earlier, by its mere comparison with the grammar of games like chess. In its grammatical structure, the game of law looks a lot more like the game of courtesy than chess. As Wittgenstein warned, to prevent the philosophical disease, we must avoid a one-sided diet whereby we nourish thinking with a single

[43] Pointed by DWORKIN, Ronald, 1986, p. 47.
[44] SHAPIRO, Scott, 2011, p. 8-10.
[45] DWORKIN, Ronald, 1986, p. 47-48. "DWORKIN, Ronald, 1999, p. 58, highlighted by me.

kind of example[46]. Dworkin proposes a dietary change.

In the interpretive-reflective game of law and courtesy, the value of the practice at hand becomes somewhat independent from conventionally accepted rules. Rules become conditioned on and sensitive to values themselves and their evaluative interpretation. In this way, interpreters may recognize that certain conventional and widely accepted practices may be wrong from the angle of the values that provide their basic point. Recognizing the criterion by means of which a practice must be evaluated is not o be confused with conventional practices pure and simple, nor do they merely translate dominant practices. Such shared practices provide a reference. However, understanding their point and identifying the best coherence[47] for certain practices and conceptualizations will depend on a more complex and reconstructive analysis. As Postema put it:

> The practice does not always make perfect and to assume that a practice serves a worthy value is not to assume that all currently accepted or historically enshrined aspects of the practice do so. A deeper understanding of the complex value or point served by the practice may lead participants to revise their understandings of what that practice requires or authorizes. And since interpretation is an integral part of the practice, this deeper understanding of the practice will alter their actions and potentially the practice itself.[48]

According to Dworkin, "[…] Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpret at ion, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved."[49]. At this point,

[46] WITTGENSTEIN, Ludwig, 2009, § 593. "A main cause of philosophical disease—a one-sided diet: one nourishes one's thinking with only one kind of example.".

[47] An analysis on the concept of coherence and its relationship with the concepts of truth and law in Dworkin and Maccormick is presented by SCHIAVELLO, Aldo. On "coherence" and "law": an analysis of different models. Ratio Juris, v. 14, n. 2, p. 233-243, June 2001. Também compartilha de uma concepção coerentista da verdade Ernest Weinrib, para quem "The reason coherence functions as the criterion of truth is that legal form is concerned with immanent intelligibility. Such an intelligibility cannot be validated by anything outside itself, for then it would no longer be immanent. Formalism thus denies that juridical coherence can properly be compromised for the sake of some extrinsic end, however desirable." WEINRIB, Ernest J., 1988.

[48] POSTEMA, Gerald J., 2011, p. 426.

[49] DWORKIN, Ronald, 1986, p. 48.

a return to the example of courtesy might lead to new conclusions. We could argue, for example, that even if Roberto were able to find repeated practices (and even a majority of them, in the context of the discussion) based on an etiquette of courtesy driven by traditional courteous behavior (such as listing the restaurants where men usually pay the bill, counting the number of times men yield to women at the elevator door, etc.), Francisco might still be correct in his interpretation of courtesy that would forever release him from paying the entire bill when he went out to dinner with a young lady. This might be case, for example, were he able to find arguments applicable to a significant portion of paradigmatic courteous behaviors that, consistently with the point of the practice, *provided the best interpretation for it.*

I earlier proposed that Francisco might argue that courteous treatment assumes treating women with *dignity and equality* and, that, as a result, automatic preferred treatment is often *discourteous*. This might be the case were he to invite a militant feminist to dinner who might understand the act of sharing the tab as symbolically offensive. Even if Roberto never accepted this argument and the dispute never saw a consensus, it would be accurate to state, under the circumstances, that Francisco was right and his critic was wrong. The criterion for correctness, from this angle, does not depend on consensus or certainty, but on the presence of better supporting arguments[50].

Obviously, the criterion for the correctness and truth of his argu-

[50] This point is important because it usually causes a lot of confusion. One thing is to affirm that there is no right answer to some question. Another one, distinct, is to affirm that we are not sure what the right answer is. Therefore, for example, we cannot be sure whether the 'Big Bang' occurred over eight billion years ago. However, even if it is slightly likely that we come to the certainty about such fact, we do not doubt the existence of a right answer to that matter. There are cases, nevertheless, in which we doubt the very existence of a correct answer, and not only about our certainty about what it consists in. Hart believed he had indicated, with his renowned example about not parking a vehicle in the park, such a situation. For Hart there is not a correct answer on considering or not a toy scooter a vehicle, since the rule that enunciates the prohibition is formulated through a language that possesses an open texture and, therefore, undetermined. In such case what we have is not the uncertainty or the doubt about the right answer, but the conviction that it does not exist. It is oblivious that a theory on truth that understands that correction is a synonym of certainty would not make such a distinction. However, our use of the language in general and in moral language suggests that this is a relevant distinction. About this point see WITTGENSTEIN, Ludwig. On certainty (Uber Gewissheit). Edited by G. E. M. Anscombe and G. H. von Wright. Translation by Denis Paul and G. E. M. Anscombe. New York: Harper Torchbooks, 1972.

ments would itself depend on other interpretive assumptions and unavoidably open to challenge. According to Francisco's argument, his justification would depend on the equally challengeable concepts of *equality* and *dignity*. In this sense, an interpretation's evaluation criterion has no outer aspect. The interpretation's challengeability or defeasibility, however, implies neither the absence of a correctness criterion, nor preference for one interpretation over others. Reconstructive interpretation must address any skeptic objections. Challengeability always leaves room for a consensual or even hegemonic interpretation to be challenged. The form of the challenge, however, as Dworkin will point out, must come from an interpretive viewpoint. Only a new (interpretive) *interpretation* may effectively challenge another interpretation. There is no room for an outside challenge, one from without the interpretive-argumentative game itself. The interpretive game does not admit Archimedean viewpoints external to the interpretation itself. One interpretation will only be superior to or better than another if, and only if, according to the rules of interpretive reconstruction, it better meets the requirements for what the best argument is. Note that the "concept of *best argument*" is also interpretive. The search for an evaluation criterion outside the interpretive game would be remindful of the imaginary hypothesis Wittgenstein described, where the reader of a newspaper doubted what he had just read and bought a second copy to verify the information[51]. In this sense,

[51] This episode is remembered by Dworkin himself in Justice for Hedghogs, 2011a, p. 37-38, where he explores again the question about the possibility of an external justitication for a moral interpretation. "When are we justified in supposing a moral judgment true? My answer: when we are justified in thinking that our arguments for holding it true are adequate arguments. That is, we have exactly the reasons for thinking we are right in our convictions that we have for thinking our convictions right. This may seem unhelpful, because it supplies no in de pen dent verification. You might be reminded of Wittgenstein's newspaper reader who doubted what he read and so bought another copy to check. However, he did not act responsibly, and we can. We can ask whether we have thought about the moral issues in the right way. What way is that? I offer an answer in Chapter 6. But I emphasize there, again, that a theory of moral responsibility is itself a moral theory: it is part of the same overall moral theory as the opinions whose responsibility it is meant to check. Is it reasoning in a circle to answer the question of reasons in that way? Yes, but no more circular than the reliance we place on part of our science to compose a theory of scientific method to check our science. These answers to the two ancient questions will strike many readers as disappointing. I believe there are two reasons for this attitude, one a mistake and the other an encouragement. First the mistake: my answers disappoint because the ancient questions seem to expect a different kind of answer. They expect answers that step outside morality to find a nonmoral ac-

if an interpretation lacks an outer side, an external point of view capable of evaluating it, then its (interpretive) rejection will lack it as well. For Dworkin, external skepticism towards interpretations is impossible. The only viable and possible form of skepticism is the one represented by internal skepticism, that is, by the kind of skepticism that argumentatively attempts to show the inexistence of a better argument of criterion for the interpretive correctness of a certain practice[52].

Back once again to the dialogue on courtesy, we might argue that the only way for Roberto to show that Francisco's interpretation of courtesy is wrong would be by argumentatively deconstructing it. It would not be possible to argue, *ex-ante*, that a correct or superior interpretation does not exist. Such an endeavor, then, would be inevitably interpretive in and of itself. What would be impossible is to argue *ex ante*, from without, without engaging in the interpretive task, that no criteria exist to determine that a better interpretation exists. Insofar as interpretation assumes identifying the point and value of the principle or interest involved in the practice, interpretation becomes an unavoidable path. When we think about interpretive concepts such as courtesy, law, or the arts, we are bound to play the interpretive game. The Archimedean game is impossible. Trying to play the Archimedean game with inter-

count of moral truth and moral responsibility. But that expectation is confused: it rests on a failure to grasp the in dependence of morality and other dimensions of value. Any theory about what makes a moral conviction true or what are good reasons for accepting it must be itself a moral theory and therefore must include a moral premise or presupposition. Philosophers have long demanded a moral theory that is not a moral theory. But if we want a genuine moral ontology or epistemology, we must construct it from within morality. Do you want something more? I hope to show you that you do not even know what more you could want. I hope you will come to find these initial answers not disappointing but illuminating. The second, more encouraging, explanation for your dissatisfaction is that my answers are too abstract and compressed: they point to but do not provide the further moral theory we need. The suggestion that a scientific proposition is true if it matches reality is actually as circular and opaque as my two answers. It seems more helpful because we offer it against the background of a huge and impressive science that gives the idea of matching reality substantial content: we think we know how to decide whether a piece of chemistry does that trick. We need the same structure and complexity for a moral ontology or a moral epistemology: we need much more than the bare claim that morality is made true by adequate argument. We need a further theory about the structure of adequate arguments. We need not just the idea of moral responsibility but some account of what that is."

[52] DWORKIN, Ronald, 1986, p. 63, 78-85 e 237. DWORKIN, Ronald, 1996b. The subject is retaken by Dworkin in Justice for Hedgehogs, 2011a, especially p. 23-98.

pretive objects means to play a different game and not to talk about the same thing or interpret the same object. It is comparable to providing a sociological description when asked about the morality of a behavior. It would be similar to translating the question "was slavery considered morally correct in Greece in the 5th century b. C.?" as "was slavery morally correct in the 5th century b. C.?" The former question concerns the conventional morality (a fact) of the times. The latter concerns a value or non-value assigned to the practice of enslavement. It would be like saying that we were obligated to do something when we mean that we had an obligation to do something.

A new clarification may avoid confusion surrounding this argument. Clearly, up to a certain point, there may be an "external" sociological interpretation. Max Weber's comprehensive sociology, based on the assumption that values are irrational preferences and, therefore, mere rationally irreducible positive expressions of will[53], may yield an enlightening and useful analysis of many social practices. In general, much of the theoretical production of anthropologists and sociologists shares this dimension. It is also important to clarify that not all practices regulated by social rules have the strict interpretive dimension we find in courtesy, as they do not involve interpretive concepts. In these cases, in the absence of the dimension of value and principle, the kind of interpretation involved might dispense with the "circular" inner dimension I have described earlier. A hermeneutical sociological analysis (such as Weber's) might involve considering the "inner" meaning of the action in a detached manner not committed to the described "interpretive game".

In this sense, the Dworkian interpretation is not properly a rival of the classic sociological interpretation, as many critics – and Frederick Schauer[54] in particular – appear to suggest, but rather a philosophi-

[53] Cfr. KRONMAN, A., 2009, chapters 2 e 3.

[54] SCHAUER, Frederick. Institutions and the concept of law: a reply to Ronald Dworkin (with some help from Neil Maccormick). In: BANKOWSKY, Zenon; DEL MAR, Maksymilian (Eds.). Law as institutional normative order: essays in honour of Sir Neil Maccormick. Burlington: Ashgate, 2009a. p. 35-44. Disponível em: <http://ssrn.com/abstract=1403311>. Acesso em: 7 set. 2012. Ver a resposta de Dworkin a Schauer em DWORKIN, Ronald. Hart and the concepts of law. Harvard Law Review, Cambridge, v. 119, p. 95-104, 2006d. The critical dialogue has began with the publication of SCHAUER, Frederick. (Re)Taking Hart. Harvard Law Review, Cambridge, v. 119, p. 852-883, 2006 (revision of Nicola Lacey A life of H. L. A. Hart: the nightmare and the noble dream. Oxford: Oxford University Press, 2004). Neil Maccormick presentes na objection less radical, but similar, in MACCORMICK, Neil, 2007, p. 296-297.

cal approach to certain interpretive practices of a reflective, normative and evaluative nature, such as law. Classic sociological analyses may be highly relevant to the determination of the interpretive materials involved in legal practices. Their approach, however, is incomplete and limited to a part, or a moment, of the interpretive activity needed for an appropriate *description* of what law is. Dworkin does not intend - contrary to as Hart argues in the postscript to *The Concept of Law*[55] - to engage in a project separate from the Hartian law description project. He understands, however, that the appropriate description of law, given its unique characteristics compared to other, normative, social practices such as chess, demands a philosophical and reconstructive approach to the concepts and values that make up its *evaluative point*[56]. Games like chess form a subset of social normative practices that do not involve a reflective interpretive activity of and within the practice. As Postema summarizes:

[55] HART, H. L. A., 1994b, p. 301-302 (Postcript): "The legal theory conceived this way as if it is at the same time descriptive and general, constitutes an enterprise radically different from Dworkin's concept of juridical theory (or 'General Theory of Law', how he often designs it), conceived, partly, as an evaluation and justification's theory and as 'directed to a concrete juridical culture', which is usually the theorist's own culture and, in Dworkin's case, Anglo-American's law. The central task of juridical theory this way conceived is designed by Dworkin as 'interpretative' and it is, partly, evaluative, since it consists in the identification of principles that simultaneously 'adjust' better to the law established and to the juridical practices of a juridical system, or that show themselves in coherence whit them and also give the best moral justification to the same, showing, this way, the law 'in its best enlightment'. Footnotes were suppressed, highlighted by me. See the passage already quoted in this chapter DWORKIN, Ronald, 1986, p. 47-48.

[56] DWORKIN, Ronald, 1986, p. 47-48: "Everyone develops a complex 'interpretive' attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle — in short, that it has some point that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy — the behavior it calls for or judgments it warrants — are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose meaning on the institution — to see it in its best light — and then to restructure it in the light of that meaning." DWORKIN, Ronald, 1999, p. 57-58.

> It follows that the case for the appropriateness of constructive interpretation for understanding a given practice must follow a precise protocol. It must be shown that an apparent regularity is not merely a matter of habitual behavior, but normative, and not merely normative, but reflective, and not merely reflective but internally critical in a way that supports the interpretive attitude. Clearly, to show that constructive interpretation is indicated for a given social practice is already to engage in interpretation – and that interpretation may be contested. Dworkin would surely not deny this. [57]

According to some critics, the negative consequence of this interpretive conception of law is that it disregards the institutional dimension. For positivists in general, law is a social practice based on the institution of an authority, be it as the sovereign power constituted by regular obedience (Austin), be it as the recognition of exclusionary reasons to obey (Raz). For them, this essentially institutional dimension of law made the analogy with chess far more convincing. For positivists, although the normativity of law is partially reflective, normative interpretation and arguments are deemed external to the practices that constitute law. They are, at the most, "[…] investigations that explore the grounds to support or amend the rules, but do not offer considerations in favor of conclusions about that the rules of the practice currently are"[58]. As a result, some positivists have accused Dworkin of offering an unacceptable argument, since its explanation would require them to accept something they deny, that is, that internal normative reflections exist in the game of law. Andrei Marmor represents this kind of criticism when he argues that Dworkin, on formulating his criticism of positivists, relies on an interpretive assumption they do not accept. In this sense, the Dworkian critique begs is inappropriate (*question begging*), as it does not offer an argument opposite the positivist perspective, but assumes the thesis it aims to prove[59].

This might lead to the conclusion that the struggle between positivists and non-positivists, such as Dworkin, would not be appropriately comparable, insofar as they emerge from different starting points. The two offer different constructions that are, to a certain extent, irreconcil-

[57] POSTEMA, Gerald J., 2011, p. 428.

[58] POSTEMA, Gerald J., 2011, p. 428.

[59]MARMOR, Andrei,. Interpretation and Legal Theory, Hart Publishing, 2005a., 2nd. Ed. 179 pp., cap. II, pp. 27-46.

able, as their starting points cannot be directly confronted or challenged. The Dworkian response to this is surprising and ingenious. Although it may appear purely rhetorical at a first glance, it does not seem to counter even the dominant attitude between the contemporary advocates of positivism and Dworkin himself. The central issue to be answered, Dworkin says, is this: which of the two interpretive approaches (external or internal) is more illuminating for legal practice? The answer to this question, again, can only be interpretive. On the one hand, it depends on the existence of better interpretive criteria capable of showing its fit with the reality one wants explained. Ultimately, the existence of a best-fitting approach depends on the integrity and fit of *the theory as a whole*, that is, of its ability to answer a series of philosophical challenges in an articulate, coherent and integrated manner. In a very particular way, the best approach should be judged based on its ability to provide satisfactory answers to central questions of contemporary philosophy, such as the possibility of objectivity in morals, the normative criteria for the construction of a theory of justice, etc.

Dworkin offers a more concrete answer in his rejection of the analogy of chess to explain law. In *Law's Empire* he argues that a more comprehensive observation of law allows identifying court decision patterns over a longer period of time[60]. Such an observation would allow spotting changes in legal rationality patterns that cannot be explained based on a conventionalist assumption. The best understanding we can achieve of those implies identifying the internal criticism movement that affected them[61]. A correct interpretation of the history of law itself and the changes its rationality underwent showcases the internal nature of the normative criticism of law. In other words, the conventionalist explanation fails because it does not fit well with a correct interpretation of the history itself of legal practices. An appropriate interpretation of legal interpretive materials over a longer period of time would show this inadequacy. This is an important dimension of Dworkin's interpretive theory for the history of law.

Postema summarizes this point for Dworkin as follows:

---

[60] DWORKIN, Ronald, 1986, p. 136-138.

[61] In a very similar sence, at least in this aspect, are the thoughts of François Ewald (See Létat Providence. Paris: Grasset, 1986) in his reconstruction archeological-genealogical of law's rationality of civil responsability law in french law and the formation of social law.

> Lawyers, judges, and legal academics did not merely challenge the conventional, accepted ground-rules; they challenged the underlying "orthodoxies of common conviction" in which the more superficial agreement on the rules was rooted. However, these arguments "would have been powerless, even silly," Dworkin maintained, "if everyone thought that the practices they challenged needed no support beyond convention or that these practices constituted the game of law in the way the rules of chess constitute that game" (Law´s Empire, p. 137). Over its history, the substance of the practice of American law, for example, has changed in profound ways, but much of this was driven by internal argument, challenge, and adjustments to them. Over its history, judges in the American legal system, for example, treated the techniques they use for interpreting statutes and measuring precedents—even those no one challenges—not simply as tools handed down by the traditions of their ancient craft but as principles they assume can be justified in some deeper political theory, and when they come to doubt this, for whatever reason, they construct theories that seem to them better. (Ibid., p. 139) Dworkin, then, rested his case for the strongly interpretive approach to legal practice on an interpretation of its history. [62]

4 Stages of interpretation

Finally, it is important to point out that Dworkin attempts to show how the stages of constructive interpretation are established. Although their purpose is chiefly heuristic ad didactic, they help understand the structure of the interpretive process. Each stage has a distinctive requirement for the level of consensus needed for interpretation. As shown earlier, during the analysis of a given social practice, such as courtesy, law or art, there must be a *pre-interpretive stage* that identifies the rules and standards or paradigms deemed to provide the experiential content of the practice[63]. In the case of courtesy, this stage involves gathering the *interpretive material* made up of common practices, paradigms, examples, illustrations of courtesy as portrayed in literature, film, etc. In the case of the determination of a film's aesthetic qualities, the stage involves identifying a consensually recognized repertoire as exemplary cases of "film", "action film", "good action film," etc. These materials allow identification of the paradigms of the practices at hand –

[62] POSTEMA, Gerald J., 2011, p. 430. Quotation by DWORKIN, Ronald, 1986, p. 65-67.
[63] DWORKIN, Ronald, 1999, p. 81 et seq.; DWORKIN, Ronald, 1986, p. 65 et seq.

for example, the film "2001: a space odyssey" as a paradigm for a "good science fiction film."

It is worth stressing that, in a sense, this *"pre-interpretive" stage* already involves some degree of interpretation. Dworkin clarifies: "I write 'pre-interpretive' in quotes because, even at this stage, some kind of interpretation is needed. Social rules lack identifying labels."[64] This early phase involves a more intense sharing of the materials. As Dworkin writes, "*But there must be a high degree of consensus – perhaps an interpretive community may be usefully defined as needing consensus at this stage* – if one expects the interpretive attitude to be fruitful and one can, therefore, abstract from this stage in ones analysis, assuming that the classifications it offers are treated as a given in everyday reflection and argumentation."[65]

After this early stage comes an "*interpretive stage*" in which the interpreter relies on a general justification for the main elements of the practice identified in the "*pre-interpretive*" stage. This will amount to an argument about the reasons why, if at all, it is worth searching for a practice with this general form[66]. This interpretive moment now takes on an argumentative dimension. In this sense, "[…] The justification need not fit every 7 aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one." The important point to emphasize is, as noted earlier, that at this stage judgments are made about the fit and justification (or evaluative appeals) that form the heart of the interpretive conception.

Finally, Dworkin indicates a post-interpretive, or *reforming*, stage at which the interpreter "[…] adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage."[67] He offers an example: "An interpreter of courtesy, for example, may come to think that a consistent enforcement of the best justification of that practice would require people to lip their caps to soldiers returning from a crucial war as well as to nobles.[68]". At this point, however, some challengeable possibilities can be found: "Or that

[64] DWORKIN, Ronald, 1986, p. 66, translated and highlighted by me, DWORKIN, Ronald, 1999, p. 81.

[65] DWORKIN, Ronald, 1999, p. 81. Translation modified by me; DWORKIN, Ronald, 1986, p. 66.

[66] DWORKIN, Ronald, 1999, p. 81. DWORKIN, Ronald, 1999, p. 81.

[67] DWORKIN, Ronald, 1986, p. 66; DWORKIN, Ronald, 1999, p. 81.

[68] DWORKIN, Ronald, 1999, p. 81. Translation modified by me; DWORKIN, Ronald, 1986, p. 66.

it calls for a new exception to an established pattern of deference: making returning soldiers exempt from displays of courtesy, for example. Or perhaps even that an entire rule stipulating deference to an entire group or class or persons must be seen as a mistake in the light of that justification"[69].

Of course, in real society, the stages would be less evident and stark. Notwithstanding, one might establish a similar analysis of its practices. How might we recognize these criteria for a given society's rules? Dworkin's response is clearly Wittgensteinian[70]: "People's interpretive judgments would be more a matter of seeing at once the dimensions of their practice a purpose or aim in that practice, and the post-interpretive consequence of that purpose."[71]. This is how agents "pick up the rule". "And this seeing would ordinarily be no more insightful than just falling in with an interpretation then popular in some group whose point of view the interpreter takes up more or less automatically."[72] In other words, there are no "ultimate grounds" for this recognition. It is

[69] DWORKIN, Ronald, 1999, p. 81; DWORKIN, Ronald, 1986, p. 66.

[70] Let's compare it with the meaning by which this rule is recognized. WITTGENSTEIN, Ludwig, 2009, § 197: "'It's as if we could grasp the whole use of a word in a flash.'— And that is just what we say we do. That is to say: we sometimes describe what we do in these words. But there is nothing astonishing, nothing queer, about what happens. It becomes queer when we are led to think that the future development must in some way already be present in the act of grasping the use and yet isn't present.—For we say that there isn't any doubt that we understand the word, and on the other hand its meaning lies in its use. There is no doubt that I now want to play chess, but chess is the game it is in virtue of all its rules (and so on). Don't I know, then, which game I want to play until I have played it? or are all the rules contained in my act of intending? Is it experience that tells me that this sort of game is the usual consequence of such an act of intending? so is it impossible for me to be certain what I am intending to do? And if that is nonsense—what kind of super-strong connexion exists between the act of intending and the thing intended?——Where is the connexion effected between the sense of the expression 'Let's play a game of chess' and all the rules of the game?—Well, in the list of rules of the game, in the teaching of it, in the day-to-day practice of playing.". Ver também, da mesma obra, § 138: "But can't the meaning of a word that I understand fit the sense of a sentence that I understand? Or the meaning of one word fit the meaning of another? — Of course, if the meaning is the use we make of the word, it makes no sense to speak of such 'fitting.' But we understand the meaning of a word when we hear or say it; we grasp it in a flash, and what we grasp in this way is surely something different from the 'use' which is extended in time!"

[71] DWORKIN, Ronald, 1986, p. 67;

[72] DWORKIN, Ronald, 1986, p. 67.

the sharing itself of a form of life that will enable the members of a community of meaning to "see" how the criterion exists and works.

This, however, will not avoid controversy. After all, people may not see exactly the same things, or may interpret things in different ways. Disagreement, therefore, may arise either in the recognition of the paradigmatic practice and the rule or, even more so, when arguing about the best justification of the latter. What then, is the level of sharing or consensus needed to enable such an interpretation? Dworkin's answer is once again inspired in the Wittgensteinian concept of *form of life*. The excerpt below sums up his thinking rather well:

> We can now look back through our analytical account to compose an inventory of the kind of convictions or beliefs or assumptions someone needs to interpret something. *He needs assumptions or convictions about what counts as part of the practice in order to define the raw data of his interpretation at the pre-interpretive stage; the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions about this*. He also needs convictions; about how far the justification he proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it rather than the invention of something new.[73]

In this excerpt, Dworkin clearly shows how and why convictions are part of the interpretive attitude. They are constituents of the inevitable human and intersubjective point of view such an attitude involves and assumes. There is no room for a "view from nowhere." As Dworkin likes to insist: "The interpretive situation is not an Archimedean point, nor is that suggested in the idea that interpretation aims to make what is interpreted the best it can seem. Once again *I appeal to Gadamer, whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note.*"[74].

In order to survive, an interpretation must fit the form of life of the community in which it is presented. It would be appropriate, however, to ask how to measure the fit of an interpretation. How to tell when a good interpretation better fits the reality it attempts to describe? Dworkin once again explains using the example of courtesy: "Can the best justification of the practices of courtesy, which almost everyone else

[73] DWORKIN, Ronald, 1986, p. 67.
[74] DWORKIN, Ronald, 1986, p. 62.

takes to be mainly about showing deference to social superiors, really be one that would require, at the reforming stage, no distinctions of social rank?". He proceeds: "Would this be too radical a reform, too ill-filling a justification to count as an interpretation at all? Once again, there cannot be too great a disparity in different peoples convictions about fit; but only history can teach us how much difference is too much."[75].

The excerpt clearly shows that there is an external, transcendental criterion from without the social practice that may serve as a metric for fit. But how and why will history teach us? Through the confrontation of interpretive practices and the production of "interpretive materials" that will enable us to justify the best interpretation possible of them. In other words, there is no outer side of the interpretive process[76].

Finally, it is important to once more emphasize the active role of convictions on the values that govern the social actions being interpreted. Therefore, insisting on the previous example:

> He will need more substantive convictions about which kinds of justification really would show the practice in the best light, judgments about whether social ranks are desirable or deplorable, for example. These substantive convictions must be independent of the convictions about fit just described, otherwise the latter could not constrain the former, and he could not, after all, distinguish interpretation from invention. But they need not be so much shared within his community, for the interpretive attitude to flourish, as his sense of pre interpretive boundaries or even his convictions about the required degree of fit.[77]

Substantive convictions, therefore, establish a requirement of sharing (or consensus) other than that required in the "pre-interpretive" phase. This is because the field of controversy on the various conceptions of a single concept is vast and unavoidable. Many will claim that the meaning of practice is the one lent by the agent's personal intent. One might, therefore, ask: if the courteous meaning of an action is given by the conviction of the agents, how to avoid subjective interpretation? If Francisco's courtesy depends on his own conviction as much as Ro-

[75] DWORKIN, Ronald, 1986, p. 67, traslated and highlighted by me; DWORKIN, Ronald, 1999, p. 83.

[76] Dworkin retakes this point in Justice for Hedgehogs, 2011a, p. 123-156.

[77] DWORKIN, Ronald, 1986, p. 67-69, translated by me. DWORKIN, Ronald, 1999, p. 83.

berto's depends on his, how to assign a value of truth to the proposition that the former was discourteous? In order to answer this question one must first clarify the relationship between the *point* of social practices and how it connects with the forms of life in the community in which they acquire sense.

5 Practical intent and *forms of life*

One of the recurring questions in interpretive discussions concerns the meaning of the *point*. In the domain of artistic interpretation, a consolidated debate exists on the topic. We might ask, as Dworkin himself did, whether artistic interpretation inevitably consists in uncovering an author's intentions. We might also ask whether uncovering an author's intentions is a factual process independent from the values of the interpreter himself.

Dworkin answers that artistic interpretation is not simply about recovering an author's intention: "[…] if by "intention" we mean a conscious state of mind and do not lend the statement the meaning that artistic interpretation always attempts to identify a specific conscious thought that coordinated the entire orchestration in the author's mind when he said, wrote, or created his work."[78] Artistic intention is far more complex. This is due to the fact that, in artistic interpretation, the notion of the author's intention, when it becomes a method or style of interpretation, itself implies the interpreter's artistic convictions[79]. Furthermore,

[78] DWORKIN, Ronald, 1999, p. 70; DWORKIN, Ronald, 1986, p. 57.

[79] DWORKIN, Ronald, 1999, p. 70; DWORKIN, Ronald, 1986, p. 57. To Dworkin, "The work of art presents themselves to us as holders – or at least they intend – of a specific value that we call aestethic: this way of presentation is part of the idea of artistic tradition." DWORKIN, Ronald, 1999, p. 72-73. The way of seeing the debate among critics explains why some periods of literary activity are more associated than others with the artistic intention: its intellectual culture entails art's value more firmly to the process of artistic creation. Cavell observes that "[…] in modern art, the problem of author's intention […] has taken a more visible role, in our acceptance of their work, than in previous periods […]'and that '[…] the poetry practice is transformed in the XIX and XX century in such a way that the questioning the intention […] are imposed to the reader by the poem." CAVELL, Stanley. Must we mean what we say? Nova York: Scribner, 1969. p. 228-229. Therefore, our dominant style of interpretation has settled down in the author's intention, and the discussions, inside that style, about what it is, more precisely, the artistic intention reveal doubts and divergences more refined about the nature of the creative genius, about the conscientious and unconscientious and about what is instinctive in

even within the tradition of artistic interpretation, the theory according to which the best way to interpret art is through the artist's personal intentions is subject to challenge[80]. Besides, this would prevent artistic interpretation from being neutral and objective, as the interpreter would have to explore someone else's motives and purposes. Finally, this does not appear to be the way in which we use language when we speak of artistic interpretations. After all, "[…] it is characteristic of such practices that an interpretive statement is *not* just a statement about what other interpreters think."[81] The question stands, therefore.

How could this form of interpretation ever hope to uncover something like an author's intention, be it in the arts or in any other form of social activity, without implying either the impossibility of objective interpretation or pure subjectivism? Dworkin counters the challenge as follows: "Two possibilities exist. One might say that interpreting a social practice means to uncover the purposes or intentions of the other participants in the practice, such as the citizens of the hypothetical community, for example."[82] In this case, the intention would refer to each intention taken individually. But another possibility exists: "Or that it means to uncover the purposes of the society that houses this practice, conceived as having some mental form of life or group awareness."[83] The former alternative seems more appealing, as it does not involve somewhat mysterious concepts like "mental form of life or group awareness". But the alternative is not viable for the reasons provided in the foregoing paragraph. The latter alternative, then, must be chosen. A preliminary distinction must be made, however. "A social practice creates and assumes a *crucial distinction* between *interpreting the acts and thoughts of individual participants*, in that sense, and *interpreting the practice itself, that is, interpreting what they do collectively*."[84]. In this respect, Dworkin resumes the social meaning of the rules that create patterns for the evaluation of behaviors and values. As Wittgenstein, Winch and Hart argued before him, rules are social.

---

its composition and expression. In the artistic interpretation, the interpret must "[…] firstly remember a crucial observation of Gadamer, that the interpretation must put in practice an intention." DWORKIN, Ronald, 1999, p. 67; DWORKIN, Ronald, 1986, p. 56, highlighted by me.

[80] DWORKIN, Ronald, 1986, p. 57.

[81] DWORKIN, Ronald, 1986, p. 55.

[82] DWORKIN, Ronald, 1986, p. 55.

[83] DWORKIN, Ronald, 1986, p. 55.

[84] DWORKIN, Ronald, 1986, p. 63,

Dworkin ponders that "[…] this distinction would be of no practical importance if the participants in a practice always agreed on how to best interpret it. But they do not, at least on details, when the interpretive attitude is lively."[85] At this point we return to the different levels of consensus that must be found at the various stages of the interpretive process as seen in the previous topic. This, however, is far from meaning that a basic, background, consensus need not be present among the participants, who

> […] must, to be sure, agree about a great deal in order to share a social practice. *They must share a vocabulary*: they must have in mind much the same thing when they mention hats or requirements *They must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims, to treat these as claims* rather than just noises. That means not just using the same dictionary, *but sharing what Wittgenstein called a form of life sufficiently concrete* so in at the one can recognize sense and purpose to what the other say a and does see what sort of beliefs and motives would make sense of his diction, gesture, tone, and so forth. *They must all speak the same language'' in both senses of that phrase*. But this similarity of interests and convictions need hold only to a point: *it must be sufficiently dense to permit genuine disagreement, but not so dense that disagreement cannot break out*.[86]

In short, for the interpretation process to occur and in order recognize "intentions" that do not merely translate subjective purposes, the interpreters must share a single form of life. This sharing is at the same time, and almost paradoxically, what enables and ensures disagreement[87]. Returning to the argument of the previous item, one may claim, as Dworkin did:

> So each of the participants in a social practice must distinguish between trying to decide what other members of his community think the practice requires and trying to decide, for himself, what

[85] DWORKIN, Ronald, 1985, p. 63.

[86] DWORKIN, Ronald, 1985, p. 63.

[87] This subject has been exemplarly brought out in the lecture DWORKIN, Ronald. Can we disagree about law or morals? Lecture presented by Dworkin no New York Institute of Philosophy, in NYU. 13 nov. 2007a. Available in: <http://www.thirteen.org/forum/topics/can-we-disagree-about-law-or-morals/14/>. Acessed in: 15 jul. 2012.

> it really requires. Since these are different questions, the interpretive methods he uses to answer the latter question cannot be the methods of conversational interpretation, addressed to individuals one by one, that he would use to answer the former. A social scientist who offers to interpret the practice must make the same distinction.[88]

Finally, it is worth pointing out another contrast between Dworkin's position and Max Weber's hermeneutics. For the former, merely reporting the opinions and values of a community and how these beliefs affect their behavior might amount to a kind of hermeneutical sociological "explanation",

> But that would not constitute an interpretation of the practice itself; if he undertakes that different project he must give up methodological individualism and use the methods his subjects use in forming their own opinions about what courtesy really requires. He must, that *join* the practice he proposes to understand; his conclusions are then not neutral reports about what the citizens of courtesy think but claims about courtesy competitive with theirs.[89]

In other words, sociology does not perform the same kind of interpretation required in the contexts of creative, artistic or social interpretation. This also means that because sociological interpretation lies seated on a conversational interpretation model, is inappropriate to interpret law from the angle of the theory of law. For Dworkin,

> […]Conversational interpretation is inappropriate because the practice being interpreted sets the conditions of interpretation: courtesy insists that interpreting courtesy is not just a matter of discovering what any particular person thinks about it. So even if we assume that the community is a distinct person with opinions and convictions of its own, a group consciousness of some sort that assumption only adds to the story a further person whose opinions an interpreter must judge and contest, not simply discover and report. He must still distinguish, that is, between the opinion the group consciousness has about what courtesy requires, which he thinks he can discover by reflecting on its distinct motives and purposes, and what he, the interpreter, thinks courtesy really re-

[88] DWORKIN, Ronald, 1985, p. 63.

[89] DWORKIN, Ronald, 1985, p. 64 highlighted by me.

> quires. He still needs a kind of interpretive method he can use to test that entity's judgment once discovered, and this method cannot be a matter of conversation with that entity or anything else.[90]

Starting in the 1990s, Dworkin attempts to clarify the scopes and domains of these different ways of interpreting law, by introducing new conceptual distinctions to help explain the meaning of a sociological, jurisprudential and doctrinal understanding of law (that is, relative to the truth value of legal propositions). Analyzing it, however, would excessively expand this paper's scope and ambition.

III. Conclusion

[90] DWORKIN, Ronald, 1985, p. 64-65. translated and highlighted by me; DWORKIN, Ronald, 1999, p. 79-80. Dworkin plunges into this quention in a long footnote (nº 14) enlightening how he reaches to such conclusions. "Habermas observes that social science differs from natural science for just that reason. He argues that even when we discard the Newtonian view of natural science as the explanation of the theory-neutral phenomena, in favor of the modern view that a scientist's theory will determine what he takes the data to be, an important difference nevertheless remains between natural and social science. Social scientists find their data already pre interpreted. They must understand behavior the way it is already understood by the people whose behavior it is; a social scientist must be at least a 'virtual' participant in the practices he means to describe, lie must, that is, stand ready to judge an well as report the claims his subjects make, because unless he can judge them he cannot understand them, (See Jürgen Habermas, I The Theory of Communicative Action [T. McCarthy trans. Boston, 1984 at 102-11) I argue, in the text, that a social scientist attempting to understand an argumentative social practice like the practice of courtesy (or, as I shall claim, law) must therefore participate in the spirit of its ordinary participants, even when his participation is only 'virtual'. Since they do not mean to be interpreting each other in the conversational way when they offer their views of what courtesy really requires, neither can he when he offers his views. His interpretation of courtesy must contest theirs and must therefore be constructive interpretation rather than conversational interpretation." DWORKIN, Ronald, 1985, p. 422, highlighted by me. DWORKIN, Ronald, 1999, p. 78. Dworkin atributes this same orientation in the direction of a constructive interpretation of history per se, in opposition to the conversional interpretation also to Habermas. Against the Dilthey's historical Archimedianism, "Habermas makes makes the crucial observation (which points in the direction of constructive rather than conversational interpretation) that interpretation supposes that the author could learn from the interpreter." DWORKIN, Ronald, 1985, p. 420; DWORKIN, Ronald, 1999, p. 63.

Chess is a game that develops the chess-playing intelligence.
(Millôr Fernandes) [91]

This paper attempts to show how the contemporary theoretical legal debate became a "methodological debate" and how Ronald Dworkin's thinking holds a central or noteworthy position in this debate. The methodological nature is expressed in several ways. It manifests itself by means of the incorporation of a series of contemporary philosophical questions regarding the concepts of *objectiveness*, *certainty* and *truth*.

The 1985 publication of Dworkin's *Law's Empire* was a new milestone for this agenda. In the book, Dworkin develops some of the ideas introduced in several previous essays, the principal among which were republished in the book *A Matter of Principle*. In it, Dworkin introduces his interpretive theory of law. To do so, he develops a detailed analysis of the concept of *interpretation* that is its cornerstone.

For Dworkin, there are many kinds of social action. Some social actions are driven by conventional interests or objectives. Others, however, are driven by values and demand interpretation from agents. The interpretation of values requires interpreters to recognize a distinctive kind of point. Dworkin's favorite example to illustrate the idea resorts to the analysis of literary interpretation. In this kind of interpretive practice, which is commonplace among literary critics, interpreters oppose interpretations that assume some kind of aesthetic hypothesis. Similarly, Dworkin argues that law requires a evaluative interpretive type of practice and this, in turn, requires interpreters to formulate, even if provisionally, a political and justice hypothesis. This is why Dworkin abandons the chess metaphor. Chess is a social practice that does not involve the existence of a evaluative point. Law has grammatical characteristics that are essentially different from those of chess, and to insist in the comparisons would involve insisting in a philosophical mistake.

An important corollary of the development of the interpretive theory of law as formulated by Dworkin, as well as of the concept of *interpretation* he uses, consists of the refutation of countless conventionalist theories of meaning and the introduction of a theory of controversy, which appears to be essential to an accurate and appropriate understanding of the legal phenomenon. For Dworkin, when two interpreters become involved in an interpretive dispute about evaluative concepts

[91] FERNANDES, Millôr. Millôr definitivo. 8. ed. Porto Alegre: L&PM, 1996. p. 499.

(later renamed interpretive concepts), they must share some identification practices and paradigms to enable identification of the values involved. This sharing, however, is frequently not enough to establish a convention to eliminate dispute about the best way to interpret the meaning of a certain value. The interpretive endeavor therefore involves a second moment at which rivaling conceptions of a single concept may compete in an effort to provide the best interpretation. That one that shows the best fit and that best recognizes the evaluative appeal in question must be recognized as the best (correct) conception of the concept. Clearly, the best interpretation does not depend solely on the existence of a social convention that recognizes it as such, even if it does require some manner of shared practices and a common "form of life". What it demands is the existence of better supporting arguments or justifications (better fit and attention to the evaluative appeal) and that they may be reconstructed by means of the shared practices that provided their reference at an initial interpretive moment. The analysis of the concept of *courtesy* attempted to illustrate how the interpretive activity for "interpretive concepts" takes place".

References

BIX, Brian. *Law, language and legal determinacy*. Oxford: Clarendon, 1993.

BIX, Brian. The application (and mis-application) of Wittgenstein´s rule-following considerations to legal theory. In: BIX, Brian. *Law, language and legal determinacy*. Oxford: Clarendon Press, 1993. p. 36-62.

BIX, Brian. H. L. A. Hart and the hermeneutic turn in legal theory. *Southern Methodist University Law Review*, Dallas, v. 52, p. 167-199, 1999a. Available from: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=163810>. Access in: 20 ago. 2012.

BIX, Brian. Patrolling the boundaries: inclusive legal positivism and the nature of jurisprudential debate. *Canadian Journal of Law and Jurisprudence*, Ontario, v. 12, p. 17-33, 1999b.

BIX, Brian. Some reflections on methodology in jurisprudence (translated into Italian). *Ars Interpretandi*, Padova, v. 8, p. 297-427, 2004.

CAVELL, Stanley. The availability of Wittgenstein's later philosophy. In: PITCHER, George. *The philosophy of Wittgenstein*. 2nd ed. New York: Anchor Books, 1966. p. 151-185.

CAVELL, Stanley. *Must we mean what we say*? Nova York: Scribner, 1969.

COHEN, Marshall (Ed.). *Ronald Dworkin and contemporary jurisprudence*. Totowa, USA: Rowman and Allanheld, 1983.

COLEMAN, Jules. Negative and positive positivism. *Journal of Legal Studies*, Chicago, v. 11, p. 139-164, 1982.

COLEMAN, Jules. Incorporationism, conventionality, and the practical difference thesis. *Legal Theory*, Oxford, v. 4, p. 381-426, 1998.

COLEMAN, Jules (Ed.). *Hart's postscript*: essays on the postscript to "The concept of law". Oxford: Oxford University Press, 2001a.

COLEMAN, Jules. *The practice of principle*: in defense of a pragmatist approach to legal theory. Oxford: Oxford University, 2001b.

COLEMAN, Jules; SHAPIRO, Scott (Eds.). *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University Press, 2002a.

DICKSON, Julie. *Evaluation and legal theory*. Oxford: Hart, 2001.

DWORKIN, Ronald. Philosophy, morality and law: observations prompted by professor Fuller's novel claim. *University of Pennsylvania Law Review*, Philadelphia, v. 113, p. 668-90, 1965.

DWORKIN, Ronald. The model of rules. *The University of Chicago Law Review*, Chicago, v. 35, n. 1, p. 14-46, 1967.

DWORKIN, Ronald. *Taking rights seriously*. Cambridge, MA: Harvard University Press, 1977a.

DWORKIN, Ronald. *The philosophy of law*. Oxford: Oxford University Press, 1977b.

DWORKIN, Ronald. Law as interpretation. *Texas Law Review*, v. 60, p. 527-550, Mar. 1982a.

DWORKIN, Ronald. Natural law revisited. *University of Florida Law Review*, Gainesville, v. 34, n. 2, p. 165-188, 1982b.

DWORKIN, Ronald. My reply to Stanley Fish (and Walter Benn Michaels): please don't talk about objectivity any more. In: MITCHELL, W. J. Thomas. *The politics of interpretation*. University of Chicago Press, 1983b. p. 287-313.

DWORKIN, Ronald. A *matter of principle.* Cambridge, USA: Harvard University Press, 1985.

DWORKIN, Ronald. *Law's empire*. Cambridge, USA: Harvard University Press, 1986.

DWORKIN, Ronald. Legal theory and the problem of sense. In: GAVISON, R.

(Ed.). *Issues in contemporary legal philosophy*. Oxford: Clarendon, 1987. p. 14.

DWORKIN, Ronald. *Life's dominion*: an argument about abortion, euthanasia, and individual freedom. New York: Alfred A. Knopf, 1993.

DWORKIN, Ronald. *Freedom's law*: the moral reading of the American Constitution. Cambridge, MA: Harvard University Press, 1996a.

DWORKIN, Ronald. *Objectivity and truth*: you'd better believe it. *Philosophy and Public Affairs*, Hoboken, v. 25, p. 87-139, 1996b.

DWORKIN, Ronald. *Sovereign virtue*: the theory and practice of equality. Cambridge, MA: Harvard University Press, 2000.

DWORKIN, Ronald. Hart's postscript and the character of political philosophy. *Oxford Journal of Legal Studies*, Oxford, v. 24, n. 1, p. 1-37, 2004. Available from: <http:// ojls.oxfordjournals.org/content/24/1/1.full.pdf+html>. Access in: 20 ago. 2012.

DWORKIN, Ronald. *Justice in robes*. Cambridge, MA: Harvard University Press, 2006b**.**

DWORKIN, Ronald. *Can we disagree about law or morals?* Lecture given by Ronald Dworkin at the New York Institute of Philosophy, da NYU. 13 nov. 2007a. Available from: <http://www.thirteen.org/forum/topics/can-we-disagree-about-law-or-morals/14/>. Access in: 15 jul. 2012.

DWORKIN, Ronald. *Justice for hedgehogs*. Cambridge, USA: Harvard University Press, 2011a.

EWALD, François. *L'Etat providence*. Paris: Grasset, 1986.

FINNIS, John. *Natural law and natural rights*. Oxford: Claredon, 1980.

FINNIS, John. On Hart's ways: law as reason and as fact. In: KRAMER, Matthew (Ed.). et al. *The legacy of H. L. A. Hart.* Oxford: Oxford University Press, 2008. p. 3-28. Available from: <http://ssrn.com/abstract=1100170>. Access in: 20 ago. 2012.

GADAMER, Hans-Georg. Verdade e método: traços fundamentais de uma hermenêutica filosófica. Translation by Flávio Paulo Meurer. 4. ed. Petrópolis: Vozes, 2002. v. 1. e v. 2.

GALLIE, W. B. Art as an essentially contested concept. *The Philosophical Quarterly*, v. 6, n. 23, p. 97-114, Apr. 1956a.

GALLIE, W. B. Essentially contested concepts. *Proceedings of the Aristotelian Society*, New Series, Hoboken, v. 56, p.167-198, 1956b.

GALLIE, W. B. *Philosophy and the historical understanding*. Londres: Chatto &

Windus, 1964.

GEACH, P. T. Ascriptivism. *The Philosophical Review*, v. 69, p. 221-225, 1960.

GREEN, Leslie. Legal Positivism. In: ZALTA, Edward N. (Ed.). *The Stanford Encyclopedia of Philosophy*. Fall 2009. Available from: <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>. Access in: 4 set. 2012

GREENAWALT, Kent. *Law and objectivity*. Oxford: Oxford University Press, 1995.

GREENBERG, Mark. How facts make law. In: HERSHOVITZ, Scott. *Exploring law's empire*: the jurisprudence of Ronald Dworkin. New York: Oxford University Press, 2006. p. 225-264.

GUEST, Stephen. *Ronald Dworkin.* 2. ed. Edinburgh: Edinburgh University, 1997.

HABERMAS, Jürgen. Prefácio. In: _____. *Direito e democracia:* entre facticidade e validade. Translation by Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997a. v. 1. p. 354; v. 2, p. 352.

HACKER, P. M. S. Definition in jurisprudence. *The Philosophical Quarterly*, Hoboken, v. 19, n. 77, p. 343-347, Oct. 1969.

HACKER, P. M. S. Hart´s Philosophy of Law. In: HACKER, P. M. S.; RAZ, Joseph (Eds.). *Law, morality and society*: essays in honour of H. L. A. Hart. Oxford: Oxford University Press, 1977. p. 1-25.

HACKER, P. M. S.; RAZ, Joseph (Eds.). *Law, morality and society*: essays in honour of H. L. A. Hart. Oxford: Oxford University Press, 1977.

HACKER, P. M. S. *Wittgenstein's place in twentieth-century analytic philosophy.* Oxford: Blackwell, 1996.

HACKER, P. M. S. Analytic philosophy: beyond the linguistic turn and back again. In: BEANEY, M. (Ed.). *The Analytic turn*: analysis in early analytic philosophy and phenomenology. London: Routledge, 2007. p. 125-141.

HACKING, Ian. *Por que a linguagem interessa à filosofia*. São Paulo: EDUNESP, 1999.

HART, H. L. A. *Essays in jurisprudence and philosophy*. Oxford: Oxford University Press, 1983.

HART, H. L. A. Comment. In: GAVISON, Ruth. *Issues in contemporary legal philosophy*: the influence of H. L. A. HART. Oxford: Claredon, 1987.

HART, H. L. A. *The concept of law*. 2nd ed. Oxford: Oxford University Press, 1994a.

HART, H. L. A. *O conceito de direito*. 3. ed. Tradução de A. Ribeiro Mendes. Lisboa: Calouste Gulbenkian, 1994b.

HOBBES, Thomas. *Leviatã, ou, matéria, forma e poder de um estado eclesiástico e civil*. São Paulo: Victor Civita, 1979.

HUME, David. *A treatise on human nature*. Edited by David Fate Norton and Mary J. Norton. Oxford: Oxford University Press, 2000.

KELSEN, Hans. *Teoria pura do direito*. 3. ed. Translation by João Baptista Machado. Coimbra: Arménio Amado, 1974.

KENNY, Anthony. Cartesian privacy. In: PITCHER, George. The philosophy of Wittgenstein. 2nd ed. New York: Anchor Books, 1966. p. 352-370.

KRONMAN, Anthony. *Max Weber*. Stanford: Stanford University Press, 1983.

KUHN, T. *The structure of scientific revolutions*. Chicago: The University of Chicago Press, 1962.

LACEY, Nicola. *A life of H. L. A. Hart*: the nightmare and the noble dream. Oxford: Oxford University Press, 2006. p. 229-230.

LEITER, Brian (Ed.). *Objectivity in law and morals*. Cambridge, UK: Cambridge University Press, 2001.

MACCORMICK, Neil. *H. L. A. Hart*. 2nd ed. rev. Stanford: Stanford University Press, 2008a.

MACEDO JUNIOR, Ronaldo Porto. *Contratos relacionais e defesa do consumidor*. 2. ed. rev., atual. e amp. São Paulo: Revista dos Tribunais, 2007.

MACEDO JUNIOR, Ronaldo Porto. Como levar Ronald Dworkin a sério ou como fotografar um porco-espinho em movimento. In: GUEST, Stephen. *Ronald Dworkin*. Translation by Carlos Borges. Tecnical revision by Rafael Mafei Rabelo Queiroz. Rio de Janeiro: Elsevier, 2010. p. VII-XVIII. (Coleção Teoria e Filosofia do Direito).

MACEDO JUNIOR, Ronaldo Porto. *Carl Schmitt e a fundamentação do direito*. 2. ed. São Paulo: Saraiva, 2011.

MACEDO JUNIOR, Ronaldo Porto; BARBIERI, Catarina Helena Cortada (Orgs.). *Direito e interpretação*: racionalidades e instituições. São Paulo: Saraiva, 2011.

MARMOR, Andrei (Ed.). *Law and interpretation*. Oxford: Clarendon, 1995.

MARMOR, Andrei Marmor. Legal conventionalism. *Legal Theory*, Oxford, v. 4, p. 509-531, 1998.

MARMOR, Andrei. How law is like chess. *Legal Theory*, Oxford, v. 12, p. 347-371, 2006a.

MARMOR, Andrei. *Social conventions.* Princeton: Princeton University Press, 2009.

NAGEL, Thomas. *The view from nowhere*. Oxford: Oxford University Press, 1989.

NAGEL, Thomas. Dworkin: interpretation and the law. In: _____. *Other minds*: critical essays 1969-1994. Oxford: Oxford University Press, 1995. p. 194-202.

NAGEL, Thomas. *Visão a partir de lugar nenhum*. Translation by Silvana Vieira. São Paulo: Martins Fontes, 2004.

PATTERSON, Dennis (Ed.). *Wittgenstein and legal theory*. Boulder: Westview Press, 1992.

PATTERSON, Dennis. *Law and truth*. New York: Oxford University Press, 1996.

PERRY, Stephen. Interpretation and methodology in legal theory. In: MARMOR, Andrei (Ed.). *Law and interpretation*. Oxford: Clarendon, 1995. p. 97-135.

PERRY, Stephen. Hart's methodological positivism. *Legal Theory*, Oxford, v. 4, p. 427-467, 1998.

POSTEMA, Gerald J. The normativity of law. In: GAVISON, Ruth (Org.). *Issues in contemporary legal philosophy*: the influence of H. L. A. Hart. Oxford: Clarendon, 1987. p. 81-105.

POSTEMA, Gerald J. *A treatise of legal philosophy and general jurisprudence*. New York: Springer, 2011. v. 11.

RAZ, Joseph. *The authority of law*: essays on law and morality. Oxford: Clarendon, 1979.

RAZ, Joseph. *Ethics in the public domain:* essays in the morality of law and politics. Oxford: Clarendon, 1995.

ROSS, Alf. *Direito e justiça*. Translation by Edson L. M. Bini. Bauru: Edipro, 2000.

SCHAUER, Frederick. *Playing by the rules*. Oxford: Clarendon, 1991.

SCHAUER, Frederick. Institutions and the concept of law: a reply to Ronald Dworkin (with some help from Neil Maccormick). In: BANCOWSKY, Zenon; DEL MAR, Maksymilian (Eds.). *Law as institutional normative order*: essays in honour of Sir Neil Maccormick. Burlington: Ashgate, 2009a. p. 35-44. Available from: <http://ssrn.com/abstract=1403311>. Access in: 7 set. 2012.

SCHMITT, Carl. *O conceito do político*. Translation by Álvaro Valls. Petrópolis: Vozes, 1992.

SCHMITT, Carl. *Teologia política*: quatro ensaios sobre a soberania. Translation by Elisete Antoniuk. Belo Horizonte: Del Rey, 2006.

SEARLE, John. *Speech Acts:* an essay in the philosophy of language. Cambridge: Cambridge University Press, 1970.

SHAPIRO, Scott. *Legality*. Cambridge, USA: Harvard University Press, 2011.

SHAPIRO, Scott. The Hart Dworkin debate: a short guide for the perplexed. *University of Michigan Public Law Working Paper n. 77*, Feb. 2007. Available from: <http://ssrn.com/abstract=968657>. Access in: 20 ago. 2012.

STAVROPOULOS, Nicos. *Objectivity in law*. Oxford: Clarendon Press, 1996.

STAVROPOULOS, Nicos. Hart's semantics. In: COLEMAN, Jules (Ed.). *Hart's postscript*. Oxford: Oxford University Press, 2001. p. 59-98.

STAVROPOULOS, Nicos. Objectivity. In: GOLDING, M. P.; EDMUNDSON, William A. (Eds.). *The Blackwell guide to the philosophy of law and legal theory*. Malden: Blackwell, 2005. p. 315-323.

WEBER, Max. *Critique of Stammler*. Translation by Guy Oakes. New York: Free Press, 1977.

WINCH, Peter. *The idea of a social science and its relation to philosophy*. 2nd ed. London: Routldge & Kegan Paul, 1990.

WITTGENSTEIN, Ludwig. *Philosophical investigations*. Translation by G. E. M. Anscombe. New York: Macmillan, 1953.

WITTGENSTEIN, Ludwig. *The blue and brown books*. Oxford: Blackwell, 1969.

WITTGENSTEIN, Ludwig. *On certainty (Uber Gewissheit)*. Edited by G. E. M. Anscombe and G. H. von Wright. Translation by Denis Paul and G. E. M. Anscombe. New York: Harper Torchbooks, 1972.

WITTGENSTEIN, Ludwig. *Philosophical investigations*. 4th ed. Edited by P. M. S. Hacker and Joachim Schulte. Oxford: Wiley-Blackwell, 2009.

WOLCHER, Louis E. Ronald Dworkin's Right answers thesis through the lens of Wittgenstein. *Rutgers Law Journal*, v. 29, p. 43-66, fall 1997.

Compatibility of the moral foundation of Law in Kant with the theory of reflective judgment and the Kantian theory of revolution

Maria Lucia de Paula Oliveira

Abstract: *The Arendtian interpretation of the political philosophy of Kant considers the aesthetic theory of judgment, as formulated by the Philosopher in the Critique of the Power of Judgment, as the true basis for his political philosophy. For her, the Kantian theory of law is incompatible with the political philosophy founded on the theory of reflexive judgment. Considering the Kantian system as a whole, it is possible (and indispensable) to combine the theory of law (that presents the Universal Principle of Right as one of the more important concepts) with the aesthetical theory of judgment, in its political dimension, as presented in Arendt´s thought. The Kantian theory of revolution illustrates very well the political dimension of an aesthetic judgment. The paradoxical relationship between Kant and the French Revolution elucidates how it is possible to identify an ethical dimension in the revolutionary process.*

Keywords: *Immanuel Kant. Judgment. Revolution.*

One of the striking features of Kantian philosophy is his systematic concern. Thus, since the great issues of Kantian philosophy reflect his critical effort, it's natural to expect that it gives undeniable attention to justice and aesthetic issues as relevant parts of his philosophical system. As long as the judgment of justice is a practical judgment, inserting the system of law in the core of Kant's pure practical philosophical system, the aesthetic judgment will stem from a faculty called power of judgment, which has a special status in Kant's philosophy. They constitute different aspects of the criticism (critique) of reason, making it impossible to mix up these two very different kinds of judgment. Nevertheless, in Kant's political philosophy it's possible to approximate aesthetics to law. Inside Kant's theory of Revolution, we can find a privi-

leged "*locus*" to make us understand that proximity.

Kant´s effort to ground the rights on reason - undertaken in the *Doctrine of Right* - drives him to see natural law as a compound of "immutable principles" that should guide positive legislation. As a matter of fact, Kant´s legal philosophy does not have a retrospective scope, but a prospective one: Kantian Rational Right does not intend to explain society´s historical origins, but starts off from its reality and its necessity to talk about a legal order according to reason[1]. That legal order, though, does not aim to substitute virtue or to fight for the metamorphoses of the human condition, with the regeneration of human finiteness[2]. From then on the enunciation of a rational and universal principle, the *Doctrine of Right* starts presenting a system of law that ends up in the public rights, which supposes not only stable legal relations among people, but also a public power that can keep these relationships granted. A private right is the right of a natural state - peremptory right - which can only be granted by an established State. For Kant, in opposition to what happened in other modern systems of natural law, a private right is a right of the state of nature. Therefore, private law comes before political societies. The state of nature is not an anti-social or a-social state; but a State where the public authority grantor of rights does not exist.

Therefore, the right to owning property and individual rights overlay the very right to create a civil State - which supposes everyone's freedom is united in accordance with an universal law; whereas the postulation of the practical pure reason is that everybody has the power of having as an object external to his or her free choice as their own. There is, thus, a foundation for coercive state power which precedes the different kinds of freedom granted by the state, consistent with the universal principle of right. As the different kinds of freedom must coexist, according to the universal law, in a fair State where peremptory possessions reign, nobody then - explains Kant - would be obliged to recognize propriety, if that which is his or hers is not recognized by the others.

The formation of a civil State means the emergence of public law and of a private right granted by the State. Legal obligations do not change when moving from the rights of natural State to the civil State. But Kant explains that public law brings within it, the means to enable the coexistence of different kinds of freedom regulated by private law.

---

[1] SOROMENHO-MARQUES, V. Razão e Progresso na Filosofia de Kant. Lisboa: Colibri, 1998. p.376.

[2] Ibid., p. 377.

The state of nature is an insecure state, overcome with the emergence of the civil union. In that state of Nature there are already human associations, as the family or the human association established by contract, for example. The rights of the state of nature will remain after the organization of a political order.

In the state of nature, though, there is an unlimited external freedom. So, this state is potentially violent, since nobody is safe from their own violence. Kant comes thus to the conclusion that the first principle man should decree is that it is a duty to leave the state of nature, submitting ourselves to an external limitation - agreed on by all - where that which is mine or yours is established by law. That state of nature, though, is not (rather than what happened with Hobbes) a state of violence or injustice; but a state devoid of justice "in which, when rights are in dispute (*ius controversum)*, there would be no judge competent to render a verdict having rightful force…"[3]

That social contract which founds the political order is different from other kinds of contract:

> The union of many for some (common) end (that all of them have) is to be found in any social contract; but that union which is in itself an end (that each ought to have) and which is therefore the unconditional and first duty in any external relation of people in general, who cannot help mutually affecting one another, is to be found in a society only insofar as if it is in the civil condition, that is, constitutes a commonwealth. 4

The reason to constitute the State is an obligation and "the supreme formal condition" of all legal obligations that, besides disposing that which belongs to every one in particular, it also ensures that, which belongs everyone, against the intervention of others. The original contract is "a rational idea" which, actually, has a practical reality: "... namely to bind every legislator to give this laws in such a way that they could have arisen from the united will of the people..."[5]. The legal state is formed by establishing a relation of citizen subordination to the powers of the city, where there would be a contract where "everyone *(omnes*

[3] KANT, I. "The Metaphysics of Morals**",** 6:312 in *Practical Philosophy***.** Cambridge: Cambridge, 2009**.**

[4] KANT, I. "On The Common Saying: That May Be Correct in Theory, But is of no Use in Practice.", 8:289, in *Practical Philosophy*, Cambridge: Cambridge, 1996.

[5] *Ibidem*, 8:297

et singuli) within a people gives up his external freedom in order to take it up again as a member of a commonwealth, that is, of a people considered as a state *(universi)*.".[6]

In the *Idea for a Universal History with a Cosmopolitan Aim*, Kant defends man´s natural disposition to entirely develop itself, not as an individual person, but as a species, with the use of reason. He also states that it is the unsociable sociability of men - a tendency to come into Society, but attached to a great disposition to isolate himself and to want to manipulate everything in his own way, is what awakes all human strengths. It is by means of this antagonism that man gives his first step from brutality to culture, reminds the philosopher: "…thus all talents come bit by bit to be developed, taste is formed, and even, through progress in enlightenment, a beginning is made toward the foundation of a mode of thought which can with time transform the rude natural predisposition to make moral distinctions into determinate practical principles..."[7] That´s why, Kant concludes, the biggest problem of human kind would be an attainment of a civil society which grants the rights, allowing natural dispositions to flourish.

The command of reason that makes man leave off his unsociable sociability - pertinent to the state of nature - does not, indeed, take man´s society to a political order of any kind; but to a constitutional order able to permit reason, through law, to pile up all forms of legislation inherited from: tradition, customs and the power of prejudice. Two years later, in *Perpetual Peace* these principles are fully repeated in the enunciation of the basic values of a republican Constitution. The principles which will rule over this "civil state" are: "1) The freedom of every member of the society as a human being. 2) His equality with every other as a subject. 3)The independence of every member of a commonwealth as a citizen."[8] The kantian republican State rules itself by two important principles: the principle of the separation of powers and the principle of popular sovereignty, combined with political representation.

Civil and political freedom supposes that nobody can be constrained to be happy in their own way, "but each one is allowed to search for happiness the way they feel like, under the condition it does not

---

[6].KANT, I. "The Metaphysics of Morals' in *Practical Philosophy, 8:297*.

[7] KANT, I. "Idea for a Universal History with a Cosmopolitan Aim", 8:21, in *Anthropology, History and Education*. Cambridge: Cambridge, 2007, 8:21.

[8] KANT, I., "On The Common Saying: That May Be Correct in Theory, But is of no Use in Practice.", 8:290, in *Practical Philosophy*. Cambridge: Cambridge, 1996.

harm the freedom of the others (that is, the rights of others) to look forward to a similar goal, that can coexist with each one´s liberty, according to the possible Universal Law". It is not the State - says the philosopher - that should decide how citizens shall be happy. Kant criticizes that what would be called the "paternal government", as the worst form of despotism - opposite to the "patriotic government", in which the rights of the State is preserved by means of common welfare laws: civil liberty and political liberty are linked in such a way (because it is with the citizens participation in the elaboration of the Political Will), that we can avoid a despotic State - the one which does not preserve the individual spheres, imposing on them its own conception of common welfare. Civil equality is reflected in the equality among citizens, which is incompatible with privileges of birth or slavery. Such equality is not, indeed, translated into a total egalitarianism, because "every member of a commonwealth must be allowed to attain any level of rank within it (that can belong to a subject) to which his talent, his industry and his luck can take him..."[9] Concerning civil independence, Kant states that the citizen should not keep a relationship of dependence that would stop him from participating - independently from others' will - in the life of the community. The passive citizens have a right in the civil state, though: "...whatever sort of positive laws the citizens might vote for, these laws must still not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that everyone can work his way up from this passive condition to an active one."[10]

There would be a principle of the practical reason that could dictate we´d rather obey the actual legislative power (Kant reinforces the theory of the tripartite separation of powers into legislative, executive and judicial), no matter the origins. In a gesture that provokes a lot of surprise, the philosopher condemns the rights of resistance. To him, subjects (vassals) would not have any power to resist the sovereign: "Moreover, even if the organ of the sovereign, the ruler, proceeds contrary to law, for example, if he goes against the law of equality in assigning the burdens of the state in matters of taxation, recruiting and so forth, subjects may indeed oppose the injustice by complaints (*gravamina)* but not by resistance."[11] The justification for the inexistence of Peoples´ power to resist to the power of the State would assent, at first, in the fact that

[9] *Ibidem*, 8:292.
[10] KANT, I. "The Metaphysics of Morals", in *Practical Philosophy.* 6:316.
[11] *Ibidem*,6:321.

the legal state is only possible by submission to a universal legislative will, and it cannot contemplate in itself the disposition to legitimate a self disobedience. Therefore, both the rebellion and the revolution are in contradiction with the principle of right. Nevertheless, says Kant, after the success of revolution, by establishing a new constitution, people must submit themselves to a new order of things as good citizens. There is something else, though, that would determine the impossibility of the existence of the right to resist, since rebellions or revolutions have to be done in secret and would oppose to the public use of reason, which believes that right of free speech is a great instrument not only for the progress of knowledge, but also to make the development of human organizations possible.

Leonel Ribeiro dos Santos[12] reminds us of a fact already observed by many well reputed interpreters: Kant´s conception of moral law would have been inspired by Rousseau´s theory of the General Will. The underlying basic conception would be the idea of the subject [individual person] as the author and the subject [vassal] of the law, which would grant autonomy and liberty, because submission to law is only that which is self-imposed. To Kant, the autonomy of moral acting is grounded in the conformity of the action or of its maxim to the moral law. Freedom must be thought in reference to moral law, in the formula of the Universal Principle of Right ("Any action is right if it can coexist with everyone´s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone´s freedom in accordance with a universal law"[13]). "The kingdom of ends" is a kantian notion of (at first sight, unsuspected) important political connotation. (The philosopher explains that "kingdom" is the systematic connection of various rational beings through (by the means of) common laws; reason why "if we abstract from the personal differences of rational beings as well as from all the content of their private ends shall be able to think of a whole of all ends in systematic connection..."[14]). The possibility of the "kingdom of ends" is what allows the autonomy of the maxim and its harmony with a universal legislation, granting an organic view of the moral world. To Kant, the State which would correspond to that "kingdom of ends" would be one in which people would submit themselves to the laws given by the People themselves. Furthermore,

[12] SANTOS, L.R. *A Razão Sensível – Estudos Kantianos*. Lisboa: Edições Colibri, 1994.
[13] KANT,I. "The Metaphysics of Morals', in *Practical Philosophy*, 6:230.
[14] KANT,I. "Groundwork of the Metaphysics of Morals" in *Practical Philosophy*, 4:433.

Kant would have seen in the French Revolution, exactly a "historical sign"[15] of the political achievement of the ideal of a "kingdom of ends". Concerning it, there is an important consideration made by Kant in the notes of the *Critique of the Power of Judgment*:

One can, conversely, illuminate a certain association, thought on that is encountered more in the idea that in reality, by means of an analogy with the immediate ends of nature that have been mentioned. Thus, in the case of a recently undertaken fundamental transformation of a great people into a state, the word **organization** has frequently been quite appropriately used for the institution of the magistracies, etc., and even of the entire body politic. For in such a whole each member should certainly be not merely a means but also a end, and, insofar as it contributes to the possibility of the whole, its position and function should also be determined by the idea of a whole. [16]

From what has been exposed, it would be possible to identify the homology between the logics of Politics and the logics of morality, that might be clearer with an attention to the rationality of political judgment and of political community, which could get clearer also with an investigation of the political meaning of Kant´s aesthetics. In Kant´s Philosophy, reason establishes a community - be it from a theoretical, from a practical or from an aesthetic viewpoint. Kant opposes isolation and selfishness with a plurality and a sense of community indispensable to sanity of reason. As Leonel Ribeiro dos Santos reminds us, in many of Kant´s thoughts, we find the question, many times implicitly put: why do we have the tendency to communicate to others our thoughts?[17] Would there be a drive for communication to guide our understanding, which would be indispensable to it: reason should be shared, my judgments should be appreciated by others, there must be a reciprocity in the use of reason, that because - Kant says – that usage is not only a right of each one´s, but a duty in relation to the community of men, "colleagues in the great counseling of human reason" – in Kant´s words[18]. It is clear here that the "universal validity" searched for by his philosophy, beyond its transcendental dimension, has an undeniable political meaning. It might be in the aesthetic judgment that the community feature of Kant´s reason would be more evident. In a first appreciation, that cannot

[15] SANTOS, L.R. *A Razão Sensível – Estudos Kantianos*. p.78.
[16] KANT, I. *Critique of the Power of the Judgment*, 5:375, Cambridge: Cambridge, 2007.
[17] SANTOS, L.R. *A Razão Sensível – Estudos Kantianos.* p.79.
[18] *Ibidem* , p.79.

be confirmed, the aesthetic judgment, for its singularity, could seem the one mostly against an universality.

With the *Critique of the Power of Judgment*, the power of judgment becomes an object of central preoccupation for Kant, and so it does the imagination, which turns out to be not only reproducer, but also producer. That imagination produces concepts, out of which it is not possible to have any knowledge. There is then an activity "with concepts", but which does not produce knowledge: it is the aesthetic judgment. Kant himself reminds us that there where reflective judgment (in which I come from the singular to reach the universal; opposite to the determinate judgment, in which the particular is a derivation of the universal) can be apprehended in the best model way as possible is exactly in the pure aesthetic judgment. The singularity of the judgment of taste is tied to its own nature of reflective judgment. Furthermore, it is indispensable to the pure judgment of taste not to be interested in the existence of the object, be that interest focusing knowledge or morality, or even the utility of the object. The lack of interest of the judgment of taste does not mean indifference or a contempt of what is being judged, but that to aesthetics judgment it is demanded a distance kept from the subject in relation to the object being judged: something is not judged beautiful or sublime, if we are worried with its utility or with its measures or with its moral correctness.

Nevertheless, Kant says that the one who judges something beautiful or sublime, place an intention of universality that is almost a plea. Even though it is an unalienable expression of a judgment of a subject, in its empirical singularity, such a judgment always pleases universally and that´s why, just because of it, there could be the pure judgment of taste. The judgment of taste supposes a kind of communicability, searching for accordance with the other subjects; an accordance which does not ground itself in any concept. The aesthetic subject is totally emancipated from any determinate concepts. In reference to the Gadamer reading, we could say "In the aesthetic plan, an attempt would have been made for the possibility of an autonomous and creative existence of its own destiny, a task that the philosophy of history and politics would further herd with his project."[19] Art would be, in its symbolism, an attempt to experience liberty and on the other hand, a prime experience of a new portrait of liberty: the liberty without obligation determined by law, since in aesthetic judgment that which is

[19] SANTOS, L.R. *A Razão Sensível – Estudos Kantianos.* p.80.

relevant is the free and harmonious play between faculties (imagination and understanding). The universal consent in the judgment of taste will only come spontaneously. The *sensus communis*, seen like a community sense, has a groundwork which is transcendental; not simply empirical. The enlarged thought - this capacity to place oneself in all possible viewpoints to appreciate a specific question, is not exclusive to the Theory of Taste, but it turns out to be an especially important field to Kant because we would not have objective principles which we could trust, taking into consideration its own singularity of judgment. We might not be speaking improperly to the light of the Kantian system, when stating that in the political judgment the subject should also, in some way, put itself in all viewpoints possible, such as to abstract from its personal and subjective conditions. Moreover, so it is driven by a community feeling. Being so, there would not be any heresy in the proximity between Political rationality and aesthetics done by Arendt in her reading of the *Critique of the Power of Judgment*. But, if it is this way, it gets crucial importance in the context of Kantian thought his philosophy of law, introduced later with the *Doctrine of Right* - first part of *The Metaphysics of Morals*.

By means of reason´s astuteness and of a pedagogical sense, a "Revolution of Reason" would happen, but without the need of the use of violence, to establish the new way of doing philosophy or knowledge, as well as a new way of moral and political existence, related to the conditions of human-beings as rational and finite (in the contingence of the experience of the world). The political program of *Aufklärung* would get new expression in the general context of Kantian philosophy and in its consequences to the theory of the power of judgment. First, such a program would comprise the intellectual emancipation of humanity through the exercise of free thought. But the condition to fulfill such an emancipation would be the exact political power and institutionalization which provides for the free circulation of ideas, because as Kant had already made clear in the *What is the Enlightenment?,* the simple freedom of thinking would not reach the public use, without that condition. The search for such an emancipation and the change in the organizations, though, demands a reform looking ahead of the establishment of a Republican State. The State reformed in those models would preserve the freedom of thought, and also granting it the possibility to go against it. In *The Conflict of the Faculties*, Kant previews that the faculty of philosophy - as the granter of the search for the truth - would have to be free and not submitted to legislation of the government. A criticism of the

government itself must be allowed as well as to ongoing public affairs[20].

On the other hand, that reforming attitude would put in evidence the polemic Kantian position in relation to the French Revolution. Actually, according to the existing biographical reports, Kant used to have a special interest into the happenings of the Revolution. Indeed, philosophers contemporary to Kant, like Fichte and H. Heine, made the association between the ideas spread in Prussia by the works of Kant and the ideas underpinning the French revolutionary process. Viriato Soromenho-Marques reasonably highlights that the interest and the affinity of the existing ideas do not reflect themselves, though, in a clearer statement in the work of Kant on the French Revolution, which may only be clearly explained by the political censorship imposed to Kant after publishing *The Religion within the Limits of Reason Alone*.[21] A first reference to the Kantian work on French Revolution is exactly that in the notes of the *Critique of the Power of Judgment* quoted some paragraphs above, in which the philosopher uses the organic model to describe the State in which a vassal is a citizen. It evidently means a pleasant remark of what was going on in France. In a second moment – coincidently the time when Robespierre had access to the power – we find Kant not so much in favor of the historical facts that had occurred. In the *Doctrine of Rights*, the philosopher is emphatic:

> Of all the atrocities involved in overthrowing a state by rebellion, the assassination of the monarch is not itself the worst, for we can still think of the people as doing it from fear that if he remained alive could marshal his forces and inflict on them the punishment they deserve, so that their killing him would not be an enactment of punitive justice but merely a dictate of self-preservation. It is the formal execution of the monarch that strikes horror in a soul filled with the ideal of human rights, a horror that on feels repeatedly as soon as and as often as one thinks of such scenes as the fate of Charles I or Louis XVI. But how are we to explain this feeling, with is not aesthetic feeling (sympathy, an effect of imagination by which we put ourselves in the place of the sufferer) but moral feeling resulting from the complete overturning of all concepts of right?22

[20] SOROMENHO-MARQUES,V. *Razão e Progresso na Filosofia de Kant.* p.456.
[21] SOROMENHO-MARQUES, V. *Razão e Progresso na Filosofia de Kant.* p.465/467.
[22] KANT, I. "The Metaphysicas of Morals", in *Practical Philosophy,* 6:320.

Such a quote is paradoxical: from one side, excludes any sympathy he could ever feel towards a formal execution of a monarch; conversely, a feeling of moral hue – kind of unexplainable to Kant himself – would come out provoked by some harm to the principles of Law underlying such an act (a formal execution of a monarch would be offensive to the necessity of a principle of Political order, as an imperative of reason, translated into a principle of right). In any case, Kant shows us the conviviality of two forms of judgment: the aesthetic and the moral one. Viewed from one angle in *The Religion within the Limits of Reason Alone*, Kant, in a certain point, forgives the people for the first excesses made in the name of freedom:

> I grant that I cannot really reconcile myself to the following expressions made use of even by clever men: "A certain people (engaged in a struggle for civil freedom) is not yet ripe for freedom"; "The bondmen of a landed proprietor are not yet ready for freedom"; and hence, likewise; "Mankind in general is not yet ripe for freedom of belief." For according to such a presupposition, freedom will never arrive, since we cannot ripen to this freedom if we are not first of all placed therein (we must be free in order to be able to make purposive use of our powers in freedom). The first attempts will indeed be crude and usually will be attended by a more painful and more dangerous state than that in which we are still under the orders and also the care of others; yet we never ripen with respect to reason except through our own efforts (which we can make only when we are free).23

It is right that, as already stressed here, Kant had to keep himself in the limits of the political viewpoint of what would be admitted and not censured by Prussian government. It seems, though, that the double treatment to the question by the philosopher does not come only from a strategy to get away with the censorship. Actually, Kant´s attitude in relation to French Revolution is really double under the moral viewpoint, any revolution would be prohibited, since it would risk dissolution of the State, which in turn would offend the principle of Law. Kant, in the *Doctrine of Right*, does not even admit the right of resistance. In his conception, for a State to have the right of resistance, it should have a public law that could predict it, and such a prediction would be contradictory,

[23] KANT, I. *Religion Within the Limits of Reason Alone*. Translated: by Theodore M. Greene & Hoyt H. Hudson. New York: Harper&Row,1960.

for it would be the people giving themselves the power to disobey the laws established by the sovereign (that would represent people´s own will. Moreover, any rebellion or revolution would not encompass the principle of publicity, being probably planned in secret, which would not be in accordance to the "political moral" attitude, argued by the philosopher. On the other hand, since he does not have the least sympathy towards the executed monarch, he was undeniably excited about the Revolution.[24] Kant states something along this line in *The Conflict of the Faculties*:

> This revolution, I state, comes across, though, the animus of all the spectators (who are not found entangled in that game), with a participation according to the desire, in the frontier of the enthusiasm, which manifestation was, indeed, linked to danger that, as consequence, cannot have any other reason, unless the moral disposition to human kind.25

Kant certainly values the sublime as a symbolic representation of the good, that because the feeling of sublime in nature could not be thought without connection with a thought disposition similar to the moral disposition. As Paul Guyer explains, we could say that beauty and sublimity symbolize different aspects of human autonomy. The freedom of imagination in the experience of the beautiful would represent our potentiality to be free from the determinism of the impulses and inclinations, whereas the most painful experience of the sublime would remind us that we only reach our potential of liberty by means of a thorough submission to our most human inclinations to the principle of the pure practical reason.[26] There is a direct influence of the Aesthetics experience on our affections and inclinations, with an evident symbolic meaning and also of moral knowledge, even if it cannot and should not be translated into a reduction and a confusion of the beautiful or of the sublime to the good and vice-versa.

Thereof, Kant states that the enthusiasm (the idea of good with an affection) is interesting because "enthusiasm is aesthetically sublime, because it is a stretching of the powers through ideas, with give the

[24] TERRA, R. *Passagens – Estudos sobre a Filosofia de Kant***.** Rio de Janeiro: Editora UFRJ, 2003. p.126/128.

[25] KANT, I. *O Conflito das Faculdades.* Translated by Artur Mourão. Lisboa: Edições 70. p.102.

[26] Ibidem , p.253.

mind a momentum that acts far more powerfully and persistently than the impetus given by sensory representations", not confusing it with a simple affection which is blind.[27] But, says Kant, it is sublime the *animus* which follows emphatically his immutable principles, having by his side only the complacence of pure reason. This mentality is called noble, producing not only astonishment, but also admiration, because it does not cease with the novelty. It does not mean to admit the feeling of sublime as relevant, to preview, then, an emotionalism or sentimentalism. Many times, the strength of something is in its contention and subtleness: enthusiasm is productive, but not an exaltation, or an unstill passion. Simplicity is "as if a style of nature and of morality in the sublime". About the moral law Kant says that "... It is utterly mistaken to worry that if were deprived of everything that the senses can recommend it would them bring with it nothing but cold, lifeless approval and no moving force or emotion"[28]. It is not allowed to run the risk of exaltation, that is "a delusion of being able to see something beyond all bounds of sensibility", "rave with reason":

> In enthusiasm, as an affect, the imagination is unreined, in visionary rupture, as a deep-rooted, oppressive passion, it is unruled. The former is a passing accident, which occasionally affects the most healthy understandings, the latter is a disease that destroys it. 29

The enthusiasm of those who watch French Revolution (that, even if episodic, it is not incompatible with a "healthier understanding") are signs of morality. The spectator of this "moment of our time that tries out the tendency of morality towards human kind", thinks about it without a goal and takes part in its approbation, in an enthusiastic way. That enthusiasm, defined as participation in the good with passion should not be fully approved, exactly because it is an affect. But, from the viewpoint of Anthropology, says the German philosopher, it has its role, since the "... real enthusiasm always refers to a sole idea and, evidently, purely moral; the concept of law, for example, and cannot engraft on its own interest."[30] Kant, indeed, consistent with such an understanding, states in the *Doctrine of Right* that, despite the inexistence of the

[27] KANT, I. *Critique of the Power of Judgment*, 5:272.
[28] Ibidem, 5:275.
[29] Ibidem, 5:275.
[30] KANT, I. *O Conflito das Faculdades*, p.103.

fight of rebellion, if a revolution is well done and thereafter comes a new government, it is to this one that the people must obey. It follows that a political action thereafter a reflective judgment would bring the future possibility of a moral legal order and more in accordance with the principles of morality and of law. Political change (which is not reduced to a political reform of minimal proportions) evokes a reflective judgment (expressed many times by an aesthetic judgment of admiration), by the unpredictably and by the radicalism of the experiences there implied. The good political change inexorably means the establishment of a legal and Political Order which is fairer.

References:

ARENDT,H. *Lectures on Kant´s Political Philosophy.* Edited by Ronald Beiner. Chicago: Chicago, 1992.

KANT, I. *Anthropology, History and Education*. Translated by Mary J.Gregor. Cambridge: Cambridge, 2007.

KANT, I. *Practical Philosophy.* Edited by Mary J. Gregor.Cambridge: Cambridge, 2009.

KANT, I. *O Conflito das Faculdades.* Translated by Artur Mourão. Lisboa: Edições 70.

KANT, I. *Religion Within the Limits of Reason Alone*. Translated: by Theodore M. Greene & Hoyt H. Hudson. New York: Harper&Row,1960.

SANTOS, L.R. *A Raz***ão Sensível – Estudos Kantianos**. Lisboa: Edições Colibri, 1994.

SOROMENHO-MARQUES, V. *Razão e Progresso na Filosofia de Kant.* Lisboa: Colibri, 1998.

TERRA, R. *Passagens – Estudos sobre a Filosofia de Kant.* Rio de Janeiro: Editora UFRJ, 2003.

A new rhetoric for a new justice and democratic order[1]

Marco Antônio Sousa Alves[2]

Abstract: The democratic experience is closely related to the practice of argumentation. There is no democracy without exchanging views and search by persuasion or convincing. Democratic practice has, therefore, a clear rhetorical dimension, understood as the pursuit of agreement or consent of a certain audience. In other words, we should not talk about democracy when decisions and political choices necessarily emanate from an evident premise or simply reflect the will of an authority. A democratic order is quite different from an order of reason, of God, or of Nature, on the one hand, and from mere imposition of the will of the sovereign, on the other hand. The relationship between politics and rhetoric is an old topic in political philosophy, as we see in the Platonic condemnation of democracy, seen as the realm of sophistical opinions. However, based on the Aristotelian reflection on practical reasoning, new studies have tried to rehabilitate rhetoric and its importance for a new political and legal order, especially since the middle of the last century. It is in these terms that Chaïm Perelman's new rhetoric must be understood. The new rhetorical perspective aims at situating properly the very rationality of the democratic order. In this sense, democracy can be approximated to the realm of reasonable argument that lies between two opposite extremes: on one side, the realm of rationality and logical necessity, on the other, the realm of irrationality and arbitrary will. I present here the broad outline of Perelman's new rhetoric (and its wide conception of rationality) in order to sketch, in what follows, some ideas about a new justice and democratic order. Among other things, I aim at highlighting Perelman's

[1] Paper presented at the special workshop (SWS) "Citizenship and access to justice in the democratic order", part of the 26th World Congress of Philosophy of Law and Social Philosophy of the International Association for Philosophy of Law and Social Philosophy (Internationale Vereinigung für Rechts-und Sozialphilosophie), held in Belo Horizonte, Brazil, at the campus of the Federal University of Minas Gerais (UFMG) from 21 to 26 july 2013.

[2] Ph. D. Student in Philosophy at Federal University of Minas Gerais (UFMG). Professor at Milton Campos Law School (Belo Horizonte – Brazil).

defense of open, tolerant and humble dialogue, which is sensitive to differences of perspective and always capable of self-criticism. The domains of law, moral and political argumentation require from the philosopher a kind of modesty: the future does not belong to the philosopher, and her mind must remain open to unpredictable experiences. The rule of law requires an open and inclusive discursive practice, a large and unending dialogue that can only occur when there is freedom of agreement and exclusion of the use of violence.

Keywords: Democracy; New rhetoric; Theory of argumentation.

The democratic experience is closely related to the practice of argumentation. There is no democracy without exchanging views and search by persuasion or convincing. Democratic practice has, therefore, a clear rhetorical dimension, understood as the pursuit of agreement or consent of a certain audience. In other words, we should not talk about democracy when legal decisions and political choices necessarily follow from an evident premise or simply reflect the will of an authority. A democratic order is quite different from an order of Reason, of God, or of Nature, on the one hand, and from mere imposition of the will of the sovereign, on the other hand.

My aim here is to defend the new rhetoric proposed by Perelman as a sound ground for democratic experience in law. Democracy works through discursive exchanges and beyond that it has its own grounding in argumentative practices and their capacity to justify rationally or reasonably our legal decisions or political choices. Therefore, I would like to introduce the new rhetoric as a basis for a renewed conception of rationality in harmony with the aspirations of democracy.

Surely, this is not a new undertaking. In fact, the relationship between politics and rhetoric is an old topic in political philosophy, as we can see in the Platonic condemnation of democracy, seen as the realm of sophistical opinions. Traditionally, philosophers, following this Platonic heritage, tried to move politics away from the noise of the rhetoric and its misleading *doxa*. In general, it was believed that the foundation of politics should be more consistent than mere opinions, namely something based on Truth, Reason and sometimes in God. Political choices, therefore, should not be delivered to the mass of ignorant and their interested power struggles. The wise, or the great enlightened leader, would be more reliable to take appropriate political decisions than the

crowd rhetorically manipulated by politicians/sophists without any ethical commitment or concern for the truth.

However, based on the Aristotelian reflection on practical reasoning, a different path is opened. Many, at different times, followed this direction. Although Aristotle condemned democracy in his political reflections, seen as a degenerate counterpart of polity, it is possible to justify a democratic political practice if we carry forward some of their considerations on dialectical or rhetorical reasoning, typical of the ethical and political argumentation. Throughout the Aristotelian theory, science, wisdom, art, dialectic and rhetoric are a series of forms of rationality, endowed with different degrees of accuracy and precision, but all characterized by arguing. Analytics, Topics, Sophistical Refutations, Rhetoric and Poetics should be seen as a whole, as a theory of argumentation in the most general sense, in other words, a true doctrine of the *logoi* or the different ways of reasoning. Aristotle held that it is proper to man to seek precision just as the nature of the subject admits. Complementing the demonstration or analytical reasoning, Aristotle introduces the dialectical rationality, seated in the practice of dialogue or the art of reasoning through questions and answers.

Especially in the mid-twentieth century, new studies have tried to rehabilitate rhetoric and its importance for a new political and legal order. It is in these terms that the new rhetoric proposed by Perelman and Olbrechts-Tyteca in 1958 in their *Treatise on Argumentation* (*Traité de l'Argumentation*) must be understood as the result of various efforts of bringing back rhetorics from the marginal status it acquired due to its negative connotations of political lies and of all sorts of manipulation and deception. The new rhetoric seeks to rehabilitate the old rhetoric, without, however, being equal to it, which explains the use of the adjective 'new'. The rhetoric of the ancients was, above all, the art of public speaking in order to achieve some desired effect. It tended to take the form of a recipe, of practical exercises to develop oratorical skills. The New Rhetoric basically inherits the notion of audience from the old rhetoric, but it expands and moves it away from mere oratory, focusing on the logical aspect and emphasizing the argumentative exchange. According to Perelman, the domain of the new rhetoric is "the study of critical thought, reasonable choice, and justified behavior. It applies whenever action is linked to rationality".[3]

The thought of Perelman stresses the field of opinions, which is

[3] Perelman, The New Rhetoric, p. 148.

fallible and situated. On that matter, Perelman intends to expand the domain of rationality and remove, for example, our legal decisions or moral choices from the reign of irrationality. According to Perelman: "If a narrow conception of proof and logic leads to a limited conception of reason, the extension of the notion of proof and the logic enrichment resulting from it should provoke a reaction, in turn, on the way that our faculty of reasoning is conceived".[4]

The reason, for Perelman, does not exist as something in the world, like an innate human faculty. The predicate 'rational' is assigned to every reasonable justified behavior. Thus, on the other hand, any behavior merely mechanical or unjustifiable is said irrational or unreasonable. It follows from this that only a justified behavior can be said rational and the attribution of rationality to men occurs only indirectly. In other words, the rational being is the one who acts rationally, that is, the one whose behavior is justified. Therefore, it is said 'irrational' the one who does not offer reasons for ones actions or that, being unable to justify ones opinions, defends them in a dogmatic way. So, the rationality of a statement or expression depends on the reliability it embodies. Perelman emphasizes the procedural aspect, the possibility of justification and critical thinking involved in a rhetorical or dialectical conception of reason. As Perelman stresses: "What is reason? It is defined, in my opinion, by recourse to universal audience".[5]

The new rhetorical perspective allows situating properly the very rationality of democratic experience. Democracy can be approximated to the realm of reasonable argument that lies between two opposite extremes: on the one side, the realm of rationality and logical necessity, on the other, the realm of irrationality and arbitrary will. Adopting the broad outline of Perelman's new rhetoric (and its wide conception of rationality), I would like to sketch, in what follows, some ideas about a new justice and democratic order.

From the 1960's onwards, Perelman developed a consistent study on moral and legal argumentation, which consisted in the application of the new rhetoric to the realm of practical reasoning. The result of this work unfortunately received a less systematic form, published in several small articles. Large part of this material was included in the post-

[4] Perelman & Olbrechts-Tyteca, Traité de l'Argumentation: la nouvelle rhétorique, p. 676 (English translation by myself).

[5] Perelman, L'idéal de rationalité et la règle de justice, p. 328 (English translation by myself).

humous work entitled *Ethics and Law* (*Éthique et Droit*) and, also, in the notes originally published by Perelman in 1979 under the title of *Legal Logic* (*Logique Juridique*).

When Perelman analyses the specificity of legal reasoning, he clearly understands the importance to consider a double requirement: on the one side, the protection of legal security, on the other, the need for social effectiveness and relevance. According to Perelman's conception of rationality, the new rhetoric indicates a *via media* for legal reasoning, avoiding both decisionism and legalism. This field is neither rational nor irrational; it does not deliver decisions according to the will of judges, nor does it follow necessarily from a logical argument. Perelman locates the field of legal argumentation in an intermediate space between legalistic determinism and arbitrary decisionism. For a decisionist, legal decisions stem from pure acts of will, lacking any rational justification. For a legalist, on the other hand, legal decisions are the result of mere applications of general rules proceeding from a legitimate authority. In other words, the decision follows syllogistically from the laws. In none of these cases, there is space for argumentation, for exchange of different opinions and reasonable justification.

In an article entitled "The Pure Theory of Law and the Argumentation", originally published in 1964 and later included in the book *Ethics and Law*, Perelman criticizes Kelsen, considering that his biggest mistake lies in his disbelief regarding practical reasoning. Kelsen had correctly perceived the impossibility of a demonstrative proof in the field of norms and values, nevertheless he derived from it some wrong implications. In short, Kelsen stressed the arbitrariness of legal decisions and upheld a dangerous decisionistic posture. According to Perelman, the pure theory of law derived from a limited theory of knowledge that accepts only demonstrative or empirical proofs, putting aside and totally disregarding the role of argumentation. Taking the opposite direction, the new rhetoric advocates the enlargement of the rational domain in order to allow justified choices and reasonable decisions in practical reasoning, going much beyond the narrow field of formal or demonstrative logic. According to Perelman: "If a legal theory assumes positions, such positions should not be taken as irrational when they can be justified in a reasonable way, through an argumentation whose soundness and relevance we accept".[6]

[6] Perelman, A Teoria Pura do Direito e a argumentação, p. 480 (English translation by myself).

It is clear that the reasonable does not lead to a single solution, as an objective and precise method. Nevertheless, the quest for reasonableness serves as a restriction on the freedom of judging, preventing the mere arbitrariness. In this sense, Perelman said that "the unacceptable and the unreasonable are limits for any formalism in law".[7] Only a wide argumentative practice, opened to the demands of society and to institutional requirements, can lead to a convincing legal decision. According to Perelman: "It is the dialectics between Legislative and Judiciary, between Doctrine and Authority, between Power and Public opinion, that produces the real life of Law and allows combining stability and change".[8]

Legal argumentation should not be limited to the legal text, nor shall it rely solely on the judge's sense of justice. Instead, law must be seen as a flexible tool, which is able to be adapted to social values and expectations, conciliating them with the established institutions and the legal order. Law is condemned to be an experience which is endlessly updated, which seeks appropriate decisions to the circumstances. In sum, Perelman emphasizes the need of reaching acceptable solutions to social conflicts, by means of arguments based on common sense, equity and public interest. However, the social appeasement or pacification can only be restored if the decision is accompanied by sufficiently convincing and sound argumentation. This, in short, should be the effort of the legal doctrine and jurisprudence.

Finally, I would like to turn my attention to the problem of political choices and democratic order. Perelman sustains a philosophical concept that is fundamentally compatible with the defense of democracy and the Rule of Law. In an article entitled *First philosophies and regressive philosophy*, originally published in 1949, Perelman emphatically defends an open philosophy, characterized by tolerance, sensitivity to different perspectives, and capacity for self-criticism. A regressive philosophy is an argumentative undertaking, part of an endless dialogue, in which nothing is out of question. In a certain way, it provides the philosophical basis of democratic experience, which is always imperfect but perfectible.

Unfortunately, Perelman did not lead his studies in this direction, unlike, for intance, Habermas' development of discourse ethics,

[7] Perelman, O razoável e o desarrazoado em direito, p. 436 (English translation by myself).

[8] Perelman, A interpretação jurídica, p. 631 (English translation by myself).

deliberative democracy, and the discourse theory of law. Despite these limitations, the new rhetoric and the study of legal reasoning carried out by Perelman are important and consistent grounds upon which one can analyze our moral, legal and political argumentative practices.

In conclusion, the domains of law, moral and political argumentation require from the philosopher a kind of modesty: the future does not belong to the philosopher, and her mind must remain open to unpredictable experiences. The rule of law requires an open and inclusive discursive practice, a large and unending dialogue that can only occur when there is freedom of agreement and exclusion of the use of violence.

References

KELSEN, Hans. *Pure Theory of Law*. Translation from the Second German Edition by Max Knight. Berkeley: University of California Press, 1967.

PERELMAN, Chaïm. L'idéal de rationalité et la règle de justice. [Presentation at *Société Française de Philosophie*, 23 april 1960]. In: *Le Champ de l'Argumentation*. Bruxelles: Éditions de l'Université de Bruxelles, 1970.

PERELMAN, Chaïm. The New Rhetoric. In: BAR-HILLEL, Yehoshua. *Pragmatics of natural languages.* Dordrecht-Holland/ Boston-USA: D. Reidel, 1971.

PERELMAN, Chaïm. *Logique Juridique*. Paris: Dalloz, 1976.

PERELMAN, Chaïm. A Teoria Pura do Direito e a Argumentação. In: *Ética e Direito*. Translation from french by Maria Ermantina Galvão. São Paulo: Martins Fontes, 1996.

PERELMAN, Chaïm. O razoável e o desarrazoado em direito. In: *Ética e Direito*. Translation from french by Maria Ermantina Galvão. São Paulo: Martins Fontes, 1996.

PERELMAN, Chaïm. A interpretação jurídica. In: *Ética e Direito*. Translation from french by Maria Ermantina Galvão. São Paulo: Martins Fontes, 1996.

PERELMAN, Chaïm; OLBRECHTS-TYTECA, Lucie. *Traité de l'Argumentation*: La Nouvelle Rhétorique. 2nd ed. Bruxelles: Editions de l'Institut de Sociologie, 1970.

The myth of constitutional neutrality Adjudication and democracy

Cássio Corrêa Benjamin[1]
Tiago Lopes Coelho[2]

Abstract: The constitutional adjudication keeps being a central problem for democracy. There are several discussions surrounding this theme. Among them, problems related to its necessity, who is expected to accomplish such task, the way it could be carried out, the competency of a court of law and its nature. Such matters remains a theoretical and practical challenge to democracy. As for the analysis of questions about the constitutional adjudication, we will resume some aspects of the Hans Kelsen's critique of Carl Schmitt concerned with the theme of the guardian of Constitution. The elements of this discussion, which could already be recognized as classical ones, remain present. We will resume some points from that debate, mainly that one related to neutrality of those who exercises the control of constitutionality. This is a crucial question that can be considered as a polemic axis between Schmitt and Kelsen and this will also reflect the attempts to determine the limits between legislation and jurisdiction.

Keywords: constitutional adjudication, democracy, neutrality

We intend to discuss the meaning of the idea of neutrality by resuming the Kelsen's critique of Schmitt about the "Guardian of the Constitution". Although both authors have divergences in relation to "character" or "status" of the "guardian" figure, that is, if it is under the ambit of a political or judicial matter, its alleged neutrality seems evident and necessary. This neutrality is necessary due to alleged asymmetry of this

[1] PhD in Political Science. Professor at the UFSJ (Universidade Federal de São João del-Rei). Email: ccbenj@yahoo.com
[2] Graduated in Law from Escola Superior Dom Helder Câmara. Member of GPES (Research Group in Health Economics) in the Medical School at UFMG (Universidade Federal de Minas Gerais). E-mail: tiago.lopesc@yahoo.com.br

place. Therefore, even the high level of discordance between the two authors about central points, there is a consensus over one aspect: the search for one neutral point in the "Guardian of the Constitution". The place of this "guardian" puts aside this way and, thereby, an asymmetry is created.

Our aim is to show how fragile such neutrality is, which means to explain the alleged aspect of this neutrality. We want to show how this neutrality, that is, how this asymmetry is an attempt to hide the contingency and arbitrariness of this place. Whatever either Schmitt´s way, the search for a neutral political ground, or Kelsen´s one, the search for a neutral judicial place, what they try to present as evident is the neutrality of this one. We will comment Kelsen´s work because he is an author who clearly stands his ground on immanence[3].

It is typical of Kelsen to start his text by drawing attention to where he intends to place the "Guardian of the Constitution". Firstly, he emphasizes that the principle of the maxim legality is at stake the ways to get guaranties from the Constitution. Surprisingly, he states that there is only one point of "primary obviousness" which has not been discussed. If an institution must be set up to control the constitutionality of certain state acts (specially, parliament and government), that is, that verifies its conformity to Constitution, so such control must not be handed by the bodies which will be under control namely parliament and government. For Kelsen, "the political function of the Constitution is to lay down judicial limits to the exercise of power" (KELSEN, 2003, p.240). The guarantee of the Constitution is the certainty that such limits will not be broken through. According to Kelsen, it should be evident that none organ which exercises power is competent to control it. He reminds the reader of a principle which would broadly be accepted: nobody can be its own judge.

It is remarkable how Kelsen starts this discussion by presupposing a jurisdictional function to the alleged court. This just means that Kelsen considers as truth what should be discussed. The debate had already finished before it started. As he estates, it concerns to establish the

[3]We will analyse the Kelsen's answer, "Who should be the Guardian of Constitution" to Schmitt's book "The Guardian of Constitution", which was published in 1931. This Schmitt's book is a enlargement of a previous article about the same theme. The article also had as a title "The Guardian of the Constitution" (Der Hüter der Verfassung). It was published in 1929 in the journal Archiv des öffentlichen Rechts, Neue Folge, XVI, p.161-237.

judicial limits to power[4]. Kelsen tends to believe that this organ would not be competent to judge. Actually, it is typical of thinking about this power that cannot have power. It comes out, right in the beginning of the text, the Kelsen's struggle to situate all that discussion as a judicial problem (nobody can be its own judge). It comes out, summarizing, quite explicitly, the attempt to construct a political neutrality in this place, exactly for being a judicial space[5].

It is not by chance that Kelsen start to criticize the monarchical principle of the constitutional theory from the XIX Century, according to it a monarch is the natural guardian of the Constitution. This is nothing more than ideology, for a monarch was the main interested one in breaking the judicial limits. It must be emphasized again that Kelsen gives an aspect of neutrality to the place of constitutionality control. When Kelsen criticizes the monarchical principle according to which the natural Guardian of the Constitution is a monarch, he criticizes the idea in which a monarch is a neutral point, but he does not criticize the idea of the possibility of a neutral place.

Conversely Schmitt, Kelsen defines what he understands about constitutional jurisdiction and touches on the problem in defining to which place such jurisdiction must be attributed. Constitutional jurisdiction is the exercise of the guarantee of the Constitution (KELSEN, 2003, p.240)[6]. Attributing such function to an independent court is transforming it into

> "a central constitutional court; in the case of a litigious suit, for instance, it may decide about the constitutionality of the parliament (specially laws) or government (specially acts) which were once refuted, by annulling such actions in case of its unconstitutionality and occasionally by judging the responsibility of certain organs

[4]A better description of the "functions" of Constitution would be this one: the judicial function of Constitution is to establish judicial limits to the political power and, therefore, to legitimate the politics. The political function of Constitution is to effect the legal possibilities presents in the Constitution and, therefore, to legitimate the law.

[5] Kelsen is a very subtle author. He never states that a Constitutional Court does not have some political matter. It does not deal with a naive positivism here, as it is described many times. But he states that even having an undeniable political aspect, such Court still carries out a clearly judicial function, as we will see.

[6]This is the background of all question, viz, related to a guarantee of Constitution and not to a creation of Constitution. Anyway, Kelsen recognizes an unavoidable moment of creation in the act of interpretation, as we will see.

under accusation" (KELSEN, 2003, p.248).

Anyway it is relevant how Kelsen sees the question as a jurisdiction's problem and again, by structuring the problem, he already solves it. By the way, under rare exceptions, this is the general tone of the text. Its importance, as we are trying to show goes beyond a Schmitt's critic. The debate between these two authors gets relevancy and contemporaneity in so far as they deal with the central question in the discussion about the meaning and the possibility of approach constitutionality control, besides they try to situate its place.

In order to oppose to Schmitt´s vision of which a court that held the constitutionality control does not have a judicial function, this is the centre of the debate here, Kelsen estates to be a secondary question " if such organ is supposed to be a court and if its function really constitutional" (KELSEN, 2003, p.248). This would not affect a decision to confide

> "the alleged function to a collective organ whose elected members hold their total independence, some independence in relation to government and parliament named judicial, for in the modern Constitutions usually are conceded to courts (that is, not only these ones)" (KELSEN, 2003, p.248).

We may notice again that Kelsen delineates the problem under a judicial way. Whether the members in a court must be independent in relation to government and parliament, therefore, it is a judicial place. Kelsen tries to read all the aspects of these questions by drifting them into the judicial space and signalising a judicial activity.

It is typical the approach of this question for the critic to Schmitt's book. Schmitt's purpose may be "to show that the decision about constitutionality of laws and the annulment of unconstitutional laws by a organ of independent men, under litigious process, is not constitutional" (KELSEN, 2003, p.250). What is important here is the given description. What we want to emphasize is why Kelsen believes that this activity deals with a decision about the constitutionality or not of laws and their annulment, if that was the case. Why not to describe such activity as a decision about validity or non-validity of laws, not for an alleged comparison with the Constitution, therefore, not for having been based on an alleged unconstitutionality, but exactly by a decision that creates the Constitution by stating what it is based on the discussion in such "organ

of independent men"? This is named legislation. If the description of the process was this one, like we believe in this regard, neither Kelsen´s vision nor Schmitt's one would be proper to understand what really occurs.

One of the most revealing moment of this debate comes out when the discussion about the relation between law and politics or, even more exactly, about the relation between judicial function and political function. To Kelsen, Schmitt begins from

> "wrong presupposition of which among judicial functions and political ones exist an essential contradiction and that specifically a decision about constitutionality of laws and the annulment of unconstitutional laws are political acts where it is supposed that such activity is not judicial any more" (KELSEN, 2003, p.250).

This is a central theme, that is, a separation between law and politics and it keeps constantly litigious in this debate.

Kelsen believes that Schmitt´s position is that politics refers to an exercise of power and right in contraposition to a pure exercise of right. But this is not the truth for Kelsen "because it presupposed that the exercise of power is closed inside the legislative process" (KELSEN, 2003, p.251). Kelsen starts a description of right by involving a strong political element. The surprising point in this description is the dissolution, by Kelsen's part, of a clear line that divided right and politics, which shows a great perspicacity. For him, there is a decisive element in the whole judicial sentence, therefore, an exercise of power. The question, maybe the main one of the whole discussion, is where to draw a line that separates legislation and jurisdiction. The mistake, for Kelsen, of stating that only the legislation may be political is linked directly to another one that states that "just the legislation is a productive creation of right and jurisdiction, however, a mere reproductive application" (KELSEN, 2003, p.251). This is, then, the central point of the question. It is not the first time that Kelsen touches this subject and it is interesting to notice how he presents an acuity about the creative character of jurisdiction that differs from the traditional vision about his work. What Kelsen emphasizes is, therefore, the creative and productive role of jurisdiction. Again, we can state that practically the whole base of argumentation against Schmitt is based on such idea. What will keep on with the discussion up to the end of the text is the development of several aspects of this point.

As the judge has authorization to assess different interests and

decide for one of them, Kelsen states that this reveals the political character of the judicial function. It is possible to notice that Kelsen names as political, in this point, such possibility of creation, of innovation over something not given yet. Law provides a parameter[7], but a judge has some certain right to decide. It is this certain space of freedom that Kelsen names political aspect of right. It is not by chance that Kelsen refers to the notion of "decision", which is central in Schmitt. This is not the place to make some appreciation about what Kelsen supposes to be the correct meaning of its use in Schmitt. But it must be emphasized something very relevant to this discussion. Schmitt really gives to decision a central role in his thought. Although it is not easy to establish a unique structure about the idea of decision in all his works, it is not difficult to realize the accuracy of designating a great phase of his thought like decisionistic[8]. And it is not difficult to realize either how this capacity of decision, in Schmitt, expresses what is really political and it links, in the concrete case of analysis of Weimar situation, to the President of Reich. Thereby, the decision specifically judicial for Schmitt is not the best place for decisionism. Schmitt has, indeed, a quite static vision of judicial decision in his decisionistic phase. Kelsen is right by noticing this fact in the discussion about the Guardian of the Constitution and how this appears in the attempt to establish a limit between jurisdiction and legislation. Kelsen is also right by noticing that the choice of the President as a Guardian of the Constitution reflects directly to this question.

The way that Kelsen gives to this limit is described as a matter of quantity: "there is just a quantitative difference, not qualitative, between the political character of legislation and the jurisdiction one" (KELSEN, 2003, p.251). For Kelsen, the amount is the one that solves the enigma of relation between law and politics. It is surprising that the following passage is thought as a traditional vision of Kelsen. In a discussion about international law, the qualitative difference between right and politics seems clearly:

> "every judicial conflict is indeed a conflict of interests or power and, therefore, every judicial controversy is a political one and every conflict of interests, about power or politics may be decided as a judicial controversy as long as it is incorporated by the question about if the pretension which a State aims in relation to another one which refuses to satisfy it – the conflict consists in it – is based

[7] A "frame", which is the term he uses in his Pure Theory of Right.

[8] See mainly his Political Theology: four chapters on the concept of sovereignty.

on the international law or not" (KELSEN, 2003, p.252).

Kelsen recognizes that a judicial conflict is a conflict of interests or power. But he steps forwards and designates it as political. We are not interested in inspecting how far he is from a correct Schmitt's interpretation. What matters is that Kelsen realizes a constitutive element of conflict in the whole judicial question. The problem of the impossibility of solution conflict in the judicial way, therefore, does not due to its political character, but to the refusal to accept the solution, in this regard, for a decision based on international law.

Kelsen states that "a conflict is not 'non-arbitrable' or political because, due to its nature, it cannot be a judicial conflict and, therefore, be judged by a court, but indeed because one of the parts or both do not intend to allow that it is solved by an objective organ" (KELSEN, 2003, p.252). Kelsen links political and non-arbitrable to the fact that a conflict may not be submitted to a third organ which is able to judge it, due to unwilling parts. The idea is that it is possible to establish a judicial court as long as its competence is accepted to judge the conflict. Again, there would not be an absolute contraposition between politics and jurisdiction, therefore, political questions could be a jurisdiction object.

Kelsen concludes that it is possible to recognize the political character in a constitutional court and even recognize that it exists in a high degree than other courts. According to Kelsen, "never have the institution defenders of a constitutional court ignored or denied the eminently political meaning of the sentences" (KELSEN, 2003, p.253). In any case, this does not prevent from recognizing that it refers indeed to a court and its function is a judicial one.

Kelsen draws attention to the fact that there is always creation by applying the law. Applying the law is to interpret it, what necessarily implies an act of creation. That´s the reason why "judicial functions" and "political functions" are not completely opposed, but they can be spotted at the extreme of same axis. Thus, the decision about the constitutionality of law and its possible annulment are both a political act and a judicial one. Consequently, a court with such function could be understood as a judicial court with an evident political role and bigger than any other one. Linked to it, Kelsen also criticizes a hard separation between legislation and jurisdiction. By considering that every jurisdiction has an evident creative role, so the jurisdiction is a continuation of legislation. In his words, there is "productive creation of law" both in the legislation and in the jurisdiction. The last one would not be only

"mere reproductive application". As he estates, the difference between the political character of legislation and jurisdiction is only quantitative. There is not an absolute qualitative difference. From it, Kelsen concludes that every judicial conflict is a conflict of power and interests and, therefore, every political conflict is a judicial conflict, Kelsen defends, thus, the existence of a constitutional court whose function is to control the constitutionality of law and administrative acts, it is, then, a judicial court with an evident judicial function. This is the main axis from which he criticises Schmitt.

It also realizes that he, indeed, defines what is judicial by the criterion of independence of this organ in relation to other powers. Whether the members of such court must be independent in relation to government and parliament, he would be then a judicial place. Kelsen tries to read all the aspects of this question as pointing out the judicial ambit and signalizing a judicial activity. What should be remembered is that we could have an independent organ, but not necessarily with judicial function. Why not considering an independent organ as having legislative activity? This formal aspect of Kelsen definition for what is "judicial" has as consequence involve any organ that exists by the side of other powers and that it were independent. In fact, it is not by chance that such definition ends up diluting the separation between legislation and jurisdiction. Therefore, as opposed to Kelsen´s statement it is essential the determination of the function of organ that lies such position. It is necessary the distinctiveness and, thus, a criterion that separates the legislative and judicial functions.

Although he is very sensitive to political question, Kelsen is able to state that "the fundamental advantage of a constitutional court is, since the beginning, that it not takes part in the exercise of power, and it does not put contrarily to parliament or to government" (KELSEN, 2003, p.276). It is impossible to find a greater idealization of this court: the power that has not power. Or even when Kelsen compares the independence that Schmitt believes the Head of Estate has, due to elections, with that one of a carrier judge. Whether Schmitt insists on seeing a neutrality fictional in a decisionist-arbitrary President of Reich, Kelsen, on his turn, insists on seeing a neutrality fictional in a bureaucratic-judge. In his words, it is evident "the fact that the judge urges to neutrality because of his professional ethics" (KELSEN, 2003, p.284). At this point, it realises the maximum idealization again, since the place of a Constitutional Court is a political one par excellence, for it is the point of the beginning. Any bureaucratic-judge who takes up this place will

act necessarily without neutrality, because neutrality is impossible here. The bureaucratic-judge will be urged to politics and not to neutrality. The outcome will not be, therefore, a neutral judge, but a bureaucratic one acting politically, pretending to be neutral and technical. Therefore, the one who really decides and, at the same time, takes the decision in alleged technical parameters. That was, including, one of the greatest threatens to democracy according to Max Weber[9].

There is, therefore, a clear activity of legislation here. A court, in this place, acts as a co-legislator or a secondary legislator or even as "negative legislator", as Kelsen intends. No matter the appellation, since it always shows a clearly legislative activity here. This means that there is effectively a division of power. It does not deal with "a power without power". There is no reason to treat this question as judicial one. The correct understanding of the problem just starts when the judicial approach is left.

This is exactly what Kelsen denies by stating that "the question must not be put like a conceptual problem of jurisdiction, but as a problem about the best configuration of this function, being necessary to separate both problems" (KELSEN, 2003, p.262). Kelsen´s solution is "to restrict the power of courts and then the political content of its function" is "to limit as much as possible the border of arbitrariness that the laws allow to the utilization that power" (KELSEN, 2003, p.262). Kelsen´s solution is, thus, to demand a greater clarity of the terms, something that he himself has already criticized in his *Pure Theory of Law*[10]. Kelsen clearly describes the central problem about Constitutional Court: "there is some danger in a transference of power – no foreseen by Constitution and highly inconvenient – from Parliament to an outside organ" (KELSEN, 2003, p.263), and he completes the phrase citing himself, "which can become the exponent of political forces totally different from those ones that express themselves in the Parliament" (KELSEN, 2003, p.263). We may criticise Kelsen in several aspects, except that he did not have absolute clarity about what was really at stake.

What Kelsen has realized, and describes as "danger" and something "inconvenient", is nothing more than the only possible function for a Constitutional Court, the only possibility of understanding about what really occurs, i.e., the transference of some power to an external parliament organ. In this sense, a "court" with such function, like we in-

[9]See his The Profession and Vocation of Politics, p.330-331.

[10] See the chapter VIII, The Interpretation.

tend to show, is not "constitutional", but a court of countermajoritarian legislative decision. That is the secret around this discussion, falsely put as "Constitutional Court" or "constitutional jurisdiction".

It is not by chance that Kelsen suggests that a Constitutional Court acts like a "negative legislator" (KELSEN, 2003, p.263). Again, despite negative, it deals with a legislator. This is the core of the question. Because of this, the problem is not a judicial one, but a legislative one. Because of this, it does not deal with the problem of a "Constitution Guardian", for who takes up the place from the beginning cannot judge something, but stating from which parameter will be judged. Who takes up the place from the beginning cannot "keep" the Constitution, but it must say what the Constitution is first of all. Dealing with the problem as it was a judicial one is avoiding the question from the beginning and creating the myth of neutrality.

When the illusion of a Constitutional Court is left is clear the question of legitimacy. It does not deal with understanding the legitimacy of a court that, for being exactly a Constitutional Court, has the power of verifying the constitutionality of voted laws by Parliament. Now it deals with the question of how coming up with the function of a court that plays like a "negative legislator", its "legitimacy" is guaranteed by situating in the judicial ambit. This court would guarantee the correction of laws in relation to Constitution. This is what Kelsen defends. However, whether this sort of court can just be legislative, which is its legitimacy in a democracy? Which is its legitimacy since it remained for it just a legislative role, therefore, redundant in relation to parliament, when it is not in clear opposition and rivalry with it?

The only possibility of legitimation of a court in a democracy is the role of an organ that decides in a countermajoritarian legislative way. The legitimacy of such court just can stand on the role of minority defenders. The existence of such court in a democracy account for, therefore, an organ able to take a countermajoritarian decision, which would differ with the decision that comes from parliament. This is the classical problem of searching for an institution that represents the minorities in a parliament and guarantees their expression. Obviously it deal with a vision of democracy like that political form that guarantees the possibility of expression in the more several interests and values of groups that belong such form. It deals with a vision of democracy worried about the diversity, a vision of democracy that sees diversity as a value. Regardless, the question about the reason of a court having as members career judges remains: Why should they be exactly judges and how should the

members of a court be chosen?

Kelsen touches the problem of democracy when he discuss Schimitt´s critics about Constitutional Court, since it would be contrary to democratic principle. Kelsen realizes that what Schmitt understands as "democratic" is a "parliamentary plebiscitary democracy in the XX Century" (KELSEN, 2003, p.291). Moreover, Kelsen states that "the democratic character of a constitutional court, not different from that one of a head of State, would only dependent on the way of its appointment and its judicial position" (KELSEN, 2003, p.291). He identifies, therefore, through the way of nomination, the criterion of democratic characterization in such court, beyond its judicial position. Because of this, he concludes that: "in case of giving a democratic configuration to it, nothing avoid us to elect it by people, like a head of Estate, and to give to its members as little as to a head of estate the position of career staff" (KELSEN, 2003, p.291). He even admits the possibility of members from such court are elected by people or by parliament, similar to the case of the austrian Constitutional Court. It was also clear that the way of appointment affects directly the character of a court member. He knows that if they were voted either by people or by Parliament, there would not be what Schmitt ironically denominates "aristocracy of toga". Because of all that, it realizes that Kelsen was completely conscious about the specific problem of democratic character of such court.

It draws attention the fact that Kelsen, soon after considering the possibility of a popular election of the members for a constitutional court, states that "even if the question remains about such way of creating and qualifying the organ would be more convenient considering its function" (KELSEN, 2003, p.291). But that´s exact the question! What is the function of this court? If the function is specifically a judicial one, the prevention of Kelsen really corresponds. Nonetheless, if the function of this court is not a judicial one, but legislative, the problem reappear with great clarity and as a central question. As we have said, if the function of this court is considered not only legislative, but also countermajoritarian (otherwise, why such rivalry with the parliament?), what would not make sense were an election of the members of such organ by people. If this is evident, what remains as a problem would be the most proper way, for a court that decides in a countermajoritarian way by choosing its members.

As we stated in the beginning, this text by Kelsen is a set of arguments, not always united, about Schmitt´s text. There are many observations about several aspects of the questions of the Guardian of the

Constitution. We have not been interested in all the discussion raised by Kelsen. We wanted to emphasize only one of the questions axis. This point is exactly the determination of the function of an organ that occupies the place described by Kelsen and Schmitt as the one for the Guardian of the Constitution. We tried to show how an activity of such organ, which declares and suspends certain laws as "unconstitutional" ones, has consequently a result that is clearly legislative. In fact, it deals with determining which law exists and which one is valid. Even it deals with a "negative" legislation, like Kelsen noticed, even so it is indeed a legislation. We also show how Kelsen, from the first line up to the last one, tries to deny any non-judicial character that intends for the activity of this organ. What pushes him, therefore, to see a court as a Constitutional Court. The result is a virtually complete misunderstanding of the referred question here. "Virtually complete" one because it deal with Kelsen. He clearly realizes the problems of his argument and expresses it in the statement of continuity between law and politics or between legislation and jurisdiction. That is the reason for the enlightening expression "negative legislator" to this organ.

Kelsen wants to criticize Schmitt´s position that makes the president of the Reich as the Guardian of the Constitution. What Kelsen accomplishes is to describe the organ that, in fact, annuls laws by declaring them unconstitutional, like a Constitutional Court. Although there is a clear legislative activity, he insists, since the beginning, to see some essentially judicial character in its function. Because of this, the idea of neutrality for Kelsen deals with a court that "understands" the Constitution and then it can "judge" the adequacy of the general law to the Constitution. Its neutrality lies in the fact that it is able to judge because it is, in relation to Constitution, above other powers. So, Kelsen´s insistence on stating that this power does not have power.

What we have intended to show was how the idea of neutrality associated with that place is fragile. This only can occur by the characterization of the activity of such organ as judicial. When it comes to the conclusion that this activity is essentially legislative, the neutrality disappears. This organ carries out, then, a legislative activity, for it occupies the place of the determination of the existence of laws. Therefore, it is not a neutral place. Approaching neutrality here, like Kelsen does and in a different way, Schmitt as well, it is just to create a myth. The place of the determination of the existence of laws is the place of the beginning. The place of which is judicial, the place of a judicial activity, must always be a secondary moment concerning with legislation. But if it is legislative,

it cannot be neutral. It is the myth of neutrality which allows the mistake of designating such debate as "the Guardian of Constitution" and describes such organ as a "Constitutional Court" that, therefore, makes the "control of constitutionality". What such organ makes, in fact, is to legislate, even negatively. Since it is constituted by a small group, the result is a legislative countermajoritarian activity. The place of such organ in a democracy considered as some legislative space is still to be established. Moreover, it deals with a *sui generis* legislative activity, for it is ruled by judicial arguments and accomplished, in general, by judges in charge, under strong political pressure. This is what drives several authors to treat such organ as running judicially. This is the mistake that stimulates the myth of neutrality. Leaving such myth allows us to start a discussion about its real role and its place in a democracy.

References

KELSEN, H. "Quem deve ser o Guardião da Constituição?". In: *Jurisdição Constitucional*. São Paulo: Martins Fontes, 2003, p.237-298.

KELSEN, H. *Pure theory of Law*. Berkeley: University of California Press, 1967.

SCHMITT, C. *La defensa de la Constitución*. Barcelona: Editorial Labor, 1931.

SCHMITT, C. *Political Theology: four chapters on the concept of sovereignty*. Chicago: The University of Chicago Press, 1985.

WEBER, M. "The Profession and Vocation of Politics". In: *Political Writings*. Cambridge: Cambridge University Press, 1994, p.309-369.

Judgment and justice: an Arendtian vision

Christina Miranda Ribas

Abstract: Starting with Hannah Arendt's account of the main legal problems of Adolf Eichmann's trial in Jerusalem, the question of justice is discussed on the basis of the tension between the human capacity of judging and the evidence of destruction of the traditional patterns of judgment caused by totalitarianism that points to the relationship between thinking and judging, we try to ponder on the question of justice in view of contemporary conditions, in an attempt to understand it under the theoretical perspective of Hannah Arendt, guided by the Arendtian conception of understanding as a producer of meaning - rooted in the life process - which allows for the reconciliation with human reasons and passions.

Keywords : Hannah Arendt, Justice, Judgment

1. It might be possible to say about justice what Arendt says about freedom: to raise the question "what is justice" seems to be "a hopeless enterprise. It is as though age-old contradictions and antinomies were lying in wait to force the mind into dilemmas of logical impossibility..." (ARENDT, 1993, p. 143).

Such a question can only be asked when traditional answers are no longer valid. According to Arendt, the traditional categories of thought have been gradually losing ground in experience; thought, detached from experience, has either been limited to repeating old truths, or has become deprived of meaning, which "…so sadly evaporated from the very key words of political language – such as freedom and justice, authority and reason, responsibility and virtue, power and glory – leaving behind empty shells with which to settle almost all accounts, regardless of their underlying phenomenal reality" (ARENDT, 1993, p.15).

Hannah Arendt asked many questions during her lifetime. She focused on fundamental political issues, such as freedom, authority, power, totalitarianism, violence and revolution. She explored the exis-

tential conditions of human life and the mysterious universe of the life of the mind, but she never tackled, not even superficially, the question of justice. Nevertheless, I think that a reflection on justice, within the domains of her thought, is possible and relevant. We can thus follow the pathways of her mind, and go through the doors her thought opens up for us.

Arendt thinks that the appearance of totalitarianism tore apart the already fragile tissue of Occidental thinking (ARENDT, 1993, p. 14), and she considers Eichmann's trial a sort of dramatic testimony of this rupture. In fact, not even totalitarian domination can be understood by means of the categories of conventional political thinking, nor can its crimes be judged "by traditional moral standards or punished within the legal framework of our civilization…" (p. 54).

I decided to focus on the theme of justice as it is presented in Arendt's account of Eichmann's trial, which, in her opinion, treats "… with nothing but the extent to which the court in Jerusalem succeeded in fulfilling the demands of justice". (ARENDT, 1994, p. 298).

2. Fifty years ago, the New Yorker published a series of reports written by Hannah Arendt about the trial of the SS troops Lieutenant Colonel Adolf Eichmann, arrested in Argentina in the beginning of the sixties and sentenced in Jerusalem for war crimes, crimes against humanity and crimes against the Jewish people, considered co-responsible for the Holocaust. Those reports originated the book *Eichmann in Jerusalem: a report on the banality of evil*, a work that has generated, since then, much controversy.

From a legal point of view, Eichmann's trial brought up several questions, such as , the problem of judging a new crime, genocide. Arendt insisted on the originality of genocide, trying to distinguish it from legal discrimination, from large scale expulsion and from the massacre of whole peoples, which were not without precedent, on the contrary. (ARENDT, 1994, p. 267-8). But that kind of administrative massacre was something never seen before, a crime perpetrated within and through the bureaucratic state machine. Recognizing the newness of genocide was a problem and, from a legal point of view, a problem of great magnitude, because it meant violating the principle *nullum crime, nulla poena sine lege praevia*, which is central to the Modern State.

The Court of Jerusalem faced this deadlock situation, that had already shown up at the Nuremberg Trials. Both the Convention on the Prevention and Punishment of the Crime of Genocide and the Israelite Law of 1950, which were related to the punishment of the Nazis and

their collaborators and were the basis for Eichmann's accusation, were posterior to his acts. From this point of view, neither Eichmann nor any other Nazi criminal could have been judged.

In order to overcome this problem, the Court in Jerusalem treated genocide as if it were no more than homicide in a large scale, a reasonably satisfactory solution in the legal perspective. Arendt, however, insists on saying that genocide and homicide are different crimes. Genocide is, in her opinion, a crime against humanity, "…an attack upon human diversity as such, that is, upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning". (ARENDT, 1994, p. 268-269).

Thus, the Court in Jerusalem failed, not being able to give a valid definition to the crime of genocide, when seen as an attack against the plurality and the diversity proper to human condition. Arendt attributed this failure to the fact that the judges had refused to act outside the established legal frameworks, never facing the challenge of the unprecedented. While holding on to a shredded tradition, they ended up by disclosing the incapability of the theory of Law to give a solution to the problems Eichmann's judgment had evinced.

Judging Eichmann also demanded to confront a paradoxical "legal crime", a crime, as Ferraz Jr emphasizes, "committed within the boundaries of lawfulness of a sovereign state that is recognized by others states.". (FERRAZ JUNIOR, 1983, p. 10). The Nuremberg Laws of 1935, that legalized the discrimination of the Jewish minority as practiced since the beginning of the Nazi period, were generally recognized as part of the German Law, even on an international level, although they violated constitutionally guaranteed liberties and rights. Later on, the order from Hitler to exterminate the Jews was treated not as an order, but as a law, having been preceded by a series of measures, among which the most serious one, according to Arendt, was the one that made Jews stateless. Those measures became the foundation for the ones implanted in other countries to which the Final Solution was extended; the stateless persons were almost always the first ones to be slaughtered.

The words of the Führer became the law of the land in Germany, a fact attested by several jurists. This character of legality of the judicial order in Nazi Germany was mentioned by Eichmann during the trial. Hannah Arendt highlights the fact that Eichmann stated he had fulfilled his duty, not only by obeying orders, but also by obeying the law. Eichmann unsuccessfully tried to explain, she says, that during the Third Reich, "the Führer's words had the force of law." (p. 148).

To Hannah Arendt, the Court, by disregarding Eichmann's insistence to define himself as a law-abiding citizen, failed to understand this fundamental characteristic of the genocide it judged, a sort of crime that could only be committed "under a criminal *law* and by a criminal *state"* (p. 262).

The difficulties the judges faced might be attributed to the fact that they were "too conscious of the very foundations of their professions" (ARENDT, 1994, p. 26). They were utterly convinced that they should not act as legislators and, consequently, were unprepared to judge in the absence of the general rule to which the concrete case should be subsumed.

Hence, the dilemma of the judges in Jerusalem: Eichmann had committed a crime that did not exist as such. That is the fundamental question that Hannah Arendt's account of the Eichmann trial highlights, which, to her, appears in terms of an inadequacy of the legal system to judge this type of "legal crime". That is why Eichmann's case caused an enormous perplexity, which ultimately presented a dilemmatic nature. Admitting such inadequacy would mean the explicit rupture with the very assumptions of the dominating Theory of Law in the contemporary world. Denying it, in an attempt to make use of the established conceptual framework, would lead to a paradoxical result.

To Arendt, it was not too difficult to notice, in the post-war trials, that "... the judges in all these trials really passed judgment solely on the basis of monstrous deeds. In other words, they judged freely, as it were, and did not really lean on the standards and legal precedents with which they more or less convincingly sought to justify their decisions" (p. 294).

As a consequence, established legal principles were put aside, because their application would offend "the most elementary sense of justice" (p. 290). Framing the question in these terms leads to a rethinking of the problem. It is not only a question of judging without the help of the specific general rule. A demand for justice appears on the horizon, with all the enormous perplexities that accompany it. And it is brought by Hannah Arendt, to whom "... the purpose of a trial is to render justice, and nothing else..." (p. 253).

3. In Arendt's thought, the problem of justice will be directed to the subject that judges and to the faculty of judging. To her, "justice is (...) a matter of judgment" (p. 296). Eichmann's trial imposed on the judges the task of judging without subsuming the case to pre-established rules; it was a trial that demanded the exercise of the faculty

of judging the way Arendt conceived it, based on the Kantian aesthetic reflective judgment. Judgment, to Arendt, is one of the three specific faculties of contemplative life, side by side with thinking and will. It is a mysterious gift, "the mysterious endowment of the mind by which the general, always a mental construction, and the particular, always given to sense experience, are brought together..." (ARENDT, 1978, p. 69). Curiously, judgment remained somewhat mysterious in her thought, since the third part of the work on contemplative life - which would precisely deal with the faculty of judging - was never written. The trilogy was time oriented. Whereas thinking moves about in the ever elusive present, and will turns to the future, judgment is the faculty of the human spirit that deals with the past.

Arendt's central idea is that "judgments are not arrived at by either deduction or induction; in short, they have nothing in common with logical operations." (ARENDT, 1978, p. 215). Judgment is a kind of talent that enables human beings to deal with the particulars that appear in the world, in opposition to thought, whose basic tendency is generalization. Only that which appears can be apprehended by human senses and acquire some internal coherence, which gives it meaning. Therefore, despite the fact that thought derives from experience, the latter only acquires meaning and sense when it is thought (ARENDT, 1978, p. 87). To Arendt, plurality is one of the basic existential conditions of human life on earth; human beings reveal themselves through action and discourse, which create a web of relations, making up the stage that is perceived as it appears to them. That which appears to a human being is that which he/she can judge, but as he/she is not alone in the world, what appears to him/her has its reality guaranteed by the fact that it appears, although from other points of view, also to the others. In politics, being and appearance coincide. (ARENDT, 1990, p. 98; ARENDT, 1958, p. 199).

One learns to judge by experience; judgment is liberated by the enlarged mentality and the more perspectives it takes into account the more valid it will be. Its criterion is communicability: judgment appeals to the common sense existing in every human being. In order to judge without the support of the general rule, one is expected to think for him/herself and, at the same time, put him/herself in other people's place, taking into account their points of view - not the real, but the possible ones. Hence, the requirement of impartial judgment on the part of the spectator, that is, the withdrawal of immediate interests, which allows for an overview of the whole scene. Although not part of the spectacle, the spectator is involved with other spectators that have to be taken into

account. "Spectators exist only in the plural" (ARENDT, 1982, p. 63), living in a world of universal interdependence. Judgment is in everyone's reach (ARENDT, 1982, p. 28) and manifests itself in terms of common sense, a sense "that fits us into a community" (ARENDT, 1982, p. 70). The specific validity of judgment lies in the potential agreement of the others with whom the judicatory ego communicates in advance. Judgment relies on common sense and unveils to us a world as a common world. The faculty of judging is the most political of the faculties of the human mind (ARENDT, 1993, p.220-1).

It is because the world is common to all of us - although it appears to each one of us from our own perspective - that we can affirm its reality (ARENDT, 1978, p. 50). Hence the political importance of the common sense, as man's proper sense to deal with reality, a sixth sense that, as it guarantees "that it is the same object that I see, touch, taste, smell and hear". (ARENDT, 1978, p. 50), adjusts our five senses and the data they perceive to a common world. What guarantees the reality of a world of appearances is intersubjectivity (lo. cit.)

So, judgment is "one of the fundamental abilities of man as a political being insofar as it enables him to orient himself in the public realm" (ARENDT, 1993, p. 221). To Arendt, "wherever people judge the things of the world that are common to them, there is more implied in their judgments than these things. By his manner of judging, the person discloses to an extent also himself..." (ARENDT, 1993, p. 223). By judging, I share the world and, at the same time, even if involuntarily reveal my own identity.

Although it cannot resort to general rules, judgment can rely on examples. The example is a particular "...that in its very particularity reveals the generality that otherwise could not be defined". (ARENDT, 1982, p. 77). The particular that is transformed into an example appears in experience. Choosing the example correctly is a gift, "a peculiar talent which can be practiced only and cannot be taught" (Kant apud ARENDT, 1978, p. 215). This Kantian idea of the example as a support to judgment, which Hannah Arendt revisits, may allow us to understand why she lamented that Eichmann's trial could not become a valid precedent (ARENDT, 1994, p. 272-3). Although it could not be taken as a general rule, the trial might have acquired an exemplary validity, becoming a support for future judgments. This, however, did not happen.

Eichmann's case has shown that, in law, one is always involved with the question of justice, "… as distinguished from the concern with certain procedures which, important in its (their?) own right, can never

be permitted to overrule justice, the law's chief concern..." (ARENDT, 1994, p. 260). In a threshold situation it was not possible to deny it as a question or to bury it under the meanderings of technical discussions. To Arendt, the Court failed and "never rose to the challenge of (the?) unprecedented" (ARENDT, 1994, p. 263), refusing to look for new answers for the new problems it faced, using sanctioned procedures to preserve the illusion that the novel could be judged in accordance to the current categories of legal thinking (p. 135). Finally, it did not admit that it is necessary to do justice even when the law leaves us unprotected. (when the law forsakes us).

It seems to be clear why Arendt could state that justice was done in Jerusalem (ARENDT, 1978a, p. 261), while vehemently disapproving the sentence, for it prevented the justice of what had been done from emerging to be seen by all. More than just being done, justice must manifest itself in the world (p. 277). That is why Eichmann's trial left much to be desired; the question of justice did not get a response that could be displayed to the eyes of all and become meaningful for the world we all share.

Judgment is not, thus, a mere expression of the judge's idiosyncrasy and interests or of the interests of the class or group which he/she belongs to or represents. The validity of the judgment demands impartiality, which is provided by the enlarged mentality, in Kantian terms, and by the position of spectator, whose existential condition is detachment. The faculty of judgment is, to Arendt, the opposite of the subjective and emotional value judgment, which is valid only for the one who judges. It is also the opposite of those conceptions that, due to the impossibility of neutrality, are likely to assert that the judge must acknowledge his/her position in the world and judge from its perspective. Such conceptions, that appear in the legal theory under varied guises, state that, as decisions always - and inevitably - reflect values or ideologies, the judge must be part of the spectacle. To Arendt, however, although one cannot demand that the interest be uninterested (OV 78), one can demand that the judgment be impartial. Thinking and judging, as activities of the spirit, demand a peculiar quietness, "the withdrawal from involvement and from the partiality of immediate interests that in one way or another make me part of the real world..." (ARENDT, 1978, p. 92). When I think, I am two-in-one; when I judge, this dialogue amplifies itself and takes into account all the others.

Dealing with the question of justice demands the effort of "thinking without a bannister": in human affairs there are no universals. Justice

may appear in the world, liberated by the faculty of judging; it belongs to the political sphere, where only particular statements have relevance. "Justice (...) is a matter of judgment..." (ARENDT, 1994, p. 296). By judging, not only do we share the world (ARENDT, 1993, p. 276), but also become responsible for it.

References

ARENDT, Hannah. Between Past and Future. Reprint of the 1968 ed. published by The Viking Press, New York. New York: Penguin Books, 1993.

ARENDT, Hannah. Eichmann in Jerusalem: a report on the Banality of Evil. 4, ed. New York: Penguin Books, 1994.

FERRAZ JUNIOR, Tercio Sampaio. Apresentação. In: ARENDT, Hannah. Eichmann in Jerusalem: um relato sobre a banalidade do mal. São Paulo: Diagrama Texto, 1983.

ARENDT, Hannah. The Life of the Mind. New York: Harvest Book, 1978.

ARENDT, Hannah. On Revolution. 5, ed. London: Penguin Books, 1990.

ARENDT, Hannah. The Human Condition. Chicago: The University of Chicago Press, 1958.

ARENDT, Hannah. Lectures on Kant's Political Philosophy. Edited and with a Interpretive Essay by Ronald Beiner. Chicago: The University of Chicago Press,1982.

ARENDT, Hannah. The Jew as Pariah: jewish identity and politics in the modern age. Edited and with an introduction by Ron H. Feldman. New York: Grove Press, 1978a.

Citizenship and cordiality
Notes on the relationship between justice and friendship

Maria Cecília Pedreira de Almeida[1]

Abstract: It has become a cliché to say that Brazilians do not fully exercise their citizenship. The problems are well known: the difficulty of putting basic civil rights into practice, as well as violations or even simple ignorance of these rights. Within this framework, there remains the additional difficulty of access to justice, with a judiciary often oblivious to the social reality which cries out for its intervention. The unique history of the construction of citizenship in Brazil may be an important factor not only for research, but for helping to overcome these difficulties. To this end it may be useful to investigate an emblematic feature of Brazilian culture: cordiality, which, according to Sérgio Buarque de Holanda, characterizes the Brazilian people. This notion, which in general evokes benevolence and kindness, carries with it a pernicious component, which hinders the clear separation of public and private and maintains an affectivity that pervades social relations. Furthermore, it is interesting to note that cordiality differs from yet resembles true friendship, philia, which according to Aristotle, is essential to political society, "the greatest good of states." If it is true as Aristotle maintains that in every community there is some form of justice and friendship, then cordiality, this significant feature of Brazilian society, offers a rich topic of investigation, with regard to both its virtues and its harmful consequences for politics and law.

Keywords: citizenship; justice; friendship.

A lot of historians, sociologists and lawyers investigate the gap between state and citizen, why it goes often beyond mere negligence, and the fact that the state even threatens and violates certain rights of citizens. The examples are many. The lack of certain essential services such as health and education, poor living conditions, bad public transport, continuing insecurity and the constant violation of human rights

[1] Professor of PoliticalPhilosophyat Universidade de Brasília, UnB, Brazil. Researchsupportwasprovidedby the Fundação de Amparo à Pesquisa do Distrito Federal (FAP/DF).

by the State, perpetrated mainly against the poor population, leaves no doubt that despite all the legislation that provides for and protects all the people, the respect for these laws is still far from being a reality.

The unique history of the construction of citizenship in Brazil may be an important factor not only for research, but for helping to overcome these difficulties. To this end it may be useful to investigate an emblematic feature of Brazilian culture: cordiality, which, according to Sérgio Buarque de Holanda, characterizes the Brazilian people. This notion, which in general evokes benevolence and kindness, carries with it a pernicious component, which hinders the clear separation of public and private and maintains an affectivity that pervades social relations. Furthermore, it is interesting to note that cordiality differs from yet resembles true friendship, *philia*, which according to Aristotle, is essential to political society, "the greatest good of states". If it is true as Aristotle maintains that in every community there is some form of justice and friendship, then cordiality, this significant feature of Brazilian society, offers a rich topic of investigation, with regard to both its virtues and its harmful consequences for politics and law. The construction of citizenship in Brazil, this passive citizenship, is marked by cordiality. I will argue that this feature is harmful to democracy in so far as it moves away from the ideal of political friendship, *politiképhilia,* because it confuses the spheres of public and private and dramatically hinders effective political action. But I also will argue that cordiality has some features that can help us to think about some contemporary political problems, especially that of the citizenship on Brazil.

In general, much is written and said about what the state can or should do. In a democratic state, political power is governed by the law. It's the law that determines the action and omission of the State, as well as its reach. Brazil has a Constitution, which has the epithet "The Citizen Constitution", to remember that it was designed to serve the interests of the people. However, despite the plenitude of political rights, some uncertainty regarding the fulfillment of our democracy remains. For it is clear that, despite having formal democracy, institutions that should be democratic, as the National Congress, parties, trade unions and the judiciary do not work satisfactorily and that Brazilian democracy exists in form but not in practice.

Of course there are several reasons for these problems. My intention here is to discuss only one point that is not so much discussed: the historical formation of citizenship in Brazil and the relationship with the concept of "cordiality", coined by Sérgio Buarque de Holanda, in the

famous book *Roots of Brazil(Raízes do Brasil)*[2]. The author is well known for making a pessimistic interpretation about the cordiality and its consequences. This paper will try to do the opposite: to show that the cordiality can be approached and compared to another concept familiar to the political philosophy: the friendship, as proposed by Aristotle.

Sérgio Buarque de Holanda, in his seminal work, asserts that there is a lack of objectivity and impartiality in national institutions, since the end of colonization period. Even before the Empire time it is possible to see throughout history the predominance of particular wills interfering in political life. This is reflected in the public service and the holders of public positions of responsibility, who do not understand the fundamental distinction between public and private. This misunderstanding creates the "patrimonial servant", for which the management of public policy is just a way to achieve his particular interest. The frequent imposition of particular wills on the collective will is explained by the author on the strength of certain "circles closed and inaccessible to an impersonal relation."[3] The most important of these circles was undoubtedly the family. It is possible to establish contacts arising from blood ties, but also from the heart, and it provides the model for all social compositions, according to the author. It is this model that focuses on the domestic, private, and intimate, which the historian relates to the appearance of cordiality, said by some the "Brazilian contribution to civilization."[4]

Cordiality should not be confused with kindness, politeness or civility. Derived from the Latin word *color*, *cordis*, it indicates in a broad sense all that is related to the heart, to the soul, the intelligence or sensitivity. Therefore it refers to the sphere of the private realm, to the domain of sentiments. It is the hospitality, generosity, spontaneity of gestures that demonstrate affection and consideration, the predominant influence of rural and patriarchal over the urban citizen. To explain the concept of cordiality, borrowed from Ribeiro Couto, Sérgio Buarque insists that it resembles to good manners or politeness, but just the opposite. For politeness requires rituals and formulas that organize society and also defends individuals against it, as it preserves their sensitivity and emotions. This virtue of appearances, as some call it, can disguise hypocrisy and enmity, but it never ceases to be a trace of civilization.

---

[2]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 145.
[3]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 146.
[4]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 146.

Regarding cordiality just the opposite occurs: the Brazilian has some difficulty in meeting the social rituals that are not rigidly formal and personal or emotional, because it cannot distinguish or rationalize these spaces, the public and the private. In other words, the public is seen as an extension of the private, as the state is regarded as an extension of the family. More than one kind of individual, the cordiality is present in a larger or lesser extent, in all social actors in Brazil.

The cordial man needs and likes the social life, because he feels awe or fear "to live with himself."[5]Unlike the polished man, he does not seek to distance himself from society, but increasingly approaches towards it. The social sphere is what matters most, because the cordiality "is rather a living on others."[6] There is an unwillingness to express a prolonged reverence to a superior, because it would exclude the possibility of a more convivial and familial relationship. According Sérgio Buarque, for Brazilians reverence, which means respect for other people, implies "desire to establish intimacy".[7]The author gives convincing examples of cordiality, first in the field of linguistics and then in the observation of customs. He draws attention to our penchant to use diminutives: the suffix "inho" serves to familiarize ourselves more with people, make them more accessible to the senses and also bring them closer to the heart. Then he notes that the Brazilians are among the few people who omit the name of the family in social treatment: the Americans and Europeans call each other by surname; but in Brazil the rule is the first name, similar to the treatment of family member. For the author, this may be related to the desire to "abolish certain psychological barriers because there are different families and they are independent of each other."[8]

In this context, forms of social interaction are dictated by an ethic of emotional background. Cordiality would be a natural attitude to human groups who accept the discipline of "sympathy" or "concord", and seek to support all relationships in three species of communities: the community of blood, in which the proximity is through kinship; the neighborhood, in which the proximity is given by the place; or the relationship of friendship, in which the approach is through the spirit.

However, the assessment of the author about the cordiality is

[5]Holanda, Sérgio Buarque de. Raízes do Brasil, p. 147.
[6]Holanda, Sérgio Buarque de. Raízes do Brasil, p. 147.
[7]Holanda, Sérgio Buarque de. Raízes do Brasil, p. 148.
[8]Holanda, Sérgio Buarque de. Raízes do Brasil, p. 148.

not positive: "this aptitude for the social is far from being a considerable factor of a collective order."[9] The problem would lie precisely in the attachment to personality, feature present in domestic sphere. More importantly, such a fact would once more overlap on the collective will, which would result in a general indifference to the law every time this law went against emotional inclinations.

I do not ignore that the concept developed by Sérgio Buarque de Holanda may suffer severe criticisms, as indeed it suffered. However, it is indisputable that the problems faced in the exercise of citizenship may be linked, in part, to this neglect of public life. The supremacy of the private interests of a ruling class and the distance from the will of the "cordial mass", the denial of authority and the revulsion to hierarchies can be at the origins of the current disenchantment of politics. This explains why most of the reform movements in Brazil starts from the "top-down"[10]: they almost always came from a landed aristocracy or an intellectual elite and most of the population received the changes with indifference, stunned, astonished, without an utter comprehension of what was happening. All these factors make the author note that "democracy in Brazil has always been an unfortunate misunderstanding."[11]

The historian José Murilo de Carvalho somehow complements this analysis by stating that, opposite to what happened in England, where the evolution of citizenship rights was slow, gradual, and rather conquered by society, in Brazil, such rights were set differently and not with an active struggle of the population. They were seen as a concession, a benefit from the established power. In England, the rights emerged in sequence: first the civil rights, which are included equality before the law, freedom and property. Then political rights, such as the right to vote, to organize parties, to express and make claims of political nature, and finally, social rights, that only came about in the twentieth century. In this context, José Murilo glimpsed the "solidity of democratic sentiment and greater completeness of citizenship in the countries of Western Europe and the United States. Citizenship was a slow construction from the population itself, an experience: it became a solid collective value for which they thought it was worth living, fighting and even dying".[12]

In Brazil, the process was quite different. The first Brazilian Con-

[9]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 155.
[10]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 160.
[11]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 160.
[12] Carvalho, José Murilo de. "Brasileiro: cidadão?". In: *Pontos e Bordados*, p. 280.

stitution, the Imperial Constitution of 1824, granted, at once, most of the civil and political rights such as appeared in the liberal constitutions of several countries of the time. There were no demands or fights. Significantly, it is quite probable that Brazil is one of the few countries in the world in which the institution of social rights was made during a period of dictatorship, with the 1945 Constitution. Even if we leave these facts aside, the fact is that the formal institution of important rights, considered sacred, taken directly from the French Constitution of 1792 and the Declaration of the Rights of Man and of the Citizen of 1789, was born as a dead letter. It is enough to remember that the first Brazilian Constitution stated the "The inviolability of Civil Rights, Politicians and Citizens Brazilians, which is based on freedom, personal safety, and property", and yet, the prohibition of torture or cruel penalties. Here is the article:

> Article 179. The inviolability of Civil Rights, Politicians and Citizens Brazilians, which is based on freedom, personal safety, and property is guaranteed by the Constitution of the Empire, in the following manner.
> I. No citizen shall be obliged to do or refrain from doing anything, except by virtue of the Law.
> XIX. Already are abolished flogging, torture, branding iron hot, and all the more cruel penalties.
> [XXI. The jails will be safe, clean, well ventilated, with several houses for separation of defendants according to the circumstances and the nature of their crimes.
> [XXXII. Primary instruction, and free to all citizens. "[13]

13 Originally: "Art.179. A inviolabilidade dos Direitos Civis, e Politicos dos Cidadãos Brazileiros, que tem por base a liberdade, a segurança individual, e a propriedade, é garantida pela Constituição do Imperio, pela maneira seguinte.
I. Nenhum Cidadão póde ser obrigado a fazer, ou deixar de fazer alguma cousa, senão em virtude da Lei.
IV. Todos podem communicar os seus pensamentos, por palavras, escriptos, e publical-os pela Imprensa, sem dependencia de censura; com tanto que hajam de responder pelos abusos, que commetterem no exercicio deste Direito, nos casos, e pela fórma, que a Lei determinar.
V. Ninguempóde ser perseguido por motivo de Religião, uma vez que respeite a do Estado, e não offenda a Moral Publica.
VI. Qualquer póde conservar-se, ou sahir do Imperio, como Ihe convenha, levando comsigo os seus bens, guardados os Regulamentos policiaes, e salvo o prejuizo de terceiro.
VII. Todo o Cidadão tem em sua casa um asyloinviolavel. De noite não se poderá entrar

Despite all these rights and guarantees, it is very well known that until 1888 slavery still existed in Brazil, followed by all kinds of punishment. Torture was not a prerogative of slaves. Free population also suffered corporal punishment, as well as much of members of the army and navy[14], unfortunately facts still seen nowadays. The education system was not universal until few years ago and its quality is one of the poorest in the world.

In this sense, it is possible to argue that the singular history of the constitution of citizenship in Brazil may be seen as marked by cordiality: in one hand it interdicts the people to propose and to perform real changes through the law; on the other, it withdraws the conscience to demand the fulfillment of the law. The cordiality also has a significant effect because it produces the oblivion of the transforming political dimension of the vote. It happens to be simple demonstration of personal loyalty and for a long time it has not passed of consideration on account of some benefit - like a basic-needs groceries packages, a sum of money or even more prosaic things. The vote is no more than a personal relationship between the voter and the candidate, a private relationship, in the extent of it is up to each voter to forget the irresponsible or wrongdoings of the chosen representative - what happens most of the time - as if it was a relationship of friendship, in which a friend just "forgets" or "forgives" what one else did, without major consequences. This, of course, further weakens the democratic mechanisms for demonstrating the lack of representation of the interests of the people and flows into a deep disenchantment with institutional policy.[15]

---

nella, senão por seu consentimento, ou para o defender de incendio, ou inundação; e de dia só será franqueada a sua entrada nos casos, e pela maneira, que a Lei determinar.
VIII. Ninguem poderá ser preso sem culpa formada, excepto nos casos declarados na Lei; e nestes dentro de vinte e quatro horas contadas da entrada na prisão, sendo em Cidades, Villas, ou outras Povoações proximas aos logares da residencia do Juiz; e nos logares remotos dentro de um prazo razoavel, que a Lei marcará,attenta a extensão do territorio, o Juiz por uma Nota, por elle assignada, fará constar ao Réo o motivo da prisão, os nomes do seu accusador, e os das testermunhas, havendo-as.
XIX. Desde já ficam abolidos os açoites, a tortura, a marca de ferro quente, e todas as mais penas crueis.
XXI. As Cadêas serão seguras, limpas, o bem arejadas, havendo diversas casas para separação dos Réos, conforme suas circumstancias, e natureza dos seus crimes.
XXXII. A Instrucção primaria, e gratuita a todos os Cidadãos".

[14] Carvalho, José Murilo de. "Brasileiro : cidadão?". In: *Pontos e Bordados*, p. 281.

[15] Carvalho, José Murilo de. "Brasileiro : cidadão?". In: *Pontos e Bordados*, p. 282.

There is no doubt that cordiality is an emblematic feature of Brazilian culture and it helps to understand the cause of a lot of problems that lies in the political sphere. However, a deeper analysis of its philosophical status may be helpful to behold that it can also be a feature that contributes to the appreciation of the public realm. And it can be done if we think and approach cordiality to other notions that are equally meaningful to the political philosophy: that of politeness and that of friendship, as a political virtue. Sérgio Buarque de Holanda maintains a critic and pessimistic view towards cordiality. First, there is one opposition to politeness, which the author stresses as a negative point, because in some sense it also opposes to civility. But one can hold that if politeness accompanies humanism, and therefore it can save society of the wildest forms of behavior, it is also a varnish used to cover something. Politeness is also secret;it is contempt for truth and the shelter of hypocrisy.[16]

It is possible to see another dichotomy, one more among the many present in *Roots of Brazil*, this time between sociability and spontaneity, or between hypocrisy and authenticity, or yet between bad and good education. Admittedly politeness puts up barriers: it makes friendly relations not the place for spontaneity and diminishes the risk of indelicacy.[17]Although it is indispensable as a code of conduct, politeness is not sufficient to think of a way of conceiving the public sphere. We can always put the question if the praise of politeness as a virtue do not imply the renunciation of the greatest impoliteness, that is, to contest or reverse the established order. If cordiality is not an ideal, it seems that the mere politeness isn't either. In fact, if cordiality implies a "living on others", and the refusal of the hierarchy, it approaches of another relevant concept to political philosophy, friendship.

Friendship in the *polis* is an old topic. Concept known of the Greeks, they understood the *philia*, friendship, in a broader sense than it is understood today. The *philia* included any kind of affinity or emotional bond between all human beings: it exists in everyday relations and extends to relatives, acquaintances and fellow citizens.[18]

Philia is a broad term which covers different affections. The affection between friends is not the same as between parent and child, for

[16]Dhoquois, Régine. « Pequenas e grandes virtudes ». In: *A polidez.* Porto Alegre: LP&M, 1993, p. 8.

[17]Dhoquois, Régine. « Pequenas e grandes virtudes ». In: *A polidez.* Porto Alegre: LP&M, 1993, p.11.

[18] Wolff, F. L'ami paradoxal. Autrement. Série Morales, n. 17. Février 1995, p. 83.

example. However, they are all different kinds of bonding. The Greek *philia* is not only love, *eros*, or a kind of passion. The word *philia* can cover all the ties of affection, from the erotic to the family, including political allegiances, humanitarian sympathies and even love for inanimate things. But most of the time it means friendship. This translation is consecrated, and Aristotle and all the classic authors who followed him acknowledge that friendship between virtuous individuals is the accomplishment of that virtue at its highest level.[19]

Aristotle devotes in the two *Ethics* considerable space to this virtue, which is only possible between equals. For him, friends are "the greatest of external goods."[20] Because is something so important, friendship is essential to happiness: "the supremely happy man will need friends."[21]

In the Aristotelian classification, there are at least three kinds of friendship: friendship for utility, that is, when there is some interest involved in the relation; friendship for pleasure, which takes place when it offers some sort of pleasure to a party; and finally, friendship for benevolence, that is the most perfect form of friendship between men who are good and alike in virtue: "perfect friendship is the friendship of men who are good, and alike in virtue; for these wish well alike to each other qua good, and they are good themselves"[22].

Aristotle maintains that friendship is a "state of character"[23] but essential to political society, because it establishes the bonds that are necessary for every association. It is important yet because it involves some kind of equality. There must be is some kind of similarity which is the starting point for any friendship, even those based on utility. These are less truthful and less permanent, for as they are based on the exchange of interests between parties. But friendship is also a political virtue, essential to the community for it expels faction and approaches to other supreme virtue, justice.[24]

But more than friendship between individuals, we are here interested in political friendship. The *politikephilia* term "civic friendship"

[19]Pangle, Lorraine Smith.Aristotle and the philosophy of friendship, p. 2.

[20] Aristotle. Nichomachean Ethics. Kitchener: Batoche Books, 199, p. 157. (Hereafter cited as EN, followed with the page number and sometimes with the Bekker number).

[21]Aristotle, EN, p. 158 (1169 b 19).

[22]Aristotle, EN, p. 130 (1156 b 6).

[23]Aristotle, EN, p. 132 (1157 b 32).

[24]Aristotle, EN, p. 127 (1155 a 20).

or "political friendship", occurs repeatedly in *Ethics Eudemus*[25], more rarely in *Nicomachean Ethics* and occurs only once in the *Politics*[26]. Political friendship is the bond between citizens (*polítai*), a particular kind of friendship between comrades, also called *hetairiképhilia*, the "affection of comrades"[27], compared to *philia,* between brothers. According to Suzanne Stern-Gillet, the concept of political or civic friendship (*philiapolitike*) was used to describe the bond that connected all those who took part in affairs of the state and were are united in their loyalty to a party.[28]

Friendship plays an important role in ethical and political reflection. For Aristotle, there is a connection between friendship and justice, as he says in the *Nicomachean Ethics*: "When men are friends they do not need justice, while the men who are just also need the friendship; and it is considered that the truest form of justice is a kind of friendship."[29] He adds further that friendship also "seems to hold states together"[30]and declares "friendship as the greatest of goods for city-states."[31]

There are, therefore, moral and political benefits that come from virtuous friendship between men and between citizens. Perfect Friendship would be the highest level of political relations, even making justice unnecessary. This must explain why they are so rare. Real friendship among neighbors or comrades is exceptionally rare, and also is political friendship. This is because it demands a high degree of unanimity, concord or harmony between the parties involved.[32]

Concord is a state of harmony between those whose purposes and desires are for the same objects[33]. Now if *philia* occurs between similar individuals that seek for the same objects (*homonoia*), there wouldn't be reason for disputes in a so perfect world. That is why Aristotle says that in tyrannies friendship and justice "hardly exist", but in democracy "they exist more fully"[34]. Therefore the philosopher emphasizes the moral and political benefits of civic friendship: if we have friends, there's no need for justice.

---

[25] Aristotle, Eudemian Ethics, VII, 9-10.
[26]Aristotle, *Politics,* 1295 b 21-25.
[27]Aristotle, EN, p. 137 (1161 b 25-6).
[28]Stern-Gillet, Suzanne. Aristotle's philosophy of friendship, p. 148.
[29]Aristotle, EN, p. 127 (1155 a 25).
[30]Aristotle, EN, p. 127 (1155 a 22).
[31]Aristotle, Politics, 1262 b 7-8
[32]Aristotle, EN, p. 127 (1155 a 24-26 and 1167 a 22).
[33]Aristotle, EN, p. 153 (1167 a 25).
[34]Aristotle, EN, p. 140 (1161 b 10).

Concord, harmony, equality. It is around these ideals that the notion of political friendship is built. It is also around these ideals that the notion of cordiality is built. It is clear that there are a difference in the extension of these concepts: friendship, according to Aristotle, presupposes a homogeneous political body, similar to itself, with a calling for unity. Cordiality doesn't go that far. However, although on different levels, we can say that the refusal of hierarchy points out to an attempt to equalize those who are different. The central difference between the two concepts is that the highest level of friendship is on public sphere. On the other hand, cordiality presupposes the private world and rejects its separation with the collective life.

Moreover, "it in the nature of friendship the coexistence and the search of their own benefit and the benefit of another."[35] In other words, people become friends seeking for a common good. Friendship, community and justice are interrelated, integrate and complement themselves. Concord presupposes this association which there is a coincidence of aims and objects. It is possible to think, in some measure, that therein lies the problem with cordiality. From this one feature of the difficult construction of the notion of citizenship in Brazil it is possible to see that, somehow, there is not a clear coincidence of purposes, and the notion of common good itself is misunderstood. José Murilo de Carvalho draws attention to the lack of "the existence of a national identity, beyond the subjective rights, which is an indispensable ingredient of citizenship."[36] The distance between state and the citizen is so overwhelming that make it difficult to think or do an approach among them, and even less to conceive the coincidence of their purposes. As an example, it is worth to think about the recruitment of members or soldiers for the army in the late nineteenth century. The recruitment of officers in Brazil has changed throughout the last century, being close to a process of democratization, but the soldiers continued to be recruited among the "unemployed, bumps, criminals and rural workers who did not have the protection of land owners. The public sentiment was the general revulsion, if not fear, for military service. People ran to get hide in the bushes and forests when any news of the presence of recruiters. Most of the soldiers were obliged to do the military service, otherwise they were arrested. A de-

[35]Zanuzzi, Inara. "A amizade em Aristóteles: Política, III, 9 eÉtica Nicomaqueia, VIII". Doispontos, Curitiba, São Carlos, vol. 7, n. 2, p.11-28, outubro, 2010, p. 15.

[36] Carvalho, J.M. Cidadania : tipos e percursos. Estudos Históricos, Rio de Janeiro, n. 18, 1996.

cree of 1835 ordered exactly this: if there are no volunteers, conscription would be done and the recruit would be conducted arrested and kept safely until to conform to the situation."[37]

This state of things, since Empire did not change substantially. Just remember that for a major part of the underprivileged population, the only face of the State is the police, which always present itself in a violent manner, and in most cases, acting in a unfair way. In this sense, we cannot speak on common goals or common purposes, we cannot even think about a intimate and close relationship. Here the cordiality has no place.

I tried to argue that cordiality develops a paradoxical relationship with the concept of friendship: the first binds itself only to the private world, to the intimate and personal relations; the latter can be the highest virtue in a association, it is a political quality linked to the public sphere. Cordiality approaches of friendship in the extent that it welcomes and accepts, as one does to a family member or a real friend. In this sense, the essence of friendship consists in the discourse and dialogue among citizens who share a common world, within an association with common interests. Cordiality works at the opposite way: it also implies a dialogue, but it will occur in the private sphere. This is why it has been seen as a problem to the construction of citizenship and the development process of democracy in Brazil.

At the same time that separates the public and the private,cordiality also desperately seeks to unite them; when there are differences, it seeks to approximate and make it equal: this is also the essence of friendship. It is also worth noting a willingness and an openness to the new, to the different, something meaningful and important for democracy.[38]Thus, perhaps more than a negative feature, the Brazilian cordiality can be used to think about new forms of conceiving politics: it is not about transpose the Brazilian reality to the ideal of the Greek*polis* as conceived by Aristotle. However, the sense of community, the hospitality, appreciation for autonomy and independence, the importance that it gives to equality, they are all relevant attributes to the political framework.

References

[37] Carvalho, J.M. Cidadania : tipos e percursos. Estudos Históricos, Rio de Janeiro, n. 18, 1996.

[38]Holanda, Sérgio Buarque de. *Raízes do Brasil,* p. 184.

Aristotle, *Eudemian Ethics*. Cambridge: Cambridge University Press, 2012.

_____.*Nichomachean Ethics*. Transl.by David Ross.Kitchener: Batoche Books, 1999.

_____. *Politics.*Transl.by B. Jowett.Kitchener: Batoche Books, 1999.

Carvalho, José Murilo de. "Brasileiro : cidadão?". In: *Pontos e Bordados*. Escritos de história e política. Belo Horizonte: UFMG, 1998.

_____. "Cidadania : tipos e percursos". *Estudos Históricos,* Rio de Janeiro, n. 18, 1996.

Dhoquois, Régine. "Pequenas e grandes virtudes". In: *A polidez.* Porto Alegre: LP&M, 1993.

Holanda, Sérgio Buarque de. *Raízes do Brasil.* São Paulo: Cia das Letras, 2013.

Pangle, Lorraine Smith. *Aristotle and the philosophy of friendship*.Cambridge: Cambridge University Press, 2003.

Stern-Gillet, Suzanne. *Aristotle's philosophy of friendship.*Albany: State University of New York Press, 1995.

Wolff, F. *L'ami paradoxal*. *Autrement.* Série Morales, n. 17. Février 1995, p. 83.

Zanuzzi, Inara. "A amizade em Aristóteles: Política, III, 9 e ***Ética Nicomaqueia***, VIII". *Doispontos*, Curitiba, São Carlos, vol. 7, n. 2, p.11-28, outubro, 2010.

Blood for peace:
A case of study of law and violence

Karla Pinhel Ribeiro[1]

Abstract: The work seeks to share an experience of legal intervention in urban conflict experienced by the author as a lawyer in June 2010 in Brasilia, Distrito Federal. In Esplanada dos Ministerios, there was an Indian camp for more than six months in order to protest and claim rights on the grounds of a presidential decree in December 2009 that abolished many regional governments and indigenous posts in Brazil, leaving indigenous people from all around the country without schools, no clinics and no job because many were also FUNAI officials. The attempts of withdrawal these Indian by government were true war operations. Yet listed, besides the indigenous mobilization in Congress and persecution of the Federal Police, Civil Police, Military Police, National Force, and other federal courts. It's a bit of history of the Revolutionary Indigenous Camp and its important episodes we want to tell, so it becomes increasingly known this mark in Brazilian indigenous history. The case of study on display reasoning fits with my doctoral research in philosophy entitled "Law and Violence in Hannah Arendt and Walter Benjamin," where I analyze the theoretical positions of these authors, comparing the similarities and differences in their conceptions. So Hannah Arendt tends to distinguish the concepts of law and violence, while for Walter Benjamin, law and violence tend to identify.

Keywords: law, violence, indigenous people

The paper "Blood for peace: a case of study of law and violence" has this name because of the title of an article published in a newspaper of Brazil, Correio Brasiliense and republished and other media press and social networks.

The issue I am bringing with this text for discussion is the case of the rights of indigenous people, not only in Brazil but also place of international relations, their inclusion and exclusion in an exception relation like Giorgio Agamben understanding of *Homo sacer:* men with rights, it

[1] Universidade de São Paulo

is not a crime kill them.

Disposition

The disposition of the rights of indigenous people in Brazilian legislation, are in Constitution of 1988, Chapter VIII, Articles 231 and 232. Toward the international affairs, we have, for example, the Convention 169 of the International Work Organization.

Here an adaptation of the new with resume of the case:

"The menarche - first menstrual flow – of an indian of 12 years was the argument used by Karla Pinhel lawyer who defends the 300 Indians camped on the Esplanade of Ministries since January, to prevent the removal of the protesters from 22 ethnic groups and request removal of about 600 men of the Federal Police and Military and Special Operations Police (BOPE). Sensitive to tradition, which provides insulation girl for seven days in his oca, federal judge substitute at the 6 th District Federal Maria Cecilia Rocha overturned an injunction issued by itself, and granted an injunction for the group to remain in central Brasilia without police monitoring.

The indians, who set up camp on January 2, require the repeal of Presidential Decree 7.056/09, which restructures the National Indian Foundation (FUNAI). The decree, signed by President Luiz Inácio Lula da Silva, extinguishes 40 regional administrations, 337 poles and replacing old servers indigenous foundation. In total, the group said at least 15 administrations will be closed or restructured in several states. Among them, Paraíba, Pernambuco e Tocantins. Indigenous people are also asking for the left of the president of Funai, Márcio Meira. 800 more Indians, according to the protesters, are on their way to the Esplanade of Ministries to strengthen the demonstration.

The first period of the small Marcia Regina Santana, 12, was seen on Saturday for their families. According to the tradition of their ethnicity (Guajajara), the girl begins to menstruate should be hidden for a week. 'At this stage, she can only be fed on rice and fish and can not see anyone. Early Sunday morning, she will participate in a ritual that marks his passage from childhood to a more advanced stage (adult)', the father explained, Edvan Bento da Silva, 28 years. The ceremony which Marcia should be the protagonist will include a small race, from one end to another of the Esplanade (the Ministry of Justice to the Health) and a bath with herbs. Upon completion, the girl must adhere to the state of

Maranhão, where your group lives.

Sacred

By tradition of the Guajajaras, where the girl of his group expresses menarche becomes sacred. Based on Articles 231 and 232 of the Constitution under which recognize customs, languages, beliefs and traditions indigenous, attorney Karla asked the federal judge Maria Cecilia revoke the injunction. The legal instrument ordered that the Indians should maintain a minimum distance of 1km and could not prevent the operation of the activities of the Ministry of Justice. Karla Pinhel, who claims to work voluntarily for the Indians, was informed by Correio Braziliense, by phone, of the judge's decision. 'I am still not knowing. Just left there (6 th DF). There was a lot of pressure from the Federal Police, which had members in the office of the judge, for them vacate the Esplanade.

The anthropologist João Pacheco de Oliveira, of the National Museum of the Federal University of Rio de Janeiro (UFRJ), was surprised by the decision of the federal judge. 'She had great sensitivity. Overall, menarche is an important moment of sex reaffirmation of the Indians. Even outside of your home, the girl has the right to a traditional initiation ritual. If she does not comply, it may be an offense to the gods', Pacheco said.

Failed negotiation

Celebrated with dancing and fireworks, the decision of the 6th District Federal Court, which established the temporary maintenance of indigenous protesters on the Esplanade, was preceded by tense moments. Since early yesterday morning, about 600 federal police and military, including men of the Special Operations Police (BOPE) and cavalry, were preparing to, at any time, fulfill the first court decision to remove the local Indians. They knelt and asked the police would shoot. The police arrived at the shooting position, but declined.

The proposal of the representative of the Ministry of Justice Ana Patricia Nogueira was that the Indians would be received by the Minister Luiz Paulo Barreto, but at the same time of the meeting, should vacate the Esplanade and camping in the Mane Garrincha Stadium. 'To get rid of us, even offered daily in five-star hotel here in Brasilia. We do

not need that. We want the repeal of Presidential Decree 7.056/09 and Márcio Meira left of the President of FUNAI, said Lucia Munduruku, who came from the city of Jatoba (PE) for the occupation in Brasilia. - If they do not meet, do we interdict major highways and dams threatened.

Besides Indians, servants of the National Indian Foundation (FUNAI), reportedly interested in recover their fees and functional apartments in Brasilia, also supported the 22 ethnic groups camped on the lawn of the central Esplanade. Using a headdress, Senator Eduardo Suplicy (PT-SP) tried to negotiate with the police officers who participated in the operation of removal of the Indians, but was unsuccessful."

Using a virtual platform in the teaching of Law

Cristiane Silva Kaitel[1]

Abstract: This paper deals with the challenges imposed by the Teaching of Law contemporarily and points to its improvement through the use of new instruments of education, typical for the digital era. Due to the impossibility of neglecting the breakthroughs of technology in the 21st century, the proposal consists in taking advantage of these resources as allies to the transmission of legal knowledge. This proposal has been executed by the research group Observatório para a Qualidade da Lei (a research group linked to the Postgraduate Departament of the Law School in the Federal University of Minas Gerais), through the Legistics Ning Platform, which has been used as a tool in the subject of Legistics, in the Law Major of the Federal University of Minas Gerais. Legistic.ning.br is a social net created to enhance the debate on the elaboration of Law and Legislation, and brings together academics of law, members of technical bodies in various legislative houses throughout the country, as well as Executive members, Parliament members and regular citizens interested in the dialogue over the quality of law. Because it is an interactive tool, it promotes autonomy of the individuals, as they may upload, initiate and choose the content to be discussed; it promotes a collaborative attitude and enhances critical thinking. Besides, it keeps scholars and professionals of law tuned to the most recent events providing them with constant updating and the possibility of assessing the acquired knowledge in real life. The Legistics Platform is a pedagogical innovation that goes along with the evolution of our time, and enjoys what technology has to offer, in order to promote an empowering and inclusive learning environment.

Key words: Web 2.0 NING Platform; Legistics; Teaching of Law.

[1] Doctoral student at the Post Graduate Program in Law of Universidade Federal de Minas Gerais, linked to the research program Observatory for the Quality of Law, created and coordinated by Prof. Dr. Fabiana de Menezes Soares. Cristiane.kaitel@gmail.com

1 Introduction

Observatório para a Qualidade da Lei (Observatory for the Quality of Law) is a research group linked to the Postgraduate Department of the Law School in the Federal University of Minas Gerais), created and coordinated by Prof. Dr. Fabiana de Menezes Soares, under the theoretical milestone of Legistics (or the Theory of Legislation or Legisprudence).

This research project aims to investigate the phenomenon of legislative elaboration, from legislative evaluation and planning (legitimacy building), decision support systems, the use of information technology, to the linguistic, communicative and discursive aspects of normative acts.

The study of legislation with the aim of bringing rationality into the theory and method of law creation, interpretation and application may be dated back to the XIX Century, with the studies of Jeremy Bentham, although it has gained weight in the second half of the XX Century with Peter Noll, and after him with the growing interest of European scholars such as Luc Wintgens, Luzius Mader, Jean-Daniel Delley, Ulrich Karpen, Alexander Flückiger, among others. It is a multidisciplinary field of research, therefore with a widespread reach and application.

2 Methodology

This work was conducted in the subject of Legistics, taught to undergraduate students in the Law Major of the Federal University of Minas Gerais, in a teaching practice internship.

Using the theoretical milestone of Phillipe Perrenoud on the competencies to be developed through the teaching-learning process and of Miracy Gustin on the Pedagogy of Emancipation, the aim was to come up with a practice of teaching-learning which would enhance the competencies to be developed in courses of Law, as well as take advantage of technological tools.

The teaching plan to the subject of Legistics was suited to have a theoretical part and a practical one, and thought out to motivate the students to take action and actively take part in the teaching-learning process.

This was enabled by the use of legistica.ning.com, a social net-

work, created to enhance the debate on the elaboration of Law and Legislation. The network has over 600 (six hundred) members, including academics of law, members of technical bodies in various legislative houses throughout the country, as well as Executive members, Parliament members and regular citizens interested in the dialogue over the quality of law.

3 A pedagogical perspective and the role of the teaching institutions and its actors

According to Antônio Augusto Cançado Trindade (2006) the XX century is the century of humanization in Law. There is a permanent struggle for the elevation of the human being, the mission of believing in education and in justice, in the need to transmit the emancipating knowledge and the practice of true values to the new generation is reaffirmed (...) (TRINDADE, 2006, p.ix).

According to Boaventura de Sousa Santos (2011), we are going through a paradigmatic transition period, in which we discuss, mainly, the role of universities and other teaching institutions. Boaventura presents us with many important questions, as the tendency to understand knowledge as merchandise, the dilemma between greed and solidarity in the educational business, the problem of standardization, which kills diversity and innovation, and the relationship between the university, the State, the market and the civil society.

Along these lines, what should be the role of the teaching institutions in this context, but that would offer us the opportunity of change?

The teaching institutions should rethink their mission and their role, in order to commit themselves with autonomy, academic freedom and the social efficacy in their actions, making the humanistic ideal from this century a reality. In a century of innovation, the institutions must leave the archaic, boring, non-critical, repetitional, massifying teaching methods behind, to commit to an emancipating, creative method, so to offer courses of excellence, by conjugating teaching, research and extension, in order to provide their alumni with tools to act in a multiple, interconnected society, with effectiveness.

The only way to make this change happen is to adopt a pedagogical, emancipating, inclusive, participative and creative approach (GUSTIN, 2010).

According to Gaston Bachelard (BARBOSA, 2004) knowledge is

the result of active work, in which there is a building rationalism because of a teacher-student dialogue, a dialectics in which there is constant trade of positions between the teacher and the student. We cannot talk about stationed teaching and learning, but in "learning of learning" (CAPELLA, 2011) or a teaching-learning process. This very approach presupposes a change in relation to the role of the teacher and of the student. The competencies, the skills and the knowledge to be develop by both actors are different from those applied in the traditional approach.

According to Phillipe Perrenoud (2000) a competence is a "capability to mobilize several cognitive resources to deal with a type of situation"[2] – our translation (PERRENOUD, 2000, p.15).

According to Lima (2010) the competencies suggested by Perrenoud that should be developed by the institutions on the teaching of law are: 1) To face the duties and the ethical dilemmas of one's profession; 2) to motivate the students to be active in their learning process and in their work; 3) to conceive and evolve the differentiation device; 4) to work in groups or in pairs, not individually; 5) to use new technology; and 6) to administer his/her own ongoing education.

This development is reached by innovative, inclusive and creative tools of teaching-learning, as will be seen in the following section.

4 The Ning Platform as a technological tool for an emancipatory, inclusive, participative and creative teaching of law

The Ning Platform is a social network, on a 2.0 web platform. The usage of the platform is simple, the student has to sign in and he/she would be able to enjoy all the tools of interaction available. The platform offers the possibility of creating groups (such as the group of students from the subject of Legistics), uploading and downloading videos and audio media, writing in blogs and in the forum, access to a library (with documents, articles, chapters of books, dissertations and thesis, videos and links for interviews and documentaries), and chats where he/she can interact freely.

Among the positive aspects of using the Ning platform 2.0 in the teaching of law we highlight:

It is very interactive, easy to use, inviting, collaborative, updated, inclusive, easy to access, enables creativity, enables critical discussions,

[2] "capacidade de mobilizar diversos recursos cognitivos para enfrentar um tipo de situações" – original text

and enables access to good information.

Among the negative aspects of using the Ning platform 2.0 in the teaching of law we list:

There is a possible difficulty if the student doesn't have internet access at home, the moderator does have to keep close track to guarantee that the interaction suits to the teaching-learning purpose.

Concerning the competencies brought by Perrenoud, we find that the following are enhanced by the usage of the platform 2.0 in the teaching-learning environment:

1) To face the duties and the ethical dilemmas of one's profession – legistica.ning has been a channel of providing updated information, of fast access to videos and debates involving members all over Brasil about national and international events. Due to that, it enables the members to deal with the real world and brings the theory closer to practice;

2) To motivate the students to be active in their learning process and in their work – Because the platform offers a big variety of tools and welcomes the members to post and interact using the technology, it is perceived as a learning and research tool adapted to the XXI Century. It breaks the stiffness of traditional law teaching, which is in itself motivating for students;

3) To conceive and evolve the differentiation device – Each member has an individual page which he/she can arrange as he/she pleases. The platform offers creative and pedagogical functions and can be linked to other social networks (such as Facebook, Youtube and others). Due to these features legistica.ning helps the empowerment of its members, respecting their individuality;

4) To work in groups or in pairs, not individually – the working plan conceived for the subject of Legistics foresees that the students work in groups of four, according to the principles of the Pedagogy of Emancipation proposed by Gustin. The research showed that it is optimal to work in groups using the platform web 2.0, since the interaction gets more active and fast, each group was responsible for feeding the network each week with any of the tools provided by it. The students interact, collaborate and active exercise their critical thinking;

5) To use new technology – the proposed tool itself is an example of new technology applied to the teaching-learning process;

6) To administer his/her own ongoing education – on the legistica.ning teacher and students are both actors on the teaching-learning process. The teacher doesn't play a dominant role there, the process of producing and sharing knowledge is administered by all of the people

involved, with freedom.

In order to assess if these competencies were in fact developed, we establish a dialogue with the students, through which they give us their feedback in a self-assessment questionnaire and post it in the subject group inside the Ning Platform.

5 Conclusions

We reach the conclusion that the use of a virtual platform, a ning web 2.0 platform, namely legistica.ning.com, is very effective in developing various competencies needed in the teaching of law. It is an information, communication and interaction environment which breaks the barriers of time and place, because it connects not only the students in a classroom but also a wide number of other citizens, who may be anywhere in the world, discussing and actively exercising their citizenship, participating in the teaching-learning activity.

References

BARBOSA, Elyana. *Bachelard*: pedagogia da razão, pedagogia da imaginação. Petrópolis: Vozes, 2004.

CAPELLA, Juan-Ramón. *A aprendizagem da aprendizagem*: uma introdução ao estudo do direito. Belo Horizonte: Fórum, 2011.

GUSTIN, Miracy Barbosa de Sousa. Uma pedagogia da emancipação. In: GUSTIN, Miracy Barbosa de Sousa; LIMA, Paula Gabriela Mendes (Coord.) *Pedagogia da Emancipação*: desafios e perspectivas para o ensino das ciências sociais aplicadas no século XXI. Belo Horizonte: Fórum, 2010, p. 15-79.

LIMA, Paula Gabriela Mendes. O papel do docente no ensino-aprendizagem emancipatório e transformador: competências a ensinar e para ensinar. In: GUSTIN, Miracy Barbosa de Sousa; LIMA, Paula Gabriela Mendes (Coord.) *Pedagogia da Emancipação*: desafios e perspectivas para o ensino das ciências sociais aplicadas no século XXI. Belo Horizonte: Fórum, 2010, p. 111-130.

PERRENOUD, Phillipe. *10 novas competências para ensinar*. Porto Alegre: Artmed, 2000.

SANTOS, Boaventura de Sousa. Revista Ensino Superior 41. Revista do SNESup: *A encruzilhada da universidade europeia.* Julho-Agosto-Setembro 2011.

TRINDADE, Antônio Augusto Cançado. *A humanização do direito internacional*. Belo Horizonte: Del Rey, 2006.

The acceptable limits of public intervention in private activity

Luiz Flávio Paína Resende Alves[1]
Paulo Antônio Machado da Silva Filho[2]
Ticiane Moraes Franco[3]
Virgínia Afonso de Oliveira Morais da Rocha[4]

Abstract: Nowadays, the necessary protection to the individual freedom, including the free transit and acting has been debated. On the other hand, the regulation of this right by the state, imposing or banning duties and conducts, considering the historical, economic and social aspects of post modernity, is strongly increasing the presence of the State as a regulator of private relations. The prerogative granted to the State as an interventor in private affairs finds shelter in the axiom of dignity of the human person. However, any state intervention, though aimed at protecting the individual, must submit the State to the limits and conditions imposed by the fundamental principles, precisely because the rule, in a general sense, is sometimes insufficient to humanize the law and may compromise the democratic rule of the law.

Thus, state intervention in private affairs should recognize basic fundamentals grounded in the principle of human dignity and human values, such as personal freedom and resolutive autonomy.

In this pillar, state paternalism has an important role intervening in civil and contractual relationships, with the objective of balancing distortions originated by macroeconomic issues or facts intrinsic to trading, such as fraud, injury and simulation.

[1] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Email: luizflavio@lopesbedran.com.br.
[2] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Email: pauloamsf@hotmail.com
[3] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Emai: ticianemfranco@gmail.com
[4] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Email: virginia.afonso@uol.com.br

Therefore, regulation of private space through regulatory actions of the state must have a limit, so as to balance the state action and restrain the excesses that may compromise the democratic rule of the law, analyzing case by case, limiting the scope of discretion by observing its necessary and vital existence and aiming at generating a greater advantage of social regulation.

In this sense, this work encompasses a practical assessment of the state´s intrusion on private autonomy, seeking to ascertain the acceptable limits of public intervention in private activity. This leads to the determination of the necessary intensity of the intervention and its adjustment to the purposes and objectives pursued by the Constitution, considering that, since the establishment of the Democratic State of Law, any form of state manifestation cannot distance itself from the common good and social justice.

Keywords: aternalism. Private autonomy. Contemporary private law.

1. Introduction

With the bourgeois revolutions of the 16th and 17th centuries came the downfall of monarchical absolutism and the advent of liberalism as the dominant ideology, marked by liberty and the ideal of State non-intervention as well as the imposition of legal limits to its actions. Liberalism was marked by the protection of private property, of freedom of commerce, and of industry: "*laisser faire, laisse passer, laisser contracter*" (GHESTIN, 1993, p. 28-29).

It can be said, in brief summary, that liberalism divided into three major economic models: The Liberal State, the Social State, and the Constitutional State. The first, characteristically extremist in its complete absence of State intervention, based on the literal regency of the law, proved unjust as it allows for life under subhuman conditions. It also inhibits that the disadvantaged achieve equal conditions in obtaining property.

Thus came the passage from the Liberal State to the Social State, and along with it the necessity to create a more equitable society in which material equality would be reached through the provision and implementation of social, economic and cultural rights, in order to assure orderly and peaceful coexistence.

The guarantee of equality would be achieved through, among other factors, intervention of the State into private affairs, with the clear objective of establishing a legal balance in the face of an unquestionable

real social imbalance. As a result, there was a corresponding growth in State regulation.

Both the period of the Industrial Revolution and the period post World War II fostered the creation of the Welfare State[5], generating government benefits for citizens through policies of full employment as well as large investments in health, education, and social security, particularly in Europe, the United States, and Japan.

The welfare state also proved to be inefficient, as it considerably increased public spending, above all in relation to social security.

In developing countries the "Neo-Liberal" model was imposed as a condition for the receipt of loans from the World Bank. While this generated great economic development, it also exacted a high price in relation to unemployment, the growth of black markets, and reductions in social guarantees.

The social and economic transformations undergone by the world economy have had a direct impact on the manner in which the State relates to economic agents and economic activities, leading to the establishment of protections in the form of laws protecting political and civil liberties as well as human rights, in the context of solidarity rights. That is, rights which are considered supra-individual (third generation rights).

In this context, given that the State speaks to equilibrium and the plurality of economic and social interests, the Democratic Rule of Law model appears. It breaks with the traditional notion of the separation of the public and private sectors in search of socially desirable objectives and the coordination of private affairs. It imposes a "publification" of private interests and a privatization of public interests. In the first we observe an ever-growing interference of the Law in private affairs. In the second, we observe the invasion of transactional instruments into the public sphere (breaking with logic of the Sovereign State) as more participative and consensual administrative tools are sought.

It cannot be ignored that these transformations have been influenced by globalization, technological evolution, and economic liberalization, which have changed the role of the State. These modifications have become necessary in the role once performed by the State in the economic life of nations.

In a more modern context, it can be seen that globalization leads

[5] On the values of well-being consult: TREBILCOCK, Michael J. The Limits of Freedom of Contract. Harvard University Press. 1997, p. 244-248.

to a narrowing of space-time within social, economic, and political structures as a whole, supported by a complex network of communications (FERNANDES, 2001, p.41-42), where events occurring in one part of the world have effects in another. HELD (1995, p.20-21), characterizes globalization as "action at a distance".

Thus, in the face of these social transformations, effects of globalization, and new forms of organization of the State, regulatory intervention has grown. (In this article we will touch upon the three notions of the term regulation). The objective of this type of regulation is the economic direction of markets by the State to achieve socially desirable outcomes – distributive and social justice- through impositions on conduct of private economic activity.

Thus, one of the questions related to social justice is the definition of a collective concept which allows for the distribution of resources in the face of scarcity or the presence of externalities[6]. Thus:

> On this view, the State is justified in adopting policies designed to redistribute private resources in accordance with some collectively or communally determined concept of distributive justice, and there may be a role for contract law or contract regulation in furthering this objective by attempting to redistribute or constrain the gains from trade. (TREBILCOCK, 1997, p. 20-21)

It happens that under the pretext of protection of fair distribution and social justice, the risks is borne of establishing paternalistic behaviors which transcend the interests of society or may surpass the objectives of what may be desirable.

The present article touches upon the limits of State intervention into economic activity, in terms of structural principles and legal-administrative relations, which would limit the technical discretion of the regulator, define the limits of the exercise of regulation in general, and also speak to the parameters to control the power of the State.

The theme currently sparks much interest, keeping in sight the excesses committed by states in the regulation of economic activity, These excesses many times violate the structural and legal principles inherent in legal-administrative relations. Notable among these are legality, legal certainty, confidence in the exercise of regulation, legal prohibition, as well as proportionality in the exercise of regulation.

[6] In the case of externalities, the values of autonomy produce a set of implications as to the interests and wellbeing of others. (TREBILCOCK, 1997, p. 243)

The goal is to establish equilibrium between the excesses of intervention and insufficient market protections, which are intimately associated with good administration, and should seek to maximize the interests of diverse actors within society.

2. A brief notion on the concept of state regulation and intervention in the economy - The importance to the current discussion

A primary definition is necessary which should describe what is meant by State regulation and intervention. According to the Brazilian author Clarisse Sampaio Silva, an explanation of the activity of regulation is as follows:

> A specific form of intervention in the economic order, such that the State does not directly assume the exercise of economic activities, but acting as an external agent uses normative and administrative measures, as well as informative and consensual techniques, to affect the behavior of economic agents in an effort to assure market stability, guarantee free competition, and defend other interests as guaranteed under the Constitutional legal order which might be affected by the free and unbridled development of a given activity.. (SILVA, 2005, p. 20)

I any case, the aforementioned author, citing Vital Moreira (apud SILVA, 2005, p. 20-21) further clarifies, explaining that there are at least three meanings given to the term regulation:

> a) regulation extending to all forms of State intervention into the economy, independent of the measures and goals; b) economic intervention through other means in which there is no direct participation in an activity, but in which there is conditioning, coordination and discipline placed upon a private economic activity; c) solely the normative regulation of an economic activity.

For the topic under consideration, the notion of regulation stems from the capacity of the State to intervene in public-private as well as private-private relations in order to avoid Market distortions through its ostensible powers to determine behaviors which assure that individual rights do not overarch the rights of all. Aragão (2002, p. 37), defines this as the "set of legislative, administrative and conventional, abstract

and concrete, through which the State may in a manner restrictive of private freedoms or merely inductive, determine, control, or influence the behavior of economic agents, to prevent them from damaging social interests as defined by the Constitution, and orienting them in socially desirable directions".

Beyond the function of guaranteeing fairness in distribution and "socially desirable" objectives (ARAGÃO, 2002, p. 37), another function of regulation is to "actively guarantee the basic conditions of competition" (SALOMÃO FILHO, 2008, p. 53), thereby seeking positive market results, the welfare of the consumer, and the protection of social interests. Thus, regulation is necessary as an instrument in the promotion of competition in markets with less than perfect conditions for such, which demand the need for controls to demand or incentives to supply, or in those markets in which structural conditions impede the formation of competition or in which it is unviable (SALOMÃO FILHO, 2008, p. 53). These justify the need to implement mechanisms of behavioral control on enterprises and limit the degree of freedom normally associated with restrictions over economic actors.

Regulation, in this sense, is based upon the economic process, and promotes the achievement of public interests that the market on its would not. Calixto Salomão Filho (2002, p. 45) points out that regulation may be divided along two lines: (a) the school of public interest, according to which social control over an economic activity seeks to promote the public good, and (b) the neoclassical school, which through the absence of preoccupation with the public good eschews market controls and permits markets to self-regulate. What is understood by self-regulation is the free exercise of an economic activity by the actors in a determined market without external interference except as relates to antitrust legislation to control and repress anti-competitive structures and behaviors.

In this context, viewing regulation as the establishment of procedures for economic activity, regulation should encourage enterprise to meet the predetermined objectives of the regulator, especially in those economic sectors which tend to strong verticalization, which demonstrate market failures, and in particular those requiring investments in infrastructure. These constitute barriers to entry, and therefore justify regulation in order to avoid the damaging effects of monopolization or the absence of proper conditions for effective competition.

Thus, State interference may occur by means of public policies, or through the creation of incentives for economic agents to participate

in the development of the market, the coordination of factors of production, by guarantee of a system of competition, all designed to achieve efficiency in allocation and decrease the probability of excessive abuse of power over the market, realized through the capacities: normative and sanction.

Finally, regulatory intervention concerns itself not only with the values of autonomy, but also with the values of well-being and distributive justice.

It is the case that the administrative regulation of a particular market, although highly technical, must not delink itself from the legal principles which endorse such administrative activity. This is because the relationships developed within the administration, and from which derive the obligations either to perform, not to perform, or to bear an onus, are safeguarded and are subject to the principles of law in general.

It cannot be ignored that in addition to the economic justifications for regulatory intervention into markets, individual autonomy is seen as a fundamental social virtue. Michael J. Trebilcock affirms that autonomy is itself a good, and as such should be respected:

> Autonomy is a good itself, and autonomous choices should be respected because they are the legitimate exercise of the right of self-government or self-determination, regardless of what outside observers may fell about the individual or social virtues of those choices. (TREBILCOCK, 1997, p. 08)

The values of well-being and distributive justice, in this case, run contrary to other values, among them private autonomy and to a certain extent, self-determination.

3. Structural principles of legal/administrative relations under democratic rule of law

This being said, the limits and intensity of action of State regulators over economic agents is directly related to the social and economic situation of each country, and should thus be linked to specific legislation. It is not the objective of this article to have a broad debate on the limits of regulation. The purpose is to deal with regulation as an administrative function of the state, which subjects it therefore to all of the principles inherent and applicable in general to Public Administration.

As such, it is a prerogative bestowed on the State to direct eco-

nomic activity or even the market which establish incentives to growth of the country, for reasons of both economic and social development. On the other hand, structural legal principles, in addition to free will, should be safeguarded in the context of a free, just, dignified and unified society.

Public Administration should in general be subject to legal principles, as a way to satisfy both social interests and collective necessities, but should also concretely limit the space for discretion and act in favor of the pursuit of the common good.

But that is not all. The promotion of dignity – the primary virtue of the fundamental set of rights in a society – cannot even remotely be detached from the economic provisions contained in the law, which together with other legal provisions, sustain State intervention into the economic life of the country. In this context, free enterprise is emphasized.

Below is a brief summary of each of the principles which are applicable to the regulatory action of the State, and which should serve to limit its discretionary power in regulation. These principles should guarantee fundamental rights under Democratic Rule of Law, aiming to achieve greater societal advantage from regulation, which is both necessary and indispensable.

3.1 Principle of Legality

The link between administration and legality, as relates to the law seen as a limit to State intervention into the sphere of individual liberties, even though the power to police, may not be spoken of as separate from the law. Regulation, even when admitting a certain margin for discretion and autonomy, should not permit administrative action *contra legem*.

3.2 Principle of reasonableness and proportionality

One of the parameters to limit the regulatory intervention of the state is the subjection of such intervention to the proposals pursued by Public Sector policy, with its legal parameters, which should in turn be subject broad examination in the light of reason and legal trustworthiness both administratively and legally.

The exercise of reason and of proportion have as a guideline the

principle of proportionality (in the broadest sense), and of the creation of doctrine. But they impose, in a practical sense the prohibition of excess as an instrument of State control. As Canotilho stated (1999, p. 263) "German doctrine raises the prohibition of excess (Übermassverbot) to a Constitutional principle, and begins the control of governmental acts from the point of view of the principle of proportionality". This principle can be translated as curbing the abusive exercise of public authority prohibition of excess is, according to Canotilho (1999, p. 267) "to avoid placing coercive acts or burdens of excessive nature upon the sphere of the individual".

3.3 Principle of reciprocal trust and barring contradictory behavior

The reliance placed in State actions is to protect the legal order and provide for social Peace, and breaking with these precepts undermines societal expectations as well as challenging legal relations. Thus the principle of trust should prevail between the State and those subject to regulation. This is due exactly to the fact that statutes, in a general sense, are sometimes insufficient to humanize the Law, and are likely to undermine the very Rule of Law. The doctrine of the Brazilian author Almiro do Couto Silva (2004, p. 274) quite clarifies the issue:

> Currently, in comparative law, the doctrine admits two distinct principles which have a close correlation. The authors thus speak to the principle of legal certainty as relates to the objective aspect of stability in legal relations, and to the protection of reliance when alluding to the subjective aspects. This last principle (a) imposes limitations upon the State to alter its behavior and to modify actions which produce benefits for recipients, even when ilegal, or (b) imposes on it patrimonial consequences for these changes, always in benefit of the trust generated among the beneficiaries, those affected, or in society in general that the actions were legitimate, and that the actions could reasonably be expected to be upheld.

3.4 Free enterprise

Free enterprise evokes an idea of the market, and liberty in the factors of production. Additionally, it evokes idea of the exercise of an

economic activity. As relates to freedom of initiative, asserts Amaral Neto (1996, p.229):

> Economic free enterprise is a *quid plurir*. Collective activity of the t is not reducible to the sum of other freedoms, and does not end in the exercise of the right to property or contract rights. One may, through the use recognized legal principles of the person as an individual or as an enterprise, assert the collective activity of the company in accordance with the corporate model chosen

As such, the principle economic free enterprise represents the capitalist mode of production, sharing the idea of freedom of the individual to pursue personal enterprise freely. This principle arose through Turgot's edict of February 9th, 1776, which was subsequently inserted into the Decreto d´Allarde, of 1791. Article 7 of the same stated that, as of April 1st of that year, any person would be free to engage in any business or exercise he pleased, being only under obligation to pay the necessary and demanded fees, and being subject to policy powers.

It appears, thus, that even at its origin the principle was not applied without restrictions.

> The view of a completely absent State, that of liberalism in relation to free economic enterprise, is the pure expression of an ideal type. When measured against policy, it was already at this stage when this principle was intended to ensure defense of economic actors against the State and against corporations imposed upon them (GRAU, 2003,p. 183).

Thus, some degree of interference into lawful activity is permitted. However, it cannot surpass what is necessary for the public interest involved. Restrictions to free enterprise must be justified, as they impose excessive and disproportionate restrictions in relation to the interest being protected. These limitations are to be found in the legislation of each country.

A post-modern society recognizes the freedoms of economic agents as being bound to the legal restrictions allowed in each jurisdiction. Considering that the market is becoming more productive and active, dialectics between freedom and abuse are coming to the fore. It is an attribute of the law to protect the first and to guard against the second (PETTER, 2005, p.163-164)

3.5 Summary of conclusions reached through the principles herein considered

In summary, from this viewpoint, the principles mentioned here form parameters for the limitation of excesses in regulation, once they impose limits on administrative actions, determine the intensity of State intervention, and the suitability of regulations in accordance with the objectives of Public Sector policy. We are lead to reflect, given the discretionary nature of administrative acts, on the legitimacy of the means used in public administration to achieve the objective of public sector policy (under the exercise of reason and proportion), as under a Democratic Rule of Law, State manifestation cannot distance itself from the common good and social justice.

Respect for these principles has elevated value in the control of administrative acts, as well as the legal trustworthiness of Administration. They diminish regulatory discretion and avoid the excessive use of paternalistic measures, and so provide enhanced value to the regulations.

Conclusions

As seen, the current reality generated by societal transformations, the effects of globalization, and new forms of governmental organization impose new (although not recent) types of State interventions into the economy aimed towards the achievement of socially desirable goals – social justice and fair distribution – through the impositions on the conduct of private economic activity. Economic agents, especially companies, have come under steady intervention of the State. Plurality of interests is the trademark of the society today.

In this context, regulation as exercised by the State is not limited to the mere correction of the problems monopoly, market failures or externalities, but also to induce socially and economically desirable behaviors. Paternalistic measures are advancing in society, justified under the rubric of social welfare. Individual autonomy as a fundamental social virtue has come to be seen as contrasting with other values.

Thus, it is necessary to find a balance that leads to the harmonious coexistence between public and private interests, in the context of the legal directives and structural principles of legal/administrative relations. This must be done, however, without removing from the regula-

tor its autonomy in the performance of its statutorily duties.

In this article we have sought to demonstrate that regulatory action of the State should be respected, keeping in sight that its necessary and indispensable activity must occur independently and autonomously, though exercised in a manner which respects the rights and fundamental guarantees of society in a Democratic State of Law, to generate a greater social benefit of the regulation. Given this interpretation, the administrative principles discussed here are a few examples to be used in curbing the excesses of modern regulatory activity when it imposes excessively paternalistic measures.

References

AMARAL NETO, Francisco dos Santos. **A liberdade de iniciativa econômica**. Fundamento, natureza e garantia constitucional. Revista de Informação Legislativa, v. 92, p. 221-240, 1986.

ARAGÃO, Alexandre Santos. **Agências reguladoras e a evolução do Direito Administrativo Econômico**. 2. ed. Rio de Janeiro: Forense, 2005.

CANOTILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição.** 3. ed. Coimbra: Almedina, 1999.

FERNANDES, Paulo Silva. **Globalização, "Sociedade de Risco" e o futuro do Direito Penal**. Coimbra: Livaria Almedina. 2001.

GHESTIN, Jacques. **Traité de droit civil – La formation Du contrat**. 3ª ed. Paris: LGDJ, 1993, p. 28-29.

GRAU, Eros Roberto. **A ordem econômica na Constituição de 1988**. 8ª ed. São Paulo: Malheiros, 2003.

HELD, David. **Democracy and the Global Order:** From the Modern State to Cosmopolitan governance. Polity Press, 1995.

PETTER, Lafayete Josué. **Princípios Constitucionais da ordem econômica**: o significado e o alcance do art. 170 da Constituição Federal. São Paulo: Revista dos Tribunais, 2008.

SILVA, Clarisse Sampaio. **Legalidade e Regulação**. Belo Horizonte: Fórum, 2005.

SILVA, Almiro do Couto e. O princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da administração pública de anular seus próprios atos administrativos: O prazo decadencial do art. 54 da Lei do Processo Administrativo da União (Lei nº 9.784/99). **Revista de Direito**

Administrativo, Rio de Janeiro, n. 237, p. 271-315, jul./set. 2004.

SALOMÃO FILHO, Calixto. **Regulação da Atividade Econômica**: Princípios e fundamentos jurídicos. São Paulo. Malheiros. 2ª ed., 2008.

_____ (coord). **Regulação e desenvolvimento**. São Paulo. Malheiros. 2002.

TREBILCOCK, Michael J. **The Limits of Freedom of Contract**. Harvard University Press. 1997.

The tax as an inducing instrument of individuals behaviors

Luiz Flávio Paína Resende Alves[1]
Paulo Antônio Machado da Silva Filho[2]
Ticiane Moraes Franco[3]
Virgínia Afonso de Oliveira Morais da Rocha[4]

Abstract: A discussion regarding extra-fiscal tax rules, and conflict between interventionist state, and liberal state in the private sphere. The debate to be waged in the group, which is being submitted the article (here presented in abstract form) corresponds to the conflict between state action, as an intervenor in the private sphere of the individual, and, the right of freedom of actions. Thus, on one side is the liberal state where the individual is given greater freedom in their actions, and on the other hand, is the face of the state intervening, that through legal standards, influence individuals in their making decisions on matters that, in principle, would be in the private sphere.

The specific analysis of the paper will stick to tax rules, especially those that concern extra-fiscal taxation, as a phenomenon in which the state uses tax rules seeking to intervene in the behavior of taxpayers. Such rules, that character is clearly extra-fiscal, are also known as inductive tax rules, dodging from the general objective, because they have the revenue collection as "secondary function", and as a "primary function" the induction of behaviors.

Entering into an analysis of individual cases will be examined those tax rules which aim to prevent the consumption of products (such as cigarettes and liquor) through increasing the tax rate on consumption. Likewise, the analysis

[1] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Email: luizflavio@lopesbedran.com.br.
[2] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Email: pauloamsf@hotmail.com
[3] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Emai: ticianemfranco@gmail.com
[4] Master's in Business Law in course at Faculdade de Direito Milton Campos (Brazil). Lawyer. Email: virginia.afonso@uol.com.br

of the principle of selectivity that deals with the exemption / encumbrance of essential products / luxury, such as basic food / caviar. Another area of analysis would be the induction of behavior through taxation on property of individuals as a way to the property meets their social function. In this situation will be presented the comparison between the individual's right to use their property in the way to better achieve their purposes, contrasting with the imposition of a higher tax burden in order to the individual achieve a social function that your property should have. The analysis of the social function of property as a way of state intervention in the sphere of private rights of the individual, particularly in the face of its assets will also be presented.

The article, in the end, would try to seek a justification and a limit to the state intervention, through extra-fiscal tax rules, and the individual's right to act and exercise their rights on their actions, and about his patrimony, in a way that best suits him, without having to stick, and worry about the state imposition, by imposing tax, which could come to influence their planning.

Keywords: Paternalism. Private autonomy. Tax rules.

1. Introduction

From the fourteenth century began the process of decline of feudalism, to the extent that the emergence of a strong central entity that could bring order in the chaos that had settled in feuds because of the absence of political organization proved necessary.

Thus kings, financed by the rising bourgeoisie, invested in and organized armies for the emergence of national states of the fifteenth century, with regulations for industries, national languages and even national churches.

The maintenance of armies was funded by taxes nationally unified, collected by a specialized administrative apparatus, which, on behalf of the central government, was responsible for organizing public finance institution.

However, insofar as the political and economic power of kings grew stronger, the administration became abusive without compliance with juridical limits. Thus, the absolute monarch was able to submit the property and lives of citizens to their will.

These factors culminated in the bourgeois revolutions of the seventeenth and eighteenth centuries, the monarchical absolutism collapsed and liberalism has established itself as the dominant ideology,

marked by the maximization of freedom and embodied the ideal of no government intervention and the imposition of juridical limits to its action. Here below the reporting of Palmeira, citing Max Weber:

> (...) Thus, liberalism touts the stability of legal guarantees that the state offers favorable conditions for the development of the market economy. Rationalize the law, then, means consecrating the neutrality of the State in the name of a supposed spontaneous order of social dynamics. In this case, it counts on the stability, security and objectivity in the functioning of the legal system, national character and in first predictable laws of administration. Otherwise, absent the guarantee is indispensable to industrial exploitation based on large capital prediction. (free translation)

Liberalism has been divided into three major economic models: the liberal state of law, the social state of law and the constitutional state of law. The first, characteristic of extremist total absence of "State intervention" and, based on a literal interpretation of the law, proved unjust, insofar as allows life in subhuman conditions, and does not enable the disadvantaged to achieve equal conditions for property.

This situation led to the creation of social movements that demanded changes in the role played by the state, with more attention to the needy.

Thus, the passage of the liberal state to welfare state resulted from the need to create a more equitable society in which substantive equality would be achieved through the provision and implementation of social, economic and cultural rights.

Ensuring equality occur through state intervention in private affairs, with the clear objective of establishing a legal balance before an unquestionable factual imbalance.

In Brazil, the constitutionalisation of social rights was with the promulgation of the 1934 Constitution, which aimed to guarantee citizens a dignified existence and ensured greater regulation of labor relations, similar to the Mexican Constitution of 1917.

The industrial revolution and the time lived after the 2nd World War led to the creation of the welfare state, enabling the generation of state benefits to its citizens through a policy of full employment and major investments in health, education and welfare social, mainly in Europe, USA and Japan.

The welfare state was also inefficient, in a way that it greatly in-

creased public spending, particularly in relation to social security.

In developing countries the "neo-liberal" model remained imposed as a condition for loans granted by the World Bank, which generated significant economic development, but , in contrast, paid a high price due to the increase in unemployment , the swelling of informal market and the reduction of social guarantees .

With the advent of the Constitution of 1988, Brazil adopted the Democratic Law State, where beyond mere obedience to the law, there must be a submission to the popular will and purposes proposed by citizens.

Indeed, state intervention in the economy became necessary, but only as a measure of exception. In this sense, the lecture of Peluso:

> The term 'intervention', therefore, translates more properly a liberal concept, in which case the state would be doing this against that ideology, which would only be admitted as 'exception'. Do not act economically would be the 'rule' of free competition. Act would 'intervene' against the rule. (free translation)

Nevertheless, besides characterizing as an exceptional measure, the interventionist action must submit to boundaries of principles of the Constitution, behold, as already said Streck, "the Democratic State of Law Rule has as a goal to promote the transformation of society by adopting constitutional principles that should guide state action" (free translation).

2. The taxation versus the extrafiscality

With the adoption of a democratic state as a political/economic model, the constitutional legislator from 1988 proved unhappy with the economic and social order that he had found. This new reality was reflected in the express provision of the goals of the Brazilian Republic, printed on Article 3, as the guarantee of "national development", the construction of a "free society, justice and solidarity", where eradicate "poverty and marginalization" and reduce "social and regional inequalities", promoting, finally, " the good of all".

The permissive of economic regulation, turn left inserted in Article 174 of the Brazilian Constitution, allowing the interventionist role of the state through the tax law.

It is the indirect intervention by induction, consisting of state-

sponsored incitement to adopt that particular market behaviour consistent with the goals of state economic policy. One of the main instruments of this form of intervention are called extrafiscal taxes.

Thus, taxation is able to induce or repress behaviours, provide distortions between taxpayers and ensure the enforcement of fundamental rights. So for, through the taxation, the State is compelled to tax in order to meet up the necessary resources to fund their constitutionally established purposes, and by extrafiscality taxation, the goal of collect revenue is put away due to the goal to promote social and economic policies.

In this sense, we see the position of Machado:

> Taxes, such as taxes generally, lend themselves as instruments for mobilizing the necessary financial resources to fund public expenditure. This is its essential purpose, but taxes may have also said extrafiscal a function, which consists of state intervention that, with them, induces is practiced or not practiced is determined activity. (free translation)

In this area, complements Machado:

> It is said that a tax is a revenue tax, or who have tax purposes when it is used especially for mobilizing financial resources. And that is extrafiscal, or has extrafiscal purpose when used for any other purpose, that is, when its purpose is otherwise, than collection revenue. Tax, or fund raising, is undergoing fully to the limitations of the power to tax. In the other hand, the extrafiscal taxes, or regulatory taxes, constitute exceptions with regard to these limitations, or some of them. For this reason they were predicted at the Federal Constitution expressly rules establishing exceptions with respect to certain delimiters principles of taxing power (free translation).

Indeed, one of the criteria for the identification of interventional standard is no direct link between the management of its quantitative aspect, which means, the tax base and the tax rate and the taxpayer's ability to pay that particular tax.

However, this criterion proves flawed, in that the rules of extrafiscal character can also relate with the taxpayer's ability to pay, whether on purpose or not. Thus was created the need for a pragmatic approach, taking as its premise the finalistic and teleological character of the standard, which will be examined in accordance with the case.

3. The limits of state intervention

The State intervention in private affairs, by applying tax rules with extrafiscal character, imposes stimulations that induce an individual to adopt certain conduct to the detriment of another.

This intervention is also called legal paternalism, which conceptualizes how the editing rules that aim to satisfy the best interest of the individual, requiring him or her abridging certain behaviours.

The legal paternalism is most striking in private relationships in which notes the existence of the theoretically weaker party in contractual relations. This is the case of the workers, labor relations, and consumer contracts involving consumerist relationship.

In these situations, we start from the assumption that the hyposufficient part presents a cognitive deficit regarding the lack of information about a particular product or service (consumer) or shows obliged to accept unfavorable conditions for subsistence (worker).

In the field of taxation, we can mention the inducing tax rules that increase in a extreme way the value of taxes on marketing of luxury items such as drinks and cigarettes. The application of the tax rule with extremely high rates, and, which, in the principle, could be regarded as confiscatory, are actually a form of the State inhibiting the consumption of such products by individuals in an attempt to influence their behaviour in choosing consumer goods. Therefore, in order of a extrafiscal function from this tax rule, there would not be, for example, a way to raise a questioning about a possible confiscatory character of such standard, since it would be faced with an intention of the legislature more involved with the induction of behaviour than necessarily a high imposition of taxes.

Schoueri points levels of incidence of tax rule that rise according to the degree of need for the state to induce the taxpayer behaviour in every situation . In this sense it has the undesired behaviour, the substitute behaviour and deviant behaviour. In summary, the tax should become more heavily unwanted behaviour towards the desired one.

However, although the use of taxes as instruments of intervention is salutary, to what extent could the State influence/induce individuals through such tax rules is a matter of tax policy. It could be questioned, for example, the extent to which the State may exercise its authority over the individual, depriving him of purchase/consume certain goods through a extreme high tax levy. After all, by raising, for example, the

price of a pack of cigarettes at $ 10.00 (ten dollar) to $50.00 (fifty dollars), the State would not, somehow limiting the right the individual to acquire certain property?

The search for the general welfare could be an answer, insofar that with a value of 700% more expensive, cigarette consumption would decrease, which resonate in a more healthy condition for the individual consuming it, besides the decrease of environments infested by cigarette smoke or even lower rates of diseases caused by overuse and, in some cases, treated by the public health system.

We found it in this type of intervention, the State seeking benefits for society as a whole, but also for the individual himself directly affected by tax law.

Another point worth mentioning concerns the way the tax law shall be considered when there is an inducer function in order to lead an intervention by the State in the decisions of individuals. In this sense Schoueri points out that:

> When you highlight a function of the tax law, in case, the inducer function, what is done is a new offshoot of the primary standard. Shall be taken - a first primary standard, which will be present in the induction itself, by the legislature, which, from a legal standpoint, is nothing more than an order for the taxpayer to adopt certain behaviour. Not making behaviour, arises a tax liability, the taxpayer will put in more costly situation than that in which if adopted would range prescribed by the legislature behaviour. Finally, do not alter the secondary standard, since the failure of the tax liability, the penalty will arise a sanction provided by the State (free translation).

In this sense, Schoueri presents the example of real state tax (IPTU) and the authority of the municipalities. The 1988 Federal Constitution, in Article 182 makes clear the possibility that the tax impact of property tax could be increased through progressive tax rates, if the property in question does not attending a social function, which would be predicted in an ordinary law known as "*Plano Diretor*". In this sense, the primary tax rule will present two different situations. The first situation, the individual owner of the property would have attended the social function wanted by the State (in this case the municipality). In this situation, the tax assessment corresponding to the IPTU would be levied with a lower rate, as an incentive to the individual owner (the

taxpayer) meet the determinations contained in the ordinary law of the Municipality. On the other hand, the second situation described in the tax rule would be one in which the taxpayer would not have attended the social function, and therefore the tax levied would be increased as a way to induce him to achieve the function social.

Therefore, from the moment the State act in an interventional way, trying to achieve the welfare of the community, the tax rule that carries the purpose of inducing desired behaviour, no longer has the fiscal neutrality. In this sense Schoueri, citing Moncada, argues that:

> Beyond mere correction of market mechanisms, arises in interventionist State, to a different standard paper, in relation to which it was secured in the liberal state: it "now assumes an economic and social content losing value neutrality that characterized the liberal moment. (...) When running values, the State operates constitutively in economic and social spheres, shaping it according to axiological load assumed. (...) The State thus becomes permeable to socioeconomic content that alter his understanding; of guarantee limits of power and respect for individual liberty a legislative program achievements becomes. The concept of State of law is of a positive nature, in moving to incorporate a state action is not only the subsidiary, but to confirm a socioeconomic model" (free translation).

Indeed, the economic intervention is legitimate and necessary to the implementation of public policies, as well as to intervene in individual behaviour, having as main objective the social welfare.

As a rule, there are no objective limits to the exercise of paternalistic State through intervention by tax rules. The Legislative Power is free to exercise their legislating within the limits of formal legality activity, as well as attention to the constitutional power to tax, predicted in Article 150 of the 1988 Constitution.

To the Executive Power was given the opportunity to manage the rates of customs taxes, and the financial transactions taxes.

Thus, before the voluntary and necessary absence of objective criteria for State intervention by tax regulations, it is questionable which limit the discretion of the Tax Authorities to exercise paternalism, in particular.

The answer to this question is certainly permeated between the principles that guide the activity of public administration, as discussed below.

4. The tax policy and the principles of administrative law

According to Mello the principle of the supremacy of the public interest over private proclaims the superiority of collective interest. It is the assumption of stable social order in which each and every one can feel secured and guarded.

Thus, the state may be in a position of superiority in relation to the individual, by focusing taxes on daily facts, for reasons which form the very basis of taxation: a) the need for revenue for maintenance of the State and, b) the achievement of state organizations, which mix with the effectiveness of fundamental rights.

Thus, the State acts, based on the principle mentioned, searching through taxation to induce certain behaviours to individuals. Induction often justified by economic policies being provided to the State, through the Executive Power modifying certain tax levies through changes in tax rates. This is done by editing decrees and through the policy adopted by the Government, at its own discretion, targeting particular outcome in the economy.

In these cases, to escape the rule of legality, the principles of motivation and morality become even more evident, in the extent that protect the legal certainty of the individual, being essential for the discretionary acts from the Public Administration are motivated by legitimate, moral and ethical reasons (the economic policy of the state).

Such values are revealed even stronger in a democratic State, in which sound louder the ideals of justice, equality and fraternity, where there is no way to conceive the Law dissociated from its ethical foundation. In this sense, Alves Junior:

> The Democratic State of Law requires the rapprochement of ethics to politics, from the moral law, making it legal rules were before cloistered within the limits of the moral field, the interest of political and economic model (free translation).

According to Carvalho Filho:

> the principle of morality requires that the public administrator does not dispense ethical precepts that must be present in their conduct. Should not only ascertain the criteria of convenience, opportunity and justice in their actions, but also to distinguish what is honest than is dishonest. We add that such conduct must exist

> not only in relations between the Administration and administered in general, but also internally, which means, the relationship between the administration and the public officials who comprise.

Thus, the morality of the Public Administration requires that the purpose of the administrative actions align with the purposes of the public interest, and observes the ethical limits even if the action is directed to the public interest.

It is noteworthy the economic regulatory taxes, which were covered by no need for compliance with the principle of legality, allowing the management of rates by editing simple executive orders.

In this sense, the Legislator insert at the Constitution of 1988 the possibility of mitigation of that principle of legality, by admitting that the Executive Power establish the tax rates of customs taxes, industrialized products tax (IPI) and the financial transaction taxes (IOF).

Indeed, it does not appear moral that the Executive Power – in front of a mere failure to provide cash – uses the constitutional rule to enlarge their financial resources, without prior examination of the Legislative Power. Important to note that managing tax rates without the need for law must necessarily have a regulatory purpose, not being ethical and moral that the Public Administrator uses these taxes for purely revenue purposes.

The arbitrary use of regulatory taxes, besides being immoral, shakes confidence between citizens and Public Administration, because may surprise individuals in their financial planning.

Regarding the principle of trust, we can infer the same through the principle of legal certainty in tax matters, like one connect to another, and both applicable to the taxes classified as regulatory ones.

Legal certainty, and as a result the confidence that the taxpayer may have is due to the legal system itself, which has as purpose to assure citizens the application of legal standards, strengthened in tax law through the principle of tax law.

Therefore, tax incentives and tax benefits earned through exemptions, amnesties, remissions and etc. existing in principle to regulate certain sector of the market, may not be revoked retroactively to cause the tax levy to those taxpayers who relied on such benefits from the State, and finished planning their activities due to the lower tax burden so far guaranteed.

Indeed, the act of State intervention in private relationships for tax measures must also meet the reasonableness and proportionality, as

a criterion for prudence of different treatments, being the Tax Authorities responsible to prove that economic intervention is appropriate and proportionate in view of the measure itself, that will suit the purposes of the economic order.

The principle of proportionality, together with the reasonableness will define the limits to state action through the tax levy. In this regard an analysis of rational motivation will be made, relationship between the finality and the ways to achieve, and, especially, prudence of the State actions.

Judging the constitutionality of Municipal Law from Santos, former Minister of the Supreme Court, Orosimbo Nonato, understood excessive increasing of the tax on toilet cabins. According to the Rapporteur, the power to tax can not get to the unbridled power to destroy, since that can only be exercised within the limits that make it compatible with the freedom of labor, trade and industry and the right to property. It is a power, in short, which the exercise should not go up to abuse, excess, deviation and applies even here, the fruitful doctrine of abuse of power.

The principle of proportionality is given, in the solution of a particular case, the verification of three essential elements: the adequacy of the means used by the legislature in achieving the intended purpose, the need for the use of those means; reasonable and effective measure (proportionality in the strict sense) , measured from the balance between the meaning of the intervention to the objectives pursued and achieved.

Proportionality in the strict sense, the induction tax rule undergoes principle prohibiting the exaggeration under review its necessity, which means, that the same result could not be achieved as efficiently by means of a measure that affects less citizens. Making it necessary to assess the relative effect of the standard with its purpose.

Thus, it will be necessary to consider the importance of the substitute behaviour (the one desired by the legislature) and the other one (the behaviour not desired by the State), taking into account mainly the factual possibility of these alternatives and their costs.

In this sense, it is suggested to compare the situation that would have if the State had taken a direct and individual interventional measure. It is from this comparison that will be extract the question if the inducing tax rule, at the concrete circumstances: (i) is compatible with the purpose (ii) is still the most neutral measure (quantitative reasonableness), considering also the goal of influencing the little as possible on free competition.

The principle of proportionality confirm that "would only be allowed to grant exemptions to new industries where the earnings of capital employed in the industrial investment are random and uncertain" since "if the taxpayer receives reasonable profits for its industrial activity, does not justify exemptions under the label of the new protection industry".

In the environmental field, the rule that discourages a polluting activity should have its constitutionality examined from the condition that other equally polluting activities are also affected, otherwise just turn away customers to other polluting activity, including details on the first without any reasonableness.

Another field using the induction rule is tax progressivity of taxes for so-called "non personal taxes". The structural progressivity was contemplated by the Constitution legislator at the real state tax (IPTU), which enable to the Tax Administration demands to the taxpayer follow a directive from the appropriate use of the property under a "penalty" to levy a higher tax, which is progressive over time. Also in relation to the tax on rural land (ITR) there is a tax rule that allows for the fixing of rates in order to discourage the retention of unproductive properties.

The selectivity, in other hand, applies in the present constitutional system leads to the application of tax rules for the tax on industrialized products (IPI), and for tax on goods and services (ICMS), and is mandatory for the first one and optional for the second one.

The Constitution of 1988 does not specify what should be considered essential. The understanding is that the tax falls on the property in the inverse ratio of their need for popular consumption and in direct proportion to their superfluity, according to doctrine.

In this sense, the question arises: can the ordinary legislator introduce inducing tax rules, and then adopting the tax rates for that not to graduate according to the parameter of the need? We believe that is not possible. The answer, however, is subjective and may be obtained in accordance with the governing principles presented above.

5. Conclusion

Brazilian Economic Order based on the principle of free initiative, ensuring that all the free exercise of any economic activity, regardless of authorization of public agencies, except in cases provided by law. Hence, therefore, it is essential to distinguish the cases of legal and il-

legal activities. If illegal, there is no way the legislator can admit this kind of activities. If the activities are legal, on the other hand, there is no way the tax legislator prevent its exercise. Certain is that the legislator, pondering constitutional principles, may seek to restrict the exercise of certain activities when public policy interests indicate the inconvenience of their uncontrolled use.

It must distinguish the legal rule that the State uses as a legal instrument to prevent or discourage directly an act or fact that the law prohibits the extrafiscal tax that is prohibitive, when there would be a predetermined duty by a legal rule that State uses as a legal instrument to prevent or discourage, indirectly, an act or fact that the legal order permit. So, for environmental reasons, as an example, may be intended to reduce the number of cars in circulation, or the number of established industries in a certain region. Also, shall be taken, in this case, the possibility of inducing use of tax regulations, which may even be higher than normal.

That means that the tax burden can not be so high to preventing economic activity not prohibited by law. It is import to inspect, always, if it is the removal of part of the heritage of the particular, through taxation is in accordance with the principle of ownership. Here goes the following rule: if the economic order would not tolerate the State, through direct act, limit or reduce the scope of private property through direct intervention, either you can do it by inducing tax rules. On the other hand, it is possible to see how totally appropriate is the use of inducing tax rules of economic behaviours for which the State seeks from the individuals a more appropriate behaviour for society as a whole, provided that such indirect imposition of reasonable behaviours.

References

CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo, Ed. 19. Rio de Janeiro: Lumen Juris, 2008.

GOUVÊA. Marcus de Freitas. A Extrafiscalidade no Direito Tributário. Belo Horizonte: Del Rey, 2006.

JÚNIOR, Onofre Alves Batista. Princípio Constitucional da Eficiência Administrativa, 2ª Ed. Belo Horizonte: Ed. Fórum, 2012.

MACHADO, Hugo de Brito. Inconstitucionalidade do aumento do IOF com

desvio de finalidade. Revista Dialética da Direito Tributário, São Paulo, Dialética, v. 154, p. 51-60, julho 2008.

PALMEIRA. Marcos Rogério. A tributação na Idade Moderna: uma construção de mitos *in* O Tributo na História: da Antiguidade à Globalização. Florianópolis: Fundação Boiteux, 2006.

SHOUERI. Luís Eduardo. Normas Tributárias Indutoras e Intervenção Econômica. Rio de Janeiro: Forense. 2005.

SOUZA. Washington Peluso Albino de. Primeiras Linhas de Direito Econômico, 4ª ed., Sãu Paulo: LTr, 1999.

STRECK, Lênio Luiz e MORAIS, José Luiz Bolzan de. Ciência Política e Teoria do estado. 5.ed. Porto Alegre: Livraria do Advogado, 2006.

The intervenue of public law in private law: Brazilian reality

Juliana Falci Sousa Rocha Cunha[1]

Abstract: The boundaries between public and private law are becoming less and less clear, increasing the state control over the private activity. At the beginning, this study will focus on the fundamental differences between these two branches of law. Furthermore, it will be discussed some situations of Brazilian legal reality, which lead to the interpenetration between these branches, reducing the boundaries; but that should be carefully analysed in order to avoid injustice in the private and public spheres. Previously the rules of private law were marked by individual's autonomy, being free to make choices in private and business life. Meanwhile, the rules of public law were founded on the sovereignty of public interest over private one, restricting the Government relationship between not only citizens but also other States. There was a clear division between these two branches of law, what no longer exists. Currently the division between these branches is imperceptible.

There are many cases of public interference over private sphere in Brazilian's legislation and case law. The social function of property has imposed duties on the owners such as condemnation and recording properties. The contracts also follow this same way, in other words, they have to find their social functions over the parties' legal affairs. Even affection between people is no longer considered a feeling, but has become an obligation imposed by the state, under penalty of condemnation for affective abandon. And the inalienability clause imposed by the testator: being restricted to the legal situations admitted, wouldn't be excessive the state intervention in the private sphere? At the end this study will briefly analyse the limit of intervention between the public and private laws in the Brazilian reality.

Keywords: Autonomy. Law. Intervenue.

[1] Lawyer, Professor, finishing Master in Bussiness Law – Faculdade Milton Campos. Specialised in Bussiness Law - Faculdade Milton Campos and also in Civil Law - Faculdade Milton Campos. Graduated in Law - Faculdade Milton Campos, Business Administration – Centro Universitário UNA and Data Information Techology – Centro Universitário UNA. E-mail: jfcunha.bh@terra.com.br.

1. Introduction

The public and private law have been linked in such a way that the boundary between them is becoming less apparent, leading the increasing state control to the private one.

Therefore, to a better study of this growing link between the two branches of law, it is essential not only the concept, but also the difference between public and private law.

It is also relevant to analyse examples of public law interference, which can be found in Brazilian's laws and case law, such as contracts: sometimes the business interests fail due to the social contract functions.

In this way, this study intends to talk about the limits of the public intervention in the private law, particularly in Brazil.

2. Historic

The difference between the public and he private law is ancient, having been started with "Corpus Juris Civilis", the Roman Law. REALE (2009) states that:

> The first division that could be found in the history of the Science of Law was the one made by the Romans, between the public and the private law. Following the criterion of private or public interface "utility": the first would be related to the State ("publicum jus et quod ad statum rei romanae spectat"), while the second would be related to the interest of each one ("privatum, quod ad singulorum utilitatem spectat").

The Ulpiano's "Digest" says that "publicum jus est quod ad statum rei romanae spectat, privatum, quod ad singulorum utilitatem". It means that the public law is related to the state of the roman things, while the private one is connected in some ways to the utility of private men.

In medieval times the public law was part of the private law. The land owner, for instance, had sovereign power not only over his "feud" but also over its inhabitants, imposing rules, charging taxes and having political power and social standing.

Some discussions about the distinction between the State and the civil society emerged in the 18th century, what brought about the coming back to the ancient difference between the public and the pri-

vate law. According to FACCHINI NETO (2010), we can remark a division between the law which deals with the private interests and the one which looks after the State, not only in its structure but also in its operation.

The French Revolution (1789-1799) with the Declaration of Man and Citizen's Rights recognised the rights of citizens against the State. At that time, GOEDERT and PINHEIRO (2012) stated:

> [...] the private law reflects on the ideology of the bourgeoisie, showing the needs of the social and economic class who gain power, passing through codes endowed with material primacy over the Constitution – which holds a secondary place - to totally regulate the society exclusively based on the bourgeois ideologies and wishes.

Thus, according to GOEDERT and PINHEIRO (2012), these constitutions showed "the division of powers" as an expression of internal limit to the State power and the recognition of the fundamental rights" because these rights limit the power of the state.

During the Liberal State there was a great effort to establish the limits between the public and the private law. The public law was related to the representative government, which guided the interests of the society through the State, while the private law focused on human being, emerging from the individual's contractual autonomy. So, with the empire of this autonomy, it was only allowed to the State to pacify the citizens, so that they could act according to their own will.

At the end of of this period, even with the prevalence of the private law over the public one, the State began to have more opportunities acquiring the power that was before from the citizens, what developed the Welfare State.

In the Welfare State, there was a large State intervention in the society, which resulted in the development of the State. At this moment, there was a huge tendency that led to confusion between the private and the public law. Although, the Welfare State went on until the arrival of the Democratic State of Law.

Nowadays there is a distinction between the public and the private law, but it is been increasingly reduced. According to GOEDERT and PINHEIRO (2012), there is a "movement towards decoding the private law ".

3. Concept: the public law and the private law

It is important to study what some doctrines state about the concept of the private and the public law.

According to DINIZ (2013), Saviny says that the public and the private law differ one from the other according to the aim of the law. The author affirms that:

> While in the public law the collective displays itself as an end and the individual remains in the background, in the private law each person, considered individually, is the goal of this branch of the law and the legal relationship only is a way to come into existence and private conditions.

In DINIZ's (2013) opinion, on the one hand the public law would be responsible for establishing the rules that guide "the relationship in which the subject is the State, safeguarding the general interests and aiming to achieve the social objective facing its members and other States". On the other hand, the private law would be in charge of the legal relationships among persons.

GAGLIANO (2013) explains that the public law would be related to the political society, its organisation, services and repression of delicts. But, there are also the Constitutional Law, the Administrative Law, the Criminal Law, the Procedural Law, the International Law and the Environmental Law. Meanwhile, the private law includes the Civil Law, the Commerce and Trade Law, the Consumer Law and the Labour Law as well.

MELO (2008) says about the public and private law:

> [...] there is no doubt that all clauses that are destinated to life, structure and operation of the State are Public Law [...], the relationship among several States [...], the administration of justice in the interest of people [...] because this is still the function of the State sovereignty. The clauses related to the person, to his family and also to the development of his patrimony belongs to the Private Law.

Finally the Public Law is interested in safeguarding all of the society. Meanwhile, the Private Law is in charge of the person's interests.

4. Difference: the public law and the private law

In the past, we studied a lot the distinction between the public and the private law. According to REIS (1998) the ancient thinkers of the dichotomy of the public and the private law showed different criteria: "Hollinger, in 1904, presented 114 criteria, Roubier [...] 17 [...], Pontes de Miranda more than 20, Mota Machado 9."

So that among many criteria studied, this brief study will talk about some of them such as "the addressee of the regulation" and "the protected interest".

Firstly, it can be analysed from the norm's addressee. If the State: Public Law; If a person: Private Law.

It is also possible to think about the subject of the regulation. If it is an "organisational law," like REIS (1998) said, it is a Public Law. Otherwise, if it is an " attributable law", it will be considered a Private Law.

According to BOBBIO (2007), the dichotomy between the public and the private is based on the equality and inequality:

> As the Law is a proceeding of social relations, the first great distinction between the public / the private dichotomy is: between equal and unequal. The State, or any other organised society in the public sphere, even if total or partial, is characterised by the subordination of the relationship between the citizen and the government, which is unequal; the natural society as described by jusnaturalists or market society according to the classical economists taken to a private sphere as opposed to the public one, is characterised by the relationship between equals [...].

In SARMENTO's (2010) opinion, the "interest" could also be analysed:

> […] the public law would correspond to the topics which have a preponderance of public interests, while the Private Law was responsible for the issues of discipline that would be related more directly to individuals, leaving the interests of the collectivity to be studied later.

As stated before, we can understand that the relationship between the private law's are done in the private sphere, without the interference of the power of the State, while the relationship of the public

law regarding the public scope is guided by the interference of the state power of the State considering the achievement of the community objective.

REIS (1998) also says about the "main interest" of the law:

> […] the regulation is inside the Public Law when not only directly and immediately protects a public interest but also indirectly and mediately protects a particular interest. When the regulation is a Private Law, it depends on the intensity or density of the main interest.

REALE (2009) declares that there are "two complementary ways of making difference between" the Private and the Public law. Firstly, it should be checked the legal relationship content: "when it is aimed immediately and directly to the public interest, the law is public"; "when it is aimed mediately and indirectly to the private interest, the law is private". Secondly, it should be analysed the form of the legal relationship: "it is usually considered private law if the connection is coordinated, public law if it is subordinated".

According to CARMO (2010), it's possible to assert that the present dichotomy of the Brazilian Public Law and Private Law is the result of the historical evolution:

> The present form of the Brazilian State came from the ideals outlined in the neoliberal period – brought about plans to change and reorganise the state in the end of the 20th century. Furthermore, it dealt with the context of the democracy outlined in the Republican Constitution (1988), which undoubtedly assumed the responsibility to create a system of cooperation and integration between the public interest pursued by the Administration, the social concerns and the new market demands. Therefore, the current State has the constitutional mission to make an effort to build a strict and prosperous democracy, getting particular attention to form new partnerships with the people, going up in value the consensus and also the citizens formation leading to them participating and acting in the social sphere.

So the subject: the private "goes public" and the public "goes private" has recently been discussed. In the first case, it has been said that it's the private interest is subordinated to the public interest or to the society, that is represented by the State. The public "goes private"

refers to the group formation of private interests that takes advantage of the public interests to achieve the private interests.

However, it's important the demarcation between the private and the public law, but it's not essential. Nowadays the challenge of the State is to make possible the harmonious coexistence between the public and the private, always aiming the public interest.

5. Cases of interpenetration in Brazil

From now on some cases of connection between the public and the private law in the Brazilian reality will be briefly analysed in some aspects such as: social function of the property, contracts, affective abandon and inalienability.

5.1. The social function of the property

It's interesting to check what MARQUESI (2005) says about the theories of social function and their relationship with the property:

> (…) when the theories of the social function were created, they took into account the agricultural wealth. They didn't analyse other important irradiations of the domain, not only the relationship between owner and workers but also the natural resources and the urban property. However, after those other new restrictions have been imposed in the community's favour (the most recent ones are related to the environment). Thus, not only the meaning of the property rules comes from a slow transformation, but also the extension of the principle of the social function has been evolved from this century.

So, in Brazil when talking about property we must look carefully at the Constitution, always focussing attention on the social function.

For instance, the urban property must obey the City's Master Plan, which describes the fundamental requirements to the city organisation.

The rural property must respect the rational and adequate use of the land and also the correct use of natural resources always trying to preserve the environment.

The social function of the private property being fulfilled the intervention of the State should not be allowed (it can only be inspected).

But, if the property does not fulfill its social function, the State should act so that it could be fulfilled according to the Constitution and the law.

COSTA (2003) states that "[...] the intervention reveals the legal power of the State, based on its own sovereignty. It is the real power of the empire that the community should obey."

The intervenue of the State in the private property can occur in two different ways: restrictive and suppressive. In the restrictive intervenue, the State imposes restrictions on the private property, so that the owner must preserve it, as in recording, public easement, requisition, temporary occupancy and public restriction. Otherwise, in the suppressive intervenue the private property is transferred to the State and the owner loses his property, known as "condemnation".

The kinds of public easement, requisition, temporary occupancy and public restriction will not be detailed, what could be analysed in another opportunity.

The "recording", for example, a restrictive intervenue, is an administrative procedure in which the State, in order to preserve it as a public interest, imposes restriction on the private property. An example is the recording of properties in Belo Horizonte/MG (Brazil), which were built in the end of 1800s and had a typical architecture. The "recording" reduces the price of the property, makes its sale more difficult to negotiate, goes up the repair costs and demands special studies to be mended. Even if the property doesn't have to pay the annual tax (the Urban Land Property Tax), the owners' properties affirm that a recording property is not financially viable, particularly because of the hard procedure of repairing it imposed by the City Hall.

So, it is important to mention part of an amendment (First Federal Court - First Region) related to "recording":

> [...] the recording, which has a collective importance, comes from the identification that a particular area has some peculiarities which need special maintenance. In these areas the public interest of the properties is superior to the owners' one.
> [...] In these cases, the restriction imposed can be justified by the interest of the urban preservation, which represents the historical patrimony. (BRASIL. Tribunal Regional Federal – 1ª Região - AC: 6666 MG 2001.38.00.006666-6, Relatora: Maria Isabel Gallotti Rofrigues. Data de Julgamento: 24/11/2008, 6ª Turma, Data de Publicação: 19/01/2009 e-DJF1 p.154)

The condemnation is an administrative procedure by which the State, with previous declaration of public requirement, public utility or social interest, imposes on the people the loss of the property through a payment of an indemnification. However, in some cases the Brazilian justice provides indemnities that are not directly influenced by the market value of the property. Unfortunately, these Brazilian's families are unable to acquire another property similar to that one. In some cases, the owners request the judicial indemnification, but generally without any success.

In conclusion, the State can intervenue in the private property due to the public interest. But, this intervenue should be reasonable and the owner of the property should not suffer any consequences.

5.2. Contracts

The contract is an agreement signed by the parts, which are adjusted to their will. Each part has the freedom to define the content of the contract and also the option to sign it or not.

MARQUESI (2005) says:

> The State always tries to preserve the contract equilibrium, imposing a counterbalance when needed. The contract parts (employer and employee, supplier and consumer) are materially unequal; the rich people's wishes take advantage of the poor's ones [...]. Therefore, the government action is required to keep balance: through the contractual duty, the delimitation of the will or using mechanisms which could favour the rights of the person who is in disadvantage.

The contract is being increasingly affected by the State intervenue, what has caused a social sight of the contract theory. However, it doesn't represent the independent and perfect wills. The intervenue takes place not only in the Legislative Department but also in the Judiciary one.

The Legislative intervenue in the private law is called "contractual dirigisme" and it limits the contractual freedom imposing cogent norms. HIRONAKA (2003) says about the "contractual dirigisme":

> The legislative intervenue of the State [...] carried out a new period, where the bad judicial liberalism consequences were de-

> creased by the social protection (which was economically available to the powerless). As a result of that, the "contractual dirigisme" repelled the contractual forms, which the law was available to one part and the obligation was only available to the other part.

The Consumer Code is an example of intervenue of the Brazilian State. The main purpose of this Consumer Code is the protection of consumers. The apparent inequality of this law aims at the supplier and consumer contract equilibrium. In that way, the formal inequality is accepted due to the material inequality.

The Brazilian Consumer Code allows the cogent norms to consumer contracts, for instance, the consumers who are favourable to the interpretation of the contract clauses (article 47); refuse right (article 49) and abusive clause (article 51). Besides, that Code has also a clause related to good faith, loyalty, equilibrium and harmony between consumer and supplier.

The Civil Code (2002) has interventionist norms, especially those related to the contractual relationship, which always seek ethic and social justice.

PINHEIRO (2002) states about the judiciary power intervenue:

> With progressive, active-productive, practical characteristic there are new models of legal thoughts based on the Case Law of the Interests and also on the Case Law of the Values. The jurist is invited to transpose the limits of the previous performance, turning his attention to the "interests" and the "values" which the legal institution can fulfill.

The Civil Code brought general clauses, which promotes the legal contract intervenue. RODRIGUES (2004) says about the judicial intervenue:

> We do not fear the mercy of the judge: we trust on him; it is essential not to obey it in fixed regulations. At least, he should know what is asked to him. So, what is asked to him? It's asked to him to establish the social function of a right, how the legislator recognises the existence of the rights of the property, the parental rights etc. Such a question does not involve solution on legal sphere because it is really great. The judge, forced to answer it, must stop controlling the law [...]

Finally, the judiciary making use of the Brazilian legislation, has instruments that allow it to intervenue in contracts aiming to limite their freedom.

5.3. Affection – affective abandon

The Family Law has some cogent public regulations, which cannot be moved away following the part's desire. GAGLIANO (2013) says that "the fact of belonging to the Private Law does not mean that the regulation of the system are all individual".

The Civil Code has Principles of Minimal State Intervention in the Family Law, as showed:

> Article 1513. It is not permitted to any person, public or private, to interfere in the communion of life established by the family.

In PEREIRA's (2012) opinion:

> The intervention of the State should merely protect the family and give it some guarantees, including the great manifestation of its will and that its members could live in such good conditions to maintain the affective core.

One example of this is the purpose of the State in norms related to members of the family and also to food. Regarding material assistance: there are a lot of regulations that force parents to provide material assistance to their children. The members of the family are highly protected by the State. For instance, the food is not renounceable and the civil prison of the debtor is admitted.

On the other hand, the right to moral assistance has always been discussed in the doctrine. It takes place due to questions related to the possibility of direct intervenue of the State in people's private sphere, demanding that one loves the other, otherwise the person should be ordered to pay "pain and suffering damages". It's called "affective abandon".

Until the Superior Court of Justice's decision - Appeal 1.159.242/SP (April 24, 2012), the Court was against the possibility of conviction for pay "pain and suffering damages" for affective abandon. The Court understood that in the Family Law the indemnity should not be analysed aiming punishment, other actions could be taken like the loss of pa-

rental power. It also considered that moreover the pecuniary conviction could also reduce the chance of a familiar reception. In the judgment of the Appeal 757.411/MG, the Minister Fernando Gonçalves concludes that " the judiciary can not force someone to love or to maintain an affective relationship; no positive purpose would be achieved with a claimed compensation."

After the Superior Court of Justice has changed its position, especially in the judgment of the Appel 1.159.242/SP, which decided in favour of the possibility of interference in the private sphere to sentence the parents to pay a compensation for their children's affective abandon.

In that Appel, the Minister Nancy Andrighi stresses that "love can not be discussed, its imposition can only be related to the biological and legal duty to take care of children, which is people's liberty to procreate or to adopt children." According to her the psychological assistance is a parents' duty. Its omission would result in an illegal act, which may cause damages and consequently condemnation in pay "pain and suffering damages".

The Minister Massami Uyeda, in his defeated opinion, remarked his concern with the consequences of pioneering decisions as the Minister Nancy Andrighi, such as violation of the principles of reasonableness and proportionality, because many children could complain about the education given to them by their parents. In his opinion, that decision cannot allow damages. He also defends that the property rights are guaranteed to the children at the moment of the inheritance. In this case there is no need to talk about pecuniary condemnation of "pain and suffering damages".

So, the change in case law states that the intervenue of the State in people's private lives influences the relationship between the parents and their children.

5.4. Inalienability

The inalienability clause doesn't allow the alienation of the property. It could not be donated, sold or be given in payment.

Therefore this clause aims to protect the family patrimony against future uncertainties.

Most of the doctrine, says that the properties can be incumbrance with the inalienability clause in wills and donations.

An important effect of inalienabity is the consequent imposition

of incommunicability and "restraint of mortgage", even if they are not in the instrument of donation or in the will (aricle 1.911 – Brazilian Civil Code).

However, the Civil Code quotes: "article 1.848. Unless there is just cause declared in the will, the testator cannot establish the restraint of alienation, the restraint of mortgage and the incommunicability on the legitime's patrimony."

So, what is a "just cause"? According to the doctrine and the case law, it is the justification to restrict a property. For instance, a prodigal heir or legatee or even who has a mental deficiency, what could damage the patrimony management. However, only the testator is responsible for declaring the reason of the inalienability clause.

Nevertheless, the main question is the possibility of the State to impose a limit on the private sphere. For example, why cannot a testator force the inalienability clause to a property so that it remains with the family patrimony passing from one generation to the other? Is the State legislating beyond the public sphere and inappropriately reaching the private one, for instance, dealing with subjects that do not concern it?

It was usual in Brazilian society that old family properties inherited from a father to a son could not be sold due to a will clause.

Finally, according to the Brazilian Civil Law, for a person who incumbrances his patrimony with inalienation is essential to give a reason for doing this ("just clause"), what clearly shows the public intervenue in the private sphere.

6. The limit of the public law in relation to the private law

After explanations and examples presented in this study, it is possible to understand that, theoretically, the public and the private law are different, but in practice it often has not been applied. So, which is the limit for the public law performance in the private sphere?

This boundary is the Constitution, what can be reinforced by the Principle of Superiority of Constitutional Norms (the constitutional norm is superior to all infra-constitutional ones and it should have formal and substantial coexistence between the infra-constitutional norms and the other ones brought by the Constitution).

It is important to remember that the legal system is only one and that the norms, (private and public law) should always seek the most convenient for the collective interest, with the greatest possible balance

between private and public interests.

The trend is to merge the public law and the private law: the public "goes private" and the private "goes public". The private interest always should be adapted to the public interest, what legitimates the State interference in the private sphere.

7. In conclusion:

The distinction between the Public Law and the Private one is ancient and has been even found in the Roman Law - "Corpus Juris Civilis".

So it is said that the Public Law protects the interests of the collective and the Private Law the ones of the individuals.

The doctrine presents many criteria to differ the two branches of the law, such as: the addressee of the regulation, the subject of the regulation, the type of relationship and the main interest.

However the dichotomy between the Private and the Public Law is losing its importance under legal discussions. The complementarity of these two branches of law has been debated and is stated that the Public Law has strongly influenced the private one, intensifying the projection of the collective interests in the relationship between individuals. The Private Law has already absorbed the collective discourse on the Public Law, so that the boundaries between these two branches of Law became permeable.

In this context, there are some cases of intervenue of these two branches of law in the Brazilian reality, such as: the social function of property, contracts, the affective abandon and the inalienability clause.

The public "goes private" and the private "goes public" have been increasingly discussed. So, the challenge of the State is the harmony of these two branches of law.

Finally, this study has shown a brief analysis of the boundary of the public law in the private sphere, which has led to make public the private law and to make private the public law. So, the State challenge is to harmonise these two branches of law.

References

BOBBIO, Norberto. *Estado, Governo e Sociedade: para uma teoria geral da política*. 14ª ed. São Paulo: Paz e Terra, 2007. ISBN 978-85-7753-017-5.

CARMO, Thiago Gomes do. Novos rumos da dicotomia entre o público e o privado no Estado brasileiro do século XXI. Âmbito *Jurídico* [on line]. 2010, may, n. 76 (cited 2013-06-02). Available from world wide web: <http://www.ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=7784>.

COLTRO, Antônio Carlos Mathias. Responsabilidade civil no direito de família. In: MAMEDE, Gladston. RODRIGUES JUNIOR, Otavio Luiz. ROCHA, Maria Vital da (Coords). *Responsabilidade civil contemporânea: em homenagem a Sílvio de Salvo Venosa*. 1ª ed. São Paulo: Atlas, 2011. ISBN 978-85-2246-204-9.

COSTA, Luiz Bernardo Dias. Intervenção do Estado sobre a propriedade privada. *Revista de Filosofia*. Julho-Dezembro 2003, vol. 15, nº 17, p. 55-56.

DINIZ, Maria Helena. *Compêndio de Introdução à Ciência do Direito*. 24ª ed. São Paulo: Saraiva, 2013. ISBN 978-85-0218-857-0.

FACCHINI NETO, Eugênio. Reflexões histórico-evolutivas sobre a constitucionalização do direito privado. In: SARLET, Ingo Wolfgang. *Constituição, direitos fundamentais e de direito privado.* 3ª ed. Porto Alegre: Livraria do Advogado, 2010. ISBN 978-85-7348-661-2.

GAGLIANO, Pablo Stolze and PAMPLONA FILHO, Rodolfo. *Novo Curso de Direito Civil – Parte Geral*. 15ª ed. São Paulo: Saraiva, 2013. ISBN 978-85-0218-502-9.

GOEDERT, Rubia Carla and PINHEIRO, Rosalice Fidalgo. A constitucionalização do direito privado, os direitos fundamentais e a vinculação dos particulares. *Revista Jurídica Cesumar.* 2012, vol. 12, nº 2 (cited 2013-06-15). Available from internet: < http://www.cesumar.br/pesquisa/periodicos/index.php/revjuridica/article/view/2451>.

HIRONAKA, Giselda Maria Fernandes Novaes. Contrato: estrutura milenar de fundação do direito privado. *Jus Navigandi*. 01-Jun-2003, ano 8, nº 66 (cited 2013-06-24). Available from internet: <http://jus.com.br/revista/texto/4194>.

MARQUESI, Roberto Wagner. Fronteiras entre o direito público e o direito privado. *Jus Navigandi*. Dez-2005, ano 10, nº. 908 (cited 2013-07-04). Available from internet: <http://jus.com.br/revista/texto/7788>.

MELO, José Tarcísio de Almeida. *Direito Constitucional do Brasil*. 1ª ed. Belo Horizonte: Del Rey, 2008. ISBN 978-85-7308-965-3.

NEVES, Marcelo. *Transconstitucionalismo*. 1ª ed. São Paulo: WMF Martins Fontes, 2009. ISBN 978-85-7827-200-5.

PEREIRA, Rodrigo da Cunha. *Princípios fundamentais norteadores para o direito de família*. 2ª ed. São Paulo: Saraiva, 2012. ISBN 978-85-0214-396-8.

PINHEIRO, Rosalice Fidalgo. *O Abuso do Direito e as Relações Contratuais*. 1ª ed. Rio de Janeiro: Renovar, 2002. ISBN 85-714-7835-X.

REALE, Miguel. *Lições preliminares de direito*. 27ª ed. São Paulo: Saraiva, 2009. ISBN 978-85-0204-126-4.

REIS, Sebastião Alves dos. Uma visão do direito: direito público e direito privado.

Revista de Informação Legislativa. Janeiro-Março 1998, nº. 137 (cited 2013-07-03). Available from: <http://www2.senado.leg.br/bdsf/bitstream/handle/id/332/r137-06.pd

f?sequence=4>.

RODRIGUES, Silvio. *Direito Civil: Responsabilidade Civil*. 20ª ed., São Paulo: Saraiva, 2004. ISBN 85-020-4377-3.

SARMENTO, Daniel. Interesses Públicos vs. Interesses Privados na Perspectiva da Teoria e da Filosofia Constitucional. In: SARMENTO, Daniel (org.). *Interesses Públicos versus Privados: desconstruindo o princípio da supremacia do interesse público*. 1ª ed. Rio de Janeiro: Lumen Juris, 2010. ISBN 85-738-7995-5.

Liberals, Communitarians, Republicans and the intervention of the State in the private sphere

Rafael Rodrigues Pereira[1]

Abstract: the aim of this paper is to discuss whether the growing intervention of the State in the private sphere – as we see in labor laws, consumer rights, bioethics and internet crimes – is compatible with the liberal ideal of neutrality, or, on the contrary, whether it can be seen as a turning point towards the position of communitarian or republican authors, for whom the State must endorse a substantive good. Such a turning point could lead to a reformulation of the public and private spheres, and, of course, raise questions over which values justify which kinds of intervention. The paper will cover these debates in three parts: firstly, by presenting briefly the history of the liberal conception of rights: we'll try to show that, from a starting notion based mostly on individual protection, the liberal tradition has turned to be more interventionist, which can be seen in the notion of "claim rights". Departing from John Rawls's work, we'll argue that this notion would allow some level of intervention, without betraying liberal neutrality. After this, we'll discuss the difference between this kind of intervention and the ones preconized by communitarians and republicans authors: the former will be illustrated by Michael Sandel's criticism of Rawls in Liberalism and the Limits of Justice, and the later by Richard Dagger's position in Civic Virtues, Citizenship and Republican Liberalism. Finally, in the third part, we'll discuss whether liberal principles can be harmonized with the republican and communitarian focus in civic virtues and the good life.

Keywords: State intervention, liberalism, communitarianism.

1. Introduction

It's possible to see the contemporary phenomenon of growing

[1] Professor of Federal University of Goias (UFG), Brazil.

intervention of the State in the private sphere – in labor laws, consumer rights, bioethics and internet crimes – as directly related to the debate, in political philosophy, between liberals, republicans and communitarians. For one of the most important issues discussed there is State's neutrality: should government's actions favor some conception of the good life? Or should it be based only in a conception of justice, which would be – theoretically – independent and prior to such conceptions? If this latter view is associated to the liberal tradition, and if we understand "neutrality" by the refraining of intervention in people's private lives, then this recent phenomenon could reflect a trend to republican or communitarian views. But this conclusion could be too hasty, if we are able to conceive some kind of "intervention" compatible with liberal ideals. And if it is possible, how can we tell if this contemporary trend is related to such liberal view, or, on the contrary, to communitarian or republican values? And how could all those different values coexist in the same society? Those are the issues discussed in this paper.

2. Liberal interventions

Liberalism, traditionally, is supposed to have two main characteristics: a- a strong emphasis in liberty and individual rights; b- the neutrality of the State. A good way to understand what "neutrality" means, here, is by Rawls's formulation of the "priority of the just": the just isn't derived from the good. The State, therefore, must be neutral in regard to conceptions of the good life (Rawls 1971, § 5-6).

This neutrality is criticized, mainly, by republican and communitarian authors, who stress the importance of the virtues and the common good, which presupposes, of course, some conception of the good (Sandel 1998, ix; Dagger 1997, 175).

An interesting way to put this is to say that the key-concept of liberalism is *autonomy,* and not *virtue*. Autonomy, here, is understood as self-government – which, as Dagger puts it, isn't directly connected to a conception of the "good", as does the notion of virtue (Dagger 1997, 14; 17).

The emphasis on autonomy is an essential aspect of the liberal conception of rights, since its origins. Locke clearly conceived "rights" as a way to protect individual freedom – hence autonomy - against arbitrary interventions of others.[2] However, this individualistic notion has

[2] See, for instance, the discussion about liberty in the Two Treatises, Book II, Chapter IV,

acquired, especially during the 20th century, a more stressed social dimension, establishing a kind of relationship between people. The distinction, made by Wesley Hohfeld, between claim-rights and liberty-rights, makes this point very clear: the autonomous individual is understood as an author of claims upon others. As Dagger puts it, the ancient notion of "natural rights" proceed from the idea of self-possession, but contemporary "human rights", though a direct descendant of the later, rests on some conception of "a person as a being with needs and interests, that must be met if he or she is to live a full human life" (Dagger 1997, 22).

This "social" conception of rights paves the way for a more interventionist State. A good example is Rawls's principle of difference, which can be seen as endorsing a claim right: Rawls thinks that the "least advantaged" members of society have the right to be somehow compensated for their bad luck in natural and social lottery (Rawls 1971, § 17). In this sense, the State can, for instance, tax the more fortunate – who doesn't deserve their good luck - in order to help them. This is, of course, a kind of intervention. The interesting point, however, is whether it is compatible with liberal neutrality.

Libertarian authors, like Robert Nozick, think that it isn't: if we understand autonomy as a kind of self-possession, then it implies, for Nozick, in the possession of our abilities – or "natural assets" - and of our holdings, as a product of our work (Nozick 1974, p. 224). That means that taxing people's revenues is an illegitimate appropriation of people's ownership, ergo a disrespect of their rights. Nozick compares taxing to stealing and forced labor (Nozick 1974, p. 169). This position is clearly related to liberalism's origins, when, as we said, the main purpose of "rights" was to protect individual's autonomy against external interventions.

Authors like Rawls – sometimes called "liberal egalitarians" – disagree. But their disagreement isn't about the necessity of protecting autonomy. On the contrary, their conception is also centered on this notion (if it wasn't, we wouldn't call them "liberals"). The difference to libertarian's position, then, must be understood as a different treatment of autonomy, more consonant to the relational dimension of contemporary rights.

This treatment is very well grasped by Kymnlicka's discussion: he stresses the difference between "formal" and "substantive" self-ownership. Let's imagine, for instance, a very poor person who needs a job

§ 22.

desperately. The employer will be in a position to offer him a very low salary. Should this be considered a "voluntary transaction"? For libertarians, like Nozick, yes. As Kymnlicka puts it, they have a formal conception of autonomy, narrowly connected to the idea of "consent". If the poor person consented to his salary, then his autonomy was respected, and no rights transgressed (Kymlicka 2002, 123). As long as he had the right to say no, he didn't really belong to his employer. In this formal way, we can say that he belongs only to himself.

Egalitarians see this differently. For them, poverty and others material limitations should be seen as a kind of coercion. In his situation, the poor person can't really exercise his autonomy. The actual control of his life implies a minimum of material resources. This is what Kymnlicka calls a "substantive self-ownership" (Kymlicka 2002, 122).

Understood this way, the protection of autonomy isn't just a matter of refraining external interventions; it's also a matter of providing substantive conditions for the exercise of this autonomy. Individuals have ergo the right to claim for these conditions being provided. That's what, roughly, Rawls's "principle of difference" tells us.

This logic legitimates a kind of State's intervention that is completely compatible with liberal ideals, for it's not an intervention that threatens personal autonomy. On the contrary, it's made for the sake of it. Of course, we could think, in Rawls's case, that this intervention supports the autonomy of only some people – the disadvantaged –, while autonomy of the more fortunate is, in fact, disrespected. But it is not that simple. This is precisely the point where Rawls's notion of "ignorance veil" intervenes.

Rawls is, here, inspired by Kant, who thought that we are autonomous individuals only when our actions aren't determined by external, empirical laws. We must follow just the laws we give ourselves, which happens when we are rational in a strong sense (Kant 1993, Section III). The way Rawls finds to express this Kantian idea is to suppose that the principles of justice regulating a well-ordered society are chosen behind an ignorance veil: people don't know the empirical circumstances that particularize their situation in the world - social position, power, degree of intelligence or other talents, and even their psychological propensities. Rawls thinks that only in this hypothetical situation people can chose, in an autonomous and fully rational way, the principles that will regulate their lives. As he tells us, only then their choice will "express their nature as rational and autonomous agents" (Ralws 1971, § 40). In this sense, if some people pay taxes for the benefit of the least

advantaged, their autonomy is being fully respected, because they are following principles that they would have autonomously chosen in the original position.[3]

Besides autonomy, Rawls's work also illustrates how some kind of "intervention" is compatible with another – and related – liberal ideal, neutrality: Rawls, in fact, is a famous defender of neutrality, as we can see in his already mentioned "priority of the just", but also with notions like "overlapping consensus" and "public reason", directly related to neutrality, in his later book *Political Liberalism* (Ralws 1993, II, 4 and 6). The original position may be seen, in fact, as a way of ensuring that our choice of principles of justice won't be influenced by any particular conception of the good – thus respecting neutrality.

We can therefore conclude that the relational dimension of contemporary rights makes possible a conception of "State's intervention" that is perfectly compatible with the liberal ideals of individual autonomy and neutrality. Now we can turn to the next part of our work, analyzing the distinction between this "liberal intervention" and the ones preconized by communitarians and republicans authors.

3. Communitarian and Republican interventions

The communitarian's position is well expressed by Michael Sandel's work. In *Justice and the Limits of Liberalism*, Sandel tries to show that Rawls's "priority of the just" presupposes an untenable conception of the *self*, the "unencumbered self", which would be previous to its ends (Sandel 1998, I). As Kymnlicka puts it, communitarians have three main reasons to believe that this liberal description of ourselves is wrong: a- it is empty; b- it violates our self-perception; c- it ignores our embeddedness in communal practices (Kymlicka 2002, 221). For Sandel, this emptiness is closely related to State's neutrality, for both are derived from the priority of the just, which ignores that "all political orders must embody *some* values" (Sandel 1998, 11).

In his most recent books - *Justice* and *What Money Can't Buy* -, Sandel applies these ideas to everyday cases, what can help us to un-

[3] There are, of course, other more simple arguments about the problem of advancing the autonomy of the least advantaged. Kymnlicka stresses, for instance, that, since "substantive self-ownership" is a matter of degree, the autonomy of the least advantaged is actually being threatened by their lack of resources, while we can't say the same when the more fortunate pay taxes (Kymlicka 2002, 124).

derstand which kind of "intervention" would be acceptable in a communitarian State. In both works, he stresses that liberal neutrality impoverishes political life, for it presupposes that we shouldn't bring our personal values and convictions to this field (Sandel 2010, Chap 10).[4] One consequence of this impoverishment is that our lives are more and more governed by impersonal mechanisms, like the market, which corrupts values that should be preserved (Sandel 2012).

Sandel doesn't make clear whether those values should be protected from the market simply by State's interventions; this idea, however, is implicit in several of his arguments, as, for instance, when he criticizes the legalized killing of animals belonging to endangered species (Sandel 2012, 43). The point, here, is clearly that this killing simply *shouldn't* be legalized. The same could be said in the comparison he makes between American and English policies of blood's donation: the later – in which payment is forbidden – is, somehow, better than the former (Sandel 2012, 62).

It must be said that Sandel's position isn't – neither communitarian's in general – that all problems should be solved by the State, in an authoritarian way. When he gives the example of a Swiss city in which citizens accepted to store radioactive nuclear waste, he stresses the importance of this being done by civic spirit. The source of this kind of attitude should be values shared by the community, not "because the government told so", and Sandel makes clear that an authoritarian State isn't the best way to promote civic spirit (Sandel 2012, 58-9). His point is that the law should enforce some values – hence his critic of the "priority of the just" -, but these values must be part of our identities, and continuously discussed in a public debate.

In our view, "communitarian's interventions" shouldn't be seen as necessarily more authoritarian that the ones supported by liberal egalitarians like Rawls. In fact, some of these interventions would be supported by both, as Sandel, once again, points out: in several of his examples, he describes two different kinds of reasons by which market's logic could be contested: "equality" and "corruption". Paying for an addicted woman's sterilization, for blood, for a place in a line or in a congressional hearing, can be seen as a corruption of certain values (maternity, donation, civic spirit), but also a way of exploring inequalities in

[4] In the second edition of Liberalism and the Limits of Justice, he sets Rawls's Political Liberalism as a typical example of this position.

people's positions (Sandel 2012, 10).[5]

We may therefore conclude that egalitarian and communitarian authors support both some kind of "State's intervention", even if only the former is compatible which liberal ideals. The difference between them rests, however, mostly in the *reasons* behind the interventions, for both will often - though not always - encourage the same ones.

We can now turn to the republican view. As we said before, we'll concentrate in Richard Dagger's *Civic Virtues, Citizenship and Republican Liberalism*, in which he discusses the differences and convergences between this position and the liberal one. Departing from the classical distinction between liberalism as focusing on individual rights and personal autonomy, and republicanism as focusing in civic virtue and public responsibility, Dagger argues that, although they are different, there is no real incompatibility between them. His strategy consists in showing that "autonomy" can be understood in a more collective way, on one hand, and "civic virtue" in a more individual way, on the other hand.[6]

What is more interesting for our purposes, however, is that this compatibility is possible, according to Dagger, only if we abandon one of the most important premises of liberal though: the idea of neutrality. As the author says,

> Republican liberalism, however, plainly is not neutral is this sense; on the contrary, it is a perfectionist doctrine that prescribes a certain conception of the good for everyone. Hence republican liberalism cannot be a satisfactory form of liberalism. If liberalism *must* be neutral or agnostic with regard to competing conceptions of the good life, republican liberalism truly is an oxymoron (Dagger 1997, 175).

Dragger strategy, then, consist in denying that liberalism *can* really be neutral. We don't have the room, here, to detail Dagger's arguments, but, in our view, he fails. Neutrality is a distinctive feature of

[5] The results would be the same in several cases, but not always, as, for instance, in the case of the legalized killing of endangered species: a communitarian could have reasons to forbid it – for there are positive values being corrupted -, but it is not so obvious with liberal egalitarians, for people's autonomy isn't at stake.

[6] Dagger strategy consists in saying that the fostering of autonomy depends on our interdependence to other people (Dagger 1997, 17-18), and that civic virtue can be understood from cooperatives practices under the principle of "flay play" (Dagger 1997, 46-47; 110).

liberalism, since derived from the idea of "no intervention", implicit, on its turn, in the very notion of individual rights.

As it happened with Sandel, Dagger doesn't talk explicitly about "government interventions", but, again, we can think that this is entailed by his denial of neutrality. He stresses, for instance, the importance of education in fostering participative citizenship, which is, we could say, a typical republican view. It is true that he puts "educating desires" as an intermediate position between the more radical position of "molding" them, and the less stringent, liberal view, for which people's preferences are just given.[7] But this difference of degree doesn't change the fact that education will have some kind of purpose, supported by the State: to promote autonomy and civic virtue. In any "perfectionist society", as Dagger himself defines republican-liberalism, government's actions will reflect some view about the good, related to a conception of the good life. And this can be seen as a kind of "intervention" in the liberal sense, whether it be in Nozick's or in Rawls' version of it. Of course, there can be several levels of intervention, from radical to more acceptable ones, but discussions about degrees are not relevant for us here.

The important point, for us, is to stress the difference between this kind of intervention and the ones compatibles with liberal neutrality, like Rawls' principle of difference, related, as we've seen, to the relational dimension of "claim rights". Despite Dagger's pretentions in showing their compatibility, his work points out, in our opinion, to the opposite direction; for, according to him, this compatibility is possible only if we abandon one of the most essential premises of liberal thought, neutrality.

When we've approached Sandel's work, we saw that the communitarian view of "interventions" often leads to the same results as the egalitarian one. But our analysis of Dagger's republican position suggests that, even if it is possible, those views are still fundamentally different. Interventions based on promoting or preserving substantive conceptions of the good life can't be labeled as "liberals", even if their results are, in many specific cases, not distinguishable from it.

Another interesting way to distinguish those views is how they

[7] "For republicans liberals, part of the point of education is to help people live autonomously. Rather than 'carefully molding' desires and passions, then, a republican-liberal education will try to enable people to govern their desires and passions so that they may live as autonomous individuals in community with other autonomous individuals" (Dagger 1997, 117).

understand and relate private and public spheres. Republican and liberals conceptions are known for defending a more strict separation between them, while communitarians – probably following the Greeks – tend to support some kind of continuity, with the public sphere usually serving as a reference to the private one (Rosas 2008, 101). This importance given to public life is a point shared with republicans, while liberal societies are often accused to impoverish it, the public sphere becoming an instrument of private interests (Rosas 2008, 96).

4. A possible coexistence?

We can now turn back to the basic premise of our paper: we've seen, lately – as in labor laws, consumer rights, bioethics and internet crimes - a growing intervention of the State in the private sphere. Can it be explained only by "liberal intervention", related to claim rights, focused on autonomy and respecting neutrality? In the actual stage of this phenomenon, it's difficult to answer this question, for, as we said, those different doctrines will often lead to the same results. If the State forbids sterilization for money of addicted women, for instance, this can be done for the sake of some substantive communitarian value (related to maternity), by a republican civic spirit, or, as liberals egalitarians puts it, as a way to avoid exploring inequalities in people's positions.

However, in our opinion, it's reasonable to suppose that the growing interventionist role of the State is somehow related to an historical tendency, in the conception of rights, from a strict formal view to a more substantive one. In fact, as we have noted, compared to its individualistic initial notion, "claim rights" are more social, establishing a kind of relationship between people. And this, in turn, is related to a more substantive conception of autonomy and self-possession. The idea, it would seem, is that freedom can't be so formal and individualist, for it presupposes cooperation, material resources, recognition and others goods.

The main point, however, is that this tendency - the dissatisfaction with formalist conceptions, and the striving for more substantive approaches -, persists. After a shift to a relational notion of rights, but still based on neutrality, actual "interventions" of government in the private sphere could be seen as a shift to laws that reflect substantive conceptions of the good life – in short, to communitarian and republican views.

We can point out as being part of this tendency, on the academic field, the recent revival of communitarianism and republicanism ideas – with the work of Michael Sandel, Alasdair MacIntyre and Charles Taylor, in the eighties, or republican authors like Philip Petit, in the nineties, and, more recently, John Maynor and Cécile Laborde – as well as the recent attempts to conciliate this views with the liberal one, as we saw in Dagger's work.

This tendency could also be present, in our view, on the legal field, as, for instance, with the growing concern with judicial paternalism (Farnsworth 2000; Kronman 1983; Trebilcock 1997; Zamir 1998), especially in labor laws, consumer rights and internet regulation. Bioethics is, of course, a rich domain for this issue: the protection of animals and the environment, or the debate about stem cells, aren't easily justified just by neutrality and the protection of humans' autonomy (Singer 2011; Regan 2004).[8]

If our analysis is correct, and this tendency actually exists, then some questions must be raised about the conciliation between liberal premises and more substantial conceptions of rights. This conciliation was possible, in the past, with the notion of claim rights; but this tendency could eventually reach a crucial point, in which it would become increasingly difficult for this harmonization to be done. As we said before, communitarian and republican views denies some fundamental premises of the liberal thought.

How to deal with this problem? One way is to think that this harmonization may be more easily reached *in practice,* even if not so *in theory*. Communitarian or republican elements may be tolerated in real societies and governments, even if their fundaments are liberal. Political theory tends to be monistic – everything coherently derived from one supreme principle -, but real societies are more pluralists, accepting the coexistence of different values in ways that aren't necessarily coherent. An example of this would be the recent problems with government spying – a movement started, perhaps, with George's Bush "patriotic act": the State must endorse many values, and those may be in conflict with one another. Even if the protection of civil rights – like the one of privacy – is very important, the government must also protect his citizens' lives. In some exceptional circumstances, the later may overcome the former. We are not saying that we support this, only using this example to illustrate how government's actions may be based on different values, not

[8] See, below, our commentary about anti-abortion laws.

necessarily harmonious.

Another contemporary example would be China, where a communist's principles based society tolerates, increasingly, several capitalist practices. Thus a country may adopt "mixed models", putting together components of different doctrines, that, although incompatibles in a theoretical level, may coexist in practice, with a certain tension between them being tolerated.

This phenomenon, in fact, isn't so recent: if we think about anti-abortion laws, for instance, very common – more in the past, but still today - in many democratic countries, it is not easy to justify them only by liberal principles. On the contrary, people opposing to it, defenders of abortion, are often labelled "pro-choice". Anti-abortion laws, in fact, are usually influenced by religious beliefs. And this is a good example of the point we are making: even if the overall principles of liberal societies are secular, following the separation between State and Church, it is possible to find laws, in these countries, based on religious beliefs, and even opposed, in some sense, to the ideals of autonomy and neutrality. Another example would be the recognizing, in liberal democracies, of only monogamous marriages – this clearly favors one way of life over others, and can't be justified only by the priority of the just (Mulhall and Swift 1996, 26-7). Real societies are complex structures, lacking the crystal clear coherence of a political theory.

This would be a way to explain how some laws, in liberal societies, may follow communitarian or republican principles. But there are others slightly different explanations: for instance, instead of seeing, here, a distance between theory and practice, we could elaborate a theoretical approach that takes into account this tension between divergent views – some kind of "tragic" or "agonistic" conception, inspired by authors like Nietzsche. One example of this sort would be the work of Chantal Mouffe: she thinks that modern democracies are based on two ideals, liberty and equality, that can't be harmonized. There will always be a tension between them, which Chantal identifies with political "left" and "right" wings. Society, them, will be marked by different configurations of power, depending on which one of those two ideals, temporary, takes over (Mouffe 2000, introduction).

We can therefore conclude that the dissatisfaction with the emptiness of "formality", that we've mentioned, and the consequent strive for laws based on more substantial values – which is, in our opinion, a contemporary tendency – could lead to the picture of a coexistence of liberal principles with laws and actions reflecting values endorsed by a

conception of a good life. And this can be seen as a "practical incoherence" - where some elements not compatible with the overall principles are tolerated in some specific cases -, or as a sign of a agonistic model of society, where these conceptions are like forces, always present, competing with each other, leading to provisory configurations of power. It is important to note that, in this last case, this "taking over" would be much more than simply winning some election. In fact, as we saw, the nature and relationship of private and public spheres would be, somehow, reconfigured.

Conclusion

In Chantal view, the two competing ideals – liberty and equality – are both part of democratic cultures. We could say the same about the communitarian and the republican models that we've discussed. In this sense, they have in common with liberal principles the defense of democracy, and this ensures a kind of "high order" coherence between them. Our paper, then, raises two main questions:

Can the growing intervention of the State in the private sphere be seen as another stage of a process coming from a strict formal to a more substantial conception of rights, which already resulted on the notion of "claim rights", and now starts to incorporate elements related to communitarian or republican views? We think the answer would be yes.

If so, how these elements can be harmonized with the overall principles of liberal societies? Will they restrict themselves to some specific cases, being "practically tolerated", or will they become strong enough to really compete with the former? This, only time will show us.

References

Dagger, Richard. *Civic Virtues: Rights, Citizenship, and Republican Liberalism.* Oxford: Oxford University Press, 1997.

Farnsworth, Allan. "Promises and Paternalism". *William and Mary Law Review*, 41.2 (2000): 385-409.

Kant, Immanuel. *Grounding for the Metaphysics of Morals.* Indianapolis: Hackett Publishing Company, 1993.

Kronman, Anthony T. "Paternalism and the Laws of Contracts". *The Yale Law*

Journal, 92.5 (1983): 763-784.

Kymlicka, Will. *Contemporary Political Philosophy.* Oxford: Oxford University Press, 2002.

Locke, John. *Two Treatises of Governments and a Letter Concerning Toleration.* Yale: Yale University Press, 2003.

Mouffe, Chantal. *The Democratic Paradox.* London, Verso, 2000.

Mulhall, Stephen, and Swift, Adam. *Liberals and Communitarians* (2nd ed). Oxford: Blackwell Publishing, 1996.

Nozick, Robert. *Anarchy, State and Utopia.* Oxford: Blackwell Publishers Ltd, 1974.

Rawls, John. *A Theory of Justice.* Cambridge: Harvard University Press, 1971

Rawls, John. *Political Liberalism.* New York: Columbia University Press, 1993.

Regan, Tom. *The Case for Animal Rights.* Los Angeles, University of California Press, 2004.

Rosas, João C. *Manual de Filosofia Política.* Coimbra: Almedina, 2008.

Sandel, Michael. *Justice – what's the right thing to do.* New York: Farrar, Strauss and Giroux, 2010.

Sandel, Michael. *Liberalism and the Limits of Justice.* Cambridge: Cambridge University Press, 1998.

Sandel, Michael. *What Money Can't Buy – the moral limits of markets.* Cambridge: Cambridge University Press, 2012 (epub).

Singer, Peter. *Practical Ethics.* Cambridge: Cambridge University Press, 2011.

Trebilcock, Michael. *The Limits of Freedom of Contract.* Cambridge: Harvard University Press, 1997.

Zamir, Eyal. "The Efficiency of Paternalism". *Virginia Law Review*, 84.2 (1998): 229-286.

The efficacy of the fundamental right to health in private legal relations established between health insurance companies and their customers

Rodolpho Barreto Sampaio Júnior[1]
Thiago Penido Martins[2]

Abstract: This work aims to analyze the efficacy of the fundamental right to health in the realm of private legal relations established between health insurance companies and their customers within the context of the Brazilian legal system, analyzing its effects both on economic relations and in the market. Moreover, this work also aims to propose solutions capable of conciliating the effectiveness of the fundamental right to health, enshrined in Brazil's Constitution, with the protection to the important rights of private autonomy, contractual freedom and the free enterprise conferred to economic agents.

Keywords: Fundamental rights, Autonomy, Contractual Freedom.

1. Introduction

Given the scope and the many themes that can be developed with regards to the issue of the effectiveness of fundamental rights in the legal relationship between insurance providers and health care recipients this article, using methodological issues, will be limited to - examining specific situations in which the theme acquires important contours within the Brazilian legal system.

[1] Rodolpho Barreto Sampaio Júnior earned his PH.D. in Civil Law from the Federal University of Minas Gerais. He teaches at Pontifícia Universidade Católica de Minas Gerais. Contact: rodolpho@pucminas.br.
[2] Thiago Penido Martins earned his LL.M. in Corporate Law from Milton Campos Law School. He teaches at Novos Horizontes College. Contact: thiagopenido@yahoo.com.br

The big question to be answered is to define the extent to which operators of private health care plans are linked to the fundamental right to health. Are the operators of private health care plans required to provide mandatory medical and hospital coverage or services that were not objective of the contract with the beneficiary in the name of the direct effectiveness of the fundamental right to health?

The resolution of this important issue pervades by delimiting the extent of the fundamental right to health in private legal relationships between providers of health care plans and their beneficiaries in order to find a solution capable of reconciling the protection of this fundamental right with the protection of private autonomy, freedom of contract and legal certainty within the legal relations between individuals.

2. The right to health

The right to health is inserted among the fundamental rights of a social nature provided by the Brazilian Constitution. The Constitution of the 1988 Brazilian Republic included the fundamental right to health in the list of social rights of Article 6, to ensure it guarantees the fundamental rights to education, work, housing rights, leisure, security, social security, protection of motherhood and childhood, assistance to the destitute, observing the other constitutional provisions.

Disciplinary social order in Article 196 in the Constitution of the Republic, is explicit and unambiguous which sought to be the fundamental right to health and duty of the State, guaranteed through social and economic policies aimed at universal and equal access to actions and services for its promotion, protection and recovery, ensuring, however, the possibility that the private sector also provides health care services under the regulatory legislation.

In the Brazilian legal system, the right to health was regulated by Law 8080 of 1990, which provides the conditions for the promotion, protection and recovery of health, organization and functioning of relevant services. According to legal provisions contained in Article 2 of that legislative instrument, *"health is a fundamental human right, and the State shall provide the conditions required for its full realization" through "the formulation and implementation of economic and social policies."*

According to the second subparagraph of Article 2 of that statute, the *"duty of the state does not exclude people, family, business and society"* consecrating therefore the principle of social solidarity, which also

constitutes one of the objectives of the Federative Republic of Brazil. The role of private enterprise to promote health, in turn, is governed primarily by Law 9656 of 1998 which regulates the activities of the operators of private insurance plans and health care.

2.1 Effectiveness of health rights in legal relationships between providers of health care plans and their beneficiaries.

Currently, the main legal disputes involving the operators of private health care plans and their beneficiaries deal with the coverage of medical procedures. The lawsuits, mostly relate to cases under which recepients of health insurance insist that the operators of private health care plans are required to cover and pay for medical procedures whose coverage was not previously contracted.

> Already there are reports of an imposition - including in the judicial sphere – of material benefits to private entities, in favor of other individuals. This occurs with some frequency (and, of course, in certain circumstances and under certain assumptions) in cases involving health plan sponsors, that even when claiming there is no contractual coverage, they are still required, based on the fundamental rights of consumer protection, health services constitutionally assured and to bear the medical and hospital expenses for its insured. (SARLET, 2006, p. 593)

Faced with these situations, the interpreter applicator is responsible to carry out the analysis of the contractually established restrictions, especially when faced with the fundamental right to health. They must also consider all consitutional normative framework to regulate the contractual relations between the operators of private health care plans and their beneficiaries, to find a constitutionally adequate solution to the problem. This is embraced by the definition of the extent of the effectiveness of the fundamental right to health under this legal relationship between individuals.

A careful and detailed study of cases involving litigations related to coverage of medical procedures by operators of private health care plans, we infer that there has been rare cases where the assigned solution entered the discussion of this important issue of the effectiveness of fundamental law to health within the legal relations between individuals, most of the time becoming of restricted analysis of abusive contract

clauses limiting coverage.

> In the jurisprudence of Brazilian law a phenomenon occurs in a curious form. Not being as scarce as judicial decisions directly using the fundamental rights governing conflicts of private nature. However, with rare exceptions, these judgments are not preceded by theoretical reasoning that give support to the implementation of the constitutional provision to private party litigation. In fact, only now we are finding an echo in our discussion the fertile conditions and limits for the application of fundamental rights in the private sphere. (SARMENTO, 2008, p. 250)

An appropriate solution to the issue of coverage of medical procedures therefore requires the analysis of the following questions: Are operators of private health care plans required, based on the fundamental right to health, to cover medical and hospital services which are not subject to the contract? To what extent are operators of private health care plans linked to the fundamental right to health? These are therefore the issues to be examined from the proper understanding of the effectiveness of fundamental rights in private legal relations.

2.1.1 Concrete Implementation and densification of the right to health by the legislature

The fundamental right to health, due to the importance and direct relationship with the fundamental rights to life and human dignity, deserved special attention of the Brazilian constitional legislature, which edited two important regulatory legislatives achieving the relevant law fundamental to social nature. The first, represented by Law 8080 of 1990 is intended to regulate the promotion of the right to health by government and the private sector, and the second, represented by Law 9656 of 1998, was specifically intended to discipline private health care plans and insurance.

As legislative precepts, contained in Law 8080 of 1990, in line with those contained in Article 196 of the Constitution, health is a fundamental right of all individuals, and it is the duty of the state to provide the necessary conditions, duty which, however does not rule out the duties assigned to individuals and society as a whole. Also in accordance with that statute and the constitutional provisions contained in Article 199 of the Constitution, private providers of health care are allowed to

directly act for private enterprise, which may develop promotion, protection and recovery activities, within the limits established by law.

Given the essential importance of the right to health, and on the premise of hypo-sufficiency of individuals, the legislature also enacted Law 9656 of 1998, a specific legislative instrument to regulate the role of private enterprise in the provision of private medical health care services. Moreover, with the aim to monitor the quality of services in health, through the enactment of Law 9961 of 2000 the government created a specific regulatory agency to regulate the activity of provision of health services of private initiatives, called the National Health Agency. This federal agency was charged with overseeing and monitoring the health supplement market, regulating the contractual legal relations between insurers and operators of private health plans and their beneficiaries.

In addition to this extensive regulatory framework, of regulating and implementing the right to health guaranteed by the Constitution, activities performed by insurers and providers of health care plans, to configure legal relationships of eminently consumerist nature, are still subjected to legislative precepts contained in Act 8078 of 1990. This established the Code of Consumer Protection, which is principally designed to protect consumer rights, making them the largest protective ballast to, for example, provide for the nullity of unfair terms, assigning operators of private health care plans the contractual obligations of information transparancy, among other protective rights of the beneficiary customer standards.

The enactment of Law 9656 of 1998 was an important legislative framework in the discipline of services conducted by operators of private health care plans. It contains an extensive number of legislative precepts intended to regulate, in detail, the most relevant legal issues involving these activities. This includes aspects that underlie the discipline of incorporation and registration of operators, methods of health care, medical procedures and treatments, mandatory coverage, waiting periods, increases in tuition, among others. This statute is therefore a true legal status of protection to consumer beneficiaries, including those protected by the principle of prohibition of retrogression. By aiming to provide maximum effectiveness and protection of the right to health this considerably limited private autonomy and contractual freedom of private health care plan operators and established the requirement that all private health assistance plans, necessarily promote, coverage for a mandatory list of medical procedures .

The Law 9656 of 1998, in article 10, aimed to protect beneficiaries

by establishing a list of procedures and events in health coverage that are mandatory for operators of private health care plans. This gave rise to the reference plane called health care, having predetermined content, providing to the beneficiary outpatient medical assistance and hospital care coverage. This includes births and treatments, performed exclusively in the national territory, with standard ward, intensive care, or similar, when hospitalization is required. Also the diseases listed under the International Statistical Classification of Diseases and Related Health Problems of the World Health Organization are to be covered.

Law 9656 of 1998, beyond disciplining the reference plan, it regulates the existence of five other targeted forms of private health care plans, explaining, in each of them, in detail, the minimum requirements of contractual coverage and medical procedures in health events. These are the outpatient plans, governed by paragraph I of Article 12, the hospital plan, governed by section II of Article 12, the obstetric plan, governed by section III of Article 12, the dental plan, governed by section IV of Article 12, together with a complete plan. Moreover, Article 10 further establishes the list of procedures and events in health that are not explicitly mandatory for coverage, due to its non essentiality.

In all forms of private health care plans operators are obliged to provide their beneficiaries at least medical procedures considered mandatory and necessary for the protection of human health, as determined by the established National Health Agency, in line with guidelines developed by the World Health Organization. NÓBREGA, analyzing mandatory coverage of medical procedures by operators of private health plans, makes the following considerations:

> Truly, the medical procedures that serve as a reference being offered mandatory by these segmented coverages were enrolled by the legislation. The reference plan is the set of coverages offered by these targeted plans. In summary, the coverage of diseases and medical procedures, that each contractual model should present were predetermined by legal rule, so as to protect the consumer. (NÓBREGA, 2005, p. 150).

The legislature gave origin to the *reference plan*, as well as other disciplinary procedures for private health care plans, and eventually materialized and implemented the fundamental right to health in the context of private legal relations between operators of private health care plans and beneficiaries. This established a minimum ratio of medi-

cal procedures and health events of mandatory coverage, regardless of the type of contract agreed upon between private health care plans and individuals. To regulate the mandatory minimum coverage, the legislature, in the exercise of its reflection of interests of political activity, restricted autonomy and contractual freedom of operators of private health care plans in order to ensure the necessary protection of the right to health, contributing to the stabilization of these legal relations.

As NÓBREGA highlights, the contractual protection conferred by the legislature to beneficiaries, with establishing a reference plan aimed to "prevent the supplier taking advantage of the vulnerability of consumers to search for easy money." Given the legislative framework contained in the Act of 9656 of 1998, the legislature has exercised an important role in attaining and regulating the fundamental right to health within the legal relations between individuals, restricting a portion of the private autonomy, free enterprise and contractual freedom of the operating companies of private health care plans. NÓBREGA, analyzes the legislative precepts contained in Law 9656 1988 and highlights:

> The legislative technique, used by the legislature of the law of health plans, was the case series, trying to exhaustively define and complete every chance of applying the rule, forming a rigid and inflexible system, limiting the role of the judge to find the solution more just for the case, unlike the legislative technique which uses general clauses. (NÓBREGA, 2005, p. 148).

It appears , therefore, that the issue of the coverage of medical procedures was the subject of specific discipline by the legislature, which has the primary task, provided there is a democratically legitimized body, to carry the considerations between protecting the right to health and the necessary degree of restriction on private autonomy and contractual freedom of operators of private health care plans. Accordingly, in assessing the case in point, the considerations and decisions materialized by the Legislative Power with the enactment of specific standards can not be ignored by the interpreter applicator. Bearing in mind that , at first, *" harmonization between the duties of solidarity and freedom of space of individuals is a task for the legislature , as a body democratically legitimized to undertake complex considerations of interests , involving abstract and intangible values .* According to Ruy Rosado de Aguiar , the direct application of fundamental rights takes place when the case requires:

> (...) the immediate implementation of the constitutional provision, when inexistent constitutional legislatives admit interpretation in accordance with the constitutional policy, or lack general applicable clauses in that situation, even though it is a patent violation of the fundamental right. (BRAZIL, STJ, Rep. Ruy Rosado de Aguiar, HC 12.547/DF, DJ 12/02/2001).

In the wake of the chief advocates of the theory of indirect or mediate effectiveness of fundamental rights in private legal relations SARMENTO claims the legislative options adopted by the legislature should be respected by the interpreter and those who exercise the judicial function. The existence of prior considerations, held between constitutionally enshrined fundamental rights and values, such as those made by the legislature to edit the legislative Law 9656 of 1998, following which, there was a balance between fundamental rights to health and private autonomy, must be respected by the interpreter :

> Indeed, as already shown, in most cases the existence of a prior legislative option, when it comes to the resolution of disputes between individuals (and their fundamental rights as subjective rights), is the constitutionally appropriate solution where there will be no interference with the judiciary, penalty - in this case - to extrapolate their jurisdiction. (Sarlet, 2006, p. 583).

Operators of health care plans which don't offer procedures and events considered mandatory health coverage, are not directly linked to the right to health and are not forced to cover medical procedures that were not objects of the contract. We should not forget that, in principle, the right to health is a duty of the public authorities, and legally inappropriate to hold that individuals are, in all situations, directly linked to the fundamental right to health to the point where you may charge obligations to provide services, perform procedures or provide medications not considered mandatory and which have not been contracted by the recipient.

As a proponent of a different solution, but sympathetic to the indirect efficacy theory of fundamental social rights, STEINMETZ argues strongly that individuals "are not required, against the fundamental social right to health, to build hospitals, clinics or health or to pay medical treatment for other individuals", not constituting, " legal and constitutional duty of individuals, by virtue of the fundamental rights

to benefits, propose, plan and implement social and economic policy - although they may participate as collaborators or partners." Ponder the realization of the right to health as a fundamental social right, besides constituting state duty pursuant to the constitutional text:

> are financially onerous and require options and positive actions, the imposition on individuals of duties of benefits consistent with the principle of free enterprise (CR, article 1, IV and Article 170, caput..) - and thus with the market economy - with the fundamental rights of liberty and property (CR, article 5, caption and XXII.) and the principle of private autonomy. (STEINMETZ, 2004, p. 279).

If upon the conclusion of the private health care plan contract, the beneficiary is duly informed about the extent of coverage provided by each of the modalities of health care plans, aware of the existence of other types of plans with more comprehensive coverage, opts for economic or free expression of will and contracts the reference plan with less comprehensive coverage , you can not claim in court against the operator of the private health care plan , for medical procedures that are not considered mandatory or that were not covered objects, with direct and exclusive basis on the fundamental right to health. Even Sarlet , a leading proponent of the direct effectiveness of fundamental social rights in legal relationships between individuals, positions himself in the sense that caution is needed , it is necessary to consider the peculiarities of the case :

> That acknowledgement - especially when directly effected, and without legislative mediation – of subjective rights of social benefits against private entities should be viewed with caution and passed through rigorous control when it comes to the criteria governing the settlement of conflicts of rights , already stressed, but are replayed . Justifiably in virtude of this need, it matters to build robust material criteria for the proper consideration in light of the case, they are equally recognized as essential, rather than - just taking care of this problem - announced the aforementioned Daniel Sarmento. (Sarlet, 2006, p. 593).

In this sense the espoused understanding of MATEUS is firmly disagreed when contending the exclusion of procedures and events of

private health care contracts. Even those not considered mandatory coverage under constitutional legislation, based on scientific and developed technical studies of the National Health Agency and the World Health Organization, would represent an affront to the right to health and the existential minimum. According to the author, in these cases, the courts, on behalf of direct effectiveness of the fundamental right to health, shall determine the plans of the private health care providers that cover the procedures or events demanded by the recipient, so that in this way, you are guaranteed the protection of the right to health and the existential minimum.

> Because of the restriction, exclusion of certain procedures, although authorized by constitutional legislation, outrageously proved the existential minimum part of the postulant, should the judiciary, not in terms of the effectiveness of the rights on it, but by the direct effectiveness of the relations between individuals, plus the power of health plans and clauses existing opening in the CDC, pronouncing decision in the sense to guarantee procedures which are covenantally excluded. (MATTHEW, 2008, p. 146).

It is stressed that the contract clause establishing exclusion is prepared in strict compliance with a set of protective standards established by Law 9656 of 1998 and therefore does not provide for the exclusion of health procedures or events considered for that type of health plan contracted, of mandatory coverage, not even contemplating their abusivity, on the basis of legal provisions contained in Article 51 of the Code of Consumer Protection. This is because of the recognition of the unfair exclusion clause in this case which involves the indirect recognition of the inadequacy of regulations contained in Law 9656 of 1998 and the guidelines established by the World Health Organization and National Health Agency, against the fundamental right to health, which can not thrive.

2.1.2 Protection of private autonomy, freedom of enterprise, freedom of contract and legal certainty.

We must take into consideration that the legal system also ensures individuals the fundamental freedom and rights to free enterprise and private autonomy. It is not fact that the particular detainer of financial power become necessarily liable to give material benefits not

contracted or not considered mandatory in the name of fundamental rights to health. The admission of an unrestricted rights to health under the legal relations between the operators of private health plans and their beneficiaries , and even in relation to non - beneficiary third countries , to the point where it is required to cover procedures or medical treatment when not contracted , violates the fundamental right to free enterprise , freedom of contract and private autonomy , braving the very effectiveness of the principle of preserving the company . Operators of private plans for health care companies having social responsibility is undeniable. However , social responsibility can not be extreme to the point of transferring particular social rights to prestacional nature and it is the duty of the government to give a true legal solidarism . SAMPAIO JR highlights :

> Given the inefficiency of the state to provide the population the minimum guarantees that could be expected, is transferred to the individual the obligation to discharge such burdens. Thus, fitting the owner of urban residential property, private hospitals, electric power and telephone company, private school and the transporter support the absence of public policies that guarantee the majority of the populations access to housing, health, energy and telecommunications, education and transport services. This practice is justified in reliance on an alleged duty of solidarity that should govern the private conduct, which, in turn, rests on reasoning-that part of the population would have a social debt with the remaining majority, which should be paid through the assumption of obligations which the State is unable to meet. (SAMPAIO JR., 2009, p. 7280).

The unconditional and irreflective adherence to a direct and immediate effect of fundamental rights in the legal relations between individuals , especially the rights of a social nature , such as the right to health , would lead to a difficult and complex problem to find a solution "to what extent may the Constitution determine the manner in which individuals should lead their lives". The direct application of fundamental rights within the legal relations between individuals can not ignore that our constitutional order guarantees individuals a space of civil autoregulation , which must be protected . In this sense it is BILBAO Ubillos who warns the fact that it is necessary to be careful not to convert all legal matters of civil life in conflicts between fundamental rights , formulating the following question "will we not be asking too much of the

Constitution ?" For CANOTILHO, despite the order of private nature not being divorced from the constitutional order , suffering under its influence , we must be alert to the risks and undesirable consequences of trivializing the adoption of the direct effectiveness of fundamental rights in private legal relations, so to speak :

> Private law is not , of course, divorced from the Constitution . There is no free space of fundamental rights. However , the private law loses its irreducible autonomy when civil regulations - legal or contractual - see its content substantially altered by the direct effect of fundamental rights in private law. The Constitution , in turn , is convened for daily courtrooms with the inevitable consequence of constitutional trivialization . If the private law must acknowledge and guarantees the basic principles of fundamental rights, then the fundamental rights must also recognize space for civil self -regulation , avoiding turning into ' right of unfreedom ' of private law . In our view , the problem is not only the dangers that lurk the two orders - constitutional and civil - when it insists on strict conformation and egalitarianism of private legal relations through constitutional norms . At issue is also the problem of whether the attachment to Drittiwirkung doesn't carry a profoundly ignorant ethical and legal pathos of postmodern disruptions . (CANOTILHO. 2001, p. 228).[3]

The activity of implementing the right to health in legal relationships between individuals can not assume the garments of a communitarian discourse , marked by welfarism or legal paternalism and by unmeasured judicial activism , to the point of making the very existence of operators of private plans health care plans unviable. As CANOTILHO highlights , *"judges can not become social conformers".* BARROSO, discussing the role of the courts in implementing the right to health weaves relevant considerations about the inherent limits of this state function by stating that *" the judiciary can not be less than it should be , failing to protect fundamental rights may be promoted with his performance".* However, *"it should not want to be more than it can be, presuming too much of itself and , under the pretext of promoting the fundamental rights of another, causing serious injury to the rights of the same nature to many others "* . And citing

[3] Apud, BARROSO, 2009, p. 13.

AMADO, concludes *" want to be more than it is , is to be less".*

In this harmony, given the situation in which a beneficiary needs treatment or events not covered by private health care plans , not being procedures which are mandatory to be covered by the government legislation, is not sustain that the individual should be denied judicial protection of the fundamental right to health , but only that this guardianship is granted to compel the government , not the particular provider of private health care plans to cover the procedure or event necessary since it is the chief duty of public poweers , in the Brazilian legal system , to promote health through social and economic policies . The transfer of the particular obligation to fulfill the right to health, when the Constitution assigns this duty to the government , is unquestionably affronted by the fundamental rights to free enterprise , freedom of contract and private autonomy . As highlights BARROSO :

> Article 196 of the Constitution makes clear that ensuring the right to health will be through social and economic policies, not through judicial decisions. The possibility of achieving Judicial Power, regardless of legislative mediation, the right to health is encounters strong obstacles in the way of positivization Article 196, which clearly defers to the task executing agencies of public policies. (Barroso, 2009, p. 30-31).

Moreover, one can not forget the understanding of STEINMETZ, whereby the argument that the effective guarantee of fundamental social rights, is essential to create the factual assumptions necessary for the full exercise of individual fundamental rights of freedom, including by allocating duties on individuals to implement them in their private legal relations, despite being sociologically relevant:

> (...) The dogmatic-constitutional point of view, does not establish the linkage of individuals to these rights because it is not strong enough to rule out the principles of free enterprise and private autonomy and the fundamental rights of liberty and property. It is, rather, relevant in relation to the State. The higher the optimization of fundamental social rights produced by the State, probably the minorities will be factual social inequalities between individuals and will be ensured the exercise of the rights of freedom. Certainly one, perhaps the main one, of the desired constitutionalization of rights to benefits and make them enforceable against the (and unavailable - such as minimum subsistence - to) State with a view to

> a more intense and widespread realization of freedoms. (STEINMETZ, 2004, p. 280-281).

Salutary is the understanding of Matthew, in the sense that the fact that the recipient has hired a private health plan for non complete health care assistence, in the exercise of their private autonomy, does not detract from the ability to litigate against the government the cost of procedures and health care not covered by insurance, having in view that "as health is guaranteed by both the state and society, it is possible, in respect for the autonomy of the will, that part is provided by the health plan, and part by the state . "Obviously, in cases of urgency or emergency, found that the beneficiary needs treatment not covered by the health care plan contracted, being that transfer to a hospital is unfeasible is maintained by the Government, subject to the life or physical integrity , should an operator of private health care plan , in the name of protecting the right to life and human dignity, cover the claimed procedure, except, in this case, the right to be reimbursed by the government for the costs of performing that procedure. By maintaining that the fundamental right to health in their prestacional dimension, is the duty of the government, and not claiming that this duty is unique to it, considering that individuals are to some extent linked to the right to health, not alleging that the operators of private health care plans , with respect to procedures or events not covered, or not hired, will always be relieved of their costs.

The operators of private health care plans, besides being indirectly and mediately linked to the right to health, given their obligation to fulfill the right to health within the limits set by the consitutional laws that govern and regulate their activities to provide medical and hospital services, only exceptional hypothesis, from a judgment consideration that takes into account the peculiarities of the case, will be directly linked to the fundamental right to health, as in the hypothesis outlined above, in which the protection of the right to life , physical integrity and human dignity become imperative to the action of the individual entity of this right constitutionally guaranteed to individuals, including a protection for the existential minimum. SARMENTO thus manifests:

> However, what we question in the case is the possibility of individuals based solely in the Constitution, complain about certain other individual material benefits linked to social rights. It seems, therefore, that this possibility should be, in principle, excluded in relation to social rights derivatives, which positively bind to the

> state itself, require a legislative achievement. This is not to say, that full effective social rights depend on the legislator interposition not binding individuals, but only that the linkage does not go so far as to allow the extraction of some positive subjective right, valid within the legal and private relationship. (Sarmento, 2008, p. 303).

Moreover, contrary to what may seem to the uninitiated, it must be emphasized that the theories of direct or indirect effictiveness of fundamental rights in the legal relations between individuals are not exclusive. Both can act in ensuring the effectiveness of fundamental rights. What we must consider is, existing legislation regulating and specifying fundamental rights, as in the Brazilian legal system with the right to health , in which there are two important regulatory instruments, one should always take into account the considerations made by the legislature and only if one understands that the achievement made by the legislature did not give in an adequate form to that desired by the current constitutional order is that, from interpretation according to the Constitution and the recognition of the objective dimension of fundamental rights, should be assigned to legal ruling interpretation consistent with the goals desired by the constituent. In this situation, as STEINMETZ contends, the interpreter will assume the argumentative burden of presenting legal and constitutional compelling reasons to remove or adjust the built legislative solution:

> Moreover, in cases for which there is specific legislative regulation (embodiment), sufficient and consistent with the Constitution and fundamental rights, the Judicial Power, in accordance with the principles of separation of powers, should not plan without filing legal-constitutional weighted reasons (for the sake of argument), to depart from the legislative solution, this is, the judiciary should not overlap, instantly and satisfy a burden of rational and objective constitutional argument, the considerations of the Legislative Power implemented in specific regulations of private law. (Steinmetz 2005, p. 212).

Given the lack or incompleteness of legislation to allocate the fundamental right in question, based on a systematic topical method, based on the analysis of the peculiarities and specificities of the case, considering the fundamental rights in conflict, it is for courts to implement the fundamental right in question by recognizing its direct effec-

tiveness within the legal relations between individuals. In addition to assessing the authenticity of desires externalized by the subjects when concluding the provision of medical services contracts, if it complied with the contractual duties of disclosure, transparency and good faith, should be examined whether the claimed medical procedure is mandatory or not, as well as the non-coverage of procedure in import risk to life or physical integrity of the beneficiary, among other factors relating to the case, behold the right to health in their prestacional dimension makes the activity of consideration even more complex than that held when it is before the given the right of defensive nature.

In this sense, we have to make exceptions to the understanding adopted by SARLET whereby fundamental social rights, "whatever the nature of the fundamental right in question" have a direct effect on private legal relations, to the point of the fundamental right to health, in your dimension, become "the particular lender of material benefits that say about health, such as medical and hospital care, supply of medicines, examinations of the most varied nature, in short, any essential provision to the implementation of this right to health."

This is because one can not ignore the existence of specific legislation that, considering the right to health, personal autonomy, free enterprise and freedom of contract, already provides extensive list of procedures and events in mandatory health coverage for operators of private care plans health, regardless of the modality employed by the beneficiary, assuring the existential minimum in regards to the protection of the right to health. There is no other reason that HESSE maintains that *"la interpretación de la Constitución debe estar, en término de HÄBERLE, abierta al tiempo, yello implica que ha que tener en cuenta la Ley actualmente vigente". "substituir el Derecho todo en su poliédrica complejidad por la simple proyección constructiva de los derechos fundamentales. La quiebra de la seguridad jurídica sería la consecuencia"*[4]

Without going into the merits of essentiality or indispensability of procedures and events considered for mandatory health coverage, and without questioning whether certain procedures or events in health should be inserted or not in this regard, given that this is to be accomplished by the consideration of an expert in medical sciences, the fact is that the establishment of the list of procedures and compliance with mandatory coverage by the courts, when urged to appreciate lawsuits involving claims for coverage procedures or events not considered man-

[4] 1955, p. 14.

datory health or have not been subject to the contract , gives legal certainty to legal relations improved between operators of private health plans and beneficiaries.

In addition to ensuring beneficiary procedures considered essential to the protection of fundamental rights to health, life and physical integrity, the establishment of the referred relationship gives transparency to the referred legal relations as well as legal certainty to operators of private health care plans, which, when the contracts are awarded to provide medical services, now have science extension of its obligations, in other words, in relation to the health procedures and events that will be required to be payed. In this line of thinking, as CRUZ highlighted, fundamental rights should help "to compose the essence of a legal system that legitimately want to stabilize the social expectations of behavior. Thus, demand respect for their professional conduct to avoid denaturation of the Law in Politics."

With regard to health plan providers, developing a relationship of events and procedures in mandatory health coverage, in conjunction with its effective observance and respect for the courts, in addition to providing and stabilizing security the legal relationship between these particular protecting the legitimate expectations of health insurance providers and beneficiaries, ensures mutuality and economic-financial balance of the health insurance contract, allowing the preservation of the company and at the same time ensuring that the coverage of a particular procedure does not harm service to other beneficiaries.

The principle of mutuality, which is closely tied to actuarial issues involving the contract of health insurance, can be conceptualized as "a system in which the entire customer base contributes so that some use more of the services of the operator and others use less, thus there is a risk of dilution". Because of the principles of mutuality and solidarity among the beneficiaries, they have a responsibility to contribute directly to cover the necessary procedures to all beneficiaries as these, taken in isolation, would not have been able to afford the cost of the necessary procedure to protect their health.

With these considerations, one concludes that it is not possible to maintain unconditional and irreflective way of the direct effectiveness of the right to health within the legal relations between operators of private health plans and beneficiaries, considering allocating those the duty to pay and cover procedures not contracted by the beneficiary or not considered mandatory coverage by current law, distorts and puts at risk the economic and financial balance of the contractual relationship. Thus, the

idea one is protecting the right to health, the courts may in fact be weakening your protection as resources are spent by health plan provider for the cost of compliance with judicial decisions case by case, settled on voluntarism and subjectivism of the judge, may directly affect other beneficiaries, whether as a result of the transfer this cost to the price of monthly payments, whether due to economic and financial infeasibility of persistent health plan provider in the market. In this sense REZENDE warns that " operators of health plans are revealed as true managers of mutual funds - funded with resources provided exclusively by fees paid by users and used when those who are in need " is the reason its duty to ensure the right to health can not be confused with the state's duty to promote health through the implementation of public policies.

In a contractual relationship in which freedom of contract and private autonomy are preshaped to the need to protect the right to health, the prior regulatory obligations that will be the responsibility of the operators of private health care plans, allows them to ensure the economic-finance balance of the provision of medical services contracted, as in the case of business activity, the risk for operators of private health care plans is " to evaluate the costs and risks and should socialize the losses , in other words , calculate all the risks that might run in the course of the investment , when calculating the price of their services, " reason to which science should be effective with its contractual obligations so that they can calculate the costs , because if calculated incorrectly the error can not be imputed to the beneficiary customer , because of the protection afforded to it by law. Similarly, if the operators of private health care plans calculate their risks considering the duties assigned to it by law, and subsequently find themselves legally compelled to assume responsibility and cover medical procedures not considered mandatory or not engaged, this coverage legislatively has not provided an immediate impact on economic-financial balance of the contract and, further, if such a situation instigates a cascading movement or multiplier effect , it puts at risk the viability of the company, even compromising the protection of the rights of the other beneficiaries . In this sense SAMPAIO JR. highlights :

> When one determines that private hospitals or private schools meet the poor without any consideration, on the grounds that existential values can not be subject to the wicked and spurious profits of entrepreneurs, the first impression one gets is that such a measure would effectively required. After all, who could leave the

> patient to wane medical treatment or a student without access to education? One resolves the problem is that of the patient or student, but at the expense of other users , who will bear the services not paid by the recipient, while the company has no motivation to require the State to meet its minimum obligations. Finally, one last consideration is required, and appears in fact that to transform law in a concrete set of values, increases the 'danger of irrational judgments, because in this case the functionalist arguments prevail over regulations' . (Sampaio JR , 2008, p. 4662) .

It is necessary to grant legal security to legal relationships between operators of private health care plans and their beneficiaries, including the protection of legitimate expectations of operator , which should, at the time of conclusion of the contract , noting the legislative precepts contained in legislation regency, have effective science to the exact extent of their obligations to their beneficiaries , so that it can enter into a contract in which the economic and financial equilibrium for both parties is guaranteed. The atividadas developed by operators of private health care plans may not be at the discretion of subjectivism and judicial activism that, totally disregarding the existing constitutional legislation, the result of legitimate and democratic action by the legislative power, imposes obligations not provided as mandatory or not have been subject to contract. If the intention is to raise the degree of protection of the right to health, one must proceed democratically and legitimately with the inclusion of other procedures on the list of procedures for mandatory coverage, because at least in this way, operators of private health care plans will have effective science of which are exact obligations to the beneficiary. As NOVAIS highlights:

> But also in terms of the division of powers between the organs of the State, the consequences would be significant. This is because all conflict between individuals is a conflict of fundamental rights, then the almost automatic consequence is the attribution of a disproportionate weighting between the the judge, namely the constitutional court and the legal and regulatory conformations of private relations. (...) However, this possibility extends not only extraordinarily pontential area of intervention of the Constitutional Court, as, taking into account that the Constitution rarely provides him, in the field of fundamental rights, certain guidelines and precise criteria of the decision, giving intense power to form specific legal relationship. (NOVAIS, 2007, p. 380).

Compliance with the criteria established by the legislature is of utmost importance to ensure the economic and financial balance of the service agreement , which does not preclude, as maintained in exceptional situations , the operator of private health care plans is compelled to cover medical procedures not contracted in order to ensure protection of life , health and dignity of the recipient . However , as noted , the interpreter applicating legal standards should act with caution and prudence , otherwise , the argument of ensuring maximum effectiveness of the right to health , to determine that the private operator of health care plan covers the cost of procedures which are not mandatory or contracted , compromising the very existence and economic viability of the provider , eventually generating a diverse desired effect , to undermine the protection of the right to health of the other beneficiaries . In this sense SARMENTO highlights that :

> We must remember that the primary entity responsible for ensuring social benefits is the State, and that the burden of private entities with positive obligations, even in law, may compromise in an exaggerated manner the dynamics of social subsystems, impairing its function, often in expense, as paradoxical as it is, of the most vulnerable and poorest groups of guardianship waived for social rights. (...) Legally, the market is not everything, but the law, including constitutional, is far from omnipotent, and - perhaps unfortunately - can never repeal the laws of the market. (Sarmento, 2008, p. 301).

In the wake of understanding SARMENTO , the interpreter and the courts , besides having to observe and consider the implementation of the right to health already undertaken by the legislature , to analyze the degree of authenticity of private autonomy and the externalization of will of beneficiaries, who should be informed in advance about the limits of coverage of health care plans offered, on behalf of the principles of information, contractual transparency and loyalty, should consider in its decision the existence of sunken risk to life , health or physical integrity of the beneficiary, to the point of making the issue so urgent to derail of which the government is liable for funding the essential medical procedures , as well as evaluating the economic impact of a court decision requiring the private health care plan provider cover procedures or events of non-mandatory health or that has not been the object of medical service provisions in the coverage of the contract.

> It is very important to analyze , among other things , the economic impact for the private agent , resulting imposition of a positive obligation linked to social rights in question . The size of the economic burden imposed on an individual is one of the pieces of information in consideration , because the application of fundamental rights in the private sphere can not import in disproportionate restrictions to the subjective sphere of anyone . (...) Even in the case of a rich and powerful private entity , the item in question is relevant because, almost always , the cost of providing, ends up being passed on to other individuals, often as or more vulnerable than the holder of social law who is allegedly injured . If a health plan were required , for example, to treat all their customers from a certain age for free, inevitably the tuition pais becomes expensive for the other consumers , some certainly more in need than the average beneficiary . (Sarmento , 2008, p. 306) .

In this respect, it is necessary to demystify and reject the false image often attributed to operators of private health care plans in the sense that they would be highly profitable companies, similarly to financial institutions. Contrary to what may seem to many, there is the large and lucrative market companies operating private health care plans, there are also medical labor cooperatives, smaller philanthropic organizations not economically sound, for which the impact of financial judicial decisions determining who is covered for procedures or events by health coverage not required or not hired may represent the closure of their activities, to the detriment of many beneficiaries. As Sampaio JR highlights, the interpreter applicating the legal rule can not fail to consider the effects and social reflection of his decision:

> (...) It is for the judge to analyze the economic reflection of his decisions and the impact they may have. Not that he necessarily gets carried away merely by economic considerations - as the focus of the law is justice, as warned by Ronald Dworkin - but it is imperative that he is fully aware that his judgment may cause reflections in a given sector, and these reflections are analyzed in detail and the result consciously assumed. We also must remember that he can no longer be considered the slave of the law and submitted to it inexorably, but continues to be a server of the law. (SAMPAIO JR, 2007, p. 4830).

It should be noted, we are not advocating that the court's decision pervades merely by an economic analysis of its effects on the mar-

ket and on the activities of the operators of private plans for health care companies, but rather, given the significance where it is addressed by hermeneuticist and the magistrates, the nature of the claimed process, whether mandatory or not, whether contracted or not covered, and not forgetting the fact that it is the chief duty of the government to develop public policies to promote and ensure the effectiveness of the right to health. REZENDE highlights:

> Thus, we must reflect on this solidarity principle, if there is justification for the user to plead for coverage often not provided in the contract, assuming individualistic position before the rest of the customer base that truly bears the cost of services provided. Rezende (2008, p. 194).

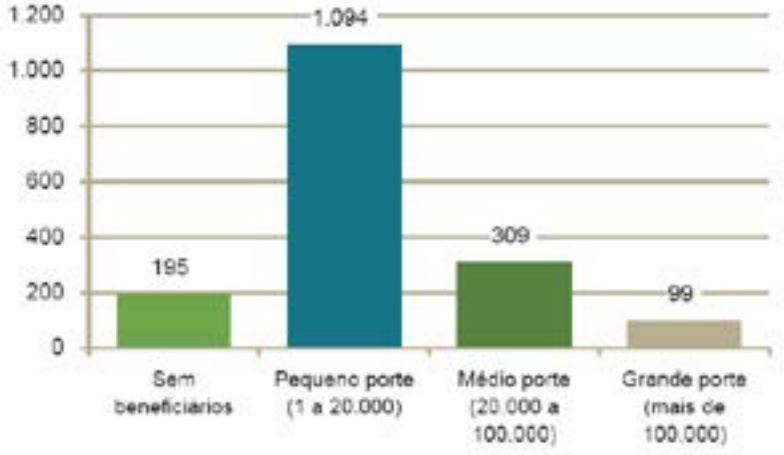
To have an adequate and correct understanding of the matter , according to studies published by the National Health Agency (ANS) , in Brazil exists approximately 56 million beneficiaries of private health care plans , linked to 1697 plan operators of private health care with active records , of which 1218 are operators of private hospital and medical health care plans and 479 operators of private dental care plans (Table 1) . Among the 1697 operating private health care plans with active records , 11.4% have no beneficiaries , and 64.4 % are classified as small having less than 20,000 beneficiaries , 18.2 % are classified as midsize having between 20,000 and 100,000 beneficiaries , only 6 % are classified as large with more than 100,000 beneficiaries . (Table 2)

Table 1 – Record summary of operators of private health plans (Brazil - 2009)

Registro	Total	Operadoras médico-hospitalares	Operadoras exclusivamente odontológicas
Registros novos	34	15	19
Registros cancelados	99	66	33
Operadoras com registro ativo	1.697	1.218	479
Operadoras com beneficiários	1.502	1.098	404

Fontes: CADOP/ANS/MS - 12/2009 e SIB/ANS/MS - 12/2009

Table 2 - Carriers with active registration by economic size (Brazil - 2009)



Fonte: CADOP/ANS/MS - 12/2009 e SIB/ANS/MS - 12/2009

Also according to the published study, in general, regardless of the size of the private health care plan provider, expenses of funded procedures and events for health care denominated expenses, administrative expenses, are added together approximating the revenue earned by these. In the case of plan operators for hospital and medical care which are classified as small to medium-sized, the data demonstrates that the receipt of fees received are even lower than the sum of the administrative and assistance costs, pointed to a situation of a deficit. (Table 3).

This scenario of a defecit performance is subject to most operators of private health care plans, especially those classified as small to medium sized ports which tends to lead to the phenomenon of a concentration of the provision of health care services to a reduced number of operators considered to be large. Moreover a gradual decrease in the number of operators of private health care plans in operation in the Brazilian market over the last few years is observed, due to the increase in requests for cancellation of registration and reduction of applications to register new operators. It appears also that the order of cancellation of registration, since the year 2001, are manifestly superior to applications for registration of new operators of private health care plans , which resulted in the extinction of more than 1000 operators plans private health care in the last 10 years. (Figure 4).

Table 3 – Revenue of plan premiums and expenditures of operators of private health plans, according to the size of the operator (Brazil - 2009)

Porte da operadora	Receita (R$)	Despesa assistencial (R$)	Despesa administrativa (R$)	Beneficiários (1)	Taxa de sinistralidade (%)	Receita média anual (R$)
Total	63.509.232.033	52.213.139.562	10.208.778.464	53.566.493	82,1	98,96
Operadoras médico-hospitalares	62.333.845.970	51.591.505.528	9.800.946.633	43.534.037	82,8	119,32
Pequeno porte (até 19.999 beneficiários)	5.057.665.800	4.050.382.247	1.903.354.099	4.371.374	80,1	96,42
Médio porte (20.000 a 99.999 beneficiários)	13.274.878.344	11.013.637.602	2.813.913.356	10.728.357	83,0	103,11
Grande porte (100.000 beneficiários ou mais)	44.001.303.826	36.527.485.679	5.083.679.179	28.434.306	83,0	128,96

Fonte: DIOPS/ANS/MS - 16/04/2010
(1) Não inclui beneficiários de Autogestões por RH (Recursos Humanos) e SPC (Secretaria Previdência Complementar), não obrigadas a enviar informações financeiras.
Notas: 1. Dados preliminares, sujeitos à revisão.
2. Para as operadoras que não enviaram DIOPS no quarto trimestre, exceto Autogestões por RH e SPC (correspondente a 7,4% dos beneficiários), foi utilizada a receita informada no terceiro trimestre (6,4% dos beneficiários).

Table 4 - Evolution of the registry of operators (Brazil - 1999 - 2009)

Ano	Registros novos	Registros cancelados	Operadoras em atividade		
			Total	Médico-hospitalares	Exclusivamente odontológicas
Até 1999	2.825	186	2.639	1.969	670
2000	235	151	2.723	2.004	719
2001	143	157	2.709	1.990	719
2002	17	319	2.407	1.747	660
2003	35	169	2.273	1.646	627
2004	32	127	2.178	1.576	602
2005	30	117	2.091	1.524	567
2006	52	76	2.067	1.488	579
2007	62	199	1.930	1.377	553
2008	31	199	1.762	1.269	493
2009	34	99	1.697	1.218	479

Fontes: CADOP/ANS/MS - 12/2009 e SIB/ANS/MS - 12/2009

According to REZENDE, the data presented is an indication that "resources have not been sufficient for the maintenance of operators in the market, which is causing competition in this sector to decrease. The same data also shows that costs are increasing year by year. "And this scenario is not likely to change, given the gradual aging of the population, due to the improvement of living conditions, which would tend to increase the number of beneficiaries of private plans for members of hospital medical care for ages greater than 60 years, with a consequent increase in health care expenses and claims.

The data presented thus only confirms the risks of the economic effects of an irreflective and unconditional admission of the direct effectiveness of fundamental rights in the legal relations between the operators of private health care plans and their beneficiaries. It is not intended to sustain and justify , from the data presented , the total absence of binding operators of private health care plans to the fundamental right to health, even because they are already linked to the protection of this

right in accordance with existing legislation . However , one can not understand supplementary health as an extension of public health , on the point of justifying a similar linkage of operators of private health care plans found, in relation to the government . According to OLIVEIRA, neither the Constitution nor the constitutional legislation " establishes the duty of carriers to offer health care on a full and unrestricted basis , replacing the duty of the State" . He concludes:

> If the composition of the price does not take into account certain coverage that is pleaded and provided to users, one can take it for granted that there will come a time that the bill will be paid, either by the mass of the users of the plans, which will be required to afford the rising cost of extra coverage, or by the operators, which will be subject to having financial difficulties over time. (OLIVEIRA, 2008, p. 165).

As PIMENTA highlights

> the imposition of full health to private entities is perhaps disproportionate, ineffective and incompatible with our laws. Such an interpretation is a negative externality for the community, a disincentive to entrepreneurship in the market and, because of that, an incentive for monopoly prices and favoring economic groups established in the jurisdiction. Ones able to afford such cost of transaction imposed by the court. "(2010, p. 458).

In the same sense that FUX highlights:

> (...) passing on the duty to an individual, mercy unauthorized by the Constitution, considering the necessity of peaceful coexistence between state action and private and free initiative, breaks the principles that govern the contract of insurance, unbalances the equality between the contractors, despite the economy entities in favor of one at the expense of other beneficiaries. (FUX, 2000, p. 297).

The hermeneuticist, besides observing the existing constitutional legislation , which established procedures for mandatory coverage for any kind of plans for medical and hospital care , as well as the economic impact of a court decision requiring private health care plan providers to fund health procedures or events in not required nor the object any

medical service contract provisions , one should consider in their decision the existence of risk to life, health or physical integrity of the beneficiary , for, in these cases , withdraw the considerations already undertaken by the legislature and determine that the private operator of health care plan is compelled to cover procedures or events in health coverage not required or has not been the provisions of the contract. Wisdom and caution is needed, as the pretext to protect and ensure maximum effectiveness of the right to health by unconditional direct application of fundamental rights in the legal relations between the operators of private health care plans and their beneficiaries , may reversely be prioritizing individual rights at the expense of the rights of an entire community of beneficiaries .

3. Final Considerations

From the analysis of the Brazilian legal system, it was possible to determine that the right to health is endowed with formal and material fundamentality, either in its own defense or prestacional dimension. If, in regards to a defensive dimension the question of the fundamental right to health in private legal relations doesn't arouse further questioning, given one recognizes that individuals have a duty to refrain from violating the health of other individuals, the same is not possible to maintain when analyzing the issue of effectiveness of the right to health in the context of private legal relations under the perpective of its prestacional dimension, in which case the question becomes contested.

Despite the Constitution having established the principle of solidarity between the government and civil society regarding the right to health, this solidarity can not be, in any and every situation, interpreted as to extend to the particular the obligation to cover and pay for medical procedures, medications or provide other materials to achieve benefits on the grounds that the right to health has a direct and immediate effect on private legal relationships. This is because this duty is assigned, under Article 196 of the Constitution, primarily, that the government, which will have to develop public policies for full access and health promotion. Individuals, in this sense, are only indirectly linked to the fundamental right to health and, only in exceptional circumstances, justified the constitutional point of view, direct and immediate way.

What it adds is that you can not admit a homogeneous solution in the sense that individuals, here including operators of private health

care plans, will always be linked directly to the fundamental right to health and thus unconditionally obliged to assume responsibility for all and any physician-hospital procedure to its beneficiaries, especially those procedures and health events that are not considered, under the law, such as mandatory coverage, or have not been subject to contract. The decision by a direct or indirect link necessarily depends on the analysis of the peculiarities and specificities of the case, which should be taken into consideration, among other factors, the existence of legislation regulating the issue.

Besides being necessary to observe the existing constitutional legislation, the fruits of considerations made by democratically constituted bodies, as well as the economic impact of a court decision requiring the private plan operator of medical assistance to fund health care procedures or event of health care where coverage is not mandatory or has not been the object of the provision of medical services contract, the existence of risk to life, health or physical integrity of the beneficiary should be considered, for, in these exceptional circumstances, the considerations carried away by the legislature, embodied in the consitutional legislation, and determines that the private operators of health care plans are compelled to cover procedures or events in non-mandatory health coverage or have not been subject to contractual provisions guaranteeing their right to be compensated by the government.

It takes wisdom and caution, as the pretext to protect and ensure the maximum right to health by unconditional and uncritical direct application of fundamental rights in the legal relations between the operators of private health care plans and their beneficiaries, as it may have a reversible effect, prioritizing individual rights at the expense of the rights of an entire community of beneficiaries, generating negative externalities, such as increased tuition and creating monopolistic markets. Moreover, the effectiveness of direct unreflective recognition of fundamental rights in private legal relations may involve in itself suppression of civil space autoregulation provided by the individuals constitutional order, in clear protection of fundamental rights of freedom and personal autonomy.

In this crossing, the aim of this work was not to exhaust the analysis of the whole issue to the extent of reaching full effectiveness of the fundamental right to health within the legal relations between operators of private health care plans and their beneficiaries, but, recognizing the greatness of this theme and to contribute to this discussion, providing questions and notes that can be useful for improvement, contributing to

the development of solutions ensuring the effectiveness of normativity and fundamental rights, combining the guarantee of the fundamental right to health, with necessary protection of autonomy, freedom of contract, freedom of enterprise, fundamental rights essential to the relations of private law, legal certainty and preserving human dignity, which are the pillars of a democratic state.

References

ARGENTINA. Corte Suprema de Justicia de la Nación. **Recurso de Hecho. C.595. XLI.** Cambiaso Péres de Nealón, Celia María Ana y otros c/ Centro de Educación Médica e Investigaciones Médicas. Buenos Aires, 28/08/2007. Disponível em: <http://www.csjn.gov.ar/jurisp/jsp/fallos.do. Acesso em 15/03/2010.

BARCELOS, Ana Paula de. Constitucionalização das políticas públicas em matéria de direitos fundamentais: o controle político-social e o controle no espaço democrático. **Revista de Direito do Estado**. v.3, n.32, 2006.

BARROSO, Luís Roberto. Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial. **Revista de Direito Social**, Porto Alegre, v.9, n.34, p.11-43, abr./jun. 2009.

BARROSO, Luís Roberto. **Temas de direito constitucional**. Rio de Janeiro: Renovar, 2005.

BILBAO UBILLOS, Juan Maria. ¿En qué medida vinculan a los particulares los derechos fundamentales? In: SARLET, Ingo (Org.). **Constituição, Direitos Fundamentais e Direito Privado.** 2ª ed. rev. ampl. Porto Alegre: Livraria do Advogado, 2006. p. 301-340.

CANOTILHO, José Joaquim Gomes. **Direito constitucional e teoria da Constituição**. 7ª ed. Coimbra: Almedina, 2003a.

CANOTILHO, José Joaquim Gomes. Civilização do Direito Constitucional ou Constitucionalização do Direito Civil? A eficácia dos direitos fundamentais na ordem jurídico-civil no contexto do direito pós-moderno. In: GRAU, Eros Roberto; GUERRA FILHO, Willis Santiago. (Orgs.) **Direito Constitucional. Estudos em Homenagem a Paulo Bonavides.** 1ª ed., São Paulo: Malheiros Editores, p. 108-113, 2003b.

CANOTILHO, Joaquim José Gomes. Dogmática de Direitos Fundamentais e Direito Privado. In: CANOTILHO, Joaquim José Gomes. **Estudos sobre Direitos Fundamentais.** Coimbra (Portugal): Coimbra Editora, 2004. p.190-215.

CLÈVE, Clèmerson Merlin. A eficácia dos direitos fundamentais sociais. **Re-**

vista de Direito Constitucional e Internacional, São Paulo, v.14, n.54, p.28-39, jan./mar. 2006.

CRUZ, Álvaro Ricardo de Souza. **Hermenêutica jurídica e(m) debate: o constitucionalismo brasileiro entre a teoria do discurso e a ontologia existencial**. Belo Horizonte: Fórum, 2007.

CRUZ, Álvaro Ricardo de Souza. **Habermas e o direito brasileito**. 2ª ed. Rio de Janeiro: Lúmen Iuris, 2008.

DUGUIT, Léon. **Fundamentos do Direito**. São Paulo: Ícone, 1996.

FERNANDES NETO, Antônio Joaquim. **Plano de saúde e direito do consumidor.** Belo Horizonte: Del Rey, 2002.

FRASCATI, Jacqueline Sophie Perioto Guhur. A força jurídica dos direitos sociais, econômicos e culturais a prestações: apontamentos para um debate. **Revista de Direito Constitucional e Internacional**, São Paulo, v.16, n. 63, p.81-129, abr. 2008.

FUX, Luiz. Tutela Antecipada e Plano Privado de Saúde. In: TEIXEIRA, Sálvio de Figueiredo (Coord.). **Direito & Medicina. aspectos jurídicos da Medicina**. Belo Horizonte: Del Rey, 2000.

HESSE, Konrad. **Derecho constitucional y derecho privado**. Madrid: Civitas, 1955, 88 p.

MARINONI, Luiz Guilherme. **Teoria Geral do Processo**. 3ª edição. São Paulo: RT, 2008.

MARTINS, Thiago Penido. **A eficácia do direito fundamental à saúde nas relações jurídicas entre operadoras de planos de assitência à saúde e seus beneficiários**. Nova Lima: Faculdade de Direito Milton Campos, 2010.

MARTINS, Samir José Caetano. Neoconsitucionalismo e seus reflexos nas relações jurídicas privadas: em busca de parâmetros de aplicação direta dos direitos fundamentais. **Revista de Direito Privado**, São Paulo, v.8, n.30, p.265-304, abr/jul. 2007.

MATEUS, Cibele Gralha. **Direitos fundamentais sociais e relações privadas.** Porto Alegre: Livraria do Advogado, 2008, 162 p.

NÓBREGA, João Neumann Marinho da. As cláusulas abusivas nos contratos de planos privados de assistência á saúde: uma proposta de sistematização. **Revista de Direito Privado**, São Paulo, v.6, n.23, p.102-180, jul. 2005.

NOGUEIRA ALCALÁ, Humberto. Los derechos económicos, sociales e culturales como derechos fundamentales efectivos en el constitucionalismo democrático latinoamericano. **Revista de Estudios Constitucionales**, Año 7, n. 2, 2009, p.

143-205.

NOVAIS, Jorge Reis. Os direitos fundamentais nas relações jurídicas entre particulares. In: SARMENTO, Daniel Antônio de Moraes. (Org.). **A Constitucionalização do Direito.** Rio de Janeiro: Lúmen Iuris, 2007.

OLIVEIRA, Luis Gustavo Miranda de. Assistência integral à saúde: ônus público, privado ou particular? Afinal, quem paga a conta. In: UNIMED COOPERATIVA DE TRABALHO MÉDICO DE BELO HORIZONTE. **Judicialização da Saúde**. Belo Horizonte, 2008, p.155-166.

PEREIRA, Jane Reis Gonçalves. Apontamentos sobre a aplicação das normas de direito fundamental nas relações jurídicas entre particulares. In: BARROSO, Luís Roberto (Coord.). **A nova interpretação constitucional: ponderação, direitos fundamentais e relações privadas.** Rio de Janeiro: Renovar, 2006.

PIMENTA, Eduardo Goulart. **A interpretação dos contratos de saúde privada sob uma perpectiva de Direito e Economia.** In: FIUZA, Cesár. Direito Civil: teoria e prática no direito privado. Del Rey: Belo Horizonte, 2010, p. 435-460.

REZENDE, Paulo Roberto Vogel de. Cálculo atuarial, mutualismo, equilíbrio econômico e plano de saúde: uma abordagem sobre dois julgados. In: UNIMED COOPERATIVA DE TRABALHO MÉDICO DE BELO HORIZONTE. **Judicialização da Saúde.** Belo Horizonte, 2008, p. 185-198.

SAMPAIO JÚNIOR, Rodolpho Barreto. Desigualdade social, solidariedade jurídica e os seus reflexos no direito contratual brasileiro. In: Conpedi; Centro Universitário de Maringá. (Org.). **Anais do XVIII Encontro Nacional do Conpedi.** 1ª ed. Florianópolis: Fundação Boiteux, 2009, v. 1, p. 7278-7293.

SAMPAIO JÚNIOR, Rodolpho Barreto. A cláusula geral da função social dos contratos; entre um sistema aberto e um sistema impositivo. In: Conpedi. (Org.). **Anais do XVII Encontro Preparatório para o Congresso Nacional do Conpedi**. 1ª ed. Florianópolis: Fundação Boiteaux, 2008, v. 1, p. 4646-4666.

SARLET, Ingo Wolfgang. **Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988.** Porto Alegre: Livraria dos Advogados, 2001, 152p.

SARLET, Ingo Wolfgang. Direitos fundamentais e direito privado: algumas considerações em torno da vinculação dos particulares aos direitos fundamentais. **Revista de Direito do Consumidor**, São Paulo, v. 36, p. 54-104, 2000.

SARLET, Ingo Wolfgang. Direitos fundamentais sociais, "mínimo existencial" e direito privado: breves notas sobre alguns aspectos da possível eficácia dos direitos sociais nas relações entre particulares. In: SARMENTO, Daniel; GALDINO, Flávio. (Orgs.) **Direitos fundamentais: estudos em homenagem ao professor Ricardo Lobo Torres**. Rio de Janeiro: Renovar, 2006.

SARLET, Ingo Wolfgang. (Org.). **O direito público em tempos de crise: estudos em homenagem a Ruy Ruben Ruschel.** Porto Alegre: Livraria do Advogado, 1999.

SARMENTO, Daniel Antonio de Moraes. **Direitos fundamentais e relações privadas**. 2ª ed. Rio de Janeiro: Renovar, 2008, 362 p.

STEINMETZ, Wilson. **A vinculação dos particulares a direitos fundamentais.** São Paulo: Malheiros Editores, 2004.

STEINMETZ, Wilson. Direitos fundamentais e relações entre particulares: anotações sobre a teoria dos imperativos de tutela. **Revista Brasileira de Direito Constitucional**, Brasília, n. 5, jan./jun. de 2005.

SILVA, Virgílio Afonso da. **A constitucionalização do direito: os direitos fundamentais nas relações entre particulares.** São Paulo: Mandamentos, 2008.

SILVA, Júlio César Ballerini. Aspectos da tutela do direito à saúde no ordenamento jurídico pátrio-ponderações sobre relação de direito público e de direito privado. **Revista Interesse Público**, Belo Horizonte, v.9, n.44, p.135-160, jul. 2007.

TEPEDINO, Gustavo. Normas constitucionais e relações privadas na experiência das cortes brasileiras. **Revista Themis**, Curitiba, Centro Acadêmico Hugo Simas, p. 21-29, 2008.

Solidarity in the private relations:
A study about the fundamental duties

Bruna Lyra Duque[1]
Adriano Sant'Ana Pedra[2]

Abstract: The goal of this article is to understand the solidarity duties in the private relations. The study intend to investigate the fundamental duties subject against the private autonomy and it will evaluate some issues linked to the duality of individualism versus solidarism, by focusing on the horizontality of the fundamental duties.

Keywords: Fundamental duties; fundamental rights; horizontality; private relations; solidarity.

Introduction

The study will examine issues related to the individualism versus solidarity movement, in private relations, with a focus on linking the fundamental duties of individuals, from the premise that an individual is entitled to a free and yet a holder not only on rights, but also on duties.

Solidarity is, indeed, the other side of the same coin in the set of rights and duties, since ratifying the incidence of fundamental rights covered by the constitutional provision, can be understood from a reciprocal relationship: if there are rights, however, there is the duty in solidarity.

[1] PhD applicant and Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Post-graduate degree in Commerce and Trade Law (FDV). Professor of Civil Law (bachelor and post-graduation courses) at Faculdade de Direito de Vitória – FDV. Lawyer. E-mail: bruna@lyraduque.com.br. Curriculum Vitae: http://lattes.cnpq.br/8396995371857547.

[2] PhD in Constitutional Law (Pontifícia Universidade Católica de São Paulo – PUC/SP). Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Professor of Constitutional Law at Faculdade de Direito de Vitória – FDV (bachelor, master and doctoral program). E-mail: adrianopedra@fdv.br. Curriculum Vitae: http://lattes.cnpq.br/0637600349096702.

Nevertheless, in the private field, autonomy is a tool that allows the free action of individuals authorized by the it is own legal framework, for the realization of their interests with diverse social and economic functions. Thus, each individual determines the course of its existence, according to their subjective preferences and materials, respecting their freedom of choice.

The Constitution of the Federative Republic of Brazil has not only rules which confer rights[3], but also has several duties of individuals as members of the State. Fundamental duties are reciprocal to fundamental rights (or rights of freedom), as limited by these and, at the same time as providing security for the exercise of freedom. A State, therefore, is not only designed to rights.

This way, the theme of the fundamental duties on the private autonomy will be considered from the theory of symmetry between fundamental rights and duties. At this point, we seek to understand how the recognition of a relationship synallagmatic between private individuals wears out private autonomy and can cause conflicts when applying without criteria and with absolutely form of the contractual dirigisme.

The theme developed will pass aspect of the economic analysis of law[4], using economic parameters to evaluate the limits on stipulation of fundamental duties aimed at particular face a conflict of interest.

1 Fundamental Duties

It is unquestionable that law operators focus their research around fundamental rights. The doctrine, in the same sense, is concerned

[3] On the need of society to organize itself with rights and duties, Carlos Alberto Gabriel Maino warns: "Thinkers have warned that it is not humanly possible to organize society around the concept of rights exclusively". The same author, citing Danilo Castellano, clarifies that "has emphasized that human rights are actually exercising the duties of man, or rights arising from the duties of others, or even from the use of goods that are the result of personal activities, for example, the work or property." Cf. MAINO, Carlos Alberto Gabriel. Derechos fundamentales y la necesidad de recuperar los deberes: aproximación a la luz del pensamiento de Francisco Puy. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel (Coordenação). Direitos, deveres e garantias fundamentais. Salvador: Juspodium, 2011, p. 36.

[4] It is about the established relationship between Law and Economics, a movement created in the United States (called "Law and Economics") in the Chicago School. Such movement establishes a link between Law and Economics that can provide solutions to current constitutional and private issues.

too with the plan of fundamental rights, which results in the emphasis of duties and in the absence of dealings of topics related to fundamental duties[5]. Dimoulis and Martins (2011, p. 325-326) explain the understanding of Carl Schmittwhich, when analyzing the Weimar Constitution, the disinterest exhibited on the fundamental duties in four points, namely:

a) the liberal-capitalist State can not establish fundamental duties that would have the same structure of fundamental rights, since their purpose is to ensure spaces for free actions of individuals, limiting the state;

b) The Weimar Constitution merely establish duties to state agencies, the only explicit duty of citizens was military service;

c) The abstract references to duties can only be implemented by Law to deliver them;

d) The duty to comply with the Law is a determination empty of content, because the content of the obligations does not depend on the Constitution, but on the variations of ordinary legislation.

As proposed Casalta Nabais (2005, p. 81), rights and duties should be placed on the same constitutional level, since both rights and duties are elements that comprise the constitutional status of the individual.

The concept of duty has been decisive for the formation of modern Law (PECES-BARBA, 1987, p. 329-341). José Casalta Nabais (1998, p. 64) also reinforces the importance of coexistence between rights and duties in society.

Fundamental duties, at the constitutional level, are qualified by the majority of the doctrine, such as those linked to the objective dimension of fundamental rights, since they concentrate the values of the community in relation to the government, since the conception of fundamental rights as individual powers against State expresses the relationship between government and citizens. Dimoulis and Martins (2011, p. 75) argue that the fundamental duties are duties of action or inaction, sculptured in the Constitution, the subjects of which assets and liabilities are proclaimed in each standard or can be deduced by interpretation. Furthermore to the authors the ownership as well as taxable persons often are diffuse and content of the duty can only result from achieving infraconstitutional.

Carlos Alberto Gabriel Maino (2011, p. 42) clarifies that it must

[5] Carlos Alberto Gabriel Maino (2011, p. 32) warns about forgetting about duties in postmodern society.

recover the horizon of the fundamental duties of both a social and political, legal point of view. This idea allows us to understand and recognize the other in his whole, and, therefore, fundamental duties covered here beside the maximum solidarity. Thus, recognizing the other, in private relations, becomes the challenge in understanding the fundamental duties and their applicability.

This article examines the issue of the fundamental duties both in the sense of abstaining when the subject's duty is forbidden to do something, such as the imposition of a positive behavior. The individual of law can not become individual in fact without first become a citizen. There is no, in its turn, autonomous individuals without an autonomous society, and society's autonomy requires self-determination, something that can only be achieved when it's shared by its members (BAUMAN, 2001, p. 50).

In this perspective, second thought of Michael J. Sandel (2011, p. 141) to act freely, according to Kant, it should act with autonomy. "And to act autonomously is to act according to the Law that impose myself – and not according to the dictates of nature or social conventions."

This way the fundamental duties can be conceived as legal duties[6] of the person, both physical and legal, which determine the fundamental position of the individual, having a meaning to a particular group or society and thus may be required in a public perspective, private, political, economic and social.

2 Solidarity in the private relations

The duty of solidarity is foreseen in Article 3 of the Brazilian Constitution as a goal of the Federal Republic, presenting itself as a purpose of building a free and just society[7]. In this context, it has to be on all private relations that principle should be considered. The essential function of such duties is related to the Communities expectations[8], in

[6] Gregorio Peces Barba Martínez (1987) warns that "la identificación del deber jurídico y su distinción del deber moral es imprescindible para aclarar el sentido del término deber fundamental".

[7] Interesting arguments about justice are raised by Political Philosophy and Philosophy of Law. We highlight some current views as Michael Sandel and Amartya Sen.

[8] Michael Sandel, in a communitarian view, argues that the individual should be evaluated in the context in which it operates. The author proposes the communitarian thesis as opposed to contemporary liberalism. Sandel presents questions when he contrasts the concrete situations to assess theories of morality and justice (contract surrogacy and or-

which human are located.

Such objectives highlighted in the constitutional text, in the Title I, like "Fundamental Principles", exalt the quality of what is essentially doing "with which enjoy of prominence, either in achievement by Public Authorities and other recipients of the saying constitutional, whether in task of interpreting it, and, by its light, interpret all planning of national law" (MORAES, 2008).

The role of the duty of solidarity, therefore, goes through the idea that the study of law can not be removed from the analysis of society, so as to enable individualization of the role and social phenomenon. The right has as reference point the man in his psychophysical evolution, "existential", which becomes history in its relationship with other men. "The complexity of social life implies that the determination of the relevance and meaning of existence should be made as in the social existence, ie as 'coexistence' " (PERLINGIERI, 2002, p.1).

On the fundamental duties in private relationships, Dimitri Dimoulis and Leonardo Martins (2011, p. 328) have the following situations: "The particular A can completely prevent the exercise of freedom of expression of B without violating it, in view of a clause contract or exercise of other fundamental rights". An association would then have the fundamental duty not to exclude an ideologically inconvenient member? A fundamental problem, therefore, is presented in this perspective: the limitations on private autonomy thus may occur under the guise of protecting itself the right holder?

Solidarity, in this scenario, ratifies the incidence of various fundamental rights covered by the constitutional norm. In other words, solidarity can be understood as a true reciprocal relationship: if there are rights, on the other hand, there is a duty in solidarity.

Maria Celina Bodin de Moraes (2003, p. 109-110) presents important distinction of solidarity. The author divides this element in two species, namely the phatic solidarity and solidarity as a value. The factual arises from the need of human coexistence, since solidarity as a value comes from the rational consciousness of common interests. Therein lies to the author, the dialectical concept of recognizing the other.

There is then a close relationship between duties and rights restrictions. It is a tenuous relationship between the fundamental duties,

---

gan sales) and argues that one can not really determine which goods and social practices should be governed by the market until it has examined such theories (SANDEL, 2011, p. 124).

limits and restrictions on fundamental rights, because such restrictions can be justified on the basis of fundamental duties in the interests of society.

The thesis developed here involves the idea of restriction, but not a restriction alone, on the contrary, it is a restriction facing the prospect of solidarism in private affairs, and, therefore, opted for the application of the dialogue sources theory supported by Erik Jayme (2003, p. 114), which does not want to remove from the system any one of his sources, but aggregate them through dialogue. Starting from the idea that given legal reality shows about "reciprocal influence between the social, economic, political and normative-legal ones, the transformation from an economic aspect, political, ethical concerns – sometimes deeply – about the normative order and vice versa" (PERLINGIERI, 2002, p. 2).

Regarding the economic character of the theme developed here, it is used economic parameters to evaluate the limits/criteria of the advance or brake on stipulation of fundamental duties aimed at particular face of a conflict of interest. We start from the premise that the economy has a strong influence on private matters.

In the globalized economy[9], in view of that, there is the weakening of the states and the strengthening of markets, propitiating the merger of large firms that concentrate economic power. In this relationship between Law and Economics, agency theory admits the difficulty in stipulating the duties between subjects, from the premise that, for example, contracts are designed to be incomplete, and presents problematic issues such as information asymmetry, transaction[10] and opportunism

[9] Bauman (1999, p. 7-8), when analyzing the relationship of globalization with notions of freedom and the market, clarifies: "The use of time and space are sharply differentiated and differentiating. Globalization both divides and unites, divides while joining – and the causes of division are identical to those that promote uniformity of the globe. Along with the planetary dimensions of business, finance, trade and information flow, is put in motion a process 'finder', mounting space. Together the two intimately related processes clearly differentiate the conditions of entire populations and stocks of various segments of each population. What for some seem to be globalization, for others means location, which for some is signaling freedom for many others is undesired target and cruel. Mobility climbs to the highest level among the highly coveted values – and freedom of movement, a commodity always scarce and unevenly distributed, soon becomes the main stratifying factor of our late modern or postmodern".

[10] On "transaction costs", Richard Posner (2005, p. 9) explains: "El primero es que el Derecho, en cuanto compete a la promoción de la eficiencia económica, debería procurar minimizar los costos de transacción. Por ejemplo, definiendo claramente los derechos de

in this economic concepts.

The private legal relations established between economic agents are effectively incomplete, since there is the ability to anticipate all future contingencies, even taking into account that none of the contractors will become a defaulter during or upon hire (SZTAJN, 2005. p. 74). And what is the relation this subject with the fundamental duties? What is it intended to propose with the thesis of harmonization?

3 Does fundamental duties restrict freedom of individuals in the exercise of private autonomy?

The notion that one has about fundamental duties is that these lend themselves to restrict freedoms. Nevertheless, as there is no absolute freedom, but "there is only freedom within the law" (PEDRA, 2012, p. 135), only when the fundamental duties are wrongly employed is that ultimately restrict the freedom of individuals.

The right does not have the power to enforce behavior to the human psyche and may not require the individual to think, act or nurture feelings this way or that way, but you can correct distortions in legal relationships and link social actors to respect the rule of law.

In the field of relations between individuals the autonomy portrays a positive and active aspect of personality, within the ambit of the people who can act as an autonomous and responsible. Thus, in an attempt to relate autonomy with duties in respect to horizontal fundamental duties, can identify constitutionalism in a simple idea, namely: who has rights must also have duties (DIMOULIS & MARTINS, 2011, p. 339). Such consideration occurs, for example, in the case of the individual who has preserved his privacy, social networks, and also respects the privacy of others in the same virtual universe.

---

propiedad, haciéndolos transferibles sin dificultad y creando soluciones baratas y efectivas cuando hay um incumplimiento de contrato. Los analistas económicos del Derecho han identificado una serie de doctrinas, procedimientos e instituciones para lograr el objetivo de minimizar los costos de transacción del mercado [...]. El segundo corolario del enfoque económico del Derecho que estoy exponiendo es que cuando, a pesar de los mejores esfuerzos del Derecho, los costos de transacción del mercado siguen siendo altos, el Derecho debería simular la asignación de recursos del mercado asignando a los derechos de propiedad a los usuarios que más los valoren". Posner, therefore, believes it is incumbent on the law to search for efficiency in order to minimize transaction costs, for example, when define property rights, creating, thus, cheaper solutions when the noncompliance of a contract occurs.

Due to solidarity, puts up the "disposition of vulnerable resources that allow the exercise of fundamental rights in a satisfactory manner, strengthening social cohesion" (DIMOULIS and MARTINS, 2011, p. 339). At this point, the fundamental duties are "tools that help community life by facilitating the organization, by itself, should be respected and enforced" (RUSCHEL, 2007, p. 231-266). Nevertheless, the application of instrumentation proposed by the author, in a strict and absolute manner, can weaken the private autonomy.

But is there criterion for the exercise and implementation of these instruments seeking solidarity? Said another way, how is the harmonization between the duties of solidarity and scope of the freedom of individuals in the exercise of private autonomy?

As we know, in the conflict of interests, it becomes part of the enacting legislators[11] which impose certain duties to private agents social and economic. In this sense, it is appropriate gratuity transport for senior citizens, the imposition of rules increases in health plans for certain groups and imposing rules for financial institutions intended portion of the proceeds to finance programs for popular housing (SARMENTO, 2004, p. 340).

The effectiveness of the rights and fundamental duties depends on the belief in its necessity and its significance for the preservation of humans in society, "besides a minimal degree of tolerance and solidarity in social relations[12]" (SARLET, 2001, p. 9). From this perspective, one may wonder *e.g.* whether there is a duty (critical) from the health insurance company that the obligation to conduct innovative medical treatment and exorbitant costs for the benefit of their insured, although there expressed contract banning, which has been much discussed in the Brazilian courts.

It is understood that the primary responsibility for ensuring certain benefits belongs to the State. Thus, the overhead of private actors with those benefits, without the existence of law and fundamental duty bias, entails the occurrence of an impairment of the dynamics of eco-

[11] Vieira de Andrade (2004, p. 170) believes that "the fundamental duties are not immediately applicable, depending on the intervention of the legislator to regulate them."

[12] The author further states: "the preservation of the environment, respect for privacy and private life, the protection of children and adolescents, equality between men and women, freedom of expression, depend on a healthily and responsible family and personal relationships, ultimately, much more than a legal system that formally make these core values, as well as the Courts to watch carefully for their fulfillment" (Sarlet, 2001, p. 9).

nomic and social subsystems.

Thus the need for the application of the fundamental duties to individuals in their relationships (horizontality of the fundamental duties), mainly basing on solidarity, can not neglect the respect for private autonomy from most basic fundamentals of the economy[13].

In optical pragmatic "Law and Economics", it is proposed to apply the law to the interpreter in order to weigh up the likely consequences of various interpretations that the text permits, paying attention also to the importance of defending democratic values, fundamental rights and legal language as a means of effective communication and the separation of powers (SALAMA, 2010, p. 43). The thesis outlined here seeks to understand the economic analysis of Law as an instrument able to clarify legal issues in private harvest and point unfolding of various normative choices in this context.

From pragmatic perspective, Law is a tool apt for the achievement of social purposes. In thought of pragmatism, if emphasizes the rejection of the idea that the law "is founding on permanent principles permanent and that it is put into practice through its logic manipulation" (SALAMA, 2010, p. 41).

The author Bruno Salama (2010, p. 41) clarifies that Richard Posner posits that

> the meaning of things are social, not immanent, and that human achievements should be assessed in relation to the circumstances and also evaluated by its consequences. This leads to rejection of all the fundamental criteria that can absolutely guide the normativity of law, including the efficiency criterion.

Thus, the particular has fundamental duty implicit of respect for others in the contractual setting, which is called by the doctrine of duties civilist attachments. However, private autonomy can not be curbed

[13] In Special Appeal No. 1106625-PR (2008/0259499-7), whose rapporteur was Minister Sydney Beneti, it was considered the economic notion of contract, as follows: "[...] The legal order is harmonious with individual interests and of the socioeconomic development. It did not completely fulminates acts that are nonconforming to any extent. The theory of legal transactions, largely informed by the principle of conservation of its effects, states that even the cogent norms intended to organize and coordinate the practice of acts necessary to social life, respected legal transactions performed. It should prefer the interpretation that avoids the complete annulment of the practiced act, opting for their reduction and renewal to the parameters of legality [...]."

by the judiciary, through contractual dirigisme without criteria and absolutely, to impose on individuals and companies certain duties typically from states, as it is the case in some cases exaggerated interference in health plans. On the other hand, when the judge interprets the case to enforce the duty attachment solidarity, based on objective criteria of violation of duties of conduct, it should be the relativized private autonomy.

It is defended that social issues are inextricably linked to the market. One of the most dangerous current modalities is the expansion of markets and market analysis for the spheres of life delimited by rules that are not economic. There are moral issues that arise when the government hires private companies to provide hospital beds, or when the government omit to regulate commerce standards that greatly affect the labor market.

It is understood, therefore, that such issues do not concern only the private autonomy and utility. They are also linked to the balanced way of considering the most relevant social practices, thus, are also related to democracy. Michael J. Sandel (2011, p. 327) addresses this issue in his thesis on the moral limits of markets and warns that "social marketing practices can corrode or degrade the standards that define them, we need to ask what are the standards not dependent on market that we want to protect from the market interference"[14].

As warns Adriano Sant'Ana Pedra (2010, p. 7-36), "the dynamic nature of the Constitution as a living organism that is, allows it to monitor the progression of social circumstances." Thus, the imposition or not of fundamental duties rests on the sovereignty of the state as an organized community, sovereignty which can not however, make a clean sweep of human dignity, ie, the idea of the human person as the beginning and end of society and the state (NABAIS, 1998, p. 60).

What is observed, in our times, in the areas of bank loans, insurance, education and housing, is that the courts have manifested from the premise of absolute protection to vulnerable and dissociated form to economic issues, reviewing the particular (companies, plans health care and the people who are part of them, financial institutions etc.) duty that it would be of the State, that is, health programs, access to education,

[14] The author Sandel (2011, p. 128), v.g. in analyzing the case of contract of surrogacy presents the following questions: "Up to what extent our choices in the free market are really free? Are there virtues and goods of nature so high that transcend the laws of market and the power of money?"

promoting economic activity, etc.. However, passing on state benefits to individuals in exercising their economic activities, to create objective conditions that allow access to services or products in the line of duty of solidarity, can generate an even greater imbalance in the private relationship versus private.

The solidarism can be found in private relations generally (bonds, contracts, civil liability, business relationships, etc). In the family law it is considered the prevalence of child's best interest, as an expression of solidarity within the family, or even the control of the means of adoption. Maria Celina Bodin de Moraes (2008) explains, for example, that the family does not find it established in hierarchies, concerned with the preservation of family assets, to reveal how the space of personal fulfillment that it composes[15].

The theory of dialogue fonts supported by German jurist Erik Jayme (2003, p.114) assists in understanding solidarism in private relationships, as it is an instrument used to overcome the antinomies and seek for solutions consistent in several areas of law, a systematic overview for the interpretation of rules. Such a theory can be used as a solution "systematic and topical at the same time, as it should be more fluid, more flexible, to allow greater mobility and fineness of distinctions", can be applied to the question of the fundamental duties, personal autonomy and economic rights (MARQUES, 2004).

On the plane of systematic interpretation, the plurality composing the Constitution prevents the isolated analysis of a particular standard (PEDRA, 2010, p. 20). For its understanding, it is necessary to interpret systemic, being the thesis outlined here the relationship between individualism versus solidarity movement under the focus of horizontality of the fundamental duties. In this aspect, the research of the duties attached on the interpretation of the relations between individuals can be applied to concrete cases, given the contractual dirigisme of magistrate has imposed such a transfer of the obligation from the state to the private.

It is defended that, for example, the application of the particular duty to indemnify the other individual who has endured a moral injury[16]

[15] In the private area, we have been living for a long time in an "axiological revolution", no other action being necessary to entertain the division between public and private. The tripod private, family, property and contracts, is modified with the rupture of the wall "separating the state and society" (NEGREIROS, 2006, p. 48).

[16] "The defect of the service that resulted in the undue restriction of the customer name of the bank should not be confused with the fact that the service, which poses a risk to

or material, in the case of breach of a positive obligation[17] as compensation for pedagogical. Matter the fundamental duty of solidarity fits the contemporary concern of civil rereading of the principles in the light of the Constitution. In the same way, Maria Celina Bodin de Moraes (2003, p. 108) warns that any "subjective situation gets guardianship of spatial up and while not only in accordance with the will power of the holder, but also in line with the social interest".

In the same vein, it is argued that the normative principles and their impact on the contractual relations is a way to encourage the application of the fundamental duties, as well as private relationships undergo the scrutiny of constitutional norms, especially solidarity.

With the (re)reading of the constitutional legal relations now socialized, aims to devise a transformation between the individual and the collective to understand the Constitution axiologically, seeking to replace the "have" to "be" with "the primacy existential realization over performing asset" (NEGREIROS, 2006, p. 62).

It is cited, even as fundamental duty under the bias of the fulfillment of the social function of the contract, the mitigation of the effects of relativity of contracts for its application in the social context, such as the sealing of unfair competition and the imposition of compensation by the insurer to the insured in the event of a claim.

---

consumer safety, and whose limitations period is defined in art. 27 CDC. 2. Is it correct to understand that the initial term of the statute of limitations for bringing a suit for damages is the date on which the consumer takes science Registration discreditable therefore the principle of 'actio nata', the right to claim compensation arises when found the injury and its consequences. 3. The violation of the duties attached, also titled instrumental, laterals, or accessories of the contract - such as the general clause of good faith objective, general duty of loyalty and mutual trust between the parties - implies contractual liability, as the authoritative doctrine teaches with support in numerous precedents of this Court, recognizing that, in this case, the negative features illegal contract. 4. The case does not molded to any of the specific terms of the Civil Code, covering the ten-year limitation period provided for in Article 205, the mentioned Diploma.5. Special feature not provided" (STJ. REsp 1276311/RS).

[17] New institutes are being welcomed by the Brazilian Civil Law to ensure the protection of the rights of the debtor, such as the theory of the duty to mitigate loss (duty to mitigate loss). Similarly, the Council of the Federal Court has approved the Statement No. 169, at the III Journey of Civil Law namely: "the principle of objective good faith must lead the lender to prevent further detriment." Follow interesting judged appreciated by STJ on the topic: REsp 758518/PR Special Appeal 2005/0096775-4. Rapporteur: Ministry Vasco Della Giustina (Judge summoned the TJ / RS). T3 - Third Class. 17/06/2010. (REPDJe 01/07/2010).

Thus, there is a two-way street that requires activity of subjects also focused on the common good, as well as a role in society that does not sacrifice the individual good, supportive considered in relation to the property of others (ROSENVALD, 2007, p. 17).

Into the contractual domain, the respect to the minimum conditions of life applies. According to the German theory of the "limits of sacrifice", the contracts do not need to be fulfilled when their execution leads to overspending and not to provided, which can be checked when the due performance compromise survival. The free market system can be worked out as an example to demonstrate this theory of "limits of sacrifice" (AZEVEDO, 2002, p. 98).

Thus, the contract[18] does not hold in an isolated way. It is a way that drives the human wills. Even when there is a conflict of interests between the contractors, the judiciary uses the specific case to better apply the Law. In business in which the social function is more evident (finance, banking contracts in general insurance, family issues, etc.)., economic and social phenomena are even more noticeable. The judge, therefore, when analyzing of the case, should be concerned with the social contingent that also[19] is reached, because here is a reflection of the application of the harmonization of the duties of solidarity and space of freedom of individuals.

In conclusion: a proposal for the implementation of solidarity in private relations

It was found in this study that in private relations there are fundamental duties of individuals involved in solidarity, but at the same

[18] The agreement now needs to be understood as an instrument of protection of the human, more than that, as a support for the free development of the individual's existence as a real policy of solidarity, as proposed in Article 1, section III of the Federal Constitution , in which the "being available to the other", becomes to na online hermeneutic line for patrimonial situations (ROSENVALD, 2007, p. 10).

[19] "Underlying the idea of reciprocity is the community of equals, which, however, under the rule of formal equality is to be understood, both factual and legal, in the sense given: factually, stressing that inequalities are never so relevant, in the legal sense, disregarding the inequalities in fact, that men can consider themselves (although they can't actually be) as equals. Community of equals and equal interests, however, still referenced by individual values, expensive to individuals in real conditions of equality and while ended in its in individuality. The only rule of justice, in this environment, remains that of equality before the law" (Moraes, 2003, p. 113).

time, private autonomy must be safeguarded in some contractual scenarios, especially in view of the economic impact that a court may cause interference in future hiring.

Thus, if certain states liens are passed on to individuals in exercising their economic activities, to create objective conditions that allow access to services or products in the line of duty of solidarity, such a scenario could generate, in certain situations, an imbalance greater in particular relation versus private.

It is tenuous, so the relationship between the fundamental duties, limits and restrictions towards fundamental rights, because such restrictions can be justified on the basis of fundamental duties in the interests of society, meaning not even the prevalence of public interest on the private.

It is concluded that the scope of the fundamental duty of the particular scenario of private autonomy, and how it brings harmonization between the duties of solidarity and space of freedom of individuals in the exercise of private autonomy, should observe the duties attached of business, but the private autonomy can not be curbed by the judiciary (subjectivism magistrate), through contractual dirigisme without criteria, absolutely and supposedly grounded in fundamental rights to impose on individuals and businesses some typically state duties.

The purpose of this study, therefore, lies in the notion that the private autonomy can only be relativized, in compliance with the fundamental duty of solidarity, when guided by rationally justifiable criteria and using dialogue sources.

References

ANDRADE, José Carlos Vieira de. **Os direitos fundamentais na Constituição portuguesa de 1976**. Coimbra: Almedina, 2004.

AZEVEDO, Antonio Junqueira de. Caracterização jurídica da dignidade da pessoa humana. **Revista USP**, São Paulo, n. 53, p. 90-101, mar./maio 2002.

BAUMAN, Zygmunt. **Modernidade líquida**. Trad. Plínio Dentzien. Rio de Janeiro: Zahar, 2001.

_____. **Globalização**: as consequências humanas. Trad. Marcus Penchel. Rio de Janeiro: Zahar, 1999.

BOBBIO, Norberto. **A era dos direitos**. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

DIMOULIS, Dimitri; MARTINS, Leonardo. **Teoria geral dos direitos fundamentais**. 3. ed. São Paulo: Revista dos Tribunais, 2011.

_____. Deveres fundamentais. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel (Coord.). **Direitos, deveres e garantias fundamentais**. Salvador: Juspodium, 2011.

FABRIZ, Daury Cesar. A Eficácia dos Direitos Sociais após duas décadas da Constituição brasileira de 1988. **Publicações Seriadas do Centro de Estudos Sociais**, Coimbra, n. 315, p. 1-13, out. 2008.

JAYME, Erik. Direito internacional privado e cultura pós-moderna. **Cadernos do Programa de Pós-graduação em Direito – PPGDir/UFRGS**, n.1, vol. 1, p. 114. mar. 2003.

LORENZETTI, Ricardo Luís. **Fundamentos do direito privado**. São Paulo: RT, 1998.

MAINO, Carlos Alberto Gabriel. Derechos fundamentales y la necesidad de recuperar los deberes: aproximación a la luz del pensamiento de Francisco Puy. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel (Coordenação). **Direitos, deveres e garantias fundamentais**. Salvador: Juspodium, 2011.

MARQUES, Cláudia Lima. Sobre a necessidade de "ações afirmativas" em contratos de planos de saúde e de planos funerários frente ao consumidor idoso. SARLET, Ingo Wolfgang (Org.). **Constituição, direitos fundamentais e direito privado**. Porto Alegre: Livraria do Advogado, 2003.

_____. Superação das antinomias pelo diálogo das fontes: o modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e Código Civil de 2002. **Revista da ESMESE**, n. 07, 2004.

MORAES, Maria Celina Bodin de. Constituição e Direito Civil: tendências. **Revista Direito, Estado e Sociedade**, Rio de Janeiro, n. 15, p. 95-113. 2001.

_____. **Danos à pessoa humana**. Rio de Janeiro: Renovar, 2003.

_____. O princípio da solidariedade. In: MATOS, Ana Carla Harmatiuk. (Org.). **A construção dos novos direitos**. Porto Alegre: Nuria Fabris, 2008, v. 1, p. 232-260. Também disponível em: <http://www.idcivil.com.br/pdf/biblioteca9.pdf>. Acesso em: 20 de junho de 2012.

NABAIS, José Casalta. **O dever fundamental de pagar impostos**. Coimbra: Livraria Almedina, 1998.

_____. A face oculta dos direitos fundamentais: os deveres e os custos dos direitos. In: _____. **Por um Estado fiscal suportável**: estudos de direito fiscal. Coimbra: Almedina, 2005.

NEGREIRO, Teresa. **Teoria do contrato**: novos paradigmas. Rio de Janeiro: Renovar, 2006.

PECES-BARBA, Gregorio Martínez. Los deberes fundamentales. **Doxa**, Alicante, n. 4, 1987.

PEDRA, Adriano Sant'Ana. **A Constituição viva**: poder constituinte permanente e cláusulas pétreas na democracia participativa. Rio de Janeiro: Lumen Juris, 2012.

_____. As mutações constitucionais e o limite imposto pelo texto da Constituição: uma análise da experiência latino-americana. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, n. 101, p. 7-36, jul./dez. 2010.

PERLINGIERI, Pietro. **Perfis do Direito Civil**: introdução ao Direito Civil constitucional. Trad. Maria Cristina de Cicco. 3. ed. Rio de Janeiro: Renovar, 2002.

POSNER, Richard. El análisis económico del derecho en el common law, en el sistema romano-germánico, y en las naciones en desarrollo. Trad. Enrique Pasquel. **Revista de Economía y Derecho**, Invierno, v. 2, nº. 7, p. 7-16, 2005.

ROSENVALD, Nelson. A função social do contrato. **MP-MG Jurídico**, Minas Gerais, n. 9, Ano II, abr.-jun. 2007.

RUSCHEL, Caroline Vieira. O dever fundamental de proteção ambiental. **Revista Direito e Justiça**, Porto Alegre, v. 33, n. 2, p. 231-266, dez. 2007.

SALAMA, Bruno Meyerhof (Org.). **Direito e Economia**: textos escolhidos. São Paulo: Saraiva, 2010.

SANDEL, Michael. **Justiça**: o que é fazer a coisa certa? Trad. Heloísa Matias e Maria Alice Máximo. Rio de Janeiro: Civilização Brasileira, 2011.

SARLET, Ingo Wolfgang. Os direitos fundamentais sociais na Constituição de 1988. **Revista Diálogo Jurídico**, Salvador, v.1, n.1, 2001, p. 5. Disponível em: <http://www.direitopublico.com.br>. Acesso em: 30 mai. 2012.

SARMENTO, Daniel. **Direitos fundamentais e relações privadas**. 2. ed. Rio de Janeiro: Lumen Juris, 2006.

SEN, Amartya. **A ideia de justiça**. Trad. Denise Bottman e Ricardo Doninelli Mendes. São Paulo: Companhia das Letras, 2011.

SILVA, Vasco Manuel Pascoal Dias Pereira da. Vinculação das entidades privadas pelos direitos, liberdades e garantias. **Revista de Direito Público**, São Paulo, a. XX, n. 82, abr./jun. 1987.

SZTAJN, Rachel. **Law and economics**: direito & economia. Análise econômica do direito e das organizações. Rio de Janeiro: Campus, 2005.

On the origins of Rule of Law and the meta-physics of institutions

Bruno Meneses Lorenzetto[1]

Abstract: The question concerning the origins or the beginning of the concepts is a philosophical problem that is located at the core of some of the most important reflections in our current time. In specific, the question about the origins of the state – the Rule of Law – is taken as the object of this reflection. It´s known that there is a wide range of answers given to it, mainly by the classical perspective of distinct authors that addressed the issue, in an effort to create theories that could shape an outlook to the social community and explain some important themes which structure the identity of a society, as such, the origins of sovereignty, the legitimacy of the representatives, the declarations of rights and the functioning of the institutions.

The aim of the present paper is to show the mechanisms that work in the "underground" of these concepts or, how does the institutions use a meta-physical production of self-legitimating acts. Problems that can be seen in the "we" of term "We the people", in the following terms: who is the "we" that precedes the "We the people", or constitutes the "people"? The state is thought as being "always there", even before the "we"? One can say that our forebears created the state but, when? And, where did came the power that legitimated our forebears?

On the other hand, from where is originated the legitimacy of the Law? How to enforce the law, remembering that the Law is an authorized and justified force, a force that justifies itself. And, furthermore, the operation that creates the Law tend to be a coup de force, that no prior foundation could, by definition, guarantee, ensure or contradict.

In sum, the search for the origins of the Rule of Law implies in putting in evidence the aporias that constitutes both the Law and Politics and, as a consequence, the uses that Law makes of politics to legitimate itself, and vice versa. Considering that both institutions bear a meta-physical structure of legitimation.

Keywords: Rule of Law. Institutions. Politics.

[1] Assistant Professor of Theory of Law, Pontifical Catholic University of Parana, Brazil. Visiting Research Scholar, Columbia University, New York, 2013.

1. Foundation

According to Hannah Arendt, the concept of authority has vanished from the modern world — not the concept in its large sense, but a specific form of it that has been valid in the Western world for a long time.[2] Arendt is talking about the Roman concept of political authority, in which the source of authority rested in the past, in the moment of the foundation of Rome, and in the importance of its forebears.

In Rome, says Arendt, since the beginning of the Republic, the sacred character of the foundation was sustained because once something has been founded, it remains connected to future generations. This was the form of political participation in Rome: the preservation of the foundation of the city, connecting it with the past, and the effort to build foundations that would last for eternity.

Those who held authority were the elders, the Senate or the *patres,* who inherited this authority from the founders of all future things.[3] For the Romans, the authority of the living was dependent on the founder's authority. *Auctoritas* connected to the past, to the tradition, and was set against power, *potestas,* the force of the living. *Auctoritas* was rooted in the past but was present and important to political life as much as the power or the force of the living. Although the power was derived from the people, the authority rested in the Senate.

According to Hannah Arendt, the Romans required "founding fathers" and examples of authority in terms of ideas. This led them to take the Greek ancestors as authorities who provided philosophy and poetry.[4] The past was sanctified through the tradition that preserved it, leaving the testimony of the forebears as a hope for the future generations.

Arendt noted that this model was incorporated by the Christian church, which transformed the Nativity into a "new foundation". The same phenomenon was used in the Enlightenment revolutions, in which the French and Americans preached belief in a future State and in a "vengeful God" as part of the new political body.

Thomas Jefferson affirmed the need for a divine principle, a

[2] ARENDT, H. "What is Authority?". In: Between the Past and the Future. New York: Penguin Books, 1993. p. 91.

[3] ARENDT, H. Between the Past and the Future.

[4] ARENDT, H. Between the Past and the Future. About philosophy and poetry, see: BLOOM, H. Where shall wisdom be found? New York: Riverhead, 2004.

transcendent sanction in the public realm. Curiously, this sanction was called for during the revolutionary period, demonstrating the founders' need for some type of metaphysical support.[5]

Although the authority, in its Roman sense demonstrated by Arendt, came close to complete oblivion, it has subsisted in Western political history in two ways: through modern revolutions, which rescued the importance of the idea of foundation, and in Machiavellian thought, in which the concept of foundation is fundamental.[6]

Conscious of the need for a new political organism, Machiavelli utilized the term *stato*, which identified him as the "father" of the modern concept of the State. Arendt adds that it is possible to consider Machiavelli the precursor of modern revolutions because he understood that in the foundation existed the central political action, the only great activity that could establish the public and political domain and that could turn the political into reality.

The modern revolutions – generally considered radical ruptures with tradition – emerged as events of political actions that were inspired by the origin of this tradition and extracted their primary force from it. According to Fioravanti, whereas the French revolution attempted to combine the individualist model with the State, the American Revolution attempted to combine individualism with historicism, excluding from its own horizon the European State philosophy of political sovereignty.[7] In both revolutions, the figure of constituent power carried enormous relevance. Nevertheless, it is important to distinguish differences between the revolutions beyond some coincidences related to the attribution of sovereignty to the people.

In this way, one can attempt to understand why, of the modern revolutions that concentrated and justified their searches for foundations, the American Revolution was successful in renewing the "broken thread with tradition".[8]

---

[5] ARENDT, H. On Revolution. New York: Penguin Books, 2006. See also: BROOKE, J. L. "Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic". In: PASLEY, J. L.; ROBERTSON, A. W.; WALDSTREICHER, D. Beyond the Founders: New Approaches to the Political History of the Early American Republic. Chapel Hill; London: The University of North Carolina Press, 2004.

[6] ARENDT, H. Between the Past and the Future.

[7] FIORAVANTI, M. Los decrechos fundamentales. Apuntes de historia de las constituciones. 3. ed. Madrid: Editorial Trotta, 2000. p. 77.

[8] ARENDT, H. Between the Past and the Future.

2. The institution's mechanisms

The next step is based on thinking how this worked in the configuration of modern institutions. From another perspective, it's important to remember that, according to Mary Douglas, the entrenching of an idea is a social process.[9] This process of entrenching implies also in determining intellectual, economic and political processes. Usually, to acquire legitimacy it will look after examples in nature and in reason, and it will be bounded to the very structure of the social order.

That's why it's common to think that institutions have a self-policing start, but, it's paradoxical to think that a community will grow up into little institutions. So, for a social convention turn itself into a legitimate social institution it must be accompanied by a cognitive convention that will structure it. This can be seen in the naturalization process that we are used to make in the dichotomist treatment we give to subjects like gender, ideology and politics.

The social principle is reinforced with a naturalized analogy: female and male, left and right, the people and the king. Mary Douglas observes that these dichotomies present both a complementary aspect, but, either a political hierarchy.[10] Ultimately, the grounding of institutions will refer to nature, and, in the XVIII century, nature was still deeply bounded to God. God wasn't dead – yet.

Other characteristics help to understand the processes of institutions is the relation with the forebears, usually it is settled a list of inheritance laws. Any person that wishes to validate its pretensions has to remark its ascendancy, and the same rule is applied to the ones wishing to contest their legacy. In addition, the social convention needs also a naturalizing principle, to give legitimacy to will be done in the future. It's not completely casual that Rome bears as its myth of foundation, the she-wolf relation with the twins Romulus and Remus.

The institutions endure to long phases in which they were simple fragile conventions. The early Christianity is also an example to this point. Being "naturalized", it became part of the universal order and, from this stage, it started to be used to ground different sorts of argumentation.

Another common aspect is that the founding analogies need to be hidden and the way of thinking about the world or the "epistemol-

[9] DOUGLAS, M. p. 45.
[10] DOUGLAS, M. p. 49.

ogy" must also be a kind of secret, not accessible to everyone. That's the form in which institutions also give uniformity to a random mixture of items that count as "members" or "elements" of certain category.

The mechanisms by which the institutions provide this uniformity is not always clear. In the case of the Rule of Law, this can be seen in the efforts to eliminate antinomies, vagueness, and other imprecisions, derived from the use of natural language to create rules. But the major conflict about this subject involves the possibility of the judicial review. A practice that is originally legitimated in the name of the coherence of the whole legal system, but it produces a problem that goes beyond this simple question of maintaining its alleged coherence, the problem of legitimacy.

The way that institutions are build is squeezing the ideas into a common shape that pursues to be recognized by all, and become the parameter of correction of other variants – but it not happens always in a pacific way. Yet, institutions fix dynamic processes and hide their influence, they endow themselves with rightness. Mary Douglas understands that: "In marking its own boundaries it affects all lower level thinking, so that persons realize their own identities and classify each other through community affiliation".[11]

And it is exactly this question "who are the ones that belong to the community?" that is in the "underground" of the foundation of the modern States. It is on the root not only of modern problems like xenophobia but, in a more profound sense, concerning the origins of the people that created – ex nihilo – this community.

3. *Deus ex machina*

Jacques Derrida in his "Declarations of Independence",[12] start his reflections with one question about the Declaration of Independence: "who signs, and with what so-called proper name, the declarative act which founds an institution?".[13] This act, of signature is not only the *gesture* of signing, but goes beyond it because it performs, accomplishes

[11] DOUGLAS, Mary. p. 102.

[12] In: DERRIDA, Jacques. Negotiations: interventions and interviews, 1971-2001.See also: HONIG, B. "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic." In: The American Political Science Review, v. 85, n.1, (97-113), 1991.

[13] DERRIDA, Jacques. Declarations of Independence. p. 47.

itself, "does what it say it does".

What Derrida says is that a declaration that founds something like an institution, a constitution or a State requires that the signer engage himself with it, because the signature maintains a link with the instituting act. An example of it is the need that one institution has of keeping itself independent of the empirical individuals who take part in its production.[14]

But who signs the letter, the declaration? Which is the person that legitimates, that founds this actions? In the case of the Declaration, Thomas Jefferson, the draftsman of the project. By right, he writes but does not sign. Jefferson, the one who represented the representatives, the ultimate signers?

But the representatives sign, by right, for themselves, but also "in the name of", for others. By right the signer is "the people", the "good" people. They (the people) are the ones who declare themselves free and independent. The problem is that this "good people", which authorizes their representatives to sign the draft, does not exist. The inexistence is in the sense of an entity, before the declaration – and this is where the *aporia* is situated – can't be anyone, but the people is also the one who legitimates the signature – the performative act that constitutes a political community, "We the people". As Derrida says: "There was no signer, by right, before the text of the Declaration which itself remains the producer and guarantor of its own signature".[15]

The *coup* of force that found the Law, brings the law to the light of day, gives birth and day to the Law. In this point can be observed the union between the constation and performance of language.[16] The Declaration of Independence is a performative act, represents in the verbal form an empirical action, the creator of a new settlement of things and the maker of a baptism.

The signature sustains the *simulacrum of the instant*, as said by Derrida, they invent (for) themselves a signing identity. They sign in the name of the laws of nature, in the name of God. They place the foundation of their institutions in natural laws, in the name of God, that is, the creator of nature, the last resource for legitimation.

If the Declaration of Independence wants to produce any signifi-

[14] DERRIDA, Jacques. Declarations of Independence. p. 48.

[15] DERRIDA, Jacques. Declarations of Independence. p. 50.

[16] A overcoming of the constative and performative aspects of language proposed by Austin.

cation this must follow a model, one example – once again, the *aporia* and the search for grounding to something that through a performative act gives birth to itself. Which is the last instance? What is the last model – in the meta-physical field? To the "Founding Fathers" of the United States the answer can, in a first look, be simple. But this thought conceals a trap, because the French, in the same period, had their revolution, and they needed to change their political configuration, mainly, to put themselves against the *Ancien* Régime, so they didn't wanted to be inspired by their predecessors, but, this also was an important question to the ones who aimed to Declare Independence in the United States, even though they were inspired by England they wished to create their own institutional design.

Which alternatives were left? Can a people be born from their own *baptism*? The social contract is ratified by whom? Is there a group of persons that precedes the "We the people"? But, isn't this people that legitimates the Declaration of Independence – in the name of themselves? In that period there were few alternatives left to justify authority. But, this question was suspended. Or, one can say, *resolved*. The last signature belonged to God, the best proper name. But there is no *proper name*.[17]

From this first point a second one is developed. If, in one hand there is a crisis in the legitimation of the independent nation, the new State, on the other hand is the problem of representation. How representatives of the people can sign, speak in the name of the people? Is there a limit to the things that the representatives can do a limit to this *procuration*? The thin link between the paradoxes is located at the metaphysical *people*. The institution that institutes.

A representative cannot faithfully represent all the represented ones, not event their voters. But there is an invisible and indispensable

[17] "It is because the proper names are already no longer proper names, because their production is their obliteration, because the erasure and the imposition of the letter are originary, because they do not supervene upon a proper inscription; it is because the proper name has never been, as the unique appellation reserved for the presence of a unique being, anything but the original myth of a transparent legibility present under the obliteration; it is because the proper name was never possible except through its functioning within a classification and therefore within a system of differences, within a writing retaining the traces of difference, that the interdict was possible, could come into play, and, when the time came, as we shall see, could be transgressed; transgressed, that is to say restored to the obliteration and the non-self-sameness [non-propriété] at the origin". DERRIDA, Jacques. Of Grammatology. Baltimore: John Hopkins University Press, 1997. p. 110

link between the voter and the elected, the sovereign and its subjects, the State and the people.

Bonnie Honig following this trace discuss the paradox of politics, democracy's grounding problem in which power should belong to the people, but the people is not allowed to make the important decisions that politics demands.[18] For this reason states Honig that:

> "The paradox of politics is not soluble by law or legal institutions, nor can it be tamed by universal or cosmopolitan norms. The paradox of politics highlights the chicken and the egg circle in which we are law´s authors and law´s subjects, always both creatures and authors of law. Thus, the paradox teaches us the limits of law and calls us to responsibility for it. And it teaches that the stories of politics have no ending, they are never-ending".[19]

In the beginning of democratic regimes, especially those derived from ruptures with authoritarian governments, can be settled an agreement about who are the opponents, who should be antagonized, but, in fewer cases is possible to make a consensual agreement about the main values that will rule the society, the institutional design of the new government, which are the principles and ideals that the new State should protect – all this stays suspended and usually is the subject of political disputes.

4. Revolution and institutionalization

After the birth of this new nation, various problems emerged regarding the political and institutional configuration of the United States. One important anchor of the national identity of the United States is stated in the Constitution. For Arendt, the relation between the American people before the Revolution and the Constitution was of a *religious order*, in the original sense of *religare*, the capacity to bind or to connect to one's origin.

This tribute to the origin has two axes, the first of which was mistaken because the men of the American Revolution thought that in rescuing the memory, they could adopt its rights and liberties. In this case, they were attempting to consolidate a liberal comprehension of the

[18] HONIG, Bonnie. *Emergency politics*: paradox, law, democracy. Princeton: Princeton University Press, 2009.

[19] HONIG, Bonnie. Emergency. p. 3.

guarantee of these rights. The second axis treats a political agreement by deriving both the authority and the stability from a political body.

This is the aspect of the American Revolution that differentiated it from the others: the implicit authority in the act of foundation despite the belief in an immortal legislator or the promises established in the rewards and threats of a future life, the after-life. For this reason, the self-evident "truths" enumerated in the Preamble of the Declaration of Independence were those that succeeded in guaranteeing permanence to the New Republic.

Governments were instituted with the aim of promoting the guarantee of rights, and these governments were derived from the consent of the governed. This gave the people the right to contest or even destroy it if the government violated these original principles (the right of the people to alter or to abolish it and to institute a new government). The new political body should be faithful to these principles to achieve happiness and safety in the best possible way.

In this original political derivation can be observed the inspiration of the Roman institutions before the challenges presented by the formation of a new sovereign entity as an organization of the internal structures of the social set and the stabilization of popular expectations. If the Roman example pointed to the power given to the people (*potestas in populo*), the authority remained with the Senate (*auctoritas in senatu*). In the case of the American revolutionaries, this formula was not fully used because the *auctoritas* was yielded to the judiciary.

From this perspective, Hannah Arendt notes that the lack of power presented in the *Federalist* indicates that the primary headquarters of the American Republic was the Supreme Court, which exercised its power through the constant constitutional activity of a permanent "Constitutional Assembly".[20]

This epoch was addressing the problem of how to make a perpetual agreement – surrounded by tensions of different orders, such as England's pressure and the necessary conciliation between the colonies – in such a way that the original act of foundation would become permanent. For this reason, a bet was made on trust in the stable and permanent figure of authority.

This "bet on authority" was also reflected in the double role played by the term "Constitution". According to Arendt, this term expressed the notion of a "constituent act" that preceded all of the govern-

[20] ARENDT, H. On Revolution.

ments, the framing of a society, and its political and institutional configuration as well as the manifestation of the legacy of this foundational moment, the Letter, the Constitution in its document form.[21]

This emulation of the "moment of origin" is the production of a foundational abstraction, a time in which the political actors were placed outside of the chronological continuum to become the "Founders". As noted by Arendt, the important point here is not the utilization of the Romans to anchor the foundation, which, in itself, represented a re-constitution, but that the political actors were ready for the paradoxical work of producing a "new origin". They were "Founders" with the authentic capacity to originate new things based in the nativity and in the comprehension of the fact that human beings existed in the world due the act of giving birth.[22]

The year 1789 marked two very important political occurrences: the French Revolution and the approval of the Constitution of the United States. Despite the political proximity between France and the United States, the institutional political models adopted by the two countries were significantly different.

However, in both cases, the revolution needed to be terminated. Therefore, the Constitution began to symbolize the institutionalization of the demands made by the revolutionaries. If, to a certain point, the Revolution had propelled the formation of new governance and a new institutional political architecture, it needed an end that allowed the transition of the revolutionary state to the Rule of Law.

The State was seen as the best form of government. Thus, the constitutional government attached democratic elements to non-democratic characteristics. This is an indication that there were tensions between the stabilization promoted by the Constitution and the Revolution linked to the constituent power and to the democratic expansion of the sovereignty.

In conclusion, it is important to note that the conventions were one of the political innovations arising from the American Revolution with the formation of a legislative body not directly connected with the legislature. The settlers had knowledge about these conventions, but, in 1770, the institutions of the government did not represent their interests. Thus, the conventions became the alternative defense of the people against the government.

[21] ARENDT, H. On Revolution.

[22] ARENDT, H. On Revolution.

As stated by Arendt, the American Revolution combined two important elements, mutual promises and deliberation. Therefore, it is remembered as the result of men who worked in common agreement backed by mutual promises because men should not be limited to the unpredictable inconstancies of fortune, waiting for their political constitutions to be graced by chance. As noted by Hamilton in the *Federalist* number 1, it was believed that societies of men were capable of establishing good governments as a result of reflection and choice.[23]

In this sense, the expression "We the People" in the Preamble of the Constitution of United States had the objective of establishing the fiction that the community was not governed by a king or an external power but by institutions that represented its own constitutional expression, with a political order that was not drawn from history but was created and implemented civically by the people themselves.[24]

[23] HAMILTON, A.; MADISON, J. JAY, J. The Federalist Papers. p. 27.

[24] KRAMER, L. D. The People Themselves: popular constitutionalism and judicial review. New York: Oxford University Press, 2004.

The right to justification and the Rule of Law:
Towards a "justifiable" legal argumentation theory

Rafael Cascardo Cardoso dos Santos[1]

Abstract: The fundamental core of moral rights is far from being an undisputed matter among philosophers and scholars in general. Here, I intend to show a possible interpretation of moral rights as having a common ground: the right to justification. The whole construction of this argument relies upon Rainer Forst's book: The Right to Justification. In the mentioned book, the author defends that the content of this right is reconstructed by looking at the contexts of people's relations in society. Although firstly developed in the moral context, I also look to show how this right could be applied to the basic structures of society (here I also rely to Rainer Forst's ideas, however, in a more loose manner). Institutions, however, are limited in internalizing the requirements of the right to justification, since they work inside a pre-established design and not in a pure normative way. Considering these limitations, I will try to show how the Legislative and the Judiciary could act in harmony to enforce this right and to help each other in a synergistic manner. To justify the application of the moral notion of the right to justification to institutions, a parallel between this right and the Rule of Law is a useful resource, since the concept proposed here of Rule of Law seems to be close to what we could call an institutional ground to the right to justification. Finally, I will expose how the growing studies on legal justification and argumentation theories could improve with the normative idea of the right to justification. By doing so, my goal is not to show a correct legal argumentation theory, but rather to give an important ground to construct analytical rules and principles of justification in legal reasoning.

Keywords: Justification; Political Constructivism; Rule of Law

1. Introduction

Prior to starting the work itself, I will briefly outline its sections. Firstly, the components of a moral right to justification will be exposed and analytically decomposed. In this first part, I will focus on the idea

[1] Undergraduate student of State University of Rio de Janeiro (UERJ).

shown by Rainer Forst on his book *The right to Justification*. Following this first description of Rainer Forst's normative conception of the foundation of moral and human rights, the second part shifts its attention to the basic structures of society. This part will show, by the method of political constructivism, how institutions – notably the Legislative and the Judiciary bodies – ought to play its roles inside the requirement of the right to justification and the Rule of Law. There are limits that prevent an institution from achieving an optimal result in theirs deliberative activity and these limits will be exposed not only descriptively, but also in order to suggest ways of making a better deliberation process. Furthermore, I will draw some remarks on Brazil's recent institutional experience and try to diagnose its problems with the help of the approach of the right to justification to political/judicial institutions. Finally, the last section is focused on legal argumentation theories and how they could be affected by the right to justification.

2. The core of moral rights: the basic right to justification

Rainer Forst formulates the right to justification as being the ground of morality, which "lies in the re-cognition of the human responsibility to reciprocally and generally justify one's actions in moral contexts in relation to all others affected"[2]. Moreover, he emphasizes the fact that the action must be reasonably (which means generally and reciprocally) non-rejectable rather than acceptable. This right has two important consequences, one as being positive and the other negative: it grants the affected a right to say in the matter (positive aspect) and a – qualified[3] - veto right against norms and structures that cannot be justified within the two exposed criteria and bring the disadvantaged unjustifiable inequalities (negative aspect).

The first important idea is the criteria of reciprocity and generality. According to Forst, reciprocity "means that no one may refuse the particular demands of others that one raises for oneself (reciprocity of content), and that no one may simply assume that others have the same values and interests as oneself or make recourse to 'higher truths' that are not shared (reciprocity of reasons). Generality means that reasons

[2] FORST, Rainer. The Right to Justification: Elements of a Constructivist Theory of Justice. Translated by Jefffrey Flynn. Columbia University Press, New York, 2012. p. 42.

[3] Rainer Forst characterizes this right as 'qualified' "in the sense that the moral appeal as 'veto' itself must observe the criteria of reciprocity and generality". p 214.

for generally valid basic norms must be sharable by all those affected"[4]. These criteria provide a common ground by which human rights can be "constructed" and against which no good reason can be raised. However, the principle of justification that gives rise to the duty to justify cannot itself be justified (or "constructed") and we must reconstruct the various contexts of human practices to conclude that the criteria of generality and reciprocity are always present in the intersubjective expectation of individuals. Again, Forst asserts that human beings are justificatory beings and "if we want to understand human practices, we must conceive of them as practices bound up with justifications; no matter what we think or do, we place upon ourselves (and others) the demand for reasons, whether they are made explicit or remain implicit (at least initially)"[5].

The methodological aspect of the criteria of justification applies primordially to the validity claims of moral relevant actions and norms. In his words, "a comprehensive analysis of practical and normative justification would thus have the task of examining the various contexts of justification within the framework of a recursive reconstruction of the validity claims raised in each context to identify the conditions for redeeming those claims"[6]. It is also very important to emphasize the contextual aspect of the discursive process of justification and its primary addresses: "those affect in relevant ways. This is far more in accord with the meaning of morality, which consists in respecting the justified claims of vulnerable beings. These claims find their way directly into the moral justification"[7]. Therefore, in the discursive procedure of justification, in order for the validity claim of the norm or action to be considered justifiable, the addresses – the most affected in relevant ways – must assess its reciprocal and general validity. The conclusion that we can reach is that, for Forst, the norms that pass the referred test have a "morally unconditional normative character and are in a strict sense categorically binding as norms against whose validity no good reasons can speak"[8]. The moral reasons which justifies the moral claims must be shared reasons, "in order to do justice to the openness of the procedure of justification and to underscore the (in this sense counterfactual) moment of recipro-

[4] FORST, Rainer. Idem. p. 6
[5] FORST, Rainer. Ibidem. p. 1
[6] FORST, Rainer. Ibidem. p. 16.
[7] FORST, Rainer. Ibidem. p. 20.
[8] FORST, Rainer. Ibidem. p. 21.

cal and general acceptability – or better, non-rejectability – independent of the factual acceptance or nonacceptance of reasons"[9]. These reasons "arise within a practice of mutual and general justification, and constitute a 'space of justification', which is not a space that contains a stock of moral truths that are fixed once and for all, but one that must always be updated and newly validated in concrete practices of justification"[10].

However, this categorical and unconditional binding gives rise to the question of how to conciliate the autonomy of morality and the morality of autonomy. Forst answers this questions with a second-order practical insight, which is an insight not in how to justify – which is explained by the principle of justification -, but into the unconditional duty of justification. This duty, according to Forst, is not derived from an obligation, "but rather as one that a person has in virtue of one's capacity for being a moral person"[11] and that "this means recognizing that (and how) one is accountable to others as an autonomous person, without any further reason"[12]. This insight into the moral point of view combines the "cognitive (the capacity for justification), volitional (willingness to give justification and act justifiably), and affective (the sensorium for moral violations) components"[13]. Forst creates his own view of Kant's idea of human being as an end in itself, affirming that "moral persons recognize one another in accordance with this duty as persons who have an irreducible right to justification. This, on my account, is precisely what it means to regard oneself and others as ends in themselves (…) Without this insight into, and acceptance of, the duty to provide justifications the principle of justification would be left hanging in the air"[14] and saying that "morality is in the first instance concerned with the dignity of other persons"[15].

Another interesting point of Rainer Forst's concept of the right to justification is the advantage of the negative formula – moral norms must be such that cannot be generally and reciprocally rejected – over the affirmative formula of merely saying that moral norms must be gen-

[9] FORST, Rainer. Ibidem. p. 21.
[10] FORST, Rainer. Ibidem. pp. 21-22.
[11] FORST, Rainer. Ibidem. p. 35.
[12] FORST, Rainer. Ibidem. p. 35.
[13] FORST, Rainer. Ibidem. p. 39.
[14] FORST, Rainer. Ibidem. p. 57.
[15] FORST, Rainer. Ibidem. p. 55. Here, Rainer Forst is criticizing Kant's perspective on the primary concerning of morality with oneself rather than with the dignity of other persons.

erally and reciprocally accepted. According to Forst, "it leaves open the possibility of morally admissible norms that could be legitimately rejected – and hence that are not categorically binding – but that can also be reasonably accepted because they concern actions that are supererogatory. Second, and more importantly, the criteria of general and reciprocal rejectability make it possible to test the character of the claims raised and to determine when a claim can be or could be reasonably rejected even in cases of (expectable) disagreement or of 'false' agreement (based, for example, on illegitimate influence, intimidation, or lack of information)"[16]. The possible limitation of the discourse of justification in the core of the definition of the right to justification makes it an interesting concept, especially regarding the next sections that will focus on institutions, which are, by definition, limited. The right to justification is compatible with dissent[17], recognizing that pure consensus theories are highly fictitious. Rainer Forst makes another good observation, paraphrasing Hannah Arendt, asserting that "reflection on the finitude of human beings also includes becoming aware of the finitude of reason and the impossibility of being able to resort to 'ultimate' and unquestionably certain grounds in procedures of moral justification. This impossibility grows more concrete as a moral problem is posed, from which, of course, the impossibility of justifying reasons does not follow, but rather the necessity of always reciprocally and generally reassessing the justifications provided. A morality of justification is a morality that can be criticized and revised in its details: a human morality 'without a banister' that cannot in principle exclude the possibility of failures and errors"[18].

To conclude this first part, it is important to emphasize that Forst finds the concept of justice – the core meaning of it being the right to justification -, as having its fundamental opposition in arbitrariness. His moral theory is thoroughly directed to fight arbitrariness, trying to make persons "understand and embrace the responsibility for finding a common 'ground' for their action on which they can stand and stand their ground: not an 'ultimate' ground, but still a stable ground precisely because of its openness to a critique in which 'nothing [is] so holy' as the

[16] FORST, Rainer. Ibidem. p. 49.

[17] "In contrast to a pure consensus theory, the criteria of reciprocal and general justification make it possible in cases of dissent (which are to be expected) to distinguish better from worse reasons" – FORST, Rainer. Ibidem. pp. 5-6.

[18] FORST, Rainer. Ibidem. p. 39.

'agreement' or the 'veto' of each"[19]. Therefore, even though the right to justification is the base from which derives all other human rights; it does not give each of these human rights full potential. Instead, it delivers only a basic framework than can be developed on different grounds than the one offered by this right to justification[20].

3. Political Constructivism[21], institutions and The Rule of law

This section is divided in three parts: the first one makes the shift from moral theory to the formation of society's basic structures (focused on the Legislative, Executive and the Judiciary) and the role of the right to justification there (3.1); the second is a little bit more focused on how the connection of the role of the right to justification and the referred institutions can be conceptually binding, so it treats how the right to justification can penetrate the notion of Rule of law (3.2); and the last is especially dedicated to some remarks on Brazil's institutions and the contribution that could be made by accepting the right to justification as a mechanism of moral correction of these institutions (3.3).

3.1 The Right to Justification as a legit basic ground for institutions

So far, we have exposed Rainer Forst's moral constructivism based upon the right to justification. Now I am going to turn my attention to the possible effect of this right when applied to state institutions. Although I am going to gradually detach myself from Rainer Forst's lessons, I will start with some of his conceptions, remarkably by his view on political constructivism.

Rainer Forst affirms that political constructivism is on the second "discursive construction" level of a constructivist conception of human rights, on which "conceptions of legal, political, and social structures need to be developed in which these general rights are concretely justified, interpreted, institutionalized and realized as basic rights in given

[19] FORST, Rainer. Ibidem. p. 42.

[20] This "weak" aspect of the right to justification is important to make it more manageable in other contexts of justice which are not pure normative and have more complex constraints to the interaction of the actors.

[21] Although introduced by John Rawls in Political Liberalism, the concept here is used in a different, but similar away. The difference between the conception here defended and Rawls's can be seen at FORST, Rainer. Ibidem. Chapter 4.

historical and social contexts"[22]. The first level is composed by the already exposed moral constructivism.

The two levels are at the same time autonomous and dependent from each other. They are autonomous, since they work in different contexts – "moral norms have to be justified in the moral community of all human beings, whereas norms of political and social justice are to be justified in particular political communities"[23] -, but they are dependent because "moral justification is – in a normative-formal sense – the core of political justification"[24].

In fact, the moral construction must be integrated by political constructivism, since the general list of moral rights that appear by the method of moral constructivism can only be enforced and "concretely justified, interpreted, institutionalized (…) within a legally constituted political order"[25]. However, even though political discourse has limitations, it "may not violate the basic right to justification or the criteria of reciprocity and generality. What is valid in the universal moral context must also be demonstrably valid in particular political contexts"[26].

Nevertheless, since political contexts are situated socially and historically, they do not merely institutionalize moral rights previously established. The rights that are going to be legally prescribed depend on the demands that are going to appear in each political context. Then, it is important to say that "a legally binding interpretation, institutionalization, and realization of these rights can be supplied only in a law-governed state, a state in which the citizens confer upon themselves a right to justification and recognize the rights that are justifiable on the basis of this right (in the form accepted by them)"[27]. The concept of "law-governed" state can be interpreted as a state that is inside the framework of the Rule of Law.

Every state that works inside the Rule of Law has a constitution – written or not – that represents its fundamental legal base. Following Forst, "a constitution has the double task of fixing a list of basic rights that citizens of a democratic order who respect one another's basic right to justification have to grant and guarantee one another (…) and of lay-

[22] FORST, Rainer. Ibidem. p. 213.
[23] FORST, Rainer. Ibidem. p. 217.
[24] FORST, Rainer. Ibidem. p. 218.
[25] FORST, Rainer. Ibidem. p. 218.
[26] FORST, Rainer. Ibidem. p. 218.
[27] FORST, Rainer. Ibidem. p. 219.

ing down the principles and rules of fair deliberative procedures"[28]. These aspects reflect the constitution as "the result of a moral construction of a just basic structure and the groundwork for the political construction of a just political and social order"[29].

However, for the success of this continuous "process of moral and political construction", a special commitment from people is necessary. As Dworkin states in his community model of principle "(…) people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise. Politics has a different character for such people. (…) In short, each accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community"[30]. Therefore, we can see integrity as central to politics[31] and as a useful virtue, even if ideal, that a political community should have to lay down the referred principles and rules of fair deliberative procedures that fits inside the requirement of the right to justification.

Klaus Günther also contributes to the matter, taking an intersubjective perspective rather than an individualist one that seems to be on the background of Dworkin conception. Günther affirms that "the principle of coherence, to which legislation is also subject, implicitly manifests this interconnection between societal solidarity and an intersubjectivist concept of law. Because every new right is valid always only in the context of consideration of other rights, they are embedded in relations of mutual recognition from the very beginning"[32]. Here, it is useful to go beyond Günther and say that not only rights are to be justified, interpreted and validated intersubjectively and interconnected to others rights, but also to affirm that in this complex chain all of them are ultimately related to the right to justification and its criteria of generality and reciprocity. Günther continues to affirm that "by 'equal concern and respect', one could mean the idea of impartiality (…) as a rule of argumentation in practical discourses. For this rule operationalizes only the universal-reciprocal sense of the idea of impartiality, namely, that

[28] FORST, Rainer. Ibidem. p.182.
[29] FORST, Rainer. Ibidem. p.182.
[30] DWORKIN, Ronald. Law's Empire. London: Fontana Masterguides, 1986. p. 211.
[31] DWORKIN, Ronald. Idem. p. 216.
[32] GÜNTHER, Klaus. The Sense of Appropriateness: Application Discourses in Morality and Law. Translated by John Farrell. Albany: SUNY Press, 1993. p. 283.

of equally considering the interests of each individual when justifying a norm"[33]. Here it is important to observe that, in spite of considering the concrete interests when justifying a norm, he does not give a special consideration to the potentially affected in the context of justification, falling short to obey the criteria of the right to justification.

Now turning specifically to the concretization of rights by deliberative institutions following the criteria imposed by the right to justification, there are two points that should be mentioned. Firstly, the cultural background is an important factor to enhance the democratic deliberation. The culture aspect is optimized in the already referred scenario of Dworkin's model of principle community. Similarly, Rainer Forst says that a community of responsibility is important to develop relations of political trust between citizens. According to him, "trust is a normative resource of special importance in a democracy, for citizens need to trust both that other citizens will accept their responsibilities and that social institutions will work according to justifiable rules and norms, even if no 'perfect' institutionalization of democracy and of democratic supervision can be established"[34]. Secondly, the institutions themselves should enable effective and fair participation and argumentation. Freedom of speech concretized in efficient mechanisms of direct participation of citizens is crucial, in order to make the input of information and the accountability of the output provided by state decisions more democratic. As Forst affirms "political institutions in a narrower sense, most importantly parliamentary decision-making bodies, also have to be 'designed' so that the 'force' of the better argument can become a real political force"[35].

Nonetheless, if majority institutions fail to make justifiable outcomes, which will always happen to a certain degree, since institutions do not work in ideal deliberative conditions, judicial review is there to check political decisions. In fact, the institutional task of Judiciary related to the right to justification is to examine "political decisions with respect to the question of whether the criteria of reciprocity and generality have been satisfied, that is, whether important moral (reciprocally and generally non-rejectable) reasons have been neglected or trumped by inappropriate considerations, and with respect to the question of whether the procedures of political participation, inclusion, and justifi-

[33] GÜNTHER, Klaus. Idem. p. 282.
[34] FORST, Rainer. Op. cit. p. 180
[35] FORST, Rainer. Idem. pp. 181-182

cation have been adequately followed"[36].

Analyzing the matter of judicial review, Humberto Ávila proposes normative standards that should be followed by the Judiciary which are in accordance with the separation of powers. According to him, the Judiciary should be more self-restrained when "(1) there is a doubt about the future effects of the norm; (2) the matter is of a difficult and technical nature; (3) the constitution permits an open balance by the Legislative on the matter"[37], whereas when there is a restriction of fundamental rights and the premises on which it is founded are clearly mistaken, the Judiciary should act in a more activist (in a non-technical sense) way. Adopting a more restrained perspective, in a defense of judicial minimalism, Cass Sunstein asserts that "minimalism tends to be the appropriate course when the Court is operating in the midst of reasonable pluralism or moral flux, when circumstances are changing rapidly, or when the Court is uncertain that a broad rule would make sense in future cases. (…) When a democracy is in a state of ethical or political uncertainty, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right"[38]. In spite of making this presumption in favor of a minimalist approach, Sunstein also says that "Sometimes minimalism is a blunder; sometimes it creates unfairness. Whether minimalism makes sense cannot be decide in the abstract; everything depends on context, prominently including assessments of comparative institutional competence"[39].

Although the Judiciary has an important role in democratic societies, its importance should not be overestimated. In fact, taking a critical-descriptive approach, Forst asserts that "what is necessary then is the general and unimpeded possibility of raising objections to decisions by pointing out that reciprocally non-rejectable claims or reasons have been ignored. This is a task that is often fulfilled by courts, with all the disadvantages of turning political questions into legal questions and of excluding certain claims which may not be easily phrased in the

[36] FORST, Rainer. Ibidem. p. 182.

[37] ÁVILA, Humberto. Teoria dos Princípios: da definição à aplicação dos princípios jurídicos. 12ª Edição, 2011. Malheiros. p. 187 (translation made by the author of this paper). For the role of burden of proof in restriction to fundamental rights, see also SILVA, Virgílio Afonso da. Direitos Fundamentais: conteúdo essencial, restrições e eficácia. 2ª Edição, 2010. Malheiros. pp. 168-183.

[38] SUNSTEIN, Cass. One case at a time – judicial minimalism in the Supreme Court. Cambridge: Harvard University Press, 2001. p. 263.

[39] SUNSTEIN, Cass. Idem. p. 262.

established legal language; therefore – and dhis is even more important in large-scale democratic orders such as the European Union- it should be a task taken up by political institutions designed for that purpose"[40].

Therefore, the risk of a "juristocracy" is always imminent and should be taken seriously[41]. The Judiciary cannot go beyond the institutional design to correct a flaw from the Legislative, since there are institutional rules to which it should be deferent. Sometimes suboptimal outcomes are not only institutionally inevitable, but also required by the legal system. In the case of a flaw of a majority institution, it is even relevant to adopt a second-best choice in the legal decision, since in the future the majority can recognize its error by seeing the bad effects it had caused (which the Judiciary could not reassess, due to institutional limitation) and correct it by itself. In a similar way, Schauer points out that "in operating in this fashion, law does not intend to be perverse. It does, however, intend to take institutional values especially seriously, and it does that in the hope that in the long run we may be better off with the right institutions than we are when everyone simply tries to make the best decision"[42].

3.2. The Right to Justification as institutionally binding – some remarks and contributions on the debate of the concept of Rule of Law

The best way to analyze the right to justification as a required component of institutions is by tracing its similarity with the Rule of Law in its common aspect: the fundamental opposition to arbitrariness[43].

Nevertheless, the concept of the Rule of Law has been much disputed nowadays between scholars. The core idea of its opposition to arbitrariness is, however, an idea shared by almost all of them, even though they diverge in matters of defining the content of the Rule of Law. Here, I will briefly expose the view of Finnis and Raz which are

[40] FORST, Rainer. Op. cit. p. 182.

[41] For a dense account of institutional and democratic critiques of judicial supremacy, see BRANDÃO, Rodrigo. Supremacia Judicial versus Diálogos Constiucionais: a quem cabe a última palavra sobre o sentido da constituição? 1ª Edição. 2ª Tiragem, 2012. Editora Lumen Juris. Chapter 5, pp. 183-197.

[42] SCHAUER, Frederick. Thinking Like a Lawyer: A new Introduction to Legal Reasoning. Cambridge: Harvard University Press, 2009. p. 233.

[43] However, it is clear that they recognize that eradicate arbitrary power completely is an impossible task.

two of the most recent and eminent scholars writing about the subject and then I will give reasons to provide an alternative structure for the Rule of Law.

Before starting, it is important to emphasize some other aspects that the authors consider common grounds. They all acknowledge that the Rule of Law in a certain State may be more or less followed, in other words, it doesn't follow the common binary code of judicial system of legal/illegal, being its implementation a matter of degree. Also, they all seem to follow[44] at least the eight requirements proposed by Lon Fuller, as being necessary to any law that exists in a State submitted to the Rule of Law[45]: generality, promulgation, no retroactivity, clarity, no contradiction, possible commanding, constancy through time, congruency between official action and declared rule[46]. At last, they agree on two basic functions of the Rule of Law: that the government should be ruled by law and that the law should be formulated as being able to guide human conduct[47].

Beginning with Finnis, it is important to say that he has both a substantial and procedural approach to the Rule of Law, although it seems, as it will be exposed, that the former always prevails over the latter. He draws his position referring to the Rule of Law as a necessary constraint in the relationship between rulers and ruled, in the sense that the rules must act towards the ruled based on a procedure fairness and reciprocity, aiming to achieve the common good[48]. A virtuous State in terms of the Rule of Law would be the one that puts the common good

[44] It is important to mention that Raz has quite a different elaboration of these requirements, saying that some may not comply with what he sees as the two basic functions of the Rule of Law. In addition, he discards some of them criticizing Fuller's view that they have a value in itself, asserting that they are not independent from the two main functions of the Rule of Law and if they cannot guarantee that these goals will be achieved, other principles shall be established for that purpose. See RAZ, Joseph. The Authority of Law: Essays on Law and Morality. Oxford University Press, 1979. pp. 214-219.

[45] FULLER, Lon. The Morality of Law (revised edition). Yale University Press, 1969. pp. 46-91

[46] Although the authors agree in these components, they develop them in a different way. However, the exposition of these differences escapes the purpose of the present paper. For a dense approach to the development of these components, see MARMOR, Andrei. Law in the age of pluralism. Oxford University Press, 2007. pp. 10-33.

[47] Again, the different insights given in the topic of these functions of the Rule of Law will not be explored.

[48] FINNIS, John. Natural Law & Natural Rights. Oxford University Press. Second edition, 2011. p. 274.

as it main goal.

Finnis goes on to say that following the Rule of Law sometimes is not enough to attain the common good and then suggests that one should depart, "temporarily, but perhaps drastically, from the law and the constitution"[49]. Therefore, even if the law obeys the eight procedural requirements, which Finnis acknowledges as being necessary components of the law in the Rule of Law, provided it does not achieve the common good in a satisfactory way, the agent should not apply the law. It is important to mention that common good in the Aristotelian approach proposed by him seems to include other moral values and virtues (dignity and equality, just to mention two of them). Proceeding this way, Finnis is not being clear on which extent the common good is a substantive component of the Rule of Law, not offering a methodological way to verify it. Therefore, Raz is right in his criticism that the Rule of Law is not the Rule of the good Law, since if it was this way, "the term lacks any useful function"[50].

On the other hand, Raz offers a more minimalistic conception of Rule of Law[51]. He affirms that "it is the virtue of efficiency; the virtue of an instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such"[52]. However, he asserts that although not being a value in itself, it is of a great moral value, since it "enable(s) the law to perform useful social functions; just as it may be of moral importance to produce a sharp knife when it is required for a moral purpose"[53]. In addition, one of his main notions is that "the Rule of Law is essentially a negative value. The law inevitably creates a great danger of arbitrary power--the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people's freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself"[54]. He concludes by saying that "since the rule of law is just one of the virtues the law should possess, it should be

[49] FINNIS, John. Idem. p. 275.
[50] RAZ, Joseph. Op. cit. p. 211.
[51] For a refutation of Raz's perspective, see MARMOR, Andrei. Op. Cit. pp. 50-54.
[52] RAZ, Joseph. Op. Cit. p. 226.
[53] RAZ, Joseph. Idem. p. 226.
[54] RAZ, Joseph. Ibidem. p. 224.

expected that it possesses no more than prima facie force. (...) Conflict between the rule of law and other values is just what is to be expected. Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better--other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals"[55].

The notion of Rule of Law that I will expose here is within a different paradigm. It has become a common ground nowadays that the Rule of Law must also presuppose the idea of a democratic State. By saying this, it is true that one gives a substantial value to the rule of law. However, I propose here that by giving the democratic characteristic to the Rule of Law, one necessarily incorporate the notion of the right to justification to the Rule of Law. The logical implication is that the eight procedural criteria mentioned above are not enough to describe the Rule of Law in democratic States. Nevertheless, the criteria of generality and reciprocity, as defined in the right to justification, makes it complete. In fact, Rainer Forst develops the concept of the right to justification in the basic structures of society taking as presupposition that these societies are democratic[56].

Finally, it is important to assert that the Rule of Law with the requirement of the right to justification makes the process of elaboration of the law to comply with the criteria of reciprocity and generality (and also the other eight original standards of the Rule of Law exposed before). The analysis is one of degree, since it is humanly impossible[57] to require the deliberative institutions (notably the Legislative) to achieve an optimum procedure referred to the right to justification. Furthermore, in a rather weak sense, the Rule of Law also requires a substantive approach regarding the approved law by the Judiciary in terms of judicial review. As it was shown, the right to justification demands that the law must be such that it cannot be generally and reciprocally rejected, so the

[55] RAZ, Joseph. Ibidem. p. 228.

[56] It is very important to emphasize that this is only one context in which the right to justification can be applied. In this specific context of basic institutions of the State, the right to justification requires a democratic State. In other contexts, this requirement may not be raised. Forst's argument for a right to justification is context-based. This right can also be applied in transnational perspective – which is usually done by Forst – and in this context it has other requirements. However, it is not the purpose of this article to analyze other contexts of justice than the ones of basic institutions within the national State.

[57] We can generally say that it is humanly impossible to achieve the practical discourse ideal conditions, since institutions invariably work in a suboptimal empirical context.

content will be analyzed in this manner, taking into account this aspect in a procedure of balancing based on the principle of proportionality.

3.3. A normative approach especially elaborated for Brazil's case

Before going further to the next section, I would like to make some remarks related to Brazil's institutional experience. Institutions do not work in a vacuum and we have to take into account the peculiarities of each State institution, in order to evaluate them. And now I have to do so, since, in my opinion, the second-best choice reasoning in the format that I just mentioned in section 3.1 is not a good way of reasoning by second order arguments in Brazil's institutions. I say that because the chance of the suboptimal decision taken by the Judiciary generating a dynamic effect to encourage the majority institutions of correcting its flaws by themselves in Brazil is very little. In fact, Brazil's majority institutions are under a very big crisis of representativeness[58]. Considering this scenario, scholars have worked a lot in order to justify the Judiciary activist approach inside the institutional design. However, it seems to me that the important issue to deal with now is to enhance the mechanisms of direct participation. Again, with Forst, it has been presented that the trust of citizen in each other is a strong value for the institutional democratic deliberation to be optimal. This is a important beginning to form a political culture that will make institutions to work inside justifiable rules and principles. However, Brazil does not have an ingrained culture of republican virtues, on the contrary, it possess a historical antirepublican tradition. Therefore, one alternative is trying to make a political reform[59] and expand the mechanisms of direct democracy to

[58] I am not forgetting here that this phenomenon is not exclusive of Brazil, but there the matter has taken critical patterns.

[59] For a proposal of political reform in Brazil, see BARROSO, Luís Roberto. A Reforma Política: Uma proposta de Sistema de governo, eleitoral e partidário para o Brasil. RDE I Revista de Direito do Estado. Ano 1, nº 3. Jul/set 2006, pp. 287-360. However, the scope of political reform here defended is more vast than the one in Barroso's, since it does not exclude mechanisms of direct participation not mentioned in the referred text (by saying so, I certainly do not mean to affirm that Barroso does not agree with mechanisms of directed participation). Another demand that would make democracy in Brazil on its way to a concretization of the right to justification in a specific context would be that of giving provisory prisoners the right to vote, since the rejection to it has no justifiable grounds (see SARMENTO, Daniel. Por um Constitucionalismo Inclusivo. 1ª Edição, 2010. Editora Lumen Juris. pp. 311-333).

encourage the participation of citizens and the growth of republican virtues. In parallel to this, it is important that the Judiciary, ultimately the STF (Supremo Tribunal Federal), makes decisions that keep democracy alive with its substantial and procedural requirements, even taking a representative role when necessary[60].

Moreover, even though, as exposed in section 3.2, we can derive constitutionally the requirement of the right to justification in the context of institutions by the framework of the Rule of Law comprehended in a democratic State, the Brazilian Constitution[61] has other normative statutes that can be interpreted as requiring the referred right. The institutional duty of public administration to act in accord with the principle of morality[62], being a general command, can be interpreted as requiring the observance of the right to justification, since it has an ultimate moral basis. As for the institutional duty of the Judiciary, there is an explicit prevision of the duty to provide justified decisions[63]. Furthermore, the Brazilian constitutional system seems to comply with a moral interpretation that confers to some of its vague texts the reading that gives rise to a duty to justification by institutions of the State and the corresponding implicit right to justification by the people. Nevertheless, the lack of compliance to this duty by the institutions in Brazil is a problem observed empirically.

To help finding a solution to the posed matter, Forst considerations are always elucidative. He affirms that the "most important in institutional designs is the institutionalization of the possibility of what

[60] For an example of typical representative approach by the STF, see ADI 4650 about campaign finance reform. For a detailed treatment of the issue, see SARMENTO, Daniel; OSÓRIO, Aline. Eleições, dinheiro e democracia: A ADI 4650 e o modelo brasileiro de financiamento de campanhas. Available from: http://www.oab.org.br/arquivos/artigo-adi-4650-362921044.pdf

[61] It is also important to mention that Brazilian Constitution declares in its first article that its bases rely upon the legal democratic State.

[62] "Article 37. The direct or indirect public administration of any of the powers of the Union, the states, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, morality, publicity and also the following:"

[63] "Article 93. A supplementary law, propose by the Supreme Federal Court, shall provide for the Statute of the Judicature, observing the following principles:

IX. All judgments of the bodies of Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, and the law may, if the public interest so requires, limit attendance in given acts to the interested parties and their lawyers, or only to the latter;".

one could call reciprocal objection. (…) Ideally, this kind of raising objections should already be part of the proper process of decision making, but given its constraints, this may not always be possible: thus, the need for additional checks that would require some institutional imaginativeness"[64]. The relation between the normative criteria of reciprocal and general justification and the concrete imperfect justification makes "democracy necessarily a self-critical enterprise"[65]. Therefore, the institution of mechanisms that confer a critical "veto" for relevant decisions interposed not only by structures of the state that aren't the authority in question, but also by associations of people, are important to strengthen the power of democracy in Brazil. However, as stated in section 3.1., there are other values to be taken into account and there are costs related to the establishment of a decision-making process more complex by the possibility of continuous objections. This empirical approach is a very relevant tool when evaluating the perfect equilibrium between raising the quality of democracy and not damaging too much governability. The way to make it concrete is a task for our time.

4. Legal Argumentation Theories, the Rule of Law and the Right to Justification – a possible approach

The moral right to justification as conceived by Rainer Forst, which is the idea that is being adopted in the whole paper, was not originally applied to legal argumentation theories. However, there is no reason to think that the criteria of reciprocity and generality could not be raised in the context of analyzing legal argumentation theories. According to Thomas Bustamante, "legal argumentation theories are theories about the use of arguments and its weights in the discourse of justification of the legal decision, looking to increase the rationality in the process of justifying and applying the law to an optimal degree"[66].

The possibility of linking the right to justification and legal argumentation theories becomes clearer if we accept Alexy's "special case" thesis[67]. The "special case" thesis affirms that legal reasoning is a special

[64] FORST, Rainer. Op. cit. p. 182.

[65] FORST, Rainer. Idem. p. 186.

[66] BUSTAMANTE, Thomas da Rosa de. Teoria do Direito e Decisão Racional: temas de teoria da argumentação jurídica. Editora Renovar. 1ª Edição, 2008. pp. 362-363.

[67] ALEXY, Robert. A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Argumentation. Oxford: Clarendon Press, 1989. Translation by Ruth

case of practical discourse, since it involves practical issues and these issues discussed have a claim to correctness, in spite of the discussion being framed within institutional limitations (the deliberation occurs inside a pre-established system of rules and procedures).

Moreover, procedures of judicial decision-making are not only institutionally limited, but also have an immense variety of constraints, being they internal or external to law. Fernando Leal states that "procedures of judicial decision-making are invariably limited. These factors will be separated within three big groups. The first consists of language and rationality limitations (extrinsic limitations), the second consists of typical limitations of judicial rationality (intrinsic limitations), and the third consists of institutional limitations"[68].

Therefore, it is easy to see that the right to justification will have a limited non-ideal penetration in legal argumentation theories, in a way similar to the limitations observed in the last section. However, by seeing specially the influence of the right to justification in legal argumentation theories, it is possible to know more accurately and analytically the manner by which the Judiciary will respond to society and to other state institutions with most of its responses being raised upon reciprocally and generally valid claims.

In addition, Peczenik states that the Rule of Law requires legal decisions to be simultaneously predictable and morally acceptable[69]. Nevertheless, there is a tension here between legal certainty and the other moral values, but this tension is only apparent since "1 - The law-giver cannot predict in advance or acceptably regulate all cases that occur in future practice. The evaluations to be done in legal practice, among other things concerning the question whether a decision of a given kind is just are easier to make in concrete cases, not in *abstracto*. 2 – Historical evolution of the method of legal reasoning has adapted it to the purpose of weighing and balancing of the wording of the law and moral demands. The judge has a far greater practical experience in applying this method to concrete cases than any legislative agency can have"[70].

Adler and Neil MacCormick . p. 212.

[68] LEAL, Fernando. Ônus de Argumentação, relações de prioridade e decisão jurídica: mecanismos de controle e de redução da incerteza na subidealidade do sistema jurídico. Tese de doutorado defendida em 2012 na Universidade do Estado do Rio de Janeiro. pp. 28-125.

[69] PECZENIK, Aleksander. On Law and Reason. Law and Philosophy Library. Dordrecht: Kluwer, 1989. p. 25.

[70] PECZENIK, Aleksander. Idem. p. 27.

However, the way Peczenik finds to solve this apparent tension is by his idea of coherence, which have ten quantitative criteria[71]. Two of these ideas are general and reciprocal justification[72], but not in the way that I am using here. Peczenik's choice to use the idea of coherence for a coherent system leads to a stability of practical opinion. Moreover, according to him, the ten quantitative ideas would lead to a moral result, since they would fulfill the demands of rationality. Peczenik says that "legal interpretatory statements are not true in the literal sense. But they can fulfil the requirements of Logical, Supportive and Discursive rationality. They thus can be both coherent and acceptable in the light of both morality and the legal paradigm. Consequently, they can fulfil important criteria of truth, coherence and consensus. For that reason, L-, S-, and D- rationality are indications of their correctness"[73].

Peczenik's idea seems to be the closest to an ideal normative and rational theory of justification of legal sentences. In spite of its analytical efforts, it seems that this theory would not achieve the requirements of the right to justification, since it does not pay enough attention to the various contexts of justification and to the addressees of the moral relevant norm. In addition, Peczenik's concept of coherence seems to rely too much on logic and rationality. As it was exposed, human rationality is limited, it is doubtful that theory that relies that much on human rationality would be altogether successful, not to mention the institutional and time limitation of gathering information. In brief, one could say that his theory talks too much about logical coherence and gives little attention to an equal – and sometimes more – important moral coherence[74].

It is important now to turn to another theory, which considers the time and rationality limits as important constraints to legal reasoning. Klaus Günther seems to propose a theory in this manner[75], by redefining the notion of integrity made by Dworkin[76]. According to Günther, "the principle of integrity can be understood as a principle for appropriateness argumentation. In this form of argumentation, societal

[71] PECZENIK, Aleksander. Ibidem. Chapter 4.

[72] PECZENIK, Aleksander. Ibidem. pp. 132-144.

[73] PECZENIK, Aleksander. Ibidem. p. 171.

[74] For an analysis of the concept of moral coherence, in a critical reference to the idea of Dworking's integrity, see MARMOR, Andrei. Op. Cit. pp. 41-44.

[75] GÜNTHER, Klaus. Op. cit. p. 43.

[76] Dworkin's theory is not going to be analyzed here since the refined version proposed by Günther appears to have ameliorated it, if we examine through the lens of the right to justification, making sufficient the evaluation of the latter.

relation of recognition are given effect in such a way that the network of concrete rights is applied equally in each particular case. (…) The right to be treated as an equal with concern and respect appears here as the right to equal treatment, that is to say, treating like cases alike not with reference to an individual norm, but with reference to a coherent set of principles as rights. This kind of equal treatment systematically creates differences and conflicts. But the very structure of such conflicts and a structure leading to the consideration of differences is the structure of appropriateness"[77]. Provided that by differences, Günther means potentially affected persons in the context of justification, then his structure of appropriateness obeys the criteria of reciprocal and general justification.

Finally, it is important to expose briefly the relation between the principle of contradictory and the right to justification. In judicial process, "the contradictory must be seen as a right to influence, which has a correspondent duty to debate, inherent to the cooperative structure of process"[78]. It is easy to conclude that "it is not possible to talk about motived decision, if it does not face explicitly the reasons brought by the parties in their manifestations"[79]. Since the parties in the process are the potentially affected in the judicial sentence, it is valid to see a context-related component of justification as presented in the relation between the principle of contradictory and the right to justification. However, in order to give a complete account of motivation of sentences that is not only context-related, but that also observes the criteria of reciprocity and generality, the following requirements of justification"(a) the enunciation of the choices made by the judge to; (a1) individualization of applicable norms; (a2) assentation of factual allegations; (a3) juridical qualification of factual support; (a4) juridical consequences derived from the juridical qualification of the fact; (b) the context of the nexus of implication and coherence between the statements and (c) the justification of statements related to criteria which put in evidence the rational quality of judicial decision"[80] may not be enough or relevant in all cases. In fact, these requirements may suffice in the concrete case to give effectiveness to the right to justification, may go even further than

[77] GÜNTHER, Klaus. Idem. pp. 283-284.

[78] SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. Curso de Direito Constitucional. 1ª Edição; 2012. Editora Revista dos Tribunais. p. 667.

[79] SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. Idem. p. 667.

[80] SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. Ibidem. p. 668.

the basic requirements or may not be enough to comply with them. The point here is that the right to justification with its criteria of reciprocity and generality does not require specific standards that make it more concrete, since these standards may eventually fail in the concrete case to translate the idea behind the right to justification. On the other hand, the best approach is to see it as a metacriterion of correctness of concrete standards of legal argumentation theory, whether for the content of the standard itself or for its application. It is only by this way that the right to justification is read within legal argumentation theories as it is in the basic structures of society: at the same time being an internal feature that the justified standard (or application of the neutral standard) has and being a transcendental concept, since it is ultimately a moral concept that lies beyond the standard.

Conclusion

After seeing the application of the right to justification in different political contexts, I tried to show that none of them is sufficient by itself. All things considered, it is easy to acknowledge the synergy between the contexts of justification. Even though we recognize the limits of human rationality and of the basic institutions of society (especially the Legislative and the Judiciary bodies that were analyzed here), it is always possible to have the right to justification as a goal and a parameter to make institutions work better. If we conceive ourselves as human beings that live in an "order of justification"[81] with our basic institutions and our relation to others "governed by" the procedural criteria of reciprocal and general justification, then we can start talking about contextualizing the ideal notion of "forceless force of the better argument"[82]. This ideal should serve as a guide to a never-ending pretension to correction of concrete institutions.

References:

ALEXY, Robert. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Argumentation*. Oxford: Clarendon Press, 1989. Translation by Ruth Adler and Neil MacCormick

ÁVILA, Humberto. *Teoria dos Princípios: da definição à aplicação dos princípios ju-*

[81] FORST, Rainer. Op. cit. p. 192.
[82] FORST, Rainer. Idem. p. 7.

rídicos. 12ª Edição, 2011. Malheiros.

BARROSO, Luís Roberto. A Reforma Política: Uma proposta de Sistema de governo, eleitoral e partidário para o Brasil. *RDE I Revista de Direito do Estado*. Ano 1, nº 3. Jul/set 2006, pages 287-360

BRANDÃO, Rodrigo. *Supremacia Judicial versus Diálogos Constiucionais: a quem cabe a última palavra sobre o sentido da constituição?* 1ª Edição. 2ª Tiragem, 2012. Editora Lumen Juris.

BUSTAMANTE, Thomas da Rosa de. *Teoria do Direito e Decisão Racional: temas de teoria da argumentação jurídica*. Editora Renovar. 1ª Edição, 2008.

DWORKIN, Ronald. *Law's Empire*. London: Fontana Masterguides, 1986.

FINNIS, John. *Natural Law & Natural Rights.* Oxford University Press. Second edition, 2011.

FORST, Rainer. *The Right to Justification: Elements of a Constructivist Theory of Justice*. Translated by Jefffrey Flynn. Columbia University Press, New York, 2012.

FULLER, Lon. *The Morality of Law (revised edition)*. Yale University Press, 1969.

GÜNTHER, Klaus. *The Sense of Appropriateness: Application Discourses in Morality and Law*. Translated by John Farrell. Albany: SUNY Press, 1993.

LEAL, Fernando. Ônus de Argumentação, relações de priorid*ade e decisão jurídica: mecanismos de controle e de redução da incerteza na subidealidade do sistema jurídico*. Tese de doutorado defendida em 2012 na Universidade do Estado do Rio de Janeiro.

MARMOR, Andrei. *Law in the age of pluralism.* Oxford University Press, 2007.

PECZENIK, Aleksander. *On Law and Reason*. Law and Philosophy Library. Dordrecht: Kluwer, 1989.

RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford University Press, 1979.

SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de Direito Constitucional*. 1ª Edição; 2012. Editora Revista dos Tribunais.

SARMENTO, Daniel; OSÓRIO, Aline. *Eleições, dinheiro e democracia: A ADI 4650 e o modelo brasileiro de financiamento de campanhas*. Available from: http://www.oab.org.br/arquivos/artigo-adi-4650-362921044.pdf

SARMENTO, Daniel. *Por um Constitucionalismo Inclusivo*. 1ª Edição, 2010. Editora Lumen Juris.

SCHAUER, Frederick. *Thinking Like a Lawyer: A new Introduction to Legal Reason-*

ing. Cambridge: Harvard University Press, 2009.

SILVA, Virgílio Afonso da. *Direitos Fundamentais: conteúdo essencial, restrições e eficácia*. 2ª Edição, 2010. Malheiros

SUNSTEIN, Cass. *One case at a time – judicial minimalism in the Supreme Court*. Cambridge: Harvard University Press, 2001.

Judicial process, jurisdiction and the tension between Constitutionalism and Democracy

William Soares Pugliese[1]

Abstract: Civil Procedural Law and Constitutional Law have shared the interest and doubts on the issue of jurisdiction. Through different optics, both disciplines aim to justify the powers and effects of jurisdictional decisions. What happens is that the dialogue that occurs between the two is minimal, so that the same subject is unevenly treated by much of the doctrine. This paper seeks to bring together the two rationales. At first, we shall proceed to an appreciation of theories of two classical authors, Chiovenda and Carnelutti, and two contemporary authors, Luiz Guilherme Marinoni and Ovídio Baptista da Silva - all arising from the Civil Procedural Law. On a second stage, we approach the perspective of legal theory and constitutional law through the analysis of proceduralists and fundamentalists theories, as control parameters between constitutionalism and democracy. From these two optics, we move on to the analysis of an empirical study of Frederick Schauer about the U.S. Supreme Court, which may prove quite revealing. From these considerations, it is argued that the new theories of jurisdiction must conform to the current constitutional model, not only respecting fundamental rights, but also the democratic game.

Keywords: Jurisdiction. Constitutionalism. Democracy.

1. Introduction

There are few works focused on the Brazilian Civil Procedural Law that do not bother to explain the concept of Jurisdiction.[2] Usually,

[1] PhD Student in Human Rights and Democracy at the School of Law at the Federal University of Paraná. Master of Laws at the School of Law at the Federal University of Paraná. Associate Professor of Civil Procedure of Positivo University. Member of the Legal Education Commitee of OAB/PR. Attorney at Law.

[2] This is, by itself, a contradiction, as the Jurisdiction is usually addressed by Constitutional Lawyers.

the books examine the opinion of a number of authors, until the most modern design is reached, from which a range of features and jurisdictional effects is extracted. Increasingly the concepts of jurisdiction have sought grounds in constitutional law, in order to justify the protection of fundamental rights and guarantees.

At the same time, Constitutional Law, aware of the role of the Brazilian Supreme Court and the Constitutional Courts of other countries, has used the terminology "constitutional jurisdiction" to refer to the procedure and decision making in higher courts. In this context, we examine the theory of judicial review, which conflicts two of the most expensive elements to the rule of law: democracy and fundamental rights.

However, the "Jurisdiction" which is referred by the proceduralists and constitutionalists is the same. After all, the judicial power is one and indivisible. What exists is merely a division of powers, but the activity exercised by a single judge and a Justice of the Supreme Court is essentially the same.[3]

In this sense, it is necessary to question what the relationship between the two separate concepts of jurisdiction (found on the Constitutional and the Procedural Law). More than that, we must look for elements that bring these concepts together, turning them into one.

In order to do that, this paper presents preliminary notions of the concept of jurisdiction set out by the civil procedural doctrine, with the primary goal to investigate whether the jurisdiction has creative power of the law, or whether it merely applies the rules enacted by the legislature.

Then, the duality that has concerned constitutionalists between democracy and the protection of fundamental rights will be examined. The responses obtained from this analysis are of vital importance to the concept of jurisdiction, because from this tension we can extract the limits to judicial activity.

Finally, some concluding remarks will be exposed about the current role of the judge facing the contemporary State and its division of powers. The purpose, here, is not to actually end the discussion, but rather to encourage reflection.

2. The various functions of the jurisdiction

The Italian Proceduralists from the nineteenth century claimed

[3] In Brazil, every judge has the power to exercise judicial review.

that modern jurisdiction was, in reality, a return to the Roman concept of *iurisdictio*. For Chiovenda, this return took place under a functional perspective,[4] as it will be shown.

The Italian author defined jurisdiction as "the State's role which aims for the enforcement of the will of the laws, by means of the activity of public institutions, the activity of private or other public bodies, as in affirming the existence of the will of the laws, as in making them practically effective".[5] The purpose of the concept developed by the author was quite limited: to differentiate the judicial function of the executive and legislative functions of the State.

The differences between the legislative and judicial functions are simple enough to point out. The legislator dictates the rules regulating the activity of citizens and public agencies. The role of the Jurisdiction is to merely enforce these rules. [6]

The distinction between Jurisdiction and the Executive is a bit more complex. The difference consists in the fact that the jurisdiction is a substitutive activity. In other words, the intellectual activity of the Judge replaces the will and the thoughts of the parties and all citizens, stating how the will of the law must be applied to the facts. Also, the jurisdiction can substitute an act someone should or should not do (i.e. to pay an amount of money). One way or another, the jurisdiction substitutes someone's activity by the will of the law.

The Executive function, in turn, takes the law as a rule of conduct, according to the principle of legality. In other words, the official has a duty to act in accordance with the law; respect for the rules is the primary activity of the administrative function, so there is no substitutive activity. [7] The law is addressed to its own government and its institutions.

What is left to know about Chiovenda was the meaning he had for the "concrete will of the law". This expression must be understood in the most restrictive way, as the judge had little or no freedom to decide. One should not forget that the work of the Italian author has strong roots

[4] SILVA, Ovídio A. Baptista da. Jurisdição, Direito Material e Processo. Rio de Janeiro: Forense, 2008, p. 263.

[5] CHIOVENDA, Giuseppe. Instituições de Direito Processual Civil. Vol. II. São Paulo: Saraiva, 1969, p. 3. Free translation.

[6] CHIOVENDA, Giuseppe. Instituições de Direito Processual Civil. Vol. II. São Paulo: Saraiva, 1969, p. 5.

[7] CHIOVENDA, Giuseppe. Instituições de Direito Processual Civil. Vol. II. São Paulo: Saraiva, 1969, p. 12.

in the Liberal State paradigm, which gave the judge a mere duty to apply the legal text. It is worth saying that "the law was nothing more than the law, that is, the general standard to be applied to concrete cases".[8]

The power of the court, therefore, was minimal. There was no concern to relate the jurisdictional activity to the Constitution, as the codes were regarded as complete and could regulate society by themselves. For this reason, Chiovenda never bothered with the interpretation of statutes in accordance with the constitutional provisions.

A second author, contemporary to Chiovenda, developed a theory that, at first glance, may reveal a greater scope of power to the judge. Francesco Carnelutti considered that the judge's function is the composition of the dispute *(lite)*, and that to perform his duty, the judge creates an individual standard that solves the case.[9] In this sense, the holding has a value in itself, by solving the conflict of interest between the parties.

This concept was seen at the time as diametrically opposed to Chiovenda's theory. It seemed, at the time, the by stating the judge created a single standard for the parties had a quite different result from the thought that there was only one general will of the law, enforced numerous times to actual cases.

However, time has demonstrated these two theories do not produce different practical results. More than that, it was revealed that both were strictly related to the liberal state model, and therefore were inextricably linked to the principle of the supremacy of law. This means that the judge, under the thought of Chiovenda and Carnelutti, creates no right when he decides a case. Rather, he merely repeats the general rule enacted by the legislature.

Jurisdiction had a mechanical performance: facts ascertained and determined the applicable laws, substituting the will of the parties or resolving the dispute. In fact, however, the result was the same: the iteration of the statutes, without any questioning about their values. The judge had no creative power and, of course, there was no parameter to escape from this repetitive role.

Anyway, there are elements of the classical theories that deserve to be commended. The findings of the judicial activity to be substitutive, through which parties may solve their matters by themselves, it is still

[8] MARINONI, Luiz Guilherme. Teoria Geral do Processo. 3ª Ed. São Paulo: RT, 2008, p. 94. Free translation.

[9] CARNELUTTI, Francesco. Diritto e processo. Napoli: Morano, [s.d.], p. 1-67.

valid. Similarly, the concept of *lite* designed by Carnelutti is still widely used by the procedural doctrine to explain the conflicting interests discussed in a process.

But we must go beyond these findings. The classical theories had strong concerns about legal certainty, which stemmed from the liberal value of formal equality. Therefore, for the same material situations, the judicial response should be equal. The uniformity of decisions was ensured by the proper function of the judiciary, which had no creative role. Observed with the proper precautions, we should keep in mind the merits of this theory, which provided the subjects of Law the possibility to predict the outcome of their actions.

Despite its merits, it is true that these classical concepts are incompatible with the current understanding of Law, in which every statement must be in compliance with a constitution.[10] In this sense, two Brazilian authors deserve to be mentioned, as they have developed concepts of jurisdiction consistent with the Constitution and its laid down fundamental rights.

Luiz Guilherme Marinoni argues that the current role of the Jurisdiction is to provide effective protection of the rights addressed by the Constitution and ordinary legislation. More than that, the right to a remedy is, in itself, a fundamental right of every individual, meaning that the State not only has a duty to provide assistance in order to decide a matter, but also has the duty to perform material acts necessary for the proper repair of the violated rights. [11]

The author derives from the idea that the legislature is unable to predict all factual situations that will be taken to the courts. Thus, he admits that the judge has the power and the duty to devise the appropriate protection for the right, even if there is no statute which points him the solution for the matter.

Marinoni goes even further. Rescuing the doctrine of constitutional principles, he states that the magistrate also has the power and duty to conform the law to the constitutional statements. Here his theory breaks sharply with the classical conceptions. With this statement, the author seeks to demonstrate that the judicial power does not consist in

[10] Il diritto mite, as defined by ZAGREBELSKY, Gustavo. Il diritto mite. Torino: Einaudi, 1992.

[11] MARINONI, Luiz Guilherme. Teoria Geral do Processo. 3ª Ed. São Paulo: RT, 2008; Técnica Processual e Tutela dos direitos. 2ª Ed. São Paulo: RT, 2009; and Tutela inibitória. 4ª Ed. São Paulo: RT, 2009.

the mere application of the law to specific cases. Rather, it is the judge's duty to determine whether, in that case brought to the Judiciary, the infra-constitutional norms governing the factual situation does not produce an outcome contrary to the Constitution.

This conception explains, for example, the possibility of judicial review control by any court or judge of the territory. Similarly, it is stated that the magistrate should ensure the achievement of substantive equality between the parties, which underlies a number of statutory exceptions, the rules to reverse the burden of proof, which at the time of the Liberal State would be absolutely unthinkable.

To Marinoni therefore the jurisdiction has a diverse role. It is responsible for the protection of fundamental rights and the framing of the law with the Constitution. In simple comparison, it can be said that the magistrates will no longer serve the law, but the Constitution. The law has ceased to be an insurmountable hurdle for the correction of inequalities and the protection of fundamental rights.

Along with the thought of Marinoni comes Ovídio Baptista da Silva, who investigates the Roman *iurisdictio* and compares it to the modern jurisdiction. [12] For him, the great mistake of the Italians Proceduralists was to compare the figure of the judge with that of the *Iudex*, a roman who merely exposed the right previously established. The Iudex had no power of empire, so he was not able to create new rights, much less provide some sort of protection to the parties. This is due to the fact that the *Iudex* was a private judge, devoid of the power of *ius dicere.*

Obviously, this figure does not resemble anything like the modern judge, and in fact there is no reason for any resemblance. After all, the *Iudex* was someone with delegated powers of a more important figure: the *Praetor.* The *Praetor* was indeed gifted the true power of *iurisdictio.* The *Praetor* had the task to set the standard applicable to the case. As there was no prior legal system, the *ius dicere* looked more like a legislative activity than the jurisdictional activity. In the Roman sense, therefore, the activity conceived as judicial was, in fact, that which is known as legislation to the nineteenth century and beyond. [13]

We must make a caveat: the expression *ius dicere* cannot be understood as a way to "declare" as many proceduralists do. It establishes

[12] SILVA, Ovídio A. Baptista da. Jurisdição, Direito Material e Processo. Rio de Janeiro: Forense, 2008.

[13] SILVA, Ovídio A. Baptista da. Jurisdição, Direito Material e Processo. Rio de Janeiro: Forense, 2008, p. 268.

a bond, a specific legal regime for the parties. In summary, the *ius dicere* had creative character of law, as the *Praetor* gave meaning to the factual situation through varied and open sources with broad discretion.

With eyes on the classical conception of jurisdiction, Ovído concludes that "stating the Law - *ius dicere* - was a function of the *Praetor*, today is a function of the legislature. Who exercises jurisdiction, such as the Roman *Praetor* did, is actually the Legislature. The jurisdiction that our magistrates exercise is a delegated function, as was exercised by *Iudex"*.[14]

At the end of his reasoning, however, the author makes a caveat that reveals the contemporaneity of his thought. He states that the early twenty-first century was marked by the search, or the resumption of, the Jurisdictional Law. In other words, there is a quest for a match between the judge and the *praetor* in order to create law, in order to the role of *iurisdictio*.

Ovído Baptista da Silva asks whether it is possible to the "null power" to reach the *juditionalism*.[15] The answer seems to echo in all courts in the country. Judges have declared statements unconstitutional; the Constitution was directly applied to concrete cases and has been interpreted quite differently to ordinary laws. In a recent decision, for example, the Regional Court of Paraná declared unconstitutional an article of the Civil Code, changing the rules of succession of the companion, equating her to a married woman, based on the direct application of Articles 226 and 227 of the Constitution.[16] Much more than the Paraná

[14] SILVA, Ovídio A. Baptista da. Jurisdição, Direito Material e Processo. Rio de Janeiro: Forense, 2008, p. 279. Free translation.

[15] "Jurisprudencialismo", on the original.

[16] INCIDENTE DE INCONSTITUCIONALIDADE. SUCESSÃO DA COMPANHEIRA. ARTIGO 1.790, III, DO CÓDIGO CIVIL. INQUINADA AFRONTA AO ARTIGO 226, § 3º, DA CONSTITUIÇÃO FEDERAL, QUE CONFERE TRATAMENTO PARITÁRIO AO INSTITUTO DA UNIÃO ESTÁVEL EM RELAÇÃO AO CASAMENTO. NECESSIDADE DE MANIFESTAÇÃO DO COLENDO ÓRGÃO ESPECIAL. IMPOSSIBILIDADE DE LEI INFRACONSTITUCIONAL DISCIPLINAR DE FORMA DIVERSA O DIREITO SUCESSÓRIO DO CÔNJUGE E DO COMPANHEIRO. OBSERVÂNCIA DO PRINCÍPIO DA IGUALDADE. ELEVAÇÃO DA UNIÃO ESTÁVEL AO "STATUS" DE ENTIDADE FAMILIAR. INCONSTITUCIONALIDADE RECONHECIDA. CONHECIMENTO DO INCIDENTE, DECLARADO PROCEDENTE. 1. Inconstitucionalidade do artigo 1.790, III, do Código Civil por afronta ao princípio da igualdade, já que o artigo 226, § 3º, da Constituição Federal conferiu tratamento similar aos institutos da união estável e do casamento, ambos abrangidos pelo conceito de entidade familiar e ensejadores de proteção estatal. 2. A distinção relativa aos direitos sucessórios dos companheiros

Court, the Supreme Court assumed the role of *Praetor* and protector of fundamental rights and constitutional principles. Issues such as binding precedents have long since passed the stage of debate and are a reality.

Despite the appreciation of the Judiciary, it is necessary to make a very simple question: is this increase of power correct? Is it appropriate to grant such power to one of the functions of the state, to the point that all acts of another function, the Legislative, can be reviewed? What are the limits to judicial action?

These limits are established by the rules of the democratic game, which is also envisaged by the Constitution. The duality between constitutionalism and democracy is nothing new for the constitutional law, but it seems to receive little attention from Proceduralists. It is worth mentioning here that the biggest criticism of the conceptions that give the courts the ability to review statutes passed by the legislature is the lack of democratic legitimacy of the judiciary, especially the Justices of the Brazilian Supreme Court, who are not elected. In Brazil, this criticism becomes even stronger, as all the judges enter the office by passing a test, not by election. It is for this reason that it is necessary to examine some questions on the tension between constitutionalism and democracy.

3. Procedural democracy and constitutionalism

The fundamental idea of democracy is majority rule. It is true that the majority vote is the cornerstone in the current representative system, but the democratic principle does not end here. After all, most are unable to ensure political equality. In this sense, the result of the election is only the voice of the winners, and not the interest of all. For this reason it is stated that the government chosen by the majority must respect the rights of minorities. Thus, some rights were elected to the category of fundamental rights.

The tension between democracy and constitutionalism is evident, because this limits the freedom of deliberations of representatives elected by the people, who must respect fundamental rights as limits to the enactment of new laws. In this discussion, the authors can be clas-

---

viola frontalmente o princípio da igualdade material, uma vez que confere tratamento desigual àqueles que, casados ou não, mantiveram relação de afeto e companheirismo durante certo período de tempo, tendo contribuído diretamente para o desenvolvimento econômico da entidade familiar. (TJPR. Órgão Especial. Incidente de Declaração de Inconstitucionalidade n. 536589-9/01. Rel. Min. Sergio Arenhart. 04/12/2009)

sified into two main streams: the proceduralists, or monistic, defending the sufficiency of the formal procedure for the laws to be valid, and the fundamentalists, for whom the judiciary has the last word on the Constitution, including substantial in scope. Both thoughts will be considered.

Procedural democracy, or monistic chain, has in John Hart Ely[17] and in Carlos Santiago Nino[18] two of its prominent writers. It is the dominant theory in American constitutionalism, which revolves around one idea: during the period between elections, all acts contrary to what is decided by those who were elected will be undemocratic. At the moment the Supreme Court invalidates a statute, it commits a countermajoritarian act, which should be reviewed. [19]

To the Judiciary remains only to guarantee the exercise of democracy. [20] After all, judges do not have the legitimacy to decide on the substantive values of society, as they were not elected. It is worth saying that procedural democracy arose as a response to the American judicial activism, marked by the so called Warren Court. In short, it can be said that "the proponents of this conception of democracy see control of constitutionality of laws as undemocratic, ie, the idea that a group of judges are not elected by the people could not limit what was chosen by the representatives the people, through Parliament, under penalty of offense to the democratic principle".[21]

Despite criticism, the monists are forced to resort to the Constitution to support the role of the Constitutional Jurisdiction as guarantor of democratic procedure.[22] Consequently, they end up advocating the protection of fundamental rights that guarantee the democratic process. Therefore, they are still linked to theoretical conceptions of fundamental

[17] ELY, John Hart. Democracy and Distrust: a theory of judicial review. Harvard University Press, 1980.

[18] NINO, Carlos Santiago. La constitución de la democracia deliberativa. Barcelona: Gedisa, 1996.

[19] ACKERMAN, Bruce. We the People – Foundations. Cambridge: Harvard University Press, 1993, p. 7--.

[20] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 153.

[21] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 154. Free translation.

[22] ELY, John Hart. Democracy and Distrust: a theory of judicial review. Harvard University Press, 1980.

rights. What they do is simply to restrict the protection of fundamental rights of political participation and access to political speech rights.[23]

There is still another criticism of proceduralists: the appointment of members to the Supreme Court is regularly scheduled, and derives from the democratic procedure, because who appoints the Justices is the elected President. So what is the real reason to stop them to check the constitutionality of laws, limiting them to arbiters of democratic procedure? The legitimacy argument seems very weak, and does not hold for the reasons given.

In any case, the proceduralists should absolutely not be neglected. After all, they seek to uncover the power of the Legislature as the appropriate function to edit the rules that govern society, always in light of the Constitution. In this sense, it can be observed at the outset that the annulment of a law cannot be made by personal criteria or loosely reasoned, failing then as an undemocratic act.

First, however, to draw further conclusions, we must examine the fundamentalist chain. Here are the authors who choose to guarantee fundamental rights, even if it limits the powers of the executive and legislative branches. Existing variations between them refer to rights that are considered most important, however, all agree that the Constitution is concerned, above all, with the protection of fundamental rights. Indeed, the sense of entitlement is able to avoid the elected majority decisions which harm social welfare.[24] Ackerman reveals in precise synthesis the thought of fundamentalists: "rights trump democracy - provided, of course, that they're the Right rights".[25]

Fundamentalists claim that the fundamental rights of freedom act's limits on governmental power and que the jurisdiction has the primary objective of protecting these rights, even in opposition to the government. [26] For Dworkin, it is better some that some decisions are held by the judiciary because it will be based on statutory criteria. Oth-

---

[23] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 154.

[24] ACKERMAN, Bruce. We the People – Foundations. Cambridge: Harvard University Press, 1993, p. 11.

[25] ACKERMAN, Bruce. We the People – Foundations. Cambridge: Harvard University Press, 1993, p. 12.

[26] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 157.

erwise, put the question to most, the basis for the decision would be moral. More than that, the decision by the Majority may offend equal representation, since the larger number may not represent the collective interest.[27] For this reason, Dworkin believes judicial review must guarantee rights by means if decisions based on principles.[28] In truth, the protection of fundamental rights by judicial action would ultimately strengthen the democratic process.[29]

For all the above, the theory of the fundamentalists is indispensable to understand the Brazilian jurisdiction. The protection of fundamental rights has been, as noted, relating to important debates within the civil procedural law. However, when importing the theory, let aside its counterpoint, which has contributed to making decisions absolutely disconnected with reality grounded in the protection of fundamental rights. Or rather, the adoption of the thesis of the fundamentalists without brakes imposed by proceduralists has caused the feeling that the judges can decide whatever they want, and that nothing prevents them from doing so because they are above the law (would therefore contemporary) praetors.

For this reason, we must find some of the limits imposed to American judges that even fundamentalists admit, as they are in constant discussion with the opposite pole.

4. Limits the performance of jurisdiction

Dworkin himself provides the first constraint to the judgments of the judiciary, which will be legitimate as long as they are based on principles.[30] It is totally unacceptable, however, that judicial decisions will based on arguments of policy and understood the arguments that establish a goal to be achieved, be it economic, political or social community.[31]

---

[27] DWORKIN, Ronald. A matter of principle. Cambridge: Harvard University Press, 1985.

[28] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 159.

[29] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 160.

[30] DWORKIN, Ronald. Taking rights seriously. Cambridge: Harvard University Press, 1977.

[31] KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional

In this sense, decisions that give effect to economic criteria in the face of fundamental rights are inadmissible. For Dworkin, even in hard cases there are principles to be applied by the courts, thus avoiding the discretion. Of course, the demonstration of these principles must be accompanied by adequate, enabling effective control of even the decisions of the constitutional court.[32] But not only these limitations should guide the work of the judiciary.

Frederick Schauer recent published a study that had as its central concern the possibility of a "government by judiciary".[33] However, recognizing that he had little to add to the discussion of constitutionalism and democracy, he invites the reader to join in the plan of the most fundamental empirical premises of judicial activism: the notion that the courts are one step closer to occupy a substantial portion of the building of U.S. policies. To prove this assumption, he claims it will be necessary to investigate how the Supreme Court operates and what is its relationship with the government action.

The role of the Supreme Court can be measured by the cases in which it acted. But this can also be done for the cases where it did not act. By the year 2005, end point of the study, episodes like the Iraq war, terrorism, national security, immigration, Hurricane Katrina and bird flu dominated the public interest and directed much of the time and work of the government and the legislature. However, the Supreme Court dealt only with emphasis of terrorism and national security.

This view does not take away the importance of the Supreme Court, but it enables one to see with other eyes topics as control of constitutionality, after all the themes addressed by the judiciary are not the only ones of national importance. There is a clear contrast between this view and the idea that the Constitution and Supreme Court play an important role in the choice of policies, but also a huge part of American politics.

For Schauer, however, the role of the Supreme Court may be lesser. In this case it is necessary to revise the narrow doctrine of judicial review and understanding of the scattered location of the Supreme Court

---

brasileira: entre Constitucionalismo e Democracia. In: Revista Seqüência, n. 56. Jun. 2008, p. 159.

[32] MOREIRA, Helena Delgado Ramos Fialho. In: BONAVIDES, Paulo; MIRANDA, Jorge; AGRA, Walber de Moura. (Coord.) Comentários à Constituição Federal de 1988. Rio de Janeiro: Forense, 2009, p. 1187 – 1193.

[33] SCHAUER, Frederick. The Supreme Court. In: Harvard Law Review Vol. 120:4, 2006, p. 5-64.

in the governmental plan. To develop their reasoning, the author goes on to examine the topics considered important by Americans. The survey used empirical data, as the headlines cover of the New York Times and public surveys made with the Americans themselves, to identify which are the most important issues of the country and its government. It was revealed that, with the exception of the topics "terrorism" and "war", the concern of the population always revolves around the same political issues: social security, health, economy and education.

The finding of the author is that the issues that concern the constitutionalists, such as homosexual marriage or individual rights are not mentioned by more than 2% of respondents. That is, the issues that concern the legal literature are not the same which general populace care about. However, it is noted that these issues are important in political campaigns. However, what happens is that these issues, although important to the State and to society, are not a matter for the everyday American citizen.

Even the Warren Court, known for its activism, deviated from the main interests of its time. In the period of the *Brown v. Board of Education*, for example, racism was only considered an important issue for 2% of the population. The only exception in history occurred during the New Deal, as the Supreme Court decisions on economic matters had enormous impact and importance.

Schauer's findings are important to reflect on an important point: the lawyers are conditioned to see the world from the legal lens.[34] For this reason, it is natural that reputable bigger issues are handled by lawyers very carefully by the higher courts. However, many of these issues are not of general interest of the population, which is why the popular event is very small on the jurisdiction. Also of note, like most lawsuits still works with private interests, it is very difficult to bring democracy into the judiciary, since there are few mechanisms to confer standing on third parties seeking to influence decision making.

Despite the considerations made so far, says Schauer, it cannot be said that the role of the Supreme Court is not vital to the nation. Much of what the Constitution and the Court is dealing, in general terms, procedural matters. What the Supreme Court does, in fact, is to decide how

[34] "And we forget about all of this because as lawyers (and especially as legal academics obsessed with courts and their written opinions) we are conditioned to see the world through a judicial lens." SCHAUER, Frederick. The Supreme Court. In: Harvard Law Review Vol. 120:4, 2006, p. 41.

the policy will be taken. In other words, it can be seen as an institution that does its own work, instead of entering into political debates.

This is precisely what you want from a court: she is aware of their role in society, who worry about the legal issues - in principle, as Dworkin preaches - and avoid making policy. With this, the court retains its connection, allowing you to take unpopular and contrary to the most fundamental decisions to protect the rights of minorities.

These comments can be directed to the Brazilian Supreme Court without many changes. Its role is to control the constitutionality of laws, but without bowing to political or economic pressures. It is absolutely feasible to admit that jurisdiction resumed its creative role of law, but should be recognized, too, that the creation process is quite distinct from the Legislature. To create Law judges must observe the unity of the legal system, respecting the judgment of their peers, and more than that, the sovereignty of the Constitution. Moreover, the judiciary should stick to matters that are brought to him, and decide according to the law, not bowing to external influences.

However, it should be noted that the limits to which it refers are not exactly the limitations to the jurisdictional activity. On the contrary, if followed, jurisdiction could become an even more respected and efficient power.

5. Conclusion

As Luiz Guilherme Marinoni sustains, the new theories of jurisdiction must conform to the current constitutional model. That's what we intended to undertake. Without trying to supplant the more modern theories, we sought to provide elements to improve them and demonstrate mainly that excessive protection of fundamental rights is not interesting, even for fundamental rights.

There must be respect for the democratic principle and the laws passed by the legislature, especially the laws of political character should. Courts must know in which matters there is interest and rights to be protected and when it must not act.

Naturally, some more complex issues will require careful examination of the courts, but at no time shall the judges succumb to economic interests or other matters outside of the law, because that is not its function.

Moreover, there is no problem in assuming that the judge cre-

ates law. The observation of Ovídio Baptista da Silva may well already be found in the courts. It is interesting to recognize, once and for all, the creative character of the Jurisdiction. It is pointed out, in this sense, the preservation of legal certainty, represented by the notion of equal treatment for equal cases.

What is totally unacceptable is that the jurisdiction confuse its power with the political power, granted to the executive and the legislature. If this occurs, the courts shall take not only constitutionalism and the protection of fundamental rights, but also what is meant by democracy. And the moment that this duality is concentrated in the hands of one power, the tension will be over, as well as what is meant by constitutional state. It will give rise to something new, but certainly undemocratic, because despite the difficulties of the subject, it is the duality between the two poles, constitutionalism and democracy, which drives the development of society and the law.

References

ACKERMAN, Bruce. **We the People – Foundations**. Cambridge: Harvard University Press, 1993.

CARNELUTTI, Francesco. **Diritto e processo**. Napoli: Morano, [s.d.].

CHIOVENDA, Giuseppe. **Instituições de Direito Processual Civil.** Vol. II. São Paulo: Saraiva, 1969.

DWORKIN, Ronald. **A matter of principle**. Cambridge: Harvard University Press, 1985.

_____. **Taking rights seriously**. Cambridge: Harvard University Press, 1977.

ELY, John Hart. **Democracy and Distrust: a theory of judicial review**. Harvard University Press, 1980.

KOZICKI, Katya; BARBOZA, Estefânia Maria de Queiroz. Jurisdição Constitucional brasileira: entre Constitucionalismo e Democracia. In: **Revista Seqüência**, n. 56. Jun. 2008, p. 151-176.

MARINONI, Luiz Guilherme. **Teoria Geral do Processo**. 3ª Ed. São Paulo: RT, 2008.

_____. Técnica Processual e Tutela dos direitos. 2ª Ed. São Paulo: RT, 2009.

_____. Tutela inibitória. 4ª Ed. São Paulo: RT, 2009.

MOREIRA, Helena Delgado Ramos Fialho. *In*: BONAVIDES, Paulo; MIRAN-

DA, Jorge; AGRA, Walber de Moura. (Coord.) **Comentários à Constituição Federal de 1988.** Rio de Janeiro: Forense, 2009, p. 1187 – 1193.

NINO, Carlos Santiago. **La constitución de La democracia deliberativa**. Barcelona: Gedisa, 1996.

SCHAUER, Frederick. The Supreme Court. In: **Harvard Law Review Vol. 120:4**, **2006,** p. 5-64.

SILVA, Ovídio A. Baptista da. **Jurisdição, Direito Material e Processo**. Rio de Janeiro: Forense, 2008.

ZAGREBELSKY, Gustavo. **Il diritto mite**. Torino: Einaudi, 1992.

Universal International Law?
A challenge and a contribution from the peoples in the South

Henrique Weil Afonso[1]

Abstract: This article explores the role of the Third World in international legal affairs vis-à-vis post-colonial readings of the history of the discipline. It sets of by examining the liberal legacy in present International Law to propose a critical survey of the methodological aspects of historical approaches to the field, namely historicism. It develops an argument according to which the Third World represents a valid, yet thoroughly diverse and complex, category of resistance committed to the interrogation of present-day projections of colonial relations and imperial agendas. After engaging with Indian Subaltern incursions in history along with Latin American post-colonial thought, the article concludes by arguing for a sustained appreciation of the methodology of history and the viability of emancipation discourses it forecloses.

Keywords: TWAIL; post-colonialism; International Law.

1. Introduction

One prominent consensus within mainstream international legal scholarship became evident in the immediate aftermath of the Cold War. The old Bipolar struggle, facts reviewed, had at last come to an end to the benefit of capitalist world economy, driven by developed countries who found in the USA the adequate leader to set the road ahead. Whatever meaning the Cold War period had to the Third World, the debacle of the URSS along with its global agenda could have had but one interpretation: all States, regardless of evident peculiarities, could – and *would* – take advantage of the capitalist market driven economy in order to bring about that very elusive quest: development and prosperity. Hardly a surprise, international law was profoundly influenced by these events, though not necessarily prone to the interests of less economically

[1] Ph.D. candidate, Pontifical Catholic University of Minas Gerais. Contact: henriqueweil@hotmail.com

developed States.

This study intends to examine the intricate relationship, on the one hand, between the ways international law perceives its history and, on the other one, the construction of its universal design. There is reason to suppose that recent perceptions of traditional international legal scholarship rest firmly on a particular understanding of the historical phenomena that posits present-day developmental schemes at the top of international community's agenda. Turning one's eye to the past, it is suggested, has the effect of understanding current discourses about how the world is and how the world should be, and the very method adopted in this exercise should unfold international law's proneness towards universality.

A brief survey of early theorists, namely 16th Century Spanish theologian Francisco de Vitoria and 19th Century liberals such as John Westlake, should add to the understanding of this intricate and complex relationship. It should be argued that international law's history is thoroughly based on particular perceptions of the international, and non-European peoples only marginally figure in this narrative. In response, it is by reviving the relevance of the Third World in international affairs that counter-hegemonic alternatives to established modern thinking may gain voice. The Third World today materializes the outcomes of colonial and imperial practices upon which the discipline is so intrinsically connected. Confronting the ways these conditions have reached the 21st Century acquires resonance within academic movements engaged with new designs of the international plane that are more inclusive when it comes to diversity and more receptive of plural forms of the legal and the historical narratives.

2. Universalism and International Law: historical views in debate

The new "age" in international affairs launched in the beginning of the 1990's is presented by doctrinal elaborations regarding both norms in practice and the justification for revisiting certain legal institutes. The idea and praxis of liberal democracy symbolizes the grindstone for a large number of accounts of this new moment[2], as an examination of the

[2] On this particular issue, the bibliography is quite vast. See, generally, SLAUGHTER, Anne-Marie. International Law in a World of Liberal States. In: European Journal of International Law, vol. 6, no. 2, p. 503-538, 1995; SLAUGHTER, Anne-Marie. A Liberal

writings of theorists like Thomas M. Franck and Fernando Tesón should disclose. Professor Franck sustains a defense of liberal democratic values as the ideal form of political participation in State level, to be transplanted to the international plane: the latter is powerfully connected to the former, and the more democratic States become, the more democratic the transnational sphere would be. Accordingly, Franck speaks of an "emerging 'law'" that corroborates domestic governance and reflects in the cannons of international law. "This newly emerging 'law'", the author explains, "– which requires democracy to validate governance – is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations."[3]

Argentinean professor Fernando Tesón is in line with Franck's insights regarding the nature of this supposedly new international law. In his work *A Philosophy of International Law*, Tesón elaborates a comprehensively liberal theory of international law based on Kant's essays *Towards Perpetual Peace* and *The Idea of a Universal History From a Cosmopolitan Point of View*. The merits generally accredited to democratic forms of government appear to be based, initially, on the assumption that "[…] the very point of democratic institutions is to keep political power (with all its corrupting potential) under check"[4], coupled with Kantian universal imperatives that deposits certain duties to be carried out by States: "the categorical imperative is universal and holds for every civil society regardless of history and culture. Liberal democracies, ranging from laissez-faire states to welfare states, are the only ones that secure individual freedom, thereby allowing human beings to develop their potential fully".[5] In short, liberal democracies, according to these

---

Theory of International Law. In: American Society of International Law Proceedings, vol. 94, p. 240-250; DOYLE, Michael. Kant, Liberal Legacies, and Foreign Affairs. In: Philosophy and Public Affairs, vol. 12, no. 3, 1983, p. 205-235; DOYLE, Michael. Kant, Liberal Legacies, and Foreign Affairs II. In: Philosophy and Public Affairs, vol. 12, no. 4, 1983, p. 323-353; TESÓN, Fernando. A Philosophy of International Law. Boulder: Westview Press, 1998.

[3] FRANCK, Thomas M. The Emerging Right to Democratic Governance. In: American Journal of International Law, vol. 86, no. 1, 1992, p. 47.

[4] TESÓN, Fernando. A Philosophy of International Law. Boulder: Westview Press, 1998, p. 19.

[5] TESÓN, Fernando. A Philosophy of International Law. Boulder: Westview Press, 1998,

views, embodies the definitive characteristics to foment dignity to human existence and prosperity to all peoples.

With the end of the Cold War, some would claim, so did the Third World come to its term and, consequently, the category no longer deserves historical significance while regarded as an entity in itself. According to specialist Mark Berger, who writes in the 1990's, a central point to be considered is that the mentioned group of States is not suitable to fit its purposes in a globalized world. In face of the trump of globalized market economy, all less economically developed countries have been put in the developmental route. Taking the Asian Tigers as a role model to be followed by other nations, Berger emphasizes the timely need to set aside this old-fashioned, Cold War response-type classification – a group of States struggling for existence outside US-Soviet dichotomy –, in order to foster economic growth and political stability via consolidation of democratic practices and processes. As Berger states, "'Third World' now serves primarily to generate both a dubious homogeneity within its shifting boundaries and an analytically irrelevant distinction between the 'Third World' (developing) on the one hand and the 'First World' (developed) on the other hand".[6] Additionally, the author suggests replacing the category for an all-inclusive treatment brought about by liberal world views that may have better results or, in other words, "an emerging approach to 'development' which privileges historical particularity, but also adopts a global perspective".[7]

Adopting a similar argumentative strategy, though enriched by universalist ideals, it is worth taking note of the influence that standard *end-of-the-world*, Fukuyaman-based ideologies, have taken concerning decisive steps towards the consolidation of certain practices and norms, either by means of legal reform – today's legal responses to terrorism, such as military intervention to end terrorist threats[8] – or reinterpretation – in the case of *ius ad bellum*, the debate on preemptive and preven-

---

p. 15.

[6] BERGER, Mark. The End of the Third World? In: Third World Quarterly, vol. 15, no. 2, 1994, p. 258. On the craft of writing history from a power-politics perspective, thoroughly neglecting a world with valid history outside Europe or North America, see KENNEDY, Paul. The Rise and Fall of the Great Powers. New York: Vintage Books, 1987.

[7] BERGER, Mark. The End of the Third World? In: Third World Quarterly, vol. 15, no. 2, 1994, p. 260.

[8] For a debate over the reformulating of international law to suit the imperial power, see CHIMNI, B. S. International Institutions Today: An Imperial Global State in the Making. In: European Journal of International Law, vol. 15, no. 1, 2004, p. 1-37.

tive self-defense.[9] It follows that the scope of participation of the Third World in international legal affairs is downplayed by an apparently natural surpass of capitalism and liberal democracy.

In other words, the end of the Cold War fomented a new universal beginning to international law, and it achieved this point by retrieving the spirit of world community that illuminates the doctrine of human rights and transnational solidarity. Third World claims, while up to a certain extent representative of interests located outside US-Soviet disputes, are labeled to be outdated when confronted to this new paradigm. In this sense, so reads the passage from *Akehurst's Modern Introduction to International Law*:

> Nevertheless, major changes in international law have occurred since 1945. Western states were anxious not to drive Third World states into the arms of communist states, and have therefore agreed to many of the alterations sought by the non-aligned countries. Most of the rules which developing countries used to regard as contrary to their interests have changed, or are in the process of being changed. Similarly, when the interests of Western states change, such states are often just as ready as other states to abandon the old rules and to replace them with new rules which are more in keeping with their own interests. Modern international law is not static, but has a dynamic nature and is in a continuous process of change. The accusation that international law is biased against the interests of Third World states is, on the whole, no longer true.[10]

These remarks on the status of the Third World are woven into a specific view on history and its mode of production. It is often acknowledged that the study of the history of international law represents a relevant aspect of the study of the discipline itself. Nevertheless, some specialists tend to approach history through rather limited lenses, embracing certain views on history as self-evident statements, or, though not without difficulties, as a natural fact that dismisses proper methodological scrutiny. Within these premises, the act of turning one's attention to the past could be initially associated with a narrative focused on

[9] An attempt to add legal and moral justifications to USA's foreign invasions in the 1980's is D'AMATO, Anthony. The Invasion of Panama was a Lawful Response to Tyranny. In: American Journal of International Law, vol. 84, no. 2, 1990, p. 516-524.

[10] MALANCZUK, Peter. Akehurst's Modern Introduction to International Law. 7a ed. London and New York: Routledge, 1997, p. 30.

the progress of the discipline, a narrative that elucidates key moments, setting aside the ones that are of less relevance, in order to finally reach the present times in a triumphant style.

Internationalist Lassa Oppenheim insists on the importance of surveying the history of the discipline, for an adequate knowledge of its history provides the international lawyer with the tools to cope with current legal or institutional challenges. International law makes its own history side by side with the evolution of the international society: together, they compose a promising portrait of the narrative of international law's institutions and norms in an ever changing world where conflicts are inevitable. In any case, there remains one steady, uncompromising fact: to speak of the history of international law means precisely to speak of the successful narrative of the discipline towards progress and universality, or, to put it differently, the triumph of international law over international anarchy. In this sense, Oppenheim asserts that "the master-historian […] will in especial have to bring to light the part certain states have played in the victorious development of certain rules and what were the economic, political, humanitarian, religious, and other interests which have helped to establish the present rules of international law."[11]

The method outlined by Oppenheim has been measured in detail by David Kennedy, to whom such an approach to history plays a central role in conventional scholarship, which is "[…] to reinforce the fantasy that some thing called 'international law' has had a continuous presence across differences in time and place."[12] Telling history according to these parameters, Kennedy points out, reflects in the act of investigating the precedence of a given rule or institution. In the same way, such a task can also be understood as an inquiry over history in a very peculiar sense: the rule or institution reaches out present day international relations through an evolutionary road that departs from the sphere of politics and, by a series of events, intentional practices, advances and drawbacks, is finally inserted in the domains of the legal world.

Professor Kennedy stresses the functional nature of the act of ad-

[11] OPPENHEIM, Lassa. The Science of International Law: Its Task and Method. In: American Journal of International Law, vol. 2, no. 2, p. 1908, p. 317. A similar line of critique has been presented by KOSKENNIEMI

[12] KENNEDY, David. The Disciplines of International Law and Policy. In: Leiden Journal of International Law, vol. 12, no. 1, 1999, p. 90. A similar line of critique has been presented recentely by KOSKENNIEMI, Martti. Histories of International Law: Dealing with Eurocentrism. In: Rechtsgeschichte, vol. 19, p. 152-176.

dressing the history of the discipline in this way. Paradoxically, though, this implies a process of writing history by selecting certain events that meet the requirement of having what it takes to leave the historical and political spheres to join the prestigious hall of legalized practices and institutions – for instance, 1648 Treaties of Westphalia –, or, in Kennedy's terms, "an argument about a rule or principle, or institutional technique in international law is almost always an argument about history – that the particular norm proffered has a provenance as law rather than politics, has become general rather than specific, has come through history to stand outside history."[13]

Writing history within the boundaries pointed out by Kennedy evidences the influence of positivistic philosophy – *historicism* – over international law's historians. Assumed to be a fact, the distinction between the historical world and what we say about it works as the framework for the much preferred scientific understanding of history *vis-à-vis* the broader complex and contradictory worldly processes. According to Kennedy, "the conventional tale of international legal history is a progress narrative, a fable about how the discipline grew and who its enemies are – above all, this history teaches, turn your back on politics and ideology, and then also on philosophy, theory and form."[14]

Historians seek to provide epistemological foundations to the discipline, and, as Michel-Rolph Trouillot highlights, "the more distant the sociohistorical process is from its knowledge, the easier the claim to a 'scientific' professionalism."[15] Once the craft of writing – and *producing* – history, as positivist tradition reveals, is determined by scientific assumptions, some preliminary conclusions should be considered regarding the positivist methodology. First, the qualification of a set of events that are likely to compose the historical narrative is a task to be performed with scientific criteria. It follows that, even though some claim to produce their own history – for instance, the Third World, social movements, minorities, etc –, it is not up to them to decide whether their tales should join 'official History'. As post-colonial Indian historian Dipesh Chakrabarty points out, "[historicism] tell us that in order to understand anything in this world we must see it as an historically devel-

[13] KENNEDY, David. The Disciplines of International Law and Policy. In: Leiden Journal of International Law, vol. 12, no. 1, 1999, p. 88.

[14] KENNEDY, David. The Disciplines of International Law and Policy. In: Leiden Journal of International Law, vol. 12, no. 1, 1999, p. 92.

[15] TROUILLOT, Michel-Rolph. Silencing the Past. Power and the Production of History. Boston: Beacon Press, 1995, p. 5.

oping entity, that is, first, as an individual and unique whole – as some kind of unity at least in potential – and, second, as something that develops over time."[16] Secondly, and as a consequence of the former statement, the very act of writing history embodies a precise, yet disguised by language, *act of power and violence*.[17] Here comes necessary the question posed by Trouillot: "what makes some narratives rather than others powerful enough to pass as accepted history if not historicity itself?"[18]

Taking Trouillot's insightful remarks, one should ask his question to contemporary international lawyers. At a first glance, one should reckon it to be a highly demanding task, though, to draft a comprehensive critique of the historical biases, the occluding processes or oppressive institutions and norms. Yet, any critical understanding of international law must come to terms with the urgent commitment to tackle history. The entrepreneurship would require diverse mechanisms that are capable of, but not only, exposing the flaws, continuities, discontinuities, and an understanding of the language that narrates history, and confront it with a vocabulary that escapes conventional scholarship. It is argued that such a vocabulary may be available in alternative readings of modernity, in social movements that permeate the peripheries of modern rationale, even perhaps in local democratic and political practices that defy the single-minded developmental model.

3. The Third World: stories of resistance and emancipation in XXI Century international law

The search for alternative readings of international law's foundations, history and subjects, conventionally taken for granted by mainstream research, has encouraged promising investigative legal approaches.[19] Present-day world relations are unquestionably complex,

[16] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000, p. 22.

[17] See the discussion of subjective and objective violence in ŽIŽEK, Slavoj. Violência. Seis notas à margem. Lisboa: Relógio D'Água Editores, 2008 (English version: Violence. Six Sideways Reflections. New York: Picador Paperbacks, 2008).

[18] TROUILLOT, Michel-Rolph. Silencing the Past. Power and the Production of History. Boston: Beacon Press, 1995, p. 6. In this remarkable and highly provocative monograph, Trouillot dedicates the third chapter to discuss the mechanisms by which the 1790 Haitian Revolution has come to be labeled by historians of its time as a non-event that was not apt to enter history.

[19] Among these approaches, one could cite the feminist, international relations theory,

broad-ranging and conflictive, which places international law in the intricate yet unavoidable position of providing normative regulation for innumerous competing perceptions of the international phenomena. Among these, the Third World Approaches to International Law (hence, TWAIL) movement has recently attracted considerable attention from international lawyers who display concern with the situation of developing countries in the global landscape.

TWAIL scholars are engaged in a number of projects ranging from the complex relations between colonialism and imperialism to contemporary surveys aimed at deeper transformations of the international plane. The movement embraces a very distinctive departing point: rather than assuming international law to be a thorough and finished project based on a conjugation of universal ideals claims and State behavior patterns, TWAIL perceives international law to be a culturally and historically constructed scholarship.[20] Conceiving classical international law as the normative product of an international order drafted by the European powers over the last five centuries, TWAIL aims at exploring the mechanisms by which colonialism, imperialism and economic dependency have framed the international order in detriment of developing and Third World countries, social movements, minorities, and other innumerable forms of communal life. International theorist Obiora C. Okafor provides a sound description of the movement:

> TWAIL scholars (or "TWAILers") are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order […] a commitment to centre the rest rather then merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.[21]

---

international legal process, law and economics, positivism and human rights approaches. For an overview of these methods, cf. SLAUGHTER, Anne-Marie; RATNER, Steven. Appraising the Methods of International Law: a Prospectus for Readers. In: American Journal of International Law, vol. 93, no. 2, p. 291-302, 1999.

[20] See GATHII, James Thou. International Law and Eurocentricity. In: European Journal of International Law, vol.9, no. 1, p. 184-211, 1998.

[21] OKAFOR, Obiora Chinedu. Newness, Imperialism, and International Legal Reform in Our Time: a TWAIL Perspective. In: Osgoode Hall Law Journal, vol. 43, no. 1 & 2, 2005, p. 176-177.

Telling the "untold stories" of international law, as Pooja Parmar asserts, materializes one the main imaginative purposes of TWAIL researchers. The widely perceived notion that modern international law was born out of the European order conceived by the 1648 Peace of Westphalia has driven the discipline into a particular set of postulates and legal theories revolving issues such as sovereignty, recognition of States, regulation of war and appeasement of conflicts. Keeping the international realm in order has attracted international law's attention for over four centuries, whereas the claims for international justice, emancipation of Third World nations and protest against economic dependency have been largely neglected. A change in the manner international problems are traditionally conceived, so as to include alternative solutions based on alternative epistemologies – non-European modes of thought, values, institutions, practices – is at the heart of TWAIL's inquiries.[22]

Whereas coming to grips with the formation of international law in its structural, ideological and normative aspects compose the mosaic in which TWAIL scholars focus their research, a further proposal in the movement aims at providing alternative solutions to contemporary socio-legal problems – underdevelopment, hunger, domestic conflicts, dependency, AIDS, to name but a few. In order to accomplish this dual objective, it adopts "[…] distinctive ways of thinking about what international law is and should be; they involve the formulation of a particular ser of concerns and the analytic tools with which to explore them."[23] Taking history seriously and critically is one of these "tools".

3.1. Who is the Third World in International Law?

The 1970's symbolizes a turn of the tide on the surveys of the role of the Third World in international legal knowledge. The aftermath of decolonization and the immediate debates that emerged concerning newly independent States that were joining the international arena and being granted international legal recognition provided the scenario

[22] PARMAR, Pooja. TWAIL: an Epistemological Inquiry. In: International Community Law Review, vol. 10, p. 363-370, 2008. See also GATHII, James Thou. International Law and Eurocentricity; OKAFOR, Obiora Chinedu. Newness, Imperialism, and International Legal Reform in Our Time: a TWAIL Perspective.

[23] ANGHIE, Anthony; CHIMINI, B. S. Third World Approaches to International Law and Individual Responsibility in Internal Conflicts. In: Chinese Journal of International Law, vol. 2, no. 1, 2003, p. 77.

for political contestation and cooperative initiatives. Taking a standard account as a starting point, it could be argued that the main concern addressed by Third World internationalists was the proposition of fair rules of commerce and perspectives of economic development that could meet these countries long-awaited expectations. Nevertheless, theorists would soon come to grips with the more profound structures and processes disrupting Third World nations' expectations.

In this large picture, Indian internationalist R. P. Anand, among others, has sounded a note in favor of the interests of Third World countries. Prof. Anand points out the perpetuation of colonial and imperial relations despite the promises of political decolonization. International economic institutions, such as the IMF and World Bank, on the one hand, and international legal forum, such as the WTO and even the UN to a certain extent, on the other hand, were drafted upon a world consensus that acted in favor of inequality, exploitation and control over the populations in the South. Despite well-known cooperative efforts, namely the Non-Aligned Movement (G-77) and its drafting of a New International Economic Order as an alternative developmental path independent of the Cold War ideological settings, colonial relations have taken new forms of influence and control over the Third World, as well as the articulation of the imperial reason has been reshaped so as to fit economic interests of rich nations. These remarks notwithstanding, Anand insists both on reforming world institutions in order to address developing nations interests and developing countries' balancing positions to confront anti-reformist discourses: "The only way the poor countries can better their lot is by increasing production and by industrialization. It is now generally recognized that the only way to have a stable and peaceful world is to help the poor countries in their development."[24]

Anand's ideal international system would embrace everyone's interests. In this sense, important documents such as the 1974 *Declaration on the Establishment of a New Economic Order*[25] emphasized the need to cope with injustices and the ever-widening gap between developing and developed countries. Similarly, the *Preamble to the Charter of Economic Rights and Duties of States*[26], also approved in 1974, stated "it is a fundamental purpose of the present Charter to promote the estab-

[24] ANAND, R. P. Confrontation or Cooperation? International Law and the Developing Countries. 2a ed. Gurgaon: Hope India Publications, 2011, p. 161.
[25] GENERAL ASSEMBLY. Res. A/3201 (S-VI).
[26] GENERAL ASSEMBLY. Res. A/3281 (XXIX).

lishment of the new international economic order, based on equality, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems". In light of these developments, international theorist Mohamed Bedjaoui argues for an international law of participation "[…] genuinely all-embracing and founded on solidarity and cooperation [which] must give great prominence to the principle of equity (which corrects injustices) rather than the principle of equality".[27] Both Anand and Bedjaoui acknowledged the dangers that arise from treating international norms – e.g, sovereignty and sovereign equality – uncritically, being it for international law remains deeply structured and influenced by imperial and colonial relations.

This seminal treatment of the Third World in international legal affairs is well deserving of its dues. This recognition notwithstanding, recent TWAIL scholarship have been focusing its efforts, on the one hand, in the direction of a deeper understanding of the specificities of this heterogeneous assembly of States that shapes varying legal arrangements, and, on the other hand, TWAILers have been drawing upon what Karin Mickelson labels "interconnectedness". As for the former, research is being carried out in major areas, namely (i) the articulation of different legal orders – and varying cultural traditions – to fashion a less Eurocentric oriented international law[28] and (ii) the accommodation of cultural diversity both within present legal institutions and around new designs of the national/international legal frameworks, especially in form of epistemic resistance[29]. Mickelson, in her turn, argues in favor of authentically interdisciplinary approaches aimed at composing a distinctive Third World approach. "Interconnectedness", in light of interdisciplinarity, cannot mean anything but an engagement between

[27] BEDJAOUI apud MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. In: Wisconsin International Law Journal, vol. 16, no. 2, 1998, p. 371.

[28] Among this rich and stimulating branch of surveys, it is worth citing, among others: ANGHIE, Antony. Imperialism, Sovereignty and the making of International Law. Cambridge: Cambridge University Press, 2004; KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001; GROVOGUI, Siba N'Zatioula. Sovereigns, Quasi Sovereigns, and Africans. Minneapolis: University of Minnesota Press, 1996.

[29] A mandatory study is RAJAGOPAL, Balakrishnan. International Law from Below: Development, Social Moviments and Third World Resistance. Cambridge: Cambridge University Press, 2003.

international legal institutions and norms, on the one hand, and a threefold analysis of justice, morality and history.[30]

Following Mickelson's analysis, the resurgence of historical studies in international law is highly noticeable. Over the last two decades, an increasing interest in the history of the discipline has given rise to academic courses and disciplines dedicated to several aspects of such a broad-reaching interconnectedness.[31] Once historical studies were back in the scene, theorists have been committed to understanding the foundations of the discipline, its disputable relations with specific historical contexts and processes and, last but not least, the formation of the nation-State along with its worldwide spread. Finally, the treatment of colonialism and imperialism, often coupled with historical approaches, emphasizes the critical twist that some contemporary internationalists imprint in their works.

3.2. Colonialism, imperialism and International Law

TWAIL benefits extensively from these propositions. For instance, the examination of colonial relations, the formation of specific historical biases – *one-sided* official Histories – and its repercussions to present-day global institutions and norms consist in one of the ways in which international law is seen through critical lenses. Consequently, there is reason to question the role played by early thinkers towards the consolidation of its universal vocation: the dynamics of colonial and imperial relations from the 16th to 19th Centuries, and up to our times, are generally left untouched by conventional scholarship.[32] Since the latter usually employs universalist arguments in their description of in-

[30] MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. In: Wisconsin International Law Journal, vol. 16, no. 2, p. 353-419, 1998.

[31] For an overview of the spread of the history of international law, see LESAFFER, Randall. International Law and Its History: Story of an Unrequired Love. In: CRAVEN, Matthew; FITZMAURICE, Malgosia; VOGIATZI, Maria (Eds). Time, History and International Law. Leiden: Martinus Nijhoff Publishers, p. 27-41, 2007; also, MACALISTER-SMITH, Peter; SCHWIETZKE, Joachim. Literature and Documentary Sources relating to the History of Public International Law: An Annotated Bibliographical Survey. In: Journal of the History of International Law, v. 1, n.1, p. 136–212 , 1999.

[32] For instance, in Wilhelm Grewe's celebrated work The Epochs of International Law, debates around colonialism, imperialism and violence are occluded by a celebrative oriented characterization of evolutionary periods, namely the Spanish, French and English Ages. GREWE, Wilhelm. The Epochs of International Law. New York: De Gruyter, 2000.

ternational law – in Koskenniemi's words, their "sensibilities"[33] –, and since a certain view on history seems to spring from such an approach, the study of history within critical parameters becomes a much needed undertaking. The production of history, or the processes by which the discipline has come to be around a certain selection of events, often conceals, or even discredits, the o*ther* non-European, his/her values and world views.[34]

Taking account of the very first questions posed by theorists such as Francisco de Vitoria – and other early "founding fathers", such as Suarez and Grotius – in his quest of providing both moral and legal justifications to the *just title* of Spanish colonial actions in 16th Century Americas, as well as the solutions advanced by him, encapsulate an effort to apply TWAIL's postulates to an early legal scholar within the dictates of the historical domain. Humanistic interpretations of Vitoria's *ius gentium*, despite being postulated by eminent internationalists[35], have nevertheless had contending aspects of their studies questioned and deconstructed. The purpose of these investigations must not be a complete deconstruction of these authors' opinions, placing them – entirely out of context, it should be said[36] – as co-responsible actors of colonial and imperial practices. Instead, this process discloses *Eurocentric* minded assumptions, particular modes of thought that are granted global access, and a highly enthralled, yet at times disguised in universalist fashion[37],

[33] Koskenniemi's works reflect a turn towards the history of the discipline that is coupled with surveys of controversial aspects of this relation. See, generally, KOSKENNIEMI, Martti. Histories of International Law: Dealing with Eurocentrism. In: Rechtsgeschichte, vol. 19, p. 152-176, 2011. Another important survey of these issues, that demonstrates a certain trend within the return of history inside the discipline, is GATHII, James Thuo. International Law and Eurocentricity. In: European Journal of International Law, vol. 9, no. 1, p. 184-211, 1998.

[34] Concerning the issue of the production of history and the processes of disavowing particular cultures from the pages of history, see, generally, TROUILLOT, Michel-Rolph. Silencing the Past. Power and the Production of History. Boston: Beacon Press, 1995.

[35] An authoritative study on this axis is SCOTT, James Brown. El Origen Español del Derecho Internacional Moderno. Valladolid: Talleres Tipográficos, 1928.

[36] On the pitfalls of examining the history of ideas out of their historical, epistemic and language context, see SKINNER, Quentin. Meaning and Understanding in the History of Ideas. In: History and Theory, vol. 8, no. 1, 1969, p. 3-53.

[37] Both the Indians – term that represents the innumerous groups of native Americans – and the Spanish, representatives of thoroughly contrasting cultural manifestations, were immerse in differing standards of values. The peculiar mode each culture relates to the circling environment, the specificities in the relations towards the divine and the percep-

imperial discourse in the making that represents the standard *attitude* or *inclination* of the discipline, an attitude that it avoids facing directly.[38]

The duty to bring civilization to the peoples of the New World, in different ways present in the writings of these authors, is rooted upon a belief of the superiority of European institutions, economy, religion, values and ways of life. An occluding attitude towards the *Other* – the Indian, the Oriental[39], the inferior –, as pointed out by Latin American philosopher Enrique Dussel[40], is a key component of modern reasoning, which unfolds the myth of modernity coupled with its underside, relentless subjective and, perhaps more troubling owing to its deceptive nature, objective violence, to use Žižek's terms[41]. This comprises a

---

tion of the other are some of the elements that allocates the Indians and the Spanish. In this sense, when in 1492 Columbus sent to Spain his primary descriptions of the New World, it should not come as a surprise the fact that these accounts were immersed in the Christian tradition. The reality the explorer encountered was perceived, understood and interpreted through a method named by Tzveran Todorov as finalist hermeneutic, in which the most significant argument is the one derived from authority, rather than the one based on personal experience: "[Columbus] sabe de antemano lo que a encontrar; la experiencia concreta está ahí para ilustrar una verdad que se posee, no para ser interrogada, según las regras preestablecidas, con vistas a una búsqueda de la verdad." TODOROV, Tzvetan. La Conquista de America. El problema del otro. Mexico: Siglo Veintiuno Editores, 2003, p. 26. In Vitoria's works, such a set of values is unquestionably the values of the Spanish society. Whenever the theologian was confronted with the question whether the Indians could be considered civilized, he would not hesitate to compare the colonized peoples' institutions and practices with the correspondent element within his own cultural patterns, which forged "a standard based on the capacity of socio-political organization and self-government whereby the Spaniard's system of governing is the natural benchmark." BOWDEN, Brett. The Colonial Origins of International Law. European Expansion and the classical Standard of Civilization. In: Journal of the History of International Law, vol. 7, no. 1, 2005, p. 11.

[38] KENNEDY, David. Primitive Legal Scholarship. In: Harvard International Law Journal, vol. 27, no. 3, 1986, p. 5-6. A TWAIL interpretation of the doctrine of Francisco de Vitoria can be found in ANGHIE, Anthony. Imperialism, Sovereignty and the Making of International Law. Cambridge: Cambridge University Press, 2004.

[39] A distinctive work that approaches European attitudes towards other cultures, often imprinted in occidental vs oriental mentality, is SAID, Edward. Orientalismo. O Oriente como invenção do Ocidente. São Paulo: Cia. das Letras, 2007 (english version: Orientalism. New York: Random House, 1978).

[40] DUSSEL, Enrique. 1492. *El encobrimiento del Otro. Hacia el origen del mito de la Modernidad*. Conferencias de Frankfurt. La Paz: Plural Editores, 1994.

[41] Slovenian philosopher Slavoj Žižek differentiates two types of violence. Subjective violence derives from day-to-day relations concerning the physical or regular conflict be-

distinctive feature of international law *vis-à-vis* its colonial and imperial roots, as internationalist Brett Bowden asserts:

> The very essence of the function of a standard of civilization. If in the eyes of the Spanish, the Indians are unable to measure up to European social and cultural practices, and more importantly, systems of political organization and government that are assumed to be the universal norm, then they are deemed as 'barbarous', 'uncivilized', or 'infantile' – in any event, inferior.[42]

The *standard of civilization* was the legal mechanism that admitted or excluded peoples and nations into the international society, "the cultural values and practices of Christian societies are taken for granted and are the infallible yardstick."[43]A particular focus at this stage is laid on

---

tween individuals or societies, e.g. crime and terror. This kind of violence is self-evident and can be noted by the nude eye. Conversely, objective violence operates inside symbolic signs – namely, language, racism, hate-speech – or structural elements – economic, political, legal relations. Žižek's point is to explore the ways we perceive and misperceive violence. See ŽIŽEK, Slavoj. Violência. Seis notas à margem. Lisboa: Relógio D'Água Editores, 2008 (English version: Violence. Six Sideways Reflections. New York: Picador Paperbacks, 2008).

[42] BOWDEN, Brett. The Colonial Origins of International Law. European Expansion and the classical Standard of Civilization. In: Journal of the History of International Law, vol. 7, no. 1, 2005, p. 12. The author took the matter to a greater and deeper scrutiny in a recent work. See: BOWDEN, Brett. The Empire of Civilization: the evolution of an Imperial idea. Chicago and London: the University of Chicago Press, 2009.

[43] CAVALLAR, Georg. Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans? In: Journal of the History of International Law, vol. 10, no. 2, 2008, p. 192. For a similar interpretation of Vitoria's doctrine, see KEAL, Paul. 'Just Backward Children': International Law and the Conquest of Non-European Peoples. In: Australian Journal of International Affairs, vol. 49, no. 2, p. 191-206, 1995. The mechanism is described in detail by Todorov, in his compelling survey of the "discovery of the Americas". Todorov tackles Spanish attitudes regarding the native peoples, which, as he points out, are based on a previous and definitive conception of the role the colonizer plays vis-à-vis the backwardness of the colonized populations, which may depart from a viewpoint of the similarities between the two peoples or the its differences. In either case, there exists an excluding and eclipsing approach towards the other. Columbus' writings and actions are representative of these interpretations: "La actitud de Colón respecto a los indios descansa en la manera que tiene de percibirlos. Se podrían distinguir em ella dos componentes, que se vuelven a encontrar en el siglo seguiente y, prácticamente, hasta nuestros días en la relación de todo colonizador con el colonizado; ya habíamos observado el gérmen de estas actitudes

historical studies dedicated to 19th Century internationalists. The ideas of progress, civilization and economic freedom are generally regarded as distinctively present in international lawyers of that period. Rising nationalism contrasted with mounting awareness of world affairs, as the European continent experienced relatively peaceful times.

One should note, however, how theorists confronted questions of international society and universal values in quite troubling terms. As Martti Koskenniemi explains, internationalists engaged in fierce debates over the characterization of international society often advanced proposals about what should international law become. Despite obvious theoretical divergences, e.g. among people like Von Martens – who confined his reflections around positivist-minded assumptions – or John Westlake – who advanced an organic understanding of international law –, Koskenniemi highlights a common belief in them: European society and civilization materialized the cornerstone of any project of the international arena, which echoed in European attitudes towards peoples outside Europe, or, in other words, "even as international lawyers had no doubt about the superiority of European civilization over 'Orientals', they did stress that the civilizing mission needed to be carried out in an orderly fashion, by providing good examples, and not through an unregulated scramble".[44]

Non-European peoples were granted access to international life provided certain conditions were met. In these accounts, Europe occupies the vertex of an allegedly natural – a fact of nature – evolutionary pyramid encompassing all the peoples in the world. In his 1894 *Chapters of the Principles of International Law*, John Westlake puts forward the nec-

---

en la relación de Colón con la lengua del otro. O bien piensa en los indios (aunque no utilice estos términos) como seres humanos completos, que tienen los mimos derechos que él, pero entonces no sólo los vê iguales, sino también idênticos, y esta conducta desemboca en el asimilacionismo, en la proyección de los propios valores en los demás. O bien parte de la diferencia, pero ésta se traduce inmediatamente en términos de superioridad e inferioridad (en su caso, evidentemente, los inferiores son los indios): se niega la existencia de una sustancia humana realmente otra, que puede no ser un simple estado imperfecto de uno mismo. Estas dos figuras elementales de la existencia de la alteridad descansan ambas en el egocentrismo, en la identificación de los propios valores con los valores en general, del propio yo con el universo; en la convicción de que el mundo es uno." TODOROV, Tzvetan. La Conquista de America. El problema del outro. Mexico: Siglo Veintiuno Editores, 2003, p. 50.

[44] KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001, p. 71.

essary attributes by which a certain people is considered a State – thus admitted to the society of States. Westlake calls these attributes the *test of civilization*. To him, the peoples in the world are expected to take European civilization as a mirror, should they look ahead to acceptance and active participation in international affairs. Accordingly, the differences between the civilized and the uncivilized cannot be bridged unless the latter is capable of being approved in the *test of civilization*. The test involves a given people's capacity to manage reasonably working institutions, such as law, administration and commerce, and inspire confidence that they can perform well without foreign "assistance". Westlake writes: "Can the native furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it."[45]

In Westlakes's view, international law should mediate the treatment of non-civilized peoples so as to expand the *standard of civilization* throughout the world. The sort of legal discourse performed by early internationalists such as Vitoria, works through 19th Century international affairs, though in more elaborate and contemporary arguments, usually concerning sovereignty, sovereign equality and basic principles of government and Constitutional achievements. In this aspect, if one considers the legal relevance of sovereignty, a cornerstone of legal subject hood for European countries, it could be argued that it is framed upon universalist assumptions: on the one hand, the peoples who are not granted with such a gift[46], because stuck in inferior scales of human progress, do not deserve recognition by the society of States; on the other hand, progress and civilization are to be brought by European interventionism, an inevitable step towards the maturing of less-developed peoples:

> Accordingly, international law has to treat such natives as uncivilized. It regulates for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded, rather than sanction their interest being made an excuse for more war between civilized claimants, devastating the region and the cause of suffering to the natives

[45] WESTLAKE, John. Chapters of the Principles of International Law. Cambridge: Cambridge University Press, 1894, p. 141.

[46] This is the term used by KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001, p. 71.

themselves.[47]

This seems to display the standard, or the legitimate fashion, for the violence that has been committed towards native populations in America, Africa and Asia since early 16th century and continued onwards, reaching the 21st century through varying mechanisms and structural imbalances. In Anghie and Chimni's remarks, "violence has been displaced in part from the first to the Third World by a number of international practices that have resulted in the South's subjugation to a range of unsustainable economic and social practices policed by international institutions and trade institutions that enrich and favor the North."[48]

4. The international and the post-colonial: dissident voices and the vocabulary of *decoloniality*

If Anghie and Chimni make a strong a point, that is to say, if colonialism and imperialism, rather than a feature of a distant past, but a component of legal Western tradition, then by what mechanisms do these aspects endure in contemporary international law? An attempt to answer this elusive question could stand upon the contributions, first, of post-colonial Indian historian Dipesh Chakrabarty[49] surveys along within the Subaltern Studies movement members on the alternatives to confront historicism with a commitment to *provincialize Europe* give life to the subaltern voices, and second, Latin American philosophers like Aníbal Quijano[50] and Walter Mignolo[51] and their critique of Western modernity through epistemic mechanisms known as *coloniality of knowledge*.

[47] WESTLAKE, John. Chapters of the Principles of International Law. Cambridge: Cambridge University Press, 1894, p. 143.

[48] ANGHIE, Anthony; CHIMINI, B. S. Third World Approaches to International Law and Individual Responsibility in Internal Conflict. In: Chinese Journal of International Law, vol. 2, no. 1, 2003, p. 89.

[49] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000.

[50] QUIJANO, Aníbal. Coloniality and Modernity/Rationality. In: Cultural Studies, vol. 21, nos. 2-3, p. 168-178, 2007.

[51] MIGNOLO, Walter. Local Histories/Global designs. Coloniality, Subaltern Knowledges, and Border Thinking. Princeton: Princeton University Press, 2000; MIGNOLO, Walter. Delinking – the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality. In: Cultural Studies, vol. 21, nos. 2-3, p. 449-514, 2007.

The conceptual framework that forges modernity, Chakrabarty outlines, "[…] entail an unavoidable – and in a sense indispensable – universal and secular vision of the human", that meaning a totalizing narrative that makes a particular reality *the only reality*. Departing from it, "the European colonizer of the nineteenth century both preached this Enlightenment humanism at the colonized and at the same time denied it in practice"[52], which reveals a hierarchy of values and the geographical site of the production of historical events. The logical conclusion, the *cunning of reason* tell us, is that all should converge to a desired point in history despite evident historical particularities.

Historicism is a product of modernity and functions by presenting certain evolutionary stages that, once achieved, should grant the necessary credentials to join *official* history. This reasoning is perhaps somewhat present in legal institutions like the recognition of States, the principle of self-determination and the idea of the nation-State itself. In order to tackle these assumptions, Chakrabarty suggests *provincializing Europe*, that is, examining the hidden ideological-historical-legal-political-cultural mechanisms responsible for projecting, to the globe, a determined local sensitivity, while downplaying other conceptions of diversity: "to 'provincialize' Europe was precisely to find out how and in what sense European ideas that were universal were also, at one and the same time, drawn from very particular intellectual and historical traditions that could not claim any universal validity".[53]

Anibal Quijano's reflections on modernity, too, display a permanent concern with making sense of the byproducts – violence, poverty, dependency – of the historical process. Western modernity presents itself linked with its totalizing counterpart, a specific mode of production of knowledge labeled *coloniality*. The relations between the colonial mode of thinking and reasoning – *coloniality* – and modern social-legal dynamics are reflective of a permanent exercise of power and violence directed at plural visions of knowledge that escapades or defies modern/colonial parameters. These forms of subjugation and occlusion of diversity inevitably colonize knowledge, in the precise sense that valid knowledge must abide by a set of standards should it be willing to be accepted globally. Modernity/coloniality, together, comprise a structure

[52] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000, p. 4.
[53] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000, p. xiii.

of power that is virtually inescapable because it creates a hierarchy of knowledge and dictates the parameters of recognition within the realm of *valid* knowledge:

> That specific colonial structure of power produced the specific social discriminations which later were codified as 'racial', 'ethnic', 'anthropological' or 'national', according to the times, agents, and populations involved. These intersubjective constructions, product of Eurocentered colonial domination were even assumed to be 'objective', 'scientific', categories, then of a historical significance. That is, as natural phenomena, not referring to the history of power. This power structure was, and still is, the framework within which operate the other social relations of classes or estates.[54]

Large scale political decolonization that took place in the 1960's and 1970's did not represent, based on Quijano's insights, the end of epistemic and systemic colonization. Colonial logics sustains action through the imposition of political, economic, social, cultural and epistemic patterns, on the one hand, and the empowerment of a matrix of power55 that is permanently categorizing knowledge and life, and it does so by the unilateral implementation of values with universal appeal. Coloniality disguises itself in universal/cosmopolitan clothing, forging a "mystified image of their own patterns of producing knowledge and meaning."56 The universal categories put forth by Western modernity through colonization and informal imperialism produce universalism by claiming the exclusivity of its epistemic position despite the contingency of the historical and cultural and social biases.[57]

---

[54] QUIJANO, Aníbal. Coloniality and Modernity/Rationality. In: Cultural Studies, vol. 21, nos. 2-3, p. 168-178, 2007, p. 168.

[55] The concept is developed further in MIGNOLO, Walter. Local Histories/Global designs. Coloniality, Subaltern Knowledges, and Border Thinking. Princeton: Princeton University Press, 2000.

[56] QUIJANO, Aníbal. Coloniality and Modernity/Rationality. In: Cultural Studies, vol. 21, nos. 2-3, p. 168-178, 2007, p. 169.

[57] The working of the parameters of universality in 16th century legal thinking was examined by Peter Fitzpatrick. The author defends the thesis that Spanish Scholastics, like Francisco de Vitoria, have developed a vocabulary that placed political-theological concepts within the rationale of modern imperialism. It follows that legal practices and norms become secular features of modernity whereas the theological remains active as it absorbs and reenacts the religious continually. FITZPATRICK, Peter. Raíces Latinas: teología secular y formación imperial occidental. In: Tabula Rasa, no. 11, p. 33-52, 2009.

Working in similar argumentative structures, Walter Mignolo develops further the concept of coloniality so that it could give rise to decolonial strategies capable of unraveling, deconstructing and reconstructing those tales, experiences, forms of life and knowledge that have been silenced for the past five centuries. Decolonial strategies, in Mignolo's words, set the road to new modes of thinking, "a delinking that leads to de-colonial epistemic shift and brings to the foreground other epistemologies, other principles of knowledge and understanding and, consequently, other economy, other politics, other ethics."[58]

4. Conclusion

So as not to drift into unnecessary excavations that may lead this study astray, two main conclusions should be made up to this stage. Firstly, international law's foundations face severe criticism by the craft of theorists who display a commitment to disenthralling given assumptions, biases and differentiations upon which legal doctrine takes root. The reasons for revisiting key thinkers such as Vitoria or 19th Century liberals are unfolding before us: these studies tackle both the history of the discipline and the broader social context in order to come to terms with the so often elusive, at times misleading, quests for decolonization and promotion of diversity in global reach. Secondly, once history has become a prominent element in TWAIL's methodology, internationalists ought to come to terms with the difficulties, limitations and perspectives woven in the task of taking the history of the discipline seriously. In other words, the Third World searches for its own voice inside international law and, while they seek to write history from distinctive perspectives, such histories may be located outside the discipline's classical accounts.

It is the extent to which violence, be it subjective or objective to use Žižek's terminology, becomes institutionalized within present practices and norms, that raises notes about the urgency of revisiting the history of the discipline and the unfolding of acts of power, occlusion or exclusion that grants a particular culture – Europe – its universal status. International law, as the discussions above may reveal, often projects particular modes of life, culture and politics to the detriment of multiple modes of life, culture and politics that are strange to its language and appeal. In this sense, the accounts that dismiss the relevance of the

[58] MIGNOLO, Walter. Delinking – the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality. In: Cultural Studies, vol. 21, nos. 2-3, 2007, p. 453.

Third World in post-1990's international affairs work in tandem with all-encompassing historical views that flattens pluralism and diversity, yet spreading a belief on current norms' proneness to address the interests of all peoples in a liberal-fashioned community of States.

The road to development becomes evident in the horizon of *official History* as the alleged fragmentation of the Third World gains prominence. In face of this, TWAIL advances vocabularies, practices and pluralism aimed at a double movement of, first, confronting established scholarship in their own foundations and, second, of bringing to the fore epistemic alternatives, the excluded voices of the *Others*, the subalterns, in international level. By embracing this critical methodology, the movement takes seriously the need to expose the limits of mainstream thinking, its promises of emancipation and development, in order to give room to academic approaches firmly grounded on social movements, alternative thinking and a commitment to act otherwise.

Critical theories, such as TWAIL, reject linear perceptions of time and history, and allow for epistemic strategies capable of recognizing counter-hegemonic conceptions of society, culture and diversity. International law, in light of TWAIL's remarks, insists on a hegemonic discourse firmly rooted on historicism. Therefore, by interpreting colonial relations both beyond temporal limits and alongside the dimension of *coloniality*, as proposed by Latin American and Indian post-colonial thinkers, international lawyers are able to perceive their discipline in more diverse ways. Silenced stories, oppressed subjects and diverse manifestations of legal pluralism will find room for a broader democratic debate that outdoes the boundaries of historicism and its embedded postulations.

The freedom of speech in the network society:
New forms of controlling information[1]

Marco Antônio Sousa Alves[2]

Abstract: At the beginning of his inaugural lecture at the Collège de France, Foucault poses the following question: "What is so perilous about the fact that people speak, and that their speech proliferates? Where is the danger in that?". Soon after, Foucault advances his hypothesis, according to which "in every society the production of discourse is at once controlled, selected, organized and redistributed according to a certain number of procedures". Following this line proposed by Foucault, we should not dream of a world without any kind of discursive control or coercion over speech. The very "conquest of freedom of speech" should not be seen as a complete liberation. Moreover, freedom of speech (which is always limited) was associated with a set of transformations that replaced the power based on the censorship of the Sovereign or the Church. The recognition of this right is linked, in the eighteenth century, to a new technology of power based on press, public opinion and mass media. In short: Is the freedom to speak or publish one's ideas an achievement or an evolution of mankind? We can say yes, but without forgetting that it also introduced a new form of domination, which takes place precisely through the exercise of this "freedom". Nowadays, with the internet, the freedom of speech acquires a new dimension and meaning, and new forms of control and domination emerge. I highlight three contemporary forms of information control: (1) ownership of content through private monopoly on large databases; (2) control over computer file formats through proprietary software and codes or technological mechanisms to control information, such as DRM (Digital Rights Management) technologies, (3) control over access, which occurs through search engines and

[1] Paper presented at the special workshop (SWS) "The philosophy of the limits to freedom of speech", proposed by Prof. Sten Schaumburg-Müller, and the work group (WG) "Law and the communication processes", both part of the 26th World Congress of Philosophy of Law and Social Philosophy of the International Association for Philosophy of Law and Social Philosophy (Internationale Vereinigung für Rechts-und Sozialphilosophie), held in Belo Horizonte, Brazil, at the campus of the Federal University of Minas Gerais (UFMG) from 21 to 26 july 2013.

[2] Ph. D. Student in Philosophy at Federal University of Minas Gerais (UFMG). Professor at Milton Campos Law School (Belo Horizonte – Brazil).

providers, as we see in the selection criteria imposed by the Google algorithm. At the same time, new forms of resistance are raising: practices of illegal sharing, free software movements and hacker groups. Like the press in the eighteenth century, the internet today brings back the libertarian discourse, promising the end of media's control and the fullest liberty. But the supposed freedom of information brings withal new forms of control, linked to new monopolies and a new information economy.

Keywords: Freedom of speech; Information society; Michel Foucault.

Much has been said about the importance of freedom of speech, freedom of the press, freedom of information, etc. They are usually seen as a human right, a great achievement of mankind, part of the Western political ideals since the late eighteenth century. There are few cases in which the perception of abuse of that freedom leads to restrictions (for example, against groups of intolerance, bullying or injuries to privacy).

In this communication, my intention is not to analyze the cases of abuse that point to the need for restrictions on freedom of speech. More than that, I would like to put in question the very idea of freedom of speech and the belief that it is a kind of liberation or achievement of mankind. From the perspective of Foucault's analysis of power, I intend to present some considerations about the conflicts that characterize the information society, looking for diagnose the emergent ways of controlling freedom of speech, as well as the new forms of resistance associated.

At the beginning of his inaugural lecture at Collège de France, Foucault poses the following question: "What is so perilous about the fact that people speak, and that their speech proliferates? Where is the danger in that?".[3] Soon after, Foucault advances his hypothesis, according to which "in every society the production of discourse is at once controlled, selected, organized and redistributed according to a certain number of procedures".[4] Following this line proposed by Foucault, we should not dream of a world without any kind of discursive control or coercion over speech.

The very "conquest of freedom of speech" should not be seen as a complete liberation. Moreover, freedom of speech (which is always limited) was associated with a set of transformations that replaced the

[3] Foucault, M. The discourse on language, p. 216.

[4] Foucault, M. The discourse on language, p. 216.

power based on the censorship of the Sovereign or the Church. The recognition of this right is linked, in the eighteenth century, to a new technology of power based on press, public opinion and mass media. Instead of conceiving freedom of speech only in its positive aspect, I would point to its negative or coercive side, as a piece of a new mechanism of power. In place of a sovereign power that makes use of an explicit and repressive apparatus of censorship, we saw born in the so-called "democratic societies" a new power economy, increasingly open to the public and dependent on your opinion. We give everyone the right to speak, but that does not mean everyone will be heard. The construction of public opinion is not free from manipulation. This new democratic power is closely linked to a new form of discursive control of information through the mass media (initially the press and later also radio and television). In this new mechanism of power, the freedom of speech represents a calculated risk, assimilated and manipulated in the service of the *status quo*.

In short: Is the freedom to speak or publish one's ideas an achievement or an evolution of mankind? We can say yes, but without forgetting that it also introduced a new form of domination, which takes place precisely through the exercise of this "freedom". Following this way of thinking, I propose to diagnose our time and make visible some new forms of control and subjection that internet brings with it. Nowadays, the freedom of speech acquires a new dimension and meaning. If, since the press revolution, the freedom of speech was associated with the emergence of a powerful mass media and a new technology of power (what we call liberal bourgeois), today it is linked to new forms of information manipulation. Like the press in the eighteenth century, the internet nowadays brings back the libertarian discourse, promising the end of media's control and the fullest liberty. But the supposed freedom of information brings withal new forms of control, linked to new monopolies and a new information economy.

So, I highlight three contemporary forms of information control: (1) ownership of content through private monopoly on large databases; (2) control over computer file formats through proprietary software and codes or technological mechanisms to control information; (3) control over access, which occurs through search engines and providers. At the same time, I aim at highlighting the new raising forms of resistance: practices of illegal sharing, free software movements and hacker groups.

1. The ownership of content through private monopoly on large databases

Several mechanisms currently exist for creating legal protections over the contents of databases. The internet and digital media, rather than serve for free exchange of information, allowed the formation of giant databases exploited by a few large companies. For example, proprietary databases are nowadays owned and controlled by companies such as Lexis-Nexis or Thomson Publishing (for legal information), Dow-Jones and Nasdaq (for financial information), Pfizer and GlaxoSmithKline (for human DNA gene sequences and medical research), MacGraw Hill, Reuters and Knight Ridder (for news and media information) and many others in different domains, such as AOL Time Warner, the Wall Street Journal and Reed Elsevier.[5]

Let's consider the case of scientific publication. The dissemination of the results of scientific production is nowadays increasingly appropriated and commercially controlled. Academics have to read and publish to sustain their careers, and if you want to do either you have to deal with some Big Journals. Today just three publishers, Elsevier, Springer and Wiley, account for roughly 42% of all articles published in science, technology, engineering, and medical topics.[6] Elsevier alone serves more than 30 million scientists and students worldwide, controlling more than 2,000 journals that publish every year 250,000 articles.[7] Besides the ownership of a significant portion of our papers, Elsevier may soon own a significant chunk of the bibliographic metadata stored by academics (Mendeley data) and all its commercial advantages. Its 2012 revenues reached $2.7 billion.[8]

Universities are today at the mercy of some few companies. Elsevier now rent access to their databases for vast sums of money. From 1984 to 2002, for example, the price of science journals increased nearly

[5] Gross, R. Buy the numbers: publishers seek special database monopoly protections.

[6] McGuigan, G. The business of academic publishing: a strategic analysis of the academic journal publishing industry and its impact on the future of scholarly publishing.

[7] Posted on the Elsevier web site: http://www.elsevier.com/about/at-a-glance. See also Alex Mayyasi post "Why is science behind a paywall?", available on http://blog.priceonomics.com/post/50096804256/why-is-science-behind-a-paywall.

[8] Reed Elsevier Annual Reports and Financial Statements 2012. Available on the Reed Elsevier web site: http://reporting.reedelsevier.com/media/174016/reed_elsevier_ar_2012.pdf.

600%. The price increases as high as 145% over the past 6 years.[9] Prices are increasing at a time when the Internet has made it cheaper and easier than ever before to share information. *Reading a single article published by one of Elsevier's journals will cost around $30 or $40.* In April 2012, the Harvard Library published a letter stating that their subscriptions to academic journals were "financially untenable" and singled out one group as primarily responsible for the problem: Elsevier.[10]

In sum, excessive database legal protections increase the cost of research and development for all of society, erecting a barrier to information access and restraining innovation. Against this commercial monopoly over scientific publication, more than 13,000 scientists have signed recently a boycott of Elsevier.[11] Furthermore, the Open Knowledge Foundation, founded in 2004 and dedicated to promoting open data and open content, fights to open up knowledge around the world and see it used and useful through many different projects.[12] In law domain, we saw the emergence of some free online databases of court rulings, such as Findlaw.com. Besides these attempts trying to build an alternative space for the dissemination of knowledge, I would like to mention the illegal actions, such as hacker attacks or P2P sharing networks.

An emblematic case in this regard is that of Aaron Swartz, programmer and cyberactivist that committed suicide at age 26 on November 8th last year. He was about to be sentenced to 50 years in prison and $ 4 million in damages. His crime was to break protection devices and try to disseminate on line scientific articles from JSTOR platform, without any intention of profit. Before death, he wrote the Guerilla Open Access Manifesto, which states that: "The world's entire scientific and cultural heritage, published over centuries in books and journals, is increasingly being digitized and locked up by a handful of private corporations. Want to read the papers featuring the most famous results of the sciences? You'll need to send enormous amounts to publishers like Reed Elsevier. […] That is too high a price to pay. Forcing academics to pay

[9] Edlin, A. & Rubinfeld, D. Exclusion or efficient pricing? The "big deal" bundling of academic journals, p. 120.

[10] Faculty Advisory Council Memorandum on Journal Pricing. Major Periodical Subscriptions Cannot Be Sustained. Posted on the Harvard University web site (April 17, 2012): http://isites.harvard.edu/icb/icb.do?keyword=k77982&tabgroupid=icb.tabgroup143448.

[11] Boycott against Elsevier's business practices web site: http://thecostofknowledge.com/.

[12] Open Knowledge Foundation web site: http://okfn.org/about/.

money to read the work of their colleagues? Providing scientific articles to those at elite universities in the First World, but not to children in the Global South? It's outrageous and unacceptable. […] We need to take information, wherever it is stored, make our copies and share them with the world. We need to take stuff that's out of copyright and add it to the archive. We need to buy secret databases and put them on the Web. We need to download scientific journals and upload them to file sharing networks. We need to fight for Guerilla Open Access".[13]

2. The control over computer file formats through proprietary software and codes

Beyond the control of content, the very format in which information is saved could be appropriated. Moreover, various technological mechanisms are created to regulate access to digital files. A new technology of power emerges, no longer focused on the laws and courts, but in the machine codes or the architecture of cyberspace. Unlike the law, code affords no appeal, no recourse, and no formal institutional review and interpretation. In its effects, code more closely resembles the laws of nature, because it requires neither the awareness nor the consent of its subjects in order to be effective. Code might be used as a tool to subvert individual liberties or public values, for either commercial or political gain. In fact, the lack of transparency of code almost invites such abuses. In sum, a new code-centric world is taking the place of the old law-regulated system.[14]

The DRM (Digital Rights Management), for example, is a class of controversial technologies that are used by hardware manufacturers, publishers and copyright holders with the intent to control the use of digital content and devices. DRM is a set of access control technologies that seek to restrict viewing, copying, printing, and altering of works or devices. An early example of a DRM system, employed since 1996 on film DVDs, is the Content Scrambling System (CSS) that uses an encryption algorithm. In general, e-book readers also use DRM technology to limit copying, printing, and sharing of information, sometimes overriding some of the user's wishes.

DRM systems have received some international legal backing by implementation of the 1996 WIPO Copyright Treaty, the 1998 US Digi-

[13] Swartz, A. Guerilla Open Access Manifesto.

[14] Lessig, L. Code: version 2.0.

tal Millennium Copyright Act (DMCA) and the 2001 European directive on copyright, imposing criminal penalties on those who make available technologies whose primary purpose and function are to circumvent content protection technologies. So, clearly code prevail over law, because DRM policies can also restrict users from doing something perfectly legal, such as making backup copies of CDs or DVDs, accessing works in the public domain, or using copyrighted materials for research and education under fair use laws.

More than an ungovernable and anonymous land, cyberspace became with these new technological tools an over regulated place. New practices of cybersecurity take place and cyberspace is today a prominent political and technical battlefield. In reaction to these technological devices, the free software movement is trying to give to the users the freedom to share, study and modify the digital world. In the site of the Free Software Foundation (FSF) their purpose is explained in this way: "Free software is about having control over the technology we use in our homes, schools and businesses, where computers work for our individual and communal benefit, not for proprietary software companies or governments who might seek to restrict and monitor us".[15] And besides these attempts trying to build an alternative space, there are several illegal actions against the so-called "Digital Imprimatur", like hackers methods to bypass DRM protections, such as the burn-rip process and many others.

3. The control over access through search engines and providers

In addition to the control over information's content and format, there is another important way of controlling information: the mastery of access. In fact, information without search engines is useless. In this sense, Google's stated mission is "to organize the world's information and make it universally accessible and useful".[16] This self-stated mission could seem megalomaniac, but it isn't. Google in fact has a quasi-monopoly over world information. The corporation has been estimated to run more than one million servers in data centers around the world and to process over one billion search requests each day, with more than U$ 40 billion of revenue, derived especially from advertising.[17]

[15] Posted on the Free Software Foundation (FSF) web site: http://www.fsf.org/about.
[16] Posted on the Google web site: www.google.com/about/company.
[17] Google, from Wikipedia, the free encyclopedia: http://en.wikipedia.org/wiki/Google.

Google is the major player in the new information economy, based on creation, distribution, use, integration, and manipulation of information. Freedom of information, in this new scenario, is assimilated into a new economical strategy. This economical shift is related to new forms of controlling information for political and commercial interests. For example, the Page Rank, algorithm used by the Google web search engine, opens new possibilities to manipulate search results in order to give a preferential treatment to Google's own products or to serve certain political interests. It's a new kind of censorship, extremely effective and powerful, because Google has become the main interface with our whole reality.

Conclusion

To wrap up, I believe that freedom of speech is now included in a new power economy, properly assimilated and domesticated by new mechanisms of power. More than a land of freedom, internet is part of an incipient system with new political and economic strategies. New forms of censorship and monopoly are silently born within the digital world. It is up to us now to raise some important questions: after all, who is interested in the massive flow of information? What kind of freedom is really given to speech? And, last but not least, do all these changes represent some kind of liberation for humanity?

References

EDLIN, Aaron; RUBINFELD, Daniel. Exclusion or efficient pricing? The "big deal" bundling of academic journals. *Antitrust Law Journal*, vol. 72, n. 1, 2004, p. 119-157. Retrieved from http://escholarship.org/uc/item/3nd7v77z. Accessed August 9, 2013.

FOUCAULT, Michel. The discourse on language [Lecture delivered in french at the Collège de France on december 2, 1970, with the title L'ordre du discours]. Translation from the French by Rupert Swyer. In: _____. *The Archeology of Knowledge*. New York, Hagerstown, San Francisco, London: Harper & Row, 1972, p. 215-237.

GROSS, Robin. Buy the numbers: publishers seek special database monopoly protections. *Multinational Monitor*, n. 7-8, July-August 2004.

LESSIG, Lawrence. *Code*: version 2.0. New York: Basic Books, 2006. Retrieved from http://codev2.cc/download+remix/Lessig-Codev2.pdf. Accessed August 9,

2013.

MCGUIGAN, Glenn S. The business of academic publishing: a strategic analysis of the academic journal publishing industry and its impact on the future of scholarly publishing. *Electronic Journal of Academic and Special Librarianship*, v. 9, n. 3, Winter 2008. Retrieved from http://southernlibrarianship.icaap.org/content/v09n03/mcguigan_g01.html. Accessed August 9, 2013.

SWARTZ, Aaron. *Guerilla Open Access Manifesto*. July 2008. Retrieved from http://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008_djvu.txt. Accessed August 9, 2013.

Featured expressions of the relationship between Law and Literature in Argentina

Miguel Angel Ciuro Caldani[1]

Abstract: Literature and art in general constitute a horizon of Law, which is especially present when the juridical object is constructed with the breadth of the tridimensionalist integrativism of the Trialist Theory of the Juridical World. According to the tridimensionalist integrativism, supported by jurists such as Miguel Reale, Werner Goldschmidt, Luis Recasens Siches, etc., Law must address social reality, norms and values. In accordance with the Trialist Theory of the Juridical World, founded by Goldschmidt, tridimensionalism raises itself on partitions of life, captured by norms and valued by a complex of values that culminates in justice. Literature and art in general are expressions of the Culture's deep meanings, as a whole, and of the Law in particular, that have to be integrated socio-normo-axiologically.

Our subject has been discussed also in Argentina. Personally we have engaged ourselves in the study of, for example, "Edipus", "Antigone", "The Divine Comedy", "Fuenteovejuna", "Don Quixote", "The Merchant of Venice", "The Mayor of Zalamea", "Facundo", "Martín Fierro" and lyrics from several tangos. "Facundo" and "Martin Fierro" constitute a skyline of significance very special to understand the Argentinean legal culture manifested in the Civil Code of 1869, which –with modifications- still rules.

The Argentinean culture, like a large part of the Iberoamerican culture, is marked by the conflict between traditional Iberian and Anglo-French sectors. The first of them, reinforced by the south European immigration and the assimilation of indigenous groups, is more organicist and communitarist, paternalistic, traditional Catholic and romantic. Its exponents are, for example: Felipe II, Rosas and Perón. The second one, reinforced by American influences, is contractualist, in a liberal sense, kindred to the Reformation and illustrated. Its exponents are, for instance: Carlos III, Moreno, Rivadavia, Mitre and Ar-

[1] Head-professor of the National University of Rosario. Professor Emeritus of Buenos Aires University, Argentina. English text whit the collaboration of Professor Marianela Fernández Oliva

amburu. Since the mid-twentieth century, the first of these sectors, usually rely on Rousseaunean democracy, while the second is more liberal and republican, affined with Locke and Montesquieu. The style of the current peronist government is, in many ways, traditional Iberian. The opposition is usually more Anglo-French.

The key to the Civil Code of 1869 –liberal, in the economic sense-, enacted under the presidency of Sarmiento, lies in the Anglo-French interpretation of the Argentinean culture that he had done in "Facundo", subtitled "Civilization and Barbarism". "Civilization" was Anglo-French and "barbarism", the Iberian traditional gaucho. Related to the juridicity implemented by the Anglo-French group, in 1871 the gaucho cried his sadness in the poem Martín Fierro by José Hernández.

I. Fundamental ideas

1. The Art in general, and within it especially literature, are manifestations of deep senses of culture as a whole and of Law in particular, with the limitations of the differences between the literary and the juridical thought. Each work of literature, especially when it is a classic, often builds a space of suggestions useful to understand the problems of Law, and constructs it as a *paralegal literary expression*[2]. The paralegal character of literature is especially present when the juridical object is constructed with the breadth of the tridimensionalist integrativism of the Trialist Theory of the Juridical World. According to the tridimensionalist integrativism, supported by jurists such as Miguel Reale, Wer-

[2] As in literature with jurical content. It can also be recognized a "parajuridical aesthetic" (it can be query Miguel Angel Ciuro Caldani, Comprensión jusfilosófica del Martín Fierro, Rosario, Fundación para las Investigaciones Jurídicas, 1984, Pg. 5). As in other cases, beauty is achieved mainly through love. Especially in literary works such as Martin Fierro, it is obtained through justice (Ibid., PG. 5). Beauty refers more to "resemble"; instead, justice is more related more to "being" (vid. José Ortega y Gasset, "Ensayo de estética a manera de prólogo", en Obras Completas, RdO, Madrid, 1961, t. VI, Pg. 256). Maybe the tension between beauty and justice has extreme expressions in Nietzsche's ideas, which submit justice to beauty. In the Christian thought, in a certain way, beauty is submitted to justice (and sanctity) (vid. Friedrich Wilhelm Nietzsche, El origen de la tragedia, trad. E. Ovejero Mauri, Espasa-Calpe, Madrid, 1980, Pg 16; Gustav Radbruch, Filosofía del Derecho, Revista de Derecho Privado, Madrid, 1952, Pg. 143/144.; about the political meaning of art, it is possible to query, for example, Pierre-Joseph Proudhon, Sobre el principio de arte y Sobre su destinación social, trad. J. Gil Ramales, Aguilar, Madrid, 1980).

ner Goldschmidt, Luis Recaséns Siches, etc., Law must address social reality, norms and values. In accordance with the Trialist Theory of the Juridical World, founded by Goldschmidt, tridimensionalism raises itself on partitions of life, conceived by norms and valued by a complex of values that culminates in justice [3].

Unlike the pure simplicity of the Kelsenian normativist proposal and the impure complexity, in which what we consider juridical object is "caught" from the outside by the Economy, the Sociology, the Psychology, etc., and unlike the internal "compression" -realist or iusnaturalist-, the Trialism proposes to differentiate and integrate the social reality, the norms and the values and to differentiate and integrate the Law within the cultural world, in respective pure complexities[4].

Under the trialist proposal, the Juridical World has to be built as a set of partitions of power and powerlessness (which favor or harm life and especially human life) (sociological dimension) normatively conceived (normological dimension) and valued, partitions and norms by a complex of values that culminates in Justice (dikelogical dimension). [5]

---

[3] About the Trialist Theory of the Juridical World, it can be query Werner Goldschmidt, Introducción filosófica al Derecho, 6ª. ed., 5ª. reimp., Bs. As., Depalma, 1987; Miguel Ángel Ciuro Caldani, Derecho y política, Bs. As., Depalma, 1976; Estudios de Filosofía Jurídica y Filosofía Política, Rosario, Fundación para las Investigaciones Jurídicas, 1982/4; La conjetura del funcionamiento de las normas jurídicas. Metodología Jurídica, Rosario, Fundación para las Investigaciones Jurídicas, 2000; Estudios Jurídicos del Bicentenario, Rosario, Fundación para las Investigaciones Jurídicas, 2010; Estrategia Jurídica, Rosario, UNR Editora, 2011; María Isolina Dabove, "El Derecho como complejidad de saberes diversos", in Revista Cartapacio de Derecho, (Revista electrónica de la Escuela Superior de Derecho. Universidad Nacional del Centro de la Provincia de Buenos Aires) 4, 2003, http://www.cartapacio.edu.ar/ojs/index.php/ctp/article/view/29/17, 8-2-2013. Also: Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, http://www.centrodefilosofia.org.ar/ , 8-2-2013. It is possible to query various opinions in Escuela Superior de Derecho, Universidad Nacional del Centro de la Provincia de Buenos Aires, Sistema de Publicaciones, http://www.cartapacio.edu.ar/, 8-2-2013.

[4] The assumption of complexity is one of the major challenges of our time (it is possible to query, for example, GOLDSCHMIDT, Introducción ... cit., PG. XVII and ss.; BOCCHI, Gianluca - CERUTI, Mauro (comp.), La sfida della complessità, trads. Gianluca Bocchi y Maria Maddalena Rocci, 10ª. ed., Milán, Feltrinelli, 1997; CIURO CALDANI, Miguel Angel, "El trialismo, filosofía jurídica de la complejidad pura", en El Derecho, t. 126, Pg. 884 and ss.; DABOVE, op. cit.).

[5] It is important that Literature, as an expression of culture, may be constructed threedimensionally, considering facts, logic and values (vid. For example, Teum A.Van Dijk, Texto y contexto, trad. J. Domingo Moyano, Madrid, Cátedra, 1980, págs. 270 and ss.;

2. Our subject has been discussed also in Argentina. Personally we have engaged ourselves in the study of, for example, "Edipus", "Antigone", "The Divine Comedy", "Fuenteovejuna", "Don Quixote", "The Merchant of Venice", "The Mayor of Zalamea", "Facundo", "Martín Fierro" and lyrics from several tangos. *Facundo* by Domingo Faustino Sarmiento [6] by Domingo Faustino Sarmiento and *Martin Fierro* by José Hernández [7] constitute a skyline of significance very special to understand the Argentinean legal culture manifested in the Civil Code of 1869, which –with modifications- still rules[8].

The Argentinean culture, like a large part of the Iberoamerican culture, is marked by the conflict between *traditional Iberian*[9] and *Anglo-French* sectors. The first of them, reinforced by the south European immigration and the assimilation of indigenous groups, is more organicistic and communitarist, paternalistic, traditional Catholic and roman-

---

also Hans Hórman, Querer decir y entender: fundamentos para una semánticapsicológica, trad. A. Agud y R. de Agapito, Madrid, Gredos, 1982; about Art Philosophy and Aesthetics, vid. Theodor W. Adorno, Teoría estética, trad. F. Riaza, rev. F. Pérez Gutiérrez, Madrid, Taurus, 1980; Virgil C. Aldrich, Filosofía del arte, trad. J. Gómez de Silva, México, UTEHA, 1966.

[6] It is possible to query Domingo F. Sarmiento, Facundo, Bs. As., Tor, Edición del Cincuentenario, 1957. Also Obras completas de Sarmiento, Luz del Día, Bs. As., 1948-1956, 53 vols. Diverse perspectives on Sarmiento's character can be query, for example, Leopoldo Lugones, Historia de Sarmiento, Publicaciones de la Comisión Argentina de Fomento Interamericano, Bs. As., 1945, and Manuel Gálvez, Vida de Sarmiento, Tor, Bs. As., 1952.

[7] V. El gaucho Martín Fierro, José Hernández, Proyecto Biblioteca Digital Argentina, http://www.biblioteca.clarin.com/pbda/gauchesca/fierro/fierro_000indice.html, 20-4-2013.

[8] Vid. Our papers "La cultura jurídica argentina en sus expresiones literarias capitales. Significados jurídicos de Facundo y Martín Fierro", en José Calvo González (dir.), "Implicación Derecho Literatura. Contribuciones a una Teoría literaria del Derecho", 2008, PG. 71 and ss.; "Hacia una teoría general de la recepción del Derecho extranjero", in Revista de Direito Civil, 8, 1979, Pg. 73 and ss.; "Originalidad y recepción en el Derecho", in Boletín del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, 9, 1987, Pg. 33 and ss.; "Nuevamente sobre los efectos de la recepción en la cultura jurídica argentina", in Revista del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, 29, 2006, Pg. 49 and ss; El Derecho Universal, Rosario, Fundación para las Investigaciones Jurídicas, 2001.

[9] The generalized reference to traditional Iberian should not mean to neglect the differences between the Hispanic and the Lusitanian.

tic[10]. Its exponents are, for example: Felipe II, Juan Manuel de Rosas and Juan Domingo Perón. The second one, reinforced by American influences, is contractualist, in a liberal sense, kindred to the Reformation and illustrated. Its exponents are, for instance: Carlos III, Mariano Moreno, Bernardino Rivadavia, Bartolomé Mitre and Pedro Eugenio Aramburu.

Perhaps the traditional Iberian sector has more features related to feudalism, and the *Anglo-French* sector has more capitalist references. As for the philosophical disciplines, the traditional Iberian sector in general has more sympathy for the Metaphysics and is sometimes pre-Kantian; the Anglo-French refers more to other philosophical disciplines such as Gnoseology, Epistemology and Logic, and it is Kantian or post-Kantian. Since the mid-twentieth century, the first of these sectors, usually rely on Rousseaunean democracy, while the second is more liberal and republican, aligned with Locke and Montesquieu.

The architecture of the city of Buenos Aires shows the presence of the two: anglo-french areas that strongly resemble Paris and London -as the Recoleta-, and more *creole spaces*, such as San Telmo. In the "interior"[11] of the country, Salta is a traditional Iberian city, and Cordoba can be considered a synthesis between traditional Iberian and relatively current Anglo-French elements. The style of the current peronist government is, in many ways, traditional Iberian. The opposition is usually more Anglo-French[12].

3. The key to the *Civil Code* of 1869 –liberal, in the economic sense-, enacted under the presidency of Sarmiento, lies in the Anglo-French interpretation of the Argentinean culture that he had done in *Facundo*, subtitled Civilization and Barbarism. "Civilization" was Anglo-French and "barbarism", the Iberian traditional *gaucho*[13]. For this porpoise were strategic -especially in the project of Sarmiento- scientific

[10] However, as an expression of the tension of a culture that is expressed in styles that are not proper to it, we recall that Sarmiento belongs to the Romantic movement of Argentina's culture. He is a romantic writer who writes against romanticism (about Illustration and Romanticism it is possible to query, for example González Porto-Bompiani, Diccionario Literario, 2ª. ed., Barcelona, Montaner y Simón, t. I, 1967, Pg. 254 and ss. - 475 and ss.).

[11] Sometimes the word "interior" leads to wonder if Buenos Aires is the "exterior".

[12] However, at the present time Frente Renovador party, the opposition, has certain traditional Iberian influences (August, 2013).

[13] For further inquiry about the Argentinean gaucho, http://jsis.washington.edu/latinam//file/Annual%20Essay%20Contest/2012%20The%20Gaucho%20&%20Argentine%20Identity%20-%20McGinty%20Liam.pdf, 20-2-2013.

and technological developments; secular education: common, free and compulsory -the presence of American teachers was fundamental- (so remarkably embodied in Act number 1420 of 1884); the rigid application the Slothful and ill entertained Act; the Constitution; the Commercial Code; the Civil Code of private property and freedom of contract -akin to the French Civil Code-; and basically, the immigration of European people capable of grounding the national bourgeoisie, as intended very explicitly Alberdi. Related to the juridicity implemented by the Anglo-French group, in 1871 the *gaucho* cried his sadness in the poem *Martín Fierro* by José Hernández.

4. The origin of immigrants that arrived to the country was actually one of the reasons why the liberal project worked for a few decades and then came into crisis, thanks to the lack of support in the idiosyncrasies of much of the population. Many people came to work hard, but the spirit of entrepreneurship was not implemented.

The Peronism ascent to power -inspired by the Social Doctrine of the Church and certain characteristics of fascism[14], mobilizer of sectors that had been marginalized-, emphasized the traditional Iberian harassment to the liberal Anglo-French model already present years before. The Civil Code was significantly amended, some of them alleged to be exceptional, and a new Constitution was dictated. Of course, it did not pass the intended path settle to reform a legal instrument such as that, and was annulled from the Anglo-French culture by the so-called Liberating Revolution in 1956[15]. If the Anglo-French space relied heavily on the Civil Code, the traditional Iberian sector referred more to Labor Law. The non-class unionism, sometimes corporative, was one of the great foundations of the Peronist movement (Justicialista).

5. The excision of the country's culture is so marked that has come to have two sectors on the right, center and left, although the anglo-french element manifests itself as parties or " pre-parties", dotted with different ideologies and sharper, and the traditional Iberian Peronist element expresses itself in a movement that covers all three orientations[16]. Military sectors that frequently clashed in the early sixties of

[14] Vid., despite our opinion, Mario G. Losano, "Ancora sui termini "peronismo" e "giustizialismo" dal Sudamerica all'Italia, e ritorno", in Teoria politica, XX, n. 1, 2004, PG. 15 and ss..

[15] It is relevant to understand the cultural jusphilosophical structure of Argentine political parties. Vid. Our paper "Notas básicas para un curso de comprensión jusfilosófica de los partidos políticos argentinos", en Boletín … cit., 9, 1987, págs. 15 and ss.

[16] A moment of agreement between the two tendencies, achieved for different purposes,

the twentieth century evidenced the opposition of the two sectors: *Colorados*, more Anglo-French oriented, and *Azules* less hostile to traditional Iberians[17]. When the *guerrillas* arrived, there was an Anglo-French faction: the People's Revolutionary Army (ERP)[18]; and another traditional Iberian faction: the Montoneros[19], which shared affinities and strained liaisons with the historical Peronism. The Military Dictatorship Process had in itself factions of both orientations[20].

6. Heir to the Spain of the Castile's Mesta and to non industrialization, the divided Argentinean population *"parasitized"* a large and rich territory, leading the country to a position that produced wonder and even sympathy[21] from the rest of the World. In addition to a model

---

allowed the constitutional reform of 1994. Vid. for example, Carla Carrizo, "Entre el consenso coactivo y el pluralismo político: La Hora del Pueblo y el Pacto de Olivos (1973-1993)", in Desarrollo Económico, vol. 37, núm. 147, Pg. 389 and ss..

[17] Siglo XX, Hechos que conmovieron a nuestra sociedad, http://www.oni.escuelas.edu.ar/olimpi99/vision20/hechos.htm , 20-2-2013.

[18] Porque el Ejército Revolucionario del Pueblo no dejará de combatir, http://www.marxists.org/espanol/santucho/1973/abril.htm , 20-2-2013.

[19] Página 12, El Lanusse que estudió a Montoneros, by Mario Wainfeld, http://www.pagina12.com.ar/diario/elpais/1-55735-2005-08-28.html , 20-2-2013. A controversial work on the subject Montoneros. Sus proyectos y sus planes, is by Mario Orsolini (Tcnl.), Bs. As., Círculo Militar, 1989.

[20] To avoid making oversimplifications it is possible to consult, for example: Clarín.com, july 28th 1966: El derrocamiento de Arturo Illia, Los entretelones de un golpe militar que anticipó la tragedia de 1976, http://www.clarin.com/diario/2006/06/27/elpais/p-01215.htm, 20-2-2013.

[21] It can be query our paper "Una Argentina parasitaria entre la feudalización y la colonización", in Investigación y Docencia, 34, 2001, Pg. 59-65. An affirmation of the "nonexistence" of Argentina and the necessity for production, can be query in LaNacion.com, February 18th 2004, Alain Touraine: el país debe olvidarse del peronismo, http://www.lanacion.com.ar/Archivo/Nota.asp?nota_id=574102 (20-2-2013). About the importance of production it is proper to recall, for example, Claude-Henry Saint-Simon, Catecismo político de los industriales (1823), trad. L. David de los Arcos, Bs. As., Aguilar, 1964. About argentinean culture it is possible to query, for example, El País, Viernes 27 de Septiembre de 2002, La Argentina todavía, Julio María Sanguinetti, vid. http://www.libreopinion.com/members/jose_marmol/La_Argentina_todavia.htm , 20-2-2013; Proyecto Ensayo Hispánico, http://www.ensayistas.org/repertorio.htm , 20-2-2013; Ezequiel Martínez Estrada, http://www.ensayistas.org/filosofos/argentina/eme/ 20-2-2013; Raúl Scalabrini Ortiz, http://www.todo-argentina.net/biografias/Personajes/raul_scalabrini_ortiz.htm , 20-2-2013; Arturo Jauretche, http://www.todo-argentina.net/biografias/Personajes/arturo_jauretche.htm , 20-2-2013; Página Principal de Leopoldo Marechal, http://victorian.fortunecity.com/palace/10/ , 3-4-2007); Biblioteca Vir-

of integration of the jiridical object, Argentina needs especially the integration of its culture, which should engage each and every Argentinean. The country requires not only the complex thought in Law but the recognition of the *juridical subject's complexity* [22]. The introversion of the tensions between sectors often hide the real problems and the possibilities of their solution. This often results in profit for sectors leading their actions in bad faith.

7. Based on the development of Private International Law we have developed a theory of *juridical responses* that deals with its scopes, its dynamics and its situation. This theory helps to understand the deployments of sectors from Argentinean culture, with processes of "plus-modelation" , "minusmodelation" and domination and little integration and coexistence of the Anglo-French and Iberian traditional areas[23].

II. "Facundo" and "Martin Fierro" in the Juridical World

1) The Juridical World in general

a) Sociological dimension

8. The Trialist Theory of the Juridical World positions Law in the field of allotments of power and powerlessness, i.e., what helps or hurts being and especially human life. The principal allotments are partitions. These are the product of human conducts which can be determinable and realize the value of "conduction". There is also a great interest in distributions, which are caused by nature, diffuse human influences or chance, which satisfy the value of "spontaneity". The world of the Pam-

tual Miguel de Cervantes, http://www.cervantesvirtual.com/servlet/IndiceTomosNumeros?portal=0&Ref=8434 , 3-4-2007).

[22] José Calvo González, "Doce preludios a la filosofía jurídica y política del siglo XXI", in Anuario de Filosofía del Derecho (Madrid), T. XVII, 2000, Pg. 419 and ss., especially Pg. 424-425. Available in http://webpersonal.uma.es/~JCALVO/docs/preludio.doc, 20-2-2013.

[23] It is possible to further the information in our papers Aportes para una teoría de las respuestas jurídicas, Rosario, Consejo de Investigaciones de la Universidad Nacional de Rosario, 1976 (re-print in "Investigación ..." cit., Nº 37, págs. 85/140), Cartapacio, http://www.cartapacio.edu.ar/ojs/index.php/mundojuridico/article/viewFile/959/793, 3-3-2013; "Veintidós años después: la Teoría de las Respuestas Jurídicas y Vitales y la problemática bioética en la postmodernidad", in Bioética y Bioderecho, Nº 3, págs. 83 and ss.

pa[24], in which to varying degrees are installed -in acceptance or rejection- the two sectors, is marked by the predominance of distributions of nature, diffuse human influences and, perhaps, chance. "Martín Fierro" is a strong expression according to that world. However in "Facundo" the author shows his significant pretention of replacing distributions by partitions -replacing spontaneity by conduction-. "Facundo" is a gaucho, but Sarmiento desires a new reality that extinguishes the world of the gauchos.

9. "Facundo" and "Martin Fierro" present a great bid for the partition of power and powerlessness, what helps or harms human life. The author of "Facundo" wants to grant power to a man of an "Europeanized" civilization, and powerlessness to the gaucho. "Martin Fierro" defends exactly the opposite order of allotments.

10. Partitions may be authoritarians, developed by imposing, and doer of the value "power". Or autonomous, developed by agreement, satisfying the value of "cooperation". These two realities: the traditional Iberian and the Anglo-French worlds, are spaces where authority predominate. But both worlds want to limit it: the first, to provide deployment of the sense of the antique rural man; the second one, to develope the capitalist economic life and "progress".

11. Partitions can be sorted according to a working government's plan, indicating who are the supreme partitioners and which are the supreme criteria of partition, and realize the value of "previsibility". Exemplary conduct is carried out persuant to the scheme: model and sequel, and bound by "reasonableness", which satisfies the value of "solidarity". Simplifying, often we speak of "law" and "custom". "Facundo" intends, at least, to impose its model -a *planned* order-, which realize the value of "previsibility". "Martin Fierro" instead prefers to keep the exemplary conduct of the gaucho's costumes, which satisfies the value of "solidarity".

12. Partitions may find necessary limits, emerged from the nature of things (usually physical, psychological, logical, socio-political and socio-economic limits). The two literary works demonstrate an awareness of limits, but "Facundo" shows a major drive to overcome them, while "Martin Fierro" gives to a certain sense of defeat. It wouldn't be until a long time after that the traditional Iberian sector was protagonic again to

[24] It can be query our paper "La Cautiva de Esteban Echeverría y la juridización de Argentina", in Investigación … cit., 3, 1987, Pg. 11 and ss.

Argentinean life and even limited the access to power for Anglo-French space.

b) Normological dimension

13. According to the trialist proposal, the norm contains the logical conception of a projected partition by an observer, and can be classified primarily as *individual*, which conceive past social sectors and therefore, realize the value of "immediacy". Norms can also be *general*, related to future social sectors, and therefore realize the value of "predictability". Although both literary works rather prefer "predictability", it is clear that the Anglo-French culture of "Facundo" has a special sympathy for this value, to the point that one of his greatest achievements was Civil Law codification.

14. Between the beginning of the literary expression process -with "Facundo"-, and the sanction of the Civil Code and the appearance of "Martin Fierro"'s first part, the Constitution was dictated in 1853-60. It included a large number of civil rights and political rights, practically always denied to the gauchos. The sanction of the Commercial Code is also of relevance.

c) Dikelogical dimension

15. According to the trialist proposal, Law must realize a complex of values that culminates in "Justice". There are also other values which are part of that complex, such as utility and love. We can say that the complex of all values culminates in the value of "Humanity", the thorough "must be" of our own being. "Facundo" refers to a justice much more integrated with utility, while "Martin Fierro" is a protest on behalf of humanity. Hernandez's[25] tragedy seems to refer to a cosmic justice (metajustice), while Sarmiento's ideal is referred to a value that is considered parallel to justice (parajustice).

16. Justice can be thought in various ways (kinds of justice) whose path has been already superbly signaled by Aristotle. Unwrapping these trails is possible to conceive extraconsensual and consensual justice, with or without consideration of people (of people or their roles), symmetrical or asymmetrical (easy or difficult comparability of the powers and powerlessness), dialogic or monologic (one or more rea-

[25] With some basic features of "epic".

sons) and commutative or spontaneous (with or without repayment). Justice can also be differentiate as "partial" or governmental (from part of the system or from all of it), sectorial or integral (directed to a part or to the whole), of isolation or participation, absolute or relative and particular or general (directed to particular good or commonweal). The particular justice is the ultimate Private Law requirement. General justice is usually the requirement of Public Law. "Facundo" is more oriented towards symmetric justice, commutative, of insolation and particular: in relation to that, it is more "privatist". "Martín Fierro" is directed especially to asymmetric justice, spontaneous, of participation, and perhaps even general. Maybe the traditional Iberian sector has metaphysical basis that make general justice more viable and therefore more "publicist". However, in general, Argentina has very limited sense of commonweal. "Facundo" contains a strong reference to "arrival" justice, which sacrifices the present for the future, different from "departure" justice, that keeps intact the present time.

17. Justice is thought as a pantonomous category[26], directed to all allotments: past, present and future. As that universe of allotments is unapproachable to us, because we are neither omniscient nor omnipotent, we feel the need to fracture justice to produce legal certainty. "Facundo" was designed with a contradictory reference to the future: on the one hand it *unfractures* it, opening possibilities. On the other hand, it compresses it to make the future happen in a certain way. It proposes a strong authority to ensure a certain course for the future. "Martín Fierro" design is oriented to the past and present. The gaucho feels insecure facing that unfractured future.

18. The supreme principle of Justice proposed by the Trialism, is to grant each individual a sphere of freedom to fully develop, that is, to become a person. Applied to the elements of the partitions, this principle indicates the justice of partitioners, its receivers, its objects of partitions, its form and its reasons. As for the receivers, the legitimating titles are specifically the *meritoriousness* linked to the need, and the *merit*, which depends on behavior. "Facundo" is a strong allegation in favor of merits, obtained from a specific behavior according to the Anglo-French standards. "Martin Fierro" refers to meritoriousness. "Facundo" shows the importance of the Anglo-French development for allotments of *patrimonial powers*.

19. To satisfy the supreme principle of Justice adopted, the sys-

[26] Pan=all; nomos=norm that rules.

tem should be Humanistic and non totalitarian, i. e., it must consider each individual as an end, and not as a mean to obtain another end. Although in theory "Facundo" has a strong inclination to humanism, it is actually a significant *totalitarian deviation* that mediatized the gaucho.

Humanism can be abstentionist or interventionist (paternalistic), which leads to the respective risks of mediation by totalitarian individualism or totalitarianism strictly Inicially, "Facundo" corresponds to an abstencionist model and Martin Fierro to an interventionist one, but finally "Facundo" has a paternalistic sense and even becomes totalitarian concerning the gaucho.

For the realization of Humanism we must address to the unicity, equality and community of all men, who tend to require political liberalism, democracy and the *res publica*. Although the gaucho has a remarkable sense of individuality, it is in "Facundo" where we can find a special inclination for the unicity. "Martin Fierro" claims a climate of greater equality and a sense of community.

To achieve the regime of justice it is necessary to protect the individual against all threats: other individuals -as such, and as a regime-, from himself and from all "the rest" (disease, poverty, ignorance, loneliness, unemployment, etc.). "Facundo" initially seeks protection from the others and from the regime, but at the end, it advocated for a dictatorship to *civilize* the gaucho, safeguarding him from himself. Martin Fierro needs circumstantially the protection against the regime and demands protection from poverty.

2) The branches of the jurical world

20. "Facundo" puts on special emphasis on *Patrimonial Law* and the application of Criminal Law regarding the gaucho's "deviations". We could say that a sophisticated Civil Law was made for the Anglo-French sector, while a rudimentary system of penalties sought to reduce the traditional Iberian culture. In present terms it would be feasible to say that through Martin Fierro traditional Iberian sector claims for the development of Social Security Law and Labour Law. At the time Peronism unwrapped those claims, and unfractured the Anglo-French privatist patterns.

III. Conclusion

21. "Facundo" and "Martin Fierro" manifest the profound connections between literature and law. In particular express the often strained ties between two cultural sectors whose differences have been splitting Argentina's life and, to various degrees, the life of Hispanoamerica and the Hispanic life as a whole; Iberoamerican life and the whole of Iberic life. Pure complex juridical models, such as the trialist theory of the juridical world can help integrate these diversities[27].

[27] It can also provide recognition to the complexity of the legal subject.

Considerarions about memory and oblivion in Law from the short story 'Pai Contra Mãe', by Machado de Assis

Leonela Otilia Sauter Soares[1]

Abstract: This working paper aims to explore the relationship between Law, official History and Literature, and the limits of appliance in this connection. Initially, this research exposes how Law is important as memory of a nation. Simultaneously, it is made clear how occasionally Law can be partial as a legal order (Law can privilege certain people, as those who are/were in power, when it allows them to misrepresent information and to spread some data that do not always match the reality). From this, the presentation analyzes the short story 'Pai contra Mãe', by Machado de Assis and the context in which it has been written. This research discusses these points investigating the analysis of discourse, according to 'A Arqueologia do Saber', by Michel Foucault.

Keywords: 'Pai contra Mãe'; Law as memory of a nation; 'A Arqueologia do Saber'.

Introduction

When one first starts attending school, one learns to obey a set of predetermined rules. We are taught that we must obey the teacher, respect our classmates, and do our homework. One is also taught to write texts about one's routine, as well as about topics concerning one's reality. As one grows, the rules become more complex. If one was to consider that throughout a person's school life one writes one's history, those rules of behavior are a sample of law, and that textual productions can be a sample of the literature, then it is possible to say that "History",

[1] Graduation Student at Federal University of Rio Grande do Sul, UFRGS, Brazil. Graduation level. The present paper was made with the support of Pró-Reitoria de Pesquisa - UFRGS –Brazil.

"Law" and "Literature" are closely linked. It is important to question, however, if when seeking to understand the history of a nation, or of a country and the law of a nation, does this maxim still hold true? And does it still indeed, if we are to add literary texts? A strong desire to find more information that may allow me to answer such questions is the main reason for writing this paper.

It is said that the past of law (and its current development) is closely related to Literature. Stories and novels often serve to portray social aspects imperceptible by other paths that are not in the literary form[2]. Holmes Jr., said: "The history of what the law has been is necessary to the knowledge of what the law is"[3]. Law is important as narrative, when studied together with literature, because this approach "[can] provide a voice to those who, through the official channels of the right, are invariably silenced".

If we are to consider a linear evolution of the story, it is possible to say that written language is a fundamental part of the development of the history of people. Through language, historical records of cultural identity are made, which can be seen in Law[4].

However, when analyzed in its densest form, the link between law and history, must be paid much more attention to. In an attempt to seek the answer to the real link between law and history, it is proposed to define the object of study.

From there, our research starts to look carefully at the book "A Arqueologia do Saber" (The Archeology of Knowledge, *free translation*), by Michel Foucault. The author explains that when speech is analyzed, it is necessary to consider a lot of speeches for a period of time, referring them to the same object - whilst trying to find a relationship between them, by rearranging them. Thus, by taking this information into account, the study of the short story "Pai contra Mãe", by Machado de Assis, can commence.

---

[2]OLIVEIRA JÚNIOR, José Alcebíades. SAUTER SOARES, Leonela Otilia. Machado de Assis e Os Direitos Humanos: Contribuição da Literatura para a Interpretação Jurídica. Page 330; Direito, arte e literatura [On-line Eletronic resource] / organized by CONPED/UFF; coordinators: MADEIRA FILHO, Wilson; GALUPPO, Marcelo Campos. – Florianópolis: FUNJAB, 2012.

[3]"The history of what the law has been is necessary to the knowledge of what the law is" in HOLMES JR., Oliver Wendell. The Common Law. 1881.

[4] OLIVEIRA JÚNIOR, José Alcebíades. SAUTER SOARES, Leonela Otilia. Ibid., page 330.

1. Pai Contra Mãe, by Machado de Assis

1.1 The tale

The tale starts on the topic of slavery, which had just been abolished at the time the author wrote the story, but that in the story itself is still a common practice. The narrator explains about some instruments, which subdue the captives, such as the mask of tinplate. It forced slaves to not get drunk, as the mask only exposed a person's nose and eyes. The narrator also describes the collar used to arrest fugitive slaves. He says that those who were recaptured - and shackled - showed the condition of fugitives, when they walked down the street. But the narrator also describes that the practice of escaping was very common as slaves, and their masters frequently maltreated them. Those whose slaves had escaped usually offered a reward to whoever may capture the escapees. Advertisements were often printed in the newspaper, and catching runaway slaves was a serious profession at that time. It was doubtlessly not a noble craft, but the economic necessity often drove free men to become 'slave-hunters'.

Cândido Neves, as the author puts it, is the one who distinguishes the link between the description of the condition the slaves found themselves in, and the tale itself. Candinho (Cândido's nickname) did not have a regular job; and from many jobs he often left on his own accord, for lack of enthusiasm in carrying them out. When he felt in love with Clara, he decided to learn the craft that the cousin whom he lived with practiced: carpentry, as he wished to have a profession by the time he married.

Clara was twenty-two years old, Candinho, thirty. She was an orphan, lived with her aunt Monica and sewed at home in order to make a living. The young girl had had a few boyfriends, but she did not have a real interest in any of them. Cândido met her at a dance and they got married eleven months later. Clara's friends advised her to not marry him, as Candinho was a known trickster.

Clara, Candinho and her aunt, Monica, lived together after the marriage. Clara's aunt had warned them against having children, as the child would certainly be made to starve due to their lack of money. Despite the advice, Clara became pregnant. The young girl sewed increasingly in order to pay the bills and make outfits for the baby.

The aunt was concerned about the situation, as Candinho had

not yet obtained a serious job. He refused the permanent job she found him by arguing that capturing slaves yielded enough money, even if it only used to happen occasionally. One day, however, his earnings from that job began to decline. The financial crisis was large, and there were many slave hunters. Consequently, Cândido's debts began to catch up with him, and he no longer was able to keep up even with the rent.

Out of pure desperation, he would sometimes capture slaves who had not actually fled, or even freed slaves by mistake. Aunt Clara advised him to find a new job, but he never followed her advice.

After Clara became pregnant, the situation worsened. During her last week of pregnancy, during dinner, Monica suggested that they should give the child to a foundling wheel[5]. After this suggestion was made, they were immediately faced with an angry landlord, demanding the late rent they owed. They were told that if the rent was not to be paid within the next five days, they would be evicted. Unbeknown to the couple however, Monica had already found a house where the three could stay for free, but she had not told the couple, with hopes that their desperate estate would drive them to cast out the soon-to-be-born child. In order to try to revert the situation, Candinho looked for runaway slaves as well as loans from friends, but is ultimately unsuccessful

The three characters end up being evicted and go on to live in the house that Monica has found. In two days, the child is born: a boy. To their own demise, the couple ultimately decides to leave the child in the foundling wheel.

On the day before the delivery, Cândido reviews all advertisement regarding the recapture of slaves. He finds one, offering a very high reward for the capture of a female slave. Cândido begins to look for her.

After a long day of search, he cannot find her and knows what awaits him once home: the casting forth to an unknown life of his first-born son. After much reluctance, he takes the boy, showers him with cuddles and protects him from the dew, covering the path leading to their separation. During the walk, the father turns away a few blocks from the wheel path, hoping to prolong the time with his son. It is then that he sees the figure of a mulatto woman. He enters a pharmacy, where earlier he had asked about the slave, and requests the attendant to take

[5]Foundling wheel, in Portuguese, "Roda dos enjeitados", was a wheel located in churches, where poor families could give their children that they could not handle. Priests or nuns used to take care the kids.

care of his son for some time whilst he investigates.

Cândido returns to the persecution. The slave is proven to really be the one described in the newspaper, Arminda - who is pregnant. Cândido calls the mulatto woman by her name, and she turns to respond, thus confirming her identity. Cândido chases and detains her. The slave begs not to be given up, promising obedience to Cândido, but after much resistance, she is taken to the owner. Nobody aids the women, even though all know what is happening: the capture of a runaway slave.

When they reach the house of the slave's master, he immediately pays Candinho for his services. Upon making the payment, however, the slave suffers a miscarriage. Candinho leaves the house without wanting to know more of what is happening, as he is only interested in getting back to his son. He takes his son, and goes back home with the reward. The aunt, Monica, hears about the events that took place and understands the necessity for Candinho's involvement, but criticizes the slave's escape and the abortion. The text ends with:

> *Cândido Neves, kissing his son tearfully, in all earnestness, blessed the escape and cared not for the abortion.*
>
> *- Not all children shall live, said his heart*[6]. (*Free translation*)

1.2 Historical Context

At the time the story is set, around 1850, the country is under the Second Brazilian Empire (1840-1889), of D. Pedro II. This period was characterized by the existence of Moderating Power[7], by the consolidation of the empire, and the liberal revolutions[8].

Since the Second Empire, the production of coffee began to gain prominence in the Brazilian economy, for which slavery was the essential hand labor. It was a period marked by alternation in State power between liberals and conservatives. Externally, it was the period of Issues

[6] MACHADO DE ASSIS, Joaquim Maria. Contos. Pai contra Mãe. Porto Alegre: L&PM, 2009, page 94.

[7] Moderating Power, or "Poder Moderador", was a fourth power (Executive power, Legislative power and Judiciary) used by the Imperator to moderate the decisions taken by the other powers, except by Judiciary, that was independent.

[8] As an exemple, it is possible to mention "Revolução Praieira", which was suppressed by the leaders themselves because slaves were sticking to it.

Christie (a diplomatic standoff with the British, 1861-1865), also the time of the Paraguay War, and the beginning of attempts at industrialization, as well as the composition of immigration policies[9] .

Nevertheless, the work *Pai contra Mãe* integrates the book *Relíquias de Casa*, which was published in 1906, when the slave regime had already been abolished in Brazil. Slave labor had doubtlessly been fundamental for the country's economy.

The author of the tale, Joaquim Maria Machado de Assis, a black person, was born on June 21, 1839, to a poor family. He never attended university. In his lifetime, he published several works (ten novels, more than two hundred short stories, more than six hundred chronic), and is thus, considered to be the greatest writer in Brazil, equivalent, on a superficial comparison, to Shakespeare or Goethe. He wrote in almost all literary genres and introduced Realism as a literary period. He was the founder of the Brazilian Academy of Letters[10].

By taking into account the historical context of the time – of true ostracism, abandonment of blacks - and to understand the story and the relationships between law, history and literature, it will be analyzed how is the discourse of history.

2. History

It is necessary to distinguish, initially, that history can both refer to the past as a retelling of the past. Considering the plural forms of speech that stood out over time and the domination imposed (as the example of Eurocentrism), History as a discipline is not the past itself, but the interpretation that historians have made or make of it[11]. J.H. Rodrigues states that:

> God is not for the dead but for the alive, because to him, all are alive. History is also not for the dead, but for the alive, because it is the present reality, mandatory for awareness, for fruitful experi-

[9] There was in Brazil, around 1824, a politic to make Brazilian people to get whiter. So the government has stimulated many European people to come to Brazil. They specially have gone to South and Southeast of Brazil.

[10] Academia Brasileira de Letras – "Brazilian Writers Academy" (free translation) – it was founded by Machado de Assis in July 20th, 1897. Available at: http://www.academia.org.br/abl/cgi/cgilua.exe/sys/start.htm?tpl=home

[11] **História** – Coleção Anglo. Anglo: ensino médio: livro-texto. São Paulo: Anglo, 2002, page 5.

> ence. Life and reality are history, generating past and future [...][12]. (*free translation*)

Foucault pointed out that traditional history used to grasp, and memorize the monuments of the past, transforming them into registry and making them count the ways by which they 'traveled'[13]. For him,

> [...] history is that which transforms documents into monuments and which unfolds the traces left by men in order to be decoded. It is where a deep attempt at trying to recognize what they had been, is made. A mass of elements must therefore be isolated, grouped, made pertinent, inter-linked, as well as organized into sets.[14] . (*free translation*)

Regardless of the distinction made between what is known about the past and the past itself; historians have, throughout the years, been devoted to studying long periods seeking a possible stability or predominance of processes. In addition to the main story, other stories unfold, like wheat, dried, Gold[15], as a great novel.

Michel Foucault explains that in disciplines such as the history of ideas and literature, attention turned not to unity but to the phenomena of rupture along the lines of "recurrent redistributions". Such is what makes the concepts reconnect with each other and produce new visions, new pasts[16]. For him, the deeper ruptures are the clippings when "a science is founded highlighting it from the ideology of its past and revealing that past as ideological" (free translation)[17]. Here, it is fitting to look at the contribution of literary analysis, considered in the structuring of a work or a text. Thus,

> The big problem that will arise – that is arisen - in such historical analysis is not knowing through which paths continuities could establish (...) [,] the problem is no longer tradition and trail, but the

[12] RODRIGUES, J. H. Teoria da História do Brasil. 3ª edição. São Paulo: Nacional, 1969, apud Coleção Anglo. Anglo: ensino médio: livro-texto. São Paulo: Anglo, 2002, page 6.
[13] FOUCAULT, Michel. A Arqueologia do Saber. 2a. reimpressão da 8. ed., Rio de Janeiro : Forense Universitária, 2012.Page 8.
[14] FOUCAULT, Michel. Ibid., page 8.
[15] FOUCAULT, Michel. Ibid., page 3.
[16] FOUCAULT, Michel. Ibid., pages 4 e 5.
[17] ALTHUSSER, Louis. apud FOUCAULT, Michel. Ibid., page 5.

cut and limit. (*free translation*)

In a simpler analogy, the problem is no longer to see the footprints in the sand forming a path, but rather, that of understanding why the footprint has not sunk in more deeply in the sand (though it may have been because of a cigarette butt or a small stone in the path, or even because it was near water or not near enough- thus the sand was too wet, or not enough). Foucault adds:

> In short, the history of thought, of knowledge, philosophy, and literature, seem to multiply the ruptures and search for all disturbances of continuity, which history itself, history in its pure and simple form, seems to erase, for the benefit of fixed structures, the irruption of events[18]. *(free translation)*

Foucault also notes that, with ruptures, there is no longer a global history and it begins to dawn what he calls 'general history'. For global history, he understands the attempt of "reconstruction" of a society, civilization, which is called "time". For both, there is a definite time-space and a system of homogeneous relations. Overall history, however, contains the elements that would allow identifying other units within this 'global history', identifiable through the reorganization of series, and of its limits[19]. "The problem that presents itself - and that defines the task of a general history - is that of determine what kind of relationship can be legitimately described between these different series"[20]. The notion of discontinuity is needed in order to better understand history. As Foucault himself said,

> Making historical analysis into continuous speech and making human consciousness the original subject of all becoming and of all practice are two sides of the same system of thought. The time is here conceived in terms of aggregation, where revolutions are never outlets of consciousness [21] (*free translation*).

This means that outbursts should not be erased from history. Nevertheless, it is not proposed that an unlimited description of the re-

[18] FOUCAULT, Michel. Ibid., page 6.
[19] Id, pages 10 -11.
[20] Id., page 11.
[21] Id., p.14

lationship be made, rather, it is necessary to limit it[22]:

> The conditions for the appearance of an object of discourse, the historical conditions in which something can be said about it as well as where several people may say different things about such object (...) are numerous and important. This means that you cannot talk about anything at any time[23].

In summary, it is understood that traditionally, global history is taught - the monolith of history - however, there are disciplines such as the history of ideas, which highlights the differences between historical periods, bringing them into conflict. However, both are not suitable to understand the relationship with the law. The most appropriate would be General History, which does not erase nor values differences, but allows one to notice the development of different "stories" such as wheat and gold. General history contains a more precise delimitation as well as limited relations, i.e., the historical moment. Let us now turn to the analysis of the discourse of law.

3. Law

As Gregory Robles Morchón believed: if there were no signs system, there would be no speech. He explains that the term "speech' applies both to each language, and in particular, to the set of them. In the same way that speech would not exist without language, he said, legal orders would not exist if there was no Law. Also according to Morchón[24]:

> In any society, whether primitive or advanced, whether it belongs to one culture or another, we use the word "law" to refer to a group, more or less extensive and complex, composed of communication processes between humans and whose immanent function is to organize life in a society and govern their own actions. In societies with low levels of complexity, these communication processes are quite simple[25](*free translation*).

---

[22] Id., 33

[23] FOUCAULT, Michel. Ibid., page 50.

[24] MORCHÓN, Gregório Robles. El Derecho como Texto (Cuatro Estudios De Teoría Comunicacional Del Derecho) 2ª ed., Navarra: Ed. Civitas, 2006, page 12.

[25] MORCHÓN, Gregório Robles. Ibid., page 12.

Morchón[26] adds that different way of saying that the law is a communicational system is to say that the law is *regulative organizational-text,* which is to organize human society to regulate actions - and thus it differs from other texts, such as literary and historical[27]. Thus, each legal system would be formed by "actos de habla" (acts of speech) which take the name of judicial decisions[28].

To the meaning of law, it is necessary to make an exception. In Portuguese, the language that this work was originally conceived in, one can use the word "right" with different meanings (law as subject, as moral principle and right, e.g.). The same word can represent the law or the legal norm (law-norm), the power to act (law-ability), which is due for righteousness (justice-law), the law as a social phenomenon (law-social fact) or as a scientific discipline (law-science)[29]. Law does not designate one but several different realities. It is impossible to work with a unique formulation of law[30].

Although possessing such diversity in meaning, the law may end up being part of various formats. As Tercio Sampaio said:

> The *law,* thus, on one side, protects us from arbitrary power exercised on the sidelines of all rules, save us of the most chaotic and dictatorial tyrant, gives everyone equal opportunities and at the same time, protects the disadvantaged people. On the other hand, it is also a manipulative tool that frustrates the aspirations of the underprivileged and allows the use of control and domination techniques, which due to its complexity, is accessible only to a few specialists [31] (*free translation*).

Therefore, one must take all the possibilities that law offers when reflecting on memory and oblivion. Now, the connections between law and history must be analyzed.

---

[26] MORCHÓN, Gregório Robles. Ibid., page 19.
[27] MORCHÓN, Gregório Robles. Ibid., page 19.
[28] Id., pages 19-20.
[29] MONTORO, André Franco. Introdução à ciência do direito. 28ª edição, revista e atualizada – São Paulo: Editora Revista dos Tribunais, 2009. page 48.
[30] MONTORO, André Franco. Ibid, page 49.
[31] FERRAZ JUNIOR, Tercio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. 3ª ed – São Paulo: Atlas, 2001.

4. Law And History - An Initial Approach

Law may end up being partial even for legal language, which is doubtlessly extremely technical and thorough. For being so technical, it distances from and sometimes injures those who seek Justice to resolve their disputes. As a legal order, law ends up being partial because it can favor certain groups. An example is given with the Nazi massacres, *apartheid,* dictatorship and slavery in Brazil, and even when regarding what happened to Arminda's, the mulatto slave's, son. Certain groups were in charge of, writing laws, and would, therefore put forth ideologies that were well ventilated at the time, leading to the aforementioned barbarities being perceived as 'legal'. Groups that prepare rules do not always take into account all sides, and it generally favors the side that it has interest in, or can empathize with. Other citizens (at least when they are considered citizens) are at the mercy of the interests of these groups.

If one is to consider Law as merely a set of rules of a nation, and as history, the linear progression of living of a nation, as usually makes common sense, one cannot say that this law is the memory of a nation, because the Law, like history, is not linear, and has much deeper influences than just rules. Moreover, the way in which the history in reports or books is seen or heard can be altered; "history producers" often would manipulate data or omit it, especially during periods of censorship. Thus, the power established by law can be broken with history and therefore relegate it to oblivion. Nevertheless, it is possible to refine the relationship between law and history from a more refined cut.

If law is to be perceived as a set of rules, principles and decisions (Common Law) or cases (Civil Law), whilst history is still perceived as a linear progression of the history of a nation, it can be said that this law is a reflection of prior to its production period, almost like a feedback, but it is not possible to say that such law is a reflection of nowadays concerns of the population, for it rarely foresees institutes. Law ends only making things retroactively. It is like giving a plate of food to those who do not eat for days, but were unable to stock up on food predicting famine.

At this point, trying to answer the question of how far law can be considered the memory of a nation becomes complex, because not all the history of a people is reported in judgments and rules, not all facts come to the attention of the judiciary. Those whom usually "make history" are the winners of the debate, i.e., historical records end up being

very partial. However, an individual who may have been found to be 'right' at one time, maybe cannot be seen in such way anymore in the light of current rules, and the records to understand the circumstances may be scarce now. Furthermore, judgments do not always involve a sense of justice, and as everywhere, there are controversial decisions. If the historical study is based on a simple random decision, the result can be completely distorted of the average thinking (of the so-called general history, the discourse of the social group).

However, if we consider discourse, while systematic and continuous playback from an average of law, though, the sum of rules, principles, and decisions (*Common Law*) / cases (*Civil Law*) in parallel with the set of facts rearranged within an analysis general history, identifying reconnections between sets, and being a very specific (and short) cut of a period of time - as Foucault determined, one can say that, to some extent, law can be considered history. However, such analysis is possible of failures, because the lines of discourse remain different (one is a reconstructive idea – history-, the other is an authoritative text- law), and the cut would be much defined, whilst "history" is a very small fragment. In addition, the cutout for analysis of law should also be very limited because, at least in Brazilian law, there are civil law, the welfare law, criminal law, constitutional law, which sometimes show internal discrepancy, either in legislation (which applies to one does not apply to the other), whether the proceedings (civil or criminal law, for example).

Nevertheless, the general history enables a reinterpretation of document:

> [...] History has changed its position on the document: it considers as its primary task, not interpret to it, but rather, it says not determine the truth or what is its expressive value, but works it inside and produces it: it organizes, cuts, sells, and distributes commands in levels, establishes series, distinguishes between what is relevant and what is not, identifies elements, define units, describes relations. The document, therefore, is not more to the history, this inert matter through which tries to reconstruct what the men did or said, what is past and that leaves only traces: it seeks to define, document the tissue itself, units, sets, series, relations. It takes off the history with the image it reveled long and why anthropological found its justification: the collective memory of an ancient and which used material documents to rediscover the freshness of its memories, it is working and the use of a documentary materiality (books, texts, stories, records, minutes, buildings, institutions, reg-

> ulations, techniques, objects, customs, etc..) that always has and everywhere, in every society, forms of stays, whether spontaneous, either organized. The document is not the happy instrument of a history that would be in itself and in its own right, *memory*, history is, to a society, a way of giving *status* and preparation for mass document that it does not separate [32]. *(free translation)*

5. "Pai Contra Mãe", Law And History

In *Pai contra Mãe,* Machado focuses mainly on the issue of the name of the characters, Clara and Cândido, as irony to the purity of that social class. Machado de Assis, masterfully, focuses on the misery of the characters, showing that Cândido and Arminda, the slave - both cannot afford a real choice in life: one is involved in misery - and slave-hunting needs, the other undergoes slavery. Nevertheless, it shows that Cândido would still have the possibility of seeking a job, which he does not do. The storyteller also shows the disadvantage of the black woman at the time. Those characters - and this tale - show the average speech of the time (in a speech analysis), because they do not represent "Cândido" and "Arminda", but rather, the allegory of the time.

In regards to the legal situation of the time, what the laws depict does not necessarily reflect social expectations; they may be merely the result of political articulations. Rules, coolly observed, do not reveal the result of human cruelty or kindness. It is undeniable that there is more history outside rules and judicial decisions. Rules do not reveal moral and financial helplessness that blacks were submitted. In Brazil, at the time of the Lei Áurea[33], freed slaves went through many difficulties, but law, *per se,* did not favor this view, which is important for Brazil's memory consolidation. Returning to the story, this is reflected in the question: why did Cândido's son have more rights to be born than Arminda's child? Legal reports do not show these abandoned children, sometimes not even history does. It is only through literature that it is possible to see and understand these children, because the approach of literature gives the density of characters and allows analyzing the average discourse of the time.

---

[32] FOUCAULT, Michel. Ibid., pages 7 and 8.

[33]"The Lei Áurea (Golden Law), adopted on May 13, 1888, was the law that abolished slavery in Brazil". Available at: http://en.wikipedia.org/wiki/Lei_%C3%81urea

Law can be considered history, rearranged within an analysis general history, identifying reconnections between sets, and being a very specific (and short) cut of a period of time within the law. Law, in general, is considered the fruit of the history, though it does not exactly match the historical period that it was drawn up, but on the previous. If one is to consider law as the set of laws, principles, decisions or case law, and history as a set of facts reorganized as Foucault, and associated disciplines such as sociology, philosophy, and some methods of analysis, law can be considered history. Law can be understood as a narrative of a nation, especially if analyzed from the perspective of literature, which adds information that are just captured by literature, as the density of characters, context, environments, scenarios, anguish [34]. Clearly each ratio analysis is a closed universe, demanding, sometimes, different literary text(s) case by case.

Conclusion: Law And History, the addition of Literature

History can indeed then, be considered as Law, in a limited time (general history) period, provided that one takes into account that law is the sum of the rules, principles and decisions, and an examination of a specific point in history. Moreover, it must be added to this analysis disciplines as literature, philosophy and sociology, taking care to not fall into the history of ideas, as Foucault well warns.

As already said by Anthony Smith[35], "no memory, no nation". The study of law whilst reporting cannot be divorced from history, sociology, or philosophy - it is that which gives them the ideological bias of the season and lead *to knowledge.* This perspective makes (or should make) judges and legislators increasingly responsible for their acts, as today is written in people's past, and it is through these reports that people will be remembered.

[34] As suggestion, it is recommended the vídeo "Autor de "O leitor", Bernhard Schlink, fala sobre dimensão humana da literatura", by Globo News. Available at: http://globotv.globo.com/globo-news/milenio/t/programas/v/autor-de-o-leitor-bernhard-schlink-fala-sobre-dimensao-humana-da-literatura/2666509/

[35] SMITH, Antony apud SOBRAL, José Manuel. Memory and National Identity: general considerations and the Portuguese case. Page 8.

References

ACADEMIA BRASILEIRA DE LETRAS. Available at: http://www.academia.org.br/abl/cgi/cgilua.exe/sys/start.htm?tpl=home. Accessed in May 24th, 2013.

"AUTOR DE 'O LEITOR', BERNHARD SCHLINK, FALA SOBRE DIMENSÃO HUMANA DA LITERATURA", by Globo News. Available at: http://globotv.globo.com/globo-news/milenio/t/programas/v/autor-de-o-leitor-bernhard-schlink-fala-sobre-dimensao-humana-da-literatura/2666509/

FERRAZ JUNIOR, Tercio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. 3ª ed. – São Paulo: Atlas, 2001.

FOUCAULT, Michel. A Arqueologia do Saber. 2a. reimpressão da 8. ed., Rio de Janeiro : Forense Universitária, 2012.

History – Coleção Anglo. Anglo: ensino médio: livro-texto. Porto Alegre: Anglo, 2002, page 5.

HOLMES JR., Oliver Wendell. The Common Law, 1881.

LEI ÁUREA (Golden Law), available at: http://en.wikipedia.org/wiki/Lei_%C3%81urea.

OLIVEIRA JÚNIOR, José Alcebíades. SAUTER SOARES, Leonela Otilia. Machado de Assis e Os Direitos Humanos: Contribuição da Literatura para a Interpretação Jurídica. Pages 330-359; Direito, arte e literatura [On-line Eletronic resource] / organized by CONPED/UFF ; coordinators: MADEIRA FILHO, Wilson; GALUPPO, Marcelo Campos. – Florianópolis : FUNJAB, 2012.

MACHADO DE ASSIS, Joaquim Maria. Contos. Pai contra Mãe. Porto Alegre: L&PM, 2009.

MONTORO, André Franco. Introdução à ciência do direito. 28ª edição, revista e atualizada – São Paulo: Editora Revista dos Tribunais, 2009.

MORCHÓN, Gregório Robles. El Derecho como Texto (Cuatro Estudios De Teoría Comunicacional Del Derecho) 2ª ed., Navarra: Ed. Civitas, 2006.

SOBRAL, José Manuel. Memory and National Identity: general considerations and the Portuguese case. Lisbon: University of Lisbon. Available at: http://www.ics.ul.pt/publicacoes/workingpapers/wp2006/wp2006_4.pdf, accessed in May 24th, 2013.

The role of Literature in promoting and effecting Human Rights

Laura Degaspare Monte Mascaro

Abstract: **Goal:** *Firstly, this work intended to re-signify human rights, by interpreting freedom and equality from existentialism philosophy grounds, in a way that is sensitive to the existential essence of man; meaning that freedom and equality could be translated in authenticity and concern for others. Secondly, the present work intended to analyze the role of literature in promoting human rights, by its educational capacity, and of effecting these rights, by allowing the experience of freedom, authenticity and recognition into the life of those who come into contact with it.* **Material and Methods***: The present work is strictly theoretical research. The material corresponds to the bibliography read principally under the hermeneutical method. We had no intention of going through the entire work of any specific author, but to accomplish a selective approach of the authors and their work, in terms of their contribution to the theme and perspective here adopted. The proposed theme raises an interdisciplinary approach which many times can find itself at the frontier between human rights, philosophy and literature. For this reason it has been necessary to examine the bibliography in a manner that allows a harmonious connection between the ideas brought by the texts, only possible by means of a creative and dialogical approach. Thus, theoretical andliterary texts could dialogue and validate themselves mutually.* **Conclusions:** *We could conclude that literature acts by its way of being as an event and experience that is incorporated in the existence of writers and readers, as a way: (i) of understanding the world and building authentic personality and human ethics; (ii) of discourse and dialogue with another and with tradition, by the fusion of horizons and sharing of world views. Therefore, literature plays an important role in forming personality, ethics and the way of being of individuals, so that people are able to be-in- the-world and share it in an authentic manner, by allowing the comprehension and understanding of human rights in a familiar way, which makes sense in their existence.*

Keywords: Literature, Human Rights, Temporality.

I- Introduction: Re-thinking Human Rights

Philosophy of Law has always struggled to promote and effect established rights, based not only on the normative relation, but also on the axiological content of the provisions. Such movement is followed by the human rights, which, as we know, are in the precise moment to be made effective. It is fundamental, in this sense, to raise a question about which ways to promote human rights pay attention to the preservation and rescue of the humanity of men, and further, how can we characterize this humanity, considering the many attempts made by philosophy over time.

It is worth remembering that the Universal Declaration of Human Rights wasn't primarily directed to the states, but to every individual and every organ of society, breaking, therefore, with the classical division between the state that ensures the protection and respect of rights and the civil society, which had been built by a Revolution of the *bourgeois,* from which derived the human rights of an egoistic man (MARX, 1975, pp. 25-30). In fact, the Universal Declaration of Human Rights points out to promoting human rights through education and development of human personality, in light of the strengthening of respect for human rights and fundamental freedoms[1].

Keeping this in mind, we intend to develop a proposal of interpreting freedom and equality principles governing human rights, having been enunciated in Article 1 of the Universal Declaration of Human Rights, by existential phenomenology. Philosophy of Law must look beyond the subject of right inherited from legal positivism so that it can (re)think and (re)signify law and justice. Therefore, it is crucial to introduce the question of who we are for and at the Philosophy of Law (CHUEIRI, 2004, p. 61).

Re-signifying human rights is important considering that law exists only when it is applied and its implementation meets the compre-

[1] UNESCO Recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedoms (1974); UNESCO World Plan of Action on Education for Human Rights and Democracy (1993); Vienna Declaration and Programme of Action (1993); UN Decade for Human Rights Education (1994-2004); World Programme for Human Rights Education (2005-); UN Declaration on Human Rights Education and Training (2011).

hensive, temporal and historic horizon (MAMAN, 2003, p. 108). Only through dialogue with human rights tradition that speaks to us, mainly through the Universal Declaration of Human Rights, we will be able to conduct an interpretation attentive to the passing of time and to human contingency.

Human Rights validity and, consequently, its effectiveness are only going to be possible with the overcoming of the distance of time by performing a reading according to the sensitivity of the present. This places the interpreter closer to human rights (MAMAN, 2003, p. 110), which will be recreated and will be made present in every time. Only by these means their continuity and universality will be secured, by accompanying human historical move.

To re-think the past that speaks through these rights and, from a certain detachment, impart a project of sense suited to the existing human being are forms of exercising human freedom on the way to an ethics more authentic and appropriate to different times and places.

The issue that will rise from this hermeneutic undertaking is on the impact of such interpretation on promoting the human rights. Men's way of being is historical, thus, contemplates changing culture and values, also due to periodical ruptures and attempts to re-think tradition. Accordingly, human rights are a mutable class, derived from contextual choices. Because of that, a cast of posed rights in a certain historical moment goes through multiple crises of signification over time and through the process that leads to their fulfillment. Nevertheless, the question of human rights' grounding shouldn't be relegated to the position of taboo, and should be taken up every time in a philosophical way, even if it is not possible to reach a final, singular foundation.

To re-thing the past and tradition that have been carried with these rights is to give human rights a project of sense adequate to the existing man. Both secularism and non-essentialism demonstrate that the 1948 declarants didn't blindly follow the illuminist precedent; yet followed to some extent their own course. Critics that interpret the articles of the Declaration through a strictly essentialist or rationalist prism undertake a very limited interpretation of the document (MORSINK, 1999, pp. 296-302).

One way to escape the essentialist formula is, as proposed, to investigate how freedom and equality can be seen from an existentialist perspective. Thereby, the investigation on human rights' grounding, having as source value the human being, would take the *dasein,* as man in its existence, as a starting point.

Considering that the strictly essentialist view of human rights pacts with humanism, such a perspective would be fundamentally compromised with traditional metaphysics; which, by the way, is oblivious to the question of being. The task of thought would be: from a new impulse evoke the *humanitas* of the *homo humanus* and from this point find its foundation (HEIDEGGER, 2005, pp. 21-25). This new, though so original impulse approaches man in its relationship with the *aletheia*, being man the one that emerges from itself, so that in this bloom, and due to it, receives the verb[2]. At the verb[3] man relates to the environment where he lives.

The living being, which is the man, is the one determined by the blossoming and opening. Such Greek determination of the essence of men soon was changed by roman understanding: man became animal and *ratio*, and in modern thought the essence of subjectivity, namely, men's selfness, was reason.

One can infer from the *dasein* that men experience themselves previously to the cognition that all the experiences are theirs. Thus, the *dasein* behaves toward its being, this meaning: the essence of man rests on its existence (*weise-zu-sein*). Heidegger intends to redirect our understanding of what it is to be a person from self-conscience to how we live our lives.

Heidegger wishes to explore a more fundamental way of self-conscience and unveiling than traditional moral philosophy is used to do by the notion of responsibility and imputation: a sense of identity that underlies the awareness of convictions, commitments, thoughts and responsibilities. Thereby, being a person means to project someone to be, the reason why our being is an issue to us. Our life matters to us, even when we neglect it. To live is to answer the question of identity. However we do not confront the question of *who we are* by thinking about ourselves, but simply living a human life, experimenting. *Who we are* is prior and more fundamental than *what we are responsible for*. Thus, there is no objection to the development of a philosophy of ethics consistent with Heidegger's thought.

---

[2] The essence of the verb is that it allows the being to appear and preserves what is presented, which means: which is uncovered as such. The being manifests primordially through the verb (HEIDEGGER, 2008, p. 114)

[3] The essence of men, therefore, inhabits the relating to the beings as such trough the verb. As the being of men, the essence of the verb is grounded in the essence of truth and belongs to it; the true verb in the sense of the aletheia is the myth and the epic (HEIDEGGER, 2008).

The question of identity also permeates our relationship to others: in the measure that I care with who I am, I also care for who others are. This will become clearer when we explore the interdependence between the rights to freedom and equality.

Given contingency and vulnerability as characteristics of the existing human being, we can understand how human rights can be defined by the possibility of contingent and flexible interpretations trough time and space, which, however, are actual at each present and dialogue with tradition. Even because, despite man's contingency and conscience of its finite existential situation, he is the only one that can be elevated, in some extent, above the world that surrounds him. He is able to expand his worldview, explore possibilities - which are a mixture of his ability of creating and of the world itself -, and to find paths so that his being endures beyond his existence. Besides that, relating to other people and other times carries the possibility of taking his identity beyond himself and coming in contact with new horizons.

Therefore, human rights' universality rests precisely on its particularism. The tension between universalism and recognition of the cultural diversity of the world is dissolved from the moment one recognizes that plurality and diversity is the most universal feature of human beings.

Human rights, therefore, would promote the legal conditions and assurances for the existing human being to fulfill its identity in a wide range of possibilities, which also would admit the choice for authenticity. Rights to freedom and equality would acquire new meaning. Equality would abandon its formal siege to be materialized. However, this realization would depend on the openness and recognition of the other, and, by consequence, on the pre-occupation towards him. Freedom, in its turn, would no longer lie on the assumption of free disposal of nature and men, and would become the possibility of projection of our own authentic identity beyond the public opinion, facing and sometimes overcoming contingencies.

However, the fulfillment of our own identity towards possibilities and above the surrounding world would depend on a few elements. Firstly, of broadening understanding and, thereby, the horizon and worldview of individuals, which would directly reflect on the investigation of their identities and of the role to be played by them in the world, beyond the possibilities offered by the public opinion and by the *Anyone*. Secondly, it would depend on the proper material and social conditions for the fulfillment of such an identity project.

When the conditions for self-empowerment (of one's own being) are assured, as well as the conditions for the authenticity that fits a social context of equality in the terms proposed[4], the rights to freedom and equality are on their way to being fulfilled. As we saw earlier, freedom is essential to man understood as the existing human being; and such freedom takes place in the determination of identity as we live our lives. The existing human being, nevertheless, has the way of being-with, which determines who the *dasein* is, its identity, is wattled with the identity of others, since they share the world and the truth.

Therefore, we do not intend to describe a particular content of freedom and equality, yet we are posing the question of the ideal conditions for the existing human being to choose and live its identity in a wide range of possibilities, which would also bear the possibility of coming as close as possible of an authentic existence.

We must recall that one of the main foundations of the totalitarian regime was the opposition between the bureaucratic state and the totality of the people; the persecution to the enemies of the enemies of the state was restless and the entire people became suspect, being held under vigilance and complete submission. As a consequence, a radical policy of isolation of the individuals was elaborated based of systematic delation. According to Comparato (2006, p. 369), "such collection of individuals, mandatorily separated from each other – since all are potential betrayers (crime of intent) -, makes an uniform mass, composed of equal unities, perfectly fungible and, therefore, susceptible to mass extermination". Again appears isolation and uniformity as elements that create ideal conditions for the terror of state to flower, which are nothing more than the notion of *das Man* (the Anyone) forged by Heidegger taken to its verge.

Considering this proposal of re-thinking human rights, what would be the spirit of the education aimed at their fulfillment? And with this question comes another concern: of interpreting and re-signifying the declared human rights, so that they can keep current and be present in every context, in every existential situation where they are brought to, authentically.

---

[4] As recognition - of the plurality of men, and of the other - as determinant to the definition of one's identity. Also, equality of conditions and opportunities that can allow the exercise of freedom as a way to the fulfillment of human potentialities and possibilities, which, however, are exercised in the being with another and being in the world, which is shared.

To ensure that the education proposed humanizes in a profound sense and that it is integrated to the existence of every man, it should intend to be not a formal education, but the true formation (*bildung*) (GADAMER, 2007, pp. 44-47).

The formation, since the Greek Paideia, intended to educate through the ethics of men, not meaning the teaching of values, but posing the question of their identity and of their way of being that would come to define the paths and purposes traced by all. There is no biggest conviction than that forged on ethical grounds. It this way we prevent the objectification of the human rights values, because to define a value is to objectify it, leaving no room for hermeneutics (GADAMER, 2007, p. 50).

Evidently, the concept of formation won a lot with existentialist theories. In them, education leaves behind the concept of knowledge as an objectification relationship, aiming towards the domination of nature, of truth and of the other, while becomes a rescue of the pre-occupation with existence, recovering the essential relationship of man with speech and with the being, in other words, man once again has a more primordial sight of the world, that was covered by oblivion of the truth of the being and replaced by the technical-scientific.

Accordingly, the ethical debate passes to the foreground, caring the man for his identity, for who he is while thrown in a world he shares with others.

II – Literature as a source of humanization and authenticity

Here, literature comes in, with its way of being that, according to Antonio Candido (2004, p. 176), "doesn't corrupt nor edifies, but freely bringing in itself what we call good and what we call evil, humanizes in a profound sense, since it makes us live." At this point, bringing a passage of Arendt's *Eichmann in Jerusalem* can help us illustrate how literature is not materially necessary for men, not even for them to live their lives at the space of medianity, however can be essential for overcoming this condition:

> Eichmann's best opportunity to show this positive side of his character in Jerusalem came when the young police officer in charge of his mental and psychological well-being handed him *Lolita* for relaxation. After two days Eichmann returned it, visibly indignant; "Quite an unwholesome book" – *Das ist aber ein sehr unerfreuliches*

> *Buch"* – he told his guard. (…) The longer one listened to him, the more obvious it became that his inability to speak was closely connected with an inability to *think*, namely, to think from the standpoint of somebody else. No communication was possible with him, not because he lied, but because he was surrounded by the most reliable of all safeguards against the words and the presence of others, and hence against reality as such. (ARENDT, 2006, p. 49)

I believe she was talking about the ability to think and judge. Isn't it curious to think that Eichmann had such relationship with literature? Because when we take a look at *Lolita*, we see that is a fictional story that is narrated in the first person. In other words, you are compelled to put yourself in the perspective of the narrator, as despicable and pathetic as he may be. As this is an exercise not only of the ability to think, of the original *logos*, but of the ability to judge as well.

But how can literature's way of being provide an ethical experience of freedom?

First of all, literature puts us in deep contact with a language closer to the Poetic Myth and to the logos, not to the ratio, recovers a little of that essential relationship of man with speech. Therefore, provides us with the unveiling of the world different from the one proposed by method and scientific enunciative language. All that because language expresses a world view. As we widen language, we expand the horizon.

Literature presents us to a truth in the sense of the *aletheia* (covering/uncovering of being) and not in the sense of the roman *veritas*, which is based at the *imperium* and adequation (HEIDEGGER, 2008).

Whether discursive speech, which widens our horizon of possibilities, which operates the growth of the world by the representation, whether poetry, which establishes the game between the said and the unsaid and thus works with the ineffable truth.

Literature restores an original look upon the world, making possible that we face the question of identity and of our relationship to the other in a more authentic way, escaping the Anyone and the medianity. As a result, we can exist in the world without ambition to overpower it, or the other.

III – Literature as discourse

Secondly, literature acts as a form of discourse, of action in the free political space, and even as a form of expansion of this space. Con-

sidering that the polis is nothing but man's essential dome, were history of truth unfolds as the covering and uncovering of being (HEIDEGGER, 2008). The writer discourses and reveal who he, authentically, is (this happens with authentic literature), by unveiling the world and himself in the public space. Furthermore, literature traverses the spaces and allows the propagation of that discourse.

We can't forget the other side of discourse, which is dialogue. Thus, as literature is only consummated with reading and comprehension, she allows a dialogue between reader and the literary work, with the fusion of horizons, which can come to change the reader.

When Sartre (2006, pp. 20, 39, 41-46, 58) supports engaged literary work, at first we suspect he confers a clearly deliberate bias to literature. Afterwards, we understand that the engagement he has been referring to is nothing but the generosity of the writer toward his reader, since he trusts on the reader's freedom to interpret his work, recognizing, thus, his freedom. The opposite also occurs, since the reader allows himself to be changed by the literary work while setting the dialogue of comprehension.

IV – Literature in time

At last, we must mention the possibility of literature acting as a way to establish a dialogue with tradition that speaks through it. One of the characteristic of literature, which, we must say, cannot be dissociated from the way its content is streamed, in this case the writing, is its temporal way of being.

It means literature is in the temporal flow and not above it, out of it.

When we say a particular literary canon is timeless because surpassed the barrier of the time it was created and can be read at any time, we use the wrong expression, once literature, as the human being, and as a human creation, exists in time.

Therefore, literature doesn't belong to eternity, maybe to a certain immortality that escapes the finite course of human lives[5]. Men are distinct because they do not live the life of the specie, but authentic, different lives within their mortality. Despite their mortality, however, they can produce immortal works, which can act as traces of their for-

[5] For the distinction between immortality and eternity see Hannah Arendt`s The Human Condition (2001, pp. 26-30).

mer existence and identity.

Thus, Antonio Candido (2006) defines that literature's utmost role arises when we evaluate a literary works' ability to transcend, endure in time and talk to each present in a current way, as its content spoke to that particular moment.

It is worth saying that these literary works that transcend the occasion and reach other times demand a certain hermeneutic spirit (GADAMER, 2007), especially because the existence of literature is only consummated through reading, with the hermeneutic act of the reader or interpreter.

We are not talking about a reading attentive only to the comprehensive horizon in which the literary work was created, in an attempt to reconstruct the meaning of the work through the historical method. Is about a reading that takes literature-se temporal way of being into account, once it doesn't act as a mere recordation, but speaks as a "you" (tu) to the reader (GADAMER, 2007, pp. 467-468); its own content carries the moment represented through tradition's moving horizon and, each time we plunge more and more into the content, more we get close of the represented, considering the changes suffered in its various interpretations, relating to different contexts in different ways.

The hermeneutical experience causes at the same time a detachment and an appropriation (two moments: the output of ourselves and the return). From the moment we intend to understand a particular literary work, we are getting in contact with the entire tradition that speaks through the literary work and ourselves. Tradition becomes so an interlocutor with whom a dialogue is established (of understanding). In this dialogue, however, we can't intend to anticipate our interlocutor reflexively, becoming masters of tradition. On the contrary, we must recognize then our own historicity.

Opening to tradition, not only we allow us to be changes by it, as we establish with it an authentic relationship of freedom, of mutual belonging, unique and distinct for every relationship set.

Nowadays, it is worth saying that the voices of tradition are not unison, but multiple, both the ones that speak through us and the ones that come from other sources. Thus, address tradition's authority is quite complex.

Tradition's, or a particular tradition's, presence and authority are very relevant for formal education, which establishes with tradition, depending on the education model adopted, a relationship of submission. However, in order for tradition to arise also as a source of freedom, the

link established must be also of formation: absolutely neither normative, nor dogmatic, but from the experience we would describe as strangeness, creation and appropriation. Accordingly, man breaks up with the immediate and overcomes the surrounding world, allowing the past to touch him profoundly and coming to project the future in an ingrained way.

Taking a distance from the daily world, occupy yourself with "something that in principle is of strange nature" leads to learning of the validity of what is odd, that starts to be taken in our being. Thus, we start to be determined by the strange that we choose welcome as ours (CALVINO, 2007) - "my classic". The unveiling of what is strange is, at the same time, our unveiling.

Thereby, the understanding and appropriation of literature, of its past and distant sense, carries the possibility of the return to us, of finding our own possibilities. We end up taking a part in the entire tradition as a common universe.

Accordingly, we are forming our memory that also needs to be formed as historical and mortal man's essential trace.

Only through forgetting and rupture with the past we can completely renovate our spirit, seeing everything with new eyes. However, this may bring drastic consequences for our freedom, considering that we may not understand anymore the influence of tradition on our actions and on the world were we have been thrown.

We can only think of freedom when we don't ignore the importance and influence of the past, coming in the form of tradition, in our being. Otherwise, we blindly submit to the authority of tradition.

Literature, that is essentially temporal in its way of being, hanging on time, provides this dialogue with tradition. Thenceforth, the right to memory acquires new meaning, extrapolating the look of historical conscience, and always pointing to an ingrained freedom and to the future.

V - Conclusion

We could conclude that literature acts by its way of being as an event and experience that is incorporated in the existence of writers and readers, as a way: (i) of understanding the world and building authentic personality and human ethics; (ii) of discourse and dialogue with another and with tradition, by the fusion of horizons and sharing of world

views. Therefore, literature plays an important role in forming personality, ethics and the way of being of individuals, so that people are able to be-in- the-world and share it in an authentic manner, by allowing the comprehension and understanding of human rights in a familiar way, which makes sense in their existence.

References

ARENDT, H. **A Condição humana**. 10. ed. Rio de Janeiro: Forense Universitária, 2001.

ARENDT, H. **Eichmann in Jerusalem**: a report on the banality of evil. London: Penguin UK, 2006.

CALVINO, I. **Porque ler os clássicos**. São Paulo: Companhia das Letras, 2007.

CANDIDO, A. O direito à literatura. In: _____. **Vários escritos.** São Paulo: Duas Cidades, 2004. p. 169-191.

CANDIDO, A. **Literatura e Sociedade:** estudo de teoria e história literária. 9. ed. Rio de Janeiro: Ouro sobre Azul, 2006.

CHUEIRI, V. K. Shakespeare e o direito. **Revista da Faculdade de Direito daUniversidade Federal do Paraná**, Curitiba, n. 41, p.59-83, 2004.

COMPARATO, F. K. **Ética:** direito moral e religião no mundo moderno. São Paulo: Companhia das Letras, 2006.

GADAMER, H. G. **Verdade e método I.** 8. ed. Petrópolis, Bragança Paulista: Vozes, Ed. Univ. São Francisco, 2007.

HEIDEGGER, M. **Carta sobre o humanismo**. São Paulo: Centauro, 2005.

HEIDEGGER, M. **Parmênides**. Petrópolis: Vozes, 2008.

MAMAN, J. A. **Fenomenologia existencial do direito:** crítica do pensamento jurídico brasileiro. 2 ed. São Paulo: Quartier Latin, 2003.

MARX, K. **A questão judaica.** [S. l.]: Lusosofia, 1975. Available from: <http://www.lusosofia.net/textos/marx_questao_judaica.pdf>. Accessed on: 04 April. 2009.

MORSINK, J. **The universal declaration of human rights**: origins, drafting, and intent. Philadelphia: University of Pennsylvania Press, 1999.

SARTRE, J-P. **Que é a literatura?** 3. ed. São Paulo: Ática, 2006.

Schlinks's "Der Vorleser" and the concept of Truth

Maria Clara Calheiros[1]

Abstract: Schlink's novel, "Der Vorleser", constitutes the starting point from which the author wishes to examine the recent debate on historical research and writing generated by the law approved by the French parliament that punished denial that the 1915-16 killing of Armenians was genocide. The fact is that nations worldwide, including those having democratic and authoritative governments, appear to be interested in exerting some kind of control on the historical narrative of past events. Therefore, this paper aims to engage in a comparative study of the meaning of the concept of truth used both in the legal and the historical fields.

Keywords: Schlink Truth History Memory Freedom of Speech

I. Introduction

In early 2012, I followed the press coverage of the lawsuit filed against Judge Baltazar Garzón, accused of having initiated a procedure to investigate crimes committed during the Spanish Civil War, covered by an amnesty law, and simultaneously followed the debate on the passing of a law by the French National Assembly on the Armenian genocide perpetrated by Turkish forces in 1915. To an external observer there was some paradox on these two events: while Spanish courts were trying to cope with legally mandatory oblivion, French legislators were ensuring the perennity of past events narrative through legal ruling.

What I found interesting was noticing that, in both events, there were obvious tensions between Law and History, with very different scenarios, motivations and interests. Eventually, I became especially interested in memorial laws and tried to understand its aim. And so, a question emerged, for which I have sought to find an answer: can law

[1] Associate Professor of law. University of Minho (Portugal) Law School. claracc@direito.uminho.pt. Unless otherwise noted, translations are mine.

legitimately establish a historical truth? And even if it can, is there any benefit to gain from it?

In my analysis, for the sake of brevity, I will be focusing on the main arguments submitted in the debate around the laws of historical memory, so that I can, at a later stage, approach the issue through the contribution that I believe can be extracted from Schlink's work The Reader. This can be of use for two reasons: one internal, or substantial to the work itself, concerning what it can tell us about the truth of Law and the truth of History; and one external, related to the controversy ultimately generated by the work (revived by its film adaptation a few years ago) and the legitimacy or illegitimacy of the interpretation it proposes of Nazi Germany and, especially, of the issue of managing the problem of guilt by the second post-war generation.

Let us recall, only briefly and in very general terms, the plot of this novel: a teenage boy , Michael Berg falls, in love with a woman, Hanna Schmitz,who is old enough to be his mother, with whom he lives an intense relationship, which is abruptly ended by her, without any explanation. This causes him a certain emotional trauma. Years later, now a law student, the protagonist of this account, told in the first person, discovers, while following the trial of a group of former Nazi guards, that the woman who had been his lover was among those accused of a crime of mass murder of women who were prisoners in a concentration camp. This event generates a set of contradictory feelings in the protagonist, who cannot help loving this woman but simultaneously feels the need to repudiate and distance himself from her.

II. Law, History and Truth

It is after this disturbing discovery and faced with the need to deal with the consequences it entails, on a personal level, that the protagonist is confronted with the need to choose his legal profession. This is a choice that he will postpone for a long time, until indecision becomes unbearable. What I intend to take as a starting point for my analysis of the intersection between History, Law and Truth, are the pages of Chapter 4 of Part III of the book, where Michael describes his thoughts about the choice he has to make, his doubts and anxieties.

> I didn't see myself in any of the roles I had seen lawyers play at Hanna's trial. Prosecution seemed to me as grotesque a simplifica-

> tion as defence, and judging was the most grotesque oversimplification of all. […] That did not leave many legal careers, and I don't know what I would have done if a professor of legal history had not offered me a research job. Gertrud said it was an evasion, an escape from the challenges and responsibilities of life, and she was right I escaped and was relieved that I could do so. […]
>
> Now escape involves not just running away, but arriving somewhere. And the past I arrived in as a legal historian was no less alive than the present. It is also not true, as outsiders might assume, that one can merely observe the richness of life in the past, whereas one can participate in the present. Being a historian means building bridges between the past and the present, observing both banks of the river, taking an active part on both sides. One of my areas of research was law in the Third Reich, and here it is particularly obvious how the past and present come together in a single reality. Here, escape is not a preoccupation with the past, but a determined focus on the present and the future that is blind to the legacy of the past which brands us and with which we must live."

Thus, in this excerpt, dominated by an intense feeling of guilt and by a pressing need to understand Hanna's actions, we find the protagonist at a crossroads, in which he seems forced to opt between a life in service to the truth of law (which corresponds to a simplification of the truth - especially in what concerns the role played by the judge, as the character concludes) or the truth of history, presented as the perspective of the legal historian, one that he ultimately ends up choosing (perhaps because it liberates him from having to issue a final decision: to not take sides, to not judge? That which he is unable to do?) But surely because it appears to him as broader, more profound, less reductive. But even then, Michael realizes that he will always be too far from any point of arrival on his search for an explanation. After all, is this not an escape again?

Back to the present and to reality, keeping in mind the previous considerations, let us, thus, analyse the issue of memory laws and, in particular, the case of the controversial French law that gave rise to this reflection.

III. Truth and memory laws

States have often shown an interest in establishing an official version of history. This has been an old concern throughout the history of mankind and it has had several manifestations. European monarchies have had official chroniclers and, even before that, the writing of history had already been ordered from certain individuals. Therefore, the State's interest in history is not new and it continues to have different expressions. The Democratic States that emerged in Europe after the Second World War took on different roles as guardians of history: preserving vestiges and historical documents, ensuring the proper teaching of history, promoting historical research.

One of the most peculiar expressions of this guardianship of history by the States took the form of the so-called "historical memory laws." These have been present in different legal systems for decades, born as a result of some peoples' need for reconciliation with dark episodes of their past and the inherent sense of guilt. Not intending to be exhaustive, I recall the cases of Germany, Spain or France.

Despite the good intentions that, one may initially assume, rule these initiatives, the fact is that there is no consensus concerning them. It is true that what is often at stake is the protection of historical truth, in face of all kinds of denial concerning the serious crimes against humanity perpetrated in the twentieth century. However, it is equally evident that the immediate consequence - we should, in fact, say the only consequence - is restrictions on freedom of expression.

One of the disputed aspects of the recent French law of 2011 (which established punishments of one year in prison or a 45,000 euro fine for anyone who denied the Armenian genocide), eventually considered unconstitutional by the Conseil Constitutionelle on 28 February 2012, has to do with the fact that it addresses an issue that did not even relate directly to French history. Historian Gilles Manceron wondered whether France would create a law for every crime in the world, such as those of communism in Russia or the Indian genocide in America. For historians, highly critical of this kind of legislative initiatives, the real reasons that compel these lawmakers fall outside the scope both of historiography and law: it has ties to the political agenda.

Even after the decision of the French *Conseil des Sages* deeming the new law unconstitutional, although based on arguments related to the issue of separation of powers and disproportionate limitation of

freedom of expression, the controversy remains and some have even considered it an opportunity to re-question other historical memory laws, in force in France.

But are all memory laws questionable? The opinions of historians are divided, as some admit that they can make sense in preventing the emergence of dormant anti-Semitic movements, for example, while others go as far as condemning all legislative interference in this field. There is, in the past, at least one example of trial and conviction of an historian (Bernard Lewis, professor at Princeton, tried by a Paris Court in 1995) for a crime of opinion.

The very *Gayssot Act*, of 1990, had already been subjected to trenchant criticism by historians such as Pierre Vidal-Naquet, condemning attempts to establish official truths and, in 2006, a petition was signed by 19 historians, demanding the repeal of the *Gayssot Act*, the *Taubira Law* on slavery and also the law demanding the inclusion of references to the positive aspects of the French colonization into school textbooks.[2]

The adoption of "historical memory laws" that intend to establish certain versions of the past and prevent, or at least restrict, their discussion was the subject of a lively dispute by historians, who prepared a manifesto whose terms are worth remembering:

> History is not a religion. The historian accepts no dogma, respects no prohibition, knows no taboos. […] History is not the moral. The role of the historian is neither to praise nor to condemn but to explain. The historian is not a slave to the present. The historian does not tack onto the past modern ideological formulations or introduce today's sensitivity into bygone events. History is not memory. The historian, in scientific steps, gathers people's memories, compares them with each other, juxtaposes them with documents, objects, traces and establishes facts. History takes memory into account but is not reduced to it. History is not a legal object. In a free state, neither the Parliament nor the judicial courts have the right to define historical truth. State policy – even driven by the best of intentions – is not the policy of history".[3]

But it was not just historians who felt, with discomfort, that a tendency to pass memory laws was emerging. Obviously, the debate

[2] RAIM; Laura, Génocide Arménien: les historiens ne veulent pas la loi, Le Figaro, 21.12.2011, electronic edition

[3] Available at www.ldh-toulon.net/spip.php?article1086

goes on (with particular interest to us in this respect) also among jurists.

In fact, 56 legal experts from all over France signed an manifesto against the adoption of memory laws, considering that what is at stake is the free communication of thoughts and opinions. While taking into account the need to punish racist behaviours, it is believed that memory laws go too far, for, in them, under the guise of the indisputable heinous nature of the crime thus recognized, the legislator prevails over the historian in defining historical reality and issuing criminal sanctions based on that definition, which prevents not only the most simple and basic denial but also the very scientific debate around reality, determining the conditions of its development.

More recently, according to BADINTER(2012), in the absence of a judicial ruling with *res judicata* (as happened in the case of the genocide of the Jews, through the judgments of the International Military Tribunal at Nuremberg - a jurisdiction created by the London Agreement, of August 1945, and ratified by France), it would not fall to French legislature to replace the action of the courts. On the other hand, it is stated: "*le Parlement français n'a pas reçu de la Constitution compétence pour dire l'histoire. C'est aux historiens et à eux seuls qu'il appartient de le faire*." ("the French parliament has not been vested by the Constitution with the power to write history. Such is the exclusive role of historians.")[4]

IV. Truth of History and Truth of Law

So far, we have simply summarized the arguments presented within the debate sparked by historical memory laws, largely focused on issues related to freedom and its legitimate or illegitimate restriction. We should now adopt another angle for the analysis, which is that resulting from the ongoing discussion about the truth of law and the truth of history. We thus wonder if there are, after all, many similarities between the roles of lawyers and historians?

In truth, it must be said that the comparison and the search for similarities between the roles of jurists, especially judges, and historians is recurrent in the legal field. Those who have engaged in this endeavour generally emphasized that both these players were tasked with ascertaining the truth of past events through a set of means, clues or evi-

[4] Badinter, Badinter: "le Parlement n'est pas un tribunal", Le Monde, 14/01/2012, electronic edition available at www.lemonde.fr/idees/article/2012/01/14/le-parlement-n-est-pas-un-tribunal-par-robert-badinter_1629753_3232.html,

dence, that only provide indirect access to them. A judge would, thus, also be involved in a historical research of bygone events, albeit less free (mainly limited to the contributions of the parties in the proceedings..., and with the leeway permitted by the law of evidence), but still with the same contours, assumptions and goals.

Criticism of this view seems necessary and obvious and many have expressed it before, so I will also present it here: the goal pursued by the historian is broader and, in truth, of a different nature, as he seeks not only to establish the singular facts, but rather explain them and frame them within their proper context.

In the words of the Portuguese historian José MATTOSO (1997, 38,39):

> In fact, History is no longer, as such, a literary discipline. It does not interpret any texts. The past is not a collection of human facts that memory retains or imagines, but the sum of those that can be deduced from concrete traces, materially imprinted by man on the surface of the Earth. […] Now, without establishing a precondition for the critical objectivity of data and their association in scientific terms, History, made into a mere narrative, is no different from fiction. With the disadvantage, in that case, of violating the rules of the game, that is, denying its fictional nature.
>
> However, the quest for positiveness in History must not lead us to forget that its contact with the past is made through signs and representations that mediate reality, and not by a direct examination of reality itself. Those signs are the marks left by the passage of Man, but they are also the very verbal or mental representations that allow us to choose which of them are considered representative. History is, therefore, a representation of representations. It's not exactly science, but knowledge.
>
> The role of history as knowledge and, consequently, the function performed by its communicability, paves the way for the examination of History as art."[5]

Thus, it seems we must[6] agree with those who advocate that the similarity between the roles of judges and historians is more apparent (and even illusory) than actual. A comparison between the two inevita-

5

[6] TARUFFO, M, la prueba de los hechos, 4ed, Madrid: ed. Trotta, 2011, pp. 336-341.

bly leads to an unacceptable simplification of the epistemological and methodological issues inherent to historiography[7] and to the judicial application of law.

This is the moment to go back and recall the excerpt we have transcribed from "*The Reader*" and the character´s dilemma pictured there. It seems to us that the above mentioned simplification is precisely what the protagonist wants to avoid by choosing the profession of historian of law.

More than anything, the truth of law is never dissociated from the truth of the lawyer. Therefore, it can never have the same nature as historical truth. As we know, in Law, a fact is never sufficient in itself; instead, they are always hopelessly juridical. Let us recall the lesson of Professor CASTANHEIRA NEVES concerning the relationship between matter of fact and matter of law:

> When considering the matter-of-fact, the matter-of-law is implicitly present and relevant; when considering the matter-of-law, the joint influence of the matter-of-fact is indispensable. Or in a much more expressive formulation: "To tell the truth, "pure fact" and "pure law" are never found in legal affairs: fact does not exist but from the moment it becomes a matter of application of law, and law is moot if there is no application of fact; so when the lawyer thinks of fact, he thinks of it as a matter of law, and when he thinks

[7] In fact, historians have been questioning the nature of historical truth for some time. There can be identified three different lines of attack on truth of history. The first one is based on the recognition of the constraints of evidence, meaning that historians have to find evidence which will enable them to draw inferences about the facts that interest them. The second one consists of the acknowledgement of the constraints of culture. In fact, historians have started to question whether their descriptions and inferences were not somewhat tainted by their own cultural circumstances. The last one is based on the constraint of language and was essentially drawn by postmodern philosophers like Roland BARTHES, Jacques DERRIDA and Jean-François LYOTARD. Barthes, for instance, argued that historians' description of past events represent a serious of concepts about the past but not the past itself. As historians don't generally recognize that they are just describing their ideas about the past, they generate a misleading effect on readers, convincing them that they are reading descriptions of reality. Furthermore, words do not refer to things in the world but just to concepts. In that sense, the truthfulness of any description depends on the meaning of the words in a certain culture and time. DERRIDA also pointed out that historical descriptions are in fact based upon others texts, mainly reports of people's experiences. Cfr. MCCULLAGH, C. Behan, *The truth of History*, London/New York: Routledge, 1998, pp. 13-42.

of law, he thinks of it as the form intended for fact"[8]

Note that we are not addressing the issue of debating the truth of norms, where ontological and epistemological arguments are wielded (is there a normative reality? is normative knowledge possible?), [9]but whether the establishment of a historical truth can legitimately be the object of a law. It seems undeniable that there is a certain historicity in the role of the jurist, especially the judge, inasmuch as legal proceedings recurrently entail a retrospective analysis of legally relevant events (as we have mentioned before). To put it simply, in this case, the goal is to extract certain legal consequences that follow from the establishment that certain events have occurred in the past. And that will make all the difference.

Let us frame the question within the scenario we were initially considering. In the case of historical memory laws, one might rightly argue that it is not only the matter of the knowledge - in and by itself - of the truth that is in question, but rather the establishment of guilt in the production of certain events and crimes against humanity. But, then, should it fall to the legislator or the judge to rule on those same events? Moreover, shouldn't it be up to an international body, rather than a third country, to play the role of arbiter?

Although a legitimate concern over the resurgence of radical movements, with racist, xenophobic and others of an equally discriminatory nature may deserve some understanding, we are forced to objectively recognize that, by giving legislature a say in the establishment of historical truths, we allow Law to invade the field of history and crys-

[8] Castanheira Neves, Questão (...), p. 55-56. In conclusion, the author advocates that: "Law is not an element, but a synthesis; not a premise for validity, but fulfilled validity (...); not prius, but posterius, not data, but a solution; not a starting point, but an outcome; it is not in the beginning, but in the end. (...) Thus, the methodological nonsense of the normative-subsuntive scheme becomes evident. It is not "law" that is set apart from "fact", as law is the normative-material synthesis in which "fact" is also an element, the very synthesis that is critically prepared and supported by the problematic distinction. And if we want to refer law to its previously accomplished objectifications (norms, institutions, precedents), then it must be taken into account that we can only think in juridical terms if we reestablish, within these objectifications of established legislation, that same constitutive problematic (and that same distinction)." Castanheira Neves, Questão (...), p. 586.

[9] On this debate, summarized, PINTORE, Anna, El derecho sin verdad, Madrid: instituto Bartolomé de las Casas, Dykinson, 2005, pp. 40 e seq.

tallize a necessarily simplified version thereof, leaving no room for nuances and deep insights, be it in History itself or in Art (as is also the case of fictional works such as The Reader).

In the case of memory laws, what seems worth pointing out is that legislature fixes an image of the past from which there are no concrete legal consequences, other than the prohibition to deny the interpretation given to the events in question, in the future. The only visible immediate result is produced in the jurisdiction of each individual, imposing restrictions on freedom of expression.

What kind of truth is that? It is certainly not one that is recognized as legal (it's extra-procedural, and oblivious to the adversarial nature of fact-finding in legal procedures contradiction), nor as historical (it is immutable and oblivious to the scrutiny of sources). Truths established by memory laws seem to serve neither Law nor History.

V. Memory laws: misunderstandings and risks

We further insist on the need to approach the issue from a different perspective: is there a protection of History here? Of its incorruptibility?

In our opinion, only apparently. The exercise seems to entail a betrayal or at least a misunderstanding of the very spirit of historiography. Moreover, currently, the real problem of researchers' freedoms and of the boundaries imposed on them seems to reside in much subtler aspects than the protection of official versions of History by legislature. Indeed, the very freedom of research and the ensuing reflection are essential elements for greater historical objectivity. The real problem, once again, has to do with the market. Judith SHULEVITZ tells us that today, in the United States, who decides the topics that students must write about "are the customers of Barnes and Noble".[10] Perhaps it is this market dictatorship, and its harmful effects on investigations, that we (or legislature) should be worried about.

Stiina LOYTOMAKI[11] has correctly pointed out the dangers of

[10] Apud Noiriel, Gérard, Sobre la crisis de la historia, Madrid: Ed. Cátedra, 1997.p.199

[11] Cfr. Law and memory, The Politics of Victimhood, 21 Griffith L. Rev. 1 2012, p. 18. We agree with the author when she states that "legal engagements in memory and identity politics tend to give rise to competition between victims and to heightened tensions concerning identity politics, leading to further polarisation of particular groups against each other and the state". Ibidem, p. 19.

manipulating memory and history through law. *"The law turns private memories into public narratives", she says and adds "However, resorting to identity politics through the law is particularly efficient because the law, as noted above, forces particular groups' narratives to be recognized in universal terms. In historical discourse, there is no equivalent universal vocabulary to the one existing within law. Consequently, voices or narratives of particular agents, although celebrated for their particularity, can also be dismissed because of their 'subjectivity' and perspectivity."* Law is, therefore, being used in a battle for recognition of past injustices. Memory constitutes often the basis of group identities based on victimhood.

On the other hand, there are obvious risks involved in an attempt to condition or restrict historical readings. One of them is a chance of it leading to aimless control that intends to establish itself as the censor of the very exercises of human creativity, namely Art and, particularly, literature.

Let us return once more to *The Reader*, this time, to analyse a few external aspects, namely, the controversy that surrounded it.

"The Reader" triggered widespread academic controversy surrounding the issues of guilt and shame. Even refraining from entering the dispute over the true interpretation of the text, and its possible hidden agenda, the work also seems to be easily associated with what some call secondary anti-Semitism. This can be defined as a backlash against the Jews, which feeds on the fact that the German Holocaust reminds the Germans of their guilt and prevents the full assimilation of the German identity[12].

[12] MUELLER, Agnes, Forgiving the Jews for Auschwitz? Guilt and Gender in Bernhard Schlink's Liebesfluchten 2007, 511-513. The summarizes the reasons that sustain current ongoing scholarly debate on Schlink'work: "Bernhard Schlink's international bestseller Der Vorleser (1995) sparked an important scholarly discussion on guilt, shame, and the so-called " Vergangen heitsbewltigung." In this debate, the text received praise for candidly taking on the subject of post-WWII German guilt and shame (Bartov, Niven, and Schmitz), yet was criticized for reintroducing familiar or tainted clichés and for affording Germans an easy way out of their feelings of guilt by turning them into "victims" of the Nazi regime (Schlant, Arnds, Donahue, Metz). These debates have not reached any definite conclusions for two reasons. First, they are intrinsically connected to how we read and how we identify with literary texts, urgent questions when it comes to literature dealing with the Holocaust, as Dominick LaCapra's work on writing trauma reveals convincingly. Secondly, and perhaps more importantly, if we understand literature to be the turf on which important matters of memory and identity are teased out and negotiated, and the interpretation of literature (by scholars and critics) as the field where this nego-

Indeed, once again, *The Reader* is a good example of a text that was subject to criticism and accused of revisionism or "bleaching" of German guilt. In this sense, Cynthia OZICK published an article (*The Rights of History and the Rights of Imagination*), addressing the fact that SCHLINK's novel leads us to feel empathy for a Nazi murderer. This author draws a very clear boundary between history and fiction, and the latter does not have to move within the limits of reality. There is, however, in her opinion, an exception: the historical novel, in which the aim is to "embody" history. In this field, there would be an added duty to respect factuality and historical truth. Thus, the author calls into question SCHLINK's true intentions in creating an atypical and inconsistent main character - the guard Hanna, who is an illiterate woman in a nation of educated people. Her conclusion points towards the manipulation of the reader, thus conditioned to feel empathy towards such a character[13].

Not wanting to excuse myself from getting to the bottom of the issue, i.e., whether or not the novel appears to be absolving the action of the German population during the Second World War, what straight away seemed disturbing to me when reading this book was precisely the fact that she leads us (by denying the reader access to Hanna's dark past) into a confrontation of mixed feelings of empathy and revulsion towards that woman. In fact, it seems to me that the work (most likely intentionally, given the author's circumstances) evokes the philosophical debate and controversy surrounding Hannah ARENDT and her book *Eichmann in Jerusalem. A report on the banality of evil.* In it, ARENDT seeks to address the need to deal with the behaviours of ordinary people

---

tiation is further reflected upon, then the continued debate on guilt and shame in Der Vorleser points to the fact that the difficulties Germans have with their history, memory, and identity are both ongoing and in need of further exploration."p. 511

[13] OZICK says: If virtually universal literacy was the German reality, how can a novel, under the rules of fiction, be faulted for choosing what is atypical? […] Characters come as they will, in whatever form, one by one; and the rights of imagination are not the rights of history. A work of fiction, by definition, cannot betray history. Nor must a novel be expected to perform like a camera. […] It would seem, though, that when a novel comes to us with the claim that it is directed consciously toward history, that the divide between history and the imagination is being purposefully bridged, that the bridging is the very point, and that the design of the novel is to put human flesh on historical notation, then the argument for fictional autonomy collapses, and the rights of history can begin to urge their own force. […] and that the unlettered woman in Schlink's novel is the product, conscious or not, of a desire to divert from the culpability of a normally educated population in a nation famed for Kultur.

(which Hanna is, undoubtedly), who, in different circumstances (other than in a totalitarian society that tolerated and endorsed the most abhorrent crimes) would not commit crimes.

It is generally accepted [14] that Hanna ARENDT failed to explain why some lose their ability to think and judge when in the context of a totalitarian society and others do not. SCHLINK's *The Reader* certainly does not offer any explanation. That could only come from Hanna, who explains nothing. But the work is effective in causing perplexity due to being confronted with "the banality of evil".

The reader's perception of his empathy towards a woman with a past such as Hannah's is disturbing, not because we are tempted to excuse her, but because we find that the face of someone who is capable of committing the most despicable crimes can be kind, or simply normal.

Personally, I do not think that such reasoning should be repressed or that it constitutes any kind of revisionism (but there is a danger that men without memory who enforce memory laws might think so), but is rather a way to remind us that no society, no civilization is exempt or safe from the possibility of embarking on the same monstrous adventure and, therefore, must be vigilant. In this sense, "The Reader" can be seen as a contribution to the contemporary movement of legal narratology, according to which, knowledge is so intensely personal, that it cannot be communicated through dispassionate reasoning, but only through the telling of stories that are themselves, inspirers of credibility.

Let us return to the philosophy in Hanna ARENDT. The author tells us: "The judges were obviously aware of how it would be comforting to believe that Eichmann was a monster, [...] The problem in Eichmann's case was that there were many like him, and these many were neither wicked nor sadistic, they were, and still are, terribly normal, frighteningly normal. From the point of view of our institutions and our moral values, this normality is much more terrifying than all the atrocities put together, as it implies (as was stated many times at the Nuremberg trials by the defendants and their lawyers) that this new type of criminal, being, in fact a *hostis humani generis*, commits crimes under circumstances that make it impossible for him/her to know or feel that he/she are acting wrongly."[15]

---

[14] Araújo, António e Nogueira de Brito, M., Arendt in Jerusalem, in Eichmann in Jerusalem. A report on the banality of evil, Portuguese edition, Lisbon: Tenacitas, 2003, pp.26 and 27.

[15] Arendt, H., op. Cit., p. 355 and 356.

VI. Conclusions.

As the main character of Schlink's book struggles with the need to cope with his nation's past and his own feelings towards the former Nazi guard Hanna, he hesitates endlessly about his career. In doing so, the character seems to be particularly aware of the challenge that constitutes establishing truth in the legal world. The paper focus on the character's dilemma as it enlightens the debate on the connection between legal and historical truth.

Indeed, and returning once more to the text of "*The Reader"*, it becomes clear, in my view, that one admits that there is a difference between the positioning of the historian (even that of a historian of law), and that of the judge or lawyer, before the truth. The protagonist's choice of History of Law as a career path (in any case, an uncommon or unlikely choice, as other alternatives would be more attractive economically or even in terms of social prestige - as some exegetes of the book have pointed out[16]) appears to result from the choice of a less "simplistic" or "reductive" conclusion.

Assuming that no one possesses absolute truth, historical truth appears as a truth constructed from the parts of truth held by each individual, almost as if it were a puzzle.[17] That is, as a whole which is constructed by juxtaposing the pieces we can find.

In recent years, collective memory has become the subject of a vivid debate, as it has been used as the basis to establish group identity. Law is recognized as an important tool in this battle. It is certainly true that, due to its specific characteristics, resorting to the legal arena allows to generalize and universalize victimhood experiences. But not without a cost. As LOYTOMAKI says "The cost of playing identity politics through the law is precisely that historical complexity is lost.[18]"

[16] Vd., ROTH, J Reading and misreading The Reader, "Law and Literature", 6: "Choosing his profession after graduation, Michael rejects lawyer, judge, and prosecutor and chooses to become a legal historian. He will delve into thepast to uncover the truth."p.169.

[17] Cf. on this matter, Montoro Ballesteros, Verdad, método y conocimiento práctico, Murcia: DM editor, 2008, p. 18 and 19.

[18] LOYTOMAKI, op.cit., p.19.

The Systemic Effects As A Legitimate Aspect
In Institutional Theory[1]

Maíra Almeida[2]
Henrique Rangel[3]
Viviane A. da Silva[4]

Abstract: This article aims to analyze the systemic effects phenomenon in the institutional theory, mainly in its alleged legitimate aspects. The central democratic difficult of the gap between legal-normative and social reality grounds is presented, arguing that only by the institutions' exercise of their democratic role it is possible to promote a satisfactory bridge. It can be affirmed based on the institutional questions – institutional capacities and systemic effects. Analyzing this perspective, it is possible to urges the hypothesis of the legitimate aspect of systemic effects. The appearance of institutional problems, generally associated to negatives systemic effects, cause resistances to this approach process on legal and political grounds.

Keywords: Institutional Design; Systemic Effects; Legitimacy.

I. Introduction

There is a growing demand on the development of research in

[1] This article was produced in the framework of the Laboratory of Analytical and Theoretical Studies on Behavior of Institutions (LETACI), linked to the National Law School (FND) and the Graduate Program in Law (PPGD), Federal University of Rio de Janeiro (UFRJ), with funding from the Carlos Chagas Filho Foundation for Research Support of the State of Rio de Janeiro (FAPERJ) for competition of Notice No. 9 of 2011 (Case No. E-26/111.832/2011), and Initiation Scholarship -IC (Case No. E-26/102.240/2011), and the National Council for Scientific and Technological Development (CNPq) by the competition of the Call Universal 14/2011 (Case No. 480729/2011-5).
[2] Master in Contemporary Legal Theory at the Graduate Program in Law from the Federal University of Rio de Janeiro. E-mail: almeida.maira.1@gmail.com.
[3] Master in National Law School of the Federal University of Rio de Janeiro. E-mail: henriquerangelc@gmail.com.
[4] Student at National Law School of the Federal University of Rio de Janeiro. E-mail: vivisalmeida@gmail.com.

the field of institutional theory, highlighting the relevance of analyzes sensitive to phenomena such as institutional capacities and mechanisms and democratic values. It is a recent movement, sparked by a renewed perspective that deepens discussions with a bias more pragmatic[5] . The American constitutional theory, given its historical concern about institutional behavior, seems to be the most advanced studies on the topic. It is understandable, that this debate about the American constitutional theory can offer numerous benefits to the Brazilian democratic constitutional experience, and therefore should guide scientific papers sensitive to institutional problems and including this one.

When it is understood as an institutional turn, the problem of constitutional legitimacy is not limited only to the size and more normative- interpretive, based on criteria of theories of interpretation, deliberation and decision of a Constitutional Court. It is necessary today to conceive that the performance of institutional activity, as a whole, represents the possibility of setting and achieving a system efficiency of fundamental rights and thus ensure a new level for understanding the constitutional[6] legitimacy .

---

[5] This paper adopts an institutional positioning corresponding to North American perspective that renewed his studies, in terms of institutions, in the 1990s, with e.g GILLMAN, Howard; CLAYTON, Cornell. The Supreme Court in American Politics: New Institutionalist Perspectives. Lawrence, KA: Kansas University Press, 1999 e GRIFFIN, Stephen. American Constitutionalism: From Theory to Politics. Princeton: Princeton University Press, 1999. Esta perspectiva recebeu maior definição a partir da publicação do artigo SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". Chicago Public Law and Legal Theory Working Paper Series, No. 28, 2002. Currently, the following theories are reference for this institution theory, among others: VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Cambridge, MA: Oxford University Press, 2007; PILDES, Richard. LEVINSON, Daryl. "Separation of Parties, Not Powers". Harvard Law Review, Vol. 119, 1, 2006; WALDRON, Jeremy. "The Core of the Case Against Judicial Review". The Yale Law Journal, Vol. 115, 1344, 2006; VERMEULE, Adrian. Judging Under Uncertainty: an institutional theory of legal interpretation. Cambridge, MA: Harvard University Press, 2006; SUNSTEIN, Cass. A Constitution of Many Minds: Why the Founding Document Doens't Means What It Meant Before. Princeton: Princeton University Press, 2009; POSNER, Eric; VERMEULE, Adrian. The Executive Unbound: after the madisonian republic. New York: Oxford University Press, 2011.

[6] There is no question that in the study of North American institutional behavior, is a new paradigm to the problem of tripartition of powers, judicial review, popular sovereignty, among other topics, that are no longer recognized as absolute principles, but results of a performance of democratic institutions and their institutional designs. The

By recognizing the democratic institutions as responsible for the effectiveness of a normative-constitutional, is crucial to discuss the phenomena that are relevant to them. This proposal is complex and dynamic, not only by the roles and responsibilities constitutionally guaranteed (legal context), but also by the fact that it is guided by an interaction with the human aspect of social (political context) .

In this sense, delimiting the present study the phenomenon of systemic effects, and wonders whether it is possible to present an outline of the methodology and delimitation of this object - systemic effects - with the goal of better reading and analysis of institutional capacities in relation panorama of the democratic constitutional state.

This discussion, which seems to be the most current and critical about the democratic constitutional context should be brought to the debate in the academic and theoretical Brazilians in order to allow a new perspective of research and knowledge about the role of institutions and the legitimacy of its performance .

Nowadays the institutional theory, presents a number of problems and questions about the activity of the basic institutions of the

---

institutional turn that we mention is summarized in the following passage: "In many ways the question of constitutional law is harder, simply because people disagree so sharply about what constitutes a good outcome. Ironically, however, constitutional law has already witnessed a significant if partial institutional turn: Many people emphasize that any approach to the Constitution must take account of the institutional strengths and weaknesses of the judiciary. Even here, however, we have seen that influential voices in constitutional law argue in favor of interpretive strategies in a way that is inadequately attuned to the issue of institutional capacities. Those who emphasize philosophical arguments, or the idea of holistic or intratextual interpretations, seem to us to have given far too little attention to institutional questions. Here as elsewhere, our minimal submission is that a claim about appropriate interpretation is incomplete if it does not pay attention to considerations of administrability, judicial capacities, and systemic effects in addition to the usual imposing claims about legitimacy and constitutional authority. But we have also suggested the possibility that in constitutional law, an assessment of those issues might lead to convergence, on appropriate methods, from those who disagree about what ideal judges should do". SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". Chicago Public Law and Legal Theory Working Paper Series, No. 28, 2002, p. 48.

state[7] *vis-à-vis* the constitutional[8] reality. Among the main problems, in-

[7] The idea of the basic structure of society is found in the work of John Rawls. He points the necessity of a justice as fairness to be applied directly to the basic structure of society, involving all the fundamental institutions that promote the principles of justice he listed. This basic structure of society would represent the set of political institutions, social and economic responsible for taking care of the essential issues of justice in a dynamic of interinstitutional activities supported by cooperative parameters. The main institutions of the State are given the responsibility of taking care of more substantial questions and that, therefore, attract more attention of citizens. The institutions of the basic structure will be democratic if they promote the principles of justice with the concern to respect the same deliberative parameter in benefit of constitutional order over the generations. The basic idea presented is, therefore, the activity of the institutions involved by a sense of cooperation from parameters already defined in the context of justice as fairness. It is also in this background that Rawls affirms the need of abandonment of comprehensive doctrines for the promotion of the principles of justice in political activity of State, filling-if the content of these principles of justice by means of public reason. Cf. RAWLS, John. Political Liberalism. New York: Columbia University Press, 1993. Para uma análise nacional sobre o tema das instituições democráticas conforme a teoria rawlsiana, Cf. BOLONHA, Carlos; RANGEL, Henrique; ALMEIDA, Maíra. "A Teoria das Instituições Democráticas em John Rawls". Revista JurisPoiesis, Vol. 13, 89-102, 2011.

[8] In accordance with the Habermasian conception of internal tension in the concept of modern law, is adopted for the understanding of constitutional reality, a dualistic perspective concerning the possibility of the legitimacy be found, at least in principle, in two distinct elements: normativity and facticity. This idea of tension is striking in HABERMAS, Jürgen. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Translated by Willian Regh. Cambridge, MA: The MIT Press, 1996. For a more synthetic passage, Cf: "(...) our understanding of modern law: we consider the validity of a legal norm as equivalent to the explanation that the state can simultaneously guarantee factual enforcement and legitimate enactment – thus it can guarantee, on the one hand, the legality of behavior in the sense of average compliance, which can if necessary be compelled by sanctions; and, on the other hand, the legitimacy of the rule itself, which must always make it possible to comply with the norm out of respect for the law". HABERMAS, Jürgen. The Inclusion of the Other: Studies in Political Theory. Cambridge, MA: The MIT Press, 1998, p. 255. In the last instance, which presents itself as central criterion for recognition of legitimacy is the presence of a stabilizing factor of the political order. This way, when you consider the deviation of the sphere of legality in search of legitimacy, it should be understood that the social demands that foster this deviation demonstrate the instability of the social and political order. For this reason, even acting outside the legal sphere, the coping and overcoming these difficulties of factual plan are sensitive issues the order of political legitimacy. In this sense, "Legitimacy is considered a measure for stability, for the legitimacy of the state is objectively measured by de facto recognition on the part of the governed. Such legitimacy can range from mere toleration to free consent (Zustimmung). Here the consent that creates legitimacy

stitutional theory argues as one of its main themes, the *systemic effects*[9]. This is one of the specific aspects of the institutions when they establish repercussions of various kinds, such as legal, political or administrative, between them, for itself and in its relationship with democratic citizens[10]. This phenomenon is the challenge for an institutional theory that directly interacts with a democratic constitutional theory.

It identifies and analyzes the systemic effects on the legal-political dimension that affects the performance of institutional activity and therefore hinders the realization of basic rights and constitutional[11] norms. Contrary to the chains of traditional[12] constitutional theory in

---

is based on subjective reasons that claim to be valid inside the currently accepted 'ideological frames'; but these reasons resist objective assessment. One legitimation is as good as another, so long as it sufficiently contributes to stabilizing a giving political order. According to this view, even a dictatorship must be considered legitimate so long as a socially recognizes framework of legitimation enables the government to remain stable. From this perspective of the theory of power, the quality of the reasons are without empirical significance". HABERMAS, Jürgen. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Translated by Willian Regh. Cambridge, MA: The MIT Press, 1996, p. 290.

[9] It is the phenomenon identified in SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". Chicago Public Law and Legal Theory Working Paper Series, No. 28, 2002,in the framework of democratic institutions and in the legal-political.

[10] GRIFFIN, Stephan. American Constitucionalism: From Theory to Politics. Princeton: Princeton University Press, 1999.

[11] For this understanding, it is possible to recognize the idea of rights system recommended in HABERMAS, Jürgen. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Translated by Willian Regh. Cambridge, MA: The MIT Press, 1996, p. 104/122. As such configuration, there are 5 (five) categories of basic rights. The first three correspond to the rights of free choice and personal autonomy - basic negative liberties, civil rights and procedural guarantees. The first category, however, may not be properly implemented if, previously, is not achieved the fourth category of the system, the rights of political participation. This is because without achieving a good political participation, all fundamental rights of private autonomy are in the field of paternalism, to the detriment of self-governance of the community. The fifth category of basic rights, however, is assumed for the actual realization of all the others. The rights of social well-being form a category that represents the rights concerning the minimum material conditions of existence, indispensable to a full exercise of private autonomy and political participation.

[12] It is, basically, as constitutional theory, the traditional German constitutional theory. In this regard, Cf. KELSEN, Hans. Teoria Pura do Direito. Trad. João Baptista Machado. São Paulo: Martins Fontes, 1996; HELLER, Hermann. Teoría del Estado. Buenos Aires: Fondo de Cultura Económica, 1992; HESSE, Konrad. Temas Fundamentais do Direito

the second half of the twentieth century, the institutional activity arises from the performance of their capabilities and systemic effects that they cause and suffer in a reflexive dimension. The research which we hereby adopts has the institutionalist perspective on the effects related to systemic institutional capacities. The study of this phenomenon requires a methodological concern to outline your problem, its concept, its classification and its importance as base a legitimate institutional activity. Wanted also to understand the influence of institutional problems on the performance of institutional activity, and how the institutional capacity and the systemic effects can overcome them as legitimate[13] aspects.

The predictability of systemic effects in the institutional sphere can be considered as a new parameter of legitimating democratic constitutional theory, the resulting context of the systemic effects of democratic institutions is the degree - major or minor - the constitutional legitimacy of a state. It is under this thesis argues that the present study in its methodological dimension .

To be taken as a parameter of concrete investigation of the effects of systemic institutional reality of the democratic rule of law , there is a central problem. There is often a mismatch between the formal legal - constitutional - legal - and institutional performance plan - political - because the institutions do not always reconcile with degree of accountability and transparency necessary, the legal provisions and the democratic[14] expectations. In fact, the democratic conduct is consolidated from the performance and behavior of the basic institutions of society,

---

Constitucional. Trad. Carlos dos Santos Almeida, Gilmar Ferreira Mendes e Inocêncio Mártires Coelho. São Paulo: Saraiva, 2009; SCHMITT, Carl. O Conceito do Político. Belo Horizonte: Del Rey, 2009; SMEND, Rudolf. Constitucion y Derecho Constitucional. Madrid: Centro de Estudios Constitucionales, 1985.

[13] About the institutional problems Cf. BOLONHA, Carlos; EISENBERG, José; RANGEL, Henrique. "Problemas Institucionais do Constitucionalismo Contemporâneo". Direitos Fundamentais & Justiça, Vol. 17, 288-309, 2011.

[14] Democratic institutions do not boil down to a conception of representative institutions. For more who do not want to, in this work, establish an own idea of democracy or immerse yourself in a deeper discussion about the topic, to be sure, the idea of democracy adopted does not boils down to this plan. The understanding of a democratic institution might involve other criteria, especially the political conception of justice of rawlsiana basis. In accordance with these criteria of evaluation on the exercise of institutional activity, it is possible, even, that a conclusion has been reached a power elected not be democratic and, at the same time, the judiciary being.

beginning with their own powers of State. Discuss performance and institutional behavior is to understand the phenomenon of institutional capacities and systemic effects, since its concept to its practical dimension. This means that the democratic state should know the actual role played by institutions in setting their " constitutional life " . Thus, it is not enough just analyze the dimension of skills formally recognized for their powers and institutions, but especially check the reflective exercise and dynamics between institutions and their consequences, which is generically called institutional[15] dialogues.

[15] The constitutional theory recognizes the beginning of the debate on institutional dialogs to a survey about the relationship maintained between judiciary and legislative in moments of declaration of unconstitutionality in work HOGG, Peter; BUSHELL, Allison. "The Charter dialogue between Courts and Legislatures: or perhaps the Charter of Rights isn't such a bad thing after all". Osgoode Law Review, Vol. 35, 1, 1997. Although the Canadian experience, where it sparked the debate, has not met many practical examples, the Canadian Charter of Rights and Freedoms provides for Clause 33, known as notwithstanding clause. It is a permission to legislative to suppress the effectiveness of a judicial declaration of unconstitutionality. The term "dialog" aims to reassemble the idea of a frequent communication between the two powers to resolve a single issue, but, throughout the debate, other authors have tried to widen the spectrum of this dialog, whereas other situations in addition to the declarations of unconstitutionality, Cf. LECLAIR, Jean. "Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien". Revue du Barreau du Québec, avril, 2003. The relationship between judicial and legislative, however, has always been central to the debate, influencing a dualistic perspective under which the dialogical theories are commonly released: institutional dialogs vs. judicial supremacy. This clash elects, as the main criterion, the existence of the power to say the last word in certain constitutional controversy. Thus, if the power belongs to the judiciary, identifies a judicial supremacy. Otherwise, we identify, in general, there are institutional dialogues. Perhaps this view of opposition is not the most appropriate to analyze this phenomenon, as there are other situations able to identify a judicial supremacy - as the political nature of the decisions, the degree of constraint of these decisions, as well as the systemic effects generated by it. It is possible, however, sustain a different perspective of institutional dialogs, displacing the parameter analysis for the idea of cooperation. Instead of restricting this phenomenon to a dimension of consecutive acts practiced between the powers in the solution of a same controversy, institutional dialogs can represent moments in which the performance of institutional activity complies with the other institutions, seeking cohesion between si and stability in democratic constitutional order. With a perspective next to this type of activity on the Supreme Court of the United States, particularly, MCCANN, Michael. "How the Supreme Court Matter for the American Politics: New Institutionalist Perspectives". In: GILLMAN, Howard. CLAYTON, Cornell. The Supreme Court in American Politics: New Institutionalist Interpretation. Lawrence, KA: University of

II . The importance of the theory of institutional and systemic effects

The study of institutional theory assumes, that they examine the systemic effects, consideration of at least three well-defined issues .

Firstly, the constitutional theory of the second half of the twentieth century was consecrated by a tradition of German parent enrolled the reflections of normative order (Hans Kelsen), phenomenological (Konrad Hesse) , interpretive (Peter Häberle), deliberative (Jürgen Habermas) and argumentative (Robert Alexy). This matrix brought the main argument regarding constitutional law and constitutional democracy as an element to be solved before the binomial law and politics. In fact, this proposal was of great value to consecrate the effective role of the constitutional state in the era of the promotion and expansion of fundamental rights. This theory did not bother to investigate the phenomenon in terms of constitutional activity itself democratic institutions. That is, the role of the effectiveness of fundamental rights was restricted to a limited plan of formal exercise of acts and decisions taken in isolation institutions, in particular the Constitutional Court. Undoubtedly, the problems faced by such a theory pose a challenge to the program of contemporary democracy. Here is not treating them. It should be noted, however, that such research methodologies constitutional (theories themselves) did not bring in sufficient clarity, the discussion of the plan of the facts. They did answer how much the norm is instrumentalized in the size of democratic institutions. Missed these theories point with clarity the importance of institutional behavior of those institutions that deal with constitutional effectiveness. Regarding the phenomenon of systemic effects in particular, the theoretical perspective shifts to the behavior of institutional activity. It is argued here that the systemic effects represent a real instrument that can give character to the activity legitimating legal and political institutions when they determine the dynamics and configuration of democratic life in the performance of its duties and functions.

Secondly, the current constitutional theory is still committed to the assumption principiológico of separation of powers, structured on a division of powers and checks and balances mechanisms. This model Madisonian separation has been criticized and demonstrates certain fragility in receiving considerations that the powers should be exercised

---

Kansas Press, 1999.

in a cooperative and deployed in institutional activity as a whole[16]. Perhaps there is no difference of interests, level of expertise, the powers of the State to control, but a difference in the political interests of those who are within the institutions as advocates Richard Pildes[17]. In this case in particular, the central perspective arises analysis of the systemic effects since the performances influenced by expressing claims party ideologies and compromises well defined. It is understandable , therefore, that a new conception of the idea of separation of powers issue is sensitive to systemic effects, since it is at the top of these institutions we observe examples of impact with greater intensity.

Thirdly, there is a problem of methodology among theorists investigating institutional behavior and in particular the phenomenon of *systemic effects*. Authors such as Stephen Griffin, who analyze the judicial supremacy within a dialogic theory are involved with a major concern, but simplified the relationship between the powers, not deepen the analysis of *systemic effects*[18]. When considering present ourselves in a conceptual dimension without care to elaborate in more detail delimiters and scientific criteria for understanding the institutional dynamics. This weakness in the methodological causes a challenge to contribute to a study aimed at developing such criteria. One can understand that the institutional designs and institutional dynamics depend on a more adequate understanding and classification of the reality of *systemic effects*, the study of a methodology relevant to their conceptual understanding and their own achievement.

Institutions promote within its capabilities the interpretation of the Constitution and the rules infra. The U.S. debate develops an understanding that this process needs to consider the so-called *institutional issues*[19]. These divide into it, at least, as already pointed out, institutional capacity and systemic effects. Such understanding is one critical thinking as opposed to current perfectionists, especially in relation to judges, who traditionally hold the legitimate prerogative of interpretation[20]. The

[16] TREMBLAY, Luc. "Le Fondement Normatif du Principe de Proportionnalité en Théorie Constitutionnelle". Mercredi, Vol. 21, 2009.

[17] PILDES, Richard. LEVINSON, Daryl. "Separation of Parties, Not Powers". Harvard Law Review, Vol 119, 1, 2006.

[18] GRIFFIN, Stephen. American Constitutionalism: From Theory to Politics. Princeton University Press, 1996.

[19] SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". Chicago Law School Public Law & Legal Theory Working Papers Series, No. 28, 2002.

[20] The perfectionist perspective that identifies in large part with the figure of Judge Her-

interpretive activity, however is not restricted to the plane of the judiciary, because all institutions covered in normative and functional assignments in a constitutional democracy have a role to play. One way of performing this is precisely the interpretive activity of these institutions and the like that cause effects.

The interpretative and deliberative activities thus should consider the institutional aspects as their own results, as well as how the institution is prepared to meet the social demands they receive[21]. These institutional aspects serve as parameters to define the limits of a legitimate institutional activity. Institutional capacities represent an institutional phenomenon related to the possibilities of the agent to raise resources

---

cules, defined in accordance with the following: "I must try to exhibit that complex structure of legal interpretation, and I shall use for that purpose an imaginary judge of superhuman intellectual Power and patience who accept law as integrity. Call him Hercules". DWORKIN, Ronald. Law's Empire. Cambridge, MA: Belknap Press of Harvard University Press, 1986, p. 239. A harsh criticism, however, is formulated by Cass Sunstein in: "Or consider perfectionism: the view that the Constitution should be construed in a way that makes it best, and in that sense perfects it. Imagine a society—proudly called Olympus—in which the original public meaning of the document does not adequately protect rights, properly understood. Imagine that the text is general enough to be read to provide that protection. Imagine finally that Olympian courts, loosened from Thayerian structures, or from the original understanding, or from minimalism, would generate a far better account of rights and institutions, creating the preconditions for both democracy and autonomy. In Olympus, a perfectionist approach to the Constitution would be entirely appropriate". SUNSTEIN, Cass. "Second-Order Perfeccionism". Chicago Public Law and Legal Theory Working Paper Series, No. 144, 2006, p. 3. It should be stressed, however, that the present study is not limited to a subjective perspective as to which Ronald Dworkin has proposed to do. Despite its importance, the figure of the judge or of the judiciary does not exhaust the limits of this study. The study on systemic effects here developed dates back to the totality of the institutional order in a dynamic perspective and dialogic. Therefore, it is not disputed the legitimacy of normative and formal judge in interpreting the Constitution and other statutes, but the legitimatory aspect existing in resulting from the effects of an institutional performance exercised in practical terms. In summary, the human elements as the judge are taken seriously, but the target of the responsibility to develop its democratic role is necessarily assigned institutions.

[21] SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". Chicago Public Law and Legal Theory Working Paper Series, No. 28, 2002; BOHMAN, James. Public Deliberation: Pluralism, Complexity and Democracy. Cambridge, MA: The MIT Press, 1996; and BOHMAN, James; REHG, William. Deliberative Democracy: Essays on Reason and Politics. Cambridge, MA: The MIT Press, 1997 are central references adopted for the understanding of interpretation and determination in this study.

and information balizem your understanding[22]. Likewise, specialization is a factor that combines greater institutional capacity for action, an in-depth knowledge about the theoretical and empirical debates about the facts related to its activity . Systemic effects, in turn are related to the prediction of the activity in the first place, will not reach people in a neg-

[22] Resources and information are understood as elements of utmost importance for the implementation of institutional capacities, not eliminating the possibility of the existence of other factors with equal function. The resources would be a factor capable of covering some conditions in which it is the institution, such as finance, logistics, or even human. The information, however, has been presented as an issue much more challenging in the study of institutional behavior over the decades. This occurs because the possibility of the agent responsible for performing certain allocation ignoring some information, or even hold incorrect information or with some degree of inaccuracy. Such situations could lead to problems such as the uncertainty and the error in moments of interpretation, deliberation or decision. Information and uncertainty are themes already faced by Robert Dahl and Adrian Vermeule, it seems, however, that there is still no provision for a cognition of these satisfactory matters. Dahl faces these issues when considering the role that the Supreme Court would be exercising in the national policy of the country: "A policy decision might be defined as an effective choice among alternatives about which there is, at least initially, some uncertainty. This uncertainty may arise because of inadequate information as to (a) the alternatives that are thought to be 'open'; (b) the consequences that will probably ensue from choosing a given alternative; (c) the level of probability that these consequences will actually ensue; and (d) the relative value of the different alternatives, that is, an ordering of the alternatives from most preferable to least preferable, given the expected consequences and the expected probability of the consequences actually occurring. An effective choice is a selection of the most preferable alternative accompanied by measures to insure that the alternative selected will be acted upon". DAHL, Robert. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker". Journal of Public Law, Vol. 6, 280, 1957. Vermeule, in turn, has directly confronted the issue in VERMEULE, Adrian. Judging Under Uncertainty: an institutional theory of legal interpretation. Cambridge, MA: Harvard University Press, 2006, strengthening his views by defending mechanism called veil of uncertainty that intends to promote the democratic value of impartiality by excluding the agent's knowledge of certain results of its operations: "A veil rule, I shall say, is a rule that suppresses self-interested behavior on the part of decisionmakers by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision (...) Veil rules suppress bias that arises from information. That bias need not to be based on self-interest, although it may be. (…) Bias arising from self-interest is the major worry where government officials are concerned, and will be my focus. To the extent that veil rules suppress both self-interested decisionmaking and other forms of biased decisionmaking, so much the better". VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Oxford: Oxford University Press, 2007, p. 31-32.

ative way , public and private institutions. Second the systemic effects represent the effects of the activity and institutional capacities which, in turn congregate factors that enable prediction of systemic effects themselves. Therefore according to this perspective, the institutional activity should promote interpretations and propose resolutions, moving away from a strictly normative, when they are accompanied by favorable institutional issues in meeting social[23] demands.

This means that, contrary to the claims by the theories perfectionists - the adoption of a democratic trend with the first -best - the institutional activity, in a democratic state, must comply with the second-best model of democracy[24]. Institutions are certain limitations in their activity that perfectionists disregard. Not respecting these constraints can give rise to high severity incidents damaging, inflicting damage on the social and even institutional a reflexive manner. Thus, there are so-

[23] The social demands are understood in a manner associated with the phenomenon of expectations that citizens exert on the institutional activity. These expectations represent important social demands for rights with potential impact on the legitimacy of institutional activity. The existence of great expectations may reveal that many individuals aspire a status of subject of rights, whether by way of innovation, is normative for the desire to execute the plan that this legal-formal had assured him. In summary, the growth of expectations about a given situation, if there is already discipline legal or constitutional, indicates difficulties in enforcement of rights. According to this logic, the expectations may have nature of systemic effects in institutional order. You can consider a case in which the promotion of a right is assigned to an institution, however, it resists to give effectiveness. Among the systemic effects of this case, it is possible to create expectations about other institutions that by prerogative functional can give it attention. The expectations are an instrument for the measurement of a real performance of institutional activity, and it may reflect in a different institution that gave it cause. The assistance to expectations of rights represents a performance by the introduction of an important democratic role, especially when social demands are structured in a more critical socioeconomic context, the example of companies recognized as emerging or peripheral.

[24] The firts best idea comes of economics, and it can be leveraged in law. When an existing limitation precludes the reach of an optimal point, we start from this limitation towards the solution that is closest to this. When we admit these limits, the same reasoning can be applied to institutional activity, discouraging institutions to interpret and act as if they could achieve perfect results. With this, the best output shall be between the ideal and what is achievable by institutional activity. It is the second-best model democracy. VERMEULE, Adrian. "The interaction of democratic mechanisms". Harvard Law School Public Law & Legal Theory Working Paper Series, No. 09-22, 2009.

cial demands that require a more significant preparation for coping.

The problems that have faced institutional activity can be countered by changes in a reduced dimension of institutional design adopted. Great changes may not be the most democratic solution strategy. Rather, the design of institutional mechanisms in order to meet the democratic values seem more effective measures than changing arrangements of larger scale[25] . Considering the possibility of replacing the separation of powers, severe changes would be required, starting with the Constitution itself, with other factors refractory to such proposal. The approval of a change of this magnitude would find resistance at the political, social and legal repercussions significantly in public life . As much as some institutional arrangements - such as the separation of powers - are having problems, his mangling a task seems difficult to achieve . Therefore, the effort to identify existing mechanisms, or try to design new mechanisms in a sphere smaller institutional design presents itself as a more strategic manner. Ultimately, we discuss solutions for a more efficient institutional activity with science that redesigns must occur on a smaller scale. Systemic effects are presented as an important phenomenon to mark a new perspective of institutional design when they could ensure a dimension of institutional legitimacy of the reflexive and systemic.

The specification of the object of analysis, systemic effects, presented here does not refer to any order passed in the practical activity of the institutions. The aim is to outline a study limited by institutional theory regarding the consequences strictly in a political- legal framework between the institutions themselves in performing their democratic activities that promote a rearrangement of the prevailing institutional design. To do so, you must conceive of how this phenomenon of institutional order is defined conceptually and understand the real plane, the universe of possibilities that present themselves in this sphere. For this analysis exercise that can understand how the systemic effects represent a phenomenon essential constitutional legitimacy, since they embody the constitutional reality while democratic exercise and not simply the democratic formalism.

III . Institutional issues and the characteristics of systemic effects

[25] The present study shares the vision that are democratic values the impartiality, accountability, transparency and the deliberation, Cf. VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Oxford: Oxford University Press, 2007, p. 4.

The democratic state often presents some problems that reflect institutional framework "threatening" the constitutional proposal is founded. These problems involve a dimension of legal content - political and administrative that are not always observable by scholars and can not be confused with the very systemic effects .In fact, the constitutional theories despite all the advances that have brought in terms of institutional design in recent decades, not focused, with due care, institutional problems relevant in order of performance of institutional activity.

Calls institutional issues, long have been neglected by interpretive theories, legally, as always sought to know "what I would do if I were a judge"[26]. With this, institutional issues of significant impact on the juridical and political order were not observed in models and techniques played throughout history and constitutional law. What can be seen today is the indispensable need to identify what an institution in circumstances where you are, and may need to make when confronted with some controversy. This means that the institution, rather than idealize the activity that must hold, need to understand what mechanisms has to perform his activity without producing, for example negative effects on the social order. The study of institutional capacity meets an idea of vices and virtues of formalism that may clarify some institutional[27] phenomena. The formalism is notably restrained behavior without advance predictions against existing standards and regulations. Rather in its Anglo-Saxon tradition seeks gradually establish new standards for deciding as a safe progression of interpretive[28] activity. Institutional theory, however has a distinct understanding of formalism, assigning it a role of strategic action. Formalism in general would be an exit strategy for times when the institution does not have the institutional capacity to address a controversy[29] height. Thus, the safest way not to make big mistakes, or breaking up with the stability of for example important precedents in the matter, for example would be a more strict set of for-

[26] This is the central critique of the interpretive tradition of thought in law formulated in SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institution". Chicago Public Law and Legal Theory Working Paper Series, No. 28, 2002.

[27] This idea comes from Alexander Bickel and is rescued in the work SUNSTEIN, Cass. One Case at a Time: Judicial Minimalism in the Supreme Court. Cambridge, MA: Harvard University Press, 1999.

[28] SCHAUER, Frederick. "Formalism". Yale Law Journal, Vol. 97, 4, 1988.

[29] This strategic understanding of formalism is in SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". Chicago Public Law and Legal Theory Working Paper Series, Np. 28, 2002.

mal terms. According to this strategic understanding, the next vicious behavior presents itself when formalistic institutional capacities allow supply problems that the standard does not identify or can not overcome; when the virtuous side missing institutional capacity and this is cause for a more subdued activity, preserving up and avoiding mistakes.

In this contexto, it is necessary to differentiate which would be institutional problems in this order of performance that would be exactly the systemic effects. Firstly, to understand systemic effects means knowing their positive or negative implications on the institutional order. Second, these negative implications go *pari passu* with what we call institutional problems.

For a more well-defined systemic effects, it is possible to consider the existence of three characteristics that are central[30]. The first feature of the systemic effects is the dynamic process by which it is driving, involves the entire institutional in that there is a permanent dynamic and continuous development. Thus, the systemic effects are always responsible for bringing successive implications of institutional activity to other institutions or itself.

Institutions when suffering the implications of systemic effects depend on their institutional capacities. This occurs because the second characteristic of systemic effects: the degree of performance of the activity must have its respective institutional support in terms of institutional capacity. When institutional performance in response to the demands of the systemic effects do not reach their level of institutional capacity, institutional problems arise. Thus an institutional problem is the result of the failure of an institution to respond to the consequences of the systemic effects through their institutional capacities. In summary, the second characteristic of systemic effects is its potential to give rise to institutional problems. Evidently, this problem will produce other systemic effects, with the trend that they are negative.

The third characteristic of systemic effects is in a legitimatory-democratic dimension and institutional activity. The relationship between systemic effects and institutional capacities can be adopted as a new approach to the phenomenon of legitimating institutions. As the performance of institutional activity occurs in a more or less problematic and in accordance with its institutional capacity this will entail other

[30] These three characteristics are being developed throughout the research, there is not, strictly speaking, prior treatment in institutional theory.

effects to the social sphere. This will be the parameter to argue in an institutionalist perspective, there is legitimacy in institutional activity.

The exercise of institutional activity in ensuring and promoting a rights system should be therefore aware of the practical difficulties this institutional level affecting the very character of legitimating their performance. It is possible to exemplify these institutional problems through situations mentioned here as: (I) reductionism of institutional activity ; (II) isolationism institutions; (iii) institutional ideology of statism; (IV) personalism and (V) conformism[31].

Such situations of institutional order can be observed from a perspective triad between institutional dialogues, institutional capacity and systemic effects. Firstly, the dynamic reality interinstitutional presents the so-called "institutional dialogue" when at the normative and practical level the interaction takes place between institutions, which generally is characterized as institutional design either by prescription normative-constitutional, whether by the exercise of institutional activity. Secondly, the institutional capacity to own dimension of potential intra-institutional performance. And finally, the systemic effects that represent the results of the activity itself institutional rules is not necessarily provided or practically. It is clear that institutional dialogues represent a formal composition or exercise between institutions with a degree of predictability, whereas systemic effects indicate splits isolated or combined to reflect consequential and subsequently results in other institutions, including with degree of unpredictability. It is exactly the composition of factors that would meet the above mentioned situations.

IV. Institutional issues and implications

The democratic constitutional order beyond considering the terms settled normatively, should turn their attention in a reflexive perspective on what has been, in fact, the mobile transformation of social reality: its institutions. While traditional legal theories maintain that the effectiveness of the plans is the norm, it is argued that it is the real guarantee of basic rights and promoting the true meaning of institutional[32] activity. As much as constitutional theory has evolved and surpassed

[31] These are institutional problems identified in the present study, without prior treatment in institutional theory.

[32] GRIFFIN, Stephen. American Constitutionalism: From Theory to Politics. Princeton: Princeton, 1999.

the limits of so-called "democracies" the rule is that institutional problems still present themselves as factors of resistance, or even of a barrier to a satisfactory plan development factual -social. It can be argued that this difficulty remains democratic over the generations as institutional problems are not addressed.

The limited experience democratic constitutional Brazilian is possibly one of the main causes of this difficulty democratic. Insufficient parameters guiding the activity of the institutions that are structured according to the constitutional experience. In the subjective performance of the institutional agent, for example it can be seen how difficult and complex performance autonomous and effective when it lacks guidelines. Such situations can lead pipes legalistic character, for example and they do not always promote the democratic role of that institution to the recipients of your activity. As identified above, there are some institutional phenomena that stand out and influence the degree of legitimacy in the dimension of systemic effects.

The phenomenon of reductionism (I) of institutional activity is when the institution does not recognize the political role that has within the democratic order. There are situations that cause institutional activity and should not be answered merely legalistic , and herein lies the problematic nature of this phenomenon. This represents the vice of formalism in which the institution reduces the political dimension that has within a democratic order, recognizing only the normative-legal aspects of its activity.

Isolationism (II) is when the activity is not exercised in cooperative mode. The institutional order, so it can be understood as a system need to watch dialogic mechanisms between institutions. Such mechanisms may increase institutional capacity for matters that are beyond the expertise of an entity now receive support from one who holds the highest[33] level of information. This enables better decisions and actions with more positive results in the factual background.

In times when institutions act through a rationality much more favorable to the interests of the State than to the interests of a public reason in politics, there is what we call statesmanship (III)[34]. The activity

[33] VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Oxford: Oxford University Press, 2007.

[34] The term State reason indicates a tradition of thought of political philosophy influenced by the work of Machiavelli and followed the structuring of political-institutional model of Modern European State. The term was coined first by Giovanni Della Casa, but only at the hands of Giovanni Botero in The Reason of State, in 1589, gained a more rig-

of the institutions should follow a public reason and not the reason of state, whether to retain the traditional conception of republican democracy. There are political movements in society which seek to control this activity. A performance so that it is recognized as legitimate must meet the values of this order. In certain aspects it is possible to assert that this is presented as another addiction of formalism, buy it is a question of impartiality[35]. This is because the institution is faced with their cases already pre-determined to defend the interests of the public entity state rather than comply with the democratic role that has to their citizens.

Personalism (IV) is in the moments when the motivations of institutional activity overlap with the reasons of private self-interest, which it operate. It is more a question linked to the value of impartiality, with severe repercussions in the sphere deliberative. The specialization of the institution can not be found in one dimension only subjective, but possess mechanisms that allow a specialized activity with this character.

Among these institutional phenomena, perhaps the most serious is the conformism (V), in most of the cases, when the vices above are known institutions and no action is taken. The formalism can compete viciously for the construction of a comfort zone of the institutional agent.

---

orous conceptualization, representing a sense of self-preservation of the state, indicating the practical needs of if acting in overcoming issues in their opposition. Cf. BOTERO, Giovanni. The Reason of State. Translated by P.J. Waley and D.P. Waley. New Haven: Yale University Press, 1956. On the other hand, the public reason is a concept closely linked to the thought of John Rawls: "The idea of public reason has a definite structure, and if one or more of its aspects are ignored it can seem implausible, as it does when applied to the background culture. It has five different aspects: (1) the fundamental political questions towhich it applies; (2) the persons to whom it applies (government officials and candidates for public office); (3) its content as given by a family of reasonable political conceptions of justice; (4) the application of these conceptions in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people; and (5) citizens' checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity. Moreover, such reason is public in three ways: as the reason of free and equal citizens, it is the reason of the public; its subject is the public good concerning questions of fundamental political justice, which questions are of two kinds, constitutional essentials and matters of basic justice; and its nature and content are public, being expressed in public reasoning by a family of reasonable conceptions of political justice reasonably thought to satisfy the criterion of reciprocity". RAWLS, John. "The Idea of Public Reason Revisited". The University of Chicago Law Review, Vol. 64, 3, 1997, p. 767.

[35] Cf. VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Oxford: Oxford University Press, 2007

It is more a difficulty in terms of impartiality[36], since the own comfort at the expense of a good performance of the activity represents an institutional self-interest of the agent. The conformation with irregular institutional order as listed above results in ensuring the maintenance of these vices , therefore , a phenomenon of great impact on the democratic order.

These institutional problems prevent the achievement of a satisfactory democratic values that stand as pillars of the constitutional order. There are at least four of these values by Adrian Vermeule, which can be recognized publicly, impartiality, transparency, deliberation and responsibility[37]. The institutional phenomena named here are examples of legal and political distortions that reduce the content of the democratic institutional activity. It is therefore necessary to seek democratic mechanisms that can provide legitimate outlets for the benefit of the structure of society, since the removal or alteration of large institutional arrangements usually generates certain strangeness and distrust by citizens[38] themselves. Thus, an institutional activity to understand mechanisms directed to democratic values allow stability and institutional development in accordance with constitutional provisions. Mechanisms, in turn must necessarily have its structure developed based on their own institutional capacities that that entity has.

V. Conclusion

In conclusion, one can say that with the institutional turn promoted within the theory of legal interpretation and constitutional become designed some institutional issues. This fact is of fundamental importance to understand the extent of the constitutional legitimacy of the factual background and experience. This means that the normative-constitutional, so it can be approached from social reality, must recognize the importance of factors such as the systemic effects. This is one of the specific aspects of the institutional dynamics, when observing effects of various kinds, such as legal, political or administrative. This phenomenon is, as it stands, the challenge for an institutional theory that directly

[36] About problems concerning the impartiality, Cf. VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Oxford: Oxford University Press, 2007.

[37] It is adopted in this respect, the prospect of VERMEULE, Adrian. Mechanisms of Democracy: Institutional Design Writ Small. Oxford: Oxford University Press, 2007, p. 4.

[38] Idem.

interacts with a democratic constitutional theory.

VI. References

BOLONHA, Carlos; RANGEL, Henrique; ALMEIDA, Maíra. "A Teoria das Instituições Democráticas em John Rawls". **Revista JurisPoiesis**, Vol. 13, 89-102, 2011.

BOLONHA, Carlos; EISENBERG, José; RANGEL, Henrique. "Problemas Institucionais do Constitucionalismo Contemporâneo". **Direitos Fundamentais & Justiça**, Vol. 17, 288-309, 2011.

BOHMAN, James. **Public Deliberation: Pluralism, Complexity and Democracy.** Cambridge, MA: The MIT Press, 1996.

BOHMAN, James; REHG, William. **Deliberative Democracy: Essays on Reason and Politics.** Cambridge, MA: The MIT Press, 1997.

BOTERO, Giovanni. **The Reason of State.** Translated by P.J. Waley and D.P. Waley. New Haven: Yale University Press, 1956.

DWORKIN, Ronald. **Law's Empire.** Cambridge, MA: Belknap Press of Harvard University Press, 1986.

DAHL, Robert. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker". **Journal of Public Law**, Vol. 6, 280, 1957.

GRIFFIN, Stephen. **American Constitutionalism: From Theory to Politics.** Princeton: Princeton University Press, 1999.

GILLMAN, Howard; CLAYTON, Cornell. **The Supreme Court in American Politics: New Institutionalist Perspectives.** Lawrence, KA: Kansas University Press, 1999.

KELSEN, Hans. **Teoria Pura do Direito.** Trad. João Baptista Machado. São Paulo: Martins Fontes, 1996.

HABERMAS, Jürgen. **Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy.** Translated by Willian Regh. Cambridge, MA: The MIT Press, 1996.

_____. **The Inclusion of the Other: Studies in Political Theory.** Cambridge, MA: The MIT Press, 1998.

HELLER, Hermann. **Teoría del Estado.** Buenos Aires: Fondo de Cultura Económica, 1992.

HESSE, Konrad. **Temas Fundamentais do Direito Constitucional**. Trad. Carlos

dos Santos Almeida, Gilmar Ferreira Mendes e Inocêncio Mártires Coelho. São Paulo: Saraiva, 2009.

HOGG, Peter; BUSHELL, Allison. "The Charter dialogue between Courts and Legislatures: or perhaps the Charter of Rights isn't such a bad thing after all". **Osgoode Law Review**, Vol. 35, 1, 1997.

LECLAIR, Jean. "Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien". **Revue du Barreau du Québec**, avril, 2003.

MCCANN, Michael. "How the Supreme Court Matter for the American Politics: New Institutionalist Perspectives". In: GILLMAN, Howard. CLAYTON, Cornell. **The Supreme Court in American Politics: New Institutionalist Interpretation.** Lawrence, KA: University of Kansas Press, 1999.

PILDES, Richard. LEVINSON, Daryl. "Separation of Parties, Not Powers". **Harvard Law Review**, Vol. 119, 1, 2006.

POSNER, Eric; VERMEULE, Adrian. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2011.

RAWLS, John. **O Liberalismo Político.** 2º ed. São Paulo: Ática, 2000.

_____. **Political Liberalism.** New York: Columbia University Press, 1993.

_____. "The Idea of Public Reason Revisited". **The University of Chicago Law Review**, Vol. 64, 3, 1997

SCHAUER, Frederick. "Formalism". **Yale Law Journal**, Vol. 97, 4, 1988.

SCHMITT, Carl. **O Conceito do Político**. Belo Horizonte: Del Rey, 2009; SMEND, Rudolf. **Constitucion y Derecho Constitucional**. Madrid: Centro de Estudios Constitucionales, 1985.

SUNSTEIN, Cass. **A Constitution of Many Minds: Why the Founding Document Doens't Means What It Meant Before.** Princeton: Princeton University Press, 2009.

_____. "Second-Order Perfeccionism". **Chicago Public Law and Legal Theory Working Paper Series**, No. 144, 2006.

_____. **One Case at a Time: Judicial Minimalism in the Supreme Court.** Cambridge, MA: Harvard University Press, 1999.

SUNSTEIN, Cass; VERMEULE, Adrian. "Interpretation and Institutions". **Chicago Public Law and Legal Theory Working Paper Series**, No. 28, 2002.

TREMBLAY, Luc. "Le Fondement Normatif du Principe de Proportionnalité en Théorie Constitutionnelle". **Mercredi**, Vol. 21, 2009.

VERMEULE, Adrian. **Judging Under Uncertainty: an institutional theory of legal interpretation.** Cambridge, MA: Harvard University Press, 2006.

_____. **Mechanisms of Democracy: Institutional Design Writ Small.** Cambridge, MA: Oxford University Press, 2007.

_____. "The interaction of democratic mechanisms"**. Harvard Law School Public Law & Legal Theory Working Paper Series**, No. 09-22, 2009.

WALDRON, Jeremy. "The Core of the Case Against Judicial Review". **The Yale Law Journal**, Vol. 115, 1344, 2006.

Institutional analysis and epistemology of values in Law: an outline

Maciej Pichlak[1]

Abstract: The paper offers an outline of a research programme consisting in cognition of axiological foundations of law through an analysis of institutional settings of legal system. Such approach allows to escape from existing controversies about arbitrary character of axiological reflection, which are still to be found in legal science. Thanks to the process of reconstructing values 'embodied' within given institutional practices and structures, it offers an intersubjective method of recognition of values material for the legal order.

To explain such version of institutional analysis the study refers to methodological postulates of two – in many respects different – philosophers, Paul Ricoeur and Jürgen Habermas. From Ricoeur it takes an idea of such analysis as a 'roundabout route' to ethical reflection, which escapes from a temptation of unconstrained and arbitrary moralizing. With Habermas it shares an aspiration to go beyond a futile conflict between functional approach (which excludes axiological inquiry at all) and aesthetic bias (which places axiological resources solely in dispositions of individual, apart from institutional structures) in social sciences. The works of both authors express and justify a possibility of conjunction of analysis of factual, empirical components of social practices, such as law, with reflection on their ideal, axiological plane.

The paper elaborates epistemological rather than epistemic problematic of cognition of values – which means that it delve into conditions of possibility of such cognition, instead of verifying particular methods of axiological studies.

Key words: Institutional theory of law; axiology of law; factual and ideal.

Introduction

The study aims at elucidate how an analysis of institutional settings of legal order supports a cognition of axiological foundations of law. To say about 'elucidation' may be a bit exaggerating, as all I of-

[1] Assistant Professor at the Department of Legal Theory and Philosophy of Law at University of Wrocław, Poland. Email adress: mpichlak@prawo.uni.wroc.pl.

fer here is a brief and preliminary outline of argumentation that waits for further elaboration. Before I will be able to conduct a more detailed analysis of these problems, let me present a roadmap of such possible inquiry.

The problem of cognition of values might be analysed on two basic levels: epistemological or epistemic one (to use terminology of transcendental philosophy for that sake). At the first level, one asks about necessary (and/or sufficient) conditions of possibility of cognition of values; the second one treats about most plausible methods of such cognition. As the title of this paper suggests, this is an epistemological problematic that will be scrutinized here. A matter of my concern are the chances that institutional analysis creates for reflecting axiological questions, rather than exact methods of such reflection.

Both these questions – about the very possibility, as well as on acceptable methods of axiological cognition in law have been a matter of controversy, where axiological considerations have been accused for irrationality and arbitrariness. Nevertheless, this is the very point where institutional approach proves its own usefulness, for it allows for a rational reconstruction of material values being 'embodied' within given institutional settings. Therefore, analysis of such institutional structures reveals to be a fruitful method of cognition of those values.

In order to justify such version of institutional analysis the study refers to methodological postulates of two – in many respects different – philosophers, Paul Ricoeur and Jürgen Habermas. From Ricoeur it takes an idea of such analysis as a "roundabout, long route" to ethical reflection, which escapes from a temptation of unconstrained and arbitrary moralizing. With Habermas it shares an aspiration to go beyond a futile conflict between two reductivisms in social science: the one of functional approach (which excludes axiological inquiry at all) and another one of aesthetic bias (which places axiological resources solely in dispositions of individuals, apart from institutional structures). Instead of this, the proposed perspective perceives public institutions as 'axiologically saturated' in nature. This proves itself to be a plausible starting point for a study on mutual relations between empirical (factual) and ideal (axiological) components of social practices – law included.

Axiology in the clash

The very possibility, as well as acceptable methods of cognition

of legal axiology, have been a matter of dispute since years, including the viewpoints negating such possibility. In particular, the question has been posed whether the reflection on axiology of law is able to liberate itself from subjectivism and arbitrariness.

On another hand, there has always been a need for axiological considerations within legal practice. It doesn't seem that it may be left apart as useless or irrational. From the most fundamental questions on legitimacy and validity of law, to purely practical methods of legal reasoning in everyday practice – the law all the time goes into intimate relations with values, particularly these of moral kind.

This practical need does not necessarily leads to any generally accepted methods of interpreting those values, though. For decades the discourse about axiology of law has been fragmented between legal philosophy of natural law on the one hand, and analytical legal theory (legal positivism) or empirical legal sociology (legal realism) on the other. These competing traditions could hardly find any common point (see e.g.Coyle, Pavlakos, 2005).

In Polish jurisprudence the problem of legal axiology has been conceptualized within the frames of the discussion about so called planes of law. 'Planes' were understood as the most relevant dimensions of the complex reality of law, at the same time determining the main methodological perspectives of analysis of law in legal science. According to the most influential proposals, the following planes have been distinguished: logical-linguistic, psychological, sociological, and axiological. Among these, the axiological plane was the most controversial and problematic one: on the one hand, it was usually recognized as a necessary one, yet on another hand, it was with just the same frequency reduced to others planes. Put it another way, 'values' relevant for law were interpreted as merely linguistic (expressions of agents' evaluations), psychological (emotions of individuals), or sociological (moral beliefs dominating in social group) phenomena (see e.g. Wróblewski, 1969a, Wróblewski, 1969b)[2].

Similar debates and controversies may be found also in other

[2] Unfortunately, I am not familiar with any easy-to-access survey of that discussion in English. However, practical consequences of a 'multi-plane approach' may be well seen e.g. in the major (and translated into English) book of one of the best-known participants of that debate, which is Judicial Application of Law by Jerzy Wróblewski (1992), where various theoretical models of application of law conforms with different possible planes of law. See particularly Wróblewski's analyses of 'ideology of judicial decision' as an instance of studies on the axiological plane.

countries, and not only within jurisprudence. In Germany – just to evoke one, yet significant, example, the opposite views on the usefulness and reasonability of axiological reflection have been replacing one another on the dominant position in general jurisprudence during the whole XX century – the process that has been recently described in a persuasive way by Jerzy Zajadło (Zajadło, 2013, see also Klatt, 2007).

One can learn one more thing from the German example: that these methodological debates within legal science reflect more general disputes in social sciences and humanities. Also the state of defragmentation of perspectives – 'objective' and 'neutral' social science vs. 'moralistic' social philosophy – can be observed in here. This rather miserable situation of both social and legal science has been depicted by Jürgen Habermas in his widely recognized book *Faktizität und Geltung* (Between Facts and Norms – see Habermas, 1998). Habermas writes about two, equally one-sided, versions of bias within social theory: functional reductivism (of system theory's kind) and aesthetic bias.

System theory represents in Habermas'es view these approaches which reduce axiological dimension of social life into some purely descriptive terms – what resembles the aforementioned general attitude of Polish jurisprudence to axiological plane of law. Thus from the point of view of Luhmann's theory, socially relevant values might be described merely as one kind of expectations that social agents share – normative ones, as distinguished from cognitive expectations. By doing this, Habermas claims, such functionalist approach "neutralizes anything that, from the participant perspective, appears obligatory or at all meaningful" (Habermas, 1998, p. 3). Yet this attempt to construct objective explanatory language drives to a paradoxical situation, for system theory lacks an explanatory force in some respects. Particularly it seems to be unable to justify practical commitments of social agents, and these practices which directly depends on such: "If reasons no longer command a force intrinsic to rational motivation – if, as Luhmann formulates it, reasons [*Gründe*] cannot be justified [*begründen*] – then the high-priced culture of argumentation developed in the legal system becomes a mystery" (Habermas, 1998, p. 51). Legal scholar might express similar thought with a use of slightly different, Hartian vocabulary: for system theory 'internal point of view' is a mere delusion of a deceived lawyer's mind (cf. Hart, 1961).

In the opposite corner Habermas locates 'aesthetic bias' of political philosophy, offering a role of its most prominent representative to John Rawls. One can hardly find more radical opposition to func-

tionalism of system theory: Rawlsian theory of political justice expresses very clearly the fundamental role of practical commitment of agents. Yet Habermas points that it goes too far this way: eventually, Rawls is said to have nothing more to build on, than moral dispositions of individuals, "political consciousness of a public of citizens"[3] (Habermas, 1998, p. 65). Still such consciousness of individuals is far too weak to ground any effective standpoint for action or critique. By omitting an institutional dimension of political practices, Rawls is accused for building sandcastles. In that light, all the accusations for arbitrariness and subjectivism of moral considerations might be repeated.

There is probably only one way of escaping the theoretical trap of functional or aesthetic reductivism, both of which fail in a plausible depiction of axiological dimension of social practices. This escape is offered by institutional theory, and at least for two reasons. Firstly, such theory proves its own usefulness, for it allows for a reconstruction of values being 'embodied' within given institutional settings – "normative presuppositions of existing legal practices", to use another quotation from Habermas (Habermas, 1998, p. xl). Hence, analysis of legal and/or political institutions allows for a rational, non-arbitrary recognition of values material for the legal order (or, one might add, any other social practice). Secondly, institutional theory reunite once again this what has been split in analyses of the aforementioned perspectives: objective social structures and practical commitments of agents (see Habermas, 1998, p. 66). To put it another way: it shows how axiological beliefs and ideals reflect at the level of institutional setting (or vice versa, as it is mutual, dialectical relation).

I will try to elaborate these two advantages of institutional perspective, with a help of two philosophers: the already evoked Jürgen Habermas and Paul Ricoeur. Such a selection might cause doubts, as their philosophical standpoints differ much from each other, and, moreover, none of them is directly associated with institutional theory. Nonetheless, I will try to show that they might be helpful for our sake. The usefulness and strength of both these projects, when it comes to cross over shortcomings of various opposite theoretical perspectives, has been already proved by John Thompson (see Thompson). Whereas Thompson shows it in the context of a clash between empirical positivism vs.

[3] It is not my ambition to answer a question whether Habermas'es critique does justice to Rawls. Even if it were the case that German philosopher misinterprets his American colleague, his description of 'a threat of aesthetic bias' remains inspiring and fruitful.

analytical theory in social science, it seems to be more universal quality of Habermas'es and Ricoeur's output. For sure this is the quality that brings these two philosophers together: a constant attempt to mediate between opposing viewpoints, to search for a risky equilibrium between differing perspectives, even if as a result one has to face a charge for eclectism. This general inclination may prove its usefulness once more, when we search for a way out from an unprofitable opposition between empty empiricism of (empirical or analytical) legal theory vs. abstract and idealistic moralism of traditional philosophy of law.

Ricoeur – a roundabout route of reflection

One of the most persuasive examples of a fruitful conjunction of 'objectifying' analysis of existing practices with more subtle axiological (and existential) reflection is a methodological programme of Paul Ricoeur, a bit metaphorically described by himself as "a roundabout, arduous […] long route" (Ricœur, 1974, p. 6). Ricoeur employs this strategy mainly to scrutinize problems of subjectivity and self-consciousness. In that context he distinguishes two possible approaches, which are called a 'short' (immediate) and a 'long' (mediate) route. A typical example of the first solution is the classical Cartesian philosophy of subject, which attempts to grasp directly one's own subjectivity, *Ego cogito*. Nevertheless, Cartesian method meets a serious problem, as it implicitly accepts a false presupposition of an absolute transparency of self-consciousness. Ricoeur claims – and he is seemingly right in that point – that it is never the case. He relies on Freud to state that "consciousness is not immediate, but mediate; it is not source, but a task, the task to become more conscious" (Ricœur, 1974, p. 324). A self-consciousness is always partially a 'false consciousness'; one can never fully and directly understand herself. However, if the consciousness is opaque for itself, the only possible way to grasp it is to go beyond it and to choose the indirect way of analyzing its creations: language, culture, works of art etc. As French philosopher puts it: "Consciousness is only the interiorization of this movement, a movement which must be rediscovered in the objective structures of institutions, monuments, works of art, and culture" (Ricœur, 1974, p. 325). This roundabout route is called by Ricoeur a reflection.

Ricoeur makes an exhaustive use of this method in his analysis of selfhood in one of his best-known book *Oneself as Another* – originally

Soi-même comme un autre (Ricoeur, 1992). Although the method is first and foremost designed and applied to the abovementioned reflection on the selfhood, it seems perfectly possible to engage it analogically for analysis of law's axiological foundations. For one may perceive law's axiology as determining the 'self-consciousness' and 'identity' of legal order. And just as those qualities of human being, which Ricoeur is trying to reach in his studies, it cannot be comprehended through a direct insight, but only on this arduous mediate path of reflection on legal practices and institutions. Hence, even if one can hardly count Ricoeur's philosophy into institutionalism camp, he justifies the need and makes a room for institutional analysis of social world. Such analysis forms a preliminary, yet inescapable stage of any axiological reflection on law.

Habermas - Faktizität und Geltung

Since I have highlighted Habermas as the main authority to argue for a need of conjunction of 'empirical' and 'ideal' elements in institutional analysis of axiological dimension of law, one may fairly expect at least a sketchy reconstruction of the solution of these problems proposed by German philosopher himself. Once again it will be of a great help to read his *Between Facts and Norms* (*Faktizität und Geltung*), which treats directly on legal discourse and legal order of modern state.

When compared with the above viewpoint inspired by Ricoeur's philosophy, Habermas may be read as designing an opposite direction of analysis, advancing from abstract and formally characterized communicational reason (the plane of *Geltung*) towards actual settings of legal order and legal discourse (*Faktizität*). This is the usual way of reconstructing his philosophical project (not only for law, but for public discourse in general), and admittedly he offers some clues which invite for such interpretation. For instance, it is by no chance a matter of coincidence that in Habermasian reconstruction of the fundamental elements of modern legal order we find numerous recourses to the philosophers of the state of nature – Hobbes and Rousseau (additionally to obvious Kantian inspirations), which suggest a belief in a hypothetical situation of a fully rational, universal and formal activity of 'pure' communicational reason, which establishes foundations of political and legal order (cf. Habermas, 1998, pp. 118–128).

However, that's only one possibility of interpreting the complex relations between 'factual' and 'ideal' – the possibility which focuses on

what may be called 'a line of justification'. It is not my intention to neglect the presence of such perspective in the project of Habermas; still one should realize the parallel existence of another line, that of gnosis, that means gaining a knowledge of such foundational ideals (e.g. of the kind of communicative rationality). And the latter, Habermas might state, should always be reconstructed from the actual institutional setting of legal order.

Furthermore, even if these two main lines coexist in Habermas'es work, the priority is given rather to the line of gnosis, proceeding (let me repeat it) from actual institutional practices towards axiological ideals. As Habermas explicitly admits, to introduce theoretically and *in abstracto* basic ideals of legal order, as for instance fundamental rights, is nothing more but a mere trick, "an artifice" (Habermas, 1998, p. 129). In fact, every such ideal needs to be extracted from actual or past practices. Thus, the real starting point of reflection are the standards stemming from the actual historical development of European legal systems – which, according to Habermas, allow for a "generalizing reconstruction" of the principles of rational discourse and communicational reason.

The dialectics of ideal and practice

The above considerations allow for a conclusion that institutional analysis offers a suitable – and probably even the most plausible – method for reconstructing foundational axiological ideals of legal order. So far, so good. However, this thesis should not be read as a claim about analytical relation between 'empirical' and 'ideal' dimension of institution. Were this relation analytical, it would be possible to infer deductively such ideals from facts at hand. As a result, possible ideals would be – from logical as well as practical point of view – fully dependent on existing practices. This would be a disappointing conclusion, though, as a reception of axiological ideals would be not so different from that of functional reductivism.

The two above-mentioned dimensions of institution should be rather perceived as remaining in more subtle, dialectical relations. Once again, this is the standpoint of Ricoeur and Habermas, who clearly adhere to dialectical thinking in their works. And this is not just a stroke of luck that in these works they illuminate the crucial characteristics of such dialectical relation, which might be named – for the sake of brevity – as inter-independence and criticalness.

Dialectical relation is an inter-independent one, since – as Ricoeur indicates – its components can never be properly understood without each other, yet they are not to be conflated with nor reduced to one another. The most relevant dialectical relation is for Ricoeur probably the one between Oneself and Another, as reflected in the title of his book. According to this viewpoint, Another becomes a necessary part of my own self-understanding, still remaining Another, distinct and independent from myself. Noteworthy, a similar dialectical structure might be noticed in the field of law, between 'legal' and 'non-legal' elements creating an identity of modern legal order (see Pichlak, 2014).

The second specific quality of dialectical relation consist in a fact that it is critical – that means that both components of it form a ground and a yardstick for a mutual criticism. This feature of dialectics is explicitly employed by Habermas in his studies of political and legal institutions. According to his view, the ideals embedded in existing practices may be at the same time understood as counter-factual foundation of actual practice which is able to reflect critically its own results. This possibility of internal critique of social institutions from the point of view of its own inherent ideals may be seen as a common motif of almost the whole output of German philosopher, including his early book *The Structural Transformation of the Public Sphere – Strukturwandel der* Öfetnlichkeit, originally published in 1962 (Habermas, 1989). It has been also in an inspiring way applied to analysis of modern legal order by Kaarlo Tuori; Tuori employs this approach in order to describe relations between various components of legal system (see Tuori, 2002).

***

As one may notice, despite the fact that the study focuses on the issues of epistemology of values, such epistemology (together with the methods of cognition typical of it) requires some ontological presumptions as to the nature of public institutions. These ontological presumptions form an implicit background of the analysis, even if they are not scrutinized here.

References

COYLE, S., and G. PAVLAKOS, eds., 2005. *Jurisprudence or legal science? A debate about the nature of legal theory.* Oxford: Hart Publishing.

HABERMAS, J., 1989. *The structural transformation of the public sphere. An inquiry into a category of bourgeois society.* [Cambridge]: Polity.

HABERMAS, J., 1998. *Between facts and norms. Contributions to a discourse theory of law and democracy.* Cambridge, Mass: MIT Press. Studies in contemporary German social thought.

HART, H., 1961. *The concept of law.* Oxford: Clarendon Press. Clarendon law series.

KLATT, M., 2007. Contemporary Legal Philosophy in Germany. *Archiv für Rechts- und Sozialphilosophie*, **94**(4), 519-539.

PICHLAK, M., 2014. Prawa człowieka a dialektyka prawa. In: A. BATOR, M. JABŁOŃSKI, M. MACIEJEWSKI, and K. WÓJTOWICZ, eds. *Współczesne koncepcje ochrony wolności i praw podstawowych.* Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa, pp. 23-36.

RICŒUR, P., 1974. *The Conflict of Interpretations: Essays in Hermeneutics.* Evanston, Ill: Northwestern University Press.

RICOEUR, P., 1992. *Oneself as another.* Chicago: University of Chicago Press.

TUORI, K., 2002. *Critical legal positivism.* Aldershot: Ashgate. Applied legal philosophy.

WRÓBLEWSKI, J., 1969a. Prawo i płaszczyzny jego badania. *Państwo i Prawo*, (6), 996-1006.

WRÓBLEWSKI, J., 1969b. Zagadnienie wielopłaszczyznowości w metodologii współczesnej teorii prawa. *Studia Prawnicze*, **21**.

WRÓBLEWSKI, J., 1992. *The judicial application of law.* Dordrecht: Kluwer Academic Publishers. Law and philosophy library. v. 15.

ZAJADŁO, J., 2013. Philosophy and theory of law in contemporary German jurisprudence. In: A. BATOR AND Z. PULKA, eds. *Legal Theory and Philosophy of Law: Towards Contemporary Challenges.* Warsaw: Scholar, pp. 67-88.

From Pontes de Miranda to Mireille Delmas-Marty: A journey to review the theory of sources of Law to accommodate the new rights generated by the nanotechnological revolution

Wilson Engelmann[1]

Abstract: There is a revolution on an unprecedented scale in progress: the nanoscale, which can be represented by the scientific notation 10^{-9}. The positive and negative effects of this revolution are still poorly understood. Because of this, the legal frameworks do not exist yet, being a challenge to Law. The Theory of Legal Fact of Pontes de Miranda is a structural model present in all branches of Law, although it has been created especially for Private Law. This theory shows to be inadequate to account for the new rights and duties arising from nanotechnology. It is proposed the adoption of a dialogue between the sources of Law, in which national and international standards can interact to accommodate new situations, giving them constitutionally and conventionally adequate legal effects. The idea of organizing the rules in a pyramidal structure will be replaced by horizontal forms of arrangement of the several sources, which can be handled as if they were open and flexible rings for formatting Law with the use of discretion in a responsible and creative form.

Keywords: Nanotechnology. New Rights. Theory of Legal Fact. Sources of Law.

Introduction

Products of different kinds, which are available to consumers, are already being produced at the nano scale. In laboratories, research continues in an accelerated process of development. Industries invest on these novelties, trying to increase their profit, considering the added value that nanotechnology can provide. Scientists have not yet reached a consensus on the most appropriate methodology for measuring the potential risks that production and commercialization of products at the nano scale may generate for workers, for consumers and for the envi-

[1] UNISINOS

ronment. Also, legal frameworks do not exist yet. There is a global debate on this topic, but considering the lack of the referred methodology and the absence of an inventory of the number of nano particles that already exist, the establishment of regulation probably will not be very simple. Law, as a representative of Human Sciences, seems indifferent to the effects — positive and negative — of the revolution caused by nanotechnology. It is necessary to bring the innovation that is under development in Exact Sciences into Law. Therefore, this article aims to bring some details about nanotechnology and to enhance that nanotechnology requires changes in legal production. Thus, it is necessary to review the Theory of Legal Fact, formulated by Pontes de Miranda, especially in the setting of factual support and in how the incidence and interpretation of legal production are facilitated, in order to accommodate the new rights and duties that are emerging from the discoveries at nanoscale. The theory of sources of law has to be revisited, so that through the dialogue between the sources of law it becomes more flexible. The topic is relevant and necessary considering the need to integrate Law in the innovative and challenging path generated by nanotechnology. Given these objectives and justification, the article also aims to answer the following question: under what conditions the revision of the Theory of Legal Fact, as planned by Pontes de Miranda, may be sufficient and adequate to account for the new rights and duties generated from nanotechnology and bring innovation to the construction of legal structures? This is a problem that shows up to Law as a whole, but it can be examined from the Theory of Legal Fact, formulated by Pontes de Miranda, as a central anchor of his Treaty of Private Law. As Pontes de Miranda admits, its formulation applies not only to private law, but it also supports the construction of Public Law. So, it seems to be a paradigmatic theory to analyze the need to review the way of construction of law as a whole. From this perspective, it is possible to see the importance of this theory and the need for its reformulation in order to ensure a longer and more effective life to law.

1. Theoretical Foundation

There is a technological and scientific revolution in progress. It is developed on a scale that is poorly known, but that has unprecedented possibilities and potential. It is the construction of things at the nano scale, which is, on the billionth part of a meter (ENGELMANN, 2011).

"Nanotechnology is a [new] field of very recent human knowledge, which is transverse, promising, inter/multi and transdisciplinary, in rapid expansion, with potential for innovation and transformation in the XXI century" (BINSFELD, 2011, p. 90). Here it is possible to see an indication of the necessity of innovation in Law, especially in the way legal effect is attached to social facts: nanotechnology. As nanoscale permeates various technologies, nanotechnology is a new industrial and scientific possibility, with unprecedented benefits and risks, considering the physicochemical interactions with different characteristics from those produced at larger scales, it is not a "scientific breakthrough" that will be linked to an area of knowledge, but it will involve all areas characterized yet, each one with specific contributions and looks; Law will have a relevant role, as legal frameworks are all to be built. There will be influences in all branches of law. This will require an effective (r) evolution in the conformation of legal effects; Law must learn to deal and interact with the other areas of knowledge, especially the "Hard Sciences", to understand the Nanotechnological phenomenon. There is a significant difficulty in developing regulatory frameworks, because not even the exact and/or technological areas know all the possibilities and risks that work at nanoscale may generate. There is no consensus or uniformity regarding the methodology for carrying out these assessments. And more than that:

> "[...] The basic principle of molecular nanotechnology is the construction of nanomaterials (nanowires, nanotubes, nanocoated, quantum dots, fullerenes, dendrimers and nanoporous materials) that are useful to life, from nanoparticles, atoms and natural elements that have physical and chemical properties completely different from natural elements, due to quantum effects" (BINSFELD, 2011, p. 90).

Nanoscale has always existed in nature. However, now, human beings are able to visualize them and reproduce them in laboratory because of the development of special equipment. Therefore, another challenge is the artificial production of nanostructures that, when interacting with the environment and with human beings, can produce toxic effects, many of which are still unknown. Anyway, an effective human intrusion in the creation of things is set up. From Eric Drexler on, the history of nanotechnology is told through the perspective of promises

and dreams, visions and expectations:

> "[...] Human beings are very bad, very poor at making things. [...] When we can get good at it, the results will be revolutionary. [...] With precision control at atomic level, physics tells us that we can build computers with a thousand times higher capacity, consuming less than 1/100.000 that energy, with about one millionth of the weight and a tiny fraction of the cost" (DREXLER, 2009, p. 46-7).

However, these possibilities are not built separately and the mastery of this technology is complex and emerging, being operationalized with the participation of various actors, which are networked together and make the effects of globalization even more striking. All this will influence the formatting of the Theory of Legal Fact, as planned by Pontes de Miranda, demanding complex and sophisticated answers, combining internal and external order, in a way that has not yet been seen in the history of Law. What should be observed in the propositions of Drexler is the exclusive focus on "Exact Sciences or Hard Sciences" to outline the path of "technological revolution" called nanotechnology: the need:

> "[...] of global partnership for development, with a partnership that gives increasing attention to molecules, to molecular technologies and to nanoscale machines; and to goals that can be achieved through the coordination of scientists and engineers in order to make components that come together to make systems" (DREXLER, 2009, p. 55).

The challenge for Law seems to have come: it must take place in the construction of this "technological revolution", under the penalty of losing its place in history. A beginning proposed in this article is to review and reconstruct the Theory of Legal Fact of Pontes de Miranda, for the importance it has in Brazilian legal scenario.

In Pontes theory, "legal fact comes from the factual world, but not everything that is part of it is, always, in legal world. [...], legal rule discriminates what can and what, by default, cannot enter. Determining the factual support of each legal rule is a task to be done with care" (PONTES DE MIRANDA, 1977, volume II, p. 183, § 159). The "factual world" is split from "legal world" and the first can only join the second if there is prevision in factual support previously drawn in legal rules. The possibilities generated by nanotechnology (the "new", the "unantic-

ipated") could not enter "legal world" because they have not been preliminary consecrated in factual support, at least so far, of any legal rule. What is not yet defined by "Hard Sciences" will have difficulty to be accommodated by "Humanities", especially in Law. Thus, the prospect of Pontes de Miranda, "[...] due to the lack of attention to both worlds many errors are committed, and what is worse, human intelligence is deprived from understanding, intuiting and mastering Law" (PONTES DE MIRANDA, 1983, volume I, p. 3-4, § 1), proves inadequate for understanding and producing Law in the XXI Century. Although it is a theory forged in the early twentieth century reflecting their epistemological assumptions, it now shows signs of inability to accommodate the rights and duties created by Nanotechnological Revolution.

According to Pontes de Miranda, in the context of the mentioned dichotomy, the notion of "factual support" is central: "[...] what is predicted by it [the rule of law] and on which it focuses is *factual support*, a concept of the highest relevance for exhibitions and scientific research" (PONTES DE MIRANDA, 1983, Volume I, p. 3, § 1). The facts of life that may enter the world of Law are always drawn previously because "[...] when it comes to legal facts, the substance lies in the essential data that integrates its factual support, as described in legal rules" (MELLO, 2010, p. 117). It is possible to say that what is likely to be legal must have been previously enrolled in the characterization of factual support of the rule of law (to use Pontes language). This generates a final result: "so it is important to stress that it is not possible, for the interpreter, to add or to delete elements to the factual support for configuring the legal fact, under penalty of error" (MELLO, 2010, p. 131). The dynamics of human life in our society — postmodern — does not show symptoms of this predictability, people are not born bringing "conduct manuals". Rather, there are actions and reactions from the movements of other social actors and this is becoming more and more unpredictable. Perhaps because of this, instead of reviewing the Theory of Legal Fact, it is more suitable to reconstruct this theory, in order to promote its effective approach to the unprecedented facts of life, promoting the emergence of new rights and duties, such as: a) juridicization of legal facts: looking specifically to the "act of creation" of things from the nanoscale: it will be possible to attach atoms and molecules and build what humans want, or by the opposite path, starting from larger particles and going down to the lowest, formatting what human inventive ability can plan. Here the notion of legal act-fact should be redesigned; b) the concept of illicit: in which it will be possible to launch, for example, the responsibility without damage, the

generation of damage without guilt, the question of limits of scientific ethics in this scenario, the question of damage to future generations; c) juridicization of risk, the actual risk of development; d) reduction to nanoscale changes the characteristics of things, this implies a change in the Theory of Goods, reflecting on the question of ownership, as new "things" can be created in laboratories and factories; e) the concept of rule of law, sheltering the principles. When Pontes de Miranda wrote his Treaty of Private Law, the conception concerning principles did not have the normative force that principles have today. Therefore, instead of the "dialogue of sources", designed by Claudia Lima Marques, a more audacious structural action will be needed: the "dialogue between the sources of law". It is time to appraise the lessons of Introduction to the Study of Law and of General Theory of Law, bringing up the topic and the exercise of Sources of Law. Although it is known for a long time that Law is only the most important source, if it still can be this way, but without the proper valuation of the other sources of Law. The dialogue between the sources of Law intends to leave the echelon or pyramidal form of organization of legal sources. Law is still seen from "the great pyramid", designed by Hans Kelsen, where "[...] a rule, from the point of etymology, is something that is set to provide a pattern (standard) upon which other things are judged; a standard is something to what one must conform" (Riddall, 2008, p. 153-4). If it was just this perspective, one could include all sources of Law. However, Kelsen establishes another condition: "[...] in any legal system, the standards that form it can be considered valid if the validity of the basic and original standard is assumed (Kelsen calls it *Grundnorm*)". With this, "if the system of rules is displayed in pyramid form, with a *Grundnorm* situated at the highest point, it would be considered that from this highest point the standards appear less general and more specific". The validity of inferior standards depends on a standard that is superior to them. There is a hierarchy among norms and a dependency on the existence of a superior standard. Because of this, "[...] the validity has no relation with the content of law. A law (or as Kelsen prefers, a norm) is valid, because it was created by a determined process" (Riddall, 2008, p. 157-64). The relation between content and form also appears in the proposal of Pontes de Miranda, from the moment that the production of legal effect depends on the prediction of the characteristics of social fact in factual support. If there is any element missing, the rule cannot be imposed, and juridicization cannot occur. To some extent, this phenomenon happens by the following observation: "precisely because it is legal and formal, modern

state Law collapses and is always buried in a text. [...] Law has become an extremely tough and rigid reality; reduced to an admirable system, which is logic, right, clear, therefore inevitable" (Grossi, 2010, p. 80-1). It is precisely because of all these characteristics that Law is unable to cope with the unprecedented movements proposed by nanotechnology. Thus, it is proposed that the dialogue between the sources of Law, with the replacement of the pyramid, in which the standards are arranged vertically, by a figure, still without a more specific name, in which the rules are laid out horizontally. This will make it possible to take advantage of the contributions from several sources simultaneously; and the design of the factual support can be supported from this dialogue, permeated by principles and substantially irrigated by Natural-Human-Fundamental Rights, amalgamated, for example, in the article 5 and its sections of the Constitution of the Republic of Brazil of 1988. In the dialogue between the sources of Law, "international standards", especially treaties and conventions dealing with Human Rights, also receive a new approach.

According to Mireille Delmas-Marty, it is necessary to operate the "restoration of a landscape" (2004, p. 1). The French author will be used to support the structuring of the mentioned dialogue between the sources, and not simply a "dialogue of sources", in which one law is only connected to another in order to solve a case of legal antinomy. It is required to open the stage of "evolutionary sources", which is, "[...] to renounce to the past of customary and to the future of laws to resolutely locate the sources of Law in the present, by unstable nature" (DELMAS-MARTY, 2004, p. 65). It will be needed to move and to reframe the role of laws as source of Law, by listening to the voice of tradition, announced, for example, by habits. To keep developing its role of providing the rules (or normative parameters) that should guide the behavior of people in society, Law needs to operate an effective recovery in its panorama, here understood as the Theory of Legal Fact: "[. ..] the panorama still inscribed in our memories did not disappear, but its components dispersed. [...]" (DELMAS-MARTY, 2004, p. 4). The "promises and disappointments of legal positivism" are still present in tradition and in legal actions of many jurists. Getting free of these jurists is a difficult task, though many of their features have already shown their weaknesses. Thus a model that starts with a threefold phenomenon arises:

> "[...] (phenomenon) of removal of landmarks, of emergence of new sources that would eventually relegate the state and law to the

> category of accessories and of displacement of lines, modifying the composition plan, so that the pyramids, still unfinished, are surrounded of weird rings that mock the old principle of hierarchy" (DELMAS-MARTY, 2004, p. 4).

These three movements are on the basis of the dialogue between the sources of Law and will be placed one next to the other, rather than one over the other. Instead of placing the Constitution, which in this model should be read from the interaction with international standards, especially those related to Human Rights, the Constitution comes to occupy a central place, through which all legal responses created by inter-sources dialogue should pass. It (the Constitution) will be the referential for the conformation of factual support. Thus, a control of constitutionality will be made, accompanied by the so-called "conventionality control", drawn from the approach of the legal response to the Universal and Regional Human Rights Declarations, as well as a look to the decisions of International Courts of Human Rights. Movements triggered for structuring the legality of the response may be compared "[...] to the image of the ring [that] introduces the idea of an interaction that does not necessarily entail the disappearance of all hierarchies, but rather the entanglement of these and, therefore, the emergence of new modes of generation of law" (DELMAS-MARTY, 2004, p. 98). The vision of the ring triggers the movement itself intended for dialogue, something that can flow between several sources, passing and passing several times through the controls mentioned above. With this, a legal-constitutional-conventional response will be ensured.

2. Methodology

The phenomenological-hermeneutic method will be used, oriented by the contributions of Martin Heidegger and Hans-Georg Gadamer. This method starts from the presupposition of ensuring certain amount of freedom to the researcher in the construction of the structures of their investigation, what enables an approximation between the subject (researcher) and the object of the research. The choice of the object is part of the world where there is the researcher. There is the phenomenon. There is no split between these two components. The choice of the object is due to this aspect, being part of the context of the researcher, who assigns meaning to it. The hermeneutic character: "[...] the word 'phenomenology' expresses a maxim which can be formulated in the phrase: 'the

things in themselves!' — by opposition to disconnected constructions, to accidental discoveries, to the admission of concepts only apparently checked, [...]" (Heidegger, 2002, § 7, p. 57). This is the point. The research is oriented by the relevant questions to nanotechnology, which are experienced by the researcher, and their (necessary) interface with Law. They are not detached from their experience and are connected with the world of their life. This experience is projected in the time horizon: "[...] from there, any phenomenological investigation is understood as a research of establishment of units of/in time consciousness, which presuppose, in turn, the constitution of this temporal consciousness. [...]" (GADAMER, 2002, § 249, p. 372). The researcher is inserted in a world where nanotechnological revolution is installing its effects. The researcher is in the world and wants to assign meaning to the movements required for Law to give its best contribution, performing its social function, in possible and adequate standardization, in order to safeguard human beings and the environment. In addition to this method of approach, there will be used, as methods of procedure, the historical, comparative and case study methods. As the main research technique bibliographic research will be used.

3. Development

By the aspects seen, Law will not take the role of sovereign source of Law, having to accept the emergence of other sources. The threefold phenomenon (*withdrawal of marks, the emergence of sources and the displacement of lines*) is necessary and will serve as a tool to update the proposal built by Pontes de Miranda, through the dialogue between all sources of Law. Nanotechnology will eventually produce a "[...] universe of events that, on the verge of misunderstanding, suggests to be apart from any possibility of control [...]. This finding implies, on legal perspective, understanding that Law needs to reframe in face of all this range of information and demands triggered by rapid changes of the social body" (FACHIN, 2012, p. 41). There is a great variety of aspects that are demanding new forms of regulation of society. The jurists (considered here as all actors of Law) are taking too long to realize this challenge. The various possibilities — positive and negative — brought by nanotechnology are incompatible with the legal structures that are still practiced. It is still operated within the following scenario, which — although has been written just for Private Law and within it to Civil

Law — will serve to reflect on the situation of Law as a whole: "in the last two centuries a supposedly neutral system, trampled on abstract legal categories, designed for an impersonal being, with pretensions to longevity, printed formulation to the project of support of Civil Law" (FACHIN, 2000, p. 324). The construction of the notion of rule of law and of its accommodation in the elements of factual support keeps a close relation with this system, which goes far beyond the area of Civil Law, but it is still the cloak of legality that covers all branches of law. And more: "the right of the human being alone, centered on a hypothetical self-regulation of their private interests, and conducted by formal equality, served to frame the beautifully finished model" (FACHIN, 2000, p. 324). It is talked about an abstract, hypothetical, and preliminary anticipation of everything people will be able to do in society, driven by the notion of formal equality, which is not concerned with the concrete life and everyday reality. Considering the contours brought by nanotechnology, it is clear that this model does no longer fit, showing blatant signs of disability and of loss of space in the regulatory scenario, as almost all areas of knowledge are opining on the regulation related to nanotechnology. This phenomenon would be healthy if Law was leading the process. However, this is not what happens in reality. At this point, it is possible to observe the danger of the loss of space of Law as a field of knowledge, by excellence, of regulation and specification of the means of formatting of legal effects. The symptoms of loss of regulatory space on new issues emerging from new themes generated by society were already denounced by Franz Wieacker, who also gazed at Private Law, but which, on account of the overcome of the dichotomy between contemporary Public Law and Private Law, can be used to analyze the situation of Law brought by advances in nanotechnology. "Without a new grounding for legal convictions there will not exist any future for the history of European private Law. Thus the conditions of this review are the most burning question of the future of private law" (WIEACKER, 1993, p. 716). As already mentioned, the new foundations for legal structuring lie on the dialogue among sources of Law and on the substantial conformation conferred to legal responses by means of fundamental-natural-human rights. These rights bring to light the learning generated by historical tradition of human beings and of their Law. For this, it is done the proposition of "[...] replace the authoritative pyramidal image by a system of rules that are not placed over one another, but at the same time, connected one with the other by a reciprocal interconnection relation" (Grossi, 2010, p. 83). This set, which operates as a network, starts

by finding natural rights — marked at the actual passage of the state of nature to civil state, in a Hobbesian conception, through their consecration especially in the Universal Declaration of Human Rights and, thereafter, in other texts, especially regional ones, until reaching the constitutionalization of these rights, giving rise to fundamental rights. In the case of nanotechnology, due to the difficulties already mentioned, there will not be traditional regulation — legal — the solution that Law will present. Maybe it is time to adopt voluntary "compliance programs" of existing standards, although not directly related to the nanoscale. This means that the dialogue between the sources of Law is projected onto these programs that will ensnare all social actors who may be affected by the effects of nanotechnology. It will be necessary a "normative power", which permeates integration between hard and soft law, without going into the merits of this dichotomy. This "normative power" has to aim to enable a corporate social responsibility, through a change in the mindset of organizations, what means, promoting a code of good practices, settled on a precautionary attitude that takes into account the current and future generations of living beings on Earth (Gorgoni, 2011, p. 371-83). These are some assumptions for the construction of the dialogue between sources of Law, supported by the principle of solidarity, "[...] which is, of responsibility, not only of governments, but also of society and of each of its individual members, for the social existence (and even for well-being) of each of the other members of society" (WIEACKER, 1993, p. 718). Therefore, with this passage it appears that there should be no concern about the dichotomy between public and private, but that everybody is responsible for the alignment of Law, and for the unconditional respect of its guidelines and standards. Other aspect that should be examined differently refers to legitimacy, which will no longer be "[...] in a single supreme source identified in whom holds the political supreme power, but, most often, in a spontaneous way of that varied and mobile reality that is the market" (Grossi, 2010, p. 83-4). It is not thought of defending the simply market matter. It is suggested to read the term "market" as the set of coordinated relations between the various actors operating in society, especially with the contours of globalization. And more: legitimacy will be promoted by the content — the respect for Rights (of) Humans, from its historical origin embedded in the deepest root of its genesis, which is Natural Law — and not by the presence of authority or power, with a simply formalistic bias. It will be necessary to take the challenge here delineated: "today, the jurist lives a fertile and hard moment: fertile, because their role is too active and stimulating;

and difficult not only for the serious responsibilities that weigh on their back, but also for the extensive quotient of uncertainty surrounding their cognitive-applicative action" (Grossi, 2010, p. 86). This is the question: it is required to leave the castle of certainty that does not allow full view of the reality that is presented to jurists and to Law in order to launch a space of uncertainty, but with the probability to envision the new and challenging scenario that human creativity is sketching through techno science and that will have to be housed by Law.

Final Considerations

Federal Constitution, in this space, should be considered as a "moral authority", able to support the constitutional validity of responses obtained in the dialogue between the sources, which has the language as condition of possibility. Law and legal production cannot be satisfied with the abstract prediction of legal rules and of assumptions of factual support. It is needed to interact with the social reality that underlies any regulation, considering local and global transformations, foregrounding "human things". So, paraphrasing Carlos María Cárcova, who mentions the opacity of Law, resulting from the unawareness of legal norms, it is intended to insist on the opacity of Law in the sense of unawareness of effective potentialities of the sources of Law. Besides this, the unawareness of the entanglement of sources existing today, many of them specified by the advances of globalization and by the emergence of new production centers of normativity. Law should not be opaque and motionless; on the contrary, it should be colorful and vibrant, opening its arms to embrace the new rights and duties generated by society. It should be observed that:

> "technological development that enables other forms of human communication; communication that accelerates and turns flows, impacting perceptions and cognitive processes; circulation of power and control, risk and possibility, here are other dimensions of complexity in which we are immersed and that imply challenges of very diverse nature, among others, challenges for the familiar institutional structures and for traditional forms of regulation of social relations" (Carcova, 1998, p. 175).

This is the situation of Law today: it is being challenged as a field of knowledge and also in its intrinsic aspect, in the structuration and in

the mode of building and listing the ways of attributing legal effects to the new risks and possibilities produced in nanoscale.

Substituting the pyramid by the horizontal arrangement of the sources of Law, connected by means of rings, in which the movements of communication occur in a much more fluid and fast way, and allow appropriate legal responses in tune with the values of a society that is local and global simultaneously. In this figure, there is also no concern to establish factual support elements previously, but, on the contrary, that are tuned with fundamental-natural-human rights. The dialogue between the sources of Law, by the constant ring movement of coming and going of sources, conducted by the thread of social solidarity, which is excited by the consonance between the three levels of rights, can bring the following composition for the generation of Law (DELMAS-MARTY, 2004, p. 116-7): a) "predetermination, which refers to the conditions of emission of the standard, to the legislator in the broad sense": it should be observed that it is not thought of a strictly state Law, but of large enough opening for the entrance of other sources of Law and of their actors of creation; b) "co-determination, which results from the margin left to the receiver, who must apply the standard, the judge in the broad sense": the standard will be assigned hermeneutic attribution of meaning, from the confrontation with the characteristics of the concrete case, giving to the applicator, who is not restricted to the judge, a creative and responsible margin of discretion for the construction of legal response; c) "overdetermination, which is, the code of values that is imposed to the legal field, to both the legislator and the judge, the implicit cultural code or 'a law that is expressed in silence'": it is worth saying, a "code" that is in consonance with the principles, values and fundamental-natural-human rights, in a substantial conjugation that must be steeped in constitutional control and in the control of conventionality. This "law which is expressed in silence" carries the screams of tradition and of the learning of experience, showing the relevance of flexibility of rings, to facilitate the movements of various formats until one finds the most suitable solution respecting living beings and the environment. This is the format of a new Theory of Legal Fact, able to respond and ensure a legally acceptable implementation of challenges, risks and possibilities — new rights and duties — generated by nanotechnology. These are the conditions, in a preliminary construction, for Law to be able to account for new rights and obligations generated by scientific-technological revolution wrought by human possibility of accessing the nanoscale. Therefore, it will be necessary to deconstruct the legal fort of certainty, so that Law

can follow the path of innovation initiated by Exact Sciences, promoting renewal, even if it is by the path of uncertainty and without the shelter of the fortress of legal precision advocated by legal positivism, notably by the legalistic aspect.

Because of this scenario, which is innovative and challenging at the same time, it is proposed the motion of ideas proposed by Pontes de Miranda to the new figures designed by Mireille Delmas-Marty, especially to enable the construction of a "world statute for scientific expertise, able to work with a "ordained pluralism" (2013, p. 62-3). There is the central point of the dialogue between the sources of Law, envisaged from a resistance to dehumanization, through the responsibility of the authors involved, seeking an anticipation of risks that are arising, for example, from nanotechnology (DELMAS-MARTY, 2013th). It will be necessary to create legal production alternatives that are ethically based on the respect to human beings and on the preservation of the environment. And more: legal mechanisms that can act in preventive or precautionary way, anticipating the likely adverse effects generated by the nanotechnological scientific revolution, changing the profile of juridicization delimitation of social facts: instead of happening after the facts, it should occur concomitantly with them.

Referências

ABDI – AGÊNCIA BRASILEIRA DE DESENVOLVIMENTO INDUSTRIAL. Nanotecnologias: subsídios para a problemática do risco e da regulação. Brasília: ABDI, 2011.

_____. Panorama de Patentes de Nanotecnologia. Brasília: ABDI, 2011a.

_____. Estudo Prospectivo Nanotecnologia. Brasília: ABDI, 2010.

BINSFELD, Pedro Canisio. Nanotecnologia: a interação célula e nanopartícula. IN: MINISTÉRIO DA SAÚDE. ORGANIZAÇÃO PAN-AMERICANA DA SAÚDE. Inovação em Temas Estratégicos de Saúde Pública. Brasília: Ministério da Saúde, 2011. Volume I. Coletânea de Textos.

CÁRCOVA, Carlos María. A Opacidade do Direito. Tradução de Edilson Alkmim Cunha. São Paulo: LTr, 1998.

DELMAS-MARTY, Mireille. Un statut mondial pour l'expertise scientifique, IN: Sciences et Avenir, Paris, n. 794, p. 62-3, avril 2013.

DELMAS-MARTY, Mireille. Résister, Responsabiliser, Anticiper ou comment

humaniser la mondialisation. Paris: Seuil, 2013a.

DIDIER JR., Fredie; EHRHARDT JR., Marcos (Coords.). Revisitando a Teoria do Fato Jurídico: homenagem a Marcos Bernardes de Mello. São Paulo: Saraiva, 2010.

COUTINHO, Luís Pedro Pereira. A Autoridade Moral da Constituição: da fundamentação da validade do Direito Constitucional. Coimbra: Coimbra Editora, 2009.

DELMAS-MARTY, Mireille. Por um Direito comum. Tradução de Maria Ermantina de Almeida Prado Galvão. São Paulo: Martins Fontes, 2004.

DREXLER, Eric. Os Nanossistemas. Possibilidades e Limites para o Planeta e para a Sociedade. IN: NEUTZLING, Inácio e ANDRADE, Paulo Fernando Carneiro de (Orgs.). Uma Sociedade Pós-Humana: possibilidades e limites das nanotecnologias. São Leopoldo: Unisinos, 2009, p. 41-55.

ENGELMANN, Wilson. Nanotechnology, Law and Innovation. Saarbrücken, Germany: LAP LAMBERT Academic Publishing, 2011.

FACHIN, Luiz Edson. Pessoa, sujeito e objetos: reflexões sobre responsabilidade, risco e hiperconsumo. IN: TEPEDINO, Gustavo e FACHIN, Luiz Edson (Orgs.). Diálogos sobre Direito Civil. Rio de Janeiro: Renovar, 2012, vol. III, p. 25-44.

_____. Teoria Crítica do Direito Civil. Rio de Janeiro: Renovar, 2000.

GADAMER, Hans-Georg. Verdade e Método: traços fundamentais de uma hermenêutica filosófica. 4. ed. Tradução de Flávio Paulo Meurer. Petrópolis: Vozes, 2002.

GORGONI, Guido. Modelli di responsabilità e regolazione delle nanotecnologie nel Diritto Comunitario. IN: GUERRA, Giorgia et al (a Cura di). Forme di Responsabilità, Regolazione e Nanotecnologie. Bologna: Società Editrice il Mulino, 2011, p. 371-95.

GRADY, Wayne. Technology. Groundwork Guides. Toronto: Groundwood Books, House of Anansi Press, 2010.

GROSSI, Paolo. O Direito entre Poder e Ordenamento. Tradução de Arno Dal Ri Júnior. Belo Horizonte: Del Rey, 2010.

HEIDEGGER, Martin. Ser e Tempo. 12 ed. Tradução de Marcia Sá Cavalcante Schuback. Petrópolis: Vozes, 2002, Parte I.

INVERNIZZI, Noela. Nanotechnology between the lab and the shop floor: what are the effects on labor? IN: J Nanopart Res. DOI 10.1007/s11051-011-0333-z, Springer, março 2011.

ISO TC 229 nº 944b. Nanotechnologies – Vocabularies for Science, Technology and Innovation Indicators. Disponível em: http://www.iso.org/iso/iso_technical_committee?commid=381983 Acesso em 06/01/2013.

MARQUES, Cláudia Lima. O "Diálogo das Fontes" como método da nova Teoria Geral do Direito: um tributo a Erik Jayme. IN: MARQUES, Cláudia Lima (Coord.). Diálogo das Fontes: do conflito à coordenação de normas do direito brasileiro. São Paulo: RT, 2012.

MELLO, Marcos Bernardes de. Teoria do Fato Jurídico. Plano da Existência. 16. ed. São Paulo: Saraiva, 2010.

PONTES DE MIRANDA. Tratado de Direito Privado. 4. ed. 2ª tiragem. São Paulo: RT, 1983, tomo I.

PONTES DE MIRANDA. Tratado de Direito Privado. 4. ed. 2ª tiragem. São Paulo: RT, 1977, tomo II.

RIDDALL, J. G. La gran pirámide. Hans Kelsen. IN: _____. Teoría del Derecho. 3. ed. Tradução de TsEdi, Teleservicios Editoriales, S.L. Barcelona: Gedisa, 2008.

SITE INOVAÇÃO TECNOLÓGICA. Tecnologias emergentes para o século 21. 15/02/2012. Online. Disponível em <www.inovacaotecnologica.com.br/noticias/noticia.php?artigo=tecnologias-emergentes>. Capturado em 05/01/2013.

WIEACKER, Franz. História do Direito Privado Moderno. 2. ed. Tradução de António Manuel Botelho Hespanha. Lisboa: Fundação Calouste Gulbenkian, 1993.

Inferencialist Pragmatism and Dworkin's "Law as Integrity"

Thiago Lopes Decat[1]

Abstract: The paper aims at justifying an interpretation of Dworkin's theory of Law as Integrity that brings it closer to philosophical pragmatism despite his rejection of legal pragmatism. In order to achieve this aim, this work employs a classification of philosophical commitments that define pragmatism in a broad and in a narrow sense, and shows that legal pragmatism follows the main thinkers of pragmatism in the narrow sense in committing to instrumentalism. The attribution of a pragmatist character to Dworkin's theory of law rests on the idea that the adoption of a commitment to instrumentalism is no implicated by its adoption of other pragmatist commitments.

Keywords: Pragmatism; Instrumentalism; Integrity.

1. Introduction

The widely known and historical polysemy of the term "pragmatism", in its philosophical theoretical use, finds a match in its use in the theory of law. Nevertheless, a conception in particular has been standing out and getting more space in discussions in the legal field, namely the one involved in the debates between Ronald Dowrkin (2010, p. 107-148) and self titled pragmatist Richard Posner (1997; 1998). Such a conception of decisionist nature seems to claim as its remote antecedent two tenets of Oliver Wendell Holmes' (1963; 2013) philosophy of law: the rejection of abstract speculation, especially moral ones, as well as the conscious decision to refer the contents of judicial decisions to its predictable social consequences. Its present-day antecedent may be found in Richard Rorty's version of pragmatism that sees anti-theoretical and

[1] Professor of Philosophy and Sociology of Law at Faculdade de Direito Milton Campos, Belo Horizonte, Brazil. E-mail: thiagodecat@gmail.com.

anti-systematic commitments as necessary consequences of conferring primacy to practice (in the sense of social practices) and of anti-essencialist thought. (Rorty, 2000a, p. 53-92)

In an article called "The banality of pragmatism and the poetry of justice," Rorty (1999, p. 93-95) predictably restates the affinity between his version of neo-pragmatism and Posner's philosophy of law, but surprises us by also enlisting Dworkin into the ranks of the legal (neo) pragmatism, despite his explicit rejection of what he conceives as legal pragmatism (Dworkin, 2007, p. 212).

This paper intends to make a similar move bringing Dworkin closer to a non rortyan version of contemporary *philosophical* pragmatism. The argument rests on the idea that Robert Brandom's inferencialist reading of pragmatist theoretical commitments (Brandom, 2011) can serve as the basis for a conception of contemporary philosophical pragmatism which is, simultaneously, anti-essentialist and based on the primacy of practical, without being for this reason anti-theoretical and anti-systematic.

The reasonableness of this effort to bring them closer is justified, among other things, by the similarity between what Brandom calls historical-expressive rationality - a conception of rationality originaly Hegelian but properly stripped of its metaphysical and teleological features by means of the resources of an inferencialist linguistic pragmatics - and the dworkian demand for integrity that guides the decisions of judges as an independent ideal, according to an interpretation of legal social practices that shows them in their best light. (Dworkin, 2007) The affinity between philosophical pragmatism and a rationalist, cognitivist, theory of law such as "Law as Integrity" might perhaps allow the extension of the expression "legal pragmatism" even beyond its already wide and vague limits.

2. Dworkin and legal pragmatism

The main difficulty in devising an argument that brings Dworkin´s law as Integrity closer to philosophical pragmatism, and consequently in developing a sense of legal pragmatism that both fits his theory of law and is conceivable as an extension or application of philosophical pragmatism to the legal field, is Dworkin´s explicit rejection of legal pragmatism. (Dworkin, 2007, p. 185-212) Even recognizing that legal pragmatism shares the merit of being an interpretive theory of law

with his own conception, and therefore is superior to semantic theories of law such as legal positivism or conventionalism, he claims that if legal pragmatism is right, his own theory of law is wrong and *vice versa*, that they are opposite theories. (Dworkin, 2007, p. 186, 212)

The awkwardness of this situation is that, at the same time, it is easy to spot some theoretical commitments typical of philosophical pragmatism in his theory of law and hard to miss the aversion and critical stance adopted towards the instrumentalism characteristic of both legal pragmatism and classical American pragmatism.

The strategy – but in no way the arguments - adopted here is recognizably a Rortyan one: to broaden the scope of philosophical pragmatism in order to include the theoretical commitments of classical pragmatism as well as the accomplishment of other philosophers that share some of these commitments, but not necessarily all of them. It is also Rortyan the strategy of identifying Dworkin's criticism of legal pragmatism with the criticism of its crass instrumentalism. As will be seen ahead, it is this theoretical commitment to instrumentalism that characterizes the distinction between pragmatism in broad and narrow sense.

One cannot agree with Rorty, however, when he claims that:

> Dwokin's polemics against legal realism appear as no more than an attempt to sound a note of Kantian moral rigorism as he continues to do exactly the sort of thing the legal realists wanted done (Rorty, 1999, p. 93)

or when, in an attempt to make the interpretation above plausible, he claims that:

> For myself, I find it hard to discern any interesting *philosophical* differences between Unger, Dworkin and Posner; their differences strike me as entirely political, as differences about how much change and what sort of change American institutions need (Rorty, 1999, p. 94)

Seeing Dworkin's theory of law (2007) as an attenuated or disguised form of legal realism, is to ignore the authority of past over future applications of legal concepts, central to the idea of integrity.

Also, understanding the disagreement between Dworkin and self titled legal pragmatists not as a philosophical difference concerning

what the law is – understood as social practice – but as a disagreement about political preferences, however broadly one takes the meaning of the term "political", amounts to acknowledge a radical separation between what the law is and what the law ought to be, something *entirely* incompatible with Dworkin's criticism of legal positivism. In fact, it is the rejection of this separation what makes both Law as Integrity and legal pragmatism examples of interpretive theories of law, as opposed to legal positivism, understood as victim of the semantic sting (Dworkin, 2007, p. 56)

If the mentioned strategy works, it will be allowed to say that, although Dworkin is not a legal pragmatist in the known and time honored sense of Holmes (2013) or Posner (2010), he is in some sense also a legal pragmatist because his theory may also be seen as an application to law of pragmatist philosophical commitments.

3. Two senses of philosophical pragmatism

The first step, then, is to discern the different philosophical commitments that shape pragmatism in its broader sense and in its narrower, classical American, sense.

Brandom's analytic classification of pragmatist commitments is the point of departure. He distinguishes pragmatism, narrowly thought, "as a philosophical school of thought centered at evaluating beliefs by their tendency to promote success at the satisfaction of wants", whose emblematic adherents are Peirce, James and Dewey, from pragmatism in a broader sense:

> […]a movement centered on the primacy of the practical, initiated already by Kant, whose twentieth century avatar include not only Peirce, James and Dewey, but also the early Heidegger, the latter Wittgenstein, and such figures as Quine, Sellars, Davidson, Rorty and Putnam. (Brandom, 2011, p. 56)

He considers the narrow sense of Pragmatism, and its commitment to an instrumental order of explanation of belief and truth, to be a way of working out the commitments that constitute pragmatism in a broader sense.

Pragmatism, in the broadest possible sense, means to him giving general explanatory pride of place to practices and the practical. (Brandom, 2011, p. 58) This idea unfolds, in a more determinate way, in a cor-

responding commitment to the explanatory priority of pragmatic theorizing over semantic theorizing. The idea that semantics must answer to pragmatics is a pragmatist one in a distinctive sense. The meaning Brandom attaches to these terms is broad:

> […] pragmatics is the systematic or theoretical study of the *use* of linguistic expressions, and semantics is the systematic or theoretical study of the *contents* they express or convey. (Brandom, 2011, p. 57)

According to Brandom, this commitment implies, even for the philosophers that wrote before the linguistic turn, an understanding of language as a kind of doing, as a practice or activity. The primary focus on the order of linguistic explanation is on the activity of saying, as opposed to focusing on what is said, the meaning or content.

To Classical American Pragmatism, this theoretical move was also compatible with, if not required by, their resolute determination to accommodate the discoveries and contributions of Darwinian evolutionism in a naturalist philosophical conception of rational (linguistic) creatures as continuous with the rest of living nature (and even inorganic nature, as in the even more radical reconciliation sought by Peirce in his evolutionary cosmology). (Bbrandom, 2011, p. 6)

Brandom attributes another pragmatist commitment, derived from the previous one, to the philosophers mentioned above: "the *point* of talking about the content expressed or the meaning possessed by linguistic expressions is to explain at least some features of their use". (Brandom, 2011, p. 58)

This is a commitment to a *methodological* Pragmatism: seeing semantic theorizing as answering to pragmatics by taking pragmatic theory as it´s explanatory target. Taking the success of the theoretical semantic enterprise to be assessed according pragmatic criteria of adequacy allows the sorting out of genuine semantic theories from others on the basis of it explaining or not a central feature of linguistic practice.

Another pragmatist commitment derived from the explanatory primacy of the practical, another way of making semantics answer to pragmatics, is *semantic* pragmatism: "[…] the "view that it is the way practitioners *use* the expressions that makes them *mean* what they do." (Brandom, 2011, 61) This commitment imposes a methodological requirement on semantic theorizing: when one

> […] associates with expressions some semantic relevant whatsis as its content and meaning, she undertakes un obligation to explain what it is about the use of thet expression that establishes in practice the association between it and the semantically relevant whatsis. (Brandom, 2011, p. 61)

Semantic pragmatism, although related to, is different from methodological pragmatism. But the difference is subtle. The methodological pragmatist

> […] looks at the explanation of the practice of using expressions, the subject of pragmatics, in terms of the contents associated with those expressions, the subject of semantics. The semantic pragmatist looks at the explanation of the association of contents with expressions in terms of the practice of using those expressions. While those explanations may be facets of the same story, they need not be. (Brandom, 2011, p. 63)

A further way in which the primacy of the practical unfolds is the commitment to the explanatory priority of "Knowing how" over "knowing that" named *fundamental pragmatism* by Brandom. (2011, p. 65) According to it, the intelligibility of explicit theoretical beliefs depends on the existence of a background of implicit practical abilities. It is the opposite of the platonic intellectualist strategy of explaining practical abilities in terms of the grasp of some principles, some privileged bits of "knowing that".

Brandom (2011, p. 65) points out that taking the capacity to entertain beliefs and acquire knowledge as parasitic on capacities to do things more primitive than thinking, believing, and saying, in the sense that it is not *yet* one of these, is something we find even in the older members of the brief list of philosophers mentioned earlier. The fact that we can find it in the first Heidegger as well as in Dewey, for example, also supports the attribution of this commitment to philosophers on both sides of the analytic-continental gap, reinforcing the idea of a wider sense of pragmatism than the one defined by the theoretical commitments undertaken by the classical American triumvirate.

This fundamental pragmatism take its force, in part, from its ability to present itself simultaneously as a determination and clearer expression of the fundamental pragmatic insight according to which practice takes explanatory precedence.

But its force comes, in part, from its ability to solve the problem of infinite regress characteristic of the attempt to start to explain believing (a dimension of linguistic practice) in terms of explicit "know that" instead of implicit "Know how".

Brandom shows that the heart of the problem is also the indication of its solution: the inferential nature of beliefs. According to him

> Beliefs would be idle unless the believer could at least some times tell what followed from them (what else they committed the believer to) and what was incompatible with them. (Brandom, 2011, p. 66)

However, sorting out among beliefs which ones are compatible or incompatible with some other belief, and which ones are consequences of it, is at the same time something that can be done right or wrong, and something for which a finite explicit regulation cannot be given. For if there are explicit rules to follow in correctly sorting incompatibilities and inferential consequences, these last rules could be rightly or wrongly followed, demanding a new set of explicit rules located at a superior level, and so forth.

The solution to this problem is agreeing with Wittgenstein and the other pragmatists on the inevitable bending of the shovel: "[…] distinguishing the potential beliefs that are incompatible with a given belief, and those that are its inferential consequences is a practical skill or ability: a kind of know how." (Brandom, 2011, p. 66)

This commitment is worked out in different ways by different philosophers. Brandon strategy (2003c) involves the developing a neo-Hegelian account of the expressive function of logic, which encompasses acknowledging the existence of material inferences, transitions and incompatibility relations between propositions and between assertions which are good not in virtue of its form, but of its content.

These material inferences, a kind of content related inferential license, are in turn instituted by the activity of practically assessing the linguistic performances of others, the activity of treating a transition as good or bad, of taking a move in the language game to be good or bad (not of saying that it is).

The fourth and final commitment Brandom (2011, p. 68) attributes to pragmatism in the broad sense is a commitment to specifying linguistic practices in terms of some sort of normative status, to employ normative vocabulary in pragmatic theory. Commitment to this norma-

tive pragmatics seems to him unavoidable, if one wants give an account of the practice of using linguistic expressions that

> I) [is] to be explained by semantics, according to methodological pragmatism; II) establish the association of linguistic expressions with semantic interpretants, according to semantic pragmatism; and III) constitute the practical know *how* against the background of which alone the capacity to know believe or think *that* can be made intelligible, according to fundamental pragmatism. (Brandom, 2011, p. 68)

This commitment was already undertaken by Kant. Brandom (2011) sees as one of the most fundamental Kantian insights the idea that what distinguishes the activities of rational beings, judgments and actions, from the behavior of non rational creatures is that judgments and actions are things one is responsible for. They involve, in an essential way, the undertaking of *commitments*. (Brandom, 2011, p. 68)

According to this interpretation, Kant takes judging and acting as discursive activities, since it consists in the applications of concepts, and sees concepts as rules that define to what one has committed oneself in judging and acting the way he did. These rules make possible to assess the correction of judgments and actions in terms of facts and intentions, respectively.

Hence, Brandom (2011, p. 68) takes Kant´s account of conceptual contents as aimed at establishing conditions of correctness to our practical performances of acting and asserting. That makes him a methodological pragmatism whose account of discursive practices employs normative vocabulary.

A contemporary version of that commitment to normative pragmatics can be seen in Frege´s distinction between force and content. As Brandom reads him, for the young Frege, *claiming* is associating a pragmatic assertional force with a sentence. He also takes assertional force as a kind normative assessment, since he sees asserting a sentence as taking it to be true, and truth to be a form of correctness. (Brandom, 2011, p. 68)

Something along the same lines can be said of the latter Wittgenstein on Brandom's account. (2011, p. 69) One of the central subjects of *Philosophical Investigations* is the existence of norms implicit in practices. That's why, for Wittgenstein as well (1999, p. 91-92; § 195-199) to take a linguistic performance to have certain meaning is committing oneself to the correctness and incorrectness of some uses of the expression. To

grasp a concept or intention is to commit to norms implicit in practice that define the correct use of the first and the fulfillment of the second.

Brandom (2011, p. 69) sees the later Wittgenstein´s version of the regress argument as qualifying him as a fundamental pragmatism, as well as a normative pragmatism. His argument about the necessary end of interpretations (the name he gives to a rule to apply or follow a rule) concludes with the acknowledgement that norms explicit in the form of rules can only be understood against a background of norms implicit in practices.

While the first three commitments that define the three more specific notions of pragmatism above may be easily applied to Classical American Pragmatism, it seems that normative pragmatism can´t be reconciled with their naturalistic approach to semantic and pragmatic theorizing.

But this is not the case. In fact, as Brandom reads the classical American pragmatist movement, this reconciliation is precisely the enterprise in which they were involved. They showed it is possible to acknowledge that the specification of social practices needed to work out the commitments to methodological, semantic and fundamental pragmatism requires the employment of normative vocabularies – talk about commitments and about correctness and incorrectness of performance – while searching for a naturalist strategy to understand the working of normative assessments. (Brandom, 2011, p. 70)

Brandom (2011, p. 70) understands classical pragmatists as pragmatists in all the senses discerned above. The explanatory priority they give to habits, practical skills, and abilities qualifies them as fundamental pragmatists. Their methodological pragmatism is manifest in their taking the point of talking about what we mean or believe –namely, semantic talk about meaning and content – to be the clarification of what we do, of our habits, of our practices of solving problems and seeking goals. They are also semantic pragmatists since they explain the meaning of utterances and the content of beliefs in terms of the roles of those utterances and beliefs play in social practices. Brandom aligns them alongside Kant, Frege, and Wittgenstein as endorsing a normative pragmatics, what in conjunction with their fundamental pragmatism implies their being also normative pragmatists. (Brandom, 2011, p. 71)

What makes it sometimes hard to see is the exclusively instrumental account they give of the norms that structure our cognitive practices. According to Brandom (2011, p. 71), classical pragmatism acknowledges only instrumental norms structuring human cognitive

practices. Instrumental norms, in this sense, are assessments of performances as correct or incorrect in terms of their contribution to the successful achievement of goals.

This is the kind of norms they see as implicit in discursive (conceptual) practice and, because of this, they are also the norms their semantic pragmatism treats as the ultimate source of specific semantic explicit normative assessments such as truth assessments. The result is a conception of truth in terms of usefulness and a corresponding understanding of the contents of utterances and intentional states in terms of their contribution in getting what one wants. This line of thought allows Brandom to describe Peirce, Dewey and James as instrumental normative pragmatists. (Brandom, 2011, p. 71)

This description, however, is far from consensual among contemporary pragmatists. Some of them, like Haack (2004) and Putnam (2002, p. 59-65), reject Brandom (2011, p. 70-81) and Rorty's (2000b, p. 34-52) attribution of instrumentalism to classical American pragmatism as an error of interpretation. It must be acknowledged that they are right concerning Peirce. Although his pragmatic maxim is formulated in a way that, if considered apart from his other theoretical concerns, allows an instrumentalist reading, the association of Peirce's conception of truth as idealized justification with his recognition of truth as a goal of inquiry certainly ends the dispute.

Attempts to eschew attributions of instrumentalism to James and Dewey, however, are not so successful. Although some specialists in the classical American pragmatism have been going to some pains to reject the attribution of instrumentalism to James and Dewey, those who accept it are entitled to do it by central passages of important works of these philosophers. The instrumentalist definitions of truth one finds in James' work *Pragmatism* (1989) are one example. Dewey's explanation of thought and action in terms of inquiry, in his work *Logic: the theory of inquiry* is another example (1985). Dewey describes inquiry as a normatively structured activity whose norms are produced by generalizations of some specific methods employed in the past: the ones that proved to be, in experience, the best methods for achieving certain results.

The best way to conciliate these perspectives seems to be to attribute to James and Dewey not only the adoption of instrumentalist strategies, but also some degree of awareness that commitment to instrumentalism is only a strategy for working out the other pragmatist commitments, and so should not cloud them. That may as well be what the complaints they made about some instrumentalist interpretations of

their work having pushed pragmatism too far are about.

However, this awareness is intermittent. The emphasis placed, by their critics and by the classical pragmatists themselves, on the instrumental aspect of pragmatism has eclipsed, from their critics and from themselves, the four more relevant pragmatist commitments that shape their philosophy, in Brandom´s view (2011, p. 71)

Since the attribution of instrumentalism to Peirce doesn't hold, and since Brandom's analysis of pragmatism ends in a definition of classical pragmatism consisting in the undertaking of all five pragmatist commitments above, from now on when talking about classical pragmatism Peirce should be excluded. The invention of the name "pragmaticism" to differentiate his thought from the thought of the rest of the pragmatists, especially their instrumentalism in matters of inquiry and truth, shows that Peirce would have no problem with this.

From the point of view of classical pragmatists, the great advantage of construing the norms implicit in practices in instrumental terms is the synthesis it allows between normative pragmatics and a Darwinian naturalism, a way to understand human practices as normative that is not mysterious, dualistic, or metaphysical, and that allows to see them as continuous with the rest of nature.

4. Legal pragmatism and instrumentalism

Of the five pragmatist commitments that shape the classical pragmatist movement´s philosophy, the one that was more intensely absorbed, and in some cases solely absorbed, by theoretical applications of pragmatism in the field of law was instrumentalism.

Instrumentalism is what boils behind Posner´s (2010, p. 32-33) resolute anti-theoretical claims that philosophical theory, even *pragmatist* philosophical theory, is irrelevant to legal pragmatism and legal practice. Such myopic absorption also help understanding Holmes' conception of law as prophecy, and his taking the judges conceptions of social benefit as supreme hermeneutic criteria.

In his *The Path of Law*, (2013) Holmes presents a series of instrumentalist claims and slogans. About law as object of inquiry, for example, he claims that "[…] the object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts". (Holmes, 2013, p. 2). In the same spirit, he claims that "The prophecies of what the courts will do in fact, and nothing more

pretentious, are what I mean by the law." (Holmes, 2013, p. 4)

Sometimes, the instrumentalism in Holmes' conception of law leans towards utilitarianism, when he claims that:

> judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. (Holmes, 2013, p. 9)

Holmes (2013, p. 16) also highlights in the same book, that priority should be given, in the shaping of lawyers, to the study of economy, thus anticipating more radical and utilitarian versions of legal pragmatism such as those exhibited by Posner and by the *Law and Economics* movement.

There certainly are other elements on Holmes (2013) conception of law that seem to follow from those other pragmatist theoretical commitments, shared by pragmatists in broad sense. The more manifest ones are the understanding of law not as a close system of norms, but as a social practice (Holmes, 2013, p. 1) as well as the understanding of the content of law as subjected to a historical process of transformation and improvement (Holmes, 2013, p. 3; 11). Such features, however, play a secondary role when compared with those features following form instrumentalism.

The same thing can be said of the sketch of a pragmatist conception of law that emerges from Dewey's *My Philosophy of Law* (2008) e *Logical Method and Law* (1925). Although in the first paper Dewey makes an effort to show the social – in the sense of interactional or intersubjective - origins of law, when it comes down to describing the activities of those involved in legal social practices in the second paper, instrumentalism dominates *entirely*.

After criticizing the syllogistic conception of legal inquiry and discussing at some length his own proposal of legal inquiry as an instantiation of the active, experimental and empirical process of inquiry that he calls logic - or, more precisely, the logic of discovery - characteristic of the reaching of intelligent decisions by lawyers and judges, Dewey adds to this process an instrumentalist twist. In a fragment resembling Holmes' instrumentalist theses, he claims about the logic of judicial decisions that:

> […] it must be a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than deduction of certainties. For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. (Dewey, 1925, p. 26)

One is right in attributing to Dewey, therefore, the idea that the real process by means of which legal decisions in general - and judicial decisions in particular - are reached is instrumental in nature. In another passage, the instrumental nature of normative legal patterns becomes even clearer:

> The "universal" stated in the major premise is not outside of and antecedent to particular cases; neither is it a selection of something found in a variety of cases. It is an indication of a single way of treating cases for certain purposes or consequences in spite of their diversity. (Dewey, 1925, p. 22)

If the reading undertaken here is sound, it seems that Dewey, in his sparse writings on law, synthesizes the conception of experience and logic typical of philosophical pragmatism in the narrow sense with an instrumentalism quite similar to the one expressed in Holmes' theses of law as prophecy and in his adoption of efficiency in bringing forth social benefits as supreme hermeneutic criteria.

Theoretical pragmatist conceptions of law can then be seen, apparently, as what happens when the orientation towards consequences that characterizes the pragmatist movement is read through reductive instrumentalist lens before being applied to law.

5. Dworkin's theory of law as a pragmatist interpretation of legal practices

But this is a half truth. There are others theories in the field of law that could be called pragmatist theories due to its absorption of one or more of the other pragmatist commitments, although rejecting instrumentalism. This is the case of Dworkin's Law as Integrity (2007).

This specific theory of law is committed to methodological pragmatism since it takes the point of theorizing about the content of law in general and of rights in particular as explaining some features of the use of legal concepts, of judicial adjudication, in short, of legal practice.

This theoretical guideline is what lies behind Dworkin´s interpretive and non reductionist conception of law according to which to interpret the law is to identify as the contents of rights those that show legal social practices in its best light, running intelligibility and justifiability together.

Law as Integrity is also committed to semantic pragmatism. It rejects the legal positivist strategy of demarcating the realm of law by means of a factual test. In its place stands the acknowledgment that the only thing that can lead us in establishing the propositional content of the doctrinaire concept law - what the law requires in novel cases - is the history of previous political and judicial decisions thought of as continuous and coherent with the current legal practices of adjudication. In short, it's a theory that makes the meaning and content of the legal propositions dependant on its historical and present use.

Differently from the other pragmatist commitments, commitment to fundamental pragmatism does not come to the fore of Dworkin's Law as integrity. However, since there is nothing in Dowrkin's theory of law that precludes commitment to fundamental pragmatism, and since this theory is not compatible with any form of platonist intellectualist order of explanation, this absence may be credited to the relative irrelevance of investigating pre-linguistic know how for achieving its theoretical goals.

The commitment to normative pragmatism, on the other hand, can be clearly seen in the pride of place Dworkin affords to the idea of norms implicit in practices. That idea is in the core of his concept of legal principle and of the distinctive rational process of simultaneously applying the law and developing the law that he calls constructive interpretation.

It is also deserving of notice that this commitment to the existence of norms implicit in practices is one that none of the self titled legal pragmatists undertook. They suggest a kind of skepticism about rights to the judges. It is the strategy of acting "as if" there were rights originating from the norms explicitly codified in the forms of rules. But they see this strategy as just one more way of "interpreting" the law and fixing its meaning *aiming at an increase in social benefit*. What follows from this is the conditional character of the strategy: it should be employed when and only when it supposedly leads to an increase in social benefit. Consequently, rights derived from rules are a considered a (sometimes) useful fiction. They don't really exist. The opposite of that conception is to recognize norms as real even when they are implicit in practices.

If this is correct, one can start to understand how the employment of Brandom's analysis of philosophical pragmatism equips one to do what this paper set out to do from the beginning: bring Dworkin closer to philosophical pragmatism. It is possible to see now that his conception of law is incompatible not with philosophical pragmatism in the broad sense as defined by the four pragmatist commitments that articulate its theories. On the contrary, Dworkin's theory of law adopts explicitly three of them and is highly compatible with the fourth. Its' incompatibility regards merely the strategy adopted by the classical pragmatists for working out their commitment to normative pragmatism in the context of their darwinian naturalist commitments, namely, instrumentalism about norms, and its legal expression.

But this strategy is entirely optional. Commitment to a naturalist order of explanation is not required by pragmatism in the broad sense. In the same spirit, commitment to instrumentalism is optional even for someone committed to naturalism. Its rejection count as rejecting at most some features of pragmatism as construed in a narrow sense. It is doubtful that committing to a reductive instrumentalism about norms is inevitable even if one wants to give a naturalist account of the norms implicit in practices. Brandom's own account of the emergence of the norms implicit in our discursive practice in the first chapter of *Making it Explicit* (Brandom, 1998, p. 3-66) can be read as a kind of weak naturalistic explanation of normativity.

Since the conception of law as integrity undertakes at least three of the four theoretical commitments that defines pragmatism in the broad sense, and since legal pragmatism, despite sharing instrumentalist commitments with classical pragmatism, undertakes no more than three of these commitments, we can draw the conclusion that Dworkin's (2007) conception of law is entitled to be understood as an application of philosophical pragmatism to the legal field, at least as much as legal pragmatism is.

References

Brandom, Robert. Analyzing Pragmatism: pragmatics and pragmatisms. In: Brandom, Robert. *Perspectives on pragmatism: classical, recent & contemporary*. Cambridge, Mass.: Harvard, 2011. p. 56-82.

Brandom, Robert. *Making it explicit*: reasoning, representing and discursive commitment. Harvard U.P: Cambridge Mass., 1998.

Brandom, Robert. Semantic inferentialism and logical expressivism. In: Brandom, Robert. *Articulating reasons*: an introduction to inferentialism. Cambridge, Mass.: Harvard U.P, 2003c. p. 45-78.

Dewey, John. *Lógica*: a teoria da investigação. Translation Murilo Otávio Rodrigues Paes Leme. São Paulo: Abril Cultural (Os pensadores), 1985.

Dewey, John. Logical method and law. *Cornell Law Quarterly*. Ithaca, N.Y., v. 10, n. 17, 1914-1925, 1925.

Dewey, John. My philosophy of law. In: Boydston, Jo Ann (Org). *John Dewey*: The Later Works, 1925-1953. Carbondale: Southern Illinois University Press, 2008, p. 115-122.

Dworkin, Ronald. *A justiça de toga*. Translation Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2010.

Dwokin, Ronald. *O império do direito*. Translation Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2007.

Haack, Suzan. Pragmatism, old and new. In *Contemporary pragmatism*, vol. 1, n.1 (junho 2004), p. 3-41.

Holmes Jr., Oliver Wendel. *The path of law*. Disponível em: <http://intersci.ss.uci.edu/wiki/eBooks/BOOKS/Holmes/The%20Path%20of%20Law%20Holmes.pdf.> Acesso em: 17/06/2013.

Holmes Jr., Oliver Wendel. *O direito comum*: as origens do direito anglo-americano. Translation J.L. Melo. Rio de Janeiro: O cruzeiro, 1963.

James, William. *Pragmatismo*. Translation Jorge Caetano da Silva. São Paulo: Nova Cultural (Os pensadores), 1989.

Posner, Richard. Conceptions of legal theory: a reply to Ronald Dworkin. *Arizona State Law Journal*. Tucson, n. 29. p. 377-385, 1997.

Posner, Richard. *Direito, pragmatismo e democracia.* Translation Teresa Dias carneiro. Rio de Janeiro: Gen Forense, 2010.

Posner, Richard. The problematics of moral and legal theory. *Harvard Law Review*. Cambridge MA, n. 111, p. 1637-1640, 1998.

Putnam. Hilary. Comment on Robert Brandom's paper. In Conant, James, Zeglen, Ursula (Ed). *Hillary Putnam: Pagmatism and Realism*. Nova York: Routledge, 2002. p. 59-65.

Rorty, Richard. The banality of pragmatism and the poetry of justice. In: Rorty, Richard. *Philosophy and social hope*. Nova York: Penguin Books, 1999. p. 93-103.

Rorty, Richard. Um mundo sem substâncias ou essências. Translation Cristina

Magro e Antônio Marcos Pereira. In Magro, Cristina. Pereira, Antônio Marcos. (orgs) *Pragmatismo*: a filosofia da criação e da mudança. Belo Horizonte: Editora UFMG, 2000a. p. 53-92.

Rorty, Richard. Verdade sem correspondência com a realidade. Translation Cristina Magro e Antônio Marcos Pereira. In Magro, Cristina. Pereira, Antônio Marcos. (orgs) *Pragmatismo*: a filosofia da criação e da mudança. Belo Horizonte: Editora UFMG, 2000b. p. 17-52.

Wittgenstein, Ludwig. *Investigações filosóficas*. Translation José Carlos Bruni. São Paulo: Nova Cultural, 1999. (Os Pensadores)

Another Pragmatism:
the Scandinavian legal thought

Jean-Baptiste Pointel

Abstract: Nowadays, the Scandinavian classical legal thought is described as "pragmatic". Though, this "pragmatism" is not rooted on Peirce, James or Dewey: the American Pragmatic Maxim was released in 1878. The two first Nordic scholars, considered as "legal pragmatists", Anders Sandøe Ørsted and Anton Schweigaard, died before 1870. Can we label them so, since they never acknowledged this philosophy? Pragmatism is, after all, a method of thinking, not a unified doctrine. As the American one, Scandinavian legal realism might be built on pragmatic precepts, with some variations: the Scandinavian Legal Realism is interested with scientific method for jurisprudence, while the American one focuses itself on practical issues. Nevertheless, there are some links interesting enough (how important are democratic issues for Dewey and the Uppsala School; the fact that William James was convinced by -and converged with- some Kierkegaard's views…)

The result of Nordic reflections is a specific concept of law. Rules are directives for action, not categorical imperatives. They give guidelines for the judges and the officials, but also for every citizen. The implementation of the law depends on the context. Legal norms are not "pure" and neutral. They contain values. That's why the legal language must be studied: its analysis reveals the inherent values. Then, a critical stance can be adopted. To sum up, this legal thought has the following characteristics: anti-foundationalism; anti-formalism; rhetorical analysis of language; moderate skepticism (or fallibilism); pluralism; contextualism.

This paper will look down on the four main Nordic scholars, namely the Danish Anders Sandøe Ørsted and Alf Ross, the Norwegian Anton Martin Schweigaard and the Swedish Karl Olivecrona. I will express how they forged a Pragmatic method. To my mind, they present the following common feature: a sensibility to individual ethic, and its relevance into the law.

Introduction

Since the "pragmatic turn" in philosophy of law[1], there is a trend to reread authors and to consider them as "legal pragmatists", sometimes "despite them". Therefore, young researchers find in the Scandinavian classical legal thoughts the basic elements of "pragmatism"[2]. Such idea may be odd: the American Pragmatic Maxim was released in 1878[3]; the two main Nordic scholars, considered as "legal pragmatists", Anders Sandøe Ørsted and Anton Schweigaard, died before 1870[4]. Their philosophical background cannot be rooted on Peirce, James or Dewey. Can we still label the Nordic "pragmatists", since they never acknowledged this philosophy?[5] May there be any sort of "plagiarism by anticipation"?[6] The only reasonable answer is to assume that pragmatism is not a unified doctrine but a method of thinking[7]. There can be some alternative reflections converging on main topics and on the way of reasoning. It is not needed to trace back roots on the same first authors. It is sufficient to highlight the consistency of their thoughts and the relevance of the answers they had on same topics.

Every legal thought is conducted by philosophical insights. Sometimes, we can only found them in background, sometimes they are explicit[8].For the Nordics, the main influence came from Germany.

[1] Jules L. Coleman, The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory, Oxford, Oxford University Press, 2001.

[2] The more relevant work is : Sverre Blandhol, Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard. Om vitenskap og metode [Nordic Legal Pragmatism: Savigny, Ørsted and Schweigaard. On science and method], Copenhagen, Jurist-og Økonomforbundets forlag, 2005.

[3] Charles Sanders Peirce, "How to Make Our Ideas Clear", Popular Science Monthly 12, January 1878.

[4] Respectively, the Danish passed away in 1860 and the Norwegian lived until 1870.

[5] Dag Michalsen, "Rettsvitenskapens mange identiteter – Bidrag til den rettsvitenskapshistoriske metode" ["Jurisprudence many identities – Contributions to the Jurisprudence Historical Method"] , in Jukka Kekkonen, Pia Letto-Vanamo, Päivi Paasto and Heikki Pihlajamäki (Ed.), Norden, Rätten, Historia. Festskrift till Lars Björne, Helsinki, Suomalainen Lakimiesyhdistys, 2004.

[6] Pierre Bayard, Le plagiat par anticipation [plagiarism by anticipation], Paris, Minuit, 2009.

[7] Arthur O. Lovejoy, "The Thirteen Pragmatisms", The Journal of Philosophy, Psychology and Scientific Methods, vol. V, no. 1, January 1908.

[8] E. g. Hans Kelsen's theory is linked to the neo-Kantian and the logical positivism, the Ordinary language philosophy innervates H.L.A Hart's jurisprudence… More explicitly,

Though, Schweigaard begins his review of German philosophy by a terrible sentence: "The German philosophy has done much harms, it made lost many great minds; it is time to get off with it."[9] What does it mean? Which scholars is he referring to? Especially Kant, followed by Fichte and Schelling and then Hegel. Apart Kierkegaard, the leaders of the Scandinavian way are the Danish Anders Sandøe Ørsted and the Swedish Axel Hägerström. They are the builder of the pragmatism legal though in Scandinavia[10]. They have the same goal: to reject every metaphysic from law.

At the beginning of the twentieth century begins the Scandinavian realism, following this trend. On the other side of Atlantic, almost at the same time, the American legal realism is considered built on philosophical pragmatism, following the example of Oliver W. Holmes Jr. While they focus themselves on practical issues, the main topics of the Scandinavians were epistemological ones: how to get a scientific method for jurisprudence, without any metaphysics[11]. Nowadays, the pragmatism "revival" is mainly found in epistemology[12]. That is why an inquiry on the Scandinavian Classical Legal Thought up to the Uppsala School is really relevant today, in a comparative perspective[13].

The object of this paper is not to compare American legal pragmatism to the Scandinavian one, nor to highlight links between the two pragmatisms (for example, democratic issues are very important

---

the French Paul Amselek wrote his PhD Thesis about the phenomenological method in jurisprudence.

[9] Anton Schweigaard, « De la philosophie allemande » [On German Philosophy], La France littéraire, vol. 16, 1835, p. 106. I translate from the french.

[10] Lars Björne, Brytningstiden. 1814-1870. Den nordiska rättsvetnenskapens historia [The Break time. 1814-1870. The History of Nordic Jurisprudence], t. II, Lund, Nerenius & Santérus förlag, 1998; Id., Realism och skandinavisk realism. 1911-1950.Den nordiska rättsvetenskapens historia [Realism and Scandinavian Realism. 1911-1950. The History of Nordic Jurisprudence],t. IV, Stockholm, Rättshistoriskt bibliotek, n. LXII, 2007.

[11] Michael Martin, *Legal Realism: American and Scandinavian*, New York, Peter Lang, coll. "American University Studies. Series V, Philosophy", 1997.

[12] Jacques Lenoble, "Beyond the Judge: From Hermeneutic and Pragmatist Approaches to a Genetic Approach to the Concept of Law", European Journal of Legal Studies, vol. 1, n° 2, 2007, p. 2.

[13] Torben Spaak, "Naturalizing Jurisprudence – By Brian Leiter", Theoria, vol. 74, n° 4, 2008, pp. 352-362; Torben Spaak, "Naturalism in Scandinavian and American Realism: Similarities and Differences", in Mattias Dahlberg (ed.), De Lege Uppsala-Minnesota colloquium: Law, Culture and Values, Uppsala, Iustus Förlag, 2009, pp. 33-83.

for Dewey[14] and the Uppsala School[15]; William James was convinced by -and converged with- some Kierkegaard's views[16]…). In this paper, my interest is the main Nordic scholars, in particular the Danish Anders Sandøe Ørsted and Alf Ross, the Norwegian Anton Martin Schweigaard and the Swedish Karl Olivecrona. How did they build a Pragmatic method? What do they intend to react to? And then, I will sum up the characteristics of this legal thought.

I. From empiricism to pragmatism: the foundation of a Scandinavian legal style

In the 19th century, the natural law school was prevalent, especially the German one. Thus, some scholars, like Savigny, broke up with the *jus naturalism*. In Scandinavia, the lawyers have developed a more practical science of law, based on empiricism. Ørsted and Schweigaard largely ruled the Nordic legal reflections, during this century[17].

a) The Danish founder: Anders Sandøe Ørsted

Anders Sandøe Ørsted (1778-1860) was the most important Danish lawyer of the Nineteenth century – and is only lately overturned by Alf Ross. He was the first one to introduce the Kantian ideas into the

[14] Robert B. Westbrook, "Pragmatism and Democracy: Reconstructing the Logic of John Dewey's Faith", in Morris Dickstein (Ed.), The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture, Durham, Duke University Press, 1998.

[15] Karl Olivecrona, Law as fact, Copenhagen, E. Munksgaard, 1939; Alf Ross, Why democracy?, Cambridge, Harvard University Press, 1952.

[16] William James, "How Two Minds Can Know One Thing", The Journal of Philosophy, Psychology and Scientific Methods, vol. 2, no. 7, 1905, p. 180; J. Michael Tilley, "William James: Living Forward and the Development of Radical Empiricism", in Jon Stewart (Ed.), Kierkegaard's Influence on Philosophy – Anglophone Philosophy, t.3, vol. 11

[17] Lars Björne, Brytningstiden. 1814-1870…, op cit., p. 433; Erik Anners, "Den europeiske rettens historie (utvalgte deler): Europa og Norden" ["The European Legal History (Selected Parts): Europe and Norden"], in Erik Boe (Ed.), Veien mot Rettstudiet [Road to Law Studies], Oslo, Tano Aschehoug, 1996, p. 235; Jens Arup Seip, "A. M. Schweigaard og liberalismens dilemna" [A. M. Schweigaard and the Liberalism Dilemna], Politisk ideologi. Tre lærestykker [Political Ideology. Three Lessons], Oslo, Universitetsforlaget, coll. "Det Blå Bibliotek", 1988, p. 76; Id., Utsikt over Norges historie [Overview of Norwegian History], t.1, Tidsrommet 1814-ca. 1860, Oslo, Gyldendals fakkelbøker, 1974, p. 100.

Danish law[18]. He opposed himself to his friend Fichte, about the inheritage of Kant. The goal of a Pure Theory of Law of his German colleague is denounced as a non-sense. He criticized the excess of theory used to describe reality: all the Danish thought, then, oppose to the will to build a system of certainty the irreducible of science, namely the individual and his subjectivity[19].

Ørsted found his arguments against Kant thanks to a divergent lecture of Christian Garve's translation of Ciceron's *De Officiis*. Based on his own Ciceronian commentaries[20], he lays stress on the use of language and its effect. We can see here the main opposition between him and Savigny: the German classical legal follows Greek tradition, based on Plato and philosophical systematism; the new Danish one is more roman, based on rhetorical and practical considerations. That is why Ørsted jurisprudence focuses on legal argumentation and empiricism: cognition is linked to language. Linguistic tools (universal) are not sufficient to encompass the diversity of reality (individual). Therefore, all the knowledge of the world is limited. His brother Hans Christian, a famous physicist and chemist, helps him to understand that natural world is composed of an infinite chain of objects. These elements are all different, but there is no clear separation among them, because there is no more than infinite small gradual variation[21]. Every barrier is arbitrary and the criteria used will never be sufficient, because the transition is always fuzzy: "the conceptions and formulas that moral theory is able to deliver, are not sufficient to solve all the tasks that life's multiple vicissitudes bring about."[22] Ørsted's contemporaries call this idea the "continuity of

[18] Anders S. Ørsted, "Over Sammenhængen mellem Dydelærens og Retslærens Princip" [1798], Moralfilosofiske skrifter i udvalg, Copenhague, Gyldendalske boghandel, 1936, pp. 7-237; See also Frantz Dahl, Hovedpunkter af Den danske Retsvidenskabs Historie, Copenhague, Nyt Nordisk Forlag, 1937, p. 47 ff.

[19] Olivier Cauly, Les philosophies scandinaves, Paris, PUF, coll. « Que sais-je ? », n°3308, 1998, p. 56.

[20] Sten Gagnér "Ørsted vetenskap, de tyska kriminalisterna och naturrättsläran" [Ørsted Science, the German Criminology and Natural Law Doctrine], Tidsskrift for Rettsvitenskap 1980, pp. 419-425.

[21] Anders S. Ørsted, "Over Grændserne mellem Theorie og Praxis i Sædelæren", Blandede Skrifter i Udvalg, Copenhague, Gyldendal, 1933 [1811], p. 37, quoted and translated by Sverre Blandhol, "The rhetorical foundations of Nordic jurisprudence", Ideas in History, vol.1, n°1-2, 2006, p. 44.

[22] Ibid., Anders S. Ørsted, p. 65 ; Sverre Blandhol, p. 47.

reality"[23]. The Danish lawyer does not conclude that Kantian categorical imperatives are non-sense. According to Ørsted, we should follow the ideal embodied in categorical imperatives. But, because such goals are too difficult, unreachable, we make do with acting prudently, pragmatically: every individual act corresponds to an area of individual liberty, trying to reach ethical ideals. Thus, a moral theory must be grounded into empirical studies.

Ørsted was also a professional judge. His legal thought is based on his everyday practice. He adapts his reflections on ethics to law: statutes law remains ideal which cannot plan with precision every individual case. We cannot deduce practical application from the mere written provisions. There is always a room left for pragmatic elements, bridging the gap between theory and practice. Thence, it is necessary, according to Ørsted, to observe factual position and social circumstances that drive human attitudes and his motivation. However, cognition flows by language. That is why argumentation is the main topic of legal method. To understand a legal norm, it is useless to refer to a philosophical system. Such ideal construction cannot offer any answer, but it can corrupt positive law with metaphysics. We must use a historical method, in order to apprehend with pragmatism the contextual elements of law: the state of mind of the legislators, morals of a people at a given time, the legal mentality, various applications of the statutes… To sum up, Ørsted refuses any systemic abstract construction[24]. Instead, his answer is to look to the living conditions and social circumstances to which law pertain: law depends on the judge which evaluates contextual elements in order to enforce legal rules[25].

b) The Norwegian successors: Anton Martin Schweigaard & Francis Hagerup

In 1814, Norway became an independent country. Anton Martin Schweigaard (1808-1870) is characteristic of the intellectual revolution that occurred at that time. High-ranking civil servant and professor of law, great Member of Parliament, he has developed an "ideology of action": all his life, he has fought against what he finds wrong or decep-

[23] Ibid., Anders S. Ørsted, p. 37 ; Sverre Blandhol, p. 44.
[24] Olivier Cauly, Les philosophies scandinaves, op cit., p. 71.
[25] Sverre Blandhol, "The rhetorical foundations of Nordic jurisprudence", op cit., pp. 48-49.

tive, especially what he calls the "false prophets"[26]. He traveled around Europa, especially Germany and France. The young Schweigaard got a strong instruction into moral (German) philosophy and Latin education, which he strongly condemned[27]. The objects of these teachings were not to understand how moral works but to inculcate one position: "they put their ideas instead of reality". That is why he confronts Kant's philosophy[28]. Providing Roman law courses, he applied his new methodology, practical-empiricism[29]. For Schweigaard, "Roman law is important, not as norms, but because he found there a jurisprudence in this law."[30] It is not only a mere history of old rules of law; it is the pattern of legal reasoning, still present and important. He used his analytical-descriptive method to bridge Roman law to current issues in Norwegian law.

He joined Ørsted's thought on many topics, especially, the objection to German jurisprudence[31], the care of language and rhetoric, the porosity of concepts, and the supremacy of argumentation over deduction. According to Schweigaard, legal principles, doctrinal studies and systematic are tools of opportunity, made by humans for practical uses. German philosophers think they are *a priori*, basic ideas of every law. This understanding leads to erroneous reasoning: it is common to proceed by reductionism, regressive analysis up to the basics that should be universal concepts with empirical proofs. But, this is a logical error claiming infallibility of deduction. Two opposite concepts have, in fact, a fuzzy frontier. Therefore, the only valid reasoning is argumentation. Schweigaard condemned the conceptualism as a whole, the use of mathematics in communication and the law of "excluded middle".

Hence, Schweigaard proposes a pragmatic methodology in law:

---

[26] Jens Arup Seip, "A. M. Schweigaard og liberalismens dilemna", op cit., p. 72.

[27] Ibid., pp. 67-72; Thor Inge Rørvik, "Schweigaard og Filosofien" ["Schweigaard and Philosophy"], in Ola Mestad (Ed.), Anton Martin Schweigaard – Professorpolitikeren [Anton Martin Schweigaard – Professor Politician], Oslo, Akademisk Publisering, 2009, p. 85.

[28] William Fovet, "L' 'affaire Schweigaard'" ["The 'Schweigaard case'"], Nouvelles de la République des Lettres, n° 2, 2002, pp. 47-70.

[29] Dag Michalsen, "Schweigaards romerske rett og den europeiske rettsvitenskap på universitet og storting" ["Schweigaard's Roman Law and the European Legal Science in University and Parliament"], in Ola Mestad (Ed.), Anton Martin Schweigaard…, op cit., pp. 336-337.

[30] Ibid. p. 362.

[31] Schleiermacher is an exception. Schweigaard got a great respect for the precursor of hermeneutics. See: William Fovet, "L' 'affaire Schweigaard'", op cit.

we need to evaluate every consideration, including natural law because frontier between law and moral is also fuzzy. But, there is no transcendental or heritable answers. Every problem is multifaceted, so we have to analyze with rhetoric and argumentation, no hermetical concepts. But the object is the description of norms that are empirically proved in order to understand how law works, not how law should work – that would be normative and no more descriptive.

His successor at the University of Oslo, Francis Hagerup (1853-1921) criticizes the narrow-minded Schweigaard's methodology: it is mere case-law analysis with no depth and no comparison at all with foreign laws[32]. He founded the first Nordic review of jurisprudence, *Tidsskrift for Retsvidenskab*. Since then, the reflections about jurisprudence have been no more purely domestic but Scandinavian. Following Jhering, Hagerup worked on an autonomous legal science apart from politics and sociology[33]. His methodology is constructive and deploys in three steps: analysis of concepts, systematization, relevant construction[34]. His methodology uses not so much deduction but induction: "Categories of general concepts cannot be deduced *a priori*, but we have to find them in inductive empiricism, if the object is partly made of rules of positive law, partly of practical forms of legal life."[35] As such, his constructive methodology looks after legal problems as they appear in practical life and not as they appear in the minds of legal theoreticians.

II. Against metaphysics and formalism: the deepening of Scandinavian Pragmatism

[32] Sverre Blandhol and Dag Michalsen, "Perspektiver på Francis Hagerup" ["Perspectives on Francis Hagerup"], in Id. (Ed.), Rettsforsker, politiker, internasjonaliste: Perspektiver på Francis Hagerup [Legal Researcher, Politician, Internationalist: Perspectives on Francis Hagerup], Oslo, Unipax Akademisk Publishering, coll. "Oslo Studies in Legal History", n° 2, p. 9-10; Sverre Blandhol, "Francis Hagerup om juridisk metode" ["Francis Hagerup on legal method"], in Sverre Blandhol and Dag Michalsen (Ed), Rettsforsker, politiker, internasjonaliste…, op cit., p. 44.

[33] Rune Slagstad, "Utilitarisme og naturret: norsk rettstenkning fra Schweigaard til Seip" ["Utilitarism and Natural Law: Norwegian Legal Thought from Schweigaard to Seip"], Rettens ironi [Legal Irony], Oslo, Pax Forlag A/S, 2001, p. 85.

[34] Sverre Blandhol, "Francis Hagerup om juridisk metode", op cit., p. 23.

[35] Francis Hagerup, "Nogle Ord om den nyere Retsvidenskabs Karakter" ["Some words about the newer Jurisprudence Characteristics"], Tidsskrift for Rettsvitenskap 1888, p. 27 quoted by Sverre Blandhol, "Francis Hagerup om juridisk metode", op cit., p. 31.

The turning point of the twentieth century, in Nordic countries, is the emergence of the Uppsala school[36]. The breaking with the traditional philosophy is far stronger than before: Axel Hägerström fought against every value, transcendental or concealed. This thought flows into a flourishing reflection on jurisprudence. Two branches appear: the radical one, with Karl Olivecrona, and the (more) "moderate" one with Alf Ross[37]. The latter offered a sort of synthesis of this trend and the tradition of Ørsted.

a) The Swedish school of legal realism: from Axel Hägerström to Karl Olivecrona

In epistemology, there is a clear shift between two movements: realism considers there is only one world, the reality, to which we are linked by mere sole empirical experience; idealism defends the existence of another world, constituted by values that can be acknowledged by pure reflection. This world is the domain of metaphysics. The conclusion is that idealism considers law as values that need an ethical cognitivism; realism states that law is social facts, empirically cognizable. But, for Axel Hägerström (1868-1939), metaphysics is every combination of words whose epistemological status cannot be determined with accuracy by those who enunciate them[38]. The war cry of Axel Hägerström is well known: death to metaphysics[39]. His task is to establish a scientific

[36] Staffan Källström, Värdenihilism och vetenskap – Uppsalafilosofin i forskning och samhällsdebatt under 1920- och 30-talen [Value Nihilism and Science – The Philosophy of Uppsala in Research and in Public Debate in the Speeches of 1920 and 1930], Göteborg, Acta Universitatis Gothoburgensis, 1984 ; Svante Nordin, Från Hägerström till Hedenius – den moderna svenska filosofin [From Hägerström to Hedenius – the Modern Swedish Philosophy], Lund, Doxa, 1983.

[37] Thomas Mautner, "Some Myth about Realism", Ratio Juris, vol. 23, n° 3, 2010, p. 418.

[38] Stig Strömholm and Hans-Heinrich Vogel, Le "Réalisme scandinave" dans la philosophie du droit [The «Scandinavian Realism» in Jurisprudence], Paris, LGDJ, coll. "Bibliothèque de philosophie du droit", vol. XIX, 1975, p. 20.

[39] Ernst Cassirer, Éloge de la métaphysique. Axel Hägerström. Une étude de la philosophie suédoise contemporaine [In Prais of metaphysics. Axel Hägerström. A Swedish Study of Contemporary Philosophy], in Œuvres, Pars, Cerf, 1996, p. 16. To be exact, the motto is "Praeterea censeo metaphysicam esse delendam" ("Furthermore, I consider that metaphysics must be destroyed"). It is a nod to Cato's famous sentence against Carthage.

method for law[40]. The main topic must be the definition of "valid law", in order to contest natural law's dogmas[41]. The bases of "valid law" are some metaphysical ideas that persevere because of habits of thought. From the divine will, positivists operate a translation to monarch, legislators or judges. But it is impossible to find and to determinate such volition with empirical observations[42]: the law is the basis and the limits to power. It is a vicious circle: the law is produced by the State, which is determined by its own creation… The law cannot be coercive by sole duties out of human reach. There must be grounds into empirical facts. The only power able to create duties is a psychological reality and nothing more. Thence, validity of law cannot be found into a descriptive reality, law is a language of action. To the "what", Hägerström commutes the "why" as decisive: a scientific analysis of moral thought by his mere contents is not as relevant as how such ideas are founded[43]. Therefore, the Swedish philosopher develops the axiological nihilism: the values and law are not grounded into material experiences or empirical, but on formal structures of mind. A scientific method cannot affirm that one given value is better than another, but it may explain the formalism used to ascertain this attitude.

Karl Olivecrona (1897-1980) is seen as the most virulent defender of the School of Uppsala[44]. His books *Law as fact* (1st ed.) is an important milestone for the development of Scandinavian realism[45]. Law cannot be a command, because will theory is metaphysics[46]. Thus, law is an independent imperative, a norm that states a directive, but disconnected to any institution or people. In fact, there is an individual who finally took this act. But, to be valid, the decision making must respect lots of proce-

---

[40] Jes Bjarup, Reason, Emotion and the Law – Studies in the Philosophy of Axel Hägerström, Aarhus, Press of the Faculty of Law, 1982 ; Max Lyles, A Call for Scientific Purity – Axel Hägerström's critique of Legal Science, Stockholm, Rättshistoriskt bibliotek, n° 65.

[41] Thomas Mautner, "Some Myth about Realism", op cit., pp. 413-418.

[42] Axel Hägerström, "Är gällande rätt uttryck av vilja ?" ["Is Valid Law the Expression of Will?], Rätten och viljan, två uppsatser [Law and Will, Two Essays], Lund, Gleerup, 1961, p. 62ff.

[43] Ernst Cassirer, Éloge de la métaphysique…, op cit., pp. 43-44. See also, pp. 94-95.

[44] Patricia Blanc-Gonnet Jonason, "Présentation", in Karl Olivecrona, De la loi et de l'État. Une contribution de l'école scandinave à la théorie réaliste du droit [Almost the same as Law and Facts, 1st ed.], Paris, Dalloz, coll. "Rivages du droit", 2011, pp. 8 & 12.

[45] Lars Björne, Realism och skandinavisk realism 1911-1950..., op cit., p. 321.

[46] Karl Olivecrona, De la loi et de l'État..., op cit., p. 53ff.

dural exigencies. Who is accountable for this command? This is norm of conduct for people, disconnected from a situation of command[47]. There is no specific ordering party; the main goal of such imperative is to imply in the mind a pattern of what is allowed or what is forbidden. Moral and law are closely imbricated and they reinforce each other. To sum up, there is a moral injunction to respect positive law; statutory law forms also the content of moral[48]. The law exists only as the content of representations into the mind of individuals[49]. If some laws seem to be permanent, it is because of the revival of the representations that animate these laws.

Therefore, Olivecrona goes on to establish a real science of law, interested only with neutral cognition of law. The object of a science of law is the content of the independent imperatives, that is to say the norms of conduct. This is still a descriptive study of norms, but not a normative study[50]. In order to understand the content, we have to use various disciplines, as economy, sociology and political sciences. The study of social life contributes to the study of law, because it is a content of ideas belonging to reality. It is an epistemological naturalism: law exists only in relation with natural facts, which is a causal relation, not a logical one[51]. The task of a scholar in law is not to predict what may – neither should – occur, but to describe what is in law, therefore, to explain the representations expressed by law[52]. To sum up, the science of law has three main goals: to put lights on the rules of law and to replace

[47] For Olivecrona, the State is a fiction. There is no real power, only positions of power. This position of power permits to exert a psychic influence on people. There is lots of such positions, thus there can't be only one power of states, but various. Karl Olivecrona, De la loi et de l'État..., op cit., pp. 59ff & 106ff.

[48] Ibid., pp. 65-67; see also Karl Olivecrona, "Realism and Idealism: Some Reflexions on the Cardinal Point in Legal Philosophy", New York University Law Review, n° 26, 1951, pp. 124-125 ; Torben Spaak, "Karl Olivecrona's Legal Philosophy. A Critical Appraisal", Ratio Juris, vol. 64, n° 2, 2011,, pp. 165-169.

[49] This made wonder Pierre Brunet whether law is only in the mind or not: "Is Law in the mind? A few thoughts on an essay of Karl Olivecrona ((De la loi et de l'État. Une contribution de l'école scandinave à la théorie réaliste du droit - french translation of Law as Fact (1939))", Jus Politicum n°8 : http://www.juspoliticum.com/Is-Law-in-the-mind-A-few-thoughts.html

[50] Karl Olivecrona, De la loi et de l'État..., op cit., p. 70.

[51] Torben Spaak, "Naturalism in Scandinavian and American Realism: Similarities and Differences", in Mattias Dahlberg (Ed.), De Lege, Uppsala-Minnesota Colloquium: Law, Culture And Values, Uppsala, Iustus Förlag, pp. 33-83.

[52] Karl Olivecrona, De la loi et de l'État..., op cit., p. 73.

them inside of their context; to canalize legal interpretation; to analyze current issues with a legal prism. Thus, doing this, some scholars insert what they think might be good, and no longer describe law. According to Olivecrona, this is still acceptable if, and only if, it is expressly stated and disjoint. There are values; none can be scientifically ascertained as true. But, nothing is worse than to conceal them into pseudo-scientific sentences[53]. The scientific and political argumentations are better if everyone accept to express his value system. No one can abstract himself from it, so the more scientific stance is to assume values, without concealing them by scientific authority[54]. There will be more room for political debates with a really scientific science of law[55].

b) The Internationalist Scandinavian: Alf Ross

The Danish Alf Ross (1899-1979) is the spearhead of the Scandinavian realism in the international debates concerning jurisprudence. Moreover, his legal theory might be seen as the synthesis of the Danish tradition leaded by Ørsted, the newly Swedish movement of Hägerström, and the internationalist stance of the Norwegian Hagerup. His legal thought follows, without any concessions, one rigorous path for a scientific method in law[56].

The basis of his epistemology can be found into his critics of the practical reason[57]. He reformulates "Hume's law": "cognition can never *motivate* an action, but, assuming a given motive (interest, attitude) it can *direct* the activity released."[58] Therefore, the science, which role is purely cognitive, cannot establish any imperative neither any valid norm of ac-

[53] Ibid., pp. 75-77.

[54] Ibid., p. 87.

[55] Gregory Alexander, "Comparing the Two Legal Realisms – American and Scandinavian", The American Journal of Comparartive Law, vol. 50, n° 1, 2002, p. 132.

[56] Sverre Blandhol, Juridisk ideologi: Alf Ross' kritikk av naturretten [Legal Ideology: Alf Ross' criticism of Natural Law], Copenhagen, Jurist- og Økonomforbundets Forlag, 1999; Jens Evald, Alf Ross: et liv [Alf Ross: A Life], Copenhagen, Jurist- og Økonomforbundets Forlag, 2010; Knut Waaben, "Alf Ross 1899-1979: A Biographical Sketch", EJIL vol. 14, n°4, 2003, pp. 661-674..

[57] Alf Ross, Kritik der sogenannten praktischen Erkenntnis : zugleich Prolegomena zu einer Kritik der Rechtswissenschaft [Criticism of the so-called Practical Knowledge: with Prolegomena to a criticism of Jurisprudence], Copenhagen, Levin & Munksgaard, 1933.

[58] Alf Ross, On Law and Justice, Berkeley, University of California Press, 1959, p. 299.

tion. One cannot deduce valid norms of action from empirical facts. Science may give directives but only with the support of a hypothetical force, on the assumptions of some given motives. The science remains pure if the motives are brought as explicit presuppositions and are no longer concealed. "The conclusions then acquire a hypothetical-objective character: they are maintained on the presupposition that a certain set of attitudes are accepted."[59] That is why rhetoric and argumentation are so important for scientific demonstrations: relations between actions and facts are causal and not logical[60].

The task of legal scholar is to describe valid law[61]. A scientific approach implies a "mode of procedure" of verification: every assumption must be verifiable. So, what is "valid law", according to this methodological requirement? Law is directive prior to the judge, then to citizens. Hence, is a rule valid law since applied in the practice of the courts? Not exactly. A statement concerning valid law does not refer to the past but to present: the state of the law may change. Moreover, a new legislation is regarded as valid law while no courts have applied it yet. So, the real content of a doctrinal proposition about valid law must be understood as referring to hypothetical future decisions: "if an action should be brought on which the particular rule of law has bearing, and if in the meantime there has been no alteration in the state of the law (that is to say, in the circumstances which condition our assertion that the rule is valid law), the rule will be applied by the courts."[62] If we cannot set the process of verification, such doctrinal statement can however be confirmed or invalidated by relevant facts, when (if) they will occur. Since we cannot verify the assertion about valid law by direct observation, we still can check whether such assumption is coherent with the other well-verified doctrinal propositions[63]. Thus, this realism is half psychological, half behavioristic[64]: the verbal behavior of the judges supplies

[59] Ibid., p. 319.

[60] Henrik Zahle, "Legal Doctrine between Empirical and Rhetorical Truth. A Critical Analysis of Alf Ross' Conception of Legal Doctrine", EJIL vol. 14, n°4, 2003, pp. 801-815.

[61] Riccardo Guastini, "Alf Ross : Une théorie du droit et de la science juridique"["Alf Ross: A Theory of Law and of Legal Science"], in Paul Amselek (Ed.), Théorie du droit et science [Legal Theory and Science], Paris, PUF, 1994, pp. 249-264.

[62] Alf Ross, On Law and Justice, op cit., p. 41.

[63] Henrik Palmer Olsen, "Overraskelser og Prognoser i Retsvidenskaben" ["Surprises and Prognosis in Jurisprudence"], Juristen n°5, 2001, pp. 173-185.

[64] Alf Ross, Towards a realistic jurisprudence. A criticism of the dualism in law, Copenhague, Einar Munksgaard, 1946, p. 147 ff, especially the diagram.

consistency and predictability, but this consistency refers to the mentality of the judge, that is a normative ideology[65].

The mentality of the judges, their beliefs and attitudes that direct their decision, is the subject of the doctrine of the sources of law. It is an ideology that animates the courts[66]. It can be observed only in the actual behavior of the judges. That's why science of law is norm-descriptive. The sources of law are a metaphor of this ideology, stating that every pieces of law flow from a common source of validity. In fact, the sources of law may vary from one legal system to another. Ross builds up a classification, according to the degree of objectification of the type of source: the authoritative formulations (legislation), custom and precedent, and what he calls "reason". However, they are all "reasons" which are more or less explicitly embodied inside rules. These are all pieces of a legal culture that shape legal reasoning[67]. In some systems of law, judges may confer more importance to statute law than precedents, and vice versa. "The judge in the performance of his calling is under the influence of the tradition of culture because he is a human being of flesh and blood, and not an automaton, or rather because he is not merely a biological but also a cultural phenomenon."[68] All these "reasons" constitute the doctrine of the source of law. This ideology is norm-expressive. The object of the science of law is not to express norms, but to describe them. Therefore, the scientific stance is to analyze this ideology[69] – which is psychological –, ascertained by the behavior of the judges[70].

This reflection leads logically to a critic of positivism. Ross rejects *jusnaturalism* because natural law is based on *a priori* insights. He also rejects positivism when it is understood as "what is formally established". Thus, he is positivist, in the sense of the empiricism dogma: "what builds on experience": "A realistic doctrine of the sources of law

[65] Torben Spaak, "Naturalism in Scandinavian and American Realism: Similarities and Differences", op cit., pp. 40-51.

[66] Noberto Bobbio, "Être et devoir-être dans la science du droit" ["Is and Ought in Science of Law"], in Essais de Théorie du Droit [Essays in Jurisprudence], Paris, LGDJ, 1998, p. 188.

[67] Alf Ross, Towards a realistic jurisprudence…, op cit., pp. 15-16 ; p. 54 ff ; p. 88, especially the diagram ; p. 92 ff.

[68] Alf Ross, On Law and Justice, op cit.,, p. 99.

[69] Riccardo Guastini, "Alf Ross : Une théorie du droit et de la science juridique", op cit., pp. 263-264.

[70] Svein Eng, "Lost in the System or Lost in Translation? The Exchanges between Hart and Ross", Ratio Juris vol. 24, n° 2, 2011 , pp. 202–203.

builds on experience, but recognizes that not all law is positive in the sense of 'formally established'."[71] Moreover, in social science, predictions might evaluate: it is possible that a prediction was false, but after its enunciation, the beliefs change and fulfill the requirements, making this prediction true afterwards[72]. Thence, the dogma of Ross is neither pure empiricism nor pure "positivism"[73]. He takes great care of pragmatic considerations.

Conclusion

There is a Nordic position on jurisprudence, which can be labeled as "pragmatic" according to Sverre Blandhol[74]. This common thought is well explained by Régis Boyer: there is no real imaginative setback for the Scandinavians; they always look after a balance between dream impetus and hard material requirements[75]. The determining elements – more or less shared – are the following[76]:

Anti-foundationalism: the knowledge does not derive from logical deduction of basic principles. There is a shaping of knowledge under both empirical observation and conceptualization. Ideas and perceptions are simultaneous constructed and may change.

Anti-formalism: the concepts are not self-sufficient to apprehend law. Enforcement of law does not respond to pure logic. The culture of the lawyer is relevant although not expressed by formal law.

Rhetorical analysis of language: it is required to use argumentation and rhetorical analysis in order to justify an interpretation of legal

[71] Ibid., p. 101.

[72] Ibid., p. 47.

[73] Compare with the concepts of positivism, as found in Hart (The Concept of Law), Bobbio (Essais de Théorie du Droit [Essays in Jurisprudence]), Scarpelli (Qu'est-ce que le positivisme juridique ?[What is legal positivism?]); see also, Éric Millard, "Présentation", in Alf Ross, Introduction à l'empirisme juridique [Introduction to legal empiricism], Paris, LGDJ, 2004, p. 8.

[74] Sverre Blandhol, "Hva er pragmatism?" ["What is pragmatism?"], Tidsskrift for Rettsvitenskap 2005, n°04-05, pp. 491-524.

[75] Régis Boyer, Histoire des littératures scandinaves [History of Scandinavian Literatures], Paris, Fayard, 1996, p. 106. The author considers more precisely the Scandinavian literature but encloses also the Nordic mentality.

[76] Compare with Brian Leiter, "Naturalism and Naturalized Jurisprudence", in Brian Bix (Ed.), Analyzing Law: New Essays in Legal Theory, Oxford, Clarendon Press, 1998, pp. 103-104.

texts. There is an open texture of language, to use Hart expression.

Moderate skepticism: to determine the meaning of a text, there must be a choice. This interpretation creates the rule. But this skepticism is not radical, which consider there are no rules but sole acts of powers. The moderate skepticism is a cautious and modest stance. It is the basis of the "normativist realism": norms exist, but textual formalism is not enough for the cognition. We have to go back to the reality and its experience. Therefore, any assertion may be revised in light of new experience.

Pluralism: state law is not the only valid law. It is required to adopt a multifaceted analysis of law to attain full understanding. Law is a kind of human representations.

Contextualism: to reach the real content of a rule, we have to apprehend the context in which it lives. That means every fact, maybe outside the spectrum of law, relevant for the application of a rule. Thence, to separate a decision of courts from the facts, that were determinant for the judges, is non-sense.

Two others common features of these Scandinavians scholars are the importance of Roman law and the individual as the cornerstone of their reflections. First, they founded their analysis in Ciceronian commentaries and in Roman jurisprudence; the study of the Praetor deeply shaped Francis Hagerup's thought; Hägerström's inquiries began with Roman law and its "magical" origin; etc. Second, all the critics about cognition strongly emphasize on individual ethics. This is the starting-point of consideration to contexts and pragmatic elements. Maybe it is linked to Lutheran Protestantism. Whatever, the whole Scandinavian thought remain consistent thanks to the respect of individual reasoning.

Yugoslav Literature under (Il)Legal Censorship: 1945-1990

Dijana Zrnić, M.A.[1]

Abstract: The main aim of this paper is to discuss the legal framework and the actual practices through which the Communist regime attempted to control Yugoslav literary production. Agitprop's role as a "prime censor" of the regime will be examined together with its centralisation of the control system over the publishing industry. The development of legal solutions and the role of judiciary in support of the control of the circulation of ideas in the society and legislative confinement of the influence of writers whose literary creativity was potentially harmful to ruling political ideology, will be exposed to critical review through certain historical timelines.

The paper will also examine the response of major publishing houses and individual authors to the new cultural policies imposed by the Communists. It will discuss a number of examples, ranging from open opposition – as was the case of prof. Mihajlo Đurić's comments on newly proposed Constitutional Amendments or Alija Izetbegovic's Islamic Declaration – to involuntary collaboration - as exemplified by self-censorship of literary majority. It will also provide examples of other means through which the regime exerted pressure on the publishers and authors like granting financial favours, nationalizing the press often supported by the application of illegal means such as direct and indirect threats, informative secret police interviews, etc.

Key words: censorship, author, law, literature, Communist regime, Agitprop, publication, judiciary, prosecution, the Publication Act.

1. Introduction

"There is no such thing as a moral or an immoral book.
Books are well written or badly written. That is all."
(Oscar Wilde, *Preface to the Picture of Dorian Gray, 1891)*

[1] Assistant in Legal English, Law Faculty in Banja Luka, Banja Luka University, Republic of Srpska, Bosnia and Herzegovina. Email: dijanapetkovic@blic.net.

The struggle for freedom of expression is as ancient as the history of censorship. The first concrete case of censorship occurred with Socrates (c. 469 BC – 399 BC), a classical Greek philosopher, who was sentenced to drink poison for promoting his philosophies. It is believed that the main reason for his execution were his attempts to improve the Athenians' sense of justice.[2] The Greek playwright Euripides (c. 480 BC – 406 BC), much to the consternation of the conservative audiences, defended the true liberty of freeborn men and women, and their right to speak freely. He believed that traditional codes of value needed to be re-examined and scrutinized through reversals of social expectations. These strategic discontinuities between character and social status suggested that status, including slavery, was not the result of natural hierarchies, but imposed by custom or chance.[3]

Thus, the struggle for freedom has throughout history been defined as a struggle against censorship as "official prohibition or restriction of any type of expression believed to threaten the political, social, or moral order imposed by governmental, religious, or local powers"[4]. In other words, censorship consists of any attempt to suppress information, points of view, or method of expression such as art or profanity. The purpose of censorship is to maintain the status quo, to control the development of a society, and to suppress dissidence.

The history of literary censorship in the post-bellum Yugoslavia largely builds on earlier and concurrent traditions of, foremost politically provoked censorship. Namely, the Communist regime believed in ideological homogeneity and universality of thought, whose stability was constantly undermined by guerrilla attacks of literary dissidents and intelligentsia in opposition. To preserve its dominance, however, the ruling regime had never prohibited anything in a vacuum, but had rather tried to control the circulation of literary ideas in the society and confine the influence of those that were potentially harmful to their interests. In order to do so, a variety of procedures was developed, spanning from *repressive*, such as restrictive legal codification, judicial injustice in the form of stage trials, and police brutality to *softer*, more sophisticated methods such as exclusions, lists of forbidden books or

[2] See: Plato, Apology, trans. by Miloš Đurić, Dereta, Belgrade, 2008;

[3] Op.cit.: Ruby Blondell et al., Women on the Edge-Four plays by Euripides, Routledge, Newyork-London, 2002;

[4] The most detailed study of censorship done by Jonathon Green and Nicholas J. Karolides, Encyclopedia of Censorship, Facts on File, New York, 2005;

authors, restricted access, etc.

The censoring methodology had closely followed the variable political situation in post-war Yugoslavia ranging from the initial settling accounts with pro-Fascist literary and non-literary material published during the war, assassinations of the so-called enemy collaborators, control of printed material through internal decrees and letters containing lists of prohibited books and authors produced by various censoring agencies –Agitprop, editors, typesetters, publishers, etc. (1945-1952), through special engagement of the Office of the Public Prosecutor in censoring a printed word aimed against brotherhood and unity and Titoism, criminal trials instigated by Public Prosecutors against writers charged with "verbal crimes" or ideologically based offences (1952-1971), to unjustly high penalties, ranging from imprisonment to hard labour at the notorious Goli otok (the Barren Island), for those who dared to soil the name of Josip Broz Tito, instigate ethnic hatred and insinuate the eventual fall of Communism (1972-1990).

2. Open war against the past (1945-1952)

"Death to Fascism, Freedom to the People!"
(Partisan slogan)

Having decided to join forces against the Axis powers to put an end to the destruction of humanity, foreign ministers of the four leading countries met in Moscow in November 1943 and sealed their agreement in the form of a *Declaration of the Four Nations on General Security*, which defined the culpability of "Hitlerite forces in many of the countries they have overrun and from which they are now steadily being expelled."[5] Likewise, the United Nations War Crimes Commission, founded in October 1943, appealed to all anti-Hitlerite coalition member states, including Yugoslavia, to establish their National Commissions that would be tasked to collect evidence against war criminals and to refer them to competent courts for sanctioning. Thus, a National Commission for the Investigation of Crimes of Occupiers and their Supporters was founded in Yugoslavia by the Anti-Fascist Council of the People's Liberation. The Commission was composed of a number of different departments, in-

[5] Annex 10 to a "Secret Protocol" signed in Moscow, during the Moscow Conference, on 1 November 1943. Signed by British Prime Minister Winston Churchill, Soviet Premier Joseph Stalin and US President Franklin D. Roosevelt.

cluding the Enemy Property Department and the Survey Commission for Crime Establishing based on the Cultural Collaboration with the Enemy. The initial task of the Survey Commission was "to identify and proclaim as criminals those persons, who placed their intellectual abilities at the service of the enemies and thus helped them enslave and disunite our people, who had been the intellectual originators of the crimes that were subsequently perpetrated by others".[6] Thus, the Communist Party started to get even with its political opponents who were usually intellectuals with bourgeois views, unselectively labelled as those "who had been collaborating with the enemy in the field of culture".[7]

The main task of the Survey Commission was to draft war crime decisions solely on the grounds of collected data. These decisions contained personal details of the offenders, victims, short descriptions and legal qualifications of the offence, place, time and methodology of crime, a list of collected evidence, and approximation of damages. Decisions were accepted and qualified war criminals were registered almost exclusively on *prima facie* evidence i.e. reasonable doubt. The legal nature of the decision, otherwise not known to the corresponding case law, was declarative in character. It served as a motion for filing a claim, first in military courts and then District courts. Thence, the respective courts were to decide whether to initiate criminal proceedings or raise criminal charges against the proposed offenders. A generally accepted principle of collective liability was closely related to the position of the suspect. Namely, certain positions automatically assumed some degree of liability. War crimes were broadly conceptualized exposing individuals to the attack of the regime for reasons as simple as contradictory political thinking.[8]

The case of dr. Ljudevit Jurak, university professor, is especially interesting. Professor Jurak was a member of the International Commission for the Investigation of the Mass Slaughter in Vinica (the Ukraine) committed by Soviets over the local population. The results of this research were eventually revealed by professor Jurak in the *Hrvatski narod*

[6] ZKRZ, HDA, Zagreb, box 685, doc. no. 18/45

[7]Op.cit.: Zoran Kantolić, The Work of the Polling Commission in 1945 in Zagreb: Crime Establishing Based on Cultural Collaboration with the Enemy", Review of Croatian History, I/2005, no.1, p. 323

[8]Op.cit.: dr Martina Grahek-Ravančić, "The Work of the National Commission for the Investigation of the Crimes of Occupiers and their Supporters in Zagreb in the period from 1944 until 1947", doctoral thesis, Filozofski fakultet, Sveučilište u Zagrebu, Zagreb, 21.04.2011.;

(*Croatian people*) on 25 May 1943 under the title "Mass Graves in Vinica". The Survey Commission accused him of "intentional and malevolent propaganda against the amicable Soviet Russia, and, thus indirectly, against the interests of our people".[9] The Decision was delivered to the Military Court of the Command of the City of Zagreb, with the proposal that the accused should be arrested "because of the possibility of escape". However, the same day the Military Court sent the report stating that professor Jurak had been executed by firing squad on 10 June 1945, two months before the Decision was written.[10]

The same destiny had befallen many fellow-scholars and men-of-letters who were guilty of merely thinking differently and acting in the spirit of common good and humanity. They were all labelled as criminals by the Survey Commission, even before their "guilt" was proven, or before the incriminations they had been charged with were substantiated.

However, a printed word represented the greatest threat to cultural and political stability of the ruling caste, which, in fear of critical thinking and ideological opposition, had declared an open war to "all pro-Ustasha and Fascist literature produced during the war in Croatian, German or Italian language".[11]

On 31 August 1945, The Press Act was promulgated, which guar-

[9] Also see: Decision on determining crime by cultural collaboration with the enemy, no. 17/45 of 9 July 1945;

[10] Op.cit: Zagreb Military court verdict no. 86/45 of 9 June 1945: "Jurak Ljudevit, University professor, Croat, Roman Catholic, son of Stjepan and Amalija (neé Progelhofer), born on 6 October 1861 in Zalug, with permanent address in Zagreb, Gundulićeva St 20, is found guilty of war crimes and sentenced to death by shooting, permanent loss of citizen's honours, and confiscation of property. There is no right of complaint against this verdict. In the course of investigation it has been established that the accused possesses the following property: a three-bedroom flat in Gundulićeva St. no. 20. Death to Fascism – Freedom to the People!"

[11] Op.cit.: "Order of prohibiting the Ustasha and Fascist Literature", Narodne novine, no.3, p.3, 10 August 1945:"It was observed that publications that were released during former NDH are freely sold in bookstores. … the Ministry of Education shall appoint a Commission of experts who shall review all literary works and therewith approve or prohibit the distribution of each individual work. In order to prevent distribution of the Fascist and Ustasha publications , until the Commission has made the final Decision, it is forbidden to sell or distribute literary works released after 10 April 1941 in Croatian, German or Italian language. This Order is effective immediately. Death to Fascism – Freedom to the People!"Ministry of Internal Affairs, no. 1737 – 45, 3 June 1945 (signed by Vicko Krstulović).

anteed freedom of expression and freedom of press to all citizens. However, the right to publish and release the text was but the luxury of the loyal few. This privilege could not be entrusted on those who did not enjoy political or civil rights, who were the Ustasha and Fascist sympathizers and collaborators, editors, publishers and writers of Fascist literature, and finally those who edited and published pornographic material, or who were indulged in other immoral activities.[12]

Thus, the Press Act guaranteed under articles 1 and 3 freedoms of the press and other information media of public expression. This was balanced by article 11, which prohibited the use of such freedoms to attack or undermine the state, to jeopardize the constitution, endanger Yugoslavia's foreign relations, stir up "national, racial or religious hatred or intolerance, or to instigate the commission of penal offences". In other words, no freedom could be used "in a manner offensive to public morals."[13]

There was little overt censorship in Yugoslavia; the control of the media was considered best achieved by the appointment of politically responsible editors and the replacement of any who had fallen into a variety of ideologically unacceptable deviations.[14]

In the context of open/hidden censorship and freedom of expression and free flow of information more important role was played by internal letters and lists of banned authors and books exchanged by various government boards, commissions or agencies, whose existence was repeatedly denied.

One such semi-official letter was sent by Milovan Đilas, the Head of Agitprop (Agency for Information and Propaganda), the first censoring agency in post-war Yugoslavia, to whom it may concern. The letter contained prohibition guidelines, i.e. instructions for the protection of the Party ideology against modern ideas and different opinions, such as "pseudoscientific, provincial or sensational content that could easily contaminate valuable scientific and popular scientific literature; all printed material should be under constant and vigilant control of the Party; in reference to foreign literature, licensed publishers should exclusively distribute books thriving with critical realism and belligerent

[12]The Press Act, Official Gazette of Democratic Federative Yugoslavia, articles 1-6, no. 65 of 31 August 1945;

[13] Ibid., article 11;

[14] See: The Decree on the Compulsory Delivery of Printed/Published Materials, Official Gazette of Democratic Federative Yugoslavia, no. 52 of 24 July 1954;

romanticism produced by English, American or French liberal writers; special attention should be given to Polish, Albanian, Bulgarian, Czech and, to some extent, Romanian literature".[15]

The Party's corpus of *librorum prohibitorum* contained, among others, examples of medieval, dialectal literature, including modernist, expressionist and surrealist literary expressions. Western literature was mainly discouraged as highly dissident, and not best suited for promoting Communist ideology, unlike the works of Socialist writers and Marxists such as Lev Tolstoy, Anton Chekhov, Maxim Gorky, Joseph Stalin, and Vladimir Ilyich Lenin, whose political and social philosophy was highly praised.

However, the 1948 conflict between Yugoslavia and USSR, which resulted in the Yugoslavia's expulsion from the Communist Information Bureau (Cominform), marked the beginning of the Informbureau period. The old practice of copying the Soviet cultural standards was no longer wanted and a new strategy had to be designed. Thus, Agitprop released the "Plan of Combating Cominform in Cultural and Educational Sector", wherewith article 10 elaborated in detail on relations between Agitprop and intellectual and artistic creation, stating, *inter alia*, that:" Literary workers shall, through newspaper articles, various texts, poems, reviews, etc., combat, unmask and debunk the Cominform campaign. They shall write one-act plays, pantomimes, humoresques in an attempt to ridicule Cominform. Every issue of the *Kolo*, *Kulturni radnik* and *Izvor* should devote an article to Cominform."[16]

Those who dared to comment on or critique the divorce of two former political and ideological allies, differently from what was prescribed, or who remained loyal to pro-Soviet thinking, were soon deported to top secret prisons or *gulag*-like labour camps on Goli otok. Yugoslav writers Vlado Dijak, Venko Markovski, Dragoslav Mihailović and Igor Torkar, were amongst those liberal thinkers who felt the need to criticize the centralized cultural policy dictated by the Communist Party. The retaliation was soon to follow; their books were banned and they were sentenced to years of hard labour on Goli otok[17].

[15] Op.cit.: Josip Grbelja, "Unknown documents about the relationship between Milovan Đilas and Petar Šegedin", Republic: literary journal, ed. Velimir Visković, no. 11-12, 1998, pp.120-130;

[16] Op.cit. : Josip Grbelja, "Unknown documents about the relationship between Milovan Đilas and Petar Šegedin: censor and his victim", Republic: literary journal, no. 11-12, 1998;

[17] Vlado Dijak, a Bosnian poet and novelist (1925-1988), was sentenced to serve a three-

3. Public Prosecutors as new Censors (1952 – 1971)

"Whenever I meet my censor we (ex) change a few words."
(Aphorism from Politika ekspress)

The conflict with the former Soviet model had also revealed certain new tendencies in culture and arts. This new whiff of fresh cultural ideas was in part initiated by certain internal, but also external tendencies to make culture follow in footsteps of political metamorphoses. Thus, the first ideological assents were marked by cultural openness towards Western influences. The introductory incomprehension in terms of cyclic conflict between ideological concept of the culture and liberal concept of the freedom of expression resulted in unplanned and unwanted derailments. In spite of their highly symbolic and narrow critique of the new society, the regime had promptly reacted by way of bans and launches of synchronized ideological prosecutions of the authors or papers, which published such texts.

Such unexpected premature change in ideological course initially happened to Yugoslav writer, Branko Ćopić in 1950. Till then, Ćopić was an epitome of a political loyalist, a Party confidante, and, foremost, Socialist writer. However, "The Tale of Heresy"[18], exposed him to ill

year hard labour sentence on the island of Goli otok due to his political convictions which the government believed had challenged the authority of the state; Venko Markovski, a Bulgarian-Macedonian writer (1915-1988) , was imprisoned in January 1956 and had to serve a five-year hard labour sentence on the island of Goli otok for publishing, what the authorities considered, an anti-Titoist poem "Contemporary Paradoxes" in Serbo-Croatian and for his leanings towards the Soviet Union; Dragoslav Mihailović, Serbian writer (1930-), was sent to serve a hard labour sentence on Goli otok when only 20. He was punished with two years of hard labour for simply defending two fellow-students from the same punishment, as a member of school youth board; Igor Torkar, a Slovenian writer, playwright and poet (1913-2004) was arrested in April 1948 by the Yugoslav Communist authorities on false charges of pro-Nazi activity during World War II. He was put on trial at the Dachau trials together with other 33 survivors from Dachau and Buchenwald concentration camps who were accused of collaborating with the German Gestapo because, according to the prosecution, "only collaboration could explain their survival". In 1949, he was sentenced to six years in prison, which was increased to 12 after the appeal. Torkar spent four years in prison, including two years in solitary confinement. He was released in 1952, and was prohibited from publishing for two more years.

[18] "The Tale of Heresy" was published in Književne novine on 22 August 1950. This paper had already had a similar experience of being banned in September 1949 for publishing

fame and to the urgent need for ideological re-education. As a rule, he received the first blows from his closest literary comrades, Skender Kulenović[19], Moša Pijade and Milovan Đilas[20], then Dušan Popović and Velibor Gligorić.[21]But the worst was yet to follow – at the Third Congress of Anti-Fascist Women's Front held on 29 October 1950, in his introductory speech, Tito accused Ćopić of wrongly presenting the socialist realism, which would not be any further tolerated.[22]Branko Ćopić's shot in the dark could not but hasten the weakening and final collapse of monolith forms of literary and artistic expression, which gradually gave way to new cultural winds from the liberal West. The necessary confirmation and acceptance of cultural changes and the return to *l'art pour l'art* principles came from the Third Congress of Yugoslav Writers held in Ljubljana in October 1952. It was Miroslav Krleža who openly talked about a new course in Yugoslav culture and official rejection of Socialist realism dogma.[23]Krleža's programme speech later served as an overture

---

Moša Pijade's tale "Krilov or Ezop".

[19] On the cover page of the next issue of Književne novine, Kulenović criticized his best friend for distorted and rather narrow vision of reality peculiar of hear-says. See more: Ratko Peković, "Književne novine ili pola vijeka sporenja", Politika, feuilleton, Belgrade, 6 November 1998.

[20]Poisonous arrows of unsigned criticism were let off from the first pages of a most prestigious Communist paper Borba four days after the publication of Ćopić's „The Tale of Heresy". The authors (most probably Moša Pijade and Milovan Đilas) in the article titled „The Heroism of Branko Ćopić" accused Ćopić of deceiving the creators of Socialist Democracy and mucking the whole system through his satires, which were nothing better than an expression of bourgeois views and concepts of freedom. See more: Milan Ristović, „Jedno viđenje prelomne godine jugoslovenske posleratne kulturne politike (1952)", Jugoslovenska kulturna politika 1952. godine, Beograd, pp. 337-352.

[21] Leading Party ideologist, Dušan Popović, described Ćopić in his article "Slanderous Satire", Književne novine, as an example of "disturbing activities" in our literature. For Popović, Ćopić was but a provincial moralist who had diverted from the Party course, and a writer of cheap narrative; Velibor Gligorić amply contributed to the united attack against Ćopić's writing in Književne novine, stating that Ćopić had simply yielded before a blind element of his talent, failed to develop his socialist ideas and thus assumed an anarchistic attitude toward the freedom of literary creation. See more: Ratko Peković, Sudanije Branku Ćopiću (1950-1960), Književni atelje, Beograd, 2000.

[22] Jože Horvat, Croatian writer (1915-2012), later remembered that even in such an unpleasant situation, Ćopić showed the superiority of his mind, by extracting from Tito's speech a quote, "We shall not arrest him (signed Tito)", and placing it on his entrance door to protect himself against dishonest intentions of his Party comrades.

[23] Miroslav Krleža's political-artistic manifesto "On Freedom of Culture" invites the lit-

into the process of political and cultural decentralization of the country proposed at the Sixth Congress of CPY, announcing significant changes in the Party agenda[24]. One of the key decisions made at the Congress, in the context of the control of the media of expression, was dissolution of Agitprop. Thus, the role of the censor was assigned to another capable government agency – Public Prosecution.

At the beginning of fifties Federal Public Prosecutor addressed Republic Public Prosecutors with a memo instructing them on how to best comply with the Press Act. They were requested to make and update a record of all publishing and press agencies. Hence, each press and publishing house had a case file at the Public Prosecutor's Office, which documented any particular breach of the Press Act or the Publishing and Press Agencies Act, including a list of banned publications. The District Public Prosecutor especially enjoyed its newly-established role. This Office had regularly filed annual reports to the Federal PP suggesting sanctions for publishers who failed to submit publishing plans for the following year and defining provisions about the status of a writer/publisher[25]. The PP Offices were particularly obsessed with crime stories and comic books and almost succeeded in banishing them from public circulation.

However, in spite of great efforts of the PP Office to prevent the circulation of non-conformist readings, it could not entirely suppress certain liberalization of the media. Thus, at the end of sixties the public was presented with a variety of new papers and weeklies, such as *Start* or *Pop-express*, which carried, to a certain extent, a breath of fresh modernist ideas from the West. The ties were loosened, but not entirely broken. Namely, in 1964 criminal charges were raised against *Privreda* publishing agency for merely omitting to mention the Sutjeska offensive under letter S in the *School Lexicon*. Even *Pop-Express* was admonished for *The Problems of soul, heart and body* column, which published the questions of readers about sexuality. Promiscuous content was prohibited in

---

erary community to part from the Soviet-like Socialist Realism of the slogan and to promote freedom of literary expression, simultaneity of styles and the principle of free expression of thought.

[24] VI Congress of CPY was held from 2-7 November 1952 in Zagreb.

[25] The DPP annual reports represent a cross-section of controlled publications, whose scope was large-scaled: literature, textbooks, brochures, scientific literature, religious publications and gazettes, journals, reviews, picture-books, children literature, dailies, weeklies, etc. Since 1965, PP Office started controlling the state – official gazettes, statutes, court decisions, etc.

Yugoslavia, but certain publishers found the way to increase their paper circulation through introducing pornographic material. Hence, *Vjesnik u srijedu (Wednesday News)* would regularly borrow the images of naked women from the Western press under the pretext that such content served as a proof of the fall of Western culture.[26]

4. The White Book (1972 – 1990)

"Censors are dead men,
Set up to judge between life and death.
For no live, sunny man would be a censor,
He'd just laugh!
But censors, being dead men,
Have a stern eye on life.
-That thing's alive! It's dangerous. Make away
With it!-
And when the execution is performed
You hear the stertorous, self-righteous heavy
Breathing of the dead men,
The censors, breathing with relief."
(Censors, D.H. Lawrence, 1929)

The 1970s in Yugoslavia were marked by a general revival of nationalistic thought, which provoked, despite significant conservative resistances, major political and sociocultural reforms in the country. Things were set in motion when a group of 130 influential Croatian poets and linguists, 80 of whom were Communists, published a *Declaration on the Status and Name of the Croatian Standard Language* in March 1967. After 1968 the patriotic goals of that document morphed into a generic Croatian movement for more rights for Croatia popularly known as *Hrvatsko proljeće (Croatian Spring)*. Three Croatian linguists, Stjepan Babić, Božidar Finka and Milan Moguš, published a spelling and grammar textbook in 1971 called *Hrvatski pravopis (Croatian Ortography)*, rather than the forced *Srpskohrvatski (Srbo-Croatian)*. It was summarily banned. Even though Yugoslav leadership had interpreted the whole affair as a restoration of Croatian nationalism, dismissed the movement as chauvinistic and had had the police brutally suppress the demonstrations, some of the goals of *Hrvatsko proljeće* movement influenced the 1971 Federal Constitution

[26] See more: Aleksandar Stipčević, Kako izbjeći cenzora, Hrvatska sveučilišna naklada, Zagreb, 1997.

Amendments that gave more autonomy to the individual republics and provinces. Thus, the provinces of Kosovo and Vojvodina had more rights than the Republic of Serbia, who had lost its constitutionally guaranteed influence within its provinces. Mihajlo Đurić, university professor, strongly criticised such constitutional injustice in his public discussion held at the Law Faculty of Belgrade University and, as a result, was expelled from the University, tried and sentenced to nine months in prison. The law journal *Anali* (*Annals*)[27], which published Đurić's speech *Smišljene smutnje (Profound intrigues)*, was soon banned by court order, along with cultural journal *Umetnost (Arts*)[28], which contained Đurić's article *Kamen razdora (The Stone of Discord)*, a literary defence of Petar Petrović Njegoš's chapel on Lovćen from destruction and replacement by Meštrović's mausoleum. A similar critique of the amendments was offered by Vojislav Koštunica, a lecturer in law at Belgrade University, who had lost his job at the Faculty in 1974 after signing a petition calling for the release of Mihajlo Đurić. His collaborator, Kosta Čavoški, also University professor, had been sentenced to five months in prison in 1973 for criticising the Yugoslav legal system and legislation, including the Prevention of Abuse of Freedom of Press and other Information Media Act of 31 December 1976[29]. This Act primarily served its creator by protecting its totalitarian position from liberal/avant-garde invasions of the literary minority.

After Tito's death in May 1980, the Party was left unprotected and without the rightful successor. The only thing they could do was to try to preserve the unity and stability through glorifying the name of their former leader. The intellectual public was regularly briefed on various cultural and literary affairs instigated by writers who dared to criticise or enquire into the true dimension of Tito's policy. The first recognised defamer of the memory of Josip Broz Tito was Gojko Đogo, Serbian poet, whose collection of poems *Vunena vremena (Woolly Times, 1981)* had aroused the wrath of the authorities who accused him of having „sought to depreciate the achievements of the peoples and nationalities of this country in the post-war building of socialism, negated the gains of our revolution, and grossly offended the values and symbols

[27] Op.cit.: Mihajlo Đurić, "Smišljene smutnje", Annali, no. 3/1971, Law School, Belgrade University, Belgrade, pp.230-233;

[28] Op.cit.: Mihajlo Đurić, "Kamen razdora", Umetnost, no. 27-28, Turistička štampa, Beograd, 1971, pp. 186-187;

[29] See: the Prevention of Abuse of Freedom of Press and other Information Media Act, Official Gazette of SFRY, 31.12.1976;

of our society".[30]Particularly galling for them was his poem *Crnokrug na Trgu Republike (The Viper on the Republic Square)* which apparently described Tito as the „old rat from Dedinje". Đogo was tried and jailed in September 1981 for two years, later reduced on appeal to one year, for this alleged offence.

Another instance of intolerance of the regime was directed toward the freedom of religious belief. Namely, Communism was openly hostile to religion and was officially atheist; it was not irreligious or unreligious, but took the position that there was no God. Moreover, such atheism translated into a form of vicious anti-religion that included a systematic, often brutal campaign to eliminate belief. When Alija Izetbegović wrote his book *Islamska deklaracija (Islamic Declaration)* in 1970, he basically verbalised his vision of Islam and modernisation. This book, however, was used against him and other pan-islamists in a trial in Sarajevo in 1983, which resulted in his condemnation to 13 years of penal servitude for an „attack against socialism and williness to build an Islamic state in Bosnia"[31].

As the time passed by, artistic and literary creations were more and more impregnated with „politically unacceptable messages". Particular vigilance and scrutiny was shown by the Centre for Information and Propaganda of the Central Committee of Croatian Leage of Communists who, in March 1984, drafted a document *On certain ideas and political tendencies in artistic creation, literary, theatrical and film critique, on public activities of a certain number of artists that contained politically unacceptable messages,* colloquially known as *The White book.* In over 237 pages the document studied „disputable" books (e.g. *Tren II* (*Flash II)* by Antonije Isaković; *Noć do jutra (Night till Morning)* by Branko Hofman; *Levitan* (*Leviathan)* by Vitomil Zupan; *Strah i hrabrost* (*Fear and Courage*) by Edvard Kocbek; *Nož* (*The Knife*) by Vuk Drašković, etc.), theatrical performances (*Golubnjača* (*Pigeon Hole)* by Jovan Radulović, *Braća Karamazovi* (*The Brothers Karamazov*) by Dušan Jovanović; *Kada su cvetale tikve* (*When the*

[30] *Op.cit.* Robert Thomas, *Serbia under Milošević: Politics in the 1990s,* C.Hurst and Co., London, 2000, p. 39

[31] District court in Sarajevo, Verdict no. K:212/83 of 20 August 1983; Alija Izetbegović was condemned for instigating ethnic hatred among the peoples of Bosnia and Herzegovina, and for using religious ideology to destabilize Yugoslavia. The author of this paper uses Alija Izetbegović 's case to support the argument about the existence of religious unfreedom in former Communist Yugoslavia. However, Izetbegović's whole political career had been dictated by the idea of creating an Islamic Bosnia and Herzegovina, which, truth be told, is not the subject of this paper.

Pumpkins Blossomed) by Dragoslav Mihailović, etc.)[32], public speeches of certain artists (Antonije Isaković, Milovan Danojlić, Momo Kapor, Vuk Drašković, Igor Mandić, Dimitrije Rupel, etc.), and many other „suspicious" cultural events, with the aim to silence the „other side". According to editor Zvonimir Despot, the *White book* represented „the Party pursuit of all intellectuals, artists, men-of-letters and others whose work and opinion did not fit into the ideological Party framework".[33]

In spite of all their efforts, the Communists could not prevent the revolutionary wheels from turning. As Jasna Dragović-Soso well put it, „by early 1988 Yugoslavia was in a pre-revolutionary situation".[34]In the eyes of the population Yugoslavia's founding myths, its unique variant of socialism and the Partisan slogan of „brotherhood and unity" had lost their legitimacy. Confidence in the League of Communists was fading, while dissident intellectuals were heavily criticising the regime. Although the Yugoslav regime still issued the occasional ban[35], its response to the July 1988 „Proposal for the Critical Re-Examination of the Historical Role of Josip Broz Tito" presented by the Committee for the Defence of Freedom of Thought and Expression reflected the change in attitude.[36]Softer measures needed to be applied to gain the control of the written word. Thus, Dobrica Ćosić, who gained access to the mass media for the first time since 1968, praised the Socialist leadership, „for granting intellectual freedoms which we have not had until now"[37]while long-standing critics of the regime, like the poet Matija Bećković, accepted prizes from the regime in highly publicised events. Thus, the system had made a strategic compromise with the intellectual opposition by lifting the two absolute political taboos: overt nationalism and the active participation of the masses in politics.

---

[32] Also see: Nick Miller, The Nonconformists: Culture, Politics and Nationalism in a Serbian Intellectual Circle, 1944-1991, Central European University Press, Budapest, 2007;
[33] Stipe Šuvar, Bijela knjiga, ed. Zvonimir Despot, Večernji proizvodi d.o.o., Zagreb, 2010;
[34] Jasna Dragović-Soso, Saviours of the Nation: Serbia's Intellectual Opposition and the Revival of Nationalism, C.Hurst & Co., London, 2002, p.206.
[35] Notably of the July 1988 issue of Književne novine, which contained a contentious text on Goli otok (Dragoslav Mihailović, "Zločinci i žrtve", Književne novine, 757-8, 1-15 July 1988, p. 3)
[36] See: South Slav Journal, X/2-3, summer-autumn 1988, pp. 68-72.
[37] Op.cit.: Slavoljub Đukić, Čovek u svom vremenu, p. 314.

5. Conclusion

The concept of cultural identity in post-war Yugoslavia represented an imitation of Stalinist and Marxist interpretation of cultural esthetics. Literary and artistic tendencies which did not interfere with the Party conceptualisation of socialist realism were highly praised and promoted, while the literary and artistic production of its ideological opponents, political enemies or the church was quashed at an early stage. Many books and periodicals with a long historical tradition and rich cultural heritage were banned because they were considered hostile and counter-revolutionary. These rather haste decisions were often made by individuals who were almost entirely uneducated and thus bound to make serious mistakes out of fear of the unknown. After the conflict with the Cominform, the Soviet influence was declining, but the mechanisms of censorship, abundantly applied by the system, still shaped the cultural identity of the society according to the political needs of the regime which was trying to distance itself from the Soviet Union.

The key event that marked the spread of new ideas and views on culture was the Third Congress of Writers of Yugoslavia in 1952, which focused on three important ideas – freedom of thought and expression, critical review of the cultural past and present, and replacement of ideological principles of valuation. At the end of this period, Yugoslav culture began to open toward the Western concept of reality. The publishing policy was no longer segregated between the Soviet and Western literature. However, the watchful eye of the stern socialist dogma could not easily retire from its censoring task.

The print media was nominally free of censorship in the 1980s, but the printed material was reviewed by official publication boards that ensured Party control. Those boards were able to stop publication of some new radical periodicals, but in 1985 their ban of *Mladina* was overruled by the Supreme Court in Slovenia[38]. Only post-publication censorship was exercised for periodicals, and individual banned issues

[38] Mladina is a Slovenian weekly left-wing current affairs magazine. Since the 1920s, when it was first published, it has become a voice of protest against those in power. Mladina's most controversial period was the spring of 1988 with the Ljubljana trial, also known as Trial Against the Four. Namely, the four defendants, editors of Mladina, were sentenced to between six months and four years imprisonment for "betraying" military secrets, after being involved in writing and publishing articles critical of the Yugoslav People's Army. However, the Supreme court in Slovenia changed the First Instance Decision on appeal and acquitted the appellants.

circulated widely in spite of the system. Over a dozen Croatian magazines and student newspapers were banned because of anti-Serbian positions in the late 1980s. Late in the 1980s, book censorship was loosened and cases of official interference increased. The list of taboo topics for books was similar to that for periodicals. Foreign dissident writings were widely available as were the writings of opposing domestic intelligentsia, such as Matija Bećković, Milovan Đilas, or Antonije Isaković, which were still banned officially in 1990.

References

Legal sources

Annex 10 to a Secret Protocol signed in Moscow on 1 November 1943;

Decision on determining crime by cultural collaboration with the enemy, no. 17/45 of 9 July 1945;

The Decree on the Compulsory Delivery of Printed/Published Materials, Official Gazette of Democratic Federative Yugoslavia, no. 52 of 24 July 1954

Order of prohibiting the Ustasha and Fascist Literature, Narodne novine, no.3, p.3, 10 August 1945

The Press Act, Official Gazette of Democratic Federative Yugoslavia, articles 1-6, no. 65 of 31 August 1945;

The Prevention of Abuse of Freedom of Press and other Information Media Act,

Official Gazette of SFRY,19 April 1973

Works cited

Blondell, Ruby et al., *Women on the Edge-Four Plays by Euripides*, Routledge, Newyork-London, 2002;

Ćopić, Branko "Jeretička priča", *Književne novine*, 22 August 1950;

Grahek-Ravančić, dr Martina, „The Work of the National Commission for the Investigation of the Crimes of Occupiers and Their Supporters in Zagreb in the Period from 1944 until 1947", doctoral thesis, Filozofski Fakultet, Sveučilište u Zagrebu, Zagreb, 21.04.2011;

Green, Jonathon et al., *Encyclopedia of Censorship*, Facts on File, New York, 2005;

Grbelja, Josip "Unknown Documents About the Relationship Between Milovan

Đilas and Petar Šegedin", *Republic*: literary journal, ed. Velimir Visković, no. 11-12, 1998, pp.120-130;

Dragović-Soso, Jasna, *Saviours of the Nation:* Serbia's Intellectual Opposition and the Revival of Nationalism, C.Hurst & Co., London, 2002, p.206.

Đurić, Mihajlo, "Smišljene smutnje", *Annali*, no. 3/1971, Law School, Belgrade University, Belgrade, pp.230-233;

Đukić, Slavoljub, *Čovek u svom vremenu*, Filip Višnjić, Beograd, 1989, p. 314;

Đurić, Mihajlo, "Kamen razdora", *Umetnost*, no. 27-28, Turistička štampa, Beograd, 1971, pp. 186-187;

Kantolić, Zoran, „The Work of the Polling Commission in 1945 in Zagreb: Crime Establishing Based on Cultural Collaboration with the Enemy", *Review of Croatian History*, I/005, no.1;

Mihailović, Dragoslav, "Zločinci i žrtve", *Književne novine*, 757-8, 1-15 July 1988, p. 3;

Nick Miller, *The Nonconformists*: Culture, Politics and Nationalism in a Serbian Intellectual Circle, 1944-1991, Central European University Press, Budapest, 2007;

Peković, Ratko,"Književne novine ili pola vijeka sporenja", *Politika*, feuilleton, Belgrade, 6 November 1998;

Peković, Ratko, *Sudanije Branku Ćopiću* (1950-1960), Književni atelje, Beograd, 2000;

Plato, *Apology*, trans. By Miloš Đurić, Dereta, Belgrade, 2008;

Ristović,Milan, „Jedno viđenje prelomne godine jugoslovenske posleratne kulturne politike (1952)", *Jugoslovenska kulturna politika* 1952. godine, Beograd, pp. 337-352;

Stipčević, Aleksandar, Kako izbjeći cenzora, Hrvatska sveučilišna naklada, Zagreb, 1997; *South Slav Journal*, X/2-3, summer-autumn 1988, pp. 68-72.

Šuvar, Stipe, Bijela knjiga, ed. Zvonimir Despot, Večernji proizvodi d.o.o., Zagreb, 2010;

Thomas, Robert, Serbia under Milošević: Politics in the 1990s, C.Hurst and Co., London, 2000;

Incestum: Love or a Criminal Act?

MirjanaBogunović, LL.M.[1]

Abstract: Incest is a psychological phenomenon that is not strange to any society, looking back from ancient times until nowadays. Unevenness in its legal treatment is obvious. Many countries have a criminally prohibited and punished incestuous love, while some countries do not treat the incest as an offence punishable by criminal law if it involves two adults who are capable of reasoning.

The basic concept of incest in literature is illicit love between representatives of two different generations, veiled by confusion and misunderstanding. Sophocles's king Oedipus is a victim of damnation that his father Laius cast on him and his descedents because he abused the hospitality of King Pelops of Elis and raped his youngest son Chrysippus. Although Greek antique awareness was very liberal, it considered incest as the worst punishment of Gods ona human being. Also, there is an incestuous relationship in the Bible, between Lot and his daughters, who made their father drunk and conceived with him. But the destiny didn't collapse on him so strongly like it did on poor Oedipus. Why? Is it possible that Christianity considers Lot as a righteous man of God and his drunkenness and unawareness as an excuse for his act?

In contrast to unaware act of incest, history revealed many a case of a volitional incest that often happened between the same generation, a brother and a sister, born and raised in great separation from the rest of the world. Example for that is Thomas Mann's bookThe Blood of the Walsungs, which describes a perfect union of blood related offspring. In Serbian literature Slobodan Selenić also develops the same concept of incest between Jelena and Jovan in Premeditated Murder, but this case is a less gruesome version of incest since they are not blood related, but rather act as stepsiblings.

The way literature treats the issue of incestuous relation clearly shows that patriarchal society is not ready to talk about the concept of incest. However, it does not mean that it is not happening, and that it should not receive more attention from national legislation.

Key words: incest, law, literature, criminal act, voluntary consent

[1]Assistant in Roman Law, Law Faculty in Banja Luka, Banja Luka University, Republic of Srpska, Bosnia and Herzegovina. Email: mirjanabogunovic86@gmail.com.

1. Introduction

While I was considering the issue of incest as the main theme of my paper and sharing my thoughts with my colleges their reactions on that matter were not encouraging. The standard reaction was that the phenomenon is unnatural and not common to our nation. Such fact made me even more curious and I started wondering whether that was true in which case it would be pointless to explore more on the subject. Reading further about the incest I came across a common explanation of the concept of incest , also called " judgment from stomach" , since it represented a kind of irrational judgment, when value judgment is made without engaging one's cognitive capacities[2]. This way of reasoning is typical of my countrymen when judging about incest and their main argument for rejecting the idea of incest is it an unnatural phenomenon. Is this argument right and is it enough to proclaim incest as a criminal act and to apply the hardest punishments on incestuous lovers ?

Prohibition of incest is worldwide spread and is well known among civilized cultures but every culture has its own special approach that is determined by cultural heritage and mentality[3]. What is very curious is that incest in South-Slavic area is actually not uncommon which is further testified by our folk ballads[4], in spite of a great rejection and resistance this phenomenon produces within my nation. But the legal point of view of incest is always standing on the point of prohibiting incestuous marriage , at least that is the case with Serbian Civil Code-[5]which under article 69, part 10 mention kinship like marriage impedi-

---

[2]http://mindreadingsblog.wordpress.com/2012/11/18/incest-zasto-je-ljubav-izmedu-srodnika-losa-ideja/, accessed on 3.7.2013.

[3] The Incas, Hawaiinas and ancient Egyptians are among most widely referenced exceptions to the incest taboo, referenced by Ray H., Bixler, Sibling Incest in the Royal Families of Egypt, Peru and Hawaii, The Journal of Sex Research 18, 1982., 264.-281.

[4]See futher in Zoja Karanović, The fearful symmetry in South Slavic folk ballads about incest between brother and sister, Annual Review of the Faculty of Philosophy in Novi Sad, Volume XXIX, 2001., 25-40.; Zoja Karanović, Brother- sister incestuous relationship somewhere in between hierogamy and incestuous sin (on example of folk songs who are about intention of Emperor Stefan Dušan to marry his own sister), Literary History, volume 34, number 118, Belgrade, 2002., 293-305.

[5]http://sr.wikisource.org/wiki/%D0%A1%D1%80%D0%BF%D1%81%D0%BA%D0%B8_%D0%B3%D1%80%D0%B0%D1%92%D0%B0%D0%BD%D1%81%D0%BA%D0%B8_%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B8%D0%BA_-_%D0-%BE%D1%80%D0%B8%D0%B3%D0%B8%D0%BD%D0%B0%D0%BB, accesed on

ments, while grade of kinship as marriage impediment is prescribed under Canon Law.

Three years ago, in our vicinity, in Croatia, serious discussion was raised on whether to decriminalize the voluntary act of incest between two adults capable of reasoning. Although two university professors in the Department of Criminal Law, Velinka Grozdanić and Ksenija Turković were doing their best to detail the legal nature of incest as a criminal act, and to emphasize that in the case of voluntary consent there was no victim, which is a key element for the for the existence of a criminal offense. "If there is no victim, what is it that we try to protect through criminal sanctioning? Only morality in the society, but do we need to protect the morality through criminal sanctioning, in the first place?",they asked[6]. From this point of view we can understand practical and theoretical legal reasons for decriminalization of voluntary incest, but things that have happened show that we are not ready to talk about incest any differently then as a offence. Publicity that was given to those changes of the Criminal Law was enormous and within the nations it was experienced as a matter of being whole entity. What caused such a strong reaction? If we cannot accept incestuous love as a normal emotion, do we need to judge so strong on people who were victims of a forbidden passion?Public opinion is that in the case of incest,there are no two victims or two perpetrators of crime, but always a perpetrator and a victim. However, during my research I have realized that even if there is no fear of criminal punishment, incest will remain in the minds of people as the worst offence against family, marriage, health and sex. Acceptance or denial of some social appearance is deeply culturally rootedand our society, now in transition, economic as well as moral, cannot or will not release the burden inherited from the indoor patriarchal morality.

2. Incest: a criminal act

Incest is a criminal act according to the Criminal Law of the Republic Srpska and punishable by prison sentence for a time of one year

3.6.2013.

[6]http://forum.badnjak.com/viewtopic.php?f=7&t=429, accesed 5.6.2013., More about the problem of legal justification of incrimination of voluntary sexsual intercourse between relatives in Nikola Visković, Sexsuality and Law 1971., Collection of papers Faculty of Law in Split, 45, 3/2008, 641- 658.

to eight years[7]. Legal description of incest is sexual intercourse between relatives in vertical line unlimited (between ancestors and descendents) and between relatives in collateral line until second grade (between sisters and brothers or between half- sisters and half-brothers)[8]. Incestuous relationship between an adult and a minor is considered as an aggravated form of offense, and a consent given by a child or minor is not relevant to the exclusion of the existence of a criminal offence. Legislator has taken special care to the interests of a child and a minor who are involved in incestuous relationship, so they are not found liable according to article 201 of the Criminal Law in the Republic of Srpska. The main reason for such a criminal political solution is that a consent given by a child or other minor cannot be considered as a voluntary act (*volenti* non fit *iniuria*) because the child or minor is always in the position of dependence and subordination against his adult blood relative. But that part of legal regulation of incest is not considered in this paper since I am only considering incest between two adults who are capable of reasoning and are getting involved into a voluntary incestuous relationship. In that case of considered criminal act is doubtful the real nature of this act. If there is an authentic and explicit will to be involve in a sexual intercourse with an other adult who is also showing a free and unforced will for the act, can we say necessary elements that are fulfilled for the existence of the criminal offence? A basic argument that holds this act non-criminalized is an abstract social risk the society will suffer and especially the family as a primary and basic social group. The social risk of a criminal offence is not something that is forever given, indifferent to time and social situation[9]. In our patriarchal society, procreation and sexual intercourse have not been separated. So if we say that we prosecute incestuous relationships because of anticipated mutations in the gene (which is not the rule)[10], we cannot call it a solid argument to criminalize sexual intercourse, because not every incestuous relationship end up with progeny. Our legislator stands on the point of view that with affirmative attitude towards this sexual behavior, our families and progeny will seriously be questioned, so incestuous relationship must remain criminally sanctioned for the sake of the whole commu-

[7]Krivični zakon RepublikeSrpske, (" Službeni glasnik Republike Srpske", broj 49\03)

[8] Milos Babic, Ivanka Markovic, Krivično pravo- posebni dio, Banja Luka, 2005., 161-163.

[9]Aleksandar Mihajlovski, Društvena opasnost krivičnog djela, Beograd, 1977., 7.

[10] We also know that if we cross-fertilize some of the best examples of the same species (plants, animals, also human) we can gain the best examples of inbreed species.

nity. Is the cause of such regulation symmetric with the development of human rights, especially with the development of sexual freedom and rights? If our society is not ready to take off stigma from incestuous sexual intercourse, does prison from one to eight years seem like an adequate sanction? Prescribed prison sanction is not the right answer to the goals of special and general prevention because prison sanction will not improve individuals who are involved in incestuous intentions. Individuals who show incestuous intentions (under condition that we are talking about voluntary incest), are not violent, and do not act as to harm another person's life, health or property. Taking into account the fact that incest is a complex phenomenon which involves philosophic, social, anthropological, legal, religious, and genetic elements and also when is about determining sanction, this are circumstances that needs to be taken care of. Thus, it is more appropriate to pronounce a security measure of compulsory medical treatment against a person with incestuous intentions which is more likely to bring a desirable resocialization. When making these suggestions, I only consider cases of voluntary incest between adults. These prepositions which are made de lege ferenda make a very favorable climate to remodify this criminal offence, and to follow the footsteps of our neighbours who have already made some changes[11]. The Croatian Criminal Code has dissolved criminal offence of incest was dissolved and only a relict of it can be traced in article 159, part 2 where it is said that blood or adoptive relative in vertical line of kinship will be sanctioned if involved in a sexual intercourse with child not younger then fifteen [12]. That kind of incrimination of incest is moderate, because the legal norm still protect the target group, and that is minor over fifteen, whose voluntary consent would be doubtful. If we want to protect an adult because of his dependant position or emotional ties to his relative, and as consequence of that, his will to involve in sexual intercourse can't be free from influence that is possible person can have over "dependent person". Dependence is very doubtful if we are talking about persons who are the same age. That is called intragenerational incest, when incest occurs between brothers and sisters. Even if they are tied by kinship, there is no dependence between them the way it exists between a parent and a child. Even if the circumstances of in-

[11] http://www.parlament.gov.rs/%D0%BD%D0%B0%D1%80%D0%BE%D0%B4%-D0%BD%D0%B0-%D1%81%D0%BA%D1%83%D0%BF%D1%88%D1%82%-D0%B8%D0%BD%D0%B0.115.html, accesed 10.6.2013.

[12] http://www.zakon.hr/z/98/, accessed 4.7.2013.

tergenerational incest are doubtful and it is still possible for adults who are financially independent to feel some dependence on their parents or older siblings.

Looking into comparative legislature, we cannot help but notice that in the neighbouring countries, have offered diametrically opposite legal solutions to incest. France is very liberal about this issue and does not prosecute relatives who are in love ever since the time of Napoleon[13]. Spain, Portugal and Belgium have designed the same attitude. This fact is very interesting since Portugal and Spain are domineered by a catholic church, which do not permit marriages if there is doubt that potential spouses are blood related in any degree of the direct line or in the second degree of collateral line[14]. However, Germanyis not likely to overcome the criminal ban on the brother- sister sex[15] and incest remains criminally punishable by fine or jail for up to three years. Even European Court for Human Rights in Strasbourg didn't appreciated the application of a brother in love with his sister, which was based that on his right to private life and his choice of a partner is a private matter. European Court for Human Rights didn't see things in that light and German High Court decision was confirmed. This variable judicial practice on the European continent shows that in some cases is impossible to judge based on the same values, because European countries cannot take a stand on one thing due to different cultural heritage. Thus, it is joint difficult, even impossible to create the unique opinion about incest, because of a great diversity in its understanding and conceptualizing.

3. Incest: a sin

The Bible doesn't recognise the concept of incest. However, if we observe the Biblical story of human creation, we shall notice that it is based on incest, and the principal assignment entrusted on humans is procreation. The realization of this task is only possible through mutual crossing. There are sequentially many cases of incest but they are not to be understood as such but rather as a fact that incest is inseparable from the of phenomenon the genesis of species. Incest was tabooed in pagan, polytheistic religions, which was best shown in the example of Edipus

[13] French Napoleonic Code from 1810.
[14] http://www.vatican.va/archive/ENG1104/_P3Y.HTM, accessed 7.6.2013.
[15] http://www.spiegel.de/international/germany/dangerous-love-german-high-court-takes-a-look-at-incest-a-540831.html, accessed 7.6.2013.

and that taboo was universally accepted in Christianity. There is no phenomenon so controversial as incest. On one side, it was a universal taboo, which the society had established already in second phase of savagery[16] and at the same time a widespread custom among royalty. Thus,how can we call incest a sin when Christian church allowed Incestuous marriages of European rulers[17]? Obviously,different reasons opted the Church for this kind of approach, including the fact that the Church was in great dependence on powerful rulers. There are examples of incestuous marriages in Orthodox church when Aleksije II Komnin entered into a marriage with Irina, his maternal half sister . He used his power of a ruler and forced archibishop from Ohrid to bless the matrimony.

Catholic and Orthodox Church share different views of this phenomenon. While Catholic church constitutes a more conciliatory stand, Serbian Orthodox- Christian church has more conservative vision of incestuous relationship between blood relatives, but not without exceptions as we can see below. South- Slavic customs are even more severe in the context of interpreting incest. After reaching independence Serbian church (autocephalous), was very strict in prohibiting marriages in collateral line up to the seventh degree[18]. In 1933, Serbian Orthodox church made some reforms of marital impediments and declared consanguinity in collateral line up to the fourth degree as irremovable impediments and from fifth up to the seventh degree also as removable impediments[19]. Illegitimate kinship was treated as irremovable impediment up to the third degree. Furthermore, Orthodox church recognizes godfather relationship as a marital obstacle and does not accept marriages between godfather and his godchild. That kind of relationship the Church determined as spiritual kinship. Genetics would hardly agree whit such

[16] Djordjo Samardzic, Opšta istorija države I prava, Sarajevo, 1976., 24.

[17]Royal families throughhistory were very fond of incest for many reasons, but one of the most important reasons was the need to produce a high ranking heir, in other words to keep the royal blood pure. Hereditary system also offered an alternative, if there was no heir in male line, then the heir could be male from female line. Hence, it was more secure if ruler's genes stayedin one family. There are other reasons for popularity of royalincest. For example, in polytheistic societies incest was common among Gods and rulers felt like being part of divine order if they practiced incest. In addition they considered legal condemnation of incest applicable only to regular citizens, not to the rulers because of their divine origin.

[18] Stanka Stjepanović, Stepeni srodstva kaogarancija trajnosti braka ,Pravnariječ- časopis za pravnu teoriju I praksu Banja Luka, 2012., 351.

[19] Ibid.

conceptualization, but my nation shows great respect for such religious interpretation, which renders a serious affect on the choice of a future life companion. During the time church rules about spiritual kinship was modified, but nowadays marital rules of our church consider first and second grade of spiritual kinship as irremovable obstacle and it is impossible to join into marriage persons who are in that grade of spiritual kinship. The lineage from the grade to the seventh grade of spiritual kinship, relationship is treated as removable obstacle. This means that is possible to marry a person with whom you are related within the range of mentioned grades of spiritual kinship, providing you acquire the blessing from the Synod and a competent bishop[20].

Religion had played a great role in the regulation of marriage in former Yugoslavia, because first state of Serbs, Croats and Slovenians in 1918, had inherited a diversity of legal rules from different ethnics. Thus, Muslims could conclude marriage under the Sharia Law, which also allowed polygamous matrimony among Islamic population. Croats concluded marriages under the Canon Law of Catholic church, and Serbs concluded marriage under the rules of Orthodox church. Marriages could be joined according to the rules of the church and religion to which the particular people belonged until 1946, when state officials took over the monopoly from priests, after the promulgation of Elementary Marriage Law. Thus, church-established rules were very alive in the antebellum times .Furthermore, in the territory of former Yugoslavia, customary law had a great role in regulating private relations among individuals. True, customary law was not an official source of law but in one particular case had a dominant position over the law. Only when traditional belief and custom approve of matrimony between first cousins, a competent municipal court could allow conclusion of that marriage[21].This procedure was like dispensation, where court could accept conclusion of this kind of marriage. It is interesting to note out that of six republics of former Yugoslavia, only Croatia adopted the rule about dispensation of marital obstacles[22].For the regulation of marriage a great role was played by customs, canonic laws and foremost legal norms of

[20] Patrijarh Pavle, Da nam budu jasnija neka pitanja naše vjere, Beograd, 1998.

[21] Elementary Marriage Law(Službeni list FNRJ, br. 31/ 41, 44/46) but from republic family laws only Marriage Law and family relations of Croatia (Narodnenovine SRH, 11/78) preserved rule about dispensation measures of kinship like marital obstacle.

[22] Could be reffered to the fact that on the Adriactic coast there are a lot of islands which had poor communication with the continent so for generations, they conludedconsaquienes marriages.

the state. There is a very important legal monument of profane and canonic law, edited by St Savaas "Zakonopravilo", also known as Krmčija in literature. St Sava, the compiler and translator of this work, pointed out, in the opening sentence, that "Zakonopravilo", was a term that indicated that the book contained mostly civil laws and church ordinances[23]. "Zakonopravilo"was often used in Serbia during the time of regulation of the institute of marriage. Marriage law and family law were regulated by customs and canonic law, so there was no need for any specific legal regulation. There were several basic rules about marital impediments that Nomocanon promotes in section 48. of the law and those were taken from the Old Testament:

1)krvomješateljstvo (perturbatiosanquinis) with the mother24

2)those who have sinned with their stepmother

3) those who have committed debauchery with their daughter and their granddaughter

4) those who have sinned with their sister

5) those who have sinned with their aunt

6) those who have sinned with their daughter in law

7) those who have sinned with brother's wife

8) those who have sinned with their wife'sdaughter (stepdaughter)

9) those who have sinned with their stepmother's daughter

In a more through analysis of "Zakonopravilo" we can see that all of these cases represent *blud*, which is a criminal offence against morality. *Blud* was defined as every sexual intercourse outside marriage[25]. Punishment prescribed for those offences have religious connotations. Canonic law theoreticians have considered the essence of a criminal act confronting God's will and his demands regarding one's acts in life[26]. Such definition of a criminal act eventually determines the goals of punishment- atonement from own one's culpability in front of God and mollification of the soul of an offender[27]. Penalties contained crying and praying, listening, depriving of Holy Secret of Communion, denial of access to God's home. From all listed cases of incestuous intercourse, the one between brother and sister is considered the worst offence and

[23]Miodrag Petrovic, Ljubica Štavljanin Đorđević, Zakonopravilo Sv. Save, Beograd, 2005.
[24] Ibid.
[25] RadeMihaljčić, SimaĆirković, Leksikons rpskog srednjeg vijeka, Beograd, 1999., 50.
[26] Aleksandar Mihajlovski, op. cit., 14.
[27] Ibid.

a brother who would dare to commit incest with his sister would be considered liable as if he were a murderer. "*Zakonopravilo"* differentiates cases where a brother and sister share the same biological parents like he does and it is called *prisna* (full siblings related), and in case of sexual intercourse between them, prescribed punishment is 20 years of atonement. For sexual intercourse with a sister with whom a brother shares only one common parent (*inorodna*), punishment is mitigated, so the brother is convicted to 12 years of atonement[28]. In addition, the same punishment is prescribed for fathers who take their daughters- in-law in cohabitation or have sexual intercourse with them[29] and men who have sexual intercourse with their stepmothers. Especially interesting is the case when a man takes two sisters to be his wives, at different times and after the death of the first. Explanation for such prohibition is that a man and woman become united and one through the act of wedding sister becomes a close kin to the husband. " As you wouldn't take your wife's mother or daughter; as you wouldn't take your mother or your daughter, so you wouldn't take sister of your wife, just like you wouldn't take your sister"[30]. This canonic prohibition has been copied into our Family Act[31], because under the law, relations in the first and second grade represent a marital obstacle according to the Family Act of the Republic of Srpska. However, it is possible by way of a extrajudicial procedure to get permission for a conclusion of marriage, e.g. between father and daughter-in-law, or between stepfather and stepdaughter (article 34 of the Family Act).

Based on previously particularized regulation it is obviously that the prohibition of mutual sexual relations between family members was very extensive and precise. Such solution came from the type of family established in medieval Serbia, and which usually included two or more married couples of different generations and their children[32]. In such highly solidary community, blood relation was not treated as a mere

---

[28] MiodragPetrović, Ljubica Štavljanin Đorđević, op. cit., rule number 67.

[29] In southern part of Serbia, in 19th century, there was a custom called " snohačestvo", probably taken from the Greeks or Turks. The custom was that father would marry his underage son (while he is still a boy) to a girl who is 5 to 7 years older then he was. Meanwhile, the father would live in a concubinage with her. That custom is best shown by Borisav Stanković, in Nečista krv (impure blood), which describes degeneration of one age and parting with old customs from Turkish period.

[30]Miodrag Petrović, Ljubica Štavljanin Đorđević, op. cit., 543.

[31]Porodični zakon Republike Srpske (SlužbeniglasnikRepublikeSrpske 54/2002)

[32]Dragoš Jevtić, Dragoljub Popović, Narodna pravna istorija, Beograd, 1997., 55.

conjuction that keeps the family together. The fact of common life of all members insisted upon the respect between relatives who are not exclusively blood related (stepmother, daughter of stepmother, daughter-in-law, stepdaughter). Based on the relicts of cooperative family which were preserved among Serbs until the end of 19th century[33], our tradition shows wide comprehension of kinship. Thus, in Serbian language expressions such as brother (son of mother's sister), sister (daughter of mother's brother), phenomenon quite unknown in other languages where only offspring from same parents are recognized as brothers or sisters. Patriarchal society raises a great wall are around the family and family's values but oral tradition records cases of destruction of those walls. Folk songs, for instance, composite part of the local tradition, reveal that incest wasn't uncommon.

4. Incest in South-Slavic literature

From legal and religious point of view, it is obvious that incest taboo was always present in our tradition, but that doesn't mean that incest was strange in our society . Literature which addresses incest isn't very rich but is very valuable, because it contains psychological, sociological and legal reasons for development of the incest and also its outer manifestations. Customary law about incest was different in certain parts of the Balcan peninsula, but there are testimonies that incest existed in Susak, an island on the Adriatic coast, then in south Serbia, as it will be illustrated in the following pages.

Our folk ballads represent a reflection of the concept of a voluntary brother- sister incest. Besides the story of brother- sister incest, represents a specific family history, our poetic literary tradition revealing a patriarchal environment with disrupted inner structure. The head of patriarchal family is the father, guarantor of stability and soundness of the family, and when such bond is not established, some pathological changes are bound to occur. When the father is dislocated from the assumed traditional picture, the mother or sometimes the eldest son become pillars of the family, but they do not posses the necessary strength to develop healthy family relationships[34]. Incest appears as a result of

[33] In some areas even longer, like in north part of Bosnia and Herzegovina (called Krajina) where it was kept until World War II

34 How much is deficient family unwanted form of family witnessed Bulgarian folk songs: " Penka remained widow/with son in her arms./Penka was ashamed, sinful was/

malfunctions in the family, as a consequence of disorder that emerged in the family. Recognizable image of the mother in a patriarchal family is a sensitive, dedicated woman whose authority is based on great affection and not on the power exerted over family members. She keeps the family together because she promotes the sense of unity, making a closed endogamous environment. A typical scheme of the brother- sister incest considers that brother and sister are only children, born and raised in seclusion from the rest of the world[35]. They have created their own world and that is the point where their relation becomes pathological. If they remain in that socially unacceptable world, they will become lovers. They lose their interest for outer world because they can't find a peer. Their brother or sister represent a role model of a perfect life companion, because they are strongly connected during their childhood and the climax in their inner relations is reached when it is time for someone new (wife or husband) to enter their world. It is very hard for someone new to break into that symmetry that has been developed for the years and resulted in a perfectly shaped and suitable adult persons. In Premeditated murder, the character of Krsman is that external factor who threatens to completely destroy Jovan and Jelena's world. He is not a symbol of any outer world, he is a symbol of a new, incoming world; the world so nauseous to Jovan and Jelena, but a world full of reality. Jelena wants to enter that world, but to keep her noble habits and Krsman is the key to that world. By choosing Krsman as a the shortcut to the new world, she is shutting the door behind her and terminating her romance with Jovan. Jovan is not ready for that radical step, he is not willing to leave their little world. He decides to close the circle between them and recourses to the ultimate resort. He kills Krsman and himself, because it is the last option to save his world, his love and his essence. Jovan and Jelena's romance begins with puberty, but with time they become more and more conscious of wrongful of their act. They know they are doing something wrong, something unlawful, even sinful and they will be duly punished. They are waiting for their punishment, but when it comes, it will be dreadful, and they will pay for enjoying forbidden passion. Jovan at last chooses the punishment for them, but he also punishes Krsman, for entering their world, breaking into pieces and for making

to keep a child without a father. (Bugarska narodna poezija i proza, Narodne balade, Sofija, 1982., 369.)

[35]"We grew up alone. Completily alone. Just two of us. Entirely connected.Without mother and father."Slobodan Selenić, Premeditated murder, Beograd, 2009.

Jelena and Jovan, once perfect lovers, perfect strangers. They are aware that their relationship is unsustainable in the real world, and it is just a matter of time when it will break.

Interesting point about incest in folk ballads is that although explicit scenes of incest are never verbalized, it is yet incest of desire and words, but love is not consumed, because patriarchal society will not stand that. That unacceptable passion destroys the family and leads them into death. Death is the only possible solution out of a complex situation. Death is the atonement from committed sins and the price to be paid by someone who violated the boundaries between allowed and forbidden. The actors are aware at all time that they have been doing something wrong and they carry that guilt which gives a new dimension to their relation, a pathological dimension. A compromise between the the real world and the world they created is not possible; the conflict is too strong so the real world outgrows their world, thus forcing the illicit love to capitulate.

Our oral poetic tradition has noted an attempt of royal incest in a folk song called " Marriage of Dušan's sister" where Emperor Dušan expresses a will to marry his sister, to keep the wealth in the family[36]. But when he becomes sober he regrets the words that he said, saying that alcohol makes people say words they do not really think, and even him, a great emperor could be influenced by alcohol. Although, the mentioned idea of possible incest in the patriarchal society of the time was unbearable, nothing could stand against the emperor's will. Church dignitaries in the song are representatives and guardians of public morality but they dared not react to this statement. Sister Kandosija was hiding her face behind servant Mijajilo looking for protection and resort from shame that brother's statement has provoked in her. Royal incest is specific because it is a demonstration of the imperial power and there was no need to limit emperor's intentions according to the positive law and good customs. In monarchies, rulers weren't limited by positive law, even in situations when their intentions were in conflict with the existing regulation they would transgress the rules. From this folk song about marriage of Dušan's sister we can only guess whether that were Dušan's true intention or just a legend. But history records cases of serious desires of Serbian rulers to be engaged in incest, such as prince

[36] https://sr.wikisource.org/wiki/%D0%A3%D0%B4%D0%B0%D1%98%D0%B0_%D1%81%D0%B5%D1%81%D1%82%D1%80%D0%B5_%D0%94%D1%83%D1%88%D0%B0%D0%BD%D0%BE%D0%B2%D0%B5, accessed 5.7.2013.

Mihailo who was involved in a relationship with his underaged niece Katarina Konstantinović. Prince Mihailo and Katarina were in the fifth grade of kinship, so the marriage couldn't become official because the church didn't allow marriages between relatives up to the sixth grade, thus metropolitan Mihailo was against that marriage[37]. The Serbian political public was also against that marriage because they weren't fond of western customs integrating into Serbian conservative community. Ilija Garašanin, who stood up against this idea, which was quite usual on French or Spanish royal palaces, was forcefully retired, as punisment. His successor to the throne, king Milan was also in unofficial relation with his cousin Katardži. Hence, incest was not uncommon to Serbian royal dynasty, who obviously suffered from the same disease like their European peers.

Serbian medieval literature, reveals more examples of incestuous relationships such as "Hagiography of Paul Caesarea" or a folk song named „ Foundling Symeon". Both literary works are based on the Greek myth about Oedipus. This pagan motive was adjusted to the feudal and Christian context where the setting is made. Polytheistic conception of incest stipulates that Oedipus must suffer consequences for his deeds. He blinds himself because his desires are the cause of his sins, he receives his punishment and his ancestors are also paying back for his sins. He suffers his doom on earth, enduring their predicaments. In Christian version of the myth of Oedipus, he is closed in a monastery where he devotes himself in praying and denounces everyday life, so he would one day experience enlightenment. The enlightenment comes after years of vegetation, full rejection of life, when Paul and Symeon find their piece in silence and isolation. Incest was a common phenomenon in the medieval times when the struggle for throne was great, and candidates who came from woman's line would be very dangerous. That is why it was so opportune to conclude incestuous marriages, because the royal blood would stay pure and the continuity of dynasty would be undisturbed. For this reason Ahaz and Agaza, Paul's parents who are brother and sister enter into such relationship to keep their wealth. As a result of their incestuous love, Paul is born and although he is legitimate heir to the throne, he is thrown into the sea. Throwing into the water, be it sea or river, represents an act of purification, symbolic throwing a burden of sin into water to clean up the quilt, to eliminate the remains of sin.

[37] Prohibition of conclusion of consaquines marriage was established by decision of Synod of Constantinopole early 997.

South Slavic area was very rich in cultural and national differences, which is the result of a number of conquests throughout history on the Balcan Peninsula. Such cultural influence of the Greeks and Turks, BorisavStanković has described in his famous novel " Nečistakrv" (Tainted blood). The plat is set into the 19th century and describes life in southeastern Serbia and the raise of civil society. Incest is described as a cause of degradation of one great family, but I think that incest is always concomitant with already started degradation. Stanković revives a traditional wealthy family headed by its founder hadži- Trifun who is an energic, strong and skillful tradesman, which brought his great wealth. His progeny was fond of easy life, drinking, carousing, gambling and they cared less for the stability and respect of the family[38]. Enjoying the fruits of the work and exploitation of another causing members of this privileged family to swerwe in many vices, inter alia in incest. The product of such dissolute life was offspring with different disorders and diseases. In another place in the novel incest is mentioned, in the context of degradation of rural environment in the form of "snohačestvo", a custom practiced in southeastern Serbia. This custom provoked incest for reasons different from reasons for incest among Sofka' s ancestry. This custom was a relict of Turkish reign and the right to the first wedding night that belonged to the master. Thus, the right belongs to the father of the groom and as a result of this relation, it was very problematic to define kinship, because the father-in-law could conceive with the daughter in law and a child born could be his son, but officially his grandson. This phenomenon was also noted when the son was absent from home for sometime participating in battles and during that time father would live in concubinage with his son's wife. Reasons for practiced incest between father -in-law and daughter- in- law were hard conditions of life and because of that the father would marry his underage son, sometimes when he was still a child, with an older girl, who was capable of working. Until his son comes of an age and gets prepared to take his marital duties, the father would use his right over his daughter-in- law. In that way sacrosanct construction of the family is broken and roles in the family are now replaced, which ends up in great confusion and disorder. Incest

[38] „And the meaning of their life was the following: every woman from the house was tending and beatifying herself so she could use her powerful beauty to overtake other women and madden all men in the house, regardless of their age or kinship.", Borisav Stanković, Nečista krv, Beograd, 1910., http://www.rastko.rs/knjizevnost/umetnicka/proza/bstankovic-krv.html, accessed 2.7.2013.

is just a symptom of an already ill family, a symptom that something is not going in a desirable direction. Legal regulation reacts to incest with punishment such as prison or fine but does not correspond to the essential basis of genesis of incest. Realized incest inevitably leads to personality disorder when clinical picture is dominated by a sense of guilt, denial of psychological reality, anxiety, depression with suicidal intentions. From concrete cases of incestuous families it is obvious that incest occurs more likely in families who are already burdened with some of deviance for example, alcoholism, drug addiction. People who have broken the oldest taboo are disoriented and need new social integration. I don't think that is possible to accomplish with state reaction through punishment by either prison or fine.

Conclusion

Regarding the issue of incest and considering all aspects of incest, it is very hard, almost impossible, to come up with unique conclusions. Conclusions are very controversial because incest is a phenomenon that is very complex and it is impossible to reduce it to one dimension only. In the Balkan area, incest is a socially unacceptable behavior and also punishable by criminal law. Incestuous marriages also are not possible to conclude. Incest is entirely tabooed but our written and oral literature evidence differently. Common Law shows that incest was very common in southeastern parts of Serbia, later maintained with custom of the privilege of the first wedding night. In addition, incest was practiced in many others places in the Balkan, what is witnessed in article of Family Law[39] wherewith it is possible to conclude marriage between first cousins if it is common in that geographic area. It is interesting to see how incest changed from tolerant to very radical even criminally prohibited attitude. Nowadays, convictions based on incest are very rare, one could say that in the Republic of Srpska in the last ten years courts have not heard a case of incest. But strict criminal regulation remains and it seems like untouchable. The main purpose of this paper was to show that incest is usually a consequence and not a cause of disorganization of the family. It is mainly a result of the presence of some already existing pathological factors.

References

Borisav Stanković, Nečista krv, Beograd, 1910., http://www.rastko.rs/

[39] Osnovni zakon o braku (Službeni list FNRJ, br. 31/ 41, 44/46)

Machado de Assis and the struggle for recognition

Hugo Schayer Sabino[1]

Abstract: The paper deals with the struggle for recognition, as presented by Axel Honneth, and connects his considerations to the possibility of recognition as a result of disrespect.

Keywords: Recognition – Disrespect – Literature.

1. Introduction:

Axel Honneth´s The Struggle for Recognition: The Moral Grammar of Social Conflicts (1999) deals with de possibilities of human and social development in contrast with the construction of identities and conflicts.

The book is divided in three parts. The first deals with history and its contents, in a Hegelian perspective. The second part deals with the systematic update of this perspective. The final part deals with morals, social evolution and social philosophy.

This essay focus on the second part and specially on Item 6 of it, which deals with personal identity and disrespect: violation, rights denial and degradation. The paper main objective is to check Honneth's methods mentioned in the chapter are sufficient to match all the hypothesis risen in the chapter.

In order to do so, three short stories by Machado de Assis are use. The disrespect forms mentioned by Honneth will be sought in the short stories and therefore compared with the models he proposes.

In order to do so, a short explanation about the item 6 in the second part of the book is given.

Item 5 in part 2 of Honneth's book is also mentioned, as it deals

[1] Ph.D. student at PUC – Minas. Professor at UNA - Betim.

with the possibility of the possibilities of recognition and ethical requirements.

2. The struggle for recognition – Personal Identity and disrespect.

To Axel Honneth (2009, 213) human integrity stands on recognition experiences. The denial of recognition is disrespect or debasement (Honneth, 2009, 213). Disrespect is able to collapse the whole identity of a person (Honneth, 2009, 214/214).

Honneth notices the possibility of disrespect as a pattern to the struggle for recognition, due to its foundations on human subject affections (2009, 214).

To Honneth, the lowest disrespect is the one involving the possibilities denying a individual the freedom to dispose of its own body (2009, 215). This matches the stated on the Art. 5º of the Brazilian constitution, as well as the Brazilian Penal Code, in wich crimes against person are the main offences.

The second form of disrespect acknowledge by Honneth are those which affects self-respect and morals through the denial of certain rights. Difficulties to access health services, public transport, sanitation example rights denied to minorities in Brazil. The individual cannot be taken liable for moral responsibility (Honneth, 2009, 217), that means he cannot recognize himself as a person with rights.

The last form of disrespect applies to those individuals or social groups and their perception as negatives (Honneth, 2009, 217). This sort of disrespect has been applied to women, gays, afro-descendents. These are prejudice and discrimination acts.

Honneth then compares the types of disrespect and rebates applicable to the human body (2009, 218). This comparison has two meanings: calling the subject attention to its condition and extracting a general view over human disrespect (Honneth, 2009, 219).

Honneth argues the way between suffering and an active action against disrespect is bounded by the struggle for recognition (2009, 220) When someone shames itself and denies this shame in this action is found self value (Honneth, 2009, 223).

Honneth therefore mentions disrespect as a starter for the struggle for recognition.

3. Machado de Assis short stories

Shame, disrespect and discrimination experiences are elements in Machado de Assis short stories. Three of these stories are studied in this essay. They are Father against Mother (Pai contra mãe), Secret Reason (A causa secreta) and The stick tale (O Conto da Vara).

Secret Cause has three dead characters: Garcia, Fortunato and Maria Luísa. Garcia was a Medical Graduate. He met Fortunato as a student. They meet again sometimes and end up in a acquaintanceship. Fortunato is considered weird and his wife, Maria Luísa, is a very kind person. Between Maria Luísa and Fortunato there is no sign of companionship. Garcia and Fortunato start a hospital and all the three of them share a social living. Garcia loves Maria Luísa, but he keeps it as a secret, as not to hurt his business partner. Maria Luísa finds out that love, but keeps herself shut. Santiago is found to be a sadist. Illness kills Maria Luísa. Both friends attend the funeral Fortunato goes to rest a little and coming back he finds Garcia kissing his dead wife corpse. Not moving, he quietly stands at the door.

Father against mother tells the story of Cândido Neves. He is a black man who earns his living through rewards paid for capturers of runaway slaves. Living with his pregnant wife and her aunt, he finds himself short of money in a way that even food might be missing in a few days. That would mean also giving away the newborn. On his way to give the child to others he finds a runaway pregnant slave woman. As he captures and delivers her to the owner, she suffers an abortion. Going back home, Cândido Neves thinks: not every child will live.

The Stick tale is about Damião, a seminarian who leaves the convent. Wandering around, he finds shelter in an old lady◎s house. He shows affection for a infant maid. As she performs a small mistake, the old lady ask Damião for a stick to punish the child. He promptly attends her, leaving the child to be severely beaten up.

Machado de Assis works are a reflection of his living years and autobiographic elements are not to be ignored (Coutinho, 1966, 35). Custom description was relevant to him (Teixeira, 1987, 195). As an Afro-American he was only taken as a white-man due to social conventions (Massa, 1971, 47).

4. Machado de Assis short stories and Honneth's ideas.

Machado de Assis short stories tell events in which disrespect did not result in recognition.

Fortunato lies disrespected in his feelings for his wife. But he does not fight the offender. He does not seek recognition as husband. Damião chooses not to help a child. In Father against Mother all sort of disrespect in shown. Cândido Neves deals with all of them and is left defeated.

These short stories show that not all disrespect case ends up in recognition. Sometimes disrespect just ends in pain.

Due to the second possibility, it might be asked: why Honneth does not work with that hypothesis? What might justify Honneth's choice of not doing so?

Considering the first question, Rudolf von Jhering answer in "The Struggle for Law" (1994) might be considered more sophisticate, as the struggle for right is taken as a moral duty. Honneth does not go any further on his considerations on this matter.

5. A new approach

Honneth's option of not dealing with the possibility of a denial to recognition might be taken as a methodological choice, but it is not a explicit one. In another work of his, "Suffering from Indeterminacy: An Attempt at a Reacturalization of Hegel's Philosophy of Right"

References

ASSIS, Machado de. Pai contra Mãe. Disponível em < http://www.dominiopublico.gov.br/pesquisa/DetalheObraDownload.do?select_action=&co_obra=1951&co_midia=2> Consultado em 24 de fevereiro de 2.011.

_____. O caso da vara. Disponível em < http://www.dominiopublico.gov.br/pesquisa/DetalheObraDownload.do?select_action=&co_obra=1927&co_midia=2> Consultado em 24 de fevereiro de 2.011.

_____. A causa secreta. Disponível em < http://www.dominiopublico.gov.br/pesquisa/DetalheObraDownload.do?select_action=&co_obraw=16917&co_midia=2> Consultado em 24 de fevereiro de 2.011.

BRASIL.; CAHALI, Yussef Said (Org.). Código civil ; Código de processo civil

; Código comercial ; Legislação civil ; Processual civil e empresarial ; Constituição Federal. 12. ed. rev., ampl. e atual. até 29.12.2009 São Paulo: Revista dos Tribunais, 2010. 1982 p. (RT Mini Códigos Civil) ISBN 9788520335970

BRASIL.; GOMES, Luiz Flávio (Org.). Código penal: Código de processo penal; Legislação penal e processual penal; Constituição Federal. 12. ed. rev., ampl. e atual. São Paulo: Revista dos Tribunais, 2010. 1387 p. (RT mini códigos) ISBN 9788520335963

COUTINHO, Afrânio. Machado de Assis na literatura brasileira. 2. ed. Rio de Janeiro: Livraria São Jose, 1966. 107p

HONNETH, Axel. Sofrimento de indeterminação: uma reatualização de filosofia do direito de Hegel. São Paulo: Singular, Esfera Pública, 2007. 145 p.

_____ . Luta por reconhecimento: a gramática moral dos conflitos sociais. 2. ed. São Paulo: Ed. 34, 2009. 291 p. ISBN 8573262818

JHERING, Rudolf von. A luta pelo direito. 14. ed. Rio de Janeiro: Forense, 1994. 88p ISBN 8530901924

MASSA, Jean-Michel. A juventude de Machado de Assis 1839-1870: ensaio de biografia intelectual. Edição ilustrada Rio de Janeiro: Civilização Brasileira, 1971. 698 p.

PROENÇA, M. Cavalcanti; HOUAISS, Antônio. Estudos literários. Rio de Janeiro: J. Olympio, [1971]. 565 p.

SCHWARZ, Roberto. A viravolta machadiana in NOVOS ESTUDOS CEBRAP. São Paulo: Centro Brasileiro de Análise e Planejamento,1981-. Quadrimestral. Continuação de Estudos CEBRAP. ISSN 0101-3300

SAYERS, Raymond S. O negro na literatura brasileira. Rio de Janeiro: O Cruzeiro, 1958. 458p

TEIXEIRA, Ivan. Apresentação de Machado de Assis. São Paulo: Martins Fontes, 1987. 221 p. (Universidade hoje)

Law and literature:
The experience of *jus* literary discussion introduced in Universidade Federal do Pará, Brasil

Victor Russo Fróes Rodrigues[1]

Abstract: The present work makes an analysis of the experience of introducing the discussion and research in "Law and Literature" in Law's graduation course of Universidade Federal do Pará – UFPa, from the year 2011. Based on the initiative of Prof. Dr. Luiz Otavio Pereira Correa by offering the elective subject named "Law and Literature" (August-2011), pioneer in the course, set up the framework of the first consistent activity on the issue, culminating in the discussion space called "I Colloquy of Law and Literature: reading the images of the Law"(December, 2011). Initially covering an estimated total of thirty undergraduate students, the elective subject applied the methodology of theoretical explanation of the object of study, followed by the choose of themes for each student to develop a work of their desire. By the presentations of studies for the entire group was discussed the angle of approach to the subject and possible interdisciplinary interfaces, usually mediated by the metaphoric language. Secondly, the space of the symposium opened up the opportunity of elaborating and presenting works for all the student community, expanding the imaginative ideas, the universe of participants and the literary spectrum initially approached. The participants themselves examined the fruitfulness yielded, especially by the reason of a different view offered in opposite of dogmatism often applied in the classroom. Ending the paper, it is analyzed the possibility of inclusion and effecting as a obligatory subject in the course curriculum, concluded as uninteresting by the reason of jailing the free initiative that drove the students toward the jus literary studies.

Key-words: Law and Literature, elective subject, interdisciplinary

[1] Undergraduate student at Federal University of Pará (UFPA), Brazil. E-mail: vicrusso_fr@hotmail.com.

1. Introduction

Law and literature are intertwined, related by the historical aspect of legal creation, or merely by the narrative aspect or, more intrinsic, because both are linked by language. Realizing this intermingling, the interdisciplinary studies of these two branches emerged, cataloged since the early twentieth century (Trindade, 2008), giving rise to a series of discussions that have developed and are still being developed both in the legal world and the literary world.

Without considering the historical aspects of the studies called "Law and Literature", we can say that they were initiated and consolidated in the United States (nuclei at several universities), from which influenced the whole world, without forgetting the concomitant European production. Despite its relatively recent onset, such studies have found repercussion in Brazil, where it was driven by intriguing thinkers[2]. Mainly in the south of Brazilians territory, it is formed an exponential production, with several universities that have research centers on that theme.

However, in the North of country, it's realized that there is not such expressive development of studies in "Law and Literature", being virtually undetectable as a set. Noticing it, in 2011, the Professor Dr. Luiz Otavio Pereira[3], along with a group of students under his guidance has decided to introduce some activities in "Law and Literature" at the Federal University of Pará (UFPA).

The Federal University of Pará is located in the Amazon region and is the largest university in the North of Brazil with a student population of over 60,000 people. Its Faculty of Law, at this time, has 112 years, being one of the most prestigious in the country and influencing the training of professionals and prominent politicians in the Brazilian scenario.

In this overview of academic and geographic isolation, as mentioned, from the year 2011 some activities have been developed to stimulate research and production in "Law and Literature". So, the objective

[2] Could list Arnaldo de Moraes Sampaio Godoy, Germano Schwartz, Luis Alberto Warat, Lenio Luiz Streck, Vera Karam de Chueiri, André Karam Trindade, notwithstanding many others.

[3] Doctor in Law by Federal University of Pará (2007) and holder of the same University. Academic profile available at: http://buscatextual.cnpq.br/buscatextual/visualizacv.do?id=K4778468T6 .

of this paper is at first to report the related jusliterary activities that occurred in 2011 and subsequently bring up an important discussion for those who think the legitimacy of the theme: the possibility of inclusion of a discipline in tracks curriculum of undergraduate courses of Law, analyzed from the perspective of the reported activities.

2. Activities of "Law and Literature" in UFPA

As already mentioned, the activities of Law and Literature were introduced in UFPA in 2011, and consisted primarily in three areas: the extension project called ""Law in film: literature, art and culture"; the elective course called " Law and literature "; and the "I Colloquy of Law and Literature: reading the images of the Law" Briefly, proposals and results of activities will be reported, also serving as a form of historical record to the memory of the Faculty of Law.

At first, the beginning activity consisted of the extension project named " Law in film: literature, art and culture", designed in 2010 and made effective in 2011. This project proposed the use of films, most of which are grounded in literary works, with the aim to contribute to the expansion of the legal imaginary of students of the Faculty of Law. Running regularly throughout the year, the project consisted of several discussions of carefully selected films with varied audience, from students of law to students of other areas (psychology, social work, history, etc).

The second activity performed, specifically in the month of August, was the offering of optional subject called "Law and Literature", taught by Prof. Dr. Luiz Otavio Pereira on vacation time. This activity involved about 30 graduate students in law, from various semesters. The methodology of the course excelled for the freedom in the choice of the object of study, preceded by a theoretical introduction class, because of the novelty of the topic in that context. In this initial class were presented the most common kinds of research in "Law and Literature", drawn from readings of François Ost (2004).

After that comprehensive theoretical introduction, all students had the opportunity to choose a topic to address in a short presentation by their own. Thus, in two weeks all students presented their works, bringing many literary genres and the most different approaches. A positive point was the use of Amazon literature, relegated to the background by the national literature and which is very close to the cultural reality of the participants.

The third activity developed was the "I Colloquy of Law and Literature: reading the images of the Law ", realized in December. This is a result of the aforementioned elective subject, seen the growing student interest in the subject. Thus, the Colloquy was a open access public event, outside the traditional classroom space and made by the presentation of work and other activities. In this way, allowed greater opportunities for interaction with the theme of "Law and Literature", covering wider range of readings and themes. With the participation of about 80 people, this event marked the end of a prolific year.

3. Including as a compulsory subject, interesting or not?

Reported the experiences in the north Brazilian college, starts from now up to an analysis of the possibility of including Law and Literature as a compulsory subject in the curriculum of the law schools. It is necessary to affirm that such a discussion arose in UFPA effectively, as a practice of the ideas discussed in the activities application. For this reason, it should be clarified that the present article does not attempt to a comprehensive analysis, but from the assumptions measured locally to add elements to the discussion.

As a starting point of analysis, we bring to light a survey realized with participants in the activities offered in 2011, especially the students who participated in the elective subject "Law and Literature" and the I Colloquy. For those involved they were asked what the motivation that had driven the search for that kind of events, as well as to pursue studies in the subject.

As majority response we brought opinions in the sense that the motivation of the participants were attracted by the novelty of the topic, the new possibilities that the object of study could offer them. It was also found that the students observe their daily lives at the Faculty of Law as unattractive, extremely dogmatic and unimaginative, so that the possibility of interaction between law and other areas drew attention and secured the participation of the majority of respondents.

Based on this assumption, it is interesting that many authors rightly confer the characteristic antidogmatic to the interdisciplinary nature of interactions involving law and art. The subversive role of merges between law and art is at the centre of the thought of Luiz Alberto Warat, which developed several proposals in this field in order to break with the traditional methodology.

An important point to note is that Warat (1995) puts the metaphor as a point of inflection between the two knowledge, encouraging the flourishing of legal imagination and the consequent opening of possibilities for legal phenomenon. This metaphor opens cracks in the barriers between science and art, while significance to our reality. We found in Warat and his legacy the critical reasoning thought by the respondents as prevalent.

Similarly, Vera Karam de Chueiri also recognizes the critical role of the blend between law and literature , saying that:

> Direito e literatura é um novo campo de possibilidades para questões formais e materiais que afligem tanto o Direito quanto a Literatura. Porém, no campo da crítica do Direito, incorpora as demandas políticas e éticas de reconstrução de um mundo mais igualitário e justo a sensibilidade estética do gosto literário (CHUEIRI, 2006, pag. 235).

Its noticed that, within the possibilities of interdisciplinary approaches traditionally listed, referenced as "Law of Literature", "Law as literature" and "Law in Literature" (OST, 2004), we think that the objective of "openness" of the legal imaginary is more strongly present in "law in literature", precisely because it is not limited to legal, linguistic and literary theories. It is this last method that we specifically consider, making refer once again to the referential metaphor that opens cracks and creates new realities.

Thus we see that the opinions of event participants join forces to critical - theoretical point of view of "Law and Literature", so we pass to the answer of the central question here.

The inclusion of a discipline that addresses "Law and Literature", even if focused on the perspective of "Law in Literature", as a compulsory subject in the curriculum of a college, firstly could be interesting as a way to mitigate the current dogmatism.

The first point to note is regarding the relative character of the law and literature approach: the possibilities of approach are manifold, and their study can not be considered emancipator by themselves. A sterile, mechanical and uninteresting theme can emasculate supposedly emancipatory character. So this is an important fact to be considered. No one denies, however, the possible use of literary works simply as a tool for positive exemplification of legal phenomena that commonly serves the legal dogmatic strategy.

Still, considering that out of an estimated universe of 1,200 students in law school , only a portion was interested in participating in those activities mentioned, relevance takes the role of free will that led them to the study of the subject . Only those truly interested in the subject attended the activities, printing their commitment to that object, which can be characterized as its object of desire at that time. The desire is the manifestation of artistic and legal center.

Included in curricular path, that is, turned compulsory for all students of a Faculty of Law, would against most primary assumption which we considered: the free will that resulted in the choice of that object of study. Would emasculate the libertarian meaning of its claims, probably resulting in an emptying of meaning.

Therefore, considering this argument as stronger among the ones analyzed, by attacking the premise from which we start , and despite what some scholars might primarily intuit, we consider uninteresting the inclusion of the subject "Law and Literature" into the curriculum route. We believe that such studies should, to maintain its possibly emancipatory and keep the margin of institutionalization, the primary thinking of Warat.

4. As briefly conclusion

Reported the experience of jus literary discussion introduced in Universidade Federal do Pará - Brasil, we reaffirm that they were performed in 2011, thought by the idealism of Professor Dr. Luiz Otavio Pereira and his students, who developed the extension project "law in cinema: literature , art and culture , the elective subject "Law and Literature" and the "I Colloquy of Law and Literature: reading the images of the Law" .

From such activities born the issue of including "Law and Literature" as an obligatory subject at the curriculum of the Faculty of Law. Answered without totalizing pretensions, starting from the local perspective, it was synchronized the speech with the critical theory created on the theme. From Warat and his legacy, it was found to be uninteresting such inclusion, as developed.

Note that the approach used is addressed from the perspective of the perspective of "Law in Literature", which we think is most appropriate for the proposed objectives and referenced by students interested in the topic.

Finally, it will be follow-up activities in the following years as well as theoretical approaches the epistemological specificities of this branch that has the possibility but not the guarantee, to expand the legal imaginary, metaphorically to overcome barriers between Law and art.

References:

CHUEIRI, Vera Karam de. Direito e Literatura. In: *Dicionário de Filosofia do Direito.* Coord. Vicente de Paulo Barreto. Rio de Janeiro: Editora Renovar, 2006.

OST, François. *Contar a lei: as fontes do imaginário jurídico.* São Leopoldo: Unisinos, 2004.

TRINDADE, André Karam and GUBERT, Roberta Magalhães. Direito e Literatura: aproximações e perspectivas para se repensar o direito. In: *Direito e Literatura: Reflexões teóricas.* Porto Alegre: Livraria do advogado, 2008.

WARAT, Luiz Alberto. Metáforas para ciência, arte e subjetividade. *Sequência,* 1995, nº30, 1 – 10.

The Dworkin's answer to Posner's Economic Analysis of Law on Bush v. Gore Supreme Court decision

Bernardo Gonçalves Fernandes[1]
Raphaela Borges David[2]
Daniel Felipe Paiva[3]

Abstract: This work intends to analyze the Supreme Court decision about the acclaimed case Bush v. Gore through the main arguments present in the Ronald Dworkin's Integrity of Law and in Richard Posner's Economic Analysis of Law. In Posner's arguments the decision was in accordance with the pragmatic approach because it's produced the most efficient allocation of resources. In turn, Dworkin argues against Posner's view, showing that was a badly flawed argument. According to him, emerges the need for Constitution's moral interpretation, to materialize the equity and freedom's rights. It'll be necessary exhibit both theories, through the author's comment, to conclude showing why the arguments presented by Dworkin are more appropriated to a democratic rule-of-law state. At last, and not least, we'll analyze if the main argument was able to influence the judgments following.

Keywords: Bush vs. Gore. Integrity of Law. Economic Analysis of Law.

Ronald Dworkin and Richard Posner are two of the most important exponents of the North American law. Throughout the last decades, they have been showing large contributions to the contemporary philosophy of law, especially on the role of judges in the legal decision. The meaning of this paper is to expose Dworkin's critical reviews over Posner's position, including the last argument in the Bush v. Gore case.

[1] http://lattes.cnpq.br/9044160342461871
[2] http://lattes.cnpq.br/3437755965976884
[3] http://lattes.cnpq.br/2051560120420945

This paper will emphasize two articles. The first published in 1997 by Dworkin in the Arizone Law Review and the second, also published by him, in the Havard Law Review of 1998. Both articles were gathered in the chapters 2 and 3 of the Justice in Robes (2006).

In Dworkin's opinion, there are two ways of answering the question of what is appropriate to reason about the truth of the allegations in law. The first, called "theoretical approach" involves the application of a set of legal or political morality principles to specific legal problems. A second response, called "practical approach", states that a judicial decision is a political event that should be achieved by analyzing the consequences of different responses from an economic evaluation, not being necessary to use a "library of philosophy policy". The latter seems to be more sensible and balanced to American way of thinking, but the author intends to demonstrate its flaws and how the "theoretical approach" can be more appropriate. (Dworkin, 2006, p. 72-73)

The theoretical approach assumes that questions about legal statements veracity are interpretive issues, which must be justified by principles that reflects the best legal practice in the case. It is interpretive, since any legal argument is subject to "justification ascent". When we turn away our eyes from a particular case to a more general examination of the issues there embedded, we must determine if the principle we wish to justify our decision is incompatible or does not accord with the principle that justifies a larger sphere of the law[4] (Dworkin, 2006, p. 76). The "justification ascent" is in Hercules, who, as a judge of extraordinary powers, expresses his arguments not from the inside out, as most lawyers, but from the outside in, trying to seize the more abstract issues to finally decide the case.

> "Before judging his first case, he could develop a gigantic theory of broad scope and appropriate in all situations. He could decide all the fundamental issues of metaphysics, epistemology, and ethics, as well as moral, even political morality. Could decide about what exists in the universe, and why it is justified to think that is what exists, of what justice and fairness require, about what it means freedom of speech, when well understood, and whether and why it is a freedom, particularly worthy of protection, and when and why it is correct to require that persons whose activity is linked to

[4]In Dworkin's example, where there is the right to claim that a person will suffer damage as a result of use of a medicament deserves to win or lose his cause, we can see that the principle X is not compatible with the principle Y that applies to tort cases.

> the loss of others, pay compensation for such damage. He could combine all this and other things to form a wonderfully architectural system. When a new case arises, he would be very well prepared. Departing from outside – starting, perhaps, in intergalactic dimensions of his wonderful intellectual creation - , he could lean quietly on the problem at hand: finding the best justification possible for the law in general, to the American legal and constitutional practice as a branch of law, for constitutional interpretation, for the civil liability and then, finally to the poor woman who took pills in excess and the angry man who set fire to the flag". (Dworkin, 2006, p. 78-79).

Further, in touch with a series of interlocutors, Dworkin develops what he calls "the three main criticisms" directed towards the "theoretical approach", by proponents of the "practical approach". The first criticism, metaphysical, is based on the idea that there are no correct answers to legal questions or objective truth about the political morality that can be discovered by legal experts. To such criticism, all our beliefs are simple creations of our language games, in such way that language creates our moral universe instead of expressing it[5].

A second critical perspective of the theoretical approach, also called professional critics, claims that we are just legal experts and not philosophers, therefore we cannot support our legal reasoning on typical arguments based on philosophical investigations.

Finally, we have the pragmatic criticism directly linked to authors like Posner, who said that his view on judicial decisions is independent, since it focuses only in an economic perspective, analyzing and choosing the best consequences for a specific case. Such analysis would be "progressive", if linked to consequential and not deontological arguments, since the deontologist assumes a result that, in certain situations,

[5]In Justice for Hedgehogs (2011), Dworkin defends the idea of there is truth in moral, against both those who hold what he calls as internal skepticism, ie, the inherent skeptical towards the substantive moral judgments, and either against those who hold the external skepticism, which is based on external statement , 'second-order' about moral. The internal skeptics founded on the moral to denigrate the moral, stating for example that if God does not exist, removes any basis for morality, or morality is empty because all human behavior is causally determined by events beyond the control of any person; the external judge moral from outside and reject any possibility of moral knowledge, stating, for example, that moral judgments are neither true nor false, but the simple expression of feelings. (p. 31-34, 2011).

can generate the worst consequences, while the consequential always searches for a maximum welfare in the decision.

The theory of integrity defended by Dworkin, raises a diverse consequentialist concern compared to Posner, as it always aims for a general objective which is a law and community structure that ensures equal respect and consideration for all. In other words, consequentialism must exist, but it cannot take the last consequences, in such way that it breaks the necessary limits in the "integrity of the decision". A consequentialism that "takes the right seriously" can only be defended on "weak" terms, Dworkin would say.

> "It is consequential in the details: each interpretive legal argument is intended to safeguard a state of things which, according to the principles embodied in our practice, is superior to the alternatives. It is therefore impossible to consider an objection to the theoretical approach the assertion that it is not sufficiently progressive, in case progressive means consequential". (Dworkin, 2006, p. 89)

Moreover, Dworkin questions the use of the welfare concept as a plausible argument to search for correct answers. A utilitarian states that a legal decision only enhances certain situation, overall or on average, if it brings improvements to the situation under discussion. The Posner's utilitarianism, however, cannot serve as a guide to judicial decision, because our constitutional rights presupposes principles of equality and freedom that will deny in certain situations the argument of best consequence for most. By breaking the code of lawful/unlawful, utilitarianism is concerned only with what works or what might be best for the greatest number of individuals, leaving aside what may be the truth, according to the moral principles accepted by the society.

However, the strongest attack by Richard Posner, against the moral foundation of the legal arguments took place in 1998, with the publication of the entitled article "Against Constitutional Theory," in the New York University Law Review.

Here we demonstrate explicitly that Posner's pragmatism frontally attacks the **academics legal theories** (academic legal experts[6]). It means that, he is part of what some would call, currently populist anti-theory movement (numerous supporters in the U.S.), which defends that any moral theory can provide solid basis for a moral judgment (no

[6] For example: Ronald Dworkin, Charles Fried, Anthony Kronman and Martha Nussbaum.

moral theory can make a person, for example, a judge, accept a moral judgment that he initially refused). Furthermore, it also argues that whatever force a moral theory may have in ordinary life, or even in politics, judges should ignore it, because magistrates have better resources to defend your objectives and decisions.

The main argument exposed here is that judges do not face moral questions in the cases they are placed with, even more, they are not interested and should not be interested in justice issues. According to Posner, when faced with cases that they do not find a simple answer in ordinary sources of guidance (Constitution, laws, precedents), the judges "can do nothing besides appealing to notions of public negotiation conduction, professional and personal values, from institution and opinion (Posner,1999 p. 08).

In a consequentialist perspective, Posner reflects that, in the moment of decision, more important than knowing the moral content (e.g., what is the value of democracy within a community, what means the clause of equal respect, or if it is compatible with the Constitution a law prohibiting physician-assisted suicide), the judge must have knowledge of the economical, social and political issues involved in the matter. He must domain, with the highest predictability, the effects generated by his decision, always adopting a measure that will bring larger benefits or an improvement in the general conditions observed by those involved in the case.

What Dworkin affirms, however, is that Posner may be more attached to a substantive moral theory than he can admit. When he tries to demonstrate that legal experts can move forward without a moral theory, his arguments always resort to this theory, perhaps he cannot make the distinction between moral philosophy on one side and sociology, anthropology and moral psychology in the other side[7]. Posner claims that

[7] "We can put a lot of questions about moral judgments in general, or any particular moral proposition - for example, that clitoridectomy is always a mistake. These questions relate to different intellectual domains. One is the moral sociology. Most people around the world have a common voice on important moral convictions? Otherwise, how great is the diversity of opinion? How many people, for example, find that clitoridectomy is an error, and many think that such practice is morally admissible or even obligatory? A second domain is the moral anthropology. What better explains how humans developed the tendency to make judgments about what is right or wrong from moral point of view? Human beings have the ability to perceive moral particles or fields located 'somewhere' in the Universe? If not, what better explains why people have the opinion that has - why, in some cultures, the majority thinks the opposite way? A third area refers to moral

his studies concerns only questions "about" morality, which Dworkin refutes, since the only way to defend his arguments would be through a moral argument. Thus, Posner says that he is not turning against morality, but against moral theory, what your opponent claims to be a confusing distinction to make, and can be defended only in terms of grades.

The moral theory, accordingly to Posner, would have only the privilege to convince the interlocutors about the truth of the speaker. Dworkin replies that this type of process is common: in everyday life and in philosophy, people try to convince each other, without putting into question the credibility of a moral theory, mainly because they think from the inside out, in the sense of "justificatory ascent", described previously.

> "It is impossible to determine beforehand by establishing a priori, any distinction between 'reasoning' and 'theory', to what extent the ascension process should continue: should continue until the puzzles or conflicts who inspired him have been resolved, and this is not something you can know in advance. Therefore, in principle it is impossible to tell where the moral judgment ends and the moral theory begins. Sustaining a point of view that seems unstable or arbitrary after the usual moral reflection, rebuilding its links with principles, concepts or broader ideals, is a component part of moral reasoning, not something different that resolves adding." (Dworkin, 2006, p. 115)

Posner then sustains two thesis: a strong and a weak. The "strong thesis" claims that no moral theory can provide a solid basis for a moral judgment, without realizing that, itself is a moral judgment offered as basis for a question, also, moral. In other words, to defend his "strong thesis" it is needed a substantive moral theory. He stands as a moral "relativistic" arguing that moral statements obey a moral code of the

---

psychology. What causes people to change their moral viewpoints when they are already formed, or acquire others? To what extent, for example, can the arguments or other inducements change people's opinions about whether clitoridectomy is correct or incorrect? A fourth area is the morality itself. The clitoridectomy is morally wrong? It is wrong everywhere, or nowhere? Only in certain traditions or cultures without special needs or circumstances? There are important connections between these areas and issues, but it is crucial to recognize that the fourth domain is conceptually distinct from any of the others." (Dworkin, 2006, p. 109-110)

particular culture in which the speaker is inserted[8]. By this argument, he approaches the evolutionary biology, linking moral arguments to local notions that have survived in certain communities. This, however, does not exclude any aspiration of integrity and coherence that it may have. So, to ask yourself, if the moral argument really has the power to change people's minds, is inappropriate and irrelevant, because nobody in healthy conditions can expect good moral arguments to defeat individuals selfishness that prevails in society (Dworkin 2006, p. 116-120).

The "weak thesis", however, maintains the idea that judges should ignore the moral theory, regardless of the strength that this may have on the common life or politics, since they have better resources to pursue their goals. It would be a category mistake, like trying to solve an algebra problem with a can opener. Therefore, Posner tries to attempt that judges do not confront themselves with moral issues, rather, they make use of moral terminologies so that their arguments become more accessible to the layman and to be magnanimous. For example, arguments about the proper functioning of a democracy are not moral judgments, but statements about the political or judicial process.

Dworkin then demonstrates how Posner's arguments are bad and unsustainable. So, what explains his violent resistance to the "academic moralism"? The author believes that the statements of the utilitarian can only be maintained if based on a broad and substantive moral theory. It is believed that Posner follows a different stance from which endorses, a moral relativism "adaptationist", that assesses the moral for its contribution to the society survival. Dworkin says that all the mysteries had been undone when he identifies this proposal in the economic analysis of law author.

> "The Darwinian hypothesis explains, above all, the distinction we found so troubling earlier between "ordinary" untutored moral reasoning, on the one hand, and "academic" moralism, on the other. Posner is anxious to protect what strikes him as natural, and "unreflective" means "natural" to him. He is equally anxious to ward off anything that smells not of nature but of the lamp: He thinks that academic theory is unnatural, interventionist, writ-

[8] Posner denies being nihilistic. Dworkin says that if they put it, would be more justified his theoretical position, since for nihilism nothing is morally right or wrong. And if that relativism were true, we would have the "moral code of a particular culture" would provide a "solid foundation" for moral claims within that community. (Dworkin, 2006, p. 117-118).

> ten by people who haven't really lived, and (however He might protest its innocuousness) in the end dangerous. He calls for the death of moral theory, but, like all of philosophy's whould-be undertakers, He only means the triumph of his own theory. For his arguments show the opposite of what He intended: they show that moral theory cannot be eliminated, and the moral perspective is indispensable, even to moral skepticism or relativism. Posner is himself ruled by an inarticulate, subterranean, unattractive but relentless moral faith." (Dworkin, 2006, p. 94)

The last arguments of Dworkin in this debate with Posner, however, comes with the backdrop of the famous case Bush vs. Gore, in which it is made clear the author fallacy placements. Al Gore, candidate of the United States Presidential Election in 2010, requested a recount of four counties in the state of Florida, suspecting on fraud in the results. The U.S. Supreme Court rejected the request alleging it to be unconstitutional and to avoid the legal uncertainty caused by exceeding the election legal term. Based on this case, Posner affirms that the pragmatic approach adoption by the judges would have better results in general terms. For him, the conservative judges of this case acted as the pragmatic approach would advise them to act (Dworkin 2006, p. 134).

Posner says that judges must balance the benefits of respecting the doctrine with the benefits that may arise by ignoring them. In this case, to the author, the U.S. Supreme Court achieved this balance. The reasoning here involves the already mentioned consequentialist view, once it orients Posner that the best decision for the electoral clash would be the one which sought the best consequences for society, in long term. The worst-case scenarios envisioned by Posner, in this case, is the one in which a recount pointed Gore as winner in Florida. In this scenario, the decision was taken beyond the legal deadline, which would make the accreditation of voters of the state immune to contestation of Congress. Florida's legislative power, mostly Republican, could have chosen their election platform in Bush's favor, once a serious recount could not be completed by December 18, final deadline for voters to deposit their votes. The Congress then would be divided by: the House of Representatives, mostly Republican, allied to Bush platform, and the Senate, controlled by the Vice President Gore, giving vote for his platform. With the Congress divided and unable to reach a consensus, the platform supported by the governor of Florida would have the winning confirmation, and therefore Bush would sworn into office.

What if, hypothetically, the Florida Supreme Court had ordered the governor to confirm the Gore platform, and he refused to do it, in declared disrespect? In other words, if he refused to recount? Posner then, puts the worst-case scenario for him thought, in a exercising required to finding the "best consequence": Gore would have a majority of voters, but not the majority of the total number of votes, in which case the chair would depend on the unresolved question of knowing if he would only need the first one to be the winner. The Supreme Court could refuse to decide because it is a political issue, creating an indefinite prolongation of the matter, leaving the country without a democratically chosen president by his people (Dworkin, 2006, p. 136-137).

What is extracted from the arguments developed by Posner when apply his conception of legal decision theory to a particular case? Here, he takes this mentioned scenario as the most likely to occur, and therefore a pragmatist judge must balance the consequences of such recount at the time of decision. Yes, a pragmatic analysis should consider all possibilities to assert itself as authentic. However, such reasoning must be done in comparative terms, taking into account the severity of each hypothesis and reducing them according to their probability to be possible its defense. Dworkin demonstrates that the reasoning of Posner does not consider this essential aspect of the pragmatic approach, since it takes as common worst-case scenario, disregarding even the real risks of taking position, thus putting in check the credibility of his argumentation theory.

For Dworkin, the judge, in his "theory of integrity", should identify, among the principles accepted by society the one that justifies the decision in the particular case, including the right as part of a linked history and then developing a constructive interpretation based in the consistency of these principles.

So the judges could not impose its decisions in pursuit of collective targets (which benefit only one portion of society against another portion) if individual rights (embodied by legal principles) were in discussion, because - as wildcards in a card game - these hold primacy over collective goals, given its universal character (valid for all members of society).

The judge should act, looking to the past and the future, building a coherent theory that justifies likewise the community of principles that embody social practices. Therefore, in the name of political morality present in a community, the constitutional right defends the inconsistent opinions that may arise, justifying their decisions on laws and

institutions that the community presupposes.

This political morality, which serves as a substrate for the integrity decisions, can be explained on the principles of equality and freedom, which are fundamental to Dworkin's theory. The real political community is one which accepts that its members are governed by common principles and not only by rules created from a common political agreement. In this context, the right to integrity is no longer just a theory guide of the judges' actions, to be revealed as a "undertaking to people" the equal respect and concern of all people, so that no group is excluded, guiding so, the achievement of the political community project.

A society that accepts integrity as a virtue becomes, according to Dworkin, in a special type of community that promotes their moral authority to take over and mobilize the monopoly of coercive force. Therefore, Dworkin's theory[9], demonstrates the integrity of the requirement that each case must be understood as part of a linked story, cannot be discarded without a reason based on a consistency principle.

Integrity, therefore, becomes a necessary element, not an option, in the democratic rule of law that appears gifted with legitimacy, allowing judgments are made by the same "collective body", ie, for this community of principles even in the face of reasonable disagreement (of pluralism of lifestyles and dignified living options) are as demanding equal respect and concern for all citizens. So, Dworkin defends that judges, regardless of their personal and moral convictions should be given of responsibility ("political morality") to make the best decision (correctly) for the case that arises as a unique and unrepeatable event.

References

Dworkin, Ronald. 1998. Darwin's New Bulldog. *Harvard Law Review* 111: 1718-1738.

Dworkin, Ronald. 1986. *Law´s Empire*. Cambridge, MA: Belknap.

Dworkin, Ronald. 2000. Sovereign Virtue. Cambridge, MA: Harvard University Press.

Dworkin, Ronald. 2006. *Justice in Robes*. Cambridge, MA: Belknap.

[9] "No government is legitimate unless it subscribes to reigning principles. First, it must show equal concern for the fate and happiness of every person ear whom it claims dominion. Equal concern is the sovereign virtue of a political community [...]" (Dworkin, 2000, p. 09-10)

Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge, MA: Belknap.

Posner, Richard. 1990. *The Problems of Jurisprudence*. Cambridge, MA: Harvard University Press.

Posner, Richard. 1999. *The Problematics of Moral and Legal Theory*. Cambridge, MA. Harvard University Press.

Posner, Richard. 2003. *Law, Pragmatism and Democracy*. Cambridge, MA: Harvard University Press.

Derrida on the Death Penalty

Theresa Calvet de Magalhães

> "[…] nous ne sommes ici ni dans un tribunal ou à la barre, ni dans un lieu de culte, ni dans un parlement, ni dans un journal écrit ou radio-télévisé. Nous ne sommes pas non plus dans un vrai théatre. Exclure tous ces lieux, sortir de tous ces lieux, sans exception, c'est la première condition pour *penser* la peine de mort. Et donc pour espérer y changer quelque chose." (Derrida 2012, 55) ["We are here […] neither in a courtroom or on a witness stand, nor in a place of worship, nor in a parliament, nor in print, radio, or televised news. And neither are we in a real theater. To exclude all these places, to exit from all of these places, without exception, is the first condition for *thinking* the death penalty. And thus for hoping to change it in some way." (Derrida 2014, 27, trans. Peggy Kamuf)].

Abstract: Reading Derrida's 1999-2000 Death Penalty Seminar, this paper presents a very brief discussion (with long quotations) of how Derrida juxtaposes Kant's defense of the death penalty with Victor Hugo's vote for the pure, simple and definite abolition of the death penalty. If one wants to ask what is the death penalty, one has to reconstitute the history of sovereignty as the hyphen in the expression "theological-political", and try to think the theological-political in its possibility beginning from the death penalty. Deconstruction is thus perhaps, perhaps insists Derrida in this seminar, the deconstruction of the death penalty.

Keywords: Derrida, death penalty, "theological-political", sovereignty, enlightenment, deconstruction.

Introduction

Jacques Derridas's *Death Penalty Seminars* at the École *des hautes études en sciences sociales* (EHESS), in 1999-2000 and 2000-2001, three years before he died the 8th of October 2004, belong to a vast research program "Questions de responsabilité" (1991-2003), that was hold from 1995 under the headings "Hostilité/hospitalité" (1995-1997), "Le parjure

et le pardon" (1997-1999), "La peine de mort" (1999-2001) and "La bête et le souverain" (in 2001-2002 and 2002-2003, the last year Derrida taught).[1] At the Sorbonne from 1960 to 1964, or the É*cole normale supérieure* (ENS Rue d'Ulm, Paris) from 1964 to 1984, and at the École *des hautes études en sciences sociales* from 1984 to 2003, Derrida always handwrote first most of his seminars (1960-1969), then typewritten them, with handwritten annotations and corrections (1969-1987), and directly on the computer (1987-2003). So the editors have now the equivalent of some 14000 printed pages, or 43 volumes, one volume for each year of the seminars or courses taught.

The seminar *La peine de mort, Volume 1 (1999-2000)*, published in 2012 (and just recently in English)[2], contains 11 sessions held from December 8, 1999 to March 22, 2000 at the École *des hautes études en sciences sociales* in Paris, within the frame of its "Philosophy and Epistemology" program. This publication corresponds to the first year of a two-year series on the topic announced by the title. The first double session (December 8, 1999) was the basis of a lecture in Sofia, Bulgaria, followed by a publication titled "Peine de mort et souveraineté (pour une déconstruction de l'onto-théologie politique)" in the journal *Divinatio* (Derrida 2002a, 13-38). Very little of his own research dedicated to the death penalty was published by Derrida in France. In 1995, four years before the beginning of this seminar, he did write the preface to the French translation of Mumia Abu-Jamal's book *Live from Death Row*.[3] And Derrida's "Peines de mort" (2001), in *De quoi demain*, a dialogue with Elisabeth Roudinesco, could also be read as a synthesis of his seminar.

---

[1] Volume 1 of this last seminar, published in French in 2008 (and in English in 2009), was the inaugural volume of the complete [critical] transcription of the seminars taught by Derrida from 1959 to 2003 being published by Editions Galilée (in French) and the University of Chicago Press (in English translation), and edited by Geoffrey Bennington, Marc Crépon, Marguerite Derrida, Thomas Dutoit, Peggy Kamuf, Michel Lisse, Marie-Louise Mallet and Ginette Michaud; all these seminars will be published, at least initially, topic by topic in reverse chronological order. Th. Calvet de Magalhães (retired professor) Philosophy Department, FAFICH, Federal University of Minas Gerais, Belo Horizonte, Brazil. Email: theresa.calvet@gmail.com

[2] Derrida 2014. All our references are to the original French edition, published by Editions Galilee, Paris, in 2012 (to facilitate scholarly reference, the page numbers of the French edition are printed, in the English tranlation, in the margin on the line at which the new page begins)..

[3] Abu-Jamal 1996, 7-13. It was published in English for the first time in Derrida 2002, 125-129.

We will have to wait the publication of the seminar *La peine de mort*, *Volume* II *(2000-2001)*, to have a better understanding of Derrida's claim: "La déconstruction [...] est peut-être, peut-être, peut-être la déconstruction de la peine de mort" (Derrida 2012, 50) [Deconstruction (…) is perhaps, *perhaps*, the deconstruction of the death penalty" (Derrida 2014, 23, trans. Kamuf)]. But is deconstruction the abolition of the death penalty?

The religious and the political basis of the death penalty.

The starting point of Derrida's 1999-2000 Death Penalty Seminar is the religious and political basis of the death penalty. The death penalty is, in these traditions, a guarantee for the dominant religion and for the state. In the first session (December 8, 1999), Derrida remarks that if we want to ask what is the death penalty or what the death penalty means, we have to reconstitute the history of sovereignty as the hyphen in the expression "theological-political". But to ask what *is* the theological-political requires recognizing that we do not already know what "theological-political" means. The best way to understand the theological-political, Derrida argues, is to analyse the historical scaffolding in which the death penalty is inscribed or prescribed. We must not suppose that we already know what "theological-political" means, and simply apply this concept to a particular case named "death penalty", but one must do just the reverse and try "to think the theological-political in its possibility beginning from the death penalty" (Derrida 2012, 50). To deconstruct the death penalty would be to deconstruct the theological-political, that is, the alliance of religion and the state. Derrida's assumption is that through the analysis of many assumptions behind the death penalty, we can understand what the theological-political *means* and *is*. And he relates it to philosophy as such:

> "Let me tell you why. To my knowledge, there have been no philosophers in the Western tradition, until now [December 2001], who have condemned the death penalty in their philosophical discourse. All the philosophers I know are, or have been, in favor of the death penalty. Some of them are against it in their hearts but not in their philosophical system. [A professor in Chicago once asked Derrida after his lecture: "You say that you are against the death penalty and that no philosopher up to now has elaborated a consistent discourse against the death penalty. So it is a mat-

> ter of the heart – do you think that your heart is better than that of others". Derrida answered: "Yes, probably better than yours"] There is no room in their system for the condemnation of capital punishment.... The question is: Why is philosophy in the West so essentially linked with the possibility and necessity of capital punishment? I have a number of doubts. One of them is that these philosophers from Kant through Hegel and up to us are of indispensable necessity forced to link their ontological and metaphysical system with the State and the authority of the State, because they can not challenge the death penalty without questioning the sovereign and authority of the state." (Derrida, Globalization and Capital Punishment (17 Sept. 2001), in Zhang 2002, 149).

If one then asks: "What is the theological-political?", the answer would be the following for Derrida: "the theological-political is a system, an apparatus of sovereignty in which the death penalty is necessarily inscribed. There is theological-political wherever there is death penalty" (Derrida 2012, 51).[4]

For Derrida, the death penalty is not a problem of death; it is a problem of death decided upon by a sovereign Nation-State:

> "There is no death penalty without the authority of the Nation-State. The death penalty is the execution of a legal murder under the politics of a Nation-State. As such, it has to be public. An execution is always public even if in some cultures and some societies the executions are not in a public place. You can not speak strictly and literally of the death penalty when the Nation-state secretly assassinates or executes people without following its ruling establishment. I don't know whether we can speak seriously of the death penalty whenever a Nation-State puts someone to death. In Europe, the death penalty must be public: the name, the date, and the place should be publicly advertised. Now publicity or being public does not mean simply that the death penalty is visible for everyone. I remind you that Michel Foucault in his *Discipline and Punish: Birth of the Prison* [*Surveiller et punir: Naissance de la prison* (1975)] mentioned that maybe in the 18th and 19th centuries, punishment and torture had become less and less visible, less and less theatrical, more and more hidden and invisible. [...] When Dr. Guillotin recommended the use of the Guillotine in the Revolution, he said that this means of execution was equal for everyone: it took only one second, it was painless, and it had even a slight

[4] See Bernardo 2005, 477-483.

> sense of pleasure, of freshness in it (laughter in audience). It was technical progression in the domain of torture. So, people argue that there was less and less publicity, which is true in a certain sense. But I would object to this. For me, it is not a matter of less or more visibility but of the change in the form of visibility. Today, I think we have more visibility through the media, the cinema, and other ways of communication. So we know better than ever who is executed in the United States. That is the major puzzle in globalization and in the struggle against the death penalty." (Derrida, Globalization and Capital Punishment (17 Sept. 2001), in Zhang 2002, 151-152).

Every death, insists Derrida, is not the sentence or the application of a death penalty, and does not correspond to what is strictly called a "death penalty", or to the juridical concept of the death penalty: "The concept of death penalty *presents itself*, in any case, as a concept of law, the concept of a sanction exercised by law in a state of law, even if one may then contest the well-foundedness of this self-presentation" (Derrida 2012, 72).

Near the end of the first session, Derrida announces that his seminar on the death penalty "will be massively turned in the direction of the United States in the year 2000" (Derrida 2012, 73).[5]

[5] [" that is, in the direction of one of the very rare, or even the only and the last large country of so-called European culture [during the session, Derrida adds: "predominantly Christian."] and with a so-called democratic constitution, that maintains - in conditions that we will examine more closely, and in defiance of numerous international conventions that we will also study- the principle of the death penalty and its massive, even growing, application, after a turbulent history, on this subject, from 1972, when the death penalty was judged unconstitutional, to 1976, when the Supreme Court reversed itself on this judgment and when thirty-eight states reinstated the death penalty and twenty-eight began once again to apply it, etc.), well, in the United States, the execution of "capital punishment" shows a great variety, a great technological refinement in cruelty or barbarity, but no longer goes directly, always, and literally after the head, whether one is talking about "decapitation" or hanging (the modality, said to be more or less cruel, of the application of the death penalty is today in the United States a more spectacular and heated debate than the debate over the death penalty itself, as if the essential thing were to maintain, or not, a human "ecology," a good and tolerable death penalty). But naturally, in the figurative sense, and the trope counts here, execution always attacks the head, the central seat of the cerebral and nervous systems, the presumed seat of consciousness and personality: the sign of this is that everywhere a prohibition is observed against executing a sentence on someone who is out of his head, as they say. The condemned man must be "normal," "responsible" and undergo punishment in full consciousness. He

"No philosophy against the death penalty". The categorical imperative of penal justice and Kant's maternal infanticide exception

In "Peines de mort" (2001) Derrida is once more very clear about philosophy's support of the death penalty and speaks of what for a long time was for him this most stupefying fact:

> "Never, *to my knowledge*, has any philosopher *as a philosopher*, *in his or her strictly and systematically philosophical discourse*, never as any philosophy *as such* contested the legitimacy of the death penalty. From Plato to Hegel, from Rousseau to Kant (who was undoubtably the most rigorous of them all), they expressly, each in his own way, and sometimes not without much hand-wringing ([as in] Rousseau), took a stand *for* the death penalty." (Derrida and Elisabeth Roudinesco 2001, 235-236).

Derrida discusses Kant's view in his third public lecture in China, given in English on September 17, 2001 at the Chinese University of Hong Kong:

> "Kant disagreed with anyone who justified the death penalty in the name of utility, exemplariness, and social security. He claimed that the death penalty is just in and by principle and not in and by its utility [and Derrida says we need to deconstruct Kant's argument precisely because it is not a utilitarian one, for otherwise abolitionist discourse would be restricted to empirical considerations]. A man who has committed a murder must be punished because he is punishable. He gave an example in his work: imagine a community on an island, Hong Kong for instance (laughter in audience); its members agree that they should leave the island, disperse, and break down the society, but before leaving, they must execute the people condemned to death who are already in jail, because it is just. It is not useful at all, because the society will be dissolved. But in the name of the principle of justice, they have to execute the last guilty one in jail. So for Kant it is a matter of principle. He believed that the justification for the death penalty on the level of its utility is to insult humanity, because the death penalty for him is a sign of humanity. Only the rational man deserves the death penalty while

---

must die awake." (Derrida 2012, 73-74)]

> an animal does not. It is a sign of the dignity of the human being, because only human beings can go beyond life, be above life, and risk their own lives. A human being can lose his life, and that is a sign of human dignity. If we use the death penalty as an article in legislation, it is simply that it structures this institution and represents its human character." (Derrida, "Globalization and Capital Punishment" (17 Sept. 2001), in Zhang 2002, 150).

In the fifth session (January 26, 2000) of his Death Penalty Seminar, Derrida introduces Kant's writings that purport to demonstrate the categorical imperative of penal justice (the pure talionic law) through Kant's concession of an exception to this categorical imperative, concerning the impunity of a mother's infanticide (*infanticidium maternale*)[6]:

"Why is it that only maternal infanticide [...] cannot or must not be punished by death? Maternal infanticide is here understood as the putting to death of a child <born> out of wedlock and it is meant to erase the shame of a maternity outside of marriage and save, Kant says, the honor of the feminine sex. [...] this maternal infanticide is indeed a homicide (*homicidium*), to be sure, it indeed puts to death a human being, but it is nevertheless not a murder (*homicidium dolosum*): that is, a putting to death, a killing that implies a wrong, some treachery (*dolos*, *dolus*), a crime of malice, a malicious ruse, thus an evil [*un mal*], an evildoing [*une malignité*], a cruelty in the sense of wanting-to-make-suffer. [...] Well, says Kant, such maternal infanticide, *homicidium* but not *homicidium dolosum*, must not be punished by death. One must not punish it by death and apply the pure talionic law (*jus talionis*) to it not only because it is a matter of saving sexual honor from an extramarital birth, but because the child born outside of marriage is born outside of the law (the law that is marriage, Kant says) and consequently also outside the protection of the law. And Kant has this extraordinary formulation:

> It [the child born outside of marriage and thus outside of law and thus outside the protection of the law] has, as it were, stolen into the commonwealth [*in das gemeine Wesen*] (like contraband mer-

[6] See Kant 1907 [1797], 336-337; "Doctrine du Droit", in Métaphysique des Moeurs II, trans. Alain Renaut (Paris: Flammarion, 1994), 158-160; "Doctrine of Right," in The Metaphysics of Morals, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), p. 109. And this case (maternal infanticide) is quite interesting in the actual Brazilian context and the recent outrageous substitutive to an alltogether outrageous bill ("Projeto de lei [Proposed Law] 478/2007").

> chandise [*wie verbotene Ware*]), so that the commonwealth can ignore its existence (since it was not right that it should have come to exist this way), and can therefore also ignore its annihilation [*seine Vernichtung*]; and no decree can remove the mother's shame when it becomes known that she gave birth without being married [*Metaphysische Anfangsgründe der Rechtslehre* (1797), in *Kant's Gesammelte Schriften*, vol. VI, 336; trans. Alain Renaut, 159]

This case [...] is very symptomatic of the logic that Kant puts to work or claims to see at work in the concept of law and penal law. Since the categorical imperative [...] of penal law is the talionic law, the equivalence of the crime and the punishment, thus of murder and the death penalty [...], since, in addition, this civil penal law, that is, the law internal to the state, to the community as a commonwealth, implies that the crime, the criminal, and the victim are all subjects of the state, well, when a mother puts to death an illegitimate child that is not recognized by the state as a legal subject, in that case the act of putting to death is indeed a homicide but not a crime punishable by the law, and the state cannot, by punishing the mother, repair the damage or the shame. The victim is nothing and nobody, in a certain way. It is indeed a human being, and that is why there is *homicidium*, but this human being is not a citizen, not even the citizen of a foreign and enemy state, like a foreign soldier legitimately killed in combat by an act for which no soldier of my country will ever be punished, but sometimes on the contrary glorified. [...] And one must think about this example historically (it is not a matter only of abortion, which is still a supplementary dimension, and I don't know if Kant would have considered the embryo put to death to be a human person or its death a homicide): it was possible to put to death children already born." (Derrida 2012, 180-183).

The categorical imperative of penal justice still remains and does not disappear in the occasion of this case of exception; it simply awaits the rising of its full coherence:

> "If the categorical imperative—which in any case remains (*bleibt*)—is one day to be in agreement with customs, then culture, non-barbarity, and civilization are necessary, which is to say: it would be necessary for women no longer to have children out of wedlock [...], for the sense of honor to be respected in fact by morality; then the knot will be untied, there will be an *Auflösung dieses Knotens*. In other words—and this is one of the great paradoxically interesting things about this Kantian position, which is as rigorous

> as it is absurd—when the history of morality and of civil society will have progressed to the point where there is no more discord between the subjective motives and the objective rules, then the categorical imperative that presides over the death penalty will be fully coherent, with neither cruelty nor indulgence, but of course, there will be no more need to sentence to death. But while waiting for that to happen, in order to think the law, the ideal and rational purity of the law, one must maintain the principle of the categorical imperative, that is, the talionic law (a life for a life, a death for a death) and inscribe the death penalty in the law, even if the ideal is to be never obliged to pronounce it in a verdict. In any case, the possibility of the death penalty, that is, of the law as what raises *homo noumenon* above *homo phaenomenon* (above its empirical life), belongs to the structure of the law." (Derrida 2012, 184-185)

To ask about the death penalty could then be the best introduction to the question "What is the Enlightenment?" And one can follow what Derrida said in the seventh session (February 9, 2000) of his seminar:

> "[...] in particular through a rereading of Kant's famous "Was ist Aufklärung?," of the question of the relations between religion and *Aufklärung*, *les Lumières*, *Illuminismo*, Enlightenment, of everything that divided the delta of Enlightenment between supporters and adversaries of the death penalty, even as one would not forget that the author of "Was ist Aufklärung?" was a firm adversary of Beccaria, a convinced proponent of the death penalty who nevertheless admitted that the age was not yet enlightened (*aufgeklärt*) but that it was on the way to enlightenment (*Aufklärung*) in the historical movement of a progress open to perfectibility. No doubt you remember: "Wenn denn nun gefragt wird: Leben wir jetzt in einem *aufgeklärten* Zeitalter? so ist die Antwort: Nein, aber wohl in einem Zeitalter der *Aufklärung* (If it is now asked whether we at present live in an *enlightened* age, the answer is: No, but we do live in an age of *enlightenment*)." One would have to privilege this passage when asking oneself whether or not this propagation, this progress of *Aufklärung* ought to be moving toward an abolition for which Kant was obviously not ready, which he even opposed in the name of human dignity (*Würde*). In concluding his text, as you know, Kant said that government had an interest in treating man, who is henceforth more than a machine, in a manner appropriate to his dignity. Each word matters for us in this concluding sentence. What is translated as "interest" when it says

> that the government has an interest in treating man, who is more, that is, something other than a machine, in a manner appropriate to his dignity, that is, has an interest in treating him beyond calculable interest, as means, and to treat him as an end in-itself beyond any market price and any pathological interest, what is translated as "interest," then, is *zuträglich*, useful, profitable: government must find it useful, profitable for itself, to treat man, who is henceforth more than a machine, in a manner appropriate to his dignity—which is thus not a price, which is a value beyond values and beyond *Marktpreis*. There is then, once again, an interest beyond interested interest interest; there is here an interest without interest, a disinterested interest of reason: "auf die Grundsätze der *Regierung*, die es ihr selbst zuträglich findet, den Menschen, der nun mehr *als Maschine* ist, seiner Würde gemäss zu handeln"("the principles of *governments*, which find that they themselves have an interest [that find it useful for themselves] in treating man, who is *more than a machine*, in a manner appropriate to his dignity")." (Derrida 2012, 252-253).

The essence of the light common to all these enlightenments (the Lumières, or the Aufklärung, or the Enlightenment or the Illuminismo), "the essence of this *aube* [dawn]", asks Derrida, in the last session (March 22, 2000), "would it not be the twilight of capital punishment"? would it not be "the doubly crepuscular moment in which one begins to think the death penalty, starting from its end, starting from the possibility of its end" ? that is, "starting from the possibility of an end that breaks like day, and already begins to condemn the condemnation to death? " (Derrida 2012, 375). And he concludes: "The age of Enlightenment [*siècle des Lumières*] would be like the rising, the sunrise, the east or the yeast [*le levant ou le levain*] of a form of speech diagnosing, prognosticating: the condemnation to death is condemned, in the long run [à échéance]" (Derrida 2012, 375).

In favor of an unconditional, pure, and simple abolition of the death penalty

Derrida began the fourth session (January 19, 2000) by citing Victor's Hugo direct and very powerful line: *I vote for the pure, simple and definite abolition of the death penalty* (Derrida 2012, 147).[7] Derrida begins

[7] Before returning to this text, the last sentence of a speech (an intervention) that Hugo

with this brief declaration because, he says, "it was made, statutorily, on the floor of a legislative body and of a Constituent Assembly of a revolutionary kind, in an assembly conscious of its inaugural, founding, instituting power." (Derrida 2012, 150).

Instead of following Derrida's long detour, at the beginning of this session, I will quote a fragment of the third public lecture he gave, in China, at the University of Hong Kong:

> "I told you that there is no philosopher I know of who condemns the death penalty, but there are a number of writers who are opposed to it, and among them the French writer, Victor Hugo, who was a militant and eloquent writer read all over the world during the 19th century. His opposition to the death penalty had been already globalized because he was sending articles worldwide to help those who were condemned. Hugo asked for a pure and simple abolition of the death penalty, because up until then, there had been sometimes a partial abolition for political charges. He was in favor of an unconditional, pure, and simple abolition. However, he referred to two sources of opposition: one was the Church and the other was the terror of the French Revolution. As you know, at the beginning of the French Revolution, Robespierre was opposed to the death penalty and he wrote against it, following the example of Beccaria (1738-1794), the famous Italian lawyer [*man and jurist of the Enlightenment*] who produced a discourse against the death penalty.[8] Then he changed his mind during the Revolution, result-

gave at the Constituent Assembly, on September 15, 1848, one century before the Universal Declaration of Human Rights (1948), Derrida takes a long detour by way of literature and by way of the question of literature on Christian soil (on French Christian soil), and therefore also a detour by way of the figure of the writer or even of the intellectual in this history of France (of Christian France) – see Derrida 2012, 153-164.

[8] [Cesare Beccaria published the book Dei deletti et delle pene (Of crimes and punishments; Des délits et des peines) in 1764, a comparatively short work in which he argued that the death penalty is neither justifiable nor useful. This argument became a major reference in France for all those who are against the death penalty, from Robespierre to Robert Badinter. But Derrida gave a different reading of Beccaria's book in the third public lecture he gave on September 17, 2001 in China at the invitation of Chung Chi College and the Department of Philosophy of the Chinese University of Hong Kong: "He [Beccaria] was a great man. Nevertheless, he said that the death penalty should be abolished with certain exceptions. The question of the exceptions is also a major issue here; for him the death penalty should be abolished not because it is inhuman, not because it is in principal not provable, but because it is not cruel enough (laughter in audience). He argued that life imprisonment and forced labor are more cruel and, therefore, more con-

> ing in the terror of the guillotine. Victor Hugo called for the abolition of the death penalty both in the name of Christianity and in the name of one moment of the French Revolution. Albert Camus was another French author who wrote against the death penalty in his essay "Reflections on the Guillotine." [1957][9] He claimed that in a world in which religion persists, the death penalty will exist; a world without the notions of heaven, promise, and immortality would have no justification for the death penalty. So for him, the end of the death penalty goes along with the end of religion." (Derrida, "Globalization and Capital Punishment" (17 Sept. 2001), in Zhang, 2002, 149).

Derrida quotes, in session four (a session devoted almost entirely to Victor Hugo's various writings against the death penalty), a letter that Hugo during his exile, in 1862, wrote to M. Bost (a pastor in Geneva), on the subject of the death penalty: "Writers of the eighteenth century *destroyed* torture; writers of the nineteenth, I have no doubt, *will destroy the death penalty*" (Derrida, 2012, 153). This word "destroys", used with insistence and deliberately twice, remarks Derrida,

> "signifies clearly that it is a question of something other than a simple legislative decision or even of an institutional or constitutional, constituting, act: it is a question, I don't dare say of deconstructing but in any case of destroying, of attacking, through writing, by speaking and by writing publicly, it is a question of attacking the foundations or the presuppositions alleged by the law or by public opinion wherever the bases of this law or the underpinnings of this public opinion, this *doxa*, or this orthodoxy uphold the death penalty; it is a question of *destroying* the discursive and other mechanisms, the supports, phantasms, and opinions, the drives, the conscious or semi-conscious or unconscious representations, that work to legitimate the death penalty; and this presupposes a certain type of writing, of public speech, and a certain type of treatment of language (national and international) that has a privileged tie to what in Europe is called literature, as well as to those citizens who have more or less broken with citizenship, who are sometimes ready, as you are going to hear in a moment, to engage in certain acts of civil disobedience, to those citizens of the

---

vincing. We have to be very careful with these arguments. I admire this man, but I have reservations about his arguments." (Zhang, 2002, 150)]. See also Derrida 2012, 291- 295; 355-359.

[9] See Camus, "Réflexions sur la guillotine" (1957), 119-170.

world who are called writers." (Derrida, 2012, 153-154).

In session seven (February 9, 2000), he quotes again a letter that Hugo wrote, after the Commune, in 1871, to the attorney for the political prisoners who had been condemned to death:

> "The question that you see as a man of the law, I see as a philosopher. The problem that you elucidate perfectly, and with an eloquent logic, from the point of view of the written law, is illuminated [éclairé] for me with an even higher and more complete light [*lumière*] by natural law. At a certain level, natural law cannot be distinguished from social law." (Derrida, 2012, 239).[10]

Hugo presents himself, in this letter, as a philosopher, and Derrida will identify with Hugo, the literary writer, surpassing, but *as philosopher*, Kant.[11]

Derrida concludes the seventh session of his seminar underlining and commenting on several remarks in Hugo's declaration of April 5, 1850, on deportation, to the assembly.[12]

---

[10] Derrida repeats this quotation several times (see Derrida 2012, 197, 201, 239, 241). But how, asks Derrida, "can Hugo both ground his abolitionism in a natural law, an unwritten, non-positive, non-historical law – a philosophical law – that cannot be distinguished from a social law, even as he constantly alleges all the same a kind of evangelical Christinanity? " (Derrida 2012, 239-240).

[11] See Dutoit 2012, 115-121.

[12] ["I believe that we must read this declaration, but I want to put in place first a few historical reminders. One must recall that although abolitionist discourses proliferated in France during the nineteenth century, as they did moreover in the United States—let us never forget this in spite of the dark picture of the United States today (let us not forget that in 1840 the man who founded the New York Tribune had initiated a true abolitionist movement and that in 1845, thus before the French Revolution of 1848, the American Society for the Abolition of the Death Penalty was founded. In 1846, Michigan replaces the death penalty by life imprisonment with one exception, once again, and the exception is precisely political treason. In 1852, the state of Rhode Island goes further because it abolishes the death penalty even in the case of treason, which Wisconsin will do a year later. This movement will grow until the end of World War I: North Dakota abolishes the death penalty in 1915; Maine abolishes it in 1876, reinstates it in 1883, abolishes it again in 1887. Six states had abolished it totally by the end of the Great War; others had reduced the sphere of its application, to which one must add a whole history of the modes of execution, from hanging to the electric chair, adopted in 1880 following a campaign organized by General Electric, the "electric chair" already provoking protests, nevertheless, from Thomas Edison among others—and the process is not altogether over.) " (Derrida 2012, 254).] Not a single word about other countries in Europe, no historical

> ["I will underline not only the teleo-theological reconciliation of the Enlightenment of reason or natural law with Christianity, the Christianity of the living and resurrected Christ, of the saved Christ in sum, of the redeemed and redeemer Christ, of the redemption, the simultaneous reconciliation in a Christian Europe of France and of Europe, of the marketplace of interest and of the non-marketplace, of the present and the promise, as "advance" in the sense both of progress and of loan, at the moment Hugo, then, applauds the abolition of the death penalty in political matters by the February Revolution even while he still hopes for the pure and simple abolition he calls for and that is still refused him." (Derrida 2012, 260).]

Hugo describes the decree in 1848 that abolished the death penalty for political crimes :

> "this great thing, this fertile decree that contains the seed of a whole code, this progress which was more than a progress, which was a principle, the Constituent Assembly adopted it and consecrated it. It placed the decree I would almost say at the summit of the Constitution as a magnificent advance[13] made by the spirit of the revolution to the spirit of civilization; like a conquest, but especially like a promise[14]; like a kind of open door that lets penetrate, in the midst of the obscure and incomplete progress of the present, the serene light [*lumière*] of the future.
>
> And in fact, at a given time, the abolition of capital punishment

---

reminder of Portugal, the first country in Europe to abolish the death penalty in 1867.

[13] Derrida comments: ["this word "advance" is magnificent, as always in Hugo, of course, he knows how to write—OK. So the advance is, obviously, progress. It is seduction; revolution seduces civilization. What is one doing when one seduces? One sweeps civilization along. The advance is credit; it makes civilization a loan in advance. "It placed the decree I would almost say at the summit of the Constitution as a magnificent advance made by the spirit of the revolution to the spirit of civilization," and the abolition of the death penalty is always placed on the side of civilization, civilization will progress with the abolition of the death penalty. It is the revolution, it is the spirit of the revolution that can make this advance to the spirit of civilization" (Derrida, 2012, 263).]

[14] Derrida comments: ["The advance is a promise. So Hugo continues to plead so that . . . one more effort, gentlemen republicans, Frenchmen, one more effort, you have abolished the political death penalty, go further. There is here an advance and a promise" (Derrida, 2012, 263).]

> in political matters must bring about and will necessarily bring about[15], by the almightiness of logic[16], the pure and simple abolition of the death penalty! (Yes, yes!)" (Derrida, 2012, 263).

And Derrida ends with this remark: ["It was not yes! yes! at the moment; one will have to wait, yes! yes!; one will have to wait until 1981, that is, a century and a half for this yes! yes! to be consistent with the almightiness of the logic in question." (Derrida 2012, 264).]

In the last session of Derrida's 1999-2000 Death Penalty Seminar, he announces:

> "Without knowing where this seminar is going, one can presume it will always be vain to conclude that the universal abolition of the death penalty, if it comes about one day, means the effective end of any death penalty [...]. Even when the death penalty will have been abolished, when it will have been purely and simply, absolutely and unconditionally, abolished on earth, it will survive; there will still be some death penalty. Other figures will be found for it; other figures will be invented for it, other turns in the condemnation to death, and it is this rhetoric beyond rhetoric that we are taking seriously here. We are taking seriously here all that is condemned, whether it be a life or a door or a window—or whatever or whoever it may be whose end would be promised, announced, prognosticated, decreed, signed like a verdict.
> Let us harbor no illusion on this subject: even when it will have been abolished, the death penalty will survive; it will have other lives in front of it, and other lives to sink its teeth into." (Derrida 2012, 379-380)

This is also our conclusion.

---

[15] Derrida comments: ["here one is going to see the formula that he takes up again elsewhere when he says "I vote for pure and simple abolition"; it already appears in this speech" (Derrida, 2012, 263)],

[16] Derrida comments : [this is not directly the revolution of Christ, it is logic, an irresistible movement of reason, of *logos*. Implacably, it will take however long it takes; reason will impose it, and between reason and life, there is an alliance here. So, implacable necessity of logic. There is pathos, feeling, heart, etc. In fact, what is almighty in the last instance is logic. No proponent of the death penalty can be in agreement with himself logically, can be in agreement with logic. There is no logic of the death penalty. Thus, the almightiness of logic will end up triumphing. "And in fact, at a given time, the abolition of capital punishment in political matters must bring about and will necessarily bring about by the almightiness of logic" (Derrida, 2012, 263)]

References

Abu-Jamal, Mumia. 1996. *En direct du couloir de la mort;* translated by Jim Cohen, with a preface by Jacques Derrida. Paris: La Découverte (7-13 for Derrida's preface).

Bernardo, Fernanda. 2005. Souveraineté's – ou la déconstruction de *la* souveraineté. In *Derrida à Coimbra – Derrida em Coimbra*. Fernanda Bernardo (ed.). Viseu (Portugal), 441-495.

Camus, Albert. 1957. Réflexions sur la guillotine. In A. Koestler, A. Camus, *Réflexions sur la peine capitale.* Paris: Calmann-Lévy, 119-170.

Derrida, Jacques. 2001. Globalization and Capital Punishment. September 17, The Chinese University of Hong Kong (in Zhang 2002, 146-152).

_____. 2002. *Negotiations*. Interventions and Interviews 1971-2001. Elizabeth Rottenberg (trans. and ed.). Stanford Stanford University Press.

_____. 2002a. "Peine de mort et souveraineté (pour une déconstruction de l'onto-théologie politique", *Divinatio*, No. 15, 13-38.

_____. 2008. *Séminaire La bête et le souverain*, Volume I (2001-2002). Michel Lisse, Marie-Louise Mallet, and Ginette Michaud (eds.). Paris: Galilée (translated by Geoffrey Bennington: *The Beast and the Sovereign*, *Volume I*. Chicago and London: The University of Chicago Press,

2009).

_____. 2010. *Séminaire La bête et le souverain*, Volume II (2002-2003. Michel Lisse, Marie-Louise Mallet, and Ginette Michaud (eds.). Paris: Galilée.

_____. 2012 *Séminaire La peine de mort*. Volume 1 (1999-2000). Geoffrey Bennington, Marc Crépon, Thomas Dutoit (eds.). Paris: Galilée.

_____. 2014. *The Death Penalty*, Volume 1. Geoffrey Bennington, Marc Crépon, and Thomas Dutoit (eds.); translated by Peggy Kamuf. Chicago and London: The University of Chicago Press.

Derrida, Jacques and Elisabeth Roudinesco. 2001. Peines de mort. *De quoi demain... Dialogue*. Paris: Fayard/Galilee, 223-267 (translated by Jeff Fort: Death Penalties. *For What Tomorrow ... A Dialogue*. Stanford: Stanford University Press (2004), 139-165).

Dutoit, Thomas. 2012. Kant's Retreat, Hugo's Advance, Freud's Erection ; or Derridas's Displacements in his Death Penalty Lectures. *The Southern Journal of Philosophy*, Volume 50, Spindel Supplement, 107-135.

Kant, Immanuel. 1907 [1797]. *Die Metaphysik der Sitten in zwey Theilen. Erster Teil:*

Metaphysische Anfangsgründe der Rechtslehre [1797], in *Kant's Gesammelte Schriften*, vol. VI, ed. Preussischen Akademie der Wissenschaften (Berlin: G. Reimer), 203-373; "Doctrine du Droit", in *Métaphysique des Moeurs* II, trans. Alain Renaut (Paris: Flammarion, 1994), 7-207; "Doctrine of Right," in *The Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1996).

Zhang, Ning. 2002. Jacques Derrida's First Visit to China: A Summary of His Lectures and Seminars. *Dao: A Journal of Comparative Philosophy*, Vol. II, No. 1 (December), 141-162.

Derrida on Friendship and Sovereignty

For Theresa Calvet de Magalhães

Marcelo Andrade Cattoni de Oliveira[1]

In this explanation, I sketch a deconstruction of the relationship/difference (*différance*) between law and politics and between politics and democracy, in the sense of a *constitutionalism to-come*, and this starting with a very symptomatic case: the discussion on the constitutionality of the Proposal of Constitutional Amendment n. 33 (PEC 33), especially about its 3rd article, proposed by Fed. Rep. Nazareno Fonteles (PT-PI) and others.

What I therefore intend to do is not exactly a dialogue with Derrida's considerations about the *avenir/future* and the possibility of democracy today, especially through the deconstruction that Derrida made of the Schmittian concepts of political and sovereignty, a very open proposal which would allow me to deal specifically with so many questions.

Well, for that, I think I have to begin with a specific issue. I do not want to resume Derrida's considerations in *La Bête et le Souverain* (2008), in *Politiques de l'Amitié* (1994) or even in *Force de Loi* (2005), but somehow show in what sense I propose, along my research on a new history of the Brazilian constitutional process, a dialogue with these considerations and how important they are, from my point of view, to the philosophy of law and the constitutional theory.

The *différance* between law and justice, between politics and violence, between violence and law, between law and politics, the theme of the foundation - and the constitution - as a promise, the theme of democracy to-come, the deconstruction of the community/fraternity and place of sovereignty, this can all be handled from the ghostly debate on PEC 33, deconstructing the semantics of sovereignty that underlies it.

In this debate on the constitutionality of the PEC 33 therefore the

[1] Jurisprudence Doctor (UFMG-Brazil). Professor of Constitutional Theory and Legal History (UFMG-Brazil).

big question is the question of sovereignty in general, of sovereignty of the State in particular - this is what I will try to show below.

With its 3rd article, the PEC 33 wishes to submit decisions of the Supreme Court on the constitutionality of Constitutional Amendments to Congress, and if the Congress will speak out against this decision of the court, it would have to submit such dispute to popular consultation. In other words, what the PEC 33 in its 3rd article proposes, according to the explanatory memorandum that clarifies it, is to submit to Congress and to popular referendums the decisions of the Supreme Court, for the judicial review of Amendments to the Constitution, on the grounds of popular sovereignty.

Some Brazilian Scholars, especially those with eyes fixed on the Canadian experience and the latest critics of authors like Waldron on Dworkin, saw in this proposal the possibility of building a sort of weak judicial review that however would strengthen the democratic experiment. Therefore, for these scholars, if democracy is the expression of self-government, a countermajoritarian institution such as the judicial review would always endanger democracy.

After all, for these authors, is not democracy that form of government whose decisions are taken by majority? However, even where a majority rules, would not the minority have guaranteed rights? If the answer is yes, how, then, to secure rights to minorities, in the face of the decisions of the governing majority? Assigning to an institution, the judiciary, for example, a countermajoritarian power? Thus, every time that majority would hurt rights of the minority, the judiciary would be allowed to protect these rights. But who would authorize, in a democracy, the judiciary, which is not even elected to control the majority decisions that allegedly violate the rights of minorities? Answer: The constitution. But why does a constitution authorize the judiciary to control decisions made by the majority, so that they do not infringe the rights of minorities? The constitution, in these terms, would not be against democracy? Answer: No, if we understand that the constitution has not been established either by the majority or the minority, but by the nation. The nation, therefore, above the majorities and minorities, is the one that sovereignly establishes the state constitution so that, within the state, decisions made by the majority do not violate the rights of minorities. The nation is the foundation of all power and all authority. But who authorizes the nation to establish a constitution, which authorizes the judiciary to control majority decisions so that these decisions do not violate the rights of minorities? The nation itself. Because it would involve

a matter of fact, not of law, or at least, not "positive" law, or perhaps "moral" law, since all law is established by the nation? There is no law without nation. But if the nation makes law, who creates the nation? A nation is created. But how as a nation is created? By a fatality of history or does history have an immanent meaning? Anyway, how a "fact" is stated as a nation endowed with sovereignty, to establish a constitution, which authorizes the judiciary to control the majority, which makes its decisions, as long as they do not injure the rights of the minority? A nation imposes itself by its own sovereignty. In the end, that is, in the *beginning*, is sovereignty itself, i.e., a force that all subjects and does not submit itself to anyone. But why would the nation wants to establish a state constitution in which, on one hand, the decisions were taken by the majority, and, on the other hand, that majorities could be controlled by the judiciary, so that the majority could not violate the rights of minorities? If the nation is sovereign thus decide, it could have decided otherwise, for example, that the minority rules over the majority, i.e., it could have decided by a government of the few or even a government of a single person? The nation would be forced then to decide for democracy? What makes a nation decide for democracy? Would the nation have, in principle, other options? Why not delegate to one person or the few the power of decision making? Is there an ultimate foundation for this option? Or is it always a choice with some degree of arbitrariness? And making that choice, who interprets the decisions of the nation? Who speaks for the nation? The nation speaks for itself? No, the state does this. The state embodies the nation, represents it in the sense of making it present, for itself and for all. The state is the nation's political representation. And if the state is the political representation of the nation, who represents the state? The government represents the state. And in a democracy, it is the majority who governs. If the government of the majority represents the state and the state represents the nation, ultimately, the government represents the nation itself. Re-presents - the government makes present, actualizes, the nation. Now, if the government of the majority re-presents the nation, if it embodies the role of the nation, what for or why speak of rights for minorities against the decisions of the governing majority, and even more so, decisions which would be controlled by the judiciary, even if it was elected by the majority? How to talk about the constitution which guarantees minorities in the face of the majority if the governing majority itself represents the nation? Constitution, justice, rights, minorities, what for or why all this, if the majority itself governs representing the nation, if the majority em-

bodies the nation, if the majority is therefore the nation in government, if the government is the very representation of national sovereignty? Thus, one can only speak of the constitution, the judiciary and rights in a democracy, only in the very terms established by the decisions of the governing majority that always, in any time, re-presents the nation, makes present the nation even to itself, in such a way that, as in a game of "mirrors" (Hobbes), the majority rule is, thus, identified with the national sovereignty that re-presents itself? And from all this follows that certain institutions, such as the constitution, which guarantees the rights of minorities, would be therefore unmanageable and undemocratic, being precisely countermajoritarian? After all, a constitutional democracy would not be thus a paradoxical union of contradictory principles, to be based, ultimately, on a mere tautology? Or, who knows, maybe democracy should not be reduced to a mere political form of government whose decisions are taken by majority? Or maybe constitutionalism and its guarantee of rights should not be merely taken as countermajoritarian? After all, what is democracy? Is the majority rule? Is the politics of the majority? What is a constitution? Is it a limit on the exercise of power? Is democracy incompatible with a constitution that guarantees rights because it limits the government of the majority? How then deconstruct relations/distinctions, the *différance* between law and politics, between politics and democracy?

Though I have previously written about the unconstitutionality of the PEC 33, also proposed by the same group of congressmen who want to change the 49 article, V, of the Brazilian Constitution, in order to revoke, by legislative enactments, the Supreme Court decisions that, from the perspective of Congress, violate its legislative prerogatives of that, as well as having published an article, coauthored with Alexandre Bahia and Dierle Nunes (2013), on the proper PEC 33, not yet explored sufficiently semantics of judicial review of constitutionality underlying these two proposals for amendment to the constitution.

Namely: that although the explanatory memorandum to the PEC 33 come to criticize the excesses of legalization of political or judicial activism, since such excesses jeopardize the prerogatives of Congress, directly elected by the sovereign people, however, the assumptions underlying the PEC 33, with regard to the tasks and direction of judicial, do not differ from the own position assumed here criticized as "activist". This is because, ultimately, from the perspective of the explanatory memorandum of the PEC. 33, the control of constitutionality, in a constitutional democracy, the task would be "political" and "legislative", even

when performed by a constitutional court. In other words, the PEC 33 just wants to reverse the logic of sovereignty from the court to the legislature without, however, breaking with the logic of sovereignty.

In this sense, it is hardly surprising as this discussion on the constitutionality of the PEC 33 resonate distorted and shuffled the positions of Kelsen (2009) and Schmitt (2008), Kelsen primarily a read from Schmitt, as the "great theme" of the guardian or custodian of constitution.

For the explanatory memorandum to the PEC 33, the judicial review is a Kelsenian legislative activity (either the constitutional court treated legislature negative, positive, alternative or competitor), it would Schmittian one, who embodies the sovereignty say the first and last word on the constitution (in a hyperbolic sense of caring, store - for you - the meaning of the Constitution).

Thus, what appears to be a sort of combination extremely inconsistent positions of Kelsen and Schmitt leads to a paradox. After all, on the one hand, Kelsen legislative activity is (also) legal, and, secondly, Schmitt parliament could ever embody the sovereignty and save the constitution (for Schmitt, this task is the Chief of State, who decides on the state of exception, who embodies the unity of sovereignty and who, ultimately distinguish friend and enemy).

After all, what is a democratic constitution? To reflect on this, I propose a very brief dialogue with Luhmann, with Habermas, and especially with Derrida.

The semantic innovation of the concept of modern constitution follows along the process of social modernization law, which might be called temporal displacement on the issue of the validity of the ground right from the past to the future. From the Middle Age's constitution, as a set of legal traditions that conform to the cultural identity of a political society, towards recovery call material constitution, to the modern constitution as "the legal statute of political" and later also as "material measure society" in the sense of Konrad Hesse. But how the modern constitution passes to articulate memory and desire, glimpsing their relationship with time?

Bernard Bailyn, historian of the American Revolution, in *The Ideological Origins of the American Revolution* (2012), seeks to show how in the course of discussions between the old settlers of North America and the British Parliament on the eve of the break with England, a distinction invented if, between a constitutional right and a right unconstitutional by introducing an asymmetry on the one hand, between a right at the

very top right inside, and secondly, the right of others to that top right should undergo under penalty of invalidity/illegality. The colonial laws of Parliament are, from the perspective of the American colonists, unconstitutional because they violate the English constitutional principle of no taxation without representation. A principle of common law that ultimately tell by the way, had taken over the seventeenth century, as well as shows in Maurizio Fioravanti's *Costituzione* (1999), the jurisprudential justification of the supremacy of the law of the *King in Parliament*.

The American side of the Atlantic then invented this distinction between a constitutional right and a right that is not right because it is unconstitutional enables therefore the independence process, recognizing on the one hand, the constitution of federalism, as said Hannah Arendt in *On Revolution* (1963), the institutional basis of a new political society, and secondly, the character of the supremacy of a law is an expression of mutual promise and foundation of a new republic, in other words, the supremacy of this Constitution in face of the legislature at the same time it jurisprudential and traditionally creates - and stresses this constitution federalism - a judicial review of the constitutionality of laws and normative acts of the executive, management, and deployment and the subsequent confirmation of the act foundation, so that the very constitution expressed.

On the French side of the Atlantic the distinction between constituent power and constituted power also seeks to deal with the problem of the absence of an absolute foundation, a tradition that has been lost. The Third Estate is neither constituted nor unconstitutional, is a constituent, says Emmanuel Sieyes. National sovereignty is to introduce a new distinction above all distinctions. A constituent power that expresses the same time, as Luhmann would say, a right and a power paradoxically unlimited self-limit themselves.

This temporal displacement law of the past for the future is seen in Luhmann (2004) as inherent to the positivity of law: the constitution is an evolutionary acquisition, a framework, a structural coupling, which allows a) mutual obligations between law and politics while functionally differentiated systems , b) and thus differentiate politics that is right for politics that is not right, paradoxically reducing complexity and maintaining c) moving the validity issue for the future the extent that any rule of law would be in principle subject to an ex post control of constitutionality. What other words would mean that the foundation of validity of the right moves for the future, for the possibility of a posteriori validation, due to the positivity or recurrence of system operations.

Something, somehow, was already present in the theory of revolution and kelseniana constituent power: in Kelsen, one can only retrospectively, i.e., future talk of the validity of the legal system, since only the future can be seen, condition for assuming the validity of the system, to presuppose the basic norm: condition overall effectiveness.

This temporal displacement of the right, from the past to the future, is reconstructed in Habermas (2005) and the opening of the constitution for the future. In his debate with Frank Michelman on the problem of the foundation, while legal and political, constitutional democracy, which refers to the very plausibility of the historical point of view of the theory of internal relation between the rule of law and democracy, Habermas maintains the position whereby to interpret the search for a moment and constituent own risk in this quest for a return to infinity as the requirement of understanding the character of openness to the future of democratic constitutions, not the pursuit of a closure point in the past , a kind of legal or political *fiat*. I.e., that they, democratic constitutions, can be interpreted as a political and social process of long-term learning in the course of historical time, subject to stumbling but able to correct itself. What ultimately relativizes the distinction between constituent power and constituted power, since the exercise of their public autonomy, over time, citizens themselves can review the material conditions of fair guarantee of the exercise of their private autonomy without however , she could have because the condition itself public autonomy.

This temporal displacement law of the past for the future is deconstructed by Derrida (2005) as the characterization of the foundation as a promise. And promise unachievable in that paradoxically the right never fully coincide with justice and with it, justice will always be the possibility of deconstructing his own distinction, distance, *différance* with the right.

However, with the design to come in Derrida radicalized a new perspective on the relationship between law and time, which may well be exploited in the direction of the central concerns of an author as Marramao (2005) in his dialogue with the critical distinction between Koselleck field horizon of experience and expectation: the issue of modern hypertrophy of the future at the expense of reducing the loss of the past and the present - the so-called syndrome hurry. Derrida, as we know, in talking to-come (*avenir*) - openness - and not in the future (*futur*) - closed.

For if Luhmann still keeps the concern of a sociological description of the law as must-be - is meant, as the standard generalized expectation of behavior, such as conditional program - a must-be due to

shifts from past to future duty, even supposing its contingency. And Habermas is rescued, albeit in a post-Hegelian vision, but not necessarily anti-Hegelian, a becoming law, even though he admits his openness to contingency.

In Derrida already can speak from the perspective of justice as deconstruction or permanent possibility of deconstruction, in justice to-come, in his hyperbolic character hyperbolic. But also, and beyond, Derrida, in what would be the *constitutionalism to-come.* A *constitutionalism to*-come that its foundation is not simply shifted from the past to the future, but open to-come without conditions. A constitutionalism *out of joint*, whose legitimacy has never closes, guard or contemporary coincides himself as presence to self: an absence, not a lack, and that opens to "the other of justice", justice as permanent possibility of deconstruction.

As I stated in the work *Constitucionalismo e História do Direito* [Constitutionalism and Legal History] (2011), "democratic constitutionalism does not necessarily lack legitimacy lived as an ultimate foundation, as a kind of nostalgia that foundation, such as pain and loss obsession ultimate foundation, sovereign, finally, as if an ultimate foundation did lack the democratic constitutionalism. The ultimate foundation and sovereign no fouls. Rather, democratic constitutionalism casts itself as the here and now, to a to-come, a future-in-open design as fallible, but in the sense that this could be the future of a past that now is redeemed by political action, legal, constitutional, that is. This opening leads to the question of legitimacy itself experienced as empty, no more likely to be filled, and how the absence assimilated - and not lack - the ultimate foundation, the legal and political process of building legitimacy by performing time history internal relationship between the notions of self-government and equal rights of individual freedom, realizes a complex notion of autonomy." (Cattoni de Oliveira, 2011: 234-235)

A key to reading and beyond Derrida, I would say, in the context of what could be considered a constitutionalism to come, that right can never be fully identifies with the requirements of constitutionalism's principles, democratic constitution would be the very expression of *différance* between law and politics, on the one hand, and politics and democracy on the other... This is because the democratic constitution, the point of view of a coming constitutionalism, law and politics, but politics and democracy, are involved at the same time that differs from each other. Such understanding has therefore implications for the understanding of constitutional democracy: for if this is *différance* lived as a permanent tension, "the identity of the constitutional subject" (the

three-way subject, i.e., subject, subjugated and matter) (Michel Rosenfeld) never be closed: an identity is not identical to itself, does not present himself - it is always to-come...

O mes amis (constitutionalistes et*) démocrates...*

References

Arendt, Hannah. *On Revolution*. New York: The Viking Press, 1963.

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. 2 ed. Cambridge, Mass.: Harvard University Press, 2012.

Cattoni de Oliveira, Marcelo Andrade (org.) *Constitucionalismo e História do Direito*. Belo Horizonte: Pergamum, 2011.

Cattoni de Oliveira, Marcelo Andrade; Bahia, Alexandre Gustavo Melo Franco; Nunes, Dierle. Controle de constitucionalidade é judicial, não político. http://www.conjur.com.br/2013-abr-30/sistema-controle-constitucionalidade-judicial-nao-politico

Derrida, Jacques. *Politiques de l'amitié*. Paris: Galilée, 1994.

Derrida, Jacques. Force de Loi: Le "fondement mystique" de l'autorité. Paris: Galilée, 2005.

Derrida, Jacques. *Séminaire La Bête et le Souverain*. Volume 1 (2001-2002), Paris: Galilée, 2008.

Fioravanti, Maurizio. Costituzione. Bologna: Il Mulino, 1999.

Kelsen, Hans. *Pure Theory of Law*. New Jersey: The Lawbook Exchange, 2009.

Marramao, Giacomo. *Potere e secularizzazione: La categorie del tempo*. Torino: Bollatti Boringhieri, 2005.

Habermas, Jürgen. Constitutional democracy: a paradoxical union of contradictory principles? In: Sadursky, Wojciecl (ed.). *Constitutional Theory*. Aldershot: Dartmouth, 2005, 69-84.

Schmitt, Carl. *Constitutional Theory*. Durham: Duke University Press, 2008.

The concept of person as an emergent phenomenon

Fabio Queiroz Pereira[1]
Jordhana Mª V. V. C. Costa Gomes[2]

Abstract: The definition of person hasn't still been satisfactorily agreed upon in scientific studies or in those of a philosophical nature. In the field of Law the concept is even weaker. However, it appears that person is an elementary concept as well as one of great practical influence. In the field of Jurisprudence, one is able to reflect upon some of the repercussions that a renewed definition could lead to. Questions related to studies on embryos, to the criminalisation of abortion or even euthanasia could have different answers, whose principal variable would be in the determination of the said concept. At the same time, many of the definitions of person are linked to the idea of rationality: the human being is a rational being, which distinguishes it from other animals. Yet this premise can lead to the formulation of a new inquiry: what makes organised material produce thought? Understanding this phenomenon is a quite complex task. Science doesn't offer the necessary subsidies and concepts based purely on metaphysics are of no use at all to those in the field of Law. In seeking definitions and answers, the article shall attempt to bring an important element to the discussion: the understanding of person as an emergent phenomenon. Among other varied aspects, one of the fundamental concerns of some supporters of the theory of emergentism is the elaboration of a new concept of person, based on basic and conceptual assumptions of the phenomenon of emergence. In accordance with such scholars, it is impossible to have a good understanding of the concept of person without having a prior, comprehensive understanding of the emergentist idea and reality. After all, human life itself can be genuinely classified as an emergence. Bearing that in mind, the reasoning of Christian Smith in

[1] Ph.D. candidate in Civil Law at Universidade Federal de Minas Gerais. Holds a Master's degree in Civil Law from Universidade de Coimbra and a Bachelor's degree in Law from Universidade Federal de Minas Gerais. Professor of Civil Law at IBMEC-MG and Milton Campos Law School. Lawyer.

[2] Master in Civil Law from Universidade Federal de Minas Gerais. Holds a Bachelor's degree in Law from Milton Campos Law School. Sponsored CNPq researcher. Voluntary Civil Law teacher at the Universidade Federal de Minas Gerais. Lawyer.

his work "What is a person?" will be discussed. Its basic fundamentals and its construction of person as an emergent phenomenon will be discussed, aiming to find a suitable outline for the subject. As a result, some of the principles of emergentism will be methodically outlined, detailing its elementary philosophical assumptions, for the subsequent understanding of the concept of person as an emergent phenomenon. For this purpose, the differences between emergentism and reductionism will be highlighted, as well as the relationship between the concept of emergence and the **current** *definition of person.*

Keywords: Emergence; person; concept of person.

1 Introduction

The definition of what a person is still finds no peaceful understanding in scientific or philosophical studies. In the field of Law, this concept proves to be even more shallow, according to Brunello Stancioli (2010, p. 27):

> The concept of person is one of the most important concepts of western Law. Paradoxically, almost zero legal studies have sought, with appropriate depth, to elucidate historical and successive theoretical increments about the topic. Most scholars consider the idea to be innate, that is, the notion of person would be something given, that has always existed.

It is noted, however, that person is a basic concept of great practical influence. In the sphere of Jurisprudence, it is possible to outline some of the repercussions that could result in a renewed definition. Questions relating to embryo research, the criminalization of abortion or euthanasia could have different answers, which would be the main variable in determining the aforementioned concept.

Many definitions of person are linked to the idea of rationality: the human being is a rational being, which is the main element that differentiates it from other animals. However, this assumption can lead to a new question: what causes organized matter to produce thoughts? Understanding this phenomenon reveals itself as too complex a job. Science does not provide the necessary subsidies for that and the conceptions supported in pure metaphysics are useless for dealing with the Law.

In search of answers and definitions, an important element can be brought into discussion: the understanding of the person as a phe-

nomenon in emergence. Among various other aspects, a key concern of some proponents of emergentist theory is to develop a new concept of personhood, starting from the basic assumptions and conceptual phenomenon of emergence. According to these scholars, it is impossible to understand the concept of person without thoroughly understand the idea and the emergentist reality. After all, human life itself can be classified genuinely as an emergence.

In this article we intend to draw some of the bases of emergentism, its elementary assumptions, for further understanding of the concept of the person as a phenomenon in emergence. In order to do this, we highlighted the differences between emergentism and reductionism, as well as the relationship between the concept of emergence and the current definition of person.

2 The bases of emergentism

Between the mid-nineteenth and early twentieth century, in a context in which the debate about the philosophical framework of evolutionary theory was intensified, a theory directed to the first systematic formulation of physicalism or non-reductive materialism appeared. According to some authors, the first philosophical support about emergence is found in John Stuart Mill's treatise A System of Logic, published in 1843. Although he did not use the term emergence itself, Mill stated that some chemical phenomena and even life were associated to the failure of the principle of Composition of Causes. He thus concluded that the effects of the causes are additive and not just mere junctions (BEDAU, HUMPHREYS, 2008, p. 11).

This was later named emergentism, which, according to Christian Smith (2010, p 23), is an anti-dualistic conception. That is, a strategy or method developed to explain the existence of many different qualities and characteristics in a unified and not dualistic reality.

Also according to the author, an emergence is a process of building a new organization, independent and autonomous from the interaction of features existing in other entities. The phenomenon, however, is not susceptible of explanation by only the entities that originated it, leading to the conclusion that the whole is bigger than the sum of its parts (SMITH, 2010, p. 26).

Following this reasoning, Mark Bedau and Paul Humphreys (2008, p. 1-59, 411-425) say emergence is a result of the interaction of

the large number of elements that compose it. It is, therefore, the phenomenon that "arises" and depends on some basic phenomena that are also simultaneously autonomous from the base. Likewise, Mario Bunge (2010), developing an emergentist view about the self, corroborates the idea that emergent properties are those that characterize a system as a whole with properties that are not found in the components when isolated.

From what we can infer that the phenomenon of emergence necessarily presupposes the existence of two or more components interacting with each other and forming a new entity entirely autonomous and peculiar. In fact, this new entity carries characteristics and properties entirely different from those which originated it, so that it is impossible for them to be reduced to the former ones again. And this is precisely because this new entity is not merely a junction of such components but rather the result of the combination that took place between them.

A classic example, repeated among scholars of the subject, as well as simple and quite enlightening, is the one that explains the composition and operation of the water molecule. In fact, the mere observance of its components alone is enough to demonstrate the emergence of this molecule. Isolatedly, hydrogen and oxygen have completely different characteristics from those of water. For example, oxygen and hydrogen, isolatedly, are highly combustible. But, when combined in the ratio of two hydrogen atoms to one oxygen atom (water formula) they are no longer able to generate fire, becoming, to the contrary, very efficient in extinguishing it due to the moisture gain with the mutual interaction. Which, according to Christian Smith (2010, p. 27), means that the key to the understanding of emergence is not to focus on the unfolding of something, but rather in the great potential of something to become something else that it never was.

Thus, it is easy to distinguish the emergentist thinking from the reductionist thinking, since the latter considers everything as simply the sum of its components. Thereby, the molecule of water, for example, depending on the amount of energy involved, cannot acquire totally different properties. However, for the reductionists, water is the sum of hydrogen and oxygen, or, in other words, the identity of something is reduced to the sum of its components, while, according to emergentist theories, isolated analysis of the components of something is just the study of the composition of matter (decay process) and not the definition.

Thus the statement that emergence is not merely descriptive, like

reductionism, but rather explanatory and thorough. Emergence therefore presupposes the lack of conditions to explain the completion of the whole from its parts, that is, it is a non ontological tool to understand the result of it.

For Michael Polanyi (*apud* SMITH, 2010, p. 28), reductionists do not admit what is most extraordinary in reality: the fact that emerging entities are completely autonomous, which is the reason why it is impossible to reduce them to the elements that originated them through their interaction. It explains something very logic and noticeable: nobody derives from vocabulary, for example. According to Polanyi, the correct use of grammar does not influence a good conversational style, nor a good conversational style provides contents for a good "chat" since it is impossible to represent the principles of organization of higher levels by the laws governing its particulars.

In its core, then, what emergentism asserts is the confusion that reductionism makes about basic scientific inquiries. In fact, reductionists confuse the question "what is it?" with the question "what is it made of?". They want to reduce reality to the sum of its components, which is practically impossible when we think of organized matter generating thoughts (a person).

After all, thoughts are not defined simply by the sum of neurons, external environment and personal convictions. They are something much more complex and very difficult to understand.

3 Types of emergence

Some authors intend to present different classifications on the phenomenon of emergentism. Thus, some definitions are brought in dualistic character, performing a contrast between different conceptions of emergence. At this point, the ideas of *weak emergence* and of *strong emergence*, as well as the concepts of *responsive emergence* and *proactive emergence* all stand out.

On the first form of classification mentioned, the issue is clarified through doctrinal constructions of David Chalmers. The author draws the outline between *weak emergence* and *strong emergence*, which, unlike what it seems at first, is not related to intensity, but to quality. About weak emergence Chalmers (2006, p. 244) states:

> We can say that a high-level phenomenon is **weakly emergent** with

> respect to a low-level domain when the high-level phenomenon arises from the low-level domain, but truths concerning that phenomenon are **unexpected** given the principles governing the low-level domain.

About strong emergence, on the other hand, the author (CHALMERS, 2006, p. 244) explains:

> We can say that a high-level phenomenon is **strongly emergent** with respect to a low-level domain when the high-level phenomenon arises from the low-level domain, but truths concerning that phenomenon are **not deducible** even in principle from truths in the low-level domain.

And that is why we conclude that *weak emergence* presupposes an easy way of understanding the system that created it, while when it comes to *strong emergence*, one cannot, in any way, explain or understand the phenomenon that created it. It is, therefore, in addition to this, that it can be stated that a leading example of *strong emergence* is the mind, due to the utter impossibility of understanding the phenomenon of the emergence of thought (CHALMERS, 2006, p. 246).

Another classification of the phenomenon of emergence is presented by Christian Smith and can be added to the duality *strong emergence* x *weak emergence*. It is the contrast between *responsive emergence* and *proactive emergence*. The first kind is linked to situations in which the object is produced by emerging external forces or agents. The new being or object has in its composition the elements responsible for emergence. A painting, for example, represents this situation, given that the painter is the agent that causes the phenomenon and is external to the emerging object. About responsive emergence, Christian Smith (2010, p.86) assumes that "emergence is responsive insofar as it exists as a response to the operations achieved by another's agency. In short, responsively emergent entities are the objects of emergent processes and outcomes caused and guided by another agency or force". Proactive emergence, in its turn, is qualified by cases in which the agent that produces the phenomenon is part of the composition of the emerging entity. In this case, the agent is the subject of an emergent process, but is also a result. Consequently, human beings could be considered a *proactive emergence*, considering that the elements that produce them are part of their own composition. In the words of Smith (2010, p. 86), "proactive emergence

involves cases in which the agency of the emergent operations resides in the emergent entity. Here the emergent entities are the subjects of the emergent processes and outcomes on which they depend".

After this brief overview about emergentism, we move on to an analysis of this theory related to the concept of person.

4 Person and Emergence

One of the few authors to make the contrast between emergence and personhood was American sociologist Christian Smith. In his work entitled "What is a person?" he deals with some assumptions about emergentism, and then come to his conception of the concept of person.

In carrying out this task, Smith (2010, p. 42) draws up a list of thirty human capacities, which are emergencies arising from the interaction of the human body with the environment in which it is inserted. These capacities would be causal, since they are responsible for providing the human being with peculiar characteristics, causing mental or material phenomena, which, in turn, influence objects and events in the world. Similarly, these human capacities materialize distinguishing factors of our species when contrasted with other animals. A primate, for example, would not hold all the designed total capacities.

Among the capacities identified by the author, some examples can be cited, namely consciousness, mental representation, emotions, ability to perceive causal attributions, creativity, use of language, self-transcendence, abstract reasoning, moral conscience, aesthetic judgment, among many other capacities. Smith tries to deal with each one of these elements, defining them and grouping them according to their dependency from other factors. The thirty human causal capacities are conceived, then, as the bases from which human personhood exists in an emergence. According to Smith (2010, p. 60), it is not possible to specify the exact settings through which human capacities interact to give rise to personhood. Such a specification would not be subject to a mathematical formula or verbal description.

On the other hand, the author tries to present a formulation of the concept of person: "By person I mean a conscious, reflexive, embodied, self-transcending center of subjective experience, durable identity, moral commitment, and social communication who exercises complex capacities for agency and intersubjectivity in order to develop and sustain his or her own incommunicable self in loving relationships with

other personal selves and with the non-personal world". (SMITH, 2010, p. 61).

From the definition presented it is possible to point out some criticism about the theoretical construct of Christian Smith.

The first thing that draws attention is the randomness in the choice of thirty human capacities from which personhood would emerge. There is no criteria whatsoever, indicating, in fact, a simple choice of what the author thinks should be the essence of the human person. In addition, some of the elements identified carry in themselves an excessive degree of subjectivity, as the ability to seek the truth, or the ability of interpersonal communion and love, or even the ability to formulate an identity.

Another debatable issue is the fact that Smith's thesis is based on the concept of normality. The author even states that his work is based on the idea of a normal person, meaning a human being who does not have serious psychiatric or mental damage nor any serious deterioration in their functional capabilities (SMITH, 2010, p. 45). Although Smith provides a definition of normality, it seems inconceivable that a scientific study is based on what is normal or not, because of the complete absence of parameter in his conception.

Some elements of his concept of person stand out to the lack of congruence.

The question of durable identity is rather a questionable point in view of the new theoretical constructs about this concept. For example, Derek Parfit (1970), with his conception, believes that personal identity is constructed through permanent interactive relationships around facts that ensure psychological continuity and psychological connectedness, whether of the person with itself or of human individuals in space and time. Thus it would not even be possible to speak of a durable identity, considering the current conceptual renewal which the topic is passing through.

Saying that every person is a central moral commitment is another point that seems to be inappropriate when it comes to scientific research. Qualifying a definition which will serve as the basis for several sciences, connected to morality, denotes some uncertainty of a conceptual standpoint. Judgments guided by the presence or absence of moral commitment do not serve to qualify an entity as a person, especially when this interrelationship is performed in the field of Jurisprudence.

Finally, a person, for Christian Smith, would ultimately be a center of purposes, identified as the development and maintenance of the

person's own incommunicable self in loving relationships with other personal selves with the impersonal world. This main purpose is considered without any scientific basis. For the author, everyone would have as their main purposes primary protection and preservation of their individuality from personal relationships. However, the purpose of a person may be one in millions and this assumption of the self preservation is not confirmed by reality.

Thus, Christian Smith's emergentist theory and his definition of person do not hold water. The absence of appropriate parameters and the excessive permeability to morality issues seem to disqualify the theoretical construction.

Despite his doctrine's lack of success, some points should be considered as positive, as, for example, the reflection about the person as a center, which denotes an option for the use of systematic thought. The human being has its own organization, considering whether cells of vital organs, or each of the functions performed by our body. This organization has its center in the human brain, which is responsible for not allowing a dispersion of the parts that form a person. Thus, working from that perspective seems to be essential, and this is achieved by sociologist Christian Smith.

Another important point is the idea that a person is an embodied center, in other words, a person depends on a bodily materiality for its operation. Despite the advances of science, it is still not possible to imagine a person without the existence of any physical support. The material and immaterial duality remain in the conception of the human being, since we still cannot think of a person as something not tangible, not designed as matter.

The qualification of a person while an emerging phenomenon is also a positive point. However, the basis for the phenomenon of emergence should be thought in a different way. There is no reason to assume that thirty capacities can generate a person. In fact, the person is in the higher-level, but the lower-level is not yet identifiable. The idea of emergentism must be kept and explored. Characterizing the person as emergence can bring new solutions to old situations experienced by humans.

5 Conclusion

Considering the emergence as a result of the impossibility of explaining the whole by the parts - as intended by reductionists – it be-

comes relevant and essential to understand a person as an emergent phenomenon. Based on this reasoning, a reformulation of the concept of person which allows the view of such entity in all its particulars should be thought.

According to the typology first presented, it is possible to qualify the person (higher-level) as a strong emergence, due to the current absolute impossibility of fully understanding the interaction that took place between the components that formed it (lower-level). Likewise, following the second criterion presented, a person can be characterized as a proactive emergence, considering that the elements that originate it form part of its own composition. There is no external agent to the emergent process, which would qualify it as a responsive emergence.

Finally, the concept of person presented by Christian Smith is liable to severe criticism, mainly due to the randomness of the criteria used and the judgments of morality inserted into his speech. However, a few points stand out and should be kept, as the conception of person as a center (system) and as an emergence. From these bases, new concepts can be formulated, helping bring new light to legal issues currently under debate.

References

BEDAU, MA.; HUMPHREYS, P. *Emergence: contemporary readings in philosophy and science*. Cambridge: M.I.T. Press, 2008.

BUNGE, M. *Matter and mind: a philosophical inquiry*. Nova York: Springer, 2010.

CHALMERS, DJ. Strong and weak emergence. In: CLAYTON, P.; DAVIES, P. (Org.) *The re-emergence of emergence: the emergentist hypothesis from science to religion*. Oxford: Oxford University Press, 2006.

MARÇAL, AC. Posfácio: pessoa e identidade pessoal. In: STANCIOLI, B. *Renúncia ao exercício do direito da personalidade ou como alguém se torna o que quiser*. Belo Horizonte: Del Rey, 2010.

PARFIT, D. Personal Identity. In: *The Philosophical Review*, Vol. 80, No. 1, Jan., 1970.

ROMANO, G. Imagens da juventude na era moderna. In: LEVI, G.; SCHMIDT, J. (Org.). *História dos jovens 2: a época contemporânea*. São Paulo: Companhia das Letras, 1996.

SMITH, C. *What is a person? Rethinking humanity, social life, and the moral good from the person up*. 1st ed. Chicago: The University of Chicago Press, 2010.

STANCIOLI, B. *Renúncia ao exercício de direitos da personalidade*. Belo Horizonte: Del Rey, 2010.

Nicomachean Ethics and the theory of Justice as the centerpiece of thearistotelian anthropology

Marcella Furtado de Magalhães Gomes[1]

Roberto Vasconcelos Novaes[2]

Abstract: The article lies within the philosophy of Law and claims that the Nicomachean Ethics is, indeed, a book in which Aristotle presents us his theory of justice. Justice, according to Aristotle, is the central and architectonic virtue of thepolis. Therefore, it is the mean of realization of the purpose (and, as such, of the good) of the individual and of the whole community, i.e., justice is the virtue that leads men to the achievement of their ends as human beings, the eudaimonia. To do so, we discuss the Aristotelian justice in its concept, its species and its characterization as an ethic virtue, as well as its relationship with the law, with the ethical paideia and the equity. Our conclusion is that men can only fulfill their ends as human beings by internalising the heteronomous good expressed in the ethically constituted nomos, i.e. the virtue of Justice, and by the conscious exteriorization of this good in their own respective praxeis. In short, men may only become complete while ethical beings as they live in ethical communities, i.e., in politically and legally organized communities. Our survey is intrinsically theoretical and hermeneutical and our focus relies on the bibliographical production.

Keywords: Philosophy – Ethics – Aristotle – Justice –Universal Justice – Particular Justice – Distributive Justice – Corrective Justice – law – Paideia – Equity – Polis – raison d'être.

1. Introduction

[1] Doutora e Mestre em Filosofia do Direito pela Universidade Federal de Minas Gerais. Profa. da Universidade Federal de Minas Gerais, Faculdade de Direito, Dep. de Direito do Trabalho e Introdução ao Estudo do Direito.

[2] Doutor e Mestre em Filosofia do Direito pela Universidade Federal de Minas Gerais. Prof. do IBMEC Minas Gerais, Curso de Direito.

Following the ethical itinerary of Aristotle, i.e., the understanding of the subject, of the object and of the mechanism of the ethical action, we can glimpse a system that captures and exposes the intelligibility of the ethical action in three different moments.

The first one shows the desire as the principle of the animal movement and thereby does not ignore the animal nature of men. Desire is to want something due to the pleasure that comes from experience.

The second relates to the intervention of the reason by controlling the desire and fixing the right rule of human action which enables its contemplative activity.

At last, the acquisition of the habit by men involves the interaction between the individual reason and the heteronomous good that the law contains. This process of habits development will form in men the principle of the particular action and the consciousness of its virtue.

The universal justice prescribes obedience to the law because the law contains all the ethical virtues. Moreover, the law is a concrete tool of virtuous habit formation because it aims to everyone equally and it has binding force.

The reception of the content of the law does not take place passively. Insofar as the agent internalizes the law he also rationally judges the values that it carries and, therefore, when he decides to act according to its commandments he does so consciously. Thus, consistent obedience to the law is, to the Stagirite, the habit capable of forming in the subject the awareness of his actions.

Therefore, we argue that the *Nicomachean Ethics* is, indeed, a book on justice (***dikaiosunh***[3]). The ultimate good of human life is only achievable if we are raised by a just *paideia* and in a just *polis*. So, justice is the essential condition to the self-realization of the individual and the *polis*. And that's what we intend to demonstrate by the explanation of justice as treated by Aristotle on the *Nicomachean Ethics*.

In short, Justice is a necessary condition for the fulfillment of the human purpose, because: a) self-sufficiency is not achiev-

[3] Check BAILLY, 1950, p. 510 (*dikaiosunh* , *dikaio ς*).

able by oneself; b) all humans are rational beings and therefore have the equal right to pursue their own purposes; c) no man in this community of equal and rational men that pursue their ends could be submitted to the will of others. Only Justice establishes a social order where all are submitted to the law and not to the will of others and where all the goods and duties are equally distributed among men and this is what allow men to achieve their purposes.

2. Ethical virtues

Virtue, to the Greeks, is the disposal of the being towards excellence. Etymologically speaking, virtue (*areth*) means strength, power, power of something, a way to be because it has a capability or ability to be this way, that which perfects something, that which makes something to be what it is or it should be (FERRATER MORA, 2000, p. 3027-3030).

A virtue is not a feeling or a faculty. When we experience an emotion, such as joy or fear, or when we exercise a faculty present in us due to our own constitution and natural conformation - and in this way independent of our decision - we are not judged as good or bad persons for having these feelings or for doing something that we cannot do differently, i.e., these behaviors cannot be judged as good or bad. Feelings and faculties do not require choice, a decision to exercise them. They are sensitive affections or innate abilities that manifest themselves without our intervention.

Virtue is not due to human nature, because we are not born virtuous. Virtue is not contrary to human nature either, since we are able to acquire it. Virtue is a disposition of the soul, the result of the development of a capacity by the performance of this same power, a performance that implies a choice. Virtue is a possibility inherent to men that will manifest itself in our actions in due course. When our actions are the conscious externalization of what is appropriate according to the nature and the purpose of men, and then they could be considered virtuous actions.

In performing the peculiar function of its nature, i.e., the activity

of the soul in accordance with reason, men is gifted with virtues. Reason participates in the sensitive faculty of the soul controlling impulses and desires and forming a rational principle of action by assessing the singular conditions of our actions in the real world. Reason also acts by itself revealing the intelligible traits of the existence and creating general concepts about the being. So, Aristotle divides human virtues on ethics and noetic-dianoetics, respectively.

3. Justice

Justice, according to the Stagirite, is the only of the ethical virtues that is practiced in the social relations. What is just is not revealed by the individuality of the action, but it only can be discovered in its consequences, in how it affects another rational being's life, another being that is our equal because it shares our specific feature as beings, reason. Justice realizes the balance among men because it assigns what is appropriate to each one of them in their social relations according to reason.

If we are all rational beings and as such we must act in accordance to our rational nature in order to achieve our purpose, *eudaimonia*, so we are all entitled to seek suitable means for this end, as well as we are all entitled to do what we believe is necessary to reach this goal. However, in doing so there may be overreaching of some that will harm others and thereby will break the equality between them. Justice is responsible for ordering the reciprocal action of men in the community in order to equally allow all of them achieve virtue. Justice is the guarantee of equality between all rational beings.

The research of justice must answer two questions: a) what is justice, what kind of ethic virtue it is, i.e., it is a rational mean to what appetite?; b) which is the right action towards the other rational being, i.e., how men should act in social life?

Aristotle states that in ordinary language there are two meanings for justice. According to him, when someone disobeys the laws we call him unjust and when someone is wicked or greedy, when someone wants to get more goods than he deserves and by questionable means we call him unjust. Thereby, we can infer two ways by which men are said to be just: when they obey the laws and when they want only their share of the social goods. The first meaning Aristotle calls universal justice, and the second particular justice (NE, V, 1, 1129 a 27 – 1129 b 1).

Justice therefore has two meanings. First it is the establishment

of general criteria, to everyone equally mandatory, for the righteousness the individual action in accordance to the collective reason. Second, it is the observance of righteousness of the content of these standards and of the behaviors of the individuals in relation to those standards. Therefore, when we refer to someone or something as fair, we can be emphasizing the compatibility of their actions with the requirements and regulations standing in that community, i.e., one who obeys the law. We can also be highlighting the very content of those laws or the intent embedded in the behavior of the subjects of that community. We are assessing whether the rules of that community effectively represent what is right in the eyes of reason,i.e., if the laws and the individuals of this community are in concrete virtuous (ROSS, 1957, p. 298):

1. To assign to each of its members the right amount of duties and goods.
2. If their subjects effectively want for themselves only their share of the assets (and losses) of the community.

4. Universal justice

Universal justice is the citizen's compliance with the law (*nomoi*)[4]. It happens when the individual action is in accordance with the law established by the competent authority designated by the social community. Just is to obey the law and unjust is to cross it[5].

It is necessary to emphasize the importance given by the Greeks, and in particular Aristotle, to the role of the legal rules in a community. The social life is essential for the full human development and the only mean of ensuring social solidarity is the imposition of equal limits to individuals in their social relations.

The legal rules of a community are created for the promotion of social harmony, for equitably distribute the goods of the city and as

[4]The word *nomoς* covers, beyond the modern legal sense, any existing regulation of human behavior whether it is moral, social or strictly legal. We are referring here to the ordering of human conducts through rules set out by custom or by political power. Check Bailly, 1950, p. 1332.

[5] This is the formulation of legal justice established for the first time by Socrates in the way that Plato tells us in the Crito. On the correlation between Aristotelian thought on justice and the platonic one check out: MACINTYRE, 1991, p. 101-116.

the best way to solve possible conflicts among citizens. The content of these rules stems from the social facts that are rationally evaluated by this community. In a community, what we deem precious must be protected, and what we believe to be vicious spurned. The laws aim to the common good and, in this regard, they order the practice of certain acts and they prohibit the practice of others. Those are not any acts, but those that the community thought, spontaneous or methodically, to be convenient or valuable and ultimately necessary for the proper existence of all. Therefore the law is the vehicle of fulfillment of all the virtues and of prohibition of all vices. The universal justice is the highest virtue, because it represents the actual practice of all other virtues, it is the perfect virtue (NE, V, 1, 1129 b 26 – 35)[6].

The universal justice identifies itself with the law and with all the other virtues as a whole because for Aristotle the political community exists to foster the fulfillment of its citizens, the *eudaimonia*. The law, therefore, also aims to promote *eudaimonia*. Hence the law cannot be established by the whim of its creator. It must be created to enable all men

[6]In our times, the legal science distinguishes between law and moral exactly because of the externality of the first. To the law it doesn't matter the motivation of action but only its accordance with the prescribed one. To moral and also to the Aristotelian theory, a man is virtuous only when he practices the action consciously of his virtue and taking it willingly as an end of his action. However, there is no contradiction between universal justice and the *praxis* of all ethical virtues. The man who obeys the law unintentionally is in the process of acquiring the ethical habit and by the repeated practice of the law he will make his appetite rectified and tending to the good. The habit is, for Aristotle, the route of acquisition of virtue. Although at first, the conduct of the person is not motivated by his belief in the virtue of the behaviors ordered by the law but only by the social coercion, by doing so, i.e., by continually obeying the law he rectifies his motivation and makes it conscience and will of the good. On the distinction between interiority and exteriority of moral norms and legal rules Bobbio clarifies: "Rispetto al rapporto tra soggeto attivo e passivo, si distinguono gli imperativi autonomi da quelli eteronomi. Si dicono autonomi quegli imperativi in cui colui che pone la norma e colui che la eseguisce sono la stessa persona. Si dicono eteronomi quelli in cui colui che pone la norma e colui che la eseguisce sono due persone diverse. […] La distinzione tra imperativi autonomi ed eteronomi ha importanza per lo studio del diritto, perché ha costituito uno dei tanti criteri con cui si è voluto distinguere la morale dal diritto. Seguendo Kant, si è detto che la morale si risolve sempre in imperativi autonomi e il diritto in imperativi eteronomi, dal momento che il legislatore morale è interno e il legislatore giuridico è esterno. In altre parole, questa distinzione vorrebe suggerire che quando ci comportiamo moralmente, non ubbidiamo ad altri che a noi stessi, quando invece agiamo giuridicamente ubbidiamo a leggi che ci sono imposte da altri." (1958, p. 100-102).

to achieve their excellence. Only the law creates the necessary conditions for the practice of the virtues, ethics and dianoetics. Only the perfect social regulation can allow men to achieve their best as human beings.

5. Particular justice

If universal justice is the synthesis of all ethical virtues in the law, specifically the particular justice is another ethical virtue that also participates in the universal one. We all desire and feel pleasure with the possession of the benefits (and non-participation in the duties) that social life offers us. However there is a fair measure imposed by reason of what each one of us should get. When the individual wants only the proper limit of collective goods, Aristotle calls him just in this particular sense.

His definition of this virtue operates by inversion. Aristotle relies on the specific unjust to bring out the particular just. All vices are unjust acts in a legal sense of breaches of the law, but are also specific addictions (cowardice, lust) in relation to a certain ethical virtue (courage, temperance). Aristotle says that the cause of particular injustice is the pleasure that arises from excessive gain(*NE*, V, 2, 1130b 19-22).

The unjust act strictly occurs when the practice of actions contrary to the law is driven by an unchecked urge of gain. When a person performs any act for the benefit of gain something that is not due to him by the law,his action is regarded as unfair in the specific sense. Particular injustice is to want more than what you are entitled to, i.e., iniquity[7].

[7]The Greek word used to describe the particular unjust is *pleonexia* (pl*eonexia)*. Vlastos explains the meaning of the Greek word: "For since pl*eonexia* is 'having more', i.e. more than what is rightfully one's own ('what belongs to one'), to 'have what belongs to others' would be to perpetrate pleonexia, and to 'be deprived of one's own' would be to suffer it." (1981, p. 119-120). The notion is common to all the Greek philosophers however in Aristotle it acquires legal-ethical sense inasmuch as for him the law is which establishes what belongs to each one: "justice is the excellence through which everybody enjoys his own possessions in accordance with the law; its opposite is injustice, through which men enjoy the possessions of others in defiance of the law." *(Retoric,* I, 9, 1366 b 9 – 11). There are three theoretical approaches about the meaning of *pleonexia* in Aristotle. Hardie (1980, p. 187) believes that the philosopher has in mind the desire for excessive profits. However, wanting surplus goods is the definition of greed or the vice of liberality. Moreover, if there is something like asking too much of profits there is also it's opposite, i.e., wanting less than due of profits. We could then speak of injustice by excess and deficiency and in this last sense the subject would be unfair to himself. But Aristotle denies

The unjust action in particular is characterized by the lack of limit to desire for gain. It is natural that we want to own property, and it is right that we wish it up to certain boundaries. When we are able to discern these constraints, to grasp that we cannot have it all, our desire is under the rational control. Rather, when we desire boundless earnings, when our will is not disrupted in front of anything or anyone else, our appetite is unjust.

All that is wicked is unlawful. Everything that is unjust in particular is universally unjust too, but not everything that is unlawful is wicked because not all actions of disobedience to the law feature the particular unjust; they may represent other addictions(ROSS, 1957, p. 299).

Aristotle says that the goods that we may want more than what we ought to are: honor, wealth and security[8](NE, V, 2, 1130b 2). On this point are required the explanations of Charles Young:

> "Note that particular justice, in being concerned with honor, wealth, and safety, overlaps with other virtues of character: with magnanimity (*NE* IV.3) and proper pride (IV.4), which deal with honor; with liberality (IV.1) and magnificence (IV.2), which deal with wealth; and with courage (III.6-9), which deals with safety. However, particular justice has a different concern with honor,

---

that one can be unjust to oneself (*NE*, V, 11, 1138b16-1138a4) and says there is only one vice that is opposed to justice, the injustice (1133b30-1134a1). Kraut (2002, p. 138-141) states that the unjust do not just want more, but more than that it is due to him causing by his action that another has fewer than he deserves. Inequality is the motivation of the act. Rawls (1999, p. 385-386) contradicts this interpretation claiming it does not make the necessary distinction between the unjust and the evil. Unjust and wicked are willing to take actions that harm others, but the first because they want more than their share and the latter because they want to be superior to others and humiliate them. The unfair loves the goods that the unjust act gives them; the bad love the injustice of his action. Finally, Young (in KRAUT, 2006, p. 191-192) argues that the unjust is not characterized by the amount of desire for gain, but by the absence of certain limitations in this desire. The just do not want to gain when the profits belong to someone else, the unjust has no such restrictions; he continues to desire such goods even when his quest and possession is wrongful. We agree with the position of the last author, because in so reading the philosopher about particular injustice we will not confuse it with any other addiction.

[8]Charles Young (in KRAUT, 2006, p. 183) explains: "It is easy to see how justice and injustice are possible with regard to honor and wealth, less easy to see with regard to safety. Aristotle may have in mind cases in which one person avoids risks that others are then forced to assume."

> wealth, and safety from that of the other virtues. Aristotle's idea, for example, is that my cheating on my taxes shows both something about my attitude toward wealth – a concern of liberality – and something about my attitude toward those other citizens who must shoulder the burden I have shirked – a concern of justice." (in KRAUT, 2006, p. 183)

The particular justice is the proper measure according to reason for the allocation of the goods (and the duties) of the city amongst its members. It shall act in two stages: in the equitable distribution of the assets between the citizens and on repairing the particular relationships forged between these citizens that might break the equality accomplished in the allocation of those goods. The particular justice can therefore be split into two species: the distributive one and the corrective one(NE, V, 2, 1130 b 30 – 1131 a 9).

6. Distributive justice

The distributive justice advises us that just is the proportional allocation of goods in accordance with the merits of every citizen. More or less goods should be spread proportionally to higher or lower merits of the individuals. Amongst equals, similar amounts of goods should be delivered, otherwise they will be treated unequally. Amongst unequals, different amounts of goods should be delivered, until they became equals, otherwise they will keep being unequals. Those who have more merits should enjoy more goods in proportion to its merits; those who have less merit should enjoy fewer assets in proportion to its merits(YOUNG in KRAUT, 2006, p. 185).

How can we verify the merits of the citizens? Aristotle says that a praiseworthy citizen is the one who dedicates himself to the goals of the community even more than to his own individual purposes. Therefore in any system of government bound by the community's interests justice can become effective.

Justice can only be carried out in social life[9]. By living in a com-

[9]About political justice, Aristotle states that it can be natural or conventional. However, by natural justice he didn't mean what is immutable since justice is a virtue, i.e., a disposition acted upon by human choice and everything that depends upon choice for be actuated is contingent. The distinction lies in what is proper to human nature and what is by convention. In the *polis*there can be rules and decisions that determine the correct conduct in accordance with the end of man and with the end of *polis* itself; but there

munity we become aware of our equality and inequality as we discover the others. In social life we become aware that we are equal in essence but, in fact, unique[10].

Only the law should rule men because we are all equal and insofar we shall not answer to the order of another man, but only to the orders of an impersonal reason, the law. Says Aristotle: "this is why we do not allow a man to rule, but law[11], because a man behaves thus in his own interests and becomes a tyrant." (NE, V, 6, 1134b 1). It is unjust to treat the ones that are equals in essence in different ways.

Specifically every human being is unique. We have different needs and different ways to contribute to the proper functioning of the group. We should not therefore get the same portions of the same things, but the portions that we deserve of what we need. It is unjust to treat the ones that are in fact different in the same ways.

7. Corrective justice

The social life is not, however, static. Once you have allocated goods proportionally amongst citizens, those goods will move between them through the countless relationships they make with one another daily, like friendship or work relationships. On these transactions one may get undue benefits and,because of that, the equality guaranteed in the distribution may be broken. It is not enough then, that the goods are equally shared; there must be a continuous possibility of correction of the imbalances that may arise from private relationships. Only then, the

---

can also be rules and decisions establishing certain behaviors because it was agreed that determined acts should be practiced. The former, carries out natural justice, and the latter, conventional justice (*NE*, V, 7, 1134b 18 - 1135th 15). In this respect said Ross: "Aristóteles hace en seguida una doble distinción: […] 2) La segunda distinción es la de la justicia natural y de la justicia convencional. Hay una categoría de derechos y de deberes universalmente reconocidos; pero a éstos se superponen los derechos y los deberes criados por las leyes de los Estados particulares. Aristóteles se opone a la teoría común de los sofistas, según la cual toda justicia es convencional. Sin embargo, hasta la justicia natural, según él, admite excepciones." (1957, p. 305-306). On the relations between justice and *polis*, check: BODÉÜS, 2007.

[10]The distribution of goods according to the proper measure is the act that takes place in the subordinate relationship between rulers and ruled. Therefore the moment of allocation of particular goods is also called public justice. Rulers are responsible for the creation of the legal standards of the community and also for their just content.

[11] The translator Jonathan Barnes (1995) claims that has used *logon* like *nomon*.

justice is fully realized and the equality is maintained.

The particular justice in its corrective sense is the one that corrects the particular relationships forged between these citizens, whether voluntary or involuntary, by establishing the middle ground between the losses and the earnings of those involved[12].

The voluntary relationships are those in which the bond formed between the individuals is wanted by them, as in the case of sale, lease or loans. When there is no match between the goods and services exchanged between individuals, a third party, equidistant to the involved, is invoked to restore the balance between them. He must subtract the surplus earned by one and return it to another, restoring equality between them[13].

The unintentional relations are those in which the bonds formed between individuals are not wanted by both sides. They can be subdivided in two types: a) those in which the subject who practices the unjust acts clandestinely, as in thefts and adulteries; b) those in which the subject who practices the unjust acts with violence, as in homicides and assaults.

The third party must apply to the perpetrator of the injustice the proper punishment, and to the one who suffer the injustice he must give the suitable *aposteriori* compensation for the damages that he endures.

Reparation fostered by the judge in such cases is proportional and not absolute. The justice system cannot allow an evil act be committed in its name, i.e., that an act of vengeance might be considered the just answer towards someone who has damaged another self[14].

---

[12]This is the private justice, i.e, the one that occurs between equal individuals which are linked to the *nomos* of the *polis*.

[13]It is important to emphasize the perception of Aristotle regarding the exchange processes that take place in society. According to him, different objects are exchanged, produced by different people and get different evaluations within the community. Thus, currency imposes itself as a mediator, allowing the evaluation of goods in trade (*NE*, V, 5, 1133b 15-18).

[14] Aristotle discusses also the degree of responsibility of the agent by the injustices committed. For the Stagirite, voluntary are the actions caused by the agent itself, i.e., free of external coercion and to which he knows the circumstances. In these cases, men are liable for the consequences of their actions. In Book V of the *Nicomachean Ethics* however the philosopher distinguishes three states of mind in which can be unrighteous acts committed: a) when we ignore the possible consequences of our actions, either because we could not anticipate them or because in theory we could, but we didn't do it in concrete. Under these conditions, we made a mistake, but we didn't commit an unjust act

Both in voluntary and in unintentional relationships it will be up to the judge to adjust the abstract commandments of the law to the special circumstances in which the action takes place in order to fully realize justice. Aristotle calls this procedure equity.

Due to the generality of law before the facts is necessary that in the concrete cases the judge can correct it for only thus the law is truly fulfilled(NE, V, 10, 1137b 21-29).

Equity is not the opportunity of noncompliance with the law. It does not endorse the inversion between the roles of the judge and the legislator. By not imposing certain rules, because of equity, the judge is acting as the lawmaker would have done if he had foreseen that circumstance[15](KRAUT, 2002, p. 109-110). Obeying the law entails the noncompliance of a special regulation because of their unsuitability to that specific situation *(Rethorics,* I, 13, 1374a 18 – 1374b 22).

---

and we are not an unjust person. b) when we know the possible consequences of that specific action, but we do not want to cause them directly. In this case, we practice an unjust act, but we are not necessarily an unfair person. c) when we know the possible consequences of our specific act and chose to practice it motivated by them. In this case, we made a wrongful act and we are an unjust person.

[15]Kraut explains: "Aristotle's approach to equity provides no justification for violating a law merely on the grounds that it is unjust and should never have been adopted in the first place. He assumes that a juror can rightly refuse to enforce the law only when he sees that legislators did not intended it to be applied to the case in hand. But a citizen who refuses to obey a law simply because it is unjust is trying to do something quite different: he concedes that the legislators intended the law to apply to him, but insists that it should not have been adopted in the first place, because of its injustice. He claims that he sees what the legislators do not – that the law is unjust – and this makes his thesis more difficult to sustain than the one Aristotle defends. For the individual violator of the law cannot expect the legislators to agree with him that he is acting properly, whereas this is precisely what Aristotle's equitable judge expects of them. The individual who breaks the law because he takes it to be unjust sets himself up as a rival to the body that has the authority to make the laws. He says that he can see where justice lies and it cannot; and that his actions should be guided by his own judgment rather than theirs. That is a radical challenge to the legal system, not the modest correction that Aristotle calls for with the equity and he has no sympathy for those who seek to undermine the whole legal framework of a city. He holds [in *Politics,* books III, IV , V e VI] that cities in which citizens seek gradual and modest improvements by lawful means are far better places to live than cities in which warring factions with rival conceptions of justice undermine the legal system rather than accommodate themselves to perceived injustices. When he defends the thesis that at times one must, as a matter of justice, refuse to comply with legislative errors, he is defending a policy that poses no threat to the rule of law." (2002, p. 110-111).

8. Conclusion

We conclude, therefore that justice is *par excellence*, the essential virtue to the formation of the virtuous man and *polis*. Justice is the necessary condition for man to become what he should be.

The Aristotelian practical philosophy is teleological and is based on the definition of the human nature. Men, because of the rational conscience of themselves, become free of the natural determination and place themselves as the first and the last cause of their actions. Thus, the reason of their existence is the excellent accomplishment of their natural essence, that is, the virtuous rational action. Only the performance of the last end of acting fulfills men and, in such a way, they reach the *eudaimonia*.

The *eudaimonia* possesses successive requirements. First, the individual must have conscience of the virtue of his actions so that they can be considered excellent. Second, the social community must be responsible for planning and giving the virtuous education that makes possible the formation of the ethical habit in the individual. Finally, the constitution of a propitious way to the development of the virtue in the individuals is necessary, that is, the *polis* also must be virtuous in its political-legal organization to guarantee the formation of the ethical habit in the individual. The individual excellency and the excellency of the *polis* are necessary to the accomplishment of the *eudaimonia* of all citizens.

There is a dialectical movement between the ethical conscience of the individual and the excellent political-legal organization of the *polis*. The man only carries through his end internalizing the heteronomous good expressed in the ethically constituted *nomos* and consciously externalizing the good in his *praxis*. The man will only be ethical if he lives in an ethical community.

Justice, through the *nomos*, is the virtue that organizes the *polis* ethically, because it promotes the proportional distribution of the goods of the community and the equitable solution of the particular conflicts. Justice, while a virtue of the *polis*, carries through the social order, that is, the rule of law, promoting the equality of the individuals between themselves and before the law. The law is the synthesis of all the ethical parameters of social community and, therefore, it limits the power of the governor to the accomplishment of the virtues that it brings in itself and it imposes itself to the governed ones as a directive of their actions. Universal justice prescribes the obedience to the law, which is the educa-

tional paradigm of the *polis* in the formation of the habit and the ethical conscience.

Finally, we must emphasize that this is not a necessary path. The *polis* ruled by just laws is a probable space of just interactions and experiences that enables the harmonization of the separate parts (excessive desire, self-reflection and conscious action) towards the ultimate end of man and *polis*, self-realization. But this is not absolute assurance. The opposite is less likely to occur, but possible. We are in the field of praxis, in which we can observe constancies and standards, in which we can only state probabilities but never necessary consequences.

References

ARISTOTLE. *The complete works of Aristotle*. The revised Oxford translation edited by Jonathan Barnes. Princeton: Princeton University Press, 1995. 2 V.

------. *Aristotle in 23 Volumes*. v. 19. Translated by H. Rackham. Cambridge: MA, Harvard University Press; London: William Heinemann Ltda, 1934. In http://www.perseus.tufts.edu/cache/perscoll_Greco-Roman.html.

-----. Ética a *Nicômacos*. 3ª ed. Tradução de Mário da Gama Kury. Brasília: UnB, 2001. 238 p. Título original: *EthikonNikomacheion*.

-----. *EthicaNicomachea*. Edited by J. Bywater. Oxford: Clarendon Press, 1894. 215 p. In http://www.perseus.tufts.edu/cache/perscoll_Greco-Roman.html.

-----. *Ética Nicomáquea, Ética Eudemia*. Traducción y notas por JulioPallíBonet. Madrid: Gredos, 1985. 561 p.

-----. *Obras Completas.* Retórica. Coordenação de António Pedro Mesquita. Prefácio e introdução de Manuel Alexandre Júnior. Tradução e notas de Manuel Alexandre Júnior, Paulo Farmhouse Alberto e Abel do Nascimento Pena. Lisboa: Imprensa Nacional-Casa da Moeda, 2005. V. VIII, tomo I, 311 p.

-----. *Política*. Texto grego com tradução ao lado para o português de Antônio Campelo Amaral e Carlos de Carvalho Gomes. Lisboa: Vega, 1998. 664 p.

-----. *Política*. Tradução de Roberto Leal Ferreira. 2ª ed. São Paulo: Martins Fontes, 1998. 321 p.

-----. *Política*. Introducción, traducción y notas de Manuela García Valdés. Madrid: Gredos, 1988. 490 p.

BAILLY, Anatole. *DictionnaireGrec-Français*. 7eme ed. Paris: Librairie Hachette, 1950. 2200 p.

BOBBIO, Norberto. *Teoria della norma giuridica*. Torino: G. GiappichelliEditore, 1958. 245 p.

BODÉÜS, Richard. *Aristóteles*. A justiça e a cidade. Tradução de Nicolás Nyimi Campanário. São Paulo: Loyola, 2007. 122 p. Título original: *Aristote*. La justice etlacité.

GUTHRIE, William Keith Chambers. *A History of Greek Philosophy*. *A History of Greek Philosophy*. Vol. VI. Aristotle an encounter. Cambridge: Cambridge University Press, 1990. 456 p.

HARDIE, W. F. R. *Aristotle's Ethical Theory*. 2nd ed. Oxford: Clarendon Press, 1980. 452 p.

KENNY, Anthony. *The Aristotelian Ethics*. A study on the relationship between the Eudemian and the Nicomachean Ethics of Aristotle, Oxford: Clarendon Press, 1978. 359 p.

KRAUT, Richard. *Aristotle*. Political Philosophy. Oxford: Oxford University Press, 2002, 520 p.

------. (Ed.) *The Blackwell guide to Aristotle's Nicomachean Ethics*. Oxford: Blackwell, 2006, 384 p.

MACINTYRE, Alasdair. *Justiça de quem? Qual racionalidade?* Tradução de Marcelo Pimenta Marques. São Paulo: Loyola, 1991. 438 p. Título original: *Whose justice? Which rationality?*

MORA, José Ferrater. *Dicionário de Filosofia.* Tradução de Maria Stela Gonçalves et al. São Paulo : Loyola, 2000. 4 V. Título original: *Diccionario de Filosofía.*

RAWLS, J. *A theory of justice*. Cambridge: Harvard University Press, 1999. 607 p.

RORTY, AmélieOksenberg. (Ed.) *Essays on Aristotle's Ethics*. Berkeley: University of California Press, 1980. 438 p.

ROSS, W. D. *Aristóteles*. Tradução de Diego F. Pró. Buenos Aires: Editorial Sudamericana, 1957. 421 p. Título original: *Aristotle*.

VAZ, Henrique Cláudio de Lima. *Escritos de Filosofia.* 2. ed. São Paulo: Loyola, 1999. 5 V.

VLASTOS, Gregory. *Platonic Studies*. 2nd ed. Princeton: Princeton University Press, 1981. 478 p.

Soft science, hard puzzle:
Can we handle John Roemer´s *Justice algorithm*?

Nuria López[1]

Abstract: This article analyzes the Theory of Justice by John Roemer, which treats Justice as the outcome of a process that is able to maximize the minimum achievement level of individuals and hold them accountable only for their autonomous choices, excluding the effect of circumstances. In other words, it is a Justice algorithm. However, the results of the application of this algorithm lead to counterintuitive (unfair) outcomes. The article investigates the this algorithm's viability and the philosophic topics that ought to be revised for an approximation with mathematical models, such as the self-reference in social sciences; the need to reformulate the concept of the individual; the variables in decision making and the complexity of life as a totality of games played by a subject in a specific period of time.

Keywords: Theory of Justice; Algorithm; Roemer.

Introduction: John Roemer´s main question

Revisiting the classic theme of *Justice as Equality*, Yale Professor John E. Roemer concludes that the existing conceptions of equality (of opportunity) always keep the individual, at some point, from achieving a goal, and that it is unfair for a goal to be unreachable to someone. How to make an achievement-position accessible to everyone, then? And how should we judge who has the right to occupy this position?

The decision making of an individual is composed of several vectors. Some of them can be considered as *circumstances* and others as autonomous *choices*. Circumstances are characteristics of the environment where the individual lives, which he cannot change (for example, his

[1] PhD Student at Pontifical Catholic University of São Paulo (PUC/SP). Master of Philosophy of Law at Pontifical Catholic University of São Paulo (PUC/SP) with a CNPq Scholarship. Email: nuria.lcs@gmail.com. I would like to gratefully acknowledge Renato Traldi Dias for the careful revision of this paper.

values derived of nationality, social class etc.). The autonomous choices are choices in the strict sense, for in account of several options, the individual had the autonomy to change the situation. In that picture, Roemer takes as common sense the notion that the individual is responsible for his own acts, however, he should not always be held accountable for them.

He works with the English terms *responsible* and *accountable* – without correspondence in other languages, such as Portuguese, Spanish, or French, and so, it is not an intuitive concept in non-English cultures. Although it is a very interesting distinction for responsibility: it means that despite being responsible for one's own acts, in the sense of an existing causality nexus between individual and act itself, he should not be charged for the vectors that did not depend on him or were even out of his reach to change.

The distributive justice *per excellence* (the justice that equates the playing field between individuals) should be able to distinguish which vectors of a decision making process are circumstances and which are autonomous choices, and then, give privilege to the autonomous ones, for they demand an effort by the individual to achieve his goal. The effort is a crucial value in John Roemer´s *Equity of opportunity* for it is the discretion to judge that will occupy a given goal-position. The judgment based on the effort made by an individual in his autonomous choice is a safe path for a Justice rule. According to Roemer, the goal – positions are accessible by those who, in their own context, choose to make an effort to reach them.

But Roemer goes further and makes an interesting personal contribution to Philosophy: he uses statistics analysis to propose a mathematical model of Justice: a Justice algorithm. An algorithm is any well-defined procedure to solve a specific class of problems (ISCID, 2012). So, what Roemer proposes is a well-defined procedure to solve Justice problems as Equity problems. It exposes the relation between Law and Mathematics. It may seem a bit odd to deal with a Justice algorithm, but the oddness ends when we realize Law (even in times of claim of a *pure law*) is nothing but algorithms (well-defined procedures) made to reach its goals. Thus, which algorithm guarantees the command that leads to the Roemer´s Justice?

1. The algorithm

Fortunately, unlike Fermat, we cannot complain about the lack of paper, and so, will demonstrate this algorithm step by step.

1.1 Circumstances and autonomous choices

First, it is necessary to distinguish which vectors should be considered *circumstances* and which should be consider *autonomous choices*. This distinction should be made for society by some political process, for there is no scientific discretion. He says: *"I do not have a theory which would enable me to discover exactly what aspects of a person´s environment are beyond his control and affect his revelant behavior in a way that relieves him or her of personal accountability for that behavior. In actual practice, the society in question shall decide through some political process, what it wishes to deem 'circumstances'."*(1998, p.08).

1.2 Finding clusters

Then, we should group individuals into clusters of similar circumstances, in a way that a cluster is composed of a group of people with similar circumstantial vectors. The more the number of circumstances in analysis, the more detail is available to establish differences. Roemer warns we should maintain the number of clusters in a manageable amount.

The clusters isolate individuals submitted to the same vectors, for which they should not be accountable. This means separating individuals in clusters by the criterion of circumstances (facts they could not *autonomously choose*) and, then, comparing them just by what they actually choose in life. With these clusters isolated, we have a clear view of *how much effort* an individual puts to reach a determinate goal-position. The *effort* is a central concept in Roemer´s theory, which assumes the individual effort is monotonically related to the outcome.

What Roemer probably meant by "monotonic function" is that the outcome is directly related to the effort the individual spends to achieve his goal. Nevertheless, even if we had a case of "more effort-less outcome", it still could be viewed as a monotonic function (albeit a decreasing one). Therefore, we must conclude that Roemer´s theory needs not only for the effort/outcome to be in a monotonic relation, but also

that such a relation should be increasing or at least non-decreasing, for the more effort an individual spends, the bigger (bigger or equal, in the case of non-decreasing functions) is his outcome.

1.3 Statistical analysis of effort levels distribution

This is done with the statistical analysis of effort levels distribution. Roemer observes the effort levels distribution inside the clusters (separated by circumstantial vectors) and reaches with this knowledge the average level of effort of each cluster. For him, the average level of effort is a feature of the cluster and ergo is defined by the circumstantial vectors – for which the individuals could not be accountable. But, if an individual puts in more than the average level of effort of his own cluster, then he deserves to occupy a better position than his fellows, since he spent a higher degree of effort than they did.

2. The algorithm outcome

In other theories of distributive justice, the individual is accountable for his acts in the context they are written in, without an isolation of the circumstances. Roemer´s criticism is based on this point. For him, this individual that puts in higher degrees of effort in comparison to his companions in the cluster, could, in traditional theories of distributive justice, not achieve the goal-position he intended, because he is always hindered by the circumstances that affect him. Separating the individuals in clusters (composed of the same circumstantial vectors) and analyzing the effort levels distribution inside them, Roemer finds a way to correct this unfairness of traditional distributive justices: he divides the inputs equally amongst the clusters (where differences exist in function of circumstantial vectors), but unequally inside them (where the differences exist in function of the effort spent by each individual) (1998,p.07). Inside the clusters, the division of inputs should be proportional to the effort degree where the individual stands – which translates to the amount of effort he spent in comparison to his fellows. The individuals that put more effort in each cluster will have an optimum goal (1998,p.08). For Roemer, to equalize is to*"seek the distribution that maximizes the minimum achievement level of the individuals (…). It is so-called maximin achievement distribution"*(1998, p.08).

3. Interpreting the algorithm

Roemer's proposal brings unfamiliar elements to the justice theories – the statistical analysis of data and the elaboration of a well-defined procedure to equate the opportunities between the individuals that dispute the same goal-position. We can see it as a mathematical model for Roemer´s Justice (for the optimum distribution of goals).

This relation between mathematical models and the Human Sciences is extremely promising, as they are capable of demonstrating with precision some aspects of social complexity. These models' applications caused some to declare this the golden age of human sciences (Abraham et al., 2007). There are some researches, in this line, that have been using dynamic systems in the analysis and projection of consumer relations and stock paper prices.

Roemer´s algorithm, however, has some peculiarities. In a very self-conscious way, he does not compromise himself with social complexity, he delegates to society the hard task of determining what is circumstance and what are autonomous choices.

4. Dealing with counterintuitive outcomes

Dealing with intuition has been a hard task for science. Roemer is not the first – and definitely neither the last one – to encounter this issue in his way. The concept of algorithm itself, used by Roemer, was formalized by Alan Turing (and also for Alonzo Church) in response to the question of David Hilbert, if it is possible to elaborate a method or general procedure able to determine if a mathematical proposition could be proved or not. Turing answered that all mathematical propositions that could be computed by what he called a Turing Machine are computable. A Turing Machine is a model that contains instructions (well defined procedures, algorithms) able to appoint if a proposition could be computed.

Hilbert needed to know if it is possible to prove all mathematical propositions because base mathematical concepts such as equality and difference so far could not be proved – they were taken as *given* by our intuition.

Just like Justice, trivial relations between finite numbers are intuitive and Hilbert believed these relations could not be reduced to nothing else and neither needed such reduction. For this intent, mathematical

concepts should be developed from them as axioms, for no contradiction should accrue from them, as they do not have a logical structure – they are simply intuitive.

The intuition in Hilbert´s work has a clear basis in Kant´s philosophy – it is a reference to the concept of *pure intuition* (and, for this purpose, we can apply to mathematical epistemology the criticism about Kantian thought).

Hilbert proposed the axiomatization of mathematical concepts and moved on from this problem (although he can often be seen turning to the founding question). Even Turing, in developing his *machine*, did it in a way that questions if our brain could be a Turing Machine, programmed to rely on states and mental processes (that today the cognitive sciences are able to demonstrate) – and so, wondered, once more, about the role of intuition.

The theory of equality of opportunity is founded on the premise that outcomes in an individual´s life are composed of some factors that he cannot control (the circumstances) and of others, such as ambition and effort, that are controllable.

Roemer himself says his proposal could seem counterintuitive, while justice is intuitive for people, who can judge a determined situation as fair or unfair regardless of their ability to define the concept of justice or even to find reasons for this intuition.

Roemer's formulation of his theory of finding to be unfair that an individual could not reach some goal-position because of the circumstances that affect him also constitutes an intuitive feeling of Justice. With his theory, Roemer does with his feeling what the mathematicians did with their own intuition: axiomatize. He axiomatized the (intuitive) concept of Justice. For him, justice is the distribution that maximizes the conquer level of individuals.

As such, maybe in fields other than Law we could be able to claim that John Roemer´s theory has internal consistency. But why is internal consistency not enough for Justice as was for Hilbert?

Hilbert and Roemer needed a starting point, even if they could not demonstrate why this starting point was the right one. But Hilbert works the science of mathematics, and that science itself is the essence of his works, for they comprehend logical structures without semantic content and, for this reason, all these structures need is internal coherence.

But Roemer has a different mission. His constants and variables have semantic content. And to reach his goal (as he would say) not only

internal consistency is needed but also semantic coherence with that feeling of Justice. Axiomatizing this concept, Roemer interprets Justice as an optimum distribution (the outcome of his algorithm), and maintains, this way, the internal coherence of his work. Nevertheless, in philosophy, axiomatization could turn into tautology. The semantic value of Justice is intuitive, as we have been told, but also is a social and historical concept (in continuous development) built and used to attend social needs.

If a proposal of Justice is counterintuitive we can (at least) assert that it is unable to meet the expectations of Justice. It does not have semantic pertinence with the term it wants to match. In this sense, the so-called *soft sciences* do seem too soft to demand a hard demonstration (eminently hermeneutic) of semantic coherence.

In this matter, it seems important to inquire about the reasons why this responsabilization technique guides us to such counterintuitive outcomes.

5. The responsabilization of individuals – the counterattack of experimental philosophy

Just like Roemer, experimental philosophers use statistical analysis as basis for their work. In a few words, they create philosophy "laboratories": they elaborate hypothetical scenarios and question people about them. The answers compose a database for the philosophical analysis. One of the greatest themes of experimental philosophy is the relation people establish between cause and consequence (and responsibility) in human actions (Experimental Philosophy, 2012).

To create a laboratory in this matter, interviewed people are presented a deterministic scenario, where there are only circumstances and, for this, individuals do not have choices. Then, they are presented a scenario where despite circumstances; individuals have options and choose to act exactly in the same way of the individual in the first (deterministic) scenario.

Although presented the same choices, some people answer differently to the questions. These people are called *compatibilists*, to maintain the idea of compatibilization between both responsibilities (with and without choice). People that answer both questions equally are called *incompabilists* for the belief that there is not a compatible responsibility rule for both scenarios.

The collected data varies depending on the presented scenario, but in all analyzed scenarios (listed above), most people are compatibilists and do not hold the individual responsible in the deterministic scenario, but do so in the second one. Most people take the concept of free will as a choice which fulfills an individual's desire and is free of internal or external constraints (Monroe; Malle, 2010).

Thus, we have that most people do not hold the individuals in the deterministic scenario responsible for believing that the circumstances leave them without option to act differently; and, consistently, hold the individuals that act "free of internal or external constrains" responsible merely for fulfilling their desires.

A major goal of these researches (developed in philosophy) is to search integrated questions (and answers as well) to the cognitive sciences, which have been having positive results in explaining behavior from the analysis of interaction of mental states and processes originated from other mental states and processes and ultimately were originated from our genes and our environment (Knobe; Nichols, 2011).

The "real life" scenario reached by the cognitive scientists is much closer to the deterministic scenario described by the experimental philosophers, in which Roemer, as most people, does not think it is fair to hold individuals responsible.

Knowing the relation of cause and effect in mental states and processes caused the cognitive sciences to interpret the world as being much more deterministic, that is, if even our autonomous choices are originated from preexisting mental states, it means there are more circumstances than we can usually perceive.

An integrated answer suggests a non-responsible world. There are more circumstances than people can, at first sight, map. This could explain why Roemer´s outcomes are so counterintuitive, why a Justice algorithm does not lead to a fair situation. Roemer says people should decide what they consider as circumstances. He recognizes there is not a method to accurately precise them. And yet this composes the main data used in his algorithm. The distortion of outcomes in the justice algorithm does not come from a lack of internal coherence. The algorithm is well thought and has a perfect internal logic. But we may not have the correct data to fulfill it.

On one hand, a complete map of circumstances (as the cognitive sciences are able to provide) would lead to a non-responsible world. On the other hand, responsibility is a necessary consequence of Justice. How can we comprehend (and determine) Justice in times of cognitive

science and advanced math? Is it possible to handle a Justice algorithm?

To search for an answer I suggest two points to be analyzed. The first one is that, from the dichotomy presented above, emerged a thesis called "the illusion of free will", according to it people believe they are really free to make their choices, but much of this freedom is an illusion. Some of the analysis deals with the importance of this illusion for society (Nadelhoffer, 2007). The destruction of such illusion would have negative consequences for individuals and society as well, because it could prevent responsabilization. This aspect takes responsabilization as an instrument to replace society of an attitude considered undesirable. This analysis brings to responsabilization a purpose other than punishment for a bad choice in exercising free will: a social need.

The second point is in a research of Joshua Knobe and Shaun Nichols that finds most people, when presented to an abstract scenario, deciding, as Roemer, to not hold individuals responsible for attitudes determined exclusively by circumstances (deterministic scenario). Nevertheless, when presented with concrete scenarios people respond to the attitudes without considering if the attitudes were derived exclusively from circumstances. Concrete consequences of human actions cause impacts (of varying levels) in other people´s circumstances: and they certainly will react to these impacts. Responsabilization is a form of answer and it plays this role in our society: being a power vector in response to an action that caused an alteration in someone´s circumstances.

It also explains other data obtained from the same research, that most people hold responsible agents that in a specific scenario act illicitly with physical violence and do not hold responsible agents that, in the same scenario, act illicitly in a manner named by researchers as *without affective impact*, such as the case of tax evasion. There are answers (data) that cannot be reduced to a single general rule.

According to them, the judgment of individual responsabilization is mostly an intuitive process that has been evolutionarily constructed. Individuals have developed a more accurate sense about more primitive illicit acts, which explains why people had a strong opinion about illicit acts involving physical violence, which cause affective impact, and a less constructed opinion about the responsabilization of an illegality without affective impact.

Therefore, even if society votes, as Roemer proposes, in a political process, about what should be considered as circumstance, it is probable that in most cases the application of the general rule (even an application with perfect internal coherence) leads to counterintuitive

outcomes, because people change their answers in a concrete scenario. People would find unfair the application of their own general rule to a concrete scenario.

6. The decision-making problem

6.1 The individual and their circumstances

Roemer considers simple the really complex process of decision making. He distinguishes in a Cartesian way what the circumstances are and what are autonomous choices. He quotes José Ortega y Gasset, "I am: me and my circumstance". Nevertheless, Ortega y Gasset´s philosophy is a vehement criticism of Cartesian philosophy, which distinguishes the *res cogitans* and the *res extensa*. For the Spanish philosopher not only are these categories integrated, but they are also so with the environment where they are found (the circumstances) that individuals and their circumstances are the same. A quote was taken from the book *"Meditaciones del Quijote"* (1914) and it corroborates with his philosophical positions in biology – curiously with the same references that Parsons and Luhmann would use in the fifties. Ortega y Gasset say: "*We will search for our circumstance as it is, precisely in its limits, peculiarities, the right place in the immense perspective of the world. (...) In short: the reabsorption of circumstance is men´s concrete destiny. (...) I am me and my circumstance, and if I don´t salve it, I don´t save myself*" (Ortega y Gasset, 1997).

In the context of the work of Ortega y Gasset the same quote could be said by the experimental philosophers previously analyzed. Indeed, the conclusions of Joshua Knobe and Shaun Nichols corroborate and, given the current scientific development, complement the thought of the Spanish philosopher: *"The thing you are forgetting is that the interaction of these states and processes – this whole complex system described by cognitive science – is simply you. So when you learn that these states and processes control your behavior, all you are learning is that you are controlling your behavior"* (Knobe; Nichols, 2011).

6.2 Decision as a move in the game

Like the cognitive sciences, philosophy also evolved since then: not satisfied to enunciate the integration between individual and his circumstance, philosophy goes further and elaborates some models of how

this integration occurs. One of these models is the *Systemic Conjecture of Law* by Márcio Pugliesi, which considers the individual as a semantic atmosphere. Beyond the traditional opposition between conscience and language in philosophy, this individual is a discontinuous and non-stop construction fed by his own circumstances, by elements of his circumstances, that he can interpret anyhow. Pugliesi says (2009, p.185-186): *"The individual acts by the rules of the game and by his own knowledge of the circumstances, he corrects his action and tries to confer its effects on the system (subset of the world, considered as his semantic atmosphere and its pollution) and the environment, the totality of possible meanings for him, and then, as it were, retroactive, that is, re-feed his own repertoire of information and redo, when possible, the decision preliminarily assumed, recomposing his theory."*

This means the individual is also composed of his circumstances and, for this reason, they compose, necessarily, any choice made by them. So, the choices are not autonomous? If we consider that autonomous is the one who has the faculty of determining his own conduct without others' impositions (Houaiss Dictionary, 2009) we will have that choices could be considered autonomous when they are not imposed directly by others; and that they could not be considered autonomous when, indirectly, all choices are affected by several impositions, from different points of the system (including other individuals).

6.3 One individuals, several games

Another important question we should argue is that Roemer´s algorithm analyses a single game of an individual´s life. But individuals do not have just one game in life. As Pugliesi says: *"The members of a society play multiple interactive games and their decisions, followed by pertinent actions, search for triumph in the whole game, that is, the game of life. Loss in some cases is not disastrous, in others, it is fatal"* (2009, p.85).

We all have several games, that we play simultaneously, and this simultaneity deeply affects the move possibilities in each one of them. In each game, the individual needs to decide between a number of possibilities of what to do and, at the same time, there are several moves in need of decision. Time is a limiting factor of decision making, it demands a constant trade-off, and is also a circumstance. Although time does not interfere for everyone in the same way – it could play different roles in each game.

7. The right thing to do in a specific moment of time

Roemer skips the time dynamic and his individual is charged even if: (i) he does not have the option pointed as the "right option" for Roemer"; (ii) the "right option" was not "right" in relation to some other game. The algorithm is quite incomplete, as it considers moves in just one game. If we could think of a justice algorithm, we should have in mind that this algorithm needs to consider all the moves and games of life – and life's complexity does not allow it to happen.

8. Ever changing values

And even so, questions about the value of Roemer's privileges would remain. The algorithm computes as "correct" some conducts that lead to the goal-position he intends to open access to. But each one of the concrete cases could originate endless questions about the imposition of these values. All social relations have a semantic charge. Roemer´s algorithm could corroborate or change the values inserted in this semantic pollution, and in this way, change the individuals' strategies in their games.

Changing the playing field as Roemer does is the same as changing the rules of the game – and so is the strategy applied to the players, because it is evident that the individuals will incorporate the new rules of games in their decision making. In consequence, prestige value (as effort) could end discredited if, for example, an individual of a cluster with low effort average, does not need to put in much of his own effort to occupy a specific goal-position.

Moreover, Roemer´s algorithm does not follow the dynamism of society and the effects caused by the algorithm itself in a previous moment in time. An algorithm that intends social application should, at least, be dynamic.

Conclusion: mathematical models in the study of social relations

Each one of the instructions of John E. Roemer´s Justice algorithm have been analyzed step by step here. The application of mathematical models is absolutely desirable in social relations because they are able to make us understand more accurately the dynamic of social systems.

Roemer found in the basic structure of Law – Justice – the same

obstacle that Hilbert and Turing found in the basic structure of Mathematics. However, for Roemer this issue had worst consequences (or maybe only a more apparent one) because social sciences should have semantic coherence in their "object". Self-reference is not enough. When social science is applied there is also an external reference to the object of the application. It is a simple – but thoroughly relevant observation. The history of Law has suffered (and still suffers) enough with the appliance of formalities that guarantee a perfect self-reference, a perfect internal logic; but, on the other hand, result in unfair (and even tragic) outcomes.

The main problem in Roemer´s algorithm is the unfair outcomes – the lack of coherence with an external reference. He elaborates this algorithm exactly to correct an unfairness of the traditional theories of Justice to, therefore, fit the concept of Justice, but then, after elaborated, he abandons this concern.

Indeed, it is very hard to deal with the concept of Justice – it is a dynamic, historical and social concept in permanent construction inside each one of the individuals. Roemer had to make some simplistic choices to be able to think about an algorithm with such a purpose. He intended to use the algorithm to make public policy choices, such as in education and health care. But outcomes obtained with this algorithm could seem polemically unfair. In this briefly analysis we pointed some philosophical questions to argue where the math went wrong.

The first one was the axiomatization of the Justice concept, which is a very intuitive concept in people – in permanent construction, with a large sociological and historical background. We pointed the same discussion was central in Mathematics philosophy – how to prove something you just know? Something so simple as equal or different… or Justice. The solution of axiomatizing the concept was used by Mathematicians such as Hilbert and Turing, and Roemer used the same path for his Theory of Justice. Unfortunately, we think, there is a simple (and insurmountable) obstacle for the axiomatization of Justice: its application is always in debt with the semantic content of Justice that exists in every single person. Beyond the internal coherence (the self-reference) demanded in Math, we also need to respect this external reference.

The second point consists of the intention to hold individuals accountable only for what they "autonomously choose", never for the circumstances they are thrown into. Without a method to determine what would be "autonomous choice" and "circumstances" Roemer bases the whole theory in what he assumes to be common sense and says that this distinction should be done by society in some sort of political pro-

cess. Neither do we have a method for finding such categories. But if the question is what people think, the best way to analyze it might be a statistical study. We approached some papers of experimental philosophy regarding this problem and, in conclusion, they argue that: (i) most people have different perceptions of Justice (as responsabilization for an autonomous choice) when presented with abstract and concrete scenarios of the exact same hypothesis; and (ii) most people have different perceptions of Justice (as responsabilization for an autonomous choice) when presented with illicit acts that cause (or do not cause) an affective impact on them.

Later, we presented the result of a paper on cognitive science and experimental philosophy that blurs the distinction between "autonomous choice" and "circumstances". The knowledge of mental states and processes change the understanding of our world to a much more deterministic world, where the individual's liberal autonomy is an illusion – but a needed illusion. Justice and responsibility for some acts are a social need. So, it is not a matter of finding the right category, but a matter of responding to a societal expectation.

This last question leads us to rebuild *the individual* in Roemer´s theory – matching the recent studies of cognitive science and recent philosophy – to understand the individual as a semantic construct of their own circumstances and what he (also semantically) carries of his own interpretation of the world around him.

The fourth point on Roemer´s theory that certainly contributed to the odd outcomes of the algorithm is that it "computes" each game separately. That is, the algorithm only comprehends one decision in life at a time, without cross-referencing data with the several decisions people make all the time. It is important to state that each individual has several games composing his life-decisions and that this totality's possible moves are limited by the factor of time. It is a complex dynamic system of endless games (not) being computed by a simple algorithm.

And at last, the effect this algorithm would cause in the values (such as "effort") that Roemer tries to privilege deserves to be pointed out. The application of this algorithm changes the "rules" of the game and it is incorporated in the strategy of the individuals in pursue of their own goals. We try to demonstrate that some values considered important in Roemer´s theory could end up discredited in the new social dynamic.

For a long time now social scientist have been searching for methods – and often borrowing them – in other fields. It is an extremely

relevant pursuit, especially in matters where discretion has played a cruel role. Applied social sciences refer not only to their own (or borrowed) methods but, most importantly, also to their reason to be: the external (of science) reference that is the society. There is a double check reference that should not be forgotten. The idea of a Justice Algorithm is an impressive idea – but not an easily conceived one. Formulating such an algorithm demands much more of philosophy than math. Soft sciences could be, after all, a really hard puzzle.

References

ABRAHAM, Ralph; FRIEDMAN, Dan; VIOTTI, Paul. 2007. *Complex dynamical systems and the social sciences.* 2007.

Experimental Philosophy (X-PHI). In: http://pantheon.yale.edu/~jk762/xphi-page.htm#Papers_on_Causation <Accessed in 06.08.12>

FERRAZ,Tercio Sampaio Junior. 2009. *Estudos de Filosofia do Direito – refelxões sobre o poder, a liberdade, a justiça e o direito*, 3a ed, Altas, São Paulo, 2009, p.222.

ISCID (International Society for Complexity, Information, and Design) Encyclopedia of Science and Philosophy. In: http://www.iscid.org/encyclopedia/Algorithm <Accessed in 06.08.11>.

KNOBE, Joshua; NICHOLS, Shaun. 2011. *Free Will and the Bounds of the Self. In* Robert Kane (ed.), *Oxford Handbook of Free Will*. Oxford.

MONROE, Andrew E.; MALLE, Bertram F. 2010. *From Uncaused Will to Conscious Choice: The Need to Study, Not Speculate About People's Folk Concept of Free Will.* R*eview of Philosophy and Psychology* 1 (2):211-224.

NADELHOFFER, Thomas. 2007. *Folk Intuitions, Slippery Slopes, and Necessary Fictions: An Essay on Saul Smilansky's Free Will Illusionism.* In Peter A. French & Howard K. Wettstein (eds.), *Philosophy and the Empirical*. Blackwell Pub. Inc..

ORTEGA, Y GASSET, Ortega. 1997. *Meditaciones del quijote,* 1a Ed, Alianza, Madri, 1997.

PUGLIESI, Márcio. 2009. *Teoria do Direito*. 2a. Ed, Saraiva, São Paulo, 2009

ROEMER, John E. 1998. *Equality of opportunity,* Harvard University Press, Cambridge (MA)/London, 1998.

Aristotle on Justice and Law:
Koinonia, Justice and *Politeia*

Giovanni Bombelli

Abstract: Aristotle's theory of law, especially with reference to the idea of justice, can be understood as a 'different' model if compared to contemporary perspectives. Nevertheless, in the light of the complex and globalized societies, the interest for the Aristotelian perspective is based at least on three concepts: koinonia, justice and politeia. Theoretically koinonia (community) represents the ontological model by which Aristotle understands the human relationship and, at the same time, is the conceptual horizon within which the notion of 'justice' and the polarity 'koinonia-dike' emerges. Justice (dike), as a 'virtue' based on the communitarian nomos, represents the 'boundary line' between community and mere alliance, that is to say the condition for eunomia and the political obligation. Furthermore, dike is a 'pragmatic and universal' dimension and community represents the theoretical 'space' for its elaboration: justice is an ideal principle whereas law, including epieikeia and the couple physikon dikaion-nomikon dikaion, represents its historical determination. On a political-constitutional level the central role of politeia emerges: it is a 'just equilibrium', based on the 'proportionality' developed into the communitarian context, and the constitutional articulation of the relation among the citizens. Koinonia and politeia are not to be confused: the latter is an adaptable paradigm, whereas the former is its critical filter. Aristotle's theory is an open model because the flexible notion of justice is adaptable to a variety of human relations and, similarly, the politeia-mesotes evolves as the paradigm of koinonia. Hence the modernity of this perspective: the great flexibility of the circle 'koinonia-justice-politeia' could represent a theoretical model to understand the present complex societies and the issues related to the ongoing globalization, especially in order to endorse the current multiple models of justice.

Keywords: Community - Justice - Politeia

1. Premise

From a legal and philosophical point of view, Aristotle's theory of law (with specific reference to the idea of 'justice') can be understood

in some way as a very peculiar conceptual model, especially if it is compared to many contemporary perspectives related to both a liberal perspective (i.e. Rawls' model[1]) and the communitarian movement[2].

Nevertheless, Aristotle's theory of justice still appears very useful in order to understand our social contexts. In fact, due to the complexity of its theoretical structure it constitutes a rich conceptual paradigm, somehow disconnected from its historical reference and, hence, still able to interpret social and political models that are very different compared to the Greek *polis*[3].

This possible reinterpretation of the Aristotelian perspective is not necessarily (neither only) based on a *Rehabilitierung der praktischen Philosophie* perspective, classically related to notions as *phronesis* and *virtue* and broadly known as a typical aspect of the Aristotle's Renaissance flourished in the last century[4]. On the contrary, in order to understand Aristotle's theory it is necessary to take into account the strict relations between its parts and, then, the entire philosophical model elaborated by the Greek philosopher (not only those aspects concerning ethics and politics).

In this paper I intend to focus only on some aspects of the Aristotelian theory of justice, starting from some selected arguments presented in *Politics* and in *Nicomachean Ethics*. More precisely, I argue that the current interest for the Aristotelian perspective, and especially for its notion of 'justice' (*dike*), should be based at least on the analysis of the relation underlying three complex concepts: a) *koinonia*, b) *justice* and c) *politeia*.

These notions, intrinsically very complicated, are strictly connected to each other, because they trace a sort of *theoretical circle*: in other words, we can understand the Aristotelian notion of 'justice' only in the

[1] John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971).

[2] Alasdair MacIntyre, *After Virtue. A Study in Moral Theory* (Notre Dame IN: University of Notre Dame Press, 1981); Alasdair MacIntyre *Whose Justice? Which Rationality?* (Notre Dame IN: University of Notre Dame Press, 1988); Charles Taylor, *Sources of the Self. The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1992); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Michael Walzer, *Spheres of Justice. A Defence of Pluralism and Equality* (Oxford: Blackwell, 1983).

[3] Enrico Berti, *Aristotele nel Novecento* (Roma-Bari: Laterza, 1992).

[4] Paradigmatically Manfred Riedel, *Rehabilitierung der praktischen Philosophie* (Freiburg: Rombach, 1972-1974).

light of the concepts of *koinonia* and *politeia*. Finally, I will try to show the relevance of some of its theoretical traits in relation to questions raised by complex and globalized societies.

2. *Koinonia* and its main articulations

Firstly we have to pay attention to the crucial notion of *koinonia*, usually translated by (and, in some way, confused with) 'community' in the modern sense of the word, or also, and misleadingly, by 'association'. As is well known, theoretically *koinonia* represents the basis for the conceptualization of the ontological or, better, ontological-anthropological model by which Aristotle theorizes the human relationship.

So, at the famous opening lines of *Politics* (*Politic*s, I, 1, 1252a, 1-5) the Greek philosopher can say:

> "We observe that every state (*polis*) is a certain sort of association (*koinonia*), and that every association (*koinonia*) is formed for some good (*agathos*) purpose; for in all their actions all men aim at what they think good[...]."[5]

This represents a crucial passage, which synthesizes in a way the entire thought of the Stagirite. On a conceptual level, it essentially concerns four elements recurring in a circular way in the entire reasoning: «man», «nature» «community» e «good».

In fact, Aristotle preliminarily establishes a sort of logical sequence centred on a substantial equivalence among these elements: «man» (*anthropos*), to whom the cited passage implicitly refers, is placed «by nature» (a concept implied within the locution «we observer», *orô-*

[5] Aristotle, *Politics* (New York: Oxford University Press, 1995-1999): vol. I, 1. See also Aristotle, *The Nicomachean Ethics* (Oxford University Press: New York, 2009): 178 (corresponding to IX, 9, 1170b 8-19): "Now his being [for each man]was seen to be desirable because he perceived his own goodness, and such perception is pleasant in itself. He must, therefore, perceive the existence of his friend together with his own, and this will be realized in their living together and sharing in discussion and thought; for this is what living together would seem to mean in the case of man, and not, as in the case of cattle, feeding in the same place. If, then, being is in itself desirable for the supremely happy man (since it is by its nature good and pleasant), and that of his friend is very much the same, a friend will be one of the things that are desirable. Now that which is desirable for him he must have, or he will be deficient in this respect. The man who is to be happy will therefore need virtuous friends".

men) in a «community» which is provided with a «political» dimension (*polis* as a *community)* and *so* in relation to the constitution of a «good» (or, better, to what «appears as good»: see also below the relation '*koinonia-eudaimonia*').

But, in addition to the mention found in *Politics*, the reference to the notion of *koinonia* is disseminated in every part of the Aristotelian philosophy, and it is more frequent here than in Plato: not only with regard to the concepts of law and justice[6], but almost in order to define the circular link (or the logical sequence) which characterizes the 'primitive elements' of the communitarian model.

So, on a theoretical level, we have to make reference to some crucial conceptual couples drawn by Aristotle (from the notion of *logos* to the model of *paideia*) in order to grasp the richness of the concept of *koinonia* and the twofold level (empirical-historical-pragmatic and theoretical) of the Aristotelian argumentation[7].

The first couple is the fundamental relation '*koinonia-logos*' (*Politics*, I, 2, 1253a 7-18[8] and *De Interpretatione*): there is a circular relation between community and language. More precisely, *koinonia* (that is the *polis*) represents the sociological and ontological horizon for (natural) language. In this direction, the Aristotelian theory of language, based on the communitarian context, is more similar to the romantic perspective

[6] Hermann Bonitz, *Index aristotelicus* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1960): 400; *Aristoteles*, ed. Roberto Radice (Milano: Biblia, 2005): 623-626.

[7] About this point Charles Howard MacIlwain, *The Growth of Political Thought in the West: from the Greeks to the end of the Middle Ages* (New York: Mac Millan, 1932): 63: "If we could but see all the shades of meaning in that word *koinonia* (κοινωνία) and could understand in the sense that Aristotle meant it just what those others are which the political *koinonia* includes, and the precise way in which it does include them all and is at the same time above them all – if we could do that we should know the basis of Aristotle's whole theory of the state. For the *koinonia* is the focus of it all, and [the] definition with which the *Politics* opens furnishes at once the link between ethics and politics."

[8] Aristotle, *Politics*, vol. I, 3: "The reason why man is an animal fit for a state to a fuller extent than any bee or any herding animal is obvious. Nature, as we say, does nothing pointlessly, and man alone among the animals possesses speech. Now the voice is an indication of pleasure and pain, which is why it is possessed by the other animals also; for their nature does extend this far, to having the sensations of pleasure and pain, and to indicating them to each other. Speech, on the other hand, serves to make clear what is beneficial and what is harmful, and so also what is just and what is unjust. For by contrast with the other animals man has this peculiarity: he alone has sense of good and evil, just and unjust, etc. An association in these matters makes a household and a state".

(as is well known polarized on the couple '*Gemeinschaft-Sprache*'[9]) than to the formalist and post-saussurian one[10].

In the same way, *koinonia* represents a crucial notion for the economic model, which is based on the nexus '*koinonia-oikonomia*'. In fact, Aristotle notoriously distinguishes between two levels: real (or true) economics, with the decisive position played by the *oikos*, and mere trade (or false) economics, namely chrematistics: *Politics* I, 8 and *Nicomachean Ethics* V, 5[11].

Once again, we can observe the crucial role of the communitarian context as a criterion to define the economic categories. See, for instance, the relevance of the concept of 'money' as a natural and *proportional/just measure* (with reference to the long discussion in *Nicomachean Ethics*, V, 5, 1132b31-1133b28[12]) but also, in a wider perspective, the issue being discussed by Aristotle about *what is* a 'economic action' (moving from the crucial distinction *poiesis-praxis*[13]).

The couple '*koinonia-philia*' (*Nicomachean Ethics*, VIII) represents another relevant articulation of the Aristotelian community. First of all, the Greek (Aristotelian) notion of *philia* should not be confused with the modern concept of 'friendship': the former expresses the ontological origin of a human relationship (maybe similarly to the role played by *Eros* for nature in Hempedocles), whereas the latter indicates only a senti-

[9] Nuno Coelho, *Justice, Society and Diversity in Aristotle*, paper presented in XXVI[th] World Congress of Philosophy of Law and Social Philosophy. *Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies* (Belo Horizonte, MG, Brazil, 21 to 26 July 2013).

[10] For this point see Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958); Hans Arens, *Aristotle's Theory of Language and Its Tradition. Texts from 500 to 1750* (Amsterdam-Philadelphia: John Benjamins Publishing Co. 1984); Franco Lo Piparo, *Aristotele e il linguaggio. Cosa fa di una lingua una lingua* (Roma-Bari: Laterza, 2002).

[11] About this point see, for instance *Polis e economia nella Grecia antica*, ed. Mario Vegetti (Bologna: Zanichelli, 1986): 96-103, 82-109.

[12] For instance, Aristotle, *The Nicomachean Ethics* (New York: Oxford University Press, 2009): 90, where the Greek philosopher states: "Money, then, acting as a measure, makes goods commensurate and equates them; for neither would there have been association if there were not exchange, nor exchange if there were not equality, nor equality if there were not commensurability. Now in truth it is impossible that things differing so much should become commensurate, but with reference to need they may become so sufficiently."

[13] William Lambert Newman, *The Politics of Aristotle* (Oxford: Clarendon Press 1950): vol. I, 158 ff., 199-204; Arendt, *The Human Condition*, especially 175-199.

mental or emotive and subjective relation.

From a philosophical-legal point of view we can evaluate the relevance of *philia* at least in two directions. On the one hand, *philia* can develop only within a communitarian context (household, *oikos*, *polis*): in other words, there is a mutual and circular relation between community and *philia* (there is no community without *philia*). On the other hand, *philia* immediately *identifies* a political dimension: in fact, *philia* is the theoretical as well as sociological basis for political obligation (*Politics*, III, 9, 1280b 30-1281a 11[14] and, more broadly for the nexus 'best *koinonia-philia*', *Politics*, IV, 11, 1295a 25-1296a 19).

In this direction, along a theoretical perspective the nexus '*koinonia-eudaimonia*' (see for instance: *Nicomachean Ethics*, I, 4, 1095a 14-20; I, 7, 1097a 30-1097b 11[15]) plays a decisive role, because it marks the conceptu-

[14] Aristotle, *Politics*, vol. II, 30-31: "[It is]plain that the city is not the sharing of a place, and does not exist to prevent wrong and promote exchange. These are necessary conditions of there being a city. But a city is not just the presence of all of them. It is the community of the households and the clans in the good life, for the sake of perfect ad selfsufficient life. But this will not happen unless they inhabit one and the same place and recognize intermarriages. Hence the origin of family connexions in the cities and brotherhoods and sacrifices and community gatherings. This kind of thing is the work of friendship, since voluntary living together constitutes friendship. The end of a city is the good life, and these things are for the sake of the end. A city is the sharing of clans and villages in a perfect and selfsufficient life. That is, we say, a happy and good life. We must lay it down, therefore, that the purpose of political society is not living together but good actions. Hence those who contribute most to such a society have a larger share in the city than those who are equal or superior in freedom and birth but unequal in political goodness, or those who are superior in wealth but inferior in goodness. It is clear from the above that all those who dispute about the constitutions are asserting some part of justice."

[15] Aristotle, *The Nicomachean Ethics*, 5, 10-11: "Let us resume our inquiry and state, in view of the fact that all knowledge and every pursuit aims at some good, what it is that we say political science aims at and what is the highest of all goods achievable by action. Verbally there is very general agreement; for both the general run of men and people of superior refinement say that it his happiness, and identify living well and faring well with being happy; but with regard to what happiness is they differ, and the many do not give the same account as the wise." Similarly: "Now we call that which is in itself worthy of pursuit more final than that which is worthy of pursuit for the sake of something else, and that which is never desirable for the sake of something else, and that which is never desirable for the sake of something else more final than the things that are desirable both in themselves and for the sake of that other thing, and therefore we call final without qualification that which is always desirable in itself and never for the sake of something else. Now such a thing happiness, above all else, is held to be; for this we

al continuity between the two profiles of the Aristotelian argumentation as a whole: the attention to the theoretical/anthropological dimension of the relation and, at the same time, its underlying contextual or empirical reference.

In other words, *eudaimonia* is to be understood as an anthropological (then: ethic, political, ecc.) flourishing and, hence, very differently if compared to the modern notion of 'happiness' *as a mere individual right to pursue personal satisfaction* (i. e. *Declarations of Independence* of the United States, 1776). In other words, according to Aristotle *eudaimonia* represents the universal-anthropological ideal of human perfection and satisfaction, which can develop *only* within the *polis-koinonia*.

Finally, we have to consider the relation '*koinonia-paideia*' (*Politics*, VIII).

The pedagogic model drawn by Aristotle in *Politics* synthesizes the long previous Hellenic tradition (from Homer and Hesiod to Plato) regarding the political role played by education and, most importantly, it represents the logical conclusion of the entire Aristotelian philosophy. In fact, if human relations and their fundamental articulations (language, economics, *philia*, *eudaimonia*) can develop only within the *polis-koinonia*, this latter is philosophically, legally and politically legitimated to elaborate and, to some degree, 'to impose' a public education. Hence (*Politics* VIII, 1, 1337a 11-22) Aristotle can say:

> "That the legislator should therefore be concerned above all with the education of the young no one would dispute; for in cities where this does not happen, the political systems are harmed. For education must be directed to the particular political system. For the character peculiar to each political system usually safeguards it and establishes that political system in the first place (for example, the democratic character a democratic political system, the oligarchic character an oligarchic political system). And in all cases better character is the cause of a better political system. Fur-

choose always from itself and never for the sake of something else, but honour, pleasure, reason, and every virtue we choose indeed for themselves (for if nothing resulted from them we should still choose each of them), but we choose them also for the sake of happiness, judging that through them we shall be happy. Happiness, on the other hand, no one chooses for the sake of these, nor, in general, for anything other than itself. From the point of view of self-sufficiency the same result seems to follow; for the final good is thought to be self-sufficient. Now by self-sufficient we do not mean that which is sufficient for a man by himself, for one who lives a solitary life, but also for parents, children, wife, and in general for his friends and fellow citizens, since man in born for citizenship."

> thermore, in the case of every capacity and craft there are certain things, having to do with the work each is to accomplish, that must be a matter of prior education and prior habits, and so obviously this applies also to the activities of virtue." [16]

This brief survey illustrates the great flexibility of the concept of *koinonia*. From a theoretical point of view, it appears a very strange *formal* notion, elaborated within the just mentioned twofold level (empirical and theoretical) of the Aristotelian argumentation. In fact, in the Aristotelian (and, more widely, Greek) model of *koinonia* we can observe a sort of fluctuation, or better a *tension*, between historical-empirical dimension and theoretical level.

On the one hand the *koinonia* is a *descriptive* model, strictly related to the Greek polis. This means that, in some way, *koinonia* statically identifies with the historical *polis* as a whole (hence, according to Aristotle, we can properly talk about the *polis-koinonia*). But, *at the same time*, *koinonia* represents in a dynamic manner a *normative* form (the community *as it ought/should be*) and is in turn philosophically based on the fluctuant (and very ambiguous) concepts of *phusis* and 'being' closely related to each other.

This is a capital aspect in Aristotle's theory, which shines through the above quoted passage from *Politics* (particularly by the word *orômen*) and mainly developed in *Metaphysics*, V, 4, 1014b 16-27[17], wherein *phusis* or 'being' (once again according to ancient Greek philosophers) means *at the same time* stagnation and movement, gathering and development,

---

[16] Aristotle, *Politics*, vol. IV, 35; but see also 35-36 where Aristotle adds: "It is clear, therefore, that one must make laws about education and that one must make this a common project. What kind of education there shall be, and how one should be educated, must not be neglected questions." For this aspect Newman**,** *The Politics of Aristotle*, vol. I, 369-374**.**

[17] Aristotle, *Metaphysics*, 2nd ed. (Oxford: Clarendon Press, 1993): 32, where he states: "We call Nature, in one sense, the coming to be of things that grow[…]; in another, the first constituent out of which a growing thing grows; again, what makes the primary change in any naturally existing thing a constituent of the thing *qua* itself. All things are said to grow which gain enlargement through another thing by contact and assimilation or (as with embryos) adhesion. Assimilation differs from contact, for in the latter case there is no necessity for any other thing apart from contact, while in the case of things assimilated there is some one thing, the same in both, which makes them assimilated instead of in contact, and makes them one in respect of continuity and quantity, though not in respect of qualification."

rest and dynamics.[18]

The 'principle of ontological continuity', which characterizes many parts of Aristotle's theory (from *Metaphysycs* to *Politics*), allows us to observe also an ontological fluctuation underlying the community. This implies a fundamental corollary: the radical ambiguity of the *koinonia*.

The communitarian model (maybe not only the Greek one[19]), can be the dynamic ideal political-legal framework to enhance personal and collective identity or freedom: by Aristotelian lexicon, to achieve the complete *eudaimonia*. But, *at the same time*, *koinonia* can develop into a totalitarian structure: just as its ontological legitimateness (the notion of *phusis*-being), *koinonia* can turn into a fixed political system, that is to say into a platonic philosophers' republic (remember the mentioned central role played by *paideia* in Aristotle). This is why only *anthropoi* can live within the *polis*: they are neither the beast, nor the god (*Politics*, I, 2, 1253a 27-29)[20].

In conclusion, we can establish at least two points.

Firstly, according to Aristotle human relations and 'communitarian bonds', including their very complex articulations, are the same thing; in other words, the Stagirite states a sort of superimposition/equation between 'relation' and 'community'.

Secondly, and consequently, Aristotle establishes the equation *polis-koinonia*, insomuch that legal/political obligation must be involved and justified within community. Only starting from this articulated conceptual framework we can try to grasp the Aristotelian notion of *dike* and its legal and political implications.

3. *Koinonia and Dike*

The complex concept of *koinonia* represents the theoretical ho-

[18] Here I am not concerned with this decisive point. Anyway, as is well known, in Aristotle 'nature' (similarly to 'arké') indicates the inner dynamic of the world, namely the 'beginning' and the 'end' (tèlos) of reality: about this point, for instance, Hans Georg Gadamer, *Wahrheit und Methode. Gründzuge einer philosophischen Hermeneutik*, Mohr, Tübingen, 1960 (especially Part II, chapter two concerning the Aristotelian perspective); see also Newman, *The Politics of Aristotle*, vol. I, 18-21, 48.

[19] Giovanni Bombelli, *Occidente e 'figure' comunitarie (volume introduttivo) "Comunitarismo" e "comunità": un percorso critico-esplorativo tra filosofia e diritto* (Napoli: Jovene, 2010).

[20] Aristotle, *Politics*, vol. I, 4.

rizon within which the notion of 'justice' (*dike*) emerges. Obviously we have to understand this relation in the light of the theoretical continuity, which does not imply confusion, between ethics and politics as a typical trait of the Aristotelian perspective (*Politics*, III, 4, 1276b 17-1277a13).

In this direction, Aristotle's answer to the question: "[A]re we to say that the goodness of a good man and a good citizen are the same, or not?" is that they are not the same: "the citizen needs not to be wise", because only "the good ruler is also a good and wise man".

In fact, Aristotle theorizes the polarity '*koinonia-dike*' and, more widely, the relation between the archaic and pre-Socratic notion of *nomos* (grounded on a community as a spatial perimeter or bounder) and the 'legal order', that is to say what we might call 'positive law'[21].

In other words, justice (*dike*) evolves only within the *polis-koinonia*: therefore the Aristotelian notion of 'justice' can be defined a 'communitarian primitive'.

Dike is first and foremost a 'virtue' (*pròs eteron*: for instance *Nicomachean Ethics*, II, 6, 1106a 14-24; V, 1, 1129a 32-1129b 19[22]) or, better, a political virtue based on the communitarian *nomos and* ultimately on the communitarian good. From this point of view, in some way it represents the 'boundary line' which marks the polarity between 'community/*nomos*' and the mere 'alliance/contract', as Aristotle plainly states in *Politics*, III, 9, 1280b 6-13 within a long discussion about justice:

> "[A]city must concern itself with goodness if it is to be truly and not merely for convenience called a city. Otherwise the community becomes an alliance, differing from the alliances of separated parties only as regards place; and its law becomes a treaty, and 'a guarantor of reciprocal rights' as Lycophron the sophist said, instead of being what makes the citizens good and just men. That this is so is clear from the fact that, if you brought the place to-

[21] *The Politics of Aristotle*, ed. Ernest Barker (Oxford: Clarendon Press 1946): XXI ff.; Newman, *The Politics of Aristotle*, vol. I, 1-11, 41-165 and vol. II, 97 (for the notion of *koinonia*).

[22] For the first passage see Aristotle, *The Nicomachean Ethics*, 29: "We must, however, not only describe virtue as a state of character, but also say what sort of state it is. We may remark, then , that every virtue or excellence both brings into good condition the thing of which it is the excellence and makes the work of that thing be done well[…].Therefore[…]the virtue of man also will be the state of character which makes a man good and which makes him do his own work well." The second passage quoted in the text concerns the nature of justice.

> gether so that the city of the Megarians and that of the Corinthians touched with their walls, it would still not be one city." [23]

In other words, only 'just communities' (i.e. communities deep-rooted on the virtue of *dike*) can be understood as true communities: the absence of *dike* implies a mere 'contract bond' underlying the social relations and, ultimately, the prevalence of a utilitarian model of human relationships.

From this perspective, and more precisely, *dike* is the *condition* of possibility for the *polis* or, better, for *eunomia* as the typical Greek model of political obligation and then, in a circular way, for the community itself.

In this direction, *dike* can properly be understood as a 'pragmatic and universal (anthropological)' dimension, in opposition to many contemporary perspectives: not only the Rawlsian one but also, for instance, some philosophical theories *lato sensu* inspired by Aristotle's reflections (Michael Sandel and, a bit less, Michael Walzer and Charles Taylor). More precisely, on a theoretical level the Aristotelian community (*koinonia*) represents the conceptual 'space' for the elaboration of justice and, hence, of law.

Note that this point does not imply a confusion among levels (in some way differently, for instance, from the interpretation proposed by Alasdair MacIntyre). In fact, according to Aristotle *dike* (insofar as *dike* is strictly connected to the *nomos*) represents an *ideal and rational (but not idealistic) principle*, grounded on a communitarian context; similarly, 'law' evolves into a necessary, historical, positive and sometimes misleading *determination* of *dike* within the *polis-koinonia*: what Greeks call *nomisma*[24], in some way along the later roman pair '*ius-iustitia*'.

See, for instance, *Nicomachean Ethics*, V, 5, 1134a 27-1134b 18, where Aristotle observes (distinguishing 'political justice' from analogous kinds of justice):

> "For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is

[23] Aristotle, *Politics*, vol. II, 29.

[24] See, for instance, the Aristotelian position concerning the nature of money: *The Nicomachean Ethics*, IV, 1132b 20-1133b 29 (Aristotle, *The Nicomachean Ethics*, 88-90). For this point: Massimo Amato, *L'enigma della moneta e l'inizio dell'economia* (Milano: Et al. 2010): 183-239, 245-252, 265-266.

> injustice; for legal justice is the discrimination of the just and the unjust.[…]This is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant.[…][Justice or injustice of citizens are]according to law, and between people naturally subject to law[that is to say] people who have an equal share in ruling and being ruled." [25]

Similarly, and beyond the mentioned *Politics,* III, 9, 1280b 5-13, see also *Politics* III, 13 1283b 42:

> "A citizen is everywhere he who shares in ruling and being ruled, but how he does so varies with each constitution. In the best constitution he is the man who both can and does rule and obey with the intention of achieving the life of goodness."[26]

Along these lines the Aristotelian distinction between distributive and commutative justice, whereby the fundamental question of the polarity *'isoi-eteroi'* emerges[27], seems less relevant and, in some way, related to the specific historical context of the Greek *polis*. On the contrary, we can understand both the decisive role of the notion of *epieikeia* and, then, the crucial position played by the dynamic couple *physikon dikaion-nomikon dikaion* in Aristotle's theory.

Epieikeia (equity: *The Nicomachean Ethics*, VI, 1143 a 19-1143b 16) represents the equilibrium, or the balance, between justice (as a theoretical model) and the positive disposition or legislation (in order to prevent the unlawful act): in other words, *epieikeia* is a sort of *justice 'in action or situation'* within the communitarian horizon[28].

Similarly, on a conceptual level, the couple '*physikon dikaion-nomikon dikaion*' (*Nicomachean Ehics*, V, 7, 1134a 24-1135a 6) is relevant because, among other things, Aristotle says:

> "Of political justice part is natural, part legal, - natural, that which everywhere has the same force and does not exist by people's

[25] Aristotle, *The Nicomachean Ethics*, 91-92.

[26] Aristotle, *Politics*, vol. II, 45.

[27] Coelho, *Justice, Society and Diversity in Aristotle*.

[28] Aristotle, *The Nicomachean Ethics*, 113-114. About this point Francesco D'Agostino, *Epieikeia: il tema dell'equità nell'antichità greca* (Milano: Giuffrè 1973); Francesco D'Agostino, *La tradizione dell'epieikeia nel Medioevo latino: un contributo alla storia dell'idea di equità* (Milano: Giuffrè 1976).

> thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent[...].Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force[...]while they see change in the things recognized as just. This, however, is not true in this unqualified way, but is true in a sense; or rather, with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature. It is evident which sort of thing, among things capable of being otherwise, is by nature; and which is not but is legal and conventional, given that both are equally changeable. And in all other things the same distinction will apply[...].The things which are just by virtue of convention and expediency are like measures[...]. Similarly, the things which are just not by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere by nature the best."[29]

This distinction illustrates the two fundamental dimensions (*dike-nomikon*) underlying the Aristotelian theory of justice and, more generally, his model of legal reasoning. According to this perspective, no 'nomikon' (that is to say: a positive and historical disposition) can be laid down beyond justice (*dike*), which is ultimately the *nomos* based on the *phusis* and developed within the community. This is why in Aristotle there is no scission between 'individual justice' and 'social (collective) justice': in other words, the Hellenic universe, which is synthesized by Aristotle's theory, cannot conceive public justice separated from its personal or individual dimensions[30].

In other words: *dike* is, at the same time, a communitarian and individual dimension.

4. *Politeia*

The complex structure composed by the theoretical axis '*koinonia*-justice (*dike*)' is the conceptual framework within which what we today call the political-constitutional level can develop. More precisely, from this point of view it is within the couple '*koinonia*-justice' that the

[29] Aristotle, *The Nicomachean Ethics*, 92-93.

[30] For this point see especially Gianfrancesco Zanetti, *La nozione di giustizia in Aristotele* (Bologna: Il Mulino, 1993).

central role of *politeia* or, according to a modern and misleading translation, the concept of 'Constitution' emerges. So in *Politics*, III, 11, 1282b 8-13:

> "[T]he laws will inevitably be bad or good, and just or unjust, concomitantly with the constitutions. Only this much is clear: the laws should suit the constitution. From this, however, it plainly follows that laws matching the correct constitutions must be just, and those matching the perverted ones not just."[31]

Similarly in *Politics* III, 13, 1283b 42-1284a 3 (partially just mentioned):

> "Perhaps we should ask what constitutes correctness here. That is correct, perhaps, which is to the advantage of the whole city and to the common advantage of the citizens. A citizen is everywhere he who shares in ruling and being ruled, but how he does so varies with each constitution. In the best constitution he is the man who both can and does rule and obey with the intention of achieving the life of goodness."[32]

As is well known, Aristotle conceptualizes the notion of *politeia* as a *mesotes* (or as a equilibrium among social groups), for instance in *Politics*, IV, 11, 1295a 25-1296a 19 where the question is:

> "What is the best constitution, and what is the best life, for most cities and most men, judging by the standard not of a goodness surpassing ordinary men, nor of an education requiring a fortunate nature and circumstances, nor of an ideal constitution, but of a life that the majority can live in common and a constitution that most cities can share?"

Aristotle answers:

> "Now in all cities the city has three parts, the very prosperous, the very needy, and the third class of those in the middle. Hence, since it is admitted that the moderate and middle is the best, it is clear that the gifts of fortune too are best of all when owned in a

[31] Aristotle, *Politics*, vol. II, 39.

[32] Aristotle, *Politics*, vol. II, 45. About the nexus '*koinonia*-rules' Newman, *The Politics of Aristotle*, vol. I, 43, 84, 97, 168, 198.

> middle amount. For that makes it easiest to obey reason, whereas excessive beauty or strength or birth or wealth, or their opposites, excessive poverty or weakness or great inferiority, make it hard to follow reason.[...][So]the middle classes are least inclined to shun office or pursue it, and these are both harmful to cities.[...]The best constituted city, therefore, must be the one consisting of those whom we hold to make up the natural composition of a city.[...] It is plain that the middle constitution is the best, for it is the only stable one."[33]

This is why *politeia* does not represent the best political system *as an abstract structure*, but only the (*relatively) better* 'Constitution' adequate, or suited, to the historical and peculiar circumstances (in fact Aristotle adds: "This explains why most constitutions are either democratic or oligarchic"). In other words, the Aristotelian notion of *politeia* is very articulated.

More precisely, *politeia* does not represent only the legal or political expression of a sociologically shared *dike*, in some way according to a modern and immediate acceptance (meaning) of 'Constitution'. Quite the contrary, within the Aristotelian perspective we can distinguish at least two levels strictly connected to each other: a) the relational dimension and b) the political-institutional level.

a) The relational dimension. Firstly, *politeia* expresses the 'just *equilibrium*' of community as a whole, similarly, but from a different perspective, to justice (*dike*). In fact, as previously remarked, justice (being a virtue) is properly placed on a theoretical level, whereas *politeia* generally concerns the social relations: so, only to a certain degree *politeia* is a *form* of justice.

Moreover, *politeia* is inspired by a principle of proportionality and continuity among the multiple levels (or the multiple communities) of the *polis-koinonia*: the relation male-female, household, *oikos* and so on. But this proportionality in turn is grounded on the ontological or metaphysical analogy and, hence, on the mentioned complex concept of nature (*phusis*), which connotes the entire Aristotelian perspective about the *polis*.

So, *politeia* arises only *within* a community (along the lines of a 'bottom-up' processing) and then, from a Hellenic point of view, *starting from* the human bonds and relations developed within the *polis*. In other

[33] Aristotle, *Politics*, vol. II, 95-97.

words, on a conceptual level *politeia* should be understood as the 'correct *model*', a sort of dynamic and flexible *paradigm*, of human relations as they are *concretely based on a communitarian horizon*.

It takes each time the most appropriate shape according to the changing social contexts (based on the crucial Aristotelian notion of *metabolè*[34]) and, particularly, in order to prevent the cyclic Greek nightmare (from Hesiod to Aristotle): the possibility of *stasis*, that is to say the 'civil war' (about this point see, for instance, the following passages: *Politics*, V, 7, 1307a 5-11[35]; V, 9, 1309a 33-38 and 1309b 10-21[36]; but see also *Politics*, III, 13, 1283b 43-1284 3 for the relevance of the notion of 'citizen').

This is the main difference between the Greek (and Aristotelian) *politeia,* including the notion of *koinonia* as its theoretical premise, and the modern concept of Constitution. Regarding this point, I completely agree with the position well summarized by Charles MacIlwain[37]:

> "There must be a common object of all their lives if citizens are ever truly to «live together» as members of a *koinonia* instead of merely feeding together like the cattle in one field. That object, Aristotle says, is «the safety of the *polity*», and by this he means nothing less than a common devotion to the central principle of the community's life, the vital spark that must glow in the breast of every citizen if he is to be a living member of the *polis* and not like

[34] Newman, *The Politics of Aristotle*, vol. I, 208-218, 283-288, 518-533. For the difference between the classical notion of *metabolè* and the modern concept of 'revolution' see Hanna Arendt, *On Revolution* (New York: Viking Press, 1963).

[35] Aristotle, *Politics*, vol. III, 15: "Polities and aristocracies are overthrown mostly because of a deviation from the just in the constitution itself. For the origin (of overthrow) in a polity is the poor mixture of democracy and oligarchy, and in aristocracy of these two and virtue, but especially of the two."

[36] Aristotle, *Politics*, vol. III, 20-21: "There are three things that those who are to hold the supreme offices ought to have; first, friendliness toward the established constitution; next, great ability in the tasks of the office; and, thirdly, virtue and justice – in each constitution the kind pertaining to that constitution. (For if what is just is not the same in relation to all constitutions, there must also be differences (in the virtue) of justice). […]Simply put, whatever provisions in the laws we describe as advantageous to constitutions, all these preserve constitutions; and so does the great elementary principle so often mentioned, to take care that the group that wants the constitution shall be stronger than the one that does not."

[37] MacIlwain, *The Growth of Political Thought in the West: from the Greeks to the end of the Middle Ages*, 73-74. More widely Charles Howard MacIlwain, *Constitutionalism. Ancient and Modern* (New York: Cornell University Press, 1940).

> a severed finger or a foot of stone, its mere inanimate tool or a positive encumbrance.[...]In this we have Aristotle's conception both of citizenship and of the *politeia* or «constitution». «The constitution» to him means this principle of unity that makes the citizens one, like the harmony that comes of different tones properly blended. In fact it is nothing less than the soul that animates the whole of the body politic, and a full understanding of its nature is impossible to one who has no knowledge of Aristotle's discussions of the relation of the soul and the body. But to anyone it must be obvious that by *politeia* Aristotle means something that we never mean by our «constitution» and by citizen (*polites*) one whose character is almost a stranger to modern political thought."

b) Political-institutional level. Consequently, and at the same time, Aristotle can establish the *political and legal* dimension of *politeia.* In this direction, *politeia* should be understood from a twofold point of view.

On the one hand, it is to be considered as the mutual *relation* among the 'citizens' (regarded as members of the *polis-koinonia*)*:* see, in particular, the *political* and *institutional* relevance played by the notion of *philia*, as previously observed, and particularly by the concept of *omonoia* (concord) in the Aristotelian theory starting from the *Nicomachean Ethics*, IX, 6, 1167a 22-1167b 16 (also, and especially, in the light of the possibility of *stasis*):

> "Concord also seems to be characteristics of friendship. For this reason it is not identity of opinion; for that might occur even with people who do not know each other; nor do we say that people who have the same views on any and every subject are in accord, e. g. those who agree about the heavenly bodies (for concord about these is not a characteristic of friendship), but we do say that a city is in accord when men have the same opinion about what is to their interest, and choose the same actions, and do what they have resolved in common. It is about things to be done, therefore, that people are said to be in accord, and, among these, about matters of consequence and in which it is possible for both or all parties to get what they want[…]. Concord seems, then, to be political friendship, as indeed it is commonly said to be; for it is concerned with things that are to our interest and have an influence on our life. Now such concord is found among good men[…]. But bad men cannot be in accord except to a small extent[…][So]if people do not watch it carefully the common well is soon destroyed. The result is

> that they are in a state of faction, putting compulsion on each other but unwilling themselves to do what is just."[38]

In other words, by *politeia* Aristotle means the *concrete*, somehow pre-political and pre-institutional, relations of a community.

But, on the other hand, this also implies a specifically constitutional moment.

Politeia cannot remain on a relational level, but it necessarily turns into a *constitutional (political) articulation*: in other words, the fundamental idea is that human relations *necessarily imply* a political and institutional 'constitution' (or structure). More precisely, and starting from the strict interlacement between individual sphere and communitarian horizon underlying the *polis-koinonia*, we can understand how the anthropological identity emerging within the *koinonia* (as its philosophical-ontological basis) and within the *politeia* (regarded as a ideal paradigm of the concrete relational dimension or as a sociological and a pre-political dimension) *must* transform into a political framework: in other words, *politeia* as a political community.

Nevertheless *koinonia* and *politeia* are not the same thing and, then, they must not be confused: we have to situate them on different levels.

Politeia is placed on a social-political-institutional level. As just remarked, it is a very adaptable, social, legal and political paradigm which, according to the Aristotelian theory, can have *many* historical articulations: monarchy, oligarchy, and the others models mentioned by Aristotle.

On the contrary, *koinonia* represents the philosophical and ontological level of the entire conceptual structure. In fact *koinonia* concerns human relations as a whole: notice that at the beginning of *Politics* Aristotle states "every state (*polis*) is a certain sort of association (*koinonia*)", but not the contrary, that is to say that 'every *koinonia* is a polis'[39].

---

[38] Aristotle, *The Nicomachean Ethics*, 171-172. For this point Gianfrancesco Zanetti, *Amicizia, felicità, diritto*: *due argomenti sul perfezionismo giuridico* (Roma: Carocci, 1998): 99, 111-112.

[39] The point is explained in McIlwain, *The Growth of Political Thought in the West: from the Greeks to the end of the Middle Ages*, 77: "But if the polity or constitution (*politeia*) is so all-important in fixing the character of the *polis* we must know exactly what a polity is. Aristotle's central thought on this subject may be expressed in three propositions concerning it, and if we can fully understand their terms, most of his political ideas will be clear to us. They are these. The *polity* determines the character of the *polis*. The *politeuma*

In substance, there is no superimposition between *koinonia* and polis: this is why *koinonia* can be considered in a way as the *critical filter* of each historical form of *politeia* (and, hence, of *koinonia*).

5. Aristotle's theory of justice and contemporary sceneries

The previous considerations show how rich and complex is the Aristotelian perspective about justice and law and, more precisely, with reference to the theoretical circle concerning the relation '*koinonia-dike-politeia*'.

Now, in conclusion and to sum up, I would like to put forward some brief remarks on a philosophical-legal level about three aspects of Aristotle's theory, trying also to evaluate its relation with the current sceneries. I will focus on the following concepts: *circularity*, *flexibility (openness)* and *modernity*.

The first point concerns the circular nature of the Aristotelian model.

In fact, it could be represented as a sort of 'conceptual Chinese box', whose pivotal ideas trace a theoretical *continuum*. So, there is a reciprocal and mutual relation among '*koinonia-dike-politeia*'. By an image, we have neither a pyramidal scheme (*à la* Kelsen) nor a linear sequence, but an osmotic circle. In other words: community (*koinonia*) 'produces' justice (*dike*), which is to be understood as a 'communitarian/practical universal dimension': but, being a virtue, *dike* 'produces' in turn *politeia* (with its many possible articulations) and so on.

In a few words: in the light of the continuity between ethics and politics underlying Aristotle's theory, the three notions (*koinonia*, *dike*, *politeia*) are to be considered as the 'natural forms of moral consciousness'. Considered altogether and circularly, they 'create' *dike*, as well as, and reciprocally, *dike legitimates* philosophically and politically the *politeia* and, then, the *polis-koinonia*.

These remarks show, and are related to, the second trait of Aristotle's model: its flexibility (or openness).

Aristotle's conceptual architecture is an open model. In other

---

determines the character of the polity. The polity is a certain ordering of the inhabitants of the *polis*. In modern terms as nearly equivalent as possible we might put the first and second of these thus: the «constitution» makes the state what it is. The nature of the ruling class (*politeuma*) determines the nature of the constitution" (with also reference to *Politics*, III, 6). See also Newman, *The Politics of Aristotle*, 236, 272 ff.

words, the flexible notion of *dike*, elaborated within the multidimensional concept of community and based on the dynamic polarity '*physikon nomikon/physikon dikaion*', is adaptable to the wide variety of human relations.

This point is confirmed by Aristotle himself in *Politics*, where he confers, at least in principle, the same political-legal relevance and legitimateness to *many historical forms* of 'constitution'. Similarly, the crucial notion of *politeia-mesotes*, as a balance of the concrete communitarian dynamics, stands for the political and institutional paradigm of *koinonia* and, consequently, of *dike*. This is the main reason why Aristotle's theory is 'open': in other words, it takes the shape of a *formal paradigm beyond its socio-historical reference to the Greek polis*[40].

And it is in the light of these two elements (circularity and flexibility), and despite the cultural distance between Hellenic world and contemporary contexts, that we can grasp (in spite of its ambiguity) the great modernity of the Aristotelian perspective, as proved by some of its recent reinterpretations[41] and, in particular, by the 'rediscovery' of Aristotle's economic theory (including its undeniable communitarian horizon proposed by Amartya Sen and, much earlier, by Karl Polanyi[42]).

The modern trait of Aristotle's theory can be caught in relation both to the concept of community and the model of justice (and, then, of law and *politeia*). In spite of his historical reference, Aristotle never defines what is concretely (or empirically) a community: thus, his *koinonia* is *undetermined* insofar it is human relation as such and, then, *formal* (but not empty or meaningless).

Similarly, and consequently, Aristotle does not elaborate a definite concept of justice (*dike*). Distinguishing *physikon dikaion* and *nomikon dikaion*, he introduces the idea of multiple levels, forms and degrees of justice: in other words, *dike* is to be understood as a *proportion* (as a relation grounded on the analogy of being: see, for instance, *Nicomachean Ethics*, V, 3 and 4) and, then, as a *formal* notion.

This flexible conceptual model too could be very useful to interpret the present complex societies, including the contemporary issues related to the ongoing globalization. Contemporary societies are domi-

[40] Ilya Prigogine and Isabelle Stengers, *La nuova alleanza. Metamorfosi della scienza* (Torino: Einaudi, 1981): 40, 266-269.

[41] Berti, *Aristotele nel Novecento*, 221, 253-254, 261.

[42] Amartya Sen, *On Ethics and Economics* (Oxford: Basil Blackwell 1987) and Karl Polanyi, "Aristotle Discovers Economy", in *Primitive, Archaic and Modern Economies. Essays of Karl Polanyi*, ed. George Dalton, 2nd ed. (Boston: Beacon Press, 1971): 78-115.

nated by the presence of many models of community and then, in parallel, of justice: so, from this point of view, the current scenery certainly appears very different if compared to the Greek *polis*.

Nevertheless, the formal (and universal) nature of the *koinonia* enables Aristotelian perspective to be a very flexible theoretical model, which can have a fundamental role in legitimating philosophically, and endorsing politically, the current multiple models of community and justice.

In conclusion, with Aristotle we could say: there is *a unique* and universal *koinonia*, that is human relation, and a universal *dike* as an anthropological dimension, but *many (plural) models* of community and justice.

References

Amato, Massimo. *L'enigma della moneta*. Milano: Et Alii Edizioni, 2010.

Arendt, Hannah. *On Revolution*. New York: Viking Press, 1963.

Arendt, Hannah. *The Human Condition*. Chicago: The University of Chicago Press, 1958.

Arens, Hans. *Aristotle's Theory of Language and its Tradition. Texts from 500 to 1750*. Amsterdam-Philadelphia: John Benjamins Publishing Co., 1984.

Aristotle. *Metaphysics*. 2nd ed. Clarendon Press: Oxford 1993.

Aristotle. *Politics*. New York-Oxford: University Press, 1995-1999.

Aristotle. *The Nicomachean Ethics*. Oxford-New York: University Press, 2009.

Barker, Ernest. (ed.) *The Politics of Aristotle*. Oxford: Clarendon Press, 1946.

Berti, Enrico. *Aristotele nel Novecento*. Roma-Bari: Laterza, 1992.

Bombelli, Giovanni. *Occidente e 'figure' comunitarie (volume introduttivo) "Comunitarismo" e "comunità": un percorso critico-esplorativo tra filosofia e diritto*. Napoli: Jovene, 2010.

Bonitz, Hermann. *Index aristotelicus*. Darmstadt: Wissenschaftliche Buchgesellschaft, 1960.

Coelho, Nuno. *Justice, Society and Diversity in Aristotle*. Paper presented in XXVIth World Congress of Philosophy of Law and Social Philosophy *Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies* (Belo Horizonte, MG, Brazil, 21 to 26 July 2013).

D'Agostino, Francesco. *La tradizione dell'epieikeia nel Medioevo latino: un contributo alla storia dell'idea di equità*. Milano: Giuffrè 1976.

D'Agostino, Francesco. *Epieikeia: il tema dell'equità nell'antichità greca*. Milano:

Giuffrè 1973.

Gadamer, Hans Georg. *Wahrheit und Methode. Gründzuge einer philosophischen Hermeneutik*. Tübingen: Mohr, 1960.

Lo Piparo, Franco. *Aristotele e il linguaggio. Cosa fa di una lingua una lingua*. Roma-Bari: Laterza, 2002.

MacIlwain, Charles. *Constitutionalism. Ancient and Modern*. New York: Cornell University Press, 1940.

MacIlwain, Charles. *The Growth of Political Thought in the West: from the Greeks to the end of the Middle Ages*. New York: Mac Millan, 1932.

MacIntyre, Alasdair. *After Virtue. A Study in Moral Theory*. Notre Dame IN: University of Notre Dame Press, 1981.

MacIntyre, Alasdair. *Whose Justice? Which Rationality?*. Notre Dame IN: University of Notre Dame Press, 1988.

Newman, W. L. *The Politics of Aristotle*. Oxford: Clarendon Press, 1950.

Polanyi, Karl. "Aristotle Discovers Economy". In *Primitive, Archaic and Modern Economies. Essays of Karl Polanyi*, edited by George Dalton, 2nd ed., 78-115. Boston: Beacon Press, 1971.

Prigogine, Ilya and Isabel Stengers. *La nuova alleanza. Metamorfosi della scienza*. Torino: Einaudi, 1981.

Radice, Roberto. (ed.) *Aristoteles*. Milano: Biblia, 2005.

Rawls, John. *A Theory of Justice*. Cambridge MA: The Belknap Press of Harvard University Press, 1971.

Riedel, Manfred. *Rehabilitierung der praktischen Philosophie*. Freiburg: Rombach, 1972-1974.

Sandel, Michael. *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press, 1982.

Sen, Amartya. *On Ethics and Economics*. Oxford: Basil Blackwell, 1987.

Taylor, Charles. *Sources of the Self. The Making of the Modern Identity*. Cambridge: Cambridge University Press, 1992.

Vegetti, Mario. (ed.) *Polis e economia nella Grecia antica*. Bologna: Zanichelli, 1986.

Walzer, Michael. *Spheres of Justice. A Defence of Pluralism and Equality*. Oxford: Blackwell, 1983.

Zanetti, Gianfrancesco. *Amicizia, felicità, diritto*: *due argomenti sul perfezionismo giuridico*. Roma: Carocci, 1998.

Zanetti, Gianfrancesco. *La nozione di giustizia in Aristotele*. Bologna: Il Mulino, 1993.

Pensar o Direito em português

Paulo Ferreira da Cunha[1]

Resumo: Cada vez mais se compreende o valor da Língua Portuguesa e, portanto, a importância da Lusofonia. A questão é se há uma lusofonia jurídica, e se pode haver uma reflexão filosófica autónoma em português. Mas mais importante que uma língua considerada como simples meio de comunicação, é pensá-la como também formadora de um espírito. E consequentemente o mais importante a indagar é qual o espírito ou a cultura lusófona que pode existir no seio do Direito. Uma sintonia constitucional entre as constituições federal brasileira e a constituição da república portuguesa pode ser um ponto de partida.

Palavras-chave: Filosofias nacionais - Lusofonia - Filosofia do Direito - Filosofia Luso-Brasileira - Constituições cidadãs

***

Abstract: We increasingly understand the value of the Portuguese language, and therefore the importance of Lusophone studies and realities. The question is whether there is a legal Lusophone reality, and if there may be an autonomous philosophical reflection using Portuguese Language and reflecting its genious. But more important than a language considered as a mere means of communication, is to consider it as well as forming a spirit. And therefore the most important is to ask what is the spirit or Lusophone culture that may exist inside law. The similarities between the Brazilian Constitution and the Portuguese Constitution may be a starting point.

Keywords: National philosophies - Lusophone - Philosophy Law - Philosophy Luso-Brazilian - Constitutions citizens

1. Introdução

Permitam-me que escreva na primeira pessoa, porque o que vou dizer não aspira a ser teoria anónima, mas o estado da questão de uma

[1]Catedrático da Universidade do Porto

pesquisa em curso. E o convite para que, dialeticamente, se juntem a esta demanda. Não vos trarei teorias nem dogmas mas hipóteses, forjadas num percurso. Não hipóteses descarnadas de paixão, mas o que é descarnado de paixão, realmente, no mundo do Direito e da sua Filosofia? Mesmo a mais abstrata das lógicas é certamente animada pela paixão do rigor, e da ausência de paixão... Lembremo-nos, para começar, do *ostinato rig*ore de Leonardo Da Vinci....ou do método "até na loucura" do poeta Antero de Quental...

Sempre suspeitei que na Língua Portuguesa, que exprime o modo de pensar de um um vastíssimo número de falantes no Mundo (quase 300 milhões de falantes, dos quais 250 milhões como língua-mãe ou nativa), haveria de ser o traço de união de alguma cosmovisão. Obviamente com o maior respeito e mesmo amor a outras línguas. Na verdade, pessoalmente gosto de muitas línguas, e bem gostaria de as saber ler e falar na perfeição. Uma delas é o próprio tupi-guarani, que encerra uma filosofia extraordinária, por exemplo com o seu sistema de prefixação e sufixação que nos faz por exemplo saber que ibirapuera é uma floresta que já não o é, ou que abaete é uma onça verdadeira... Como o eminente filósofo e polígrafo Jean Lauand, da USP, tem sugestivamente realçado em vários estudos e palestras.

Pois como seria interessante estudar mais aprofundadamente o sistema de valores - e os que pudessem transmutar-se em valores jurídicos - numa língua tão claramente axiológica como essa...

Mas bebemos a Língua Portuguesa (ou as Línguas Portuguesas – não vamos entrar nessa querela) no leite materno, e com ela será que nos foi veiculado um sistema de valores, ou algumas idiossincrasias ao menos?

Evidentemente que, como diligentes funcionários das universidades, públicas e privadas, submetidos a sistemas de avaliação, cada vez mais sofisticados, e mesmo a avalições internacionais, que muitas vezes se fazem em Inglês, temos tendência a não pensar na radicação nacional e muito menos linguística do nosso Direito (que ainda é escrito em boa medida em português) e a ir buscar fora as principais fontes doutrinais de que nos servimos. Muito boa parte do que nos ocupa é divulgação e exegese de trabalhos em outros idiomas. Mas será que poderemos pensar o Direito em Português, e de uma forma original? Quiçá poderíamos ir mais longe, e contribuir assim para que a nova Idade do Direito (posmodernidade ou outra) que agora se constrói também fale no nosso *Idiomaterno*? E o espírito da nossa Língua leve a melhor Direito, mais humano e mais fraterno?

Mas será que existe espírito da língua, será que existe uma cosmovisão ou mundividência ainda que reminiscente ou embrionária? E disse cosmovisão ou mundividência propositadamente, para não dizer *Weltanschauung* que, desde Dilthey, toda a gente em todo o mundo utiliza...

2. A Inspiração Hispanoamericana

Esta suspeita encontrou-se adormecida em mim durante muitos anos, como que uma doença em incubação, até que fui convidado para participar, há quase 22 anos já, em Santiago do Chile, num congresso de História do Direito: "Congreso Internacional 'Protección Juridica de las Personas en la Historia del Viejo y del Nuevo Mundo", organizado pela Faculdade de Direito da Universidade do Chile, em Setembro de 1991. Foi para mim uma maravilhada surpresa ver desfilar conferências sobre direitos do mais variado tipo, inspirados na matriz dos concílios toledanos de Santo Isidoro de Sevilha dizem alguns.

Alguns eram direito antigos, nos forais, com as suas formas concretas de proteção, que contudo já eram do conhecimento geral, embora não ainda interpretados num sistema coerente.

Num plano intermédio surgia desde o direito ao sigilo na correspondência, defendido já por Afonso X, o Sábio, o das *Cantigas de Santa Maria*, avô do primeiro rei de Portugal. Mas outros eram já direitos de novo tipo, direitos dos peregrinos, dos soldados, e até das mulheres.

E outros ainda, conquanto antigos, configuravam garantias, de índole processual e até de grande relevo, como a instituição do visitador dos cárceres em Castela, com poderes de revisão de processos de presos. E com poderes para mesmo ali os soltar, se acaso o que chamamos hoje *due process of law* não houvesse sido cumprido. Fiquei com a impressão que o que se passa na ópera *Fidelio* (aliás uma ópera que pessoalmente considerei enfadonha, salvo a bela ária do carcereiro sobre o oiro), tem algo a ver com esta instituição. Mas seria preciso ir averiguar, e também, o grande Beethoven que me perdoe, ter coragem para de novo ouvir a ópera.

Lamento, é mesmo de lamentar, que o meu redespertar para o tema tenha vindo dos nossos vizinhos. Mas as coisas são como são. A política da Língua castelhana é muito mais ativa que a da Língua Portuguesa. Se um acordo ortográfico que tira meia duzia de letras e dois pontinhos em palavras causa escândalo e comoção de um lado e de ou-

tro do Atlântico, como poderemos ter uma política comum da Língua? Fico deveras vexado quando vejo o Instituto Cervantes com pujantes sedes e cursos, e não encontro um Instituto da Língua Portuguesa luso-brasileiro e dos demais países que a têm como sua. O português Instituto Camões afigura-se-me um apêndice de Embaixadas e Consulados, sem verdadeira visibilidade nem mesmo aqui no Brasil. Mas os colegas dirão... Exceção se faça ao Museu da Língua Portuguesa, que é uma catedral sagrada da Língua.

O mundo de língua castelhana já há bastantes anos, pois, procurou averiguar de velhas liberdades e direitos ibéricos (remotamente originários ainda da monarquia visigótica), que teriam passado para os países desse idioma na América Latina. E com o legado de Língua Portuguesa, o que se terá passado? Não só no Brasil, como em África e na Ásia...

3. O Espírito das Leis Lusófonas

Como não colocar uma interrogação: será possível que a *Casa do Ser* da Língua Portuguesa seja uma casa diferente das demais? E tal no atinente a vários tipos ou "géneros" em que a filosofia do Direito se expressa: não apenas a jurisfilosofia explícita do direito dos professores, mas também a jurisfilosofia implícita, presente na Literatura e nas Artes. E a questão não só se refere ao problema no passado, como no presente, e sobretudo no futuro.

Creio que a filosofia dos professores, explícita, tende normalmente para uma de duas orientações, nos nossos países:

Tradicionalmente, era comum a expressão coimbrã dizer-se que "o que o lente diz, vem de Paris". E recorde-se que Coimbra foi, no mundo de Língua Portuguesa, a única universidade durante séculos: até à independência do Brasil e em Portugal só perderia realmente o monopólio (salvo uma tentativa gorada dos Jesuítas no séc. XVII), depois da implantação da República, em 1910. Bem ao contrário do que ocorria com a língua castelhana: mas há quem pense que a unidade do Brasil, por contraposição à proliferação de estados de língua castelhana no hemisfério sul, se deve precisamente a essa unidade da elite académica, toda formada em Coimbra até à independência.

Por um lado, havia uma dependência grande do conhecimento estrangeiro, que se ia buscar como moda. Mas a isso contrapunha-se uma vontade eclética. Pelo que se colhiam várias modas, e na junção delas (não nos ingredientes, mas no tempero, se diria) algo de pessoal coloca-

ria cada Mestre.

Contudo, de há algumas décadas a esta parte, afigura-se-nos que a importação continua, em vários horizontes em que se fala português, contudo o ecletismo tende a diminuir. E não raro os pesquisadores e docentes parecem enquistar-se na lição de um único mestre, ou de uma só escola, que reverenciam como dogma, esquecendo e desprezando tudo o mais em redor.

As exceções são obviamente muito de louvar.

Devo fazer a minha autocrítica. Só agora, uma dúzia de anos após ter chegado ao topo da carreira, a cátedra, é que começo a pensar em publicar autonomamente o que será o meu pensamento sobre Filosofia do Direito. Até agora, os meus manuais, monografias e teses, estão cheios das ideias dos outros. E reconheço que assim tem de ser, porque seria ousada petulância vir dizer o que se pensa sem provar que se sabe o que os outros já disseram. Mas, note-se: refiro-me apenas aos principais dos outros, a começar pelos clássicos. Não um ou outro dos "outros" apenas. E muito menos os "outros" que são capelinha ou moda.

Cremos assim que, humildemente, avanço a hipótese de que não será talvez ainda entre os professores que se encontrarão as mais genuinamente lusófonas teorias do Direito. Penso que mais bem recompensados serão os nossos esforços se nos encaminharmos para a pesquisa sobre o que do Direito pensam os não juristas, ou juristas não agindo enquanto tais (ex-juristas normalmente, se é que um jurista alguma vez se torna ex- de si mesmo) e para o que se poderia chamar "espírito das leis" dos países lusófonos.

Esse "espírito das leis" lusófonas tem um antecedente para Portugal de grande relevo, embora o texto seja esquecidíssimo. Teixeira de Pascoaes (jurista de formação e grande poeta incompreendido e mal interpretado) procurou coligir num livro que dirigia aos estudantes do ensino elementar (mas que nunca seria dotado oficialmente, como é óbvio) um conjunto de singularidades lusas no direito: a começar pela forma pactuada de governo na própria velha monarquia, quando outros povos europeus ainda gemiam ao peso de poderes sanguinários (e até, relembremos nós, faziam sacrifícios humanos).

Não se pode prescindir da citação do mais relevante desse texto, que aliás é também um certo programa, e não apenas uma descrição do passado. Como aliás é sempre a redescoberta da raízes: as raízes servem para fazer asas! Também hoje procuramos a nossa identidade porque acreditamos que ela foi desvirtuada. Pelo menos, olvidada.

Foi o que ocorreu explicitamente com os preâmbulos das cons-

tituições veteroliberais do final do séc. XVIII e inícios do séc. XIX, em França, Espanha e Portugal: todas se reclamaram de uma redescoberta de velhos direitos. José Liberato Freire de Carvalho, liberal português exilado em Londres, confessou nas suas memórias que se pediam as Cortes Velhas, não reunidas (como ocorrera também com os Estado Gerais em França: os absolutismos nunca gostaram de assembleias) havia muito, porque se sabia que elas traziam no ventre as Cortes Novas. E citemos um velho *blues* de outra língua, mas da mesma civilização: "everything old is new again".

Dizia então Pascoaes:

> "É certo que a nossa jurisprudência deriva das leis godas e romanas, e a dos últimos tempos não é mais que uma cópia inferioríssima das leis estrangeiras que desnaturaram por completo o corpo jurídico do Estado.
> Mas há leis na nossa antiga legislação, como as primeiras leis proteccionistas do comércio marítimo (Cortes de Atouguia) e do desenvolvimento da agricultura, que nasceram directamente do instinto que teve Portugal, depois de se fixar como Pátria, de se defender e consolidar. Ele começou por criar a família rural, ligando-a à posse duradoura da terra. Assim, entre nós, o morgadio teve como origem uma lei (lei avoenga, da 1.ª Dinastia).
> Temos ainda os forais e os princípios de direito político estabelecidos nas antigas cortes, revelando o espírito de independência e liberdade que animou sempre a alma popular. Intervinha no governo do País, na sucessão do trono, em todos os actos de interesse geral que o Rei praticasse: a guerra e a paz, lançamento de impostos, etc. E exercia ainda uma esperta vigilância sobre o procedimento dos homens de Estado, alguns dos quais foram acusados e condenados !
> Em plena Idade Média, enquanto outros Povos gemiam sob o peso do poder absoluto, impúnhamos à nossa Monarquia a forma condicional: o Rei governará se for digno de governar, e governará de acordo com a nossa vontade, expressa em cortes gerais reunidas anualmente.
> Temos ainda várias leis antigas emanadas do Costume, as quais receberam dele uma nuance original que também caracteriza o génio português"[2]

Tratar-se-ia então de, com vasta equipa de pesquisadores, nos di-

[2] PASCOAES, Teixeira de – *Arte de ser Português*, Lisboa, Assírio & Alvim, pp. 78-79.

versos países que falam a nossa língua, procurar traços comuns, e traços diferenciadores dos demais. É uma tarefa hercúlea, mas nada que não se consiga, desde que a torneira dos fundos científicos se abra para este tipo de pesquisas.

Temos a iluminar os nossos esforços esta passagem, algo enigmática, do luso-brasileiro Agostinho da Silva:

> "Mas os Portugueses é que, realmente, levaram o Império Romano até aos seus confins, o Império Romano que ainda hoje dura! Porque aquela história do Império Romano ter acabado quando entraram os Bárbaros, quando entrou o Cristo… coisa nenhuma! O Império veio por aí fora. Hoje, tudo é governado pelo Direito Romano! […] Claro que Portugal tinha o seu próprio Direito! É o drama da Península! O Carlos V, que é um Imperador Alemão, veio para Espanha cheio de Direito Romano. […] As coisas que ele traz para Espanha, traz para a Península. Mas a Península nem era do Direito Romano, nem do mercantilismo capitalista, nem da Contra-Reforma. Também não era da Reforma, era ela, era a Península […] Porque o que os Espanhóis queriam era manter os 'fueros y costumbres', não era a porcaria do Direito Romano, sobretudo do fim do Império, não é?"[3]

Será que no porão das suas caravelas Cabral trouxe, além do tão referido nepotismo da carta de Pero Vaz de Caminha, também algumas sementes de liberdade dos velhos direitos também portugueses das velhas liberdades ibéricas? E como Cabral também Vasco da Gama e outros... No reinado do tão execrado D. João VI (de um e de outro lado do Atlântico) ainda se podem ver alguns vestígios de uma singularidade *antropodikeia* no direito político? Parece que sim... Mas ocorrerá o mesmo no direito privado e no penal?

Gilberto Freyre, na sua obra-prima *Casa Grande & Senzala,* alude ao realismo económico e jurídico dos Portugueses na formação do Brasil e liberdade de expressão "falaram sempre grosso aos representantes de El-Rei" [4]), e refere o sistema leve e irregular da administração do Brasil, pelo menos até ao séc. XVIII, e citando Leroy Beaulieu[5]. Mais diante,

---

[3] SILVA, Agostinho da – *Ir à Índia sem abandonar Portugal*, Lisboa, Assírio & Alvim, 1994pp. 32-34.

[4] FREYRE, Gilberto – *Casa Grande & Senzala. Formação da Família Brasileira sob o Regime de Economia Patriarcal*, Lisboa, Livros do Brasil, s.d., p. 17.

[5] *Ibidem*, p. 30.

alude aos "privilégios" de mouros e judeus[6], logo, tratamento não discriminatório das minorias, que era aliás timbre das Ordenações Afonsinas, etc..

O autor não deixa de referir esse momento fundador das liberdades ibéricas que terá sido o dos concílios de Toledo. E comenta: "(...) em Toledo, no concílio celebrado em 633, os bispos tiveram o gosto de ver o rei prostrado a seus pés".

Contudo, o mais importante terão sido mesmo os resultados para o povo em geral, e não uma questão entre realeza e clero. O clero, aí, terá liderado a vanguarda dos direitos.

Limitamo-nos a citar dois trechos, que nos parecem muitíssimo significativos, de Sérgio Buarque de Holanda, em *Raízes do Brasil*:

> "(...) pela importância particular que atribuem ao valor próprio da pessoa humana, à autonomia de cada um dos homens em relação aos semelhantes no tempo e no espaço, devem os espanhóis e os portugueses muito da sua originalidade nacional "7.
> "E a verdade é que, bem antes de triunfarem no mundo as chamadas ideias revolucionárias, portugueses e espanhóis parecem ter sentido vivamente a irracionalidade específica, a injustiça social de certos privilégios, sobretudo os privilégios hereditários. O prestígio pessoal, independente do nome herdado, manteve-se continuamente nas épocas mais gloriosas da história das nações ibéricas"8.

Também o jusracionalismo luso-brasileiro se nos apresentam com uma faceta tal que em autores e atores jurídicos como Cruz e Silva, Tomás António Gonzaga e Ribeiro dos Santos (estes três com ligação clara ao Brasil) e o (menos brasílico) Melo Freire se nos afigura ficar até em causa a clássica e radical divisão entre jusracionalismo e realismo clássico. Ela tem a seu favor elementos de cor local, cabeleiras empoadas no séc. XVIII, e sobretudo o despotismo iluminado. Mas ao nível jurídico propriamente dito, desde uma peça processual que encontramos em Braga, do punho de Melo Freire, a favor do "Marquesinho" dos Távoras, até à argumentação de Cruz e Silva, na sua polémica com a coroa a propósito da falta dos juízes a uma solenidade de corte, em que haviam

[6] *Ibidem*, p. 198.
[7] HOLANDA, Sérgio Buarque de – *Raízes do Brasil*, 4.ª ed. (1.ª portuguesa), Lisboa, Gradiva, 2000, p. 14.
[8] *Ibidem*, p. 17.

sido de antemão preteridos em favor dos militares (para só citar dois exemplos) tudo nos leva a crer que o corte, pelo menos no mundo de língua portuguesa, é político, mas não é metodológico e quiçá nem sequer das grandes ideias filosófico-jurídicas não imediatamente relacionadas com a política.

Tentei que uma tese de doutoramento analisasse a jurisprudência intensivamente para provar ou infirmar esta hipótese, mas a tese fez-se e aprovou-se, com muito interesse, mas o doutorando, hoje doutor, preferiu ficar nas teorias mais doutrinais... Estava no seu direito...

Fala-se ainda, por exemplo, da suavização das penas, do humanitarismo penal: Manuel José de Paiva, obscuro juiz, teria precedido mesmo o Marquês de Beccaria. Mas pouco mais...

É no plano jurídico-político que a invocação do direito e da tradição nacionais é mais frequente, mas para fazer uma contraposição com o constitucionalismo "estrangeiro" ou "estrangeirado". Cremos contudo que há uma confluência e não oposição entre as formas de controlo e liberdade políticas em tese (na prática a teoria seria outra) existentes nas velhas liberdades hispânicas exportadas para o Mundo, e o constitucionalismo moderno, inglês, americano e francês. São facetas diversas da mesma preocupação. Mas a oposição é vital para os que, como diria Teilhard de Chardin, sendo nossos contemporâneos, ainda não são modernos.

Será preciso, pois, calcorrear a História em busca de exemplos, e não tomar a nuvem da exceção pela Juno da regra. A história, como dizia Dioniso de Halicarnasso, não é (e aqui não pretende ser) mais que "filosofia a partir de exemplos". Os exemplos históricos serão um convite aos estudos no sentido de se avaliar da existência, ainda que mítica, de um legado jurídico com eventuais singularidades.

4. A Filosofia Jurídica Implícita

Mas nem só da análise do espírito das leis lusófonas viveríamos.

Devemos tomar ainda em consideração as chamadas filosofia brasileira e filosofia portuguesa, ou mesmo filosofia luso-brasileira, ou, de todo o mundo (independentemente das classificações, que implicam opções), a filosofia que autores brasileiros e portugueses (e dos PALOP e de Timor, etc.) vão fazendo, quer em estudos especificamente filosóficos, quer em textos literários com dimensão jurisfilosófica.

Pessoalmente, do estudo de autores normalmente sobretudo co-

nhecidos como literários como Fernando Pessoa, Teixeira de Pascoaes, Guerra Junqueiro, e até Raul Brandão, e dos mais filosóficos Leonardo Coimbra, Sampaio Bruno, Álvaro Ribeiro, José Marinho, Dalila Pereira da Costa, Afonso Botelho, Delfim Santos, entre outros, há já algumas regularidades que se podem extrair.

A mais importante das quais afigura-se-nos ser, em geral, o pluralismo jurídico. Sem uma necessária vinculação ao direito natural (pelo contrário, em alguns casos, como em Álvaro Ribeiro, até contra ele, ou o que se pensaria ele ser), mas colocando sempre em causa a omnipotência e *omnivalidade* do mero direito positivo. Colocando sempre, pois, o problema da Justiça.

Leonardo Coimbra será muito claro ao afirmar que a si lhe não importava o código da justiça, se ele tem apenas palavras e não justiça...

Encontrando-se hoje o Direito numa encruzilhada. O que mais nos importa ainda saber será do papel que os juristas, e em especial os amigos da Filosofia do Direito que em ambos os hemisférios falam a Língua Portuguesa, pela particular inventiva, ductilidade, adaptabilidade e particular "génio", serão capazes de desempenhar.

Além da filosofia brasileira propriamente dita (recorde-se que a "Revista Brasileira de Filosofia" *tout court* tem desde sempre ligação a juristas: recordemos o nome de Miguel Reale), a literatura brasileira está cheia de pérolas sobre o Direito. Quão bela seria uma tese, por exemplo, sobre o Direito e a Ética em *Grande Sertão – Veredas*, de Guimarães Rosa, cujo original tive a honra de ver e tocar, como relíquia, pelas mãos do saudoso Dr. Mindelin, na sua casa Biblioteca em São Paulo...

Sabemos, pois, que a Língua é mais que um veículo comunicacional vazio e inócuo. Uma "casa do ser molda" o ser ao mesmo tempo que o espelha. Portanto, mais ainda que um elogio do Pensar o Direito em Português, o mais importante parece ser entender o que venha a ser uma Cultura dos Povos de Língua Portuguesa - e como essa Cultura se pode refletir num Direito com elementos comuns.

Já se pode começar por ver, hoje em dia, por exemplo alguns elementos de uma comunidade constitucional lusófona, ou, ao menos, para já, luso-brasileira: as nossas Constituições são, antes de mais, constituições cidadãs... E por isso "incomodam muita gente" (na verdade pouca, mas relevante)... Ora sendo a Constituição o vértice da pirâmide normativa, é natural que todo o edifício jurídico viesse a refletir os seus valores e princípios, e assim o mesmo ar de família impregnasse todas as fontes de direito e o ambiente ou clima jurídico e institucional em geral. Daí seria impossível refletir sobre o Direito sem ver esse ar de família.

Mas a constitucionalidade irradiante que deveria existir e prevalecer ainda precisa, em geral, de maior aprofundamento. No caso português, a Constituição presentemente a ser vítima de um enorme ataque (com grande apoio da comunicação social), a que o Tribunal Constitucional tem resistido, declarando sucessivamente inconstitucionalidade de normas[9]. Mas é em tempos críticos como os presentes que mais agudamente se pode pensar o Direito, na sua mais radical e profunda realidade: sem véus e sem máscaras.

Ora há sempre uma Filosofia Jurídica ínsita nas várias ordens jurídicas (não é Filosofia do Direito, mas Filosofia no Direito). Ora estamos em crer que, como já Gilberto Freyre previra, a nossa cultura se encontra ameaçada "por parte de grupos tecnicamente mais fortes"[10], ou seja, em termos filosóficos, por uma filosofia geral (uma cosmovisão) que se traduz numa filosofia política e este numa ideologia - que tem passado na comunicação social de "neoliberalismo" a "ultraliberalismo" e agora já vai sendo chamada "liberal fascismo"[11] - a qual nada tem a ver com os valores que nos são próprios, antes arranca do individualismo possessivo, normalmente considerado mais próprio de outras latitudes[12].

---

[9] Cf., por todos, FERREIRA DA CUNHA, Paulo – *Constituição & Política*, Lisboa, Quid Juris, 2012; Idem – *Direito Constitucional Geral*, nova ed., Lisboa, Quid Juris, 2013.

[10] FREYRE, Gilberto – *Uma Cultura Ameaçada: a Luso-Brasileira*, *apud O Futuro Político da Lusofonia*, Lisboa, Verbo, 2002, de Vamireh Chacon.

[11] Cf. algumas aproximações a novas manifestações do fenómeno, *v.g. in* BOMBIG, Alberto / CORONATO, Marcos – *Dilemas da Democracia*, "Época", 12 de agosto de 2013, p. 52-54. V. ainda RIEMEN, Rob – *De eeuwige terugkeer van het fascisme*, trad. port. de Maria Carvalho, *O Eterno Retorno do Fascismo*, trad. port., Lisboa, Bizâncio, 2012. Explicitamente, no Brasil, ALTMAN, Breno – *Neoconservadors são Vanguarda Liberal-Fascista*, in: ttp://www.brasil247.com/pt/247/poder/110840/

[12] Cf. o clássico MACPHERSON, C. B. — *The Political Theory of Possessive Individualism,* Clarendon Press, Oxford University Press, 1962. E ainda, *v.g.*, BOUDON, Raymond —*L'Individualisme en Sociologie (Entretien)*, in «Esprit», n.º 108, nov. 1985, p. 101-110; CAMPS, Victoria — *Paradojas del Individualismo*, Crítica, 1993, trad. port. de Manuel Alberto, *Paradoxos do Individualismo*, Lisboa, Relógio D'Água, 1996; DUMONT, Louis — *Ensaios sobre o Individualismo. Uma perspectiva antropológica sobre a ideologia moderna*, trad. port. de Miguel Serras Pereira, Lisboa, Dom Quixote, 1992; LIPOVETSKY, Gilles — *L'Ere du Vide*, trad. port. de Miguel Serras Pereira e Ana Luísa Faria, *A Era do vazio. Ensaio sobre o Individualismo Contemporâneo*, Lisboa, Relógio d 'água, 1988.

A influência de J. C. Salgado na produção científica em Filosofia do Direito na Faculdade de Direito da Universidade Federal de Minas Gerais

Laura Souza Lima e Brito[1]

Resumo: O presente artigo defende a existência positiva de uma tradição na pesquisa produzida sob orientação dos docentes da área de Filosofia do Direito na Universidade Federal de Minas Gerais. Ainda, resta demonstrado que há uma concentração dos trabalhos científicos em torno da produção de Joaquim Carlos Salgado, professor titular de Filosofia do Direito naquela universidade desde 1991, aposentado em 2009. Especificamente, dentro do acima exposto, é apontado que a linha mestra desse núcleo de produção científica é a efetivação do processo histórico das instituições e dos valores jurídicos.

Palavras-chave: Filosofia do Direito. Universidade Federal de Minas Gerais. Pós-graduação.

1. Considerações Iniciais

O presente artigo foi elaborado para ser apresentado no XXVI World Congress of Philosophy of Law and Social Philosophy, ocorrido na Universidade Federal de Minas Gerais, no grupo de trabalho especial denominado VII Jornada Brasileira de Filosofia do Direito, cuja pretensão temática era: "reunir os trabalhos que representam o estado da arte da Filosofia do Direito no Brasil (e de todas as suas disciplinas, tais como Teoria da Justiça, Teoria do Método Jurídico, Hermenêutica Jurídica, etc)". Diante disso, a proposta ora apresentada é de uma análise da presença dos temas tradicionalmente pesquisados por Joaquim Carlos Salgado nas dissertações e teses na Faculdade de Direito da UFMG como um parâmetro possível de verificação da inter-relação das pesquisas de

[1] Aluna do Programa de Pós-Graduação da Faculdade de Direito da Universidade de São Paulo – nível doutorado. Graduada em Direito na Faculdade de Direito da Universidade Federal de Minas Gerais. Email: lauraslbrito@gmail.com/laurabrito@usp.br.

Filosofia do Direito naquela instituição.

Salgado é Professor Titular de Teoria Geral e Filosofia do Direito na Faculdade de Direito da UFMG desde 1991, tendo se aposentado compulsoriamente em 2009. Desde então, ministra seminários na pós-graduação da faculdade. Durante a carreira docente, ministrou diversas disciplinas na graduação e na pós-graduação e orientou alunos de mestrado e doutorado.

Sua obra tem eixos fundamentais que podem ser entendidos como: (a) teoria da justiça; (b) a experiência da consciência jurídica em Roma; (c) a relação entre a razão e a história do direito e do Estado no ocidente; (d) o idealismo alemão; (e) direitos fundamentais como a justiça concreta no mundo contemporâneo; e (f) fundamentos da hermenêutica[2].

A questão proposta é: do universo de teses e dissertações defendidas na Faculdade de Direito da UFMG, na área de Filosofia do Direito, desde 1991 até a metade de 2013, quantas abordam temas diretamente ligados aos eixos acima apontados?

Os trabalhos defendidos naquela instituição estão disponíveis na internet[3], com possibilidade pesquisa por orientador e ordenação dos resultados por data da defesa. Diante desses dados, serão analisados os trabalhos orientados pelos professores do Departamento de Direito do Trabalho e Introdução ao Estudo do Direito, excetuadas as teses e dissertações orientadas por professores de Direito do Trabalho. Ainda, serão considerados os trabalhos defendidos do ano de 1991 até julho de 2013, ou seja, desde que Salgado tornou-se titular da área de Filosofia do Direito na UFMG até a apresentação da presente pesquisa no XXVI World Congress of Philosophy of Law and Social Philosophy.

O método para verificação da similaridade do tema dos trabalhos obtidos pela pesquisa na plataforma virtual da universidade com os eixos de estudo de Salgado foi a leitura de sumário, resumo, introdução, conclusão e referências bibliográficas, sempre que disponíveis. Aqueles trabalhos que apresentarem a obra de Salgado como bibliografia central para o desenvolvimento ou que a temática abordada seja um de seus

[2] Esta é a síntese realizada pela autora deste artigo, de acordo com a sua leitura da obra em análise. Segundo o texto informado por Joaquim Carlos Salgado em seu currículo na Platafoma Lattes, ele "tem experiência na área de Direito, com ênfase em Filosofia do Direito, atuando principalmente nos seguintes temas: direito, direitos fundamentais, filosofia, teoria da justiça e hermenêutica". Disponível em < http://lattes.cnpq.br/2312044112222253>, acessado em 01 de julho de 2013.

[3] Disponível em <http://www.pos.direito.ufmg.br>, acessado em 01 de julho de 2013.

eixos fundamentais serão justificadamente apontados como "coerentes com a pesquisa de Salgado". Ao fim, serão confrontados o número de trabalhos analisados e o de estudos que abordam os temas em comento.

A hipótese deste trabalho é que Joaquim Carlos Salgado conseguiu formar gerações de pesquisadores na UFMG em torno de uma pesquisa alinhada e consistente, com coerência mútua entre eles, como aspecto positivo da produção de conhecimento, nos termos das orientações mais recentes de planejamento de pesquisa no Brasil.

2. Eixos fundamentais da pesquisa desenvolvida por Salgado

Joaquim Carlos Salgado formou-se em Direito (1962) e em Filosofia (1973) na Universidade Federal de Minas Gerais. É especialista em Filosofia do Direito pela Universidade de Bonn (1976) e Doutor em Direito pela Universidade Federal de Minas Gerais (1985).

De acordo com as informações contidas no currículo de Salgado na Plataforma Lattes, desde 1980 ele desenvolve o projeto de pesquisa *Justiça: teoria e realidade*, descrito da seguinte maneira:

> Investigação do percurso histórico da idéia de justiça, em íntima conexão com a demanda pela efetividade do Direito. O projeto encontra-se em desenvolvimento desde os anos 1980 e em seu âmbito produziu-se A Idéia de Justiça em Kant, A Idéia de Justiça em Hegel e o recente A Idéia de Justiça no Mundo Contemporâneo. A investigação desdobra-se na direção da construção de uma Teoria da Justiça conectada ao legado do pensamento ocidental e ao projeto ético do Estado de Direito e apta a servir ao Direito.

Importante, então, salientar que a análise realizada neste artigo acerca das temáticas desenvolvidas por Joaquim Carlos Salgado corrobora, mas vai além das informações por ele prestadas oficialmente, sendo fruto de pesquisa da autora sobre a obra do professor em comento e de sua inteira responsabilidade.

Diante disso, é possível começar a explicitar os principais eixos formados por suas pesquisas desde então a partir de um tronco fundamental que é a história do desenvolvimento dialético da idéia de justiça no mundo ocidental, elaborada em cinco volumes. Na realidade, só a posteridade pôde apresentar sua principal obra como unidade desenvolvida em múltiplas etapas. Explica-se.

O primeiro parte trazida ao público é sua tese de doutorado,

publicada originalmente pela Editora UFMG (1986 e 1995) e em versão revista pela Editora Del Rey (2012), intitulada *A idéia de justiça em Kant*: seu fundamento na liberdade e na igualdade. A referida obra tem como objetivo demonstrar que Kant centraliza seu conceito de justiça na questão da liberdade intrínseca a cada homem: "o primeiro bem que se deve reconhecer a cada um, pelo simples fato de ser humano, é a liberdade" (SALGADO, 1995, p. 20). Segundo Salgado, a tradição antiga e medieval da idéia de justiça como igualdade é conservada em Kant, junto à qual ele destaca o seu elemento eminentemente ético que é a liberdade. Neste caso, a idéia de justiça encontra-se no âmbito da filosofia do sujeito.

A obra *A idéia de justiça em Kant* já apresenta o posicionamento de Joaquim Carlos Salgado no sentido de

> A idéia de justiça, vista assim do ponto de vista dialético da sua evolução histórica a partir dos momentos concretos de seu aparecimento, embora se mostre também como ideologia na medida em que representa interesses de classe, incorpora-se como valor ao patrimônio espiritual da humanidade civilizada. Como é apenas uma idéia, não pretende efetivar-se mecanicamente, mas de forma dialética, segundo as novas conquistas materiais e espirituais da humanidade. (SALGADO, 1995, p. 20)

O segundo trabalho desse tronco fundamental é *A idéia de justiça em Hegel*, publicação feita pelas Edições Loyola (1996) da tese para professor titular da Faculdade de Direito da Universidade Federal de Minas Gerais. Este livro aborda, por meio da análise da Filosofia do Direito de Hegel, a assimilação de um novo valor à idéia de justiça - ao lado da igualdade (período clássico) e da liberdade (modernidade), agora se tem o trabalho, compondo a idéia de justiça social no Estado democrático contemporâneo. Neste volume, a idéia de justiça está no âmbito da metafísica especulativa.

A terceira obra que compõe o centro da pesquisa de Salgado é *A idéia de justiça no mundo contemporâneo*: fundamentação e aplicação do direito como *maximum* ético, publicado pela Editora Del Rey em 2007. Neste livro, há uma perspectiva histórica evidente, vez que, segundo o próprio autor, "este livro trata do resgate da experiência jurídica em Roma para o entendimento da idéia de justiça no mundo contemporâneo" (SALGADO, 2007, p. 1). A processualidade histórica da idéia de justiça, que se revela na atualidade como efetivação de direitos fundamentais universalmente declarados e reconhecidos, é o fio condutor da

pesquisa. Em suma:

> A idéia de justiça no mundo contemporâneo é a efetividade de todo o processo histórico, cujo vetor é a racionalidade imanente do *ethos* ocidental que se desenvolve do conceito de homem (*zoon logikón*), desdobrado historicamente como cidadão da pólis, pessoa de direito em Roma até ao de sujeito de direito universal, reconhecido formalmente nas constituições dos Estados civilizados do nosso tempo histórico, bem como na Carta das Nações Unidas, como tentativa de síntese da *voluntas* e do *logos* na ordenação racional da vida, tarefa do direito (SALGADO, 2007, p. 270).

O quarto livro sobre a idéia de justiça é, na realidade, o primeiro volume do tratado e será lançado sob o título *A idéia de justiça no período clássico*. A obra está no prelo e seu conteúdo encontra-se no âmbito da metafísica do objeto.

Por fim, o quinto volume do conjunto da obra, em revisão pelo autor, deve receber o título *A idéia de justiça no mundo contemporâneo II*. Este último aprofundará o desdobramento dos direitos fundamentais no Estado de Direito contemporâneo, na perspectiva do *maximum* ético, como momento de efetivação do embate historicamente desenvolvido entre poder e liberdade, como anunciado em outros textos de Salgado. Neste volume de conclusão, o autor destaca que o enfrentamento da questão posta − a de como se realiza a justiça como idéia no mundo contemporâneo − exige que o tema seja tratado segundo uma perspectiva interdisciplinar, em que a organização do poder e a ordenação da liberdade tenham consideração epistemológica própria[4].

São também relevantes para o levantamento dos temas que se revelaram como constantes das pesquisas de Joaquim Carlos Salgado os artigos por ele publicados, dentro os quais, devem ser destacados: *Os direitos fundamentais* (1996); *Princípios hermenêuticos dos direitos fundamentais* (1996); *Fundamentos filosóficos para uma hermenêutica jurídica* (1997); *Hermenêutica dos direitos fundamentais e o Judiciário* (1997); *O estado ético e o estado poiético* (1998); *Contas e ética* (1999); *Semiótica estrutural e transcendentalidade do discurso sobre a justiça* (2000); *A experiência da consciência jurídica em Roma* (2001); *Globalização e justiça universal concreta* (2004). Todos eles, de alguma forma, tratam da retomada histórica da idéia de justiça no mundo ocidental, com destaque para a matriz romana e ten-

[4] Referências da obra em revisão me foram gentilmente cedidas pelo Professor Joaquim Carlos Salgado em e-mail de 20 de janeiro de 2014.

do como cumeada os direitos fundamentais no mundo contemporâneo, cuja efetivação depende de um rigoroso estudo hermenêutico.

Diante disso, é possível afirmar que a obra de Joaquim Carlos Salgado tem eixos fundamentais que podem ser entendidos como: (a) teoria da justiça; (b) a experiência da consciência jurídica em Roma; (c) a relação entre a razão e a história do direito e do Estado no ocidente; (d) o idealismo alemão; (e) direitos fundamentais como a justiça concreta no mundo contemporâneo; e (f) fundamentos da hermenêutica.

3. Os trabalhos defendidos na pós-graduação da Faculdade de Direito da UFMG

Está disponível na página da internet da Pós-Graduação em Direito da Universidade Federal de Minas Gerais um registro das teses e dissertações defendidas no programa daquela instituição[5]. Não é possível identificar se todas as teses e dissertações estão listadas nessa base de dados, mas é possível afirmar que, até julho de 2013, existiam 1.112 trabalhos enumerados, sendo 303 teses e 809 dissertações.

Para fins deste trabalho, do universo acima apontado, foram selecionados os trabalhos orientados pelos professores do Departamento de Direito do Trabalho e Introdução ao Estudo do Direito[6], excetuadas as teses e dissertações orientadas por professores que lecionam Direito do Trabalho. Ainda, foram considerados os trabalhos defendidos a partir do ano de 1991, ou seja, desde que Joaquim Carlos Salgado tornou-se titular da área de Filosofia do Direito na UFMG.

Diante dos critérios acima relacionados, foi possível selecionar 96 trabalhos de pós-graduação, sendo 29 teses e 67 dissertações.

Esses 96 trabalhos previamente selecionados foram analisados por meio da leitura das informações disponíveis no site do PPG – título, linha de pesquisa, resumo, palavras-chave (quando informadas) –, além de dados encontrados em página de busca na internet. Aos referidos trabalhos foram aplicados os seguintes critérios de classificação: são coerentes com as pesquisas do Professor Salgado? Em caso positivo, qual a justificativa?

---

[5] Disponível em: http://www.pos.direito.ufmg.br/tesediss.php. Acessado em 01 de julho de 2013.

[6] Existem trabalhos que poderiam ser identificados como da área de Filosofia e Teoria Geral do Direito que foram orientados por professores de outros departamentos. Nesse caso, não foram considerados neste artigo.

Para responder a essa última pergunta, as respostas possíveis, baseadas no tema e nos marcos teóricos dos trabalhos, eram: (a) teoria da justiça; (b) experiência da consciência jurídica em Roma; (c) relação entre a razão e a história do direito e do Estado no ocidente; (d) idealismo alemão; (e) direitos fundamentais como a justiça concreta no mundo contemporâneo; (f) fundamentos da hermenêutica.

O resultado encontrado foi que, dos 96 trabalhos analisados, 56 tinham, por meio de algum desses critérios acima mencionados, coerência com os eixos de pesquisa de Joaquim Carlos Salgado. Dentre eles, 18 teses e 38 dissertações.

É preciso destacar também que, entre os trabalhos testados, 35 – 18 teses e 17 dissertações – foram de orientação do próprio Salgado, sendo o professor da área que mais orientou no período selecionado. Ou seja, 36,45% dos trabalhos defendidos em Filosofia do Direito entre 1991 e 2013 foram de orientação do professor em comento.

Ainda quanto aos critérios de justificação da classificação como "coerentes com a pesquisa de Joaquim Carlos Salgado", é preciso esclarecer que alguns trabalhos satisfaziam mais de um tópico. Nesses casos, foi indicado somente o de maior adesão. Ainda, em dois casos, por falta de informações, os trabalhos foram indicados como não coerentes.

Dito isso, foi possível encontrar os seguintes resultados:

1. 8 trabalhos sobre "teoria da justiça", sendo 3 teses e 5 dissertações;
2. 4 trabalhos sobre "experiência da consciência jurídica em Roma", sendo 1 teses e 3 dissertações;
3. 12 trabalhos sobre "relação entre a razão e a história do direito e do Estado no ocidente", sendo 5 teses e 7 dissertações;
4. 7 trabalhos sobre "idealismo alemão", sendo 3 teses e 4 dissertações;
5. 7 trabalhos sobre "direitos fundamentais como a justiça concreta no mundo contemporâneo", sendo 3 teses e 4 dissertações;
6. 18 trabalhos sobre "fundamentos da hermenêutica", sendo 3 teses e 15 dissertações.

Interessante notar, nesse sentido, que o tema da hermenêutica teve o maior número de adesões. Esse foi um tema de pesquisa cuja ampla divulgação também foi dada por Salgado, desde estudantes da

graduação, já que na "hermenêutica jurídica tem de inserir-se os princípios superiores do direito" (SALGADO, 1996b, p. 29). Ainda, a relevância do tema da hermenêutica dentro do panorama geral da pesquisa de Salgado aparece nos seguintes termos: "todas as suas regras e princípios subalternos convergem para a realização do fim supremo do direito: realizar a liberdade" (SALGADO, 1996b, p. 29).

Ainda, a hermenêutica é o foco da pesquisa da Professora Maria Helena Damasceno e Silva Megale, que sucedeu o Professor Joaquim Carlos Salgado no cargo de titular do Departamento de Direito do Trabalho e Introdução ao Estudo do Direito, e que foi orientada em seu doutorado por Salgado.

Mas entende-se que o maior destaque deve ser dado para a grande adesão ao tema da "relação entre a razão e a história do direito e do Estado no ocidente", que aponta para a hipótese de que o ponto central da pesquisa realizada na área de Filosofia do Direito na Universidade Federal de Minas Gerais tem sido a processualidade histórica do Direito, em outras palavras, a efetivação do processo histórico das instituições e dos valores jurídicos.

Em suma, entre 1991 e julho de 2013, 58% dos trabalhos de pós-graduação *stricto sensu* defendidos sob orientação dos professores do Departamento de Direito do Trabalho e Introdução ao Estudo do Direito da Universidade Federal de Minas Gerais guardavam coerência com a pesquisa desenvolvida pelo Professor Joaquim Carlos Salgado, titular da área entre 19991 e 2009. Tendo em vista que o departamento em tela teve, nesse período, 12 professores orientadores[7], cada qual com liberdade científica para desenvolver seus projetos de pesquisa, é possível afirmar que a alta concentração de trabalhos com temas coerentes aos aqui apontados demonstra a consolidação de uma tradição de pesquisa na Universidade Federal de Minas Gerais.

[7] Alexandre Travessoni Gomes, Elza Maria Miranda Afonso, Fabiana de Menezes Soares, Gerson de Britto Mello Boson, Joaquim Carlos Salgado, José Luiz Borges Horta, Mariá Aparecida Brochado Ferreira, Maria Helena Damasceno e Silva Megale, Miracy Barbosa de Sousa Gustin, Mônica Sette Lopes, Renato César Cardoso e Ricardo Henrique de Carvalho Salgado.

4. A busca pelo planejamento da pesquisa no Brasil

A primeira experiência de estabelecimento de critérios de avaliação de pós-graduação em Direito ocorreu em 2001, na avaliação referente ao período 1998-2000[8]. Desde então, são critérios de qualificação desses cursos a adequação e abrangência dos projetos e linhas de pesquisa em relação às áreas de concentração e o vínculo entre linhas e projetos de pesquisa.

Nos critérios de avaliação mais recentes disponibilizados pela CAPES, referentes ao triênio 2004-2006, a questão da coerência e consistência das áreas de concentração, linhas de pesquisa e projetos em andamento continua presente, sendo certo que "linhas de pesquisa que não guardam organicidade entre si e ligação com a área indicam incoerência e conseqüente inconsistência da proposta do programa"[9].

Ou seja, há aproximadamente quinze anos, existe uma busca pelo planejamento da pesquisa em direito no Brasil, sendo certo que faz parte desse plano a coesão entre os trabalhos científicos produzidos numa mesma área dentro de determinado programa de pós-graduação. Isso porque o planejamento da pesquisa no Brasil é o "o reconhecimento de que o processo contemporâneo de pesquisa deve ser coletivo e articulado institucionalmente, como forma de garantir sustentabilidade a muitas universidades e outras organizações congêneres" (BORGES-ANDRADE, 2003, p. 163).

Não é demais observar que, à primeira vista, quando do início da instituição do planejamento de pesquisa em direito, a articulação institucional da produção de conhecimento pareceu uma cerceamento da liberdade científica, ou uma espécie de imposição de cima para baixo nas pesquisas desenvolvidas na pós-graduação. Mas, na realidade, mesmo nas ciências sociais aplicadas, como é o caso do direito, "a cooperação na pesquisa, a sinergia, só pode ser obtida com a união efetiva e o trabalho conjunto de pesquisadores da mesma área e dentro de objetivos comuns" (MARRARA, 2004, p. 24-25).

As breves referências acima expostas acerca de critérios de avaliação da pós-graduação em direito servem para reforçar as vantagens da formação de uma tradição em pesquisa nas áreas de concentração

[8] Disponível em: http://www.capes.gov.br/images/stories/download/avaliacao/Direito2001_2003.pdf. Acessado em: 01 de julho de 2013.

[9] Disponível em: http://www.capes.gov.br/images/stories/download/avaliacao/CA2007_Direito.pdf. Acessado em 01 de julho de 2013.

dos programas, assim como se pode verificar, a partir de 1991, na Universidade Federal de Minas Gerais.

5. Considerações finais

A hipótese original deste trabalho era a de que seria possível demonstrar que existe coerência na pesquisa desenvolvida pelos docentes da área de Filosofia do Direito no programa de pós-graduação em direito da Universidade Federal de Minas Gerais, sendo certo que o eixo fundamental dessa coesão seria o trabalho articulado por Joaquim Carlos Salgado a partir de 1991, quando se tornou professor titular da mesma área.

Acredita-se que a hipótese mostrou-se fundamentadamente comprovada, já que do universo de 96 teses e dissertações defendidas na Faculdade de Direito da UFMG, na área de Filosofia do Direito, desde 1991, 56 aguardavam coerência com os eixos de pesquisa de Salgado, quais sejam: (a) teoria da justiça; (b) experiência da consciência jurídica em Roma; (c) relação entre a razão e a história do direito e do Estado no ocidente; (d) idealismo alemão; (e) direitos fundamentais como a justiça concreta no mundo contemporâneo; (f) fundamentos da hermenêutica.

Além disso, entende-se que ficou ressaltado que a linha mestra do conjunto de pesquisa em comento pode ser entendida, em suma, como a efetivação do processo histórico das instituições e dos valores jurídicos.

Por fim, também restou demonstrado que existência de uma tradição científica em torno de temas interligados na área de Filosofia do Direito na Universidade Federal de Minas Gerais está positivamente alinhada com as determinações mais atuais sobre o planejamento da pesquisa no Brasil.

Referências bibliográficas

BORGES-ANDRADE, Jairo Eduardo. Em busca do conceito de linha de pesquisa. **RAC**, v. 7, n. 2, abr./jun. 2003: 157-170.

MARRARA, Thiago. Liberdade científica e planejamento: uma tensão aparente. **RBPG**, v. 1, n. 2, nov. 2004: 71-80.

SALGADO, Joaquim Carlos. **A idéia de justiça em Hegel**. São Paulo: Loyola, 1996.

_____. **A idéia de justiça em Kant**: seu fundamento na liberdade e na igualdade. Belo Horizonte: Editora UFMG, 1986.

_____. **A idéia de justiça em Kant**: seu fundamento na liberdade e na igualdade. 2. ed. Belo Horizonte: Editora UFMG, 1995.

_____. **A idéia de justiça em Kant**: seu fundamento na liberdade e na igualdade. 3. ed. Belo Horizonte: Del Rey, 2012.

_____. **A idéia de justiça no mundo contemporâneo**: fundamentação e aplicação do direito como *maximum* ético. Belo Horizonte: Del Rey, 2007.

_____. Contas e ética. **Revista do Tribunal de Contas de Minas Gerais**, 1999.

_____. Os direitos fundamentais. **Revista Brasileira de Estudos Políticos**, n. 82, jan. 1996a.

_____. O estado ético e o estado poiético. **Revista do Tribunal de Contas de Minas Gerais**, vol. 27, n. 2, abr./jun. 1998.

_____. A Experiência da Consciência Jurídica em Roma. **Revista do Tribunal de Contas de Minas Gerais**, 2002.

_____. Fundamentos filosóficos para uma hermenêutica jurídica. **Sino de Samuel**, 1997.

_____. Globalização e justiça universal concreta. **Revista Brasileira de Estudos Políticos**, n. 89, jan./jun. 2004.

_____. Hermenêutica dos direitos fundamentais e o Judiciário. **Sino de Samuel**, 1997.

_____. Princípios Hermenêuticos dos Direitos Fundamentais. **Revista do Tribunal de Contas de Minas Gerais**, vol 20, n. 3, jul./set. 1996b.

_____. Semiótica estrutural e transcendentalidade do discurso sobre justiça. **Revista da Faculdade de Direito da Universidade Federal de Minas Gerais**, vol. 1, n. 37, 2000: 79-102.

Pode-se prescindir da ideia de contrato social como parâmetro para uma teoria da justiça relevante?

Alguns inconvenientes da abordagem comparativa de Amartya Sen

Fábio Creder

Resumo: Em A ideia de justiça, sua obra de 2009, Sen enuncia uma crítica contundente às teorias políticas modernas alicerçadas sobre a ideia de contrato social, especialmente a de John Rawls, cuja abordagem da justiça distributiva conta-se entre os exemplares mais notáveis desta corrente.

Neste trabalho pretendo analisar a procedência da crítica de Sen ao contratualismo rawlsiano, ao qual opõe uma abordagem supostamente focada não na concepção, ou identificação transcendental, da justiça ideal, mas na comparação dos resultados empíricos das tentativas de combater fenômenos de injustiça remediáveis com os quais nos deparamos quotidianamente.

A crítica de Sen evidentemente possui vários méritos, mas há que se questionar a possibilidade de uma teoria política ou do direito conceber a estrutura básica de uma sociedade prescindindo de alguma concepção mínima de contrato social. A teoria da justiça de Sen, marcada pelo dinamismo característico do pensamento econômico, com seu método comparativo, focado nas realizações efetivamente viáveis nas sociedades tais como se nos apresentam no tempo em que são consideradas, provavelmente carece de elementos que possibilitem a concepção de uma estrutura institucional mínima para um Estado em fase de constituição. Parece-me, ademais, que a doutrina rawlsiana seja essencialmente uma teoria do direito constitucional, e como tal deva ser interpretada.

A hipótese, portanto, que eu gostaria de aventar neste trabalho, sugere que a abordagem de Sen, a despeito do seu louvável pragmatismo, ao invés de afigurar-se uma alternativa à teoria da justiça de Rawls, seria mais bem considerada seu importante, e até mesmo indispensável complemento. Pretendo demonstrar que o contratualismo, designadamente o rawlsiano, cumpre satisfatoriamente a tarefa de ser uma espécie de necessário princípio regulativo da justiça social em determinada sociedade. Mas suas pretensões de "perfeição" (no dizer de Sen) devem ser compensadas por uma análise imparcial e objetiva das situações concretas das sociedades em questão, e das realizações passíveis de

serem alcançadas no sentido de um avanço efetivo da justiça, conquanto precário, porque a realidade sempre impõe limites às nossas mais nobres pretensões. O método mais adequado a uma análise deste tipo parece-me, de fato, como quer Sen, ser o comparativo; mas a sua aplicação não dispensa a adoção de um arcabouço teórico mais abstrato, como o proposto por Rawls. Ao contrário, penso que, na verdade, o pressuponha.

1. Em sua obra de 2009, *A ideia de justiça*, Amartya Sen enuncia uma crítica contundente às teorias políticas modernas alicerçadas sobre a ideia de contrato social, especialmente a de John Rawls, cuja abordagem da justiça distributiva na obra *Uma teoria da justiça* constituiu-se um novo paradigma entre as teorias contratuais contemporâneas.

Neste trabalho pretendo analisar a procedência da crítica de Sen às teorias do contrato social em geral, e ao contratualismo rawlsiano em particular, às quais opõe uma abordagem supostamente focada não na concepção, ou identificação transcendental, da justiça ideal, mas na comparação dos resultados empíricos das tentativas de combater fenômenos de injustiça remediáveis com os quais nos deparamos quotidianamente.

Conforme veremos, a crítica de Sen evidentemente possui vários méritos, mas há que se questionar a possibilidade de uma teoria política conceber a estrutura básica de uma sociedade prescindindo de alguma concepção mínima de contrato social. A teoria da justiça de Sen, marcada pelo dinamismo característico do pensamento econômico, com seu método comparativo, focado nas realizações efetivamente viáveis nas sociedades tais como se nos apresentam no tempo em que são consideradas, provavelmente carece de elementos que possibilitem a concepção de uma estrutura institucional mínima para um Estado em fase de constituição.

A hipótese, portanto, que eu gostaria de aventar neste trabalho, sugere que a abordagem de Sen, a despeito do seu louvável pragmatismo, ao invés de afigurar-se uma alternativa à teoria da justiça de Rawls, seria melhor considerada seu importante, e até mesmo indispensável complemento.

2. Um mote perpassa a obra em que Sen enuncia a sua teoria da justiça: a ideia segundo a qual o que nos move a agir contra a injustiça não é a constatação de que o mundo fracasse em ser completamente justo, mas o fato de as injustiças que queremos eliminar serem claramente elimináveis. Não é, pois, a frustração de um desejo talvez impossível de ser satisfeito o que nos move à ação, mas o reconhecimento de que exis-

tem injustiças cuja abolição é possível.

Eis porque Amartya Sen defende categoricamente a identificação de injustiças corrigíveis como sendo o elemento crucial de uma teoria da justiça. O seu objetivo é, pois, bastante preciso. Não lhe interessa conhecer, ou conceber, a natureza da justiça perfeita. Portanto, certas difíceis questões que se têm colocado sobre este problema, mormente nas teorias da justiça predominantes na filosofia política contemporânea, não lhe parecem merecedoras do esforço de respondê-las. Com efeito, segundo Sen, são outras as questões que devem ser respondidas. Elas não indagam em que consiste a justiça perfeita, mas o que está ao nosso alcance fazermos para promovermos a justiça e eliminarmos a injustiça.

3. Sen enfatiza particularmente três diferenças entre o tipo de teoria da justiça ao qual a sua se filia e aquele ao qual se filiam as demais teorias da justiça ainda predominantes na atualidade (Cf. Sen, 2010 [2009], pp. ix-xi).

A primeira diz respeito à *aptidão a servir como base do raciocínio prático*. Teorias da justiça que apenas pretendam caracterizar sociedades perfeitamente justas são incapazes de servir a este propósito. Somente uma teoria da justiça que inclua *modos de julgar como reduzir a injustiça e promover a justiça* pode servir como base do raciocínio prático.

Há, pois, dois exercícios antagônicos subjacentes a cada um desses tipos de teoria. Um consiste em identificar arranjos sociais perfeitamente justos, e o outro em *decidir se determinada mudança social promove melhor ou não a justiça*.

Sen considera o exercício inerente ao segundo tipo de teoria central à tomada de decisões acerca de instituições, comportamentos e outros determinantes da justiça; e que o processo pelo qual tais decisões são deliberadas seja crucial para uma teoria da justiça que pretenda guiar o raciocínio prático acerca do que deve ser feito. Trata-se de um exercício *comparativo*, que, segundo Sen, não depende absolutamente de uma identificação prévia das exigências da justiça perfeita.

Em segundo lugar, Sen reconhece que, embora muitas questões comparativas de justiça possam ser efetivamente resolvidas, podendo-se chegar, acerca delas, a um acordo com base em argumentos razoáveis, há comparações nas quais considerações conflitantes não podem ser completamente resolvidas. Sen defende a possibilidade de várias razões de justiça distintas serem capazes de sobreviver a um escrutínio

crítico, e, não obstante, produzirem conclusões divergentes[1].

Em terceiro lugar, Sen nota que a presença de uma injustiça remediável pode não estar associada a deficiências institucionais, mas a *transgressões comportamentais*; uma vez que a ideia de justiça concerne, sobretudo, ao modo como as pessoas vivem, e não meramente à natureza das instituições que compõem a estrutura básica da sua sociedade.

Em contrapartida, as teorias contemporâneas da justiça objetadas por Sen reputam primordial o objetivo de se estabelecerem *instituições justas*, atribuindo aos aspectos comportamentais um papel meramente subsidiário e derivado.

A abordagem de Rawls da justiça como equidade, por exemplo, produziria um conjunto peculiar de princípios de justiça cujo propósito é estabelecer instituições justas que constituam a estrutura básica da sociedade, presumindo que os comportamentos dos seus membros se adéquem impecavelmente às exigências do funcionamento apropriado dessas instituições.

A teoria da justiça defendida por Sen parece considerar ingênua essa ênfase nas instituições, bem como a presunção de os comportamentos das pessoas serem apropriadamente dóceis às suas exigências. O que, ao contrário, precisa ser enfatizado, segundo ele, são as vidas que as pessoas são capazes de viver. O enfoque da vida real na avaliação da justiça teria, pois, muitas amplas implicações para a natureza e o alcance da ideia de justiça.

O uso da perspectiva comparativa, adotada pela teoria da justiça de Sen, teria o grande mérito de transcender a estrutura limitada e limitante do contrato social, ao comprometer-se na realização de comparações das práticas de promoção da justiça.

4. Sen remonta tanto a sua abordagem da justiça, quanto aquelas às quais se opõe, a duas linhas básicas e divergentes de raciocínio acerca da justiça surgidas no contexto do Iluminismo europeu, às quais denomina, respectivamente, *institucionalismo transcendental* e *abordagem comparativa focada em realizações*.

O institucionalismo transcendental assumiria prioritariamente a tarefa de identificar arranjos institucionais justos para a sociedade, e se-

[1] Sen cita Isaiah Berlin e Bernard Williams como exemplos de pensadores que exploraram extensa e poderosamente a importância da pluralidade avaliativa. E cita Michael Walzer, Charles Taylor e Michael Sandel como exemplos de pensadores que discutiram variações de valores entre povos em diferentes comunidades.

ria marcado por duas características básicas. A primeira consistiria justamente no enfoque na identificação da justiça perfeita, e não em comparações relativas de justiça e injustiça; enquanto a segunda concerniria ao fato de, na busca da justiça perfeita, se concentrar principalmente em obter a correção das instituições, não estando diretamente focado nas sociedades reais que acabariam por surgir. De acordo com Sen, ambas as características referem-se ao modo "contratualista" de pensar, inaugurado por Hobbes e desenvolvido por Locke, Rousseau e Kant.

Um "contrato social" hipotético, presumidamente escolhido, está claramente preocupado com uma alternativa ideal para o caos que, de outro modo, poderia caracterizar uma sociedade; e os principais contratos discutidos pelos autores lidavam principalmente com a escolha de instituições. O resultado geral, segundo Sen, teria sido a concepção de teorias da justiça centradas na identificação transcendental de instituições ideais.

Em franco contraste com o institucionalismo transcendental, Sen propõe que outros teóricos do Iluminismo adotaram abordagens comparativas, preocupadas com realizações sociais. Versões desse pensamento comparativo seriam encontradas, sobretudo, nas obras de Adam Smith, Condorcet, Jeremy Bentham, Mary Wollstonecraft, Karl Marx, e John Stuart Mill. Ainda que esses autores, com suas ideias tão diferentes das exigências da justiça, tenham proposto maneiras completamente distintas de se fazerem comparações sociais, Sen supõe que estivessem todos envolvidos em comparações de sociedades que já existiam ou podiam viavelmente surgir. Eles estariam voltados para comparações focadas em realizações, e se interessariam pela remoção de injustiças manifestas no mundo tal como se lhes apresentava.

Para Sen, a distância entre essas duas abordagens é bastante significativa. Teria sido sobre o institucionalismo transcendental que a filosofia política contemporânea se apoiou em sua exploração da teoria da justiça.

5. A abordagem contratualista tem sido pois, segundo Sen, a influência predominante na filosofia política contemporânea, especialmente desde a publicação, em 1958, do artigo de John Rawls, "Justiça como equidade", que precedeu a sua declaração definitiva sobre essa abordagem na obra clássica, *Uma teoria da justiça*, de 1971.

É por isso que Sen dedica um lugar significativo em sua análise da ideia de justiça a uma compreensão de alguns aspectos fundamentais da obra de Rawls (2010 [2009], pp. 52-74), cuja concepção de que a justiça

deve ser considerada segundo as exigências da equidade Sen considera o exemplo mais bem alcançado do que é essencial a uma adequada apreensão do tema (2010 [2009], p. 53).

Com efeito, Sen ressalta o valor da percepção rawlsiana de que a equidade, cuja característica mais evidente seria a imparcialidade, afigurar-se o aspecto crucial da justiça, substanciado na exigência de igual consideração dos interesses de todas as pessoas envolvidas, e, por conseguinte, no zelo em evitar a precedência de quaisquer interesses, prioridades, excentricidades ou preconceitos particulares (2010 [2009], p. 54).

A noção de equidade, em cujo núcleo repousa a necessidade de se evitarem vieses em avaliações e ações, seria para Rawls, como o lembra Sen, ainda mais fundamental do que o desenvolvimento dos princípios de justiça (2010 [2009], p. 54).

A primazia da equidade é manifestada por Rawls através do célebre artifício da *posição original*, cujo aspecto mais notável é o esforço em conceber uma maneira de os indivíduos, em uma dada sociedade, se disporem a cooperar mutuamente, apesar de anuírem "doutrinas abrangentes" tão díspares quanto razoáveis. Rawls pensava que, a despeito, por exemplo, das suas várias convicções religiosas e visões gerais do que constitui uma vida boa, os cidadãos de um Estado seriam capazes de partilhar uma concepção política mínima de justiça que lhes permitisse eleger, de maneira absolutamente consensual, um conjunto de princípios de justiça, julgado equitativo por todos os membros razoáveis do grupo. Tais princípios orientariam a escolha das instituições sociais elementares que constituiriam a estrutura básica dessa sociedade original, bem como de todos os arranjos sociais subsequentes.

Sen diz-se cético quanto à proposição rawlsiana de uma necessidade de escolha unânime de um conjunto particular de princípios imprescindíveis à constituição de uma sociedade completamente justa (2010 [2009], p. 56-7; 69.).

Segundo Sen há preocupações gerais genuinamente plurais, e por vezes conflitantes, que suportam uma compreensão da justiça em cujo cerne esteja a racionalidade, a imparcialidade e a equidade. Esse fato, segundo Sen, minaria radicalmente a teoria de Rawls e determinaria o seu abandono (2010 [2009], p. 57-8).

Talvez se possa sintetizar a crítica de Sen ao idealismo transcendental em geral, e ao contratualismo rawlsiano em particular, destacando o que ele denomina "o problema do ponto de partida".

Sen pensa que a pergunta do contratualismo contemporâneo, qual seja a que indaga "o que seriam instituições perfeitamente justas?"

é intrinsecamente equivocada. A pergunta que deveria ser colocada em primeiro lugar é "como se promoveria a justiça?".

Partir de uma preocupação pragmática com as realizações efetivamente possíveis, ao invés de apenas instituições e regras, exigiria uma mudança radical na maneira de formular teorias da justiça, mas responderia ao que Sen considera os dois problemas básicos do contratualismo, quais sejam o problema da viabilidade e o problema da redundância da busca de uma solução abstrata ou transcendental.

O problema da viabilidade consiste no fato de que pode não haver absolutamente nenhum acordo arrazoado, mesmo sob rigorosas condições de imparcialidade e análise isenta (por exemplo, como as identificadas por Rawls em sua "posição original") quanto à natureza da "sociedade justa".

Sen insiste em afirmar a possibilidade de haver diferenças sérias entre os princípios concorrentes de justiça capazes de sobreviver a um escrutínio crítico e de ter pretensões de imparcialidade. Segundo ele este é um problema bastante grave, por exemplo, para o pressuposto de Rawls de que haverá uma escolha unânime de um único conjunto de "dois princípios de justiça" em uma situação primordial hipotética de igualdade (*posição original*), em que as pessoas ignoram os seus próprios interesses subjetivos. Isto pressupõe que haja basicamente apenas um tipo de argumento imparcial capaz de satisfazer as exigências da justiça, despojado de interesses pessoais. Sen acredita que isto possa ser um erro.

Se um diagnóstico de arranjos sociais perfeitamente justos for incuravelmente problemático, diz Sen, então toda a estratégia do contratualismo estará profundamente prejudicada, mesmo se cada alternativa concebível no mundo estivesse disponível. Por exemplo, os dois princípios de justiça na investigação clássica de Rawls da "justiça como equidade" são precisamente sobre instituições perfeitamente justas em um mundo onde todas as alternativas estão disponíveis. No entanto, o que não se poderia saber é se a pluralidade de razões de justiça permitiria que um único conjunto de princípios de justiça surgisse na posição original. A teoria da justiça social de Rawls, que procede passo a passo a partir da identificação e do estabelecimento de instituições justas, estaria então emperrada na própria base.

O problema da redundância, por sua vez, estipula que um exercício da razão prática que envolva uma escolha real exige uma estrutura para a comparação da justiça, sem a qual seria impossível escolher entre alternativas viáveis, e não uma identificação de uma situação perfeita,

possivelmente indisponível, que não poderia ser transcendida.

6. A novidade da abordagem de Sen provavelmente ainda levará algum tempo para ser assimilada e devidamente compreendida. Hilary Putnam não exagerou ao dizer que *A ideia de justiça* é a mais importante contribuição para o tema desde *Uma teoria da justiça*.

A obra de Rawls inaugurou uma nova fase no contratualismo. As críticas de Sen ao contratualismo, talvez tenham, por muito tempo, um efeito análogo àquele provocado pela crítica outrora formulada por Hume, mas é não é provável que determine o ocaso de uma tradição tão sólida.

Com efeito, para responder-se às inúmeras críticas que lhe têm sido dirigidas ao longo da história, a tradição contratualista passou por importantíssimas transformações que lhe permitiram conservar a relevância. A principal delas foi passar da ênfase no consenso à ênfase no acordo, distinguindo assim a questão do que gera a obrigação política (que era principal preocupação da tradição do *consenso* no pensamento do contrato social) da questão de quais ordens constitucionais ou instituições sociais são mutuamente benéficas e estáveis ao longo do tempo, ou seja, passou-se a uma ênfase na moralidade pública ou social, ao invés de na obrigação individual.

A ideia central das teorias contemporâneas do contrato social é, portanto, o *acordo*. E o ato de acordar é uma indicação de quais razões oferecemos. Se os indivíduos são racionais, aquilo sobre o que concordam reflete as razões que têm.

Em teorias contemporâneas do contrato, como a de Rawls, o problema da justificação torna-se, portanto, central. O renascimento da teoria do contrato social por Rawls em *Uma teoria da justiça*, portanto, não baseia obrigações em consenso, embora o aparato de um "acordo original" persista. O propósito da posição original é, segundo Rawls, resolver "a questão da justificação ... trabalhando o problema da deliberação".

O contrato social na teoria moral e política contemporânea, portanto, é uma tentativa de resolver um problema justificatório convertendo-o em um problema deliberativo. Em seu cerne está a "questão da justificação".

Justificar arranjos sociais requer demonstrar que todos os cidadãos têm razões favoráveis aos arranjos. Este seria uma exigência desnecessária se as razões dos cidadãos convergissem plenamente. É porque os cidadãos têm razões diversas que se faz necessário justificar os arranjos sociais demonstrando que todos os cidadãos *idealmente* têm razões

que favoreçam esses arranjos.

O contrato social é inevitavelmente hipotético, abstrato, ideal (ou, para o usar o termo caro a Sen, transcendental), mas trata-se de uma abstração cujo propósito é ilustrar um argumento, justifica-lo, oferecer razões. O fato de tratar-se de um artifício retórico não o torna irrelevante, mas justamente o contrário: o torna um instrumento precioso na discussão pública.

Parece-me que o contratualismo, designadamente o rawlsiano, funcione como uma espécie de necessário princípio regulativo da justiça social em uma determinada sociedade. Mas as suas pretensões de "perfeição" (no dizer de Sen) devem ser compensadas por uma análise imparcial e objetiva das situações concretas das sociedades em questão, e das realizações passíveis de serem alcançadas no sentido de um avanço efetivo da justiça, conquanto precário, porque a realidade sempre impõe limites às nossas mais nobres pretensões. O método mais adequado a uma análise deste tipo parece-me, de fato, como quer Sen, ser o comparativo; mas a sua aplicação não dispensa a adoção de um arcabouço teórico mais abstrato, como o proposto por Rawls. Ao contrário, penso que, na verdade, o pressuponha.

Solidariedade e deveres fundamentais da pessoa humana[1]

Adriano Sant'Ana Pedra[2]

Resumo: Em muitas situações a atuação estatal não é suficiente para assegurar os direitos fundamentais de uma pessoa, o que só ocorrerá com a prestação de um dever por parte de outra pessoa. O estudo busca responder qual o significado dos deveres fundamentais em uma democracia constitucional. A indagação nuclear a ser perseguida diz respeito aos limites e às condições para serem exigidos deveres fundamentais de uma pessoa a fim de que os direitos fundamentais em geral sejam preservados e promovidos. A partir daí, é possível avaliar em que medida são legítimos os deveres impostos por uma Constituição.

Palavras-chave: deveres fundamentais; direitos fundamentais; solidariedade.

1. Nota introdutória

As constituições geralmente preveem a existência de deveres fundamentais em seu texto. Todavia, durante bastante tempo, os estudos ocuparam-se precipuamente dos direitos fundamentais e houve certo esquecimento das questões relativas aos deveres fundamentais da pessoa humana, e isso ocorreu especialmente em razão da influência liberal, com o desprezo da solidariedade, bem como em razão do temor de que os deveres servissem a regimes autoritários, como forma de reação aos horrores praticados contra a humanidade. No Brasil, o momento

[1] Trabalho apresentado na VII Jornada Brasileira de Filosofia do Direito, realizada durante o "XXVI World Congress of Philosophy of Law and Social Philosophy – Human Rigths, Rule of Law and the Contemporary Social Challenges in Complex Societies", promovido pela International Association for Philosophy of Law and Social Philosophy (Internationale Vereinigung für Rechts- und Sozialphilosophie – IVR) (2013).

[2] Doutor em Direito Constitucional (Pontifícia Universidade Católica de São Paulo – PUC/SP). Mestre em Direitos e Garantias Fundamentais (Faculdade de Direito de Vitória – FDV). Professor do Curso de Direito e do Programa de Pós-Graduação – Mestrado e Doutorado – em Direitos e Garantias Fundamentais da Faculdade de Direito de Vitória – FDV. Curriculum Vitae na Plataforma Lattes: http://lattes.cnpq.br/0637600349096702. E-mail: adrianopedra@fdv.br

constituinte que sucedeu a ditadura militar fez com que o texto constitucional de 1988 fosse rico na previsão de direitos e pobre na abordagem de deveres.

Não obstante, aos deveres fundamentais é reservado um nobre papel. Em muitas situações, a atuação estatal não é suficiente para assegurar os direitos fundamentais de uma pessoa, o que só ocorrerá com a prestação de um dever por parte de outra pessoa. É o que ocorre, por exemplo, com o dever da coletividade de defender e preservar o meio ambiente ecologicamente equilibrado.

Este estudo busca analisar o papel dos deveres humanos na efetivação de direitos fundamentais. Apesar da menção feita aos deveres humanos, ou seja, aos deveres fundamentais da pessoa humana, o desenvolvimento aqui construído também se aplica aos deveres fundamentais da pessoa jurídica, no que couber. Assim, busca-se avaliar a legitimidade da exigibilidade de deveres impostos aos particulares pela Constituição com o fim de assegurar direitos fundamentais.

A investigação leva em conta uma abordagem do dever fundamental não como uma prestação egoística e individualista, mas, sim, sob uma perspectiva em que se respeita e se inclui o outro. Na perspectiva da solidariedade, o comportamento ético faz com que se coloque a serviço do outro, o que resulta na efetivação dos direitos fundamentais.

2. Direitos e deveres fundamentais em uma sociedade solidária

As constituições contemporâneas geralmente colocam os direitos e as garantias fundamentais logo nos seus primeiros títulos, mostrando que o Estado deve atender ao que está ali preceituado. A Constituição brasileira de 1988 divide o Título II – Dos Direitos e Garantias Fundamentais – em quatro capítulos, quais sejam: direitos e deveres individuais e coletivos (artigo 5º), direitos sociais (artigos 6º a 11), direitos de nacionalidade (artigos 12 e 13), direitos políticos (artigos 14 a 16) e direitos relacionados à existência, organização e participação em partidos políticos (artigo 17). Entretanto, é possível encontrar ainda direitos fundamentais em outras partes da Constituição brasileira. Tal situação não ocorre apenas no texto brasileiro, mas também em outros países.

Pode-se verificar que o rol dos direitos fundamentais tem uma extensão maior nas constituições dos países de democracia recente do que nas constituições dos países de democracia consolidada, o que se dá "pela necessidade da proteção estatal aos bens essenciais à sobrevi-

vência das populações miseráveis"[3]. Entretanto, como adverte Norberto Bobbio, nem sempre pode ser realizado tudo aquilo que é desejável e merecedor de ser perseguido, porque "são frequentemente necessárias condições objetivas que não dependem da boa vontade dos que os proclamam, nem das boas disposições dos que possuem os meios para protegê-los"[4].

Além disso, não se pode olvidar que a satisfação das necessidades essenciais das pessoas depende de atuações de outras pessoas (físicas ou jurídicas), além da atuação do próprio Estado. O direito à educação de uma criança, por exemplo, só será plenamente atendido com o cumprimento do dever dos pais ou responsáveis para com a educação desta, o que se dará com atuações como a realização da matrícula na escola, o acompanhamento da frequência e do rendimento escolar, dentre outras. Não basta que o Estado proporcione escolas, professores, livros, cadernos, transporte e merenda, por exemplo; é preciso que a família participe efetivamente da educação da criança.

O mesmo se dá com o direito à saúde e o combate à dengue, que depende da participação de todos para que não se formem criadouros de mosquitos que possam transmitir essa doença. A exclusiva atuação estatal é, também aqui, insuficiente para acabar com a doença.

Assim, os deveres fundamentais possuem o importante papel de proteger e promover direitos fundamentais; alguns destes dependem daqueles diretamente (*v.g.* dever de educar os filhos) enquanto outros dependem indiretamente (*v.g.* dever de pagar tributos).

> Quem possui direitos deve também possuir deveres. Isso se justifica com referência à reciprocidade: o meu vizinho respeita a minha privacidade e deseja que eu respeite a dele. Mas também se justifica com referência à solidariedade: devemos colocar à disposição dos grupos mais fracos recursos que permitam o exercício dos direitos fundamentais de maneira satisfatória, fortalecendo a coesão social. Trata-se de um pensamento que se contrapõe ao liberalismo-individualismo em sua forma absoluta[5].

---

[3] TORRES, Ricardo Lobo. A cidadania multidimensional na era dos direitos. In: TORRES, Ricardo Lobo (Org.). *Teoria dos direitos fundamentais*. 2. ed. Rio de Janeiro: Renovar, 2001, p. 286.

[4] BOBBIO, Norberto. *A era dos direitos*. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992, p. 44-45.

[5] DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias*

Daí a razão para que as pessoas sejam solidárias. Uma solidariedade que decorre do ordenamento jurídico e não necessariamente do altruísmo de cada um. A própria Constituição brasileira coloca como objetivo fundamental da República a construção de "uma sociedade livre, justa e solidária" (art. 3º, I). As pessoas devem ser solidárias, e não solitárias, porque, além da atuação estatal, são necessárias condutas positivas e negativas dos indivíduos para a efetivação de direitos fundamentais.

3. Fundamentalidade dos deveres humanos e tutela dos direitos fundamentais

Em decorrência do objetivo de edificação de uma sociedade livre, justa e solidária, os indivíduos dessa sociedade devem ter condutas compatíveis com a concretização desses valores. Daí o estabelecimento, pela Constituição, de deveres fundamentais compatíveis com a promoção desses ideais.

Assim, por um lado, é necessária uma previsão constitucional (*fundamentalidade formal*) acerca dos deveres fundamentais, pois estes devem ser estabelecidos por normas com força jurídica própria da supremacia constitucional. Segundo Gregorio Peces-Barba Martínez, "o dever jurídico tem que estar reconhecido por uma norma pertencente ao ordenamento"[6]. Esse é um fundamento lógico, de inserção no texto constitucional, criado pelo poder constituinte (originário ou derivado) e decorrente da expressão da soberania popular.

Vale destacar que a Constituição pode estabelecer deveres fundamentais tanto explícitos como implícitos, e também, tal como os direitos, outros decorrentes do regime e dos princípios adotados pela Constituição, bem como dos tratados internacionais[7] em que a República Federativa do Brasil seja parte, nos termos do artigo 5º, § 2º, da Constituição Federal, o que nos remete à ideia de *bloco de constitucionalidade*[8].

---

fundamentais. Salvador: Juspodivm, 2011, p. 339.

[6] PECES-BARBA MARTÍNEZ, Gregorio. Los deberes fundamentales. *Doxa*. n. 4. 1987, p. 335.

[7] Vide, por exemplo, o dever de instrução previsto no artigo XXXI da Declaração Americana dos Direitos e Deveres do Homem, aprovada na Nona Conferência Internacional Americana, em Bogotá, no ano de 1948: "Toda a pessoa tem o dever de adquirir, pelo menos, a instrução primária".

[8] VIEIRA, Pedro Gallo; PEDRA, Adriano Sant'Ana. O rol de deveres fundamentais na Constituição como *numerus apertus*. *Derecho y Cambio Social*. a. X. v. 31. jan./mar. 2013, p. 9.

Por outro lado, a *fundamentalidade material* leva em conta a relevância do dever no sentido de suprir as necessidades básicas essenciais de uma pessoa – de si, de outrem ou da coletividade – e volta-se à defesa e promoção de direitos fundamentais.

Assim, é possível afirmar que os deveres fundamentais estão diretamente ligados "à necessidade de os homens – seres gregários por natureza – viverem em comunidade, a qual exige a contribuição de todos para que os objetivos comuns sejam alcançados"[9].

De fato, o os autores que se debruçam sobre o tema dos deveres fundamentais destacam que é preciso compreendê-los não como um contraponto ou mitigador de direitos, senão como um promotor destes.

Segundo José Casalta Nabais,

> os deveres fundamentais constituem uma categoria jurídico-constitucional própria colocada ao lado e correlativa da dos direitos fundamentais, uma categoria que, como correctivo da liberdade, traduz a mobilização do homem e do cidadão para a realização dos objectivos do bem comum[10].

Embora constitua uma categoria autônoma, os deveres fundamentais são correlacionados com os direitos fundamentais, haja vista que estes são tanto limitados quanto assegurados por aqueles[11]. De fato, é justificável o vínculo entre direitos e deveres fundamentais, pois o direito de um indivíduo leva ao surgimento de pelo menos um dever para os demais[12], seja o de não impedir a realização do direito ou até mesmo o de promovê-lo.

Neste momento, merece ser trazido o conceito de dever fundamental adotado neste estudo:

---

[9] SCHWAN, Felipe Teixeira; PEDRA, Adriano Sant'Ana. A democracia brasileira e o dever fundamental de votar. In: BUSSINGUER, Elda Coelho de Azevedo (org.). *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011, p. 178.

[10] NABAIS, José Casalta. *O dever fundamental de pagar impostos*: contributo para a compreensão constitucional do estado fiscal contemporâneo. Coimbra: Almedina, 2009, p. 64.

[11] DUQUE, Bruna Lyra; PEDRA, Adriano Sant'Ana. Os deveres fundamentais e a solidariedade nas relações privadas. *In*: BUSSINGER, Elda Coelho de Azevedo. *Direitos e deveres fundamentais*. Rio de Janeiro: Lumen Juris, 2012, p. 18.

[12] GONÇALVES, Luísa Cortat Simonetti; PEDRA, Adriano Sant'Ana. Deveres fundamentais: a ressocialização enquanto dever do próprio apenado. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011, p. 209.

> Dever fundamental é uma categoria jurídico-constitucional, fundada na solidariedade, que impõe condutas ponderadas àqueles submetidos a uma determinada ordem política, passíveis ou não de sanção, com a finalidade de assegurar direitos fundamentais a ele correlacionados[13].

Deve-se enfatizar que o dever imposto a alguém não deve corresponder a um esforço exorbitante para essa pessoa. Mesmo em decorrência da ideia de solidariedade não se pode impor ao sujeito do dever um sacrifício extraordinário – ou desproporcional – com o fim de salvaguardar determinado direito. Somente será possível exigir do sujeito do dever um "sacrifício trivial"[14].

O ônus imposto ao sujeito do dever não pode ser excessivo – exorbitante –, o que é uma vedação relativa e que deve ser aferida no caso concreto, nunca em abstrato, ponderando-se o que se busca alcançar com aquela obrigação imposta.

Em geral, é possível exigir que alguém salve uma criança que esteja se afogando à sua frente, em uma piscina rasa, mas o mesmo não pode ser exigido se o afogamento ocorre em um mar revolto, porque, neste caso, o sujeito do dever seria colocado em risco. O crime de omissão de socorro (artigo 135 do Código Penal) deve ponderar a situação concreta. Da mesma forma, quando houver uma situação de extrema pobreza e ausência de condições para dar cumprimento ao dever fundamental de assegurar a educação dos filhos (artigos 205, 227 e 229 da Constituição), não se poderá condenar criminalmente os pais que deixarem de prover a instrução primária do filho em idade escolar, o que poderia constituir, em situação diversa, crime de abandono intelectual (artigo 246 do Código Penal). No âmbito tributário, o princípio da capacidade contributiva é um corolário que decorre da vedação de onerosidade excessiva – ou exorbitante – do sujeito do dever.

Dessa forma, a trivialidade do esforço dependerá não apenas do sujeito do dever como também do direito fundamental correlacionado que se busca proteger, o que torna possível falar em *ponderação subjetiva*

---

[13] Conceito cunhado coletivamente pelos membros do Grupo de Pesquisa "Estado, Democracia Constitucional e Direitos Fundamentais", coordenado pelos professores Adriano Sant'Ana Pedra e Daury Cesar Fabriz, do Programa de Pós-Graduação *Stricto Sensu* – Mestrado e Doutorado – em Direitos e Garantias Fundamentais da Faculdade de Direito de Vitória (FDV).

[14] GARZÓN VALDÉS, Ernesto. Los deberes positivos generales y su fundamentación. *Doxa*. n. 3. 1986, p. 17.

e em *ponderação objetiva*, respectivamente. Uma carga tributária poder ser excessiva ou não, a depender da capacidade do sujeito contribuinte (ponderação subjetiva) ou a depender de haver uma situação de guerra ou paz (ponderação objetiva), por exemplo.

É necessário haver equidade na onerosidade assumida por cada pessoa. Sobretudo naquelas situações em que o ônus incide especificamente em alguns poucos indivíduos, e tem a coletividade como sua beneficiária, o ordenamento jurídico deve prever, tanto quanto possível, a redistribuição dessa onerosidade para com os demais membros da sociedade[15].

É o que acontece, por exemplo, quando há uma redução da carga tributária nas hipóteses de tombamento (dever fundamental de defender e preservar o patrimônio histórico e cultural, previsto no artigo 216, § 1º, da Constituição) ou ainda nas hipóteses de manutenção de reservas florestais (dever fundamental de defender e preservar o meio ambiente ecologicamente equilibrado, previsto no artigo 225 da Constituição). Tais compensações devem ocorrer para que a sociedade também arque com tais ônus ao financiar a proteção de tais bens constitucionalmente protegidos.

4. A necessidade de atuação do legislador

A abertura do sistema constitucional significa a incompletude e a provisoriedade do conhecimento científico[16]. O jurista, como qualquer cientista, deve estar preparado para colocar em causa o sistema até então elaborado, para alargá-lo ou modificá-lo com base numa melhor consideração. Com este intuito, a textura aberta da linguagem constitui uma vantagem, porque considera tanto a necessidade de certeza quanto a

[15] A fim de serem proporcionados meios ao indivíduo para que ele cumpra o seu dever, em alguns casos o ônus do sujeito do dever não é dividido com a coletividade, mas com certas pessoas, como, por exemplo, com o seu empregador e a parte em um processo, conforme dispõe o artigo 419 do CPC: "Art. 419. A testemunha pode requerer ao juiz o pagamento da despesa que efetuou para comparecimento à audiência, devendo a parte pagá-la logo que arbitrada, ou depositá-la em cartório dentro de 3 (três) dias. Parágrafo único. O depoimento prestado em juízo é considerado serviço público. A testemunha, quando sujeita ao regime da legislação trabalhista, não sofre, por comparecer à audiência, perda de salário nem desconto no tempo de serviço".

[16] CANARIS, Claus Wilhelm. *Pensamento sistemático e conceito de sistema na ciência do direito*. 2. ed. Trad. Antonio Menezes Cordeiro. Lisboa: Calouste Gulbenkian, 1996, p. 106.

necessidade de deixar certas questões em aberto para que sejam apreciadas no tempo adequado.

> As normas que estabelecem deveres autônomos dos particulares costumam ter baixa densidade normativa. No nosso exemplo, a Constituição não indica o que a "família" deve fazer para promover a educação de seus membros, quais integrantes da família devem assumir essa obrigação e como, se a família deve se limitar a cuidar da formação de seus integrantes, se é suficiente matricular os jovens em instituições de ensino ou se a própria família deve lhes propiciar conhecimentos etc[17].

Dimitri Dimoulis e Leonardo Martins ainda trazem os exemplos da Constituição espanhola, que estabelece que "os espanhóis têm o direito e o dever de defender a Espanha" (artigo 31, 1), e da Constituição italiana, que prescreve que "a defesa da Pátria é sagrado dever do cidadão" (artigo 52, I), e indagam: "o que significa 'defender' um país? Defender de quem? E como? Militarmente? Economicamente? Politicamente? Promovendo a arte, a literatura ou – por que não? – a culinária nacional?"[18].

Daí surge a necessidade (relativa) de integração legislativa. Vale dizer, é necessário que o legislador interprete as normas constitucionais que versam sobre deveres fundamentais, mesmo aquelas normas com aparência de clareza.

Os textos normativos necessitam de interpretação não apenas por não serem unívocos ou evidentes, isto é, destituídos de clareza, mas também porque devem ser aplicados a situações concretas[19]. Nesse sentido posiciona-se Karl Larenz:

> Seria um erro aceitar-se que os textos jurídicos só carecem de interpretação quando surgem como particularmente "obscuros", "pouco claros" ou "contraditórios"; pelo contrário, em princípio todos

[17] DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011, p. 330. Vide também: DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 4. ed. São Paulo: Atlas, 2012, p. 63.

[18] DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011, p. 342-343.

[19] GRAU, Eros Roberto. *Ensaio e discurso sobre a interpretação/aplicação do direito*. 4. ed. São Paulo: Malheiros, 2006, p. 29.

> os textos jurídicos são suscetíveis e carecem de interpretação. Esta sua necessidade de interpretação não é um "defeito" que pudesse remediar-se em definitivo mediante uma redação tão precisa quanto possível[20].

A imprescindibilidade da interpretação ocorre porque o sistema jurídico deixa várias possibilidades em aberto e não contém ainda qualquer decisão sobre qual dos interesses em jogo é o de maior valor, mas deixa a decisão de determinação da posição relativa dos interesses a um ato de produção normativa que ainda será posto.

> A regulamentação genérica desses deveres pela Constituição desempenha uma dupla função. Por um lado, orienta o legislador ordinário para que, no exercício de sua função concretizadora, operacionalize os deveres, caracterizados pela já repetidamente mencionada baixa densidade normativa. Por outro lado, a regulamentação constitucional é um fundamento para examinar a constitucionalidade dessa legislação. Temos assim uma *estrutura bifásica* do dever fundamental. A Constituição enuncia e a lei concretiza[21].

Convém acrescentar ainda que a suposta clareza não é uma propriedade do texto, mas fruto da interpretação. Ou seja, até para se afirmar que um enunciado normativo é claro faz-se necessário interpretá-lo.

> Evidentemente a previsão desses deveres é sempre genérica o suficiente para sobre eles pairarem as mesmas dificuldades que se opuseram quanto a uma exigibilidade maior em relação ao Estado. Há de ser entendida como uma autorização para que, por meio de lei, se esclareçam e estabeleçam com maior concretude tais deveres[22].

Foi visto que os deveres fundamentais destinam-se a assegurar direitos fundamentais com eles correlacionados. O conteúdo desses di-

---

[20] LARENZ, Karl. *Metodologia da ciência do direito*. Trad. José Lamego. 3. ed. Lisboa: Calouste Gulbenkian, 1997, p. 283-284.

[21] DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011, p. 335.

[22] TAVARES, André Ramos. *Curso de direito constitucional*. 10. ed. São Paulo: Saraiva, 2012, p. 534.

reitos fundamentais necessita, conforme Robert Alexy[23], de justiciabilidade, isto é, deve tratar de "interesses e carências que, em geral, podem e devem ser protegidos e fomentados pelo Direito". Ademais, as constituições positivam os direitos fundamentais e afirmam assim o seu caráter jurídico, a sua exigibilidade e a sua acionabilidade[24].

Dessa forma, a inércia do legislador para estabelecer os comportamentos obrigatórios que o sujeito do dever deve seguir acaba por prejudicar os direitos fundamentais que deveriam ser protegidos por tais prestações.

Jorge Miranda[25] escreve que ocorrem *omissões legislativas* quando há situações *previstas* no programa ordenador global da Constituição, mas faltam as prescrições adequadas a uma imediata exequibilidade. As omissões podem ser especificamente declaradas pelos órgãos de fiscalização da inconstitucionalidade por omissão, e a integração das omissões legislativas ocorre por meio da edição de lei.

Existe, por exemplo, uma omissão inconstitucional do legislador federal, que não institui o imposto sobre grandes fortunas previsto no artigo 153, VII, da Constituição, o que prejudica a realização de inúmeras prestações estatais – pois os recursos públicos são escassos e os direitos têm custos[26] –, bem como faz com que os contribuintes que não possuem "grandes fortunas" fiquem mais onerados do que deveriam. A não criação desse imposto, longe de ser um alívio para o contribuinte, é uma grande injustiça. O legislador só poderia deixar de instituir o mencionado tributo se este fosse desnecessário, o que não é o caso. Mesmo na hipotética e improvável situação em que as receitas públicas fossem suficientes para atender a todas as demandas da sociedade, ainda assim

---

[23] ALEXY, Robert. Direitos fundamentais no Estado constitucional democrático: para a relação entre direitos do homem, direitos fundamentais, democracia e jurisdição constitucional. *Revista de Direito Administrativo*. n. 217. jul-set 1999. Rio de Janeiro: Renovar, 1999, p. 61.

[24] Segundo Luís Roberto Barroso, "modernamente, já não cabe indagar o caráter jurídico e, pois, a exigibilidade e acionabilidade dos direitos fundamentais, na sua múltipla tipologia." Cf. BARROSO, Luís Roberto. *O direito constitucional e a efetividade de suas normas*: limites e possibilidades da Constituição brasileira. 5. ed. Rio de Janeiro: Renovar, 2001, p. 106.

[25] MIRANDA, Jorge. *Manual de direito constitucional*. 4. ed. Coimbra: Coimbra, 2000, t. II, p. 274.

[26] Cf. HOLMES, Stephen; SUNSTEIN, Cass R. *El costo de los derechos*: por qué la libertad depende de los impuestos. Trad. Stella Mastrangelo. Buenos Aires: Siglo Veintiuno, 2011.

o imposto sobre grandes fortunas deveria ser instituído a fim de desonerar os contribuintes menos afortunados que pagam impostos sobre o consumo, sobre a renda de trabalho assalariado, etc.

É possível apontar inúmeras outras omissões inconstitucionais do legislador para regulamentar condutas, e até mesmo para estabelecer sanções para o seu descumprimento, que serviriam para proteger e promover direitos fundamentais. Não obstante, apesar de haver vozes destoantes[27], o neoconstitucionalismo indica uma visão de que, mesmo as normas constitucionais que veiculam deveres fundamentais devem ter aplicação direta, sem a intermediação do legislador ordinário, tanto quanto necessário e possível.

Vale trazer o exemplo da construção judicial criativa feita pelo Supremo Tribunal Federal no julgamento da ADPF nº 132/RJ e da ADI nº 4.277/DF, que reconheceu que o regime jurídico das uniões estáveis também se aplica às uniões homoafetivas, promovendo uma nova leitura do artigo 226, § 3º, da Constituição. Além do reconhecimento de direitos inerentes à união estável, houve também a criação de deveres fundamentais – como, por exemplo, deveres conjugais (artigo 226, § 5º, da Constituição) de mútua assistência – para pessoas em união estável homoafetiva, o que não havia até a decisão do STF em maio de 2011.

Entretanto, será necessária a mediação legislativa para imposição de sanção por descumprimento de algum dever[28], pois normalmente tais sanções não são previstas no texto constitucional, o que não poderá operar efeitos retroativos[29]. Vale destacar que a sanção é importante, porque é um elemento coercitivo, mas não é imprescindível para a eficácia de um dever fundamental. Mas, mesmo que não haja sanções, é natural haver consequências jurídicas[30] em decorrência do descumprimento de

---

[27] Cf. CHULVI, Cristina Pauner. *El deber constitucional de contribuir al sostenimiento de los gastos públicos*. Madri: Centro de Estudios Políticos y Constitucionales, 2001, p. 49. Ver também: RUBIO LLORENTE, Francisco. Los deberes constitucionales. *Revista Española de Derecho Constitucional*. a. 21. n. 62. mai./ago. 2001, p. 21. Cf. ainda: DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 4. ed. São Paulo: Atlas, 2012, p. 66.

[28] SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2007, p. 244.

[29] BERNARDO SEGUNDO, Ronaldo Louzada; PEDRA, Adriano Sant'Ana. Limites ao dever de tolerância. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011, p. 203.

[30] A língua portuguesa é o idioma oficial do Brasil (artigo 13 da Constituição) e há o dever de conhecê-la. O seu desconhecimento poderá levar o sujeito do dever a

um dever fundamental, haja vista a sua normatividade.

5. Considerações finais

Para muitas pessoas, o vocábulo "dever" ainda remete à ideia de limitação de direitos, castração de liberdades individuais e autoritarismo estatal[31]. De fato, os deveres fundamentais restringem as liberdades das pessoas a quem o dever é imposto. Contudo, o enfrentamento do tema dos deveres fundamentais tem servido para mostrar o outro lado da moeda: os deveres prestam-se para realizar direitos fundamentais. Ademais, a consolidação dos estudos sobre os deveres fundamentais evidenciam a necessidade de ponderar o sacrifício de cada pessoa para que não haja exorbitância nas prestações positivas ou negativas exigidas do sujeito do dever[32].

O ordenamento jurídico deve prever prestações alternativas para

---

sofrer alguma lesão decorrente *v.g.* da não observância de avisos de cuidado ou perigo, ou ainda de alergia ou intolerância alimentar de um produto consumido, o que não ocorreria se a informação adequadamente apresentada fosse devidamente compreendida. A pessoa lesada não poderá reclamar indenização caso a advertência tenha sido dada adequadamente em língua portuguesa. Não é por outro motivo que o Código de Defesa do Consumidor determina que mesmo os produtos importados devem ter instruções em língua portuguesa: "Art. 31. A oferta e apresentação de produtos ou serviços devem assegurar informações corretas, claras, precisas, ostensivas e em língua portuguesa sobre suas características, qualidades, quantidade, composição, preço, garantia, prazos de validade e origem, entre outros dados, bem como sobre os riscos que apresentam à saúde e segurança dos consumidores".

[31] TAVARES, Henrique da Cunha; PEDRA, Adriano Sant'Ana. As obrigações tributárias acessórias e a proporcionalidade na sua instituição: uma análise a partir da teoria dos deveres fundamentais. *Revista Tributária e de Finanças Públicas*. a. 21. v. 109. mar./abr. 2013. p. 203-223. Vide também: TAVARES, Henrique da Cunha; PEDRA, Adriano Sant'Ana. Obrigações tributárias acessórias na perspectiva do dever fundamental de contribuir com os gastos públicos: uma reflexão acerca dos critérios para sua instituição. In: ALLEMAND, Luiz Cláudio da Silva (coord.). *Direito tributário*: questões atuais. Brasília: OAB, 2012, p. 170.

[32] Vide *v.g.* os artigos 347 e 406 do Código de Processo Civil: "Art. 347. A parte não é obrigada a depor de fatos: I - criminosos ou torpes, que Ihe forem imputados; II - a cujo respeito, por estado ou profissão, deva guardar sigilo. Parágrafo único. Esta disposição não se aplica às ações de filiação, de desquite e de anulação de casamento". "Art. 406. A testemunha não é obrigada a depor de fatos: I - que Ihe acarretem grave dano, bem como ao seu cônjuge e aos seus parentes consanguíneos ou afins, em linha reta, ou na colateral em segundo grau; II - a cujo respeito, por estado ou profissão, deva guardar sigilo".

aqueles indivíduos que não podem cumprir o comportamento originalmente exigido, quando há uma onerosidade excessiva para a pessoa, como ocorre *v.g.* nas hipóteses de objeção de consciência decorrente de crença religiosa e de convicção filosófica ou política.

As pessoas cumprem o seu dever e adequam o seu comportamento quando percebem que as prestações que lhe são exigidas são legítimas.

Entretanto, no Brasil, verifica-se a ausência de um sentimento constitucional em razão de um cenário legislativo distante da realidade social e de raízes herdadas do processo de colonização, com a imposição das normas do ordenamento jurídico pelos governantes, sem qualquer interação ou manifestação social, gerando um sentimento de não pertencimento[33].

O exemplo tributário é frequente. Em "terras tupiniquins", a resistência ao dever de contribuir com os gastos públicos dá-se por diversos aspectos, dentre eles a ausência de discussão pública e transparência quanto à destinação dos valores arrecadados, a elevada carga tributária, a má administração dos recursos e a corrupção que assola o país[34].

As pessoas em geral não respeitam a lei se não a reconhecem como legítima. E isso significa que o indivíduo deve perceber que os encargos moderados que lhe são impostos são distribuídos de forma mais ou menos equitativa[35] e contribuem para a realização de direitos fundamentais de si próprio, de seus familiares ou da coletividade da qual faz parte.

Referências

ALEXY, Robert. Direitos fundamentais no Estado constitucional democrático:

[33] SANTOS, André Filipe Pereira Reis dos; FITTIPALDI, Paula Ferraço; BINDA, Rosana Júlia. O problema da legitimidade social do direito e da justiça numa sociedade desigual: considerações sociológicas a partir da realidade brasileira. *Revista de Direitos Fundamentais e Democracia*. v. 13. n. 13. jan./jun. 2013, p. 248.

[34] MACHADO, Álvaro Augusto Lauff; PEDRA, Adriano Sant'Ana. A redução das alíquotas do IPI incidente na comercialização de veículos automotores: uma (in)justificável relativização do dever fundamental de contribuir com os gastos públicos. *In*: BUSSINGER, Elda Coelho de Azevedo. *Direitos e deveres fundamentais*. Rio de Janeiro: Lumen Juris, 2012, p. 2-3.

[35] HOLMES, Stephen; SUNSTEIN, Cass R. *El costo de los derechos*: por qué la libertad depende de los impuestos. Trad. Stella Mastrangelo. Buenos Aires: Siglo Veintiuno, 2011, p. 197.

para a relação entre direitos do homem, direitos fundamentais, democracia e jurisdição constitucional. *Revista de Direito Administrativo*. n. 217. jul-set 1999. Rio de Janeiro: Renovar, 1999.

BARROSO, Luís Roberto. *O direito constitucional e a efetividade de suas normas*: limites e possibilidades da Constituição brasileira. 5. ed. Rio de Janeiro: Renovar, 2001.

BERNARDO SEGUNDO, Ronaldo Louzada; PEDRA, Adriano Sant'Ana. Limites ao dever de tolerância. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011.

BOBBIO, Norberto. *A era dos direitos*. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

CANARIS, Claus Wilhelm. *Pensamento sistemático e conceito de sistema na ciência do direito*. 2. ed. Trad. Antonio Menezes Cordeiro. Lisboa: Calouste Gulbenkian, 1996.

CHULVI, Cristina Pauner. *El deber constitucional de contribuir al sostenimiento de los gastos públicos*. Madri: Centro de Estudios Políticos y Constitucionales, 2001.

DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011.

DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 4. ed. São Paulo: Atlas, 2012.

DUQUE, Bruna Lyra; PEDRA, Adriano Sant'Ana. Os deveres fundamentais e a solidariedade nas relações privadas. *In*: BUSSINGER, Elda Coelho de Azevedo. *Direitos e deveres fundamentais*. Rio de Janeiro: Lumen Juris, 2012.

GARZÓN VALDÉS, Ernesto. Los deberes positivos generales y su fundamentación. *Doxa*. n. 3. 1986. p. 17-33.

GONÇALVES, Luísa Cortat Simonetti; PEDRA, Adriano Sant'Ana. Deveres fundamentais: a ressocialização enquanto dever do próprio apenado. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011.

GRAU, Eros Roberto. *Ensaio e discurso sobre a interpretação/aplicação do direito*. 4. ed. São Paulo: Malheiros, 2006.

HOLMES, Stephen; SUNSTEIN, Cass R. *El costo de los derechos*: por qué la libertad depende de los impuestos. Trad. Stella Mastrangelo. Buenos Aires: Siglo Veintiuno, 2011.

LARENZ, Karl. *Metodologia da ciência do direito*. Trad. José Lamego. 3. ed. Lisboa:

Calouste Gulbenkian, 1997.

MACHADO, Álvaro Augusto Lauff; PEDRA, Adriano Sant'Ana. A redução das alíquotas do IPI incidente na comercialização de veículos automotores: uma (in)justificável relativização do dever fundamental de contribuir com os gastos públicos. *In*: BUSSINGER, Elda Coelho de Azevedo. *Direitos e deveres fundamentais*. Rio de Janeiro: Lumen Juris, 2012.

MIRANDA, Jorge. *Manual de direito constitucional*. 4. ed. Coimbra: Coimbra, 2000, t. II.

NABAIS, José Casalta. *O dever fundamental de pagar impostos*: contributo para a compreensão constitucional do estado fiscal contemporâneo. Coimbra: Almedina, 2009.

PECES-BARBA MARTÍNEZ, Gregório. Los deberes fundamentales. *Doxa*. n. 4. 1987. p. 329-341.

PEDRA, Adriano Sant'Ana. *Mutação constitucional*: interpretação evolutiva da Constituição na democracia constitucional. Rio de Janeiro: Lumen Juris: 2012.

RUBIO LLORENTE, Francisco. Los deberes constitucionales. *Revista Española de Derecho Constitucional*. a. 21. n. 62. mai./ago. 2001.

SANTOS, André Filipe Pereira Reis dos; FITTIPALDI, Paula Ferraço; BINDA, Rosana Júlia. O problema da legitimidade social do direito e da justiça numa sociedade desigual: considerações sociológicas a partir da realidade brasileira. *Revista de Direitos Fundamentais e Democracia*. v. 13. n. 13. jan./jun. 2013. p. 235-249.

SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2007.

SCHWAN, Felipe Teixeira; PEDRA, Adriano Sant'Ana. A democracia brasileira e o dever fundamental de votar. In: BUSSINGUER, Elda Coelho de Azevedo (org.). *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011.

TAVARES, André Ramos. *Curso de direito constitucional*. 10. ed. São Paulo: Saraiva, 2012.

TAVARES, Henrique da Cunha; PEDRA, Adriano Sant'Ana. As obrigações tributárias acessórias e a proporcionalidade na sua instituição: uma análise a partir da teoria dos deveres fundamentais. *Revista Tributária e de Finanças Públicas*. a. 21. v. 109. mar./abr. 2013. p. 203-223.

TAVARES, Henrique da Cunha; PEDRA, Adriano Sant'Ana. Obrigações tributárias acessórias na perspectiva do dever fundamental de contribuir com os gastos públicos: uma reflexão acerca dos critérios para sua instituição. In: ALLEMAND, Luiz Cláudio da Silva (coord.). *Direito tributário*: questões atuais.

Brasília: OAB, 2012.

TORRES, Ricardo Lobo. A cidadania multidimensional na era dos direitos. In: TORRES, Ricardo Lobo (Org.). *Teoria dos direitos fundamentais*. 2. ed. Rio de Janeiro: Renovar, 2001.

VIEIRA, Pedro Gallo; PEDRA, Adriano Sant'Ana. O rol de deveres fundamentais na Constituição como *numerus apertus*. Derecho y Cambio Social. a. X. v. 31. jan./mar. 2013. p. 1-14.

Por uma retórica construtiva no Direito:
Esclarecimento e completude

Lourenço Torres[1]

Resumo: Este estudo faz um retrospecto do desenvolvimento da Retórica na esfera jurídica. Questiona o conceito jurídico atual de retórica como tópica, argumentação e persuasão. Sugere a retórica como um processo de construção da linguagem a partir da história grega e seus filósofos clássicos, em particular Parmênides e Heráclito, no estabelecimento das tradições filosóficas: ontológica e retórica. Conclui que a Retórica também é um método e uma análise que envolve fatores e níveis complexos na busca da tolerância.

Palavras-chave: Filosofia do Direito. História da Filosofia. Retórica jurídica.

Introdução: Conhecimento e construção retórica.

O meio ambiente significa um espaço vital perfeitamente limitado sobre o qual se estabelece um ser vivo de forma específica. O ser humano não possui essa especialização orgânica como possuem outros animais, então, para sobreviver, o homem tem de compensar esta falta de especialização com uma ação propriamente sua, que lhe permita construir um mundo cultural, um "lugar" onde surjam as mais elevadas realizações espirituais e culturais. Por isso, o homem cria um ambiente na esfera da linguagem com todas as suas incertezas e nessa imprevisibilidade linguística, toda espécie de entendimento, análise ou classificação torna esse ambiente uma adaptação vital. Embora tal adaptação não melhore ou piore valorativamente o ser, quanto melhor seu domínio sobre esse ambiente, mais bem sucedido o ser humano se sentirá ou se afirmará[2]. Daí a importância do entendimento retórico dentro do complexo

[1] José Lourenço Torres Neto é advogado; mestrando em Teoria Geral, Sociologia e Filosofia do Direito na UFPE orientado pelo Dr. Torquato Castro Júnior; bacharel em Direito e Pós-Graduado em Direito Processual Constitucional, Civil, Penal e Trabalhista pela UNINASSAU *campus* Recife/PE; membro pesquisador do Grupo de Pesquisas sobre Retórica na História das Idéias Jurídicas no Brasil da PPGD da UFPE coordenado pelo Prof. Dr. João Maurício Adeodato.

[2] A esse respeito ver GEHLEN, Arnold. **Der Mensch. Seine Natur Und Seine Stellung**

ambiente da linguagem humana para a compreensão do ser humano.

Além de se desconectar do ambiente, é por meio da linguagem que se apreende o conhecimento. Certamente essa linguagem não consiste apenas de palavras, mas envolve signos e informações que de uma forma ou de outra constroem algum tipo de conhecimento. Dois termos tentam descrever esse conhecimento: *gnosiologia*, que o dicionário define como um estudo ou uma "teoria do conhecimento" e, *epistemologia*, definido como um "conjunto de conhecimentos que tem por objeto o conhecimento científico, visando a explicar os seus condicionamentos, sistematizando suas relações, esclarecendo seus vínculos e avaliando seus resultados e aplicações"[3]. Na língua inglesa não há distinção teórica entre gnosiologia e epistemologia como se encontra na língua portuguesa. Epistemologia é uma *espécie* que pretende mais, pois é um metanível; é um "conhecimento" que se pretende metódico, verdadeiro, sistemático, com um objeto definido. Na gnosiologia se tem o "conhecimento" vulgar, o conhecimento emocional, o conhecimento fragmentário. O Direito faz parte desse tipo de conhecimento gnosiológico. Essa gnosiologia vem da tradição ontológica ocidental iniciada por Parmênides, embora muitos a atribuam a Descartes, que na verdade, é uma extensão e expressão atualizada daquela. Para se entender melhor essa diferença, é preciso adentrar nas origens do conhecimento e do Direito a partir dos gregos antigos que perceberam e inseriram a Retórica para dentro de uma teorização ou conceituação dessas matérias.

Logo, o objetivo deste texto é apresentar de forma resumida o desenvolvimento da Retórica para compreender os paradigmas conceituais sobre Retórica empregados na atualidade e como ela é entendida principalmente por operadores do Direito. Questiona o conceito jurídico atual a respeito do uso da retórica como tópica, argumentação e persuasão. Além disso, analisa o preconceito popularizado onde pessoas consideram a Retórica como uma mera arte de "falar bem" ou de "persuadir", não poucas vezes relacionada às falácias, mentiras e engodos. Para isso, toma como marcos teórico: a retórica "tripartida" de Ottmar

---

in Der Welt. Frankfurt: VK, 1993.

[3] FERREIRA, Aurélio Buarque de Holanda. **Novo Dicionário Aurélio da língua portuguesa**. 3. ed. Curitiba: 2004. p. 774 e 988.

Ballweg[4] e as dimensões da retórica desenvolvidas por Adeodato[5], aqui denominadas de "níveis", e suas linhagens advindas da filosofia retórica clássica. Perpassa pela história grega e alguns filósofos clássicos, em particular Parmênides, Heráclito e Aristóteles, no estabelecimento das tradições filosóficas, ontológica e retórica. Defende a tese de que a tradição retórica é construtiva no sentido de que possibilita a tolerância e o diálogo, mesmo em áreas de conflito, como ocorre na seara do Direito, e conclui que, com essa finalidade, a Retórica se apresenta como um método construtivo para a análise da linguagem do Direito com suas complexidades.

Esse tipo de análise, repita-se, vai de encontro a um preconceito

[4] Ottmar Ballweg (nascido em 11 de março de 1828 na cidade de Hockenheim na Alemanha) é um jurista e filósofo alemão que substituiu Theodor Viehweg na Universidade Johannes Gutemberg de Mainz nas áreas de Filosofia jurídica e Sociologia jurídica direcionando seus estudos para a "pequena" escola de Retórica Jurídica juntamente com Peter Schneider (1920 – 2002). Sob a influência de Viehweg desenvolveu uma teoria retórica como parte do movimento de filosofia jurídica alemão, teoria esta com raízes também na semiótica de Charles William Morris. Desde 1993 Ballweg está aposentado. Seus principais livros são: *Analytische Rhetorik*: rhetorik, recht und philosophie (2009); *Rhetorische Rechtstheorie* (1982); *Rechtswissenchaft und jurisprudenz* (1970); *Zu einer Lehre von der Natur der Sache* (1963).

[5] São três as dimensões ou metaníveis de retórica: material, estratégica e analítica. Ballweg faz uma diferenciação entre: as retóricas materiais, com as quais são preenchidas as funções básicas da vida comum e que criam "as realidades em que vivemos"; as retóricas práticas, que ensinam o emprego transcendente dos meios retóricos imanentes à linguagem; e, a retórica analítica. Cf. BALLWEG, Ottmar. Retórica Analítica e Direito. Trad. João Maurício Adeodato. **Revista Brasileira de Filosofia**, v. XXXIX, fasc. 163, julho-agosto-setembro. São Paulo, 1991, p. 177-179. João Maurício Adeodato descreve essa diferenciação referindo a retórica material, existencial, como sendo as próprias relações humanas, entendidas todas enquanto comunicação, e que constituem o primeiro plano da realidade; a retórica prática ou estratégica, como um primeiro grau de metarretórica sobre a retórica material, que parte dela e a ela retorna para reconstituí-la, e, a retórica analítica, reflexiva, que procura ampliar a semiótica e dá igual atenção aos seus elementos dentro dos sistemas linguísticos, uma metódica. Cf. ADEODATO. Retórica como metódica para estudo do direito. **A retórica constitucional** (sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo). São Paulo: Saraiva, 2009, p. 32 – 39. Adeodato aplica essa retórica tripartida à sua tese sobre conhecimento e ética na filosofia retórica onde a retórica material é constitutiva da realidade, a retórica estratégica age como ação sobre a retórica material e a retórica analítica faz uma descrição específica do mundo, no caso, o jurídico e sua dogmática. Cf. ADEODATO. **Uma teoria retórica da norma jurídica e do direito subjetivo**. São Paulo: Noeses, 2011, *passim*.

popularizado onde um grande número de pessoas, independentemente de educação ou classe social, considera a Retórica como uma mera arte de falar bem ou um artifício para persuadir, relacionando-a positivamente, quando muito, apenas com a oratória e a eloquência, isso quando não a relacionam pejorativamente a discursos falaciosos, mentirosos ou enganadores proferidos por políticos ou advogados inescrupulosos. Contudo, a Retórica além de ser um processo de construção da linguagem, é também a própria estrutura que constitui o significante, o idioma e, especificamente, o discurso, aqui também jurídico, expresso em suas variadas formas e institutos.

Não é muito popular se falar em Retórica, muito mais, descrever seus detalhes e liames. Talvez, porque tanto na Literatura como no Direito onde a retórica é "tudo", quanto menos ela for evidenciada, melhor ela funciona. "A melhor retórica é a que se nega, já que dificilmente se luta contra um inimigo que se não vê"[6]. É parte de sua estratégia: se ocultar. Também é dever do orador fazer que ela seja esquecida pelo receptor. Mas, como todos são concomitantemente receptores, é importante conhecer "as armas do inimigo" sem deixar, também, de "armar-se". Parte da Retórica se presta a isso mesmo, fornecer instrumentos para derrotar o oponente, mas há uma retórica que fornece elementos para a construção do diálogo e a tolerância.

1. Duas tradições na filosofia retórica

A retórica é um instrumento amplamente usado na atualidade pelos meios de comunicação e publicidade e não há dúvidas que ela é também usada na política e na esfera jurídica já de algum tempo. Estudos revelam que a retórica tem sua origem não na literatura ou na política, mas no discurso judiciário[7]. Essa é a razão porque se conecta o Direito e a retórica intrinsecamente. Ballweg afirma que "da retórica nenhum direito escapa"[8]. Mas ela não ficou restrita às questões de Direito, ao discurso jurídico. Contudo, "a retórica não esta associada a uma

[6] MALATO BORRALHO, Maria Luísa; CUNHA, Paulo Ferreira da. **Manual de retórica e direito**. Lisboa: Quid Juris, 2007, p. 25.

[7] MALATO BORRALHO, Maria Luísa; CUNHA, Paulo Ferreira da. **Manual de retórica e direito**. Lisboa: Quid Juris, 2007, p. 41 – 43.

[8] "An der Rhetorik Fürt kein Recht vorbei". In: BALLWEG, Ottmar. Retórica Analítica e Direito. Tradução João Maurício Adeodato. **Revista Brasileira de Filosofia**, v. XXXIX, fasc. 163, julho-agosto-setembro. São Paulo, 1991. p. 175.

classe definida de assuntos, ela é universal" (1355b7)[9] e todos os homens fazem uso dela em maior ou menor medida, já dizia Aristóteles. Por isso, não existe uma definição uniforme e consensual acerca de sua acepção. Assim como a retórica tem evoluído, seu conceito indissociavelmente, também evoluiu. Essa "evolução" não significa um desenvolvimento crescente e melhor, mas significa que em determinados momentos foi (ou é) mais abrangente que em outros.

Dependendo em muito da tradição que se siga, a retórica receberá definições descritivas ou pejorativas. Se por um lado for escolhida uma das definições descritivas, como a de que a retórica é uma arte, uma ciência, uma técnica ou um código de poder, ou, por outro, de que a retórica é constituída de artifícios falaciosos e erísticos para provocar contradições, confusões e falsidades nos incautos e assim vencer os debates, a retórica tornar-se-á facilmente uma habilidade fátua, um jogo, um mecanismo ou um moralismo[10].

Mais do que um conceito, a retórica é uma prática construída ao longo de milênios. Para compreendê-la é necessário entender sua história, mesmo que resumidamente como aqui. A retórica como disciplina começa na cultura grega e esta se insere na cultura ocidental. Já existia uma cultura anterior, a cultura oriental, que teve expoentes entre os egípcios, babilônicos e caldeus. Entretanto, a cultura ocidental historicamente teve sua arremetida inicial entre os gregos que difundiram sua cultura principalmente por toda a Europa ao longo do tempo, uma cultura "greco-romano-européia", da qual a cultura brasileira atualmente se situa perifericamente. Assim, colocando intencionalmente a cultura oriental de lado, pode-se afirmar que a retórica começa na Grécia. Há uma narrativa que chama Homero de pai da retórica. Como é incerta a existência do próprio Homero, os preceitos e paradigmas pedagógico-retóricos desse "autor" são atribuídos à *Odisseia* e à *Ilíada*[11]. Há uma tradição, referida por Aristóteles, que relaciona as origens da retórica a Empédocles de Agrigento[12]. Outra tradição atribui sua criação a Córax, que era discípulo de Empédocles, e a Tísias, ambos de Siracusa[13]. Inde-

[9] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 22.

[10] MALATO BORRALHO, Maria Luísa; CUNHA, Paulo Ferreira da. **Manual de retórica e direito**. Lisboa: Quid Juris, 2007, p. 18.

[11] ORTEGA, Alfonso. **Retorica**. El arte de hablar en público. Historia, método y técnicas oratorias. Madrid: Ideas Culturales, Instituto Europeo de Retórica, 1989, p. 20.

[12] ARISTÓTELES. **Organon**. Refutações sofísticas. IV. 183b31.

[13] GUTHRIE, W.K.C. **Historia de la filosofía griega**. vol. 3. Madrid: Editorial Gredos,

pendentemente de quem a tenha iniciado realmente, se aceita que tenha iniciado regularmente na Grécia.

Entre os gregos são encontrados os filósofos pré-socráticos que tiveram pensamentos radicalmente distintos dentro de uma tradição definitivamente bifurcada. Bipolaridade onde, por um lado são encontrados os que seguiam a obra de **Parmênides**, e por outro, se encontra a corrente de **Heráclito**. Destes dois filósofos gregos são bem conhecidas suas posturas radicais. O primeiro partia do princípio de que existe "a unidade e a imobilidade do ser", ou seja, de que "a experiência é uma ilusão e o conhecimento vem de dentro e não do mundo exterior"[14]. Por sua vez, Heráclito dizia que: "tudo está em mudança e nada permanece parado"[15]. Veem-se assim, em outras e poucas palavras, as duas posições extremas: o "nada muda" e o "tudo passa". Posturas que se perpetuaram. Mas, não são a única nem a mais importante síntese de seu pensamento, muito mais amplo e que não se desenvolverá aqui.

1.1 A tradição parmenidiana.

Dos parmenidianos vem a cultura filosófica dominante na tradição ocidental atual que é a cultura ontológica, uma cultura que acredita que é possível uma verdade introjetal. Ou seja, terá razão e facilmente se destacará aquele que tiver um discurso que corresponda ao que é em si. "Verdade que talvez seja mesmo corolário de uma necessidade atávica do ser humano por segurança"[16].

Seguindo o rumo do pensamento de Parmênides se encontram as ontologias de Platão que em sua *Academia* ensinava que para a ação política, ou para qualquer ação, a base deveria ser a investigação científica, de índole matemática. Ou seja, seus discípulos aprendiam que "a atividade humana, desde que pretendesse ser correta e responsável, não poderia ser norteada por valores instáveis, formulados segundo o

---

1994, p. 181.

[14] IGLÉSIAS, Maura. **O que é filosofia e para que serve.** In: REZENDE, Antonio. **Curso de Filosofia***:* para professores e alunos dos cursos de segundo grau e de graduação. 12. ed. Rio de Janeiro: Jorge Zahar Ed., 2004. p. 29-30.

[15] IGLÉSIAS, Maura. **O que é filosofia e para que serve.** In: REZENDE, Antonio. **Curso de Filosofia***:* para professores e alunos dos cursos de segundo grau e de graduação. 12. ed. Rio de Janeiro: Jorge Zahar Ed., 2004. p. 29.

[16] ADEODATO, João Maurício. **A retórica constitucional** (sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo). São Paulo: Saraiva, 2009, p. 18.

relativismo e a diversidade de opiniões"; ela deveria fundar-se sobre os requisitos da *episteme*, "uma ciência dos fundamentos da realidade na qual aquela ação está inserida" e não sujeita à "arte encantatória e à prestidigitação dos retóricos"[17]. Dando um salto histórico nessa mesma direção se chega ao pensamento de Descartes que com sua célebre frase "penso, logo existo"[18], implementou a "certeza" subjetiva, o acordo consigo mesmo. Para ele, a verdade é imanente; o conhecimento vinha "de dentro". Corrente admiradora das matemáticas, como já fazia Platão. Mais uma vez, nessa tradição também estão incluídas as "verdades eternas" que Platão detectou no mundo das *idéias*. Um plano além da "palavra-convenção" (*nomos*) dos sofistas e de Isócrates[19]. Essa é a tradição que prevalece até hoje.

Por outro lado, dentro das variantes dessa tradição existem cientistas e pensadores empiristas que enfatizam o conhecimento do ponto de vista do mundo exterior. Locke dizia em seu empirismo britânico que "somos como uma folha de papel em branco na qual a experiência vai imprimindo o conhecimento"[20]. E também existem os que desprezam o conhecimento empírico e se apegam ao conhecimento "certo" e "imutável", "verdadeiro". Quem dá atenção aos fatos externos tem mais dúvidas sobre o conhecimento em face de que os fatos externos nunca se repetem, tais fatos são individuais. Inclui-se aí o Direito como uma "ciência" empírica. Isso porque, não existem dois homicídios iguais, dois adultérios iguais, duas colisões de carros iguais, etc.; todo fato é único. A tendência de todos os filósofos empiristas, ou seja, daqueles que enfatizam os fatos é achar que o conhecimento é provisório, passageiro e fugitivo. Uma aproximação com a tradição de Heráclito. Talvez por isso algumas enciclopédias e dicionários de filosofia incluam os céticos ao lado dos empiristas[21].

Distintamente, mas seguindo a mesma tradição há a tendência

[17] FLORIDO, Janice (Coord). Aristóteles – vida e obra. Col. **Os Pensadores**. São Paulo: Nova Cultural, 2004, p. 5 – 6.

[18] DESCARTES, René. O discurso sobre o método. col. **Os Pensadores**. 2. ed. São Paulo: Abril Cultural, 1979. p. 47.

[19] FLORIDO, Janice (Coord). Aristóteles – vida e obra. Col. **Os Pensadores**. São Paulo: Nova Cultural, 2004, p. 6.

[20] LOCKE, John. **Ensaios Acerca do Entendimento Humano**. Trad. Anoar AQiex. São Paulo: Nova Cultural, 2000, *passim*.

[21] Cf. VITA, Caio Druso de Castro Penalva. Ceticismo. LUCAS, Doglas Cesar. Empirismo. In: BARRETO, Vicente de Paulo (Coord.). **Dicionário de Filosofia do Direito**. Rio de Janeiro: Renovar, 2006, p. 121 – 124, 264 – 266.

dos racionalistas parmenidianos, que acreditam na imanência do conhecimento, de que o conhecimento correto é imutável, verdadeiro e inquestionável. Se há dúvidas sobre determinado conhecimento é porque se está cometendo algum erro de abordagem. Há uma verdade e quem não a alcança é porque está desviado dela ou tem algum problema no ato do conhecimento, seja por não ter conhecimento dos fatos ou não ter conhecimento das normas, tomando-se, por exemplo, o caso de estudiosos do Direito. Essa tradição ontológica diz que apenas existe uma decisão correta em cada problema jurídico, como afirma Dworkin em seu substancialismo, ele, um dos filósofos mais populares entre os que usam a língua inglesa hoje[22]. Se os juízes decidirem diferentemente é porque algum deles é antiético não querendo decidir corretamente, ou é porque ele é incompetente seja por não conhecer o fato ou a norma, ou ambas as coisas. Cometendo, respectivamente, os chamados: erro ético ou erro gnosiológico. Se não ocorrer nem o erro gnosiológico nem o erro ético, todos os juízes decidirão os casos semelhantes exatamente da mesma maneira, pensam. Daí resultou a teoria da subsunção lógica e a tese silogística, entre outras.

1.2 A tradição heraclitiana

Em contraposição à tradição parmenidiana está a tradição heraclitiana, (embora seus seguidores se denominassem heraclíticos)[23], tão antiga e respeitada quanto a primeira, mas que ao longo da história se tornou marginal e minoritária. Ela diz que toda "verdade" é "um acordo de hábitos e convenções, onde as partes, sem discussão, aceitam-na como correta"[24]. A partir de Heráclito existe uma corrente que inclui a tradição retórica e não acredita que exista uma "verdade" no sentido que lhe dá a ontologia. Para a tradição retórica toda verdade é um consenso autopoiético. Exemplo disso é que, nela, se pode denominar uma parede de preta mesmo que seja branca. Contudo, a humanidade demorou tanto a descobrir isso, e embora tal tradição retórica seja tão

[22] DWORKIN, Ronald. **Taking Rights Seriously**. London: Gerald Duckworth, 1977.

[23] LAÊRTIOS, Diógenes. **Vidas e doutrinas dos filósofos ilustres.** Tradução do grego, introdução e notas Mário da Gama. 2. ed. Reimpressão. Brasília: Editora Universidade de Brasília, 2008. p.252.

[24] LAÊRTIOS, Diógenes. **Vidas e doutrinas dos filósofos ilustres.** Tradução do grego, introdução e notas Mário da Gama. 2. ed. Reimpressão. Brasília: Editora Universidade de Brasília, 2008. p.268.

antiga, ela tem sido por muito tempo marginal. Na verdade, tudo é uma convenção. Poder-se-ia chamar a uma cor preta de azul, de vermelho ou de qualquer coisa já que as convenções são arbitrárias. Os signos são inteiramente arbitrários.

Historicamente, os primeiros a chamarem a atenção para isso foram os sofistas. Os sofistas foram os pais do Direito, foram os democratas por excelência, os anti-tirania, já que nada é mais tirânico do que "a verdade". Werner Jaeger chamou os sofistas de "mestres da sabedoria"[25] e de "mestres da *arete*"[26]. Ele considerou tal "movimento espiritual de incalculável importância para a posteridade"[27] e afirmou que "do ponto de vista histórico, a sofística é um fenômeno tão importante como Sócrates e Platão. Além disso, considerou "impossível concebê-los sem ela" (a sofística)[28]. Em Atenas, sendo contemporânea de Platão, essa outra tradição disputava a preferência dos jovens na escola de Isócrates, que seguia a trilha dos sofistas e se propunha a desenvolver nos seus alunos a *arete* política, a virtude, a capacidade para lidar com os assuntos relativos à polis e, para isso, lhes transmitiam a arte de "emitir opiniões prováveis sobre coisas úteis"[29].

A atitude dos sofistas era diferente daqueles que não aceitam o diálogo. Parafraseando Kant, em 1874, é possível dizer que é melhor uma sociedade de descerebrados tementes à lei, do que uma sociedade de santos que viram a luz[30]. Para com os que já "viram a luz" não se tem mais o que fazer, pois eles já sabem a diferença entre o certo e o errado. Indivíduos que fazem assim, o fazem para passar uma idéia de certeza e segurança, como se isso fosse superior. Contudo, até a ontologia tradicional religiosa mostra algo distinto, para usar um padrão extremo como é o caso na Bíblia, do exemplo de Adão e Eva. O ato do "casal" mítico ser tentado pela "serpente" com o intuito de distinguirem "o bem

---

[25] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 340.

[26] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 344.

[27] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 335.

[28] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 341.

[29] FLORIDO, Janice (Coord). Aristóteles – vida e obra. Col. **Os Pensadores**. São Paulo: Nova Cultural, 2004, p. 5.

[30] KANT, Immanuel. **O que é Esclarecimento?** Disponível em: <http://www.espacoacademico.com.br/031/31tc_kant.htm>. Acesso em: 08 abr. 2011.

e o mal" não parece ser algo positivo ou louvável. A retórica pentatêutica parece defender uma dependência às vezes dialética com o divino e condena o processo de se alcançar o "conhecimento do bem e do mal", lamentando a perda da condição "original" do homem, um estado natural original de incerteza e com amplas e variadas possibilidades de insegurança, que passa a esperá-lo num futuro "celeste". Assim, o "natural" para o homem seria não "saber", não ter certeza do que é certo ou errado, isso seria deixado para a divindade. E já que o homem (ou a mulher) "caiu" na "desobediência", segundo o relato bíblico, e se tornou conhecedor do bem e do mal, a salvação restauradora não seria a volta ao relativismo original de valores, como então ensinavam os sofistas?

Retornando aos elementos constitutivos deste conceito tão amplo, está que o primeiro paradigma da retórica é o pensamento dos sofistas que não argumentavam com base na verdade, mas no verossímil[31]. No campo do Direito merece destaque o fato de que quando se lida com questões jurídicas não se analisa o verdadeiro ou falso, mas o mais ou o menos verossímil. Os sofistas diferiam na apreciação de muitas coisas, mas tinham em comum o ideal educativo da retórica e a *arete* política[32]. Apesar dos esforços, por sinal, bem sucedidos, de Platão para excluí-los da filosofia e de Aristóteles não incluí-los na história da filosofia em sua *Metafísica*, o mesmo Platão admite uma exceção por meio da crítica da teoria do conhecimento feita por Protágoras[33]. Contudo, a sofística se constituía como um membro orgânico do desenvolvimento filosófico, como reconhecidamente fazem as histórias da filosofia grega, e, as mais recentes histórias da filosofia que os consideram como fundadores do subjetivismo e do relativismo filosófico[34]. Tanto Heráclito como Empédocles de Agrigento (Ácragas) foram filósofos que articularam pensamentos filosóficos entre o homem, o cosmos e seus elementos e outros aspectos da alma e da religião[35]. É certo que a cultura filosófica dominante tentou excluir a sofística de todo movimento científico

---

[31] IORIO FILHO, Rafael Mario. Retórica. In: BARRETO, Vicente de Paulo. (Org.) **Dicionário de Filosofia do Direito**. 1. ed. Rio de Janeiro: Renovar, 2006, p. 723 e 726.

[32] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 343.

[33] PLATÃO, Teeteto, 152, A.

[34] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 343 – 344.

[35] LIMA JÚNIOR, Dílson Machado (Coord.). **Dicionário bibliográfico e teórico (de) filosofia do direito**. Belo Horizonte: Líder, 2007, p. 83, 135.

usando a estratégia de dividir a filosofia da retórica, apesar de paradoxalmente considerá-los também fundadores da ciência da educação. Mas, também é certo que foram os sofistas que propiciaram a inundação do espírito da antiga física e da "história" dos jônicos com problemas pedagógicos e sociais que surgiram em consequência de sua sensibilidade e da transformação do estado econômico e social de então[36].

Entretanto, a retórica não se separou da filosofia. Ela abriu o caminho a uma verdadeira filosofia política e ética, ao lado e mesmo acima da ciência da natureza, como salientou Platão no *Hípias Maior* (281c) sobre a tendência prática dos sofistas e a antiga filosofia separada da vida. Os sofistas produziram as primeiras especializações e obras particularizadas sobre as várias *techne*. Uma tendência geral do tempo para dividir a vida inteira numa série de compartimentos separados, concebidos com vistas a uma finalidade e teoricamente fundamentados num saber adequado e transmissível[37].

Essa tendência foi adotada por Aristóteles. Depois de Platão, Aristóteles desenvolveu e sistematizou o estudo da retórica que não teria apenas a função de "somente ser bem-sucedida na persuasão, mas descobrir os meios de alcançar tal sucesso" (1355a-b)[38]. O "descobrir" é uma metalinguagem acerca dos meios como objeto, que dilata a tese da retórica também como um método de "observação" amplo.

A matriz aristotélica do sistema retórico serviu de paradigma para os estudos que se seguiram sobre o assunto e resistiu sem muitas mudanças até o século XIX. Contudo, cabe lembrar que Aristóteles efetuou uma intercessão entre a retórica e a persuasão, pois sendo ele um "continuador" da tradição parmenidiana, apropriou-se da técnica de persuasão sofística, heraclitiana, para lançar seus estudos sobre a retórica. Considerações a respeito são tratadas em outro lugar de forma a destacar a questão da persuasão[39].

2. Os gêneros do discurso retórico

[36] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 348.

[37] JAEGER, Werner. **Paidéia** – A formação do homem grego. trad. Artur M. Parreira. São Paulo: Martins fontes, 2003, p. 349.

[38] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007. p. 23.

[39] TORRES NETO, J. L. **Preserved sophistic rhetoric as part of Aristotle legacy to the history of legal persuasion**. Saarbrücken, Germany: LAP-Lambert, 2014.

Aristóteles em seu livro *Retórica* define, analisa e fundamenta três gêneros para a retórica. Antes dessa incursão, ele define a retórica não como os meios de persuasão ou o uso persuasivo da linguagem em si, como comumente se entende quando se refere essa arte para o treinamento de oradores[40]. Embora Aristóteles já percebesse que a maioria dos tratados, já naquele então, se dedicasse a elaborar apenas uma pequena parte dessa arte[41], para ele, ela era algo além.

"A retórica é uma maneira de "experimentar o mundo, com as associações que o verbo acarreta, a exemplo de 'olhar', 'sentir', 'pensar', 'provar', 'julgar'"[42]. Aristóteles já tinha percebido com acuidade que "a retórica pode ser definida como uma faculdade de observar os meios de persuasão disponíveis em qualquer caso dado" (1355b25) e diferentemente de outras ciências que também podem instruir ou persuadir sobre seus próprios objetos de estudo específicos, ele considerava "a retórica como poder de observar os meios de persuasão em quase todos os assuntos que se [...] apresentam" (1355b33)[43]. Note-se que ele usa os termos "faculdade de observar" e "poder de observar". Uma coisa são os meios de persuasão, outra coisa é a observação ou, como diz outra tradução: "faculdade de descobrir especulativamente"[44]. E não só isso, em outra passagem ele aponta que a retórica é também uma "faculdade de demonstrar argumentos" (1356 a33)[45]. O uso de meios de persuasão está em um nível e a observação e a demonstração deles está em outro nível. Esse conjunto, até certo ponto, exterior ao objeto dos argumentos e da persuasão, mas incluindo-os é que é a retórica. De qualquer forma, a retórica a que Aristóteles se refere é uma metarretórica e essa percepção também deve ser captada hodiernamente para não se incorrer em

---

[40] FERREIRA, Aurélio Buarque de Holanda. **Novo Dicionário Aurélio da língua portuguesa**. 3. ed. Curitiba: 2004, p. 1751.

[41] "Todavia, os autores dos tratados atuais sobre retórica elaboraram uma pequena parte dessa arte" (1354 a). In: ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 19.

[42] ADEODATO, João Maurício. **A retórica constitucional**. São Paulo: Saraiva, 2009, p. 15.

[43] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 23.

[44] «La rhétorique est la faculté de decouvrir spéculativement [...] » In : ARISTOTE. **Rhétorique**. Tome Premier. Trad. Médéric Dufour. 11. ed. Paris: Société d'Édition Les Belles Lettres, 1960, p. 76.

[45] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 24.

limitações e faltas.

A partir desse nível de observação é que Aristóteles distingue três gêneros de discursos retóricos são: "o deliberativo, o judiciário e o demonstrativo"[46]. Em outro lugar os três gêneros de discursos são traduzidos como: "político, jurídico e exibicional ou epidítico" (1358b)[47]. No discurso deliberativo também chamado de político usa-se ou não o conselho, seja em prol de algo particular ou de interesses públicos, isto é, ora se procura persuadir, ora dissuadir apresentando o que é útil ou prejudicial para que, se acolhido, pareça vantajoso e caso seja rechaçado pareça como funesto. Em um discurso judiciário se acusa ou se defende com base principalmente no que é justo ou injusto. O gênero demonstrativo (epidítico ou vitupério) comporta o elogio e a censura.

Aristóteles também destaca que esses gêneros têm por objeto uma parte do tempo que lhe é próprio. Ou seja, o gênero deliberativo para o futuro, pois se delibera aconselhando ou não sobre algo que vai acontecer. O orador tenta persuadir o ouvinte sobre uma coisa boa ou má para o futuro. O gênero judiciário sobre o passado, visto que a acusação ou a defesa incide sobre fatos pretéritos. Ou seja, o orador tenta persuadir o julgador sobre uma coisa justa ou injusta do passado. E o gênero demonstrativo ou "exibicional" sobre o presente, pois para louvar ou censurar sempre se apoia no estado presente das coisas, embora sempre se utilize a lembrança do passado ou se presuma o futuro. É onde o orador tenta comover o ouvinte, que também pode ser um observador que apenas decide sobre a destreza dos oradores, acerca de uma coisa digna, bela ou infame a respeito do tempo presente. Este gênero busca o deleite do auditório[48].

Além disso, naquele livro clássico, argumentos em favor da utilidade da retórica são apresentados bem como uma análise da natureza da prova retórica que é o entimema, um silogismo derivado. Essa utilidade vai aléns dos fins, dos objetivos do discurso, pois busca determinar os significados dos fins, o que Aristóteles mesmo afirma ser "o que é mais útil de se fazer [...] enquanto se tenha condições de prever e des-

---

[46] ARISTÓTELES. **Retórica**. Tradução Antonio Pinto de Carvalho.17. ed. Rio de Janeiro: Ediouro, 2005, p. 39.

[47] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p.30.

[48] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 29 – 30.

truir seus opostos"[49]. Entendido aqui que seja "oposto" aquilo que não é útil ou o que não é bom. Tais argumentos foram discutidos por ele nos capítulos 6 e 7.

3. Bases ou fundamentos filosóficos da retórica

3.1 Ceticismo.

Já foi visto que é na sofistica e nos seus paradigmas que se encontra a origem da retórica. Essa perspectiva retórica possui três bases filosóficas comuns: o ceticismo, o humanismo e o historicismo. No entanto, estas são posturas filosóficas constitutivas complementares.

O ceticismo é a concepção de que o conhecimento certo e definitivo sobre algo pode ser buscado, mas não atingido[50]. Ou seja, são doutrinas que repelem que qualquer idéia tenha uma orientação que seja ideal ou absoluta. Parte desse entendimento pode ser percebido em declarações de sofistas. O primeiro grande sofista, de acordo com a acepção platônica, é Górgias que no seu único fragmento preservado, disse: (1) Nada existe. (2) Mesmo que algo exista não pode ser apreendida pelo homem. (3) Mesmo que alguma coisa pudesse ser apreendida, não poderia com toda a certeza ser expressa e comunicada aos nossos semelhantes [*Frag.* B_3. 979b20-980a1][51]. Isso fez parte de uma idéia revolucionária pregada por ele.

Contudo, ser cético não quer dizer unicamente que não se acredite em nada absoluto. Entretanto, desde a Antiguidade é assim que são retrados os céticos. Exemplo disso é a narração de Diôgenes Laêrtios em seu livro *Vidas e Doutrinas dos Filósofos Ilustres*, escrito cerca de 200 d.C., com o conto (fantasioso talvez) sobre o filósofo cético Pirro[52] que, segun-

[49] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 39.

[50] HUNNEX, Milton D. **Filósofos e correntes filosóficas em gráficos e diagramas.** Tradução de Alderi de Souza Matos. São Paulo: Vida, 2003. p. 22.

[51] McCOMISKEY, Bruce. Gorgias, *On Non-Existence*: Sextus Empiricus, Against the Logicians 1.65-87, Translated from the Grees Text in Hermann Diels's *Die Fragmente der Vorsokratiker*. In: **Philosophy and Rhetoric**, vol. 30. n. 1. Pennsylvania: Penn State University Press, 1997, p. 45.

[52] Pirro de Élis (ca. 360 a.C. — ca. 270 a.C.) o filósofo grego, nascido na cidade de Élis, considerado o primeiro filósofo cético e fundador da escola que veio a ser conhecida como pirronismo. Suas doutrinas são conhecidas principalmente pelos escritos satíricos de seu pupilo Tímon, o Silógrafo. Seu ceticismo drástico é a primeira e mais completa

do a narrativa, andava com seus alunos e foi alertado por um deles sobre um buraco adiante, ao qual respondeu: "esse buraco não existe". O resultado, segue a narrativa, foi que ele caiu no buraco, quebrou a perna e no 'hospital' onde convalescia ao receber a visita de alguns alunos foi questionado novamente se em face dos fatos o buraco existia. Sua resposta foi mais inusitada ainda: "o buraco não existe, eu não estou aqui, minha perna não esta quebrada e vocês também não estão aqui" (IX, 11, 62)[53]. Essa anedota tipicamente é uma caricatura do ceticismo feita por pessoas que provavelmente também são contra ele. Há também o exemplo do conhecido paradoxo de Zenão que afirmava que ao ser atirada uma flecha ela não sai do lugar e alguns dizem: "Coloca-te diante da flecha, então". Paradoxo que Laêrtios literalmente transcreve como: "um corpo que se move não se move nem no lugar em que está, nem no lugar em que não está" (IX, 11, 72)[54]. Mais uma vez, estes são os gracejos dos prováveis inimigos da retórica e do ceticismo.

Na verdade, a retórica e a sofistica são métodos, métodos de abordagem do objeto[55]. O ceticismo, o humanismo e o historicismo são posições filosóficas que apoiam esses métodos. O retórico não pode analisar nada se já tem uma compreensão pré-concebida. Por isso, ele necessita do ceticismo. Este pode ser chamado de ceticismo genuíno, "segundo o qual não se devem afirmar verdades, mas também não se pode negar que elas existam"[56]. O ceticismo é o conceito de que todas as verdades são provisórias. Como já dito, não é afirmar que o mundo não existe e que ao se colocar a mão no fogo se afirmar que ela não vai queimar, e ela não queimará. Repetindo, ser cético é "acreditar" em verdades provisórias. Contudo, já que não são absolutas serão afastadas ou reiteradas, segundo o resultado que a crença nelas der às pessoas

exposição de agnosticismo na história do pensamento. Seus resultados éticos podem ser comparados com a tranquilidade ideal dos estóicos e os epicuristas.

[53] LAÊRTIOS, Diógenes. **Vidas e doutrinas dos filósofos ilustres.** Tradução do grego, introdução e notas Mário da Gama. 2. ed. Reimpressão. Brasília: Editora Universidade de Brasília, 2008. p.268.

[54] LAÊRTIOS, Diógenes. **Vidas e doutrinas dos filósofos ilustres.** Tradução do grego, introdução e notas Mário da Gama. 2. ed. Reimpressão. Brasília: Editora Universidade de Brasília, 2008. p.270.

[55] Métodos são caminhos, meios. O próprio Aristóteles incluiu o *Tópicos* e o *Argumentos Sofísticos* em seu *Organon*, e, *organon* significa "instrumento".

[56] ADEODATO, João Maurício. Ética **e Retórica**: para uma teoria da dogmática jurídica. 4.ed. São Paulo: Saraiva, 2009, p. 407.

sobre o mundo[57].

Também, ser cético nem sempre é ser negativo, mas é principalmente ser estratégico. Os céticos acreditam que os seres humanos agem de forma estratégica. Serve de exemplo até o agir de uma criança que faz uma coisa que dá certo, ela vai repetir aquilo como um hábito até que se torne uma norma de cultura. Ou seja, se a criança chora e obtém o que quer, então ela sempre chorará para obter o que deseja. Contudo, se colocar o dedo numa tomada e levar um choque, ela não mais o fará. Não que essas ações sejam verdades conhecidas; apenas, naquele momento circunstancial, ela (a criança) percebe que determinadas atitudes dão certo e outras não. Isso é estratégia.

Existem muitas estratégias sobre o ser cético: por que ser cético? Porque todas as pessoas veem as coisas de maneiras diferentes. Tudo, certamente, dependendo das variáveis de sentidos, idade, sexo, cultura e etc. Assim é que surgem os *tropoi*. São, pelo menos, 23 motivos para não se acreditar na objetividade do mundo. Que leva à conclusão de que toda a decepção dos seres humanos depende deles mesmos[58]. Os céticos, na verdade, buscam a *eudemonia*, a felicidade no cotidiano e na condução da vida até a tranquilidade (a *ataraxia*).

Kant afirmou que "o maior inimigo do conhecimento é o senso comum" ( ). Se alguém tivesse "o olhar" de um microscópio eletrônico com uma ampliação de quinhentas mil vezes[59], e outrem lhe dissesse

[57] "Os céticos empenhavam-se constantemente em demolir todos os dogmas das escolas, e nunca se expressavam dogmaticamente. Limitavam-se a apresentar e a expor os dogmas dos outros sem jamais chegar a definições, não afirmando sequer que não faziam qualquer definição. Sendo assim, eliminavam até o não-definir, e, portanto não afirmavam: "Nada definimos", porque se assim não fosse, estariam dessa maneira dando uma definição" (IX, 11, 74) In: LAÊRTIOS, Diógenes. **Vidas e doutrinas dos filósofos ilustres.** Tradução do grego, introdução e notas Mário da Gama. 2. ed. Reimpressão. Brasília: Editora Universidade de Brasília, 2008. p. 271.

[58] Mais detalhes em: ADEODATO, João Maurício. Ética **e Retórica**: para uma teoria da dogmática jurídica. 4.ed. São Paulo: Saraiva, 2009, p. 391 – 400.

[59] O sistema de lentes de um MEV (Microscópio eletrônico de varredura), situado logo abaixo de um canhão de elétrons, possibilita (de ~10-50 μm no caso das fontes termoiônicas) um tamanho final de 1 nm - 1 μm ao atingir a amostra. Isto representa uma demagnificação da ordem de 500 000 vezes e possibilita que a amostra seja varrida por um feixe muito fino de elétrons. Os elétrons podem ser focados pela ação de um campo eletrostático ou de um campo magnético. As lentes presentes dentro da coluna, na grande maioria dos microscópios, são lentes eletromagnéticas. Essas lentes são as mais usadas pois apresentam menor coeficiente de aberração. Após o feixe de elétrons incidir na amostra isso acarreta a emissão de elétrons com grande espalhamento de energia,

que "uma parede não é uma parede", o primeiro não teria dificuldades em aceitar tal afirmação em face de sua alta capacidade de observar minúsculos detalhes do objeto observado. Mais fácil ainda seria acreditar que "os sólidos não são tão sólidos assim". Em relação ao estudo do Direito é difícil afastar totalmente o ceticismo até da dogmática. Até um positivista inclusivista como H. L. A. Hart podia sentir que o Direito é falho quando observou que "o cético quanto às normas às vezes é absolutamente desapontado"[60] principalmente quando associado a questões levantadas pelo realismo jurídico, como a de que "proposições gerais não decidem casos concretos" ou que "a vida do Direito não foi a lógica"[61], questões que uma vez sob reflexão levam à conclusão de que pouco se entende a respeito, o que alarga ainda mais o questionamento.

Em suma, o ceticismo é inafastável das observações filosóficas. Existem várias correntes. Entre os filósofos céticos, seja do ceticismo gnosiológico ou do ceticismo ético (do bem e do mal), há os que não acreditam no conhecimento, mas acreditam na ética, como Kant que disse que o conhecimento não existe porque cada pessoa vê o mundo de uma maneira diferente (em sua Critica da Razão Prática, como protestante pietista que era, ele afirmou que "duas coisas me enchem a alma de felicidade – o céu estrelado do universo e a certeza moral em meu coração", contudo, para ele a razão não consegue explicar essa moral)[62]; e há o lado contrário, como se vê em Luhmann, ou num cientificista, ou num construtivista radical, que acreditam no conhecimento do mundo, mas não crêem num conhecimento ético. Afirmam que se fosse possível isolar todas as variáveis da experiência humana se poderiam explicar as coisas mais inusitadas, como preferências e gostos. Resumindo tudo, as reações químicas e a ética seria um conjunto de multi preferên-

---

que são coletados e amplificados para fornecer um sinal elétrico que é utilizado para modular a intensidade de um feixe de eletrons num tubo de raios catódicos, assim em uma tela é formada uma imagem de pontos mais ou menos brilhantes (eletromicrografia ou micrografia eletrônica), semelhante à de um televisor em branco e preto. Cf. KESTENBACH, Hans-Jürgen, NOCITE, Nádia C. P., Rinaldo Gregório P, LAOS, Joachim e PETERMANN, Jürgen. Resolução Lamelar num Novo Microscópio Eletrônico de Varredura. **Polímeros** vol.7 n.1 São Carlos Jan./Mar. 1997.

[60] HART, H. L. A. **The concept of law**. Oxford: Clarendon Press, 1961, p. 135.

[61] HOLMES, O. W. **O direito comum**. Trad. J. L. Melo. Rio de Janeiro: O Cruzeiro, 1967, p. 29.

[62] KANT, Immanuel. **Crítica da razão prática**. Tradução e prefácio Afonso Bertagnoli. Versão para eBooks eBooksBrasil, 2004. Disponível em <http://www.ebooksbrasil.org/eLibris/razaopratica.html>. Acesso em 14 jul. 2012.

cias, as quais seriam resultado da ignorância humana dos processos causais que os produziram, pois tudo é causal. Entre estes existem os monistas, os dualistas, os monistas espiritualistas que são mais difíceis de entender ainda, cada um com sua visão cética.

3.2 Humanismo.

O humanismo é outra base filosófica de apoio à retórica. Isso porque a retórica se preocupa muito mais com o homem e dá menos atenção à natureza. Segundo esse conceito, os próprios seres humanos, são a verdadeira causa pela qual o mundo existe. Assim, em grande medida, tudo deveria se medido, mensurado, quantificado e conceituado tomando-se por base o ser humano. Essa postura pode ser vista em Protágoras, que junto com Górgias, expressa a melhor potência intelectual daquela primeira época ao dizer: "o homem é a medida de todas as coisas, das que são que elas são, das que não são que elas não são" (*Teeteto*, 152 a)[63]. Foram os grandes humanistas que inventaram o conceito de "tolerância". Relacionando o humanismo com o ceticismo não há uma total contradição. Embora alguns céticos tenham suas dúvidas sobre a bondade da natureza humana, não significa um pessimismo absoluto para com a humanidade, apenas uma desconfiança para com o ser humano. Numa visão ceticista, o ser humano pode ser alguém bom porque a vida o tratou bem. E talvez alguém é mau em vista de situações negativas pelas quais tenha passado e viveu.

Mais uma vez, o humanismo é essa coisa de que o mais importante é o ser humano. E um paradoxo disso é que um humanista como Nietzsche abominava o humanismo, chegando a criticar Sócrates, um dos pais do humanismo, que causou uma inversão da ética de sua época, já que para os pré-socráticos o ser humano era "um nada", um "verme", e a visão filosófica de Sócrates mudou isso incorporando a importância do homem, seja em sua beleza ou em sua baixeza, pois tudo o que fosse humano seria grandioso.

O humanismo não enfatiza o conhecimento técnico. Ele busca os limites do venha a ser culto ou não, embora isso seja muito difícil de dizer. Visto que muito do veio a ser parte do acervo humanístico da história humana se deveu não às habilidades geniais de alguns, mas de fatores como o sucesso ligado às influências e privilégios providos pela

[63] PLATÃO. Diálogos I: **Teeteto** (ou do Conhecimento). Tradução, textos complementares e notas Edson Bini. Bauru, SP: EDIPRO, 2007, p. 57.

sorte encontrada na existência de alguns.

Definir-se exatamente o que é ser humanista é coisa de cartesianos. E ser retórico é ser nunca "exatamente". Na verdade, segundo Sextus Empiricus, o "é" é uma metáfora. Quando se quer dizer que algo é "isso" significa que "neste momento" ou "da maneira que estou me sentindo e diante deste contexto, pode ser que talvez eu pensasse que viesse a achar que essa coisa fosse assim". Como não se deve falar dessa maneira comum, então isso fica reduzido ao verbo "ser". Porém, o ser não quer dizer o que as pessoas ontologizam, embora o ser humano tenha uma predisposição necessária para as certezas. O humanismo, assim como a retórica, pressupõe a incerteza. Dúvida e precariedade são características do humano. Por isso é que é mais fácil ser ontológico, tomando posições de "isto é assim", "aquilo é daquela forma". É a criação comum de *topoi*. Contudo, tal comportamento ontologizante dominante produz a intolerância. Ser intolerante é mais fácil. E a partir dele se produzem pensamentos extremos como os conceitos de racismo e sexismo, que desenvolvem intolerâncias por (de)semelhanças físicas que são da mais baixa estirpe. Algo totalmente irracional e absurdo.

3.3 Historicismo.

Por fim, apoiando ainda a perspectiva filosófico-retórica está o historicismo. De maneira geral, o historicismo é a prática de uma História radical, que enfatiza além de sua importância como saber e reflexão, mas impondo sua posição central para uma compreensão do ser humano e da própria realidade. O historicismo moderno tem suas raízes nos escritos de Hegel (1770 – 1831) que considerava que o estudo da história era o método adequado para abordar o estudo da ciência da sociedade, já que revelaria algumas tendências do desenvolvimento histórico. Em sua filosofia, a história não somente oferece a chave para a compreensão da sociedade e das mudanças sociais, como também é considerada tribunal de justiça do mundo. Por causa desta posição, seu historicismo foi fortemente rechaçado, por exemplo, por Arthur Schopenhauer (1788 – 1860).

Contudo, também é inegável que Giambattista Vico (1668 – 1744) foi um dos seus precursores, quando tratou do princípio da causação em sua publicação *De Antiquíssima Italorum Sapientia* (A Antiga Sabedoria dos Italianos) de 1710 onde observa que a metafísica devia encontrar os fatos que podiam ser convertidos em verdades e descobrir assim um

princípio de causação enraizado no senso comum. Em 1694 encontrou Dante ignorado, Ficino e Pico postos de lado e o cartesianismo na vanguarda do debate intelectual. Como influenciado parcialmente, porque apreciava Platão, e influenciador da segunda tradição filosófica, ele olhou para a filosofia cartesiana e imediatamente reconheceu nela as bases das ciências emergentes, mas descobriu em Descartes erro e perigo. Vico passou doze anos elaborando a idéia de que a abordagem histórica da lei como desenvolvida nas diferentes sociedades, aliada à visão metafísica da lei divina imutável, poderia delinear uma ciência que compreendesse as verdades conhecíveis pelo homem. Ou seja, atribuiu ao homem o conhecimento da história[64].

A história sempre foi uma parte da retórica. Até "recentemente", uns quinhentos anos atrás, a História era entendida no meio das artes retóricas, juntamente com outros conhecimentos como a música e a filosofia. Os engenheiros, médicos, físicos e químicos eram considerados nessa época como profissionais inferiores na escala de conhecimento cultural por sua esfera de ação limitada. Quem estudava história estava entre os humanistas, que como já dito, se ocupavam muito mais com o homem, do que com a natureza, e assim, tinha conhecimento de vários fatos ao longo da existência humana, o que permitia uma variedade de visões sobre mesmos fatos. Logo, é ingênuo supor-se "o historicismo como um mero modo de tratar um tema registrando dados cronológicos"[65].

"O historicismo é um modo de pensar [...]". "O homem, como ser histórico, torna obviamente históricas todas as suas obras e requer do filósofo uma perspectiva histórica para entendê-las"[66]. Ser culto é conhecer História. Isso implica em conhecer Literatura e Arte, incluindo a Música. É a História quem dá essa relatividade de visões. "O relativismo, que se impõe ao pensador em uma época saturada e crítica não pode satisfazer-se com os sistemas que ignoram a temporalidade e a concreteza da condição humana"[67]. Ela mostra onde a humanida-

[64] SALDANHA, Nelson. Historicismo. In: BARRETO, Vicente de Paulo (Coord.). **Dicionário de Filosofia do Direito**. Rio de Janeiro: Renovar, 2006, p. 435 – 436.
[65] SALDANHA, Nelson. Historicismo. In: BARRETO, Vicente de Paulo (Coord.). **Dicionário de Filosofia do Direito**. Rio de Janeiro: Renovar, 2006, p. 435.
[66] SALDANHA, Nelson. Historicismo. In: BARRETO, Vicente de Paulo (Coord.). **Dicionário de Filosofia do Direito**. Rio de Janeiro: Renovar, 2006, p. 435.
[67] SALDANHA, Nelson. Historicismo. In: BARRETO, Vicente de Paulo (Coord.). **Dicionário de Filosofia do Direito**. Rio de Janeiro: Renovar, 2006, p. 435.

de errou, e como deveria aprender com os próprios erros. É a falta dos conhecimentos da História que suscita novos erros. A História faz conhecer o passado para se poder projetar o futuro. Essas são, em suma, as três vertentes filosóficas nas quais se fundamenta a perspectiva retórica.

4. Diferenças entre sofística e retórica

Embora já se tenha falado da sofística anteriormente, importa observar outros nuances. A sofística foi a primeira grande escola da retórica na cultura ocidental. Retórica é uma espécie de gênero classificatório e nela temos a sofística e uma série de outras escolas, como por exemplo, os atuais desconstrutivismo e o neo-estruturalismo, entre muitas outras, que são todas escolas retóricas. De certa forma, até o positivismo jurídico é uma escola retórica. Por exemplo, na definição da inconstitucionalidade da lei o que se encontra é sem dúvida uma posição retórica. Quando se questiona se o aborto é justo ou injusto, a resposta jurídica certamente será que a questão será resolvida por uma assembleia devidamente constituída e legitimamente designada para decidir o que é justo ou injusto com relação ao aborto. Define-se uma norma como inconstitucional aquela que não obedeceu ao rito de elaboração previsto pelo sistema e não foi elaborada pela autoridade competente para tanto (já que quem estabelece essa competência é o sistema). Todos esses são critérios inteiramente formais. Como disse Luhmman: "O bem e o mal são resultados de um procedimento".

A filosofia subjaz a retórica. Vale lembrar que para Platão, a retórica não era filosofia, porque ele considerava que a filosofia se preocupava unicamente com a "verdade". Quando se aceita essa definição então é correto dizer que retórica não é filosofia. Mas, se a filosofia é o amor ao saber, como leva a crer sua etimologia, então a sofistica é uma forma de filosofia. Embora isso seja irrelevante, o importante é que se possa ter abordagens ou formas de ver o mundo.

Pode-se ver o mundo como filosofia, sofística. Então a sofistica será uma das formas da retórica. Que se subdivide em uma teoria das figuras, ou ornamentos, ou mesmo figuras de estilo, que são importantes no mundo jurídico, embora um tanto desprezadas pelo ensino superior (metáforas, metonímias, sinédoque, estudo de silogismos, etc.) e, a teoria da argumentação, que é tópica, entimemática, consensual, circunstancialmente procedimental. O próprio Robert Alexi e outros ontologistas apenas se apropriaram dessa nomenclatura, mas não se referem à

teoria da argumentação descrita aqui. A tópica é procedimental, com a diferença de que os próprios participantes do discurso escolhem o procedimento.

Esclarecendo, na teoria da argumentação de Alexi, as regras de procedimento são impostas de fora para dentro e se você não se submeter a elas não se estará agindo racionalmente. Por exemplo, se usam os vinte e oito meta-códigos, que não são escolhidos por nós que estamos participando do discurso, eles se impõe pela sua própria natureza ou ontologia mais popular. Uma dessas regras é *todo aquele que pode falar e quer falar, deverá falar no discurso.* Outra regra é a de que *todos são iguais.* A regra da auto-consistência é a de que *quem fala e mente, não está sendo racional.*

A argumentação tópica não vê o problema assim. Ela acha que é possível haver discursos em que o procedimento não respeite essas regras, onde, por exemplo, algumas partes sejam proibidas de falar. Uma parte tem a força e a outra não a tem. Usa-se a ação estratégica. Algo como o que um advogado usa em seus discursos. Omitir algumas passagens, enfatizar outras, com o fim de se obter o fim desejado. Assim, a tópica entimemática não se subordina a uma postura ética definida. Embora não seja correto dizer que a retórica é antiética.

A sofística é a primeira das escolas retóricas e a retórica, grosso modo, é a crença na auto-constituição de um discurso circunstancial. Como a filosofia é a "busca pelo saber", em substituição ao mito, ela compreende o mundo não de forma mitológica, mítica. Isto é, a filosofia como linguagem sai das narrativas que retratam tempos fabulosos ou heroicos[68]. Em geral, seus arrazoamentos não se baseiam em seres e acontecimentos imaginários, embora algumas dessas narrativas tentem ser explicadas de forma filosófica. No máximo, ela busca em fatos e personagens reais exagerados pela imaginação popular seu correspondente lógico, visto que é considerado verdadeiro por força da tradição e são passíveis de refutação. Nisso buscaram se especializar os sofistas e ali desenvolveram seu instrumental retórico. Logo, a sofística como filosofia é uma das escolas retóricas, também filosóficas, e, têm na retórica instrumentalidades como as teorias das figuras e da argumentação tópica, entimemática. Existe também a corrente das ontologias que desenvolvem os silogismos racionalistas, como outra forma de pensamento.

Tal bipartição se baseia numa compreensão do ser humano. A

[68] FERREIRA, Aurélio Buarque de Holanda. **Novo Dicionário Aurélio da língua portuguesa**. 3. ed. Curitiba: 2004. p. 1340 e 1341.

retórica tem um conteúdo persuasivo que não é um conteúdo verdadeiro, mas é um conteúdo consensual. Os seres humanos se entendem porque possuem consensos pré-constituídos, que não são discutidos ou questionados a fim de se evitar as literalidades hermenêuticas e se dê algum sentido às ideias, como bem estuda a Teoria da Argumentação tópica que não se baseia em "verdades", mas em consensos sobre qualquer conteúdo.

Essas duas inclinações, ontológicas e retóricas, marcaram toda a cultura ocidental, já que a cultura oriental é mais unicista ou holística. A retórica é uma racionalização. Os sofistas já percebiam que os efeitos das palavras sobre as pessoas têm resultados poderosos. Quem fala bem tem poder. Por isso eles desenvolveram uma técnica de falar bem, e como nem todo mundo consegue falar bem, embora isso possa ser adquirido com o devido treino e prática, eles impuseram uma certa vantagem sobre os outros.

Platão considerava a retórica dos sofistas uma falsidade, porque achava que eles tinham o objetivo de provocar um efeito de submissão sobre a conduta alheia, de forma que o orador, o *retor*, pudesse se impor, tendo o poder, atitude abominada por ele.

Contudo, Aristóteles percebeu que é impossível se fugir da retórica. Embora fosse ideal, como pensava Platão, que só se trabalhassem silogismo apofânticos e dialéticos para uma busca de verdade, a realidade é que muitos assuntos humanos importantes tornam esse idealismo uma impossibilidade.

Aristóteles, em sua metódica, explica o porquê. Ele diz que certas coisas que podem ser demonstrados, são de tão difícil ou demorada demonstração, que fica difícil demonstrar cada palavra que se diz, até porque o auditório não aguenta tantos detalhes explicativos. Outras questões não são possíveis de demonstração, por mais tempo que se tenha para demonstrar. Ainda tem que se considerar a ignorância do ouvinte. Às vezes o discurso exige tantos pressupostos que o ouvinte não tem, que nunca se poderá incluir o ouvinte na parte apofântica da comunicação. Por isso Aristóteles divide os silogismos em apofânticos, aqueles iluminam sem ser necessário nem pensar, e que se aproximam da verdade, e os dialéticos, os que se chega à verdade, mas que demora a chegar à verdade, como por exemplo, tentar explicar $E=mc^2$, que se acredita, mas é necessário todo um tempo e conhecimento específico, pressupostos para se entender isso, e assim, se chegar a essa conclusão. Ele informa que pouca coisa se consegue apofântico, e alguma coisa se consegue dialética, caso se tenha o conhecimento especial, como o que

possuem pessoas muito elitizadas.

Ainda existe o entimema, que é o silogismo retórico, porém do provável, já que há assuntos em que a verdade é possível, e aqueles em que não se pode chegar à verdade. Daí ele separar a retórica do "bem", que são os entimemas, que se baseia em *topoi*, em probabilidades, e, a retórica do "mal" que são os *erismas* aqueles que são da "mentira".

Aristóteles é o primeiro da tendência dominante a assumir que a retórica era útil (1355a20)[69]. Mostrando que há uma retórica do lado do "bem" e que é preciso estudar retórica para se poder combater a "má" retórica, a erística, já que os sofistas usam ambas. Portanto, se for possível separa esses elementos, o orador poderá se defender melhor. Aristóteles acreditava que o discurso forense tem mais do erisma do que os outros discursos.

5 Elementos constitutivos da base retórica.

5.1 Os meios técnicos da retórica aristotélica – a tríade retórica

5.1.1 O e*thos*

Sabe-se também que esta classificação foi introduzida por Aristóteles. Essa é a grande importância que se deve conceder a esse grande filósofo, pois mesmo contando entre os filósofos ontológicos, ele percebeu a necessidade do estudo retórico na esfera do ambiente linguístico. Por isso, ele demonstrou que os meios discursivos de persuasão dizem respeito a alguns aspectos técnicos infringidos ao discurso. Daí termos o *ethos*, o *pathos* e o *logos*. O *ethos* indica o caráter pessoal do orador. Aquilo que do próprio orador dá peso a suas palavras.

O Ethos se refere ao caráter ou a presença do locutor ou escritor que tenta convencer. O autor deve ter - ou parecer ter - um argumento crível e parecer ser uma pessoa confiável. Se o argumento é uma questão técnica ou requer conhecimento especializado, o orador deve estabelecer sua posição de perito. Se o indivíduo não for crível ou de confiança, o público não vai assistir ao seu argumento ou ser persuadido por ele. O orador também deve usar o tom de voz adequado para a situação, se quiser ser eficaz em sua apresentação.

---

[69] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 21.

5.1.2 O *pathos*

O *pathos* é o que causa no auditório algum tipo estado de espírito, de reação, de emoção. Que é um dos objetivos do orador, controlar a reação do auditório. Controlar o *pathos*, mas não qualquer *pathos*, mas aquele que o orador deseja.

O Pathos refere-se ao papel da audiência em uma situação retórica. O argumento deve apelar para as emoções ou valores do público, se quiser ser eficaz. A retórica deve estimular a imaginação do leitor ou ouvinte. O locutor ou autor deve desenvolver empatia com o público. No entanto, o orador deve tomar cuidado para não parecer manipulador ou corre o risco de perder o ethos, sua credibilidade com o público.

5.1.3 O *logos*

É a prova, ou aparente prova. O conteúdo do discurso, propriamente dito. A argumentação racional objetiva[70].

O *logos* refere-se à lógica do argumento em si. Um texto retórico deve ser estruturado de forma clara e lógica. Se um argumento for ilógico e confuso, o público não será capaz de segui-lo. Independentemente do carisma do orador, se seu argumento for difícil de entender, é improvável que ele convença seus ouvintes. Um texto lógico e de fácil compreensão é muito mais provável de influenciar o público. Um argumento ilógico pode afetar a percepção do público sobre o orador, diminuindo seu ethos, sua credibilidade com eles.

5.2 Os recursos retóricos

Outros "meios" ou "recursos" discursivos referidos por Aristóteles são os recursos retóricos pertinentes especificamente à retórica persuasiva, argumentativa, e são os por ela construídos através dos princípios da retórica[71]. O gênero que sustentou a classificação aristotélica destes recursos retóricos foi o *silogismo*. Para fins didáticos, convém ressaltar que, em sua *Tópica*[72], Aristóteles já havia introduzido o conceito

[70] ADEODATO, João Maurício. **A retórica constitucional**. São Paulo: Saraiva, 2009, p. 23.

[71] São princípios gerais da retórica: objetividade, atratividade, concisão, simplicidade, comunicabilidade, adequação ao perfil do auditório e respeito ao idioma.

[72] ARISTÓTELES. **Tópicos**: dos argumentos sofísticos. 2.ed. São Paulo: Abril Cultural,

de silogismo dialético [*Top*., 154a20], fazendo uma distinção entre os silogismos apodíticos, baseados em premissas aceitas indiscutivelmente e de forma evidente e silogismos dialéticos, baseados em premissas aceitas universalmente. Essa sistemática foi uma analogia dos métodos empregados pela ciência e pela dialética, onde ele encontrou também a indução *(επαγωγή – epagoge*) e a dedução (συλλογίσμός – silogismos).

Genericamente, o silogismo seria uma dedução formal a partir de duas proposições, chamadas de premissas, das quais, por inferência, se chega a uma terceira, chamada de conclusão[73]. É a definição para o silogismo "perfeito". Mirabete utilizou-se da doutrina jurídica para comparar os requisitos formais da sentença, que são três: a exposição (ou relatório, ou histórico); a motivação (ou fundamentação) e a conclusão (ou decisão) com a exposição esquemática de Noronha que afirmava representar a sentença um silogismo, onde na premissa maior se encontrava a exposição dos fatos apresentados pelas partes; na premissa menor se encontravam os motivos, isto é, as provas e as regras do Direito normativo e, na conclusão, a decisão condenando ou absolvendo o acusado[74]. Porém, esse padrão é comumente quebrado no mundo do Direito, que oculta um dos três elementos formais. É o caso do *entimema*.

Para tratar das deliberações, o papel mais importante foi atribuído ao entimema ou silogismo retórico, este visto como o corpo da persuasão e o centro da retórica, e constituído principalmente por premissas que enunciam apenas o que é provável (*Ret*., 1357a 13-14)[75].

O entimema é o recurso dedutivo próprio da oratória retórica consagrado até em texto normativo judicial. Parece um silogismo, mas não é, pois só do ponto de vista formal mantêm semelhanças com o silogismo científico ou demonstrativo. Sua principal diferença reside em que suas premissas, em contrapartida ao que acontece com o silogismo perfeito, não são sempre necessárias (como no exemplo), nem universais, nem verdadeiras.

Ao enumerar os recursos discursivos retóricos Aristóteles usa a mesma sistemática dividindo-os em indutivos e dedutivos, mas com a diferença de que tomam por base a verossimilhança. O recurso indutivo

1978, p. 136.

[73] FERREIRA, Aurélio Buarque de Holanda. Silogismo. **Novo Dicionário Aurélio da língua portuguesa**. 3. ed. Curitiba: 2004, p. 1846.

[74] MIRABETE, Júlio Fabbrini. **Processo penal**. 4. ed. rev. e atual. São Paulo: Atlas, 1995, p. 439.

[75] ARISTOTE. **Rhétorique**. Tome Premier. Trad. Médéric Dufour. 11. ed. Paris: Société d'Édition Les Belles Lettres, 1960, p. 80.

é chamado de paradigma, o exemplo, conhecido como indução retórica. Segundo Adeodato o meio, ou recurso dedutivo é o entimema, conhecido como silogismo retórico[76], já assim classificado por Ferraz Júnior[77], e distinto do erisma ou silogismo erístico. As premissas oriundas dos entimemas são constituídas de probabilidades e signos, e segundo as palavras mesmas de Aristóteles "esse é o meio de persuasão mais efetivo", pois "o homem que faz boas conjecturas acerca da verdade assemelha-se ao fazer boas conjecturas acerca das probabilidades" [*Ret.*, 1355a16][78].

O entimema paradigmático ganha todo o seu conteúdo persuasivo dos exemplos, sendo predominantemente demonstrativo, vez que, apresentados os casos, estes são aceitos pela maioria das pessoas, e em especial pela maioria dos auditórios, enquanto que o silogismo ou entimema retórico tem sua persuasão baseada em sinais ou indícios, onde aparecem apenas algumas premissas e subentendem-se outras. Portanto, o entimema é formalmente definido como uma estrutura silogística à qual falta um dos três elementos formais, possuindo "desdobramentos modais ocultos"[79].

6 A Retórica e seus três níveis ou dimensões.

6.1 A Retórica material.

Ainda para se compreender o que vem a ser a retórica propriamente, é preciso ver seus três sub-níveis. Existe a retórica material, que é aquilo que todo ser humano pratica sem reflexão, ou seja, o próprio ambiente das relações humanas. São nossos diálogos, nossas inter-relações.

O ser humano é um ser que fala. Dessa forma pensamos que somos mais que os animais, tendo a linguagem como o diferencial. O ser humano é um ser pleno porque vive tanto nas regiões árticas como nas florestas, se adaptando a qualquer ambiente sendo assim, inteligente. Para os retóricos, o ser humano não é mais que os outros, pelo contrário,

---

[76] ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. 4. ed. São Paulo: Saraiva, 2009, p. 339.

[77] FERRAZ JÚNIOR, Tércio Sampaio. **Introdução ao estudo do Direito:** técnica, decisão, dominação. 6. ed. São Paulo: Atlas, 2008, p. 381.

[78] ARISTÓTELES. **Retórica**. Tradução Marcelo Silvano Madeira. São Paulo: Rideel, 2007, p. 21.

[79] cf. ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. 4. ed. São Paulo: Saraiva, 2009, p. 339.

é menos. Se falamos é porque não temos o ambiente do mundo. A capacidade de sobrevivência do ser humano é inferior à maioria dos outros animais. Por exemplo, uma girafa recém-nascida pode correr por léguas fugindo de uma onça. Já o ser humano, demora cem anos para aprender a viver e a maioria não aprende. Os dinossauros viveram cento e cinquenta milhões de anos sobre a terra e nós apenas com pouco mais de trezentos mil anos estamos acabando com ela, e isso porque nos consideramos inteligentes. Será que a humanidade viverá cento e vinte milhões de anos? Isso sem falar que ainda existem os descendentes dos dinossauros, como as aves. O que é viver em metabolismo perfeito e interação com a natureza? O que é ser inteligente? Estes são questionamentos da retórica material.

A retórica material é esse inter-relacionamento das relações humanas por meio da comunicação. Nosso ambiente é a língua. O ser humano sozinho não é nada, ele necessita da comunicação até para ser humano. Prova disso são poucas experiências e constatações através de crianças encontradas perdidas em florestas, que foram criadas por lobas ou gorilas, vivendo como bichos sem desenvolver sua humanidade exatamente por falta da comunicação. Essa é a retórica material natural que faz parte de nossa formação antropológica, resultado da sociabilidade humana. Sem comunicação não somos humanos. É a retórica da matéria ou do primeiro nível.

O primeiro passo para se determinar o nível da retórica material é o contexto histórico, a descrição dos eventos. O que acontece nos debates que o autor observado traçou, qual o relato de suas ideias; isso separado de sua estratégia, o que seria um nível mais acima, chamada de: a argumentação do autor. Na falta de uma palavra melhor, seria a retórica prática ou estratégica. Primeiro é necessário isolar o contexto histórico descrevendo casos. O que tem muito a ver com questões pessoais.

Já vimos que são pressupostos da retórica o ceticismo, o historicismo e o humanismo. Em alguns casos de um estudo, fica muito patente o humanismo demonstrado pelos autores ao manifestarem, por exemplo, raiva. É o exemplo de um autor expressar sempre sua raiva pelo fato de um determinado colaborador ter sido escolhido para uma função jurídica e não ele ou algum de seus colaboradores. Isso é um fator importante para quem estuda a retórica. É o *pathos*. Observar a raiva de quem foi desprezado pelos historiadores mais ontológicos.

Quase todo grande pensador não é fruto apenas de seu contexto histórico. É o exemplo observado em Nicolai Hartman que escreveu

sua Ética de mil páginas no front da Primeira Grande Guerra Mundial em meio a toda aquela confusão. Balas silvando e ele pensando no *reino eterno dos valores*. Esse pensador conseguiu abstrair-se no contexto histórico, mas nunca totalmente. Contudo, cabe lembrar que contexto histórico não é sinônimo de retórica material, é apenas uma aplicação de método que deve ser observado em um determinado trabalho.

Esse contexto histórico envolve um levantamento bibliográfico. O levantamento bibliográfico é um trabalho diário que abrange: uma bibliografia primária, as obras escritas pelo próprio autor incluindo documentos, jornais e processos e não só obras de doutrina; a bibliografia doxografica que são os escritos de outros observadores sobre o autor. Dela também vão ser construídas as teses do estudo em questão.

Porém, há uma diferença entre a história dos eventos históricos e a história das idéias, como bem o coloca o professor José Antônio Tobias em seu livro *História das Idéias no Brasil* da editora EPU. [Não é nossa função demonstrar essa diferença, mas precisamos pelo menos perceber e fazer essa diferenciação].

A proporção da ênfase que será dada a cada fase da retórica vai depender do estilo de vida e da obra de cada autor escolhido e analisado. Se o autor teve uma vida intensa e interessante, haverá um destaque maior na questão material e estratégica, ou se mais recluso e introspecto na questão analítica, haja vista sua contextualização histórica ou bibliográfica. Contudo, deve se colocar alguma ênfase em todos os níveis de estudo retórico pretendidos.

6.2 A Retórica estratégica.

Ao se observarem alguns dos fatos comunicativos, percebe-se que algumas estratégias são melhores que outras. Essa observação é um pouco mais difícil de ser feita. Na área do Direito existe uma guerra de estratégias, e é para isso que se passam cerca de cinco anos em uma faculdade estudando. Outras questões da vida humana não necessitam desse aprendizado, porque se utiliza de códigos simples, variáveis e não dogmáticos.

Diferentemente da retórica jurídica onde o Direito tem alguns limites dogmáticos, que na verdade não são uma prisão, mas uma porta para um mundo inteiro, nas palavras de Tércio Ferraz Jr. Porém, é um mundo que não pode tudo. Pode fazer muita coisa, mas não pode tudo. O aluno tem a ilusão ao verem as muitas teorias diferentes do Direito

e pensam que poderão criar a sua também, mas não é bem assim. Eles têm uma grande liberdade dentro da dogmática, mas é uma liberdade dogmatizada. Todo argumento tem que se basear em uma fonte válida e pertinente, o sentido e o alcance dos termos tem que ser determinado, a argumentação tem que se dirigir a um objetivo e tem que haver uma sugestão de decisão. Isso é o procedimento dogmático. Tudo isso também é retórica estratégica.

A retórica estratégica é que da observação do mundo visto na retórica material pela comunicação humana, são retiradas algumas orientações normativas que permitem o sucesso estratégico nessa convivência do primeiro nível. Ao passar pelo primeiro nível, observando o que deu certo ou errado ali, se chega ao que se denomina retórica prática ou estratégica.

Isso é visto de forma tópica, ou seja, em cada ambiente é diferente. Por exemplo, nos ambientes marginais a gentileza ou o ato de chorar é uma fraqueza. Em alguns ambientes mais patriarcais, a mulher só pode falar com um homem na companhia de seu irmão, de seu marido ou pai. Houve tempo e em alguns lugares em que a mulher era tutelada relativamente incapaz, contudo, em alguns lugares se deu a emancipação feminina revertendo esse quadro. Tudo isso faz parte das estratégias de linguagem que marcaram o século XX.

6.3 A Retórica analítica.

O último dos três níveis é a retórica analítica ou cientifica. É a tentativa de estudar o resultado de determinadas estratégias nos níveis de retórica material, a fim de que possam ser repetidos e consequentemente, mantido um grau de sucesso. Foram as tentativas de mostrar que determinadas expressões provocam deleite aos ouvintes e outras não. Como o *Manual de Retórica* de Frei Caneca baseado no pensamento de Quintiliano, que ensina como seduzir os outros. Mas tem que ficar bem claro que isso só vale topicamente. Em ambientes incultos, ambientes agressivos, em ambientes onde não satisfeitas as necessidades básicas isso não funciona. Quem tem fome não é humano. Para ser humano, o lado animal precisa estar satisfeito.

7 Conclusão: Direito, consenso e tolerância por meio da instrumentalidade e metodologia retórica.

Para a Retórica é necessário uma antropologia realista. Sabemos que há sociedades onde apedrejar ou lapidar mulheres adúlteras aceitável, embora o consideremos um comportamento antiético. O uso da ordália (prova sem combate, juízo de Deus) na Idade Média, hoje é considerado um absurdo para a solução de conflitos, ainda mais, se fossem legitimados pelo "estado". Para o retórico se foi tomada uma decisão ética que foi transformada em norma jurídica é porque uma boa parcela da população acredita que isso é o justo. Alexy dizia que os positivistas são adeptos da tese da separação do direito moral e os não positivistas ou pós-positivistas da tese da vinculação, o que parece errado diante de casos como este. Na verdade todo positivismo não crê na vinculação, mas, acredita que todo direito tem um conteúdo ético. Esse conteúdo ético não é determinado por ninguém a não ser pelos próprios seres humanos. Assim, leis como o apedrejamento de mulheres adúlteras, a decepação das mãos de quem furta ou a castração do estuprador provêm de boa parte de uma população que se não é uma maioria democrática, é um grupo mais bem estruturado, armado, solidário ou rico. Este grupo é denominado de vencedores éticos. E são os vencedores éticos que decidem que aquilo se torne uma norma coercitiva, obrigatória. Isso não pode ser chamado de antiético. Pode ser antiético para um ou outro indivíduo ou grupo. Contudo esses mesmo que formularam essa coerção, se submetidos aos horrores de muitos anos de guerra ou de fome contumaz, como acontece em certos países primitivos, quem sabe, mudarão sua opinião completamente. O retórico não é aquele que aceita qualquer dominação, pelo contrário, por desconfiar tanto na natureza humana, acredita que se não se der roupa, comida e condições básicas de sobrevivência às pessoas elas voltam à barbárie. Justamente o contrário do que os anti-retóricos dizem. Terrível também é a doutrina da verdade que é imposta e empurrada "goela abaixo".

O retórico, como visto, é aquele cético, que não será levado ou enganado por um grande salvador da humanidade como Hitler ou Chaves. Somente os famintos e extremamente necessitados é que acompanham esses iluminados que viram a "luz". Os que apoiam ideologias como o racismo é que devem ser considerados marginais. São dominações sem escrúpulos que em face de necessidades extremas, vem dominar os que são ainda mais fracos. A posição cética também não é uma

posição imoral. Pelo contrário, ela segue a linha do "bem" sendo cética, humanista e histórica. Onde cada um pode fazer o seu presente.

Os retóricos são muito descrentes sobre os discursos das dominações, onde alguns seres humanos são excluídos do discurso. Não que isso seja verdade. Mas, porque o ser humano excluído do discurso deixa de ser humano. Os retóricos são acusados de aceitarem qualquer tipo de relacionamento social. Perguntaram a Kelsen se o sistema nazista era um sistema jurídico, se era Direito, ao que respondeu que sim. Da mesma forma que em certas sociedades e países apedrejar uma mulher por adultério é direito se visto do ponto de vista do direito positivo. Olhando do ponto de vista humanista e cultural de outras sociedades, isso é considerado um absurdo. Mas para Kelsen, um positivista, é Direito, embora seja um direito ruim, já que ele era democrata, judeu, mas é Direito.

Portanto, pelo simples fato de que no mundo dos fatos é sempre imperfeito, o Direito seja na produção normativa, seja na aplicação decisória, necessita ser construtivo positivamente a fim de que, ao menos, em sua finalidade teleológica sua credibilidade seja reforçada. Não ignoramos que, no mundo do Direito, determinadas construções da linguagem produzem mais injustiça do que equidade. Mas isso se deve, talvez, à ignorância ou ao despreparo de profissionais na boa retórica que, se apegando a um dogmatismo cego, veem escapar por entre os dedos o bom senso e a civilidade.

Percebemos então, que todos esses elementos, que atualmente têm ocupado exaustivamente a análise de vários dos maiores filósofos do Direito e permeiam os gabinetes dos seus operadores, são os resultados do trabalho prático (mesmo que oculto) da Retórica, na busca do consenso e da tolerância.

Natural Law: Classic and Modern?

Paulo Ferreira da Cunha[1]

Abstract: Natural Law was, in its many aspects, the philosophy of Law of the Western World, at least, during centuries. A general change of paradigm is making it a sleeping beauty in a beautiful castle surrounded by high and wild vegetation. If we want to wake up Natural Law from its persistent dream, we must face some myths about it, and deconstruct them. And try to build not a modern Natural law against the past ones, but a more flexible and contemporary vision of it. Let me present to you some basic thesis to what I call a critical neojusnaturalism, an alternative to the present dogmatic theories of a positivist natural law, and the ideological division between classical and modern natural law.

Keywords: Natural Law, Human Rights, Ideology

1. Perfection

The common idea about Natural Law is, as all professors of Jurisprudence know, very far away from what Natural Law really is.

According to many who are by no means learned in the matter, Natural Law would be "the right law", "the just law" or "the perfect law". One of the first indications of a false theory in those philosophical fields is the strong conviction used to assert one's thesis. Those who say that Natural Law is the best, the most perfect law, normally do that emphatically, with no shadow of a doubt, and it seems that things become real or true merely because they say things are as they are.

For those dogmatic iusnaturalists, Natural Law would be plain law, and positive law would be a decayed or maculated law.

But it is quite obvious that Natural Law cannot, by definition, be unjust or even unfair and if it is even more true that there are and there always were all over the world many examples of an unjust and unfair positive law (the machine of making law is mainly in the hands of politicians, sometimes deprived of juridical knowledge and more often with-

[1] Catedrático da Universidade do Porto.

out a real sense of justice - either juridical or social), it is undeniable that Natural Law and positive law need each other.

2. Positive Law

So, against the prejudice that Natural Law is the good law and positive law the bad one, or at least the decayed one, we declare that they need each other. And why? Because Natural Law is not a complete law, and positive law, though positivists like to think otherwise, is in a symmetrical position.

Natural Law cannot determine by itself the colour of official forms, the exact amount of academic fees or the duration of a punishment for this or that crime.

On the other hand, positive law has no detachment from its own reality. And the *dura lex sed lex* pseudo-principle enables positivists to think of the most important thing in law: justice. In general, without the window of Natural Law, positive law would be the same as a subordinate, more or less mechanical activity. Law would be just another way of force, power and politics. We obviously do not deny the immense importance of those matters to the law, but there are some limits. At a certain point, jurists, the priests of Justice, are allowed by their special legitimacy to say "no" to the simple orders of a power that, even if it is legitimate by title, by doing evil things falls into the darkness of the exercise of illegitimacy. This may be said with other words, but it was formulated approximately in these terms centuries ago. Another common place - also a mistake, but not so serious - considers Natural Law as a set of principles - it is an understandable temptation for a philosopher (even more for a jurist) who is not so demanding and is, let us say, short of time. In fact, the matter is more complex than that. Judging from one of its aspects, we could even say that maybe Natural Law was once (mainly in jusrationalist times and immediately after that) a set of principles, or, better still, a system of principles, but that does not help us a lot, because, first of all, Natural Law was not always seen like that, and - what is even more complicated - it seems that nowadays Natural Law can no longer be conceived as being only principles or mainly certain concrete principles.

Today, with a certain "good will" we would admit a very subtle presence of principles of Natural Law. They should be mainly principles *under* the commonly accepted ones. A kind of shadow-principles, more

difficult to understand and that prevail long term over current ones. Those shadow principles, or "silent principles", are the only justification of the exile and death of the simple principles created by deduction from political fashions or by the decantation of positive laws.

The classical principles "of Natural Law" were in the meanwhile reduced to written norms in the declarations of rights, constitutions and even treaties. So, the main principles and their consequent rules are now positive law. Some even talk about a *positive Natural Law*.

3. Change

Another very common dogma consists in thinking that Natural Law is eternal, unchangeable and universal, like the commandments of eternal Law engraved in golden letters in everlasting marble tables. Some of the great classic founders, however, do not share this point of view.

On the contrary, many centuries before Stammler, Del Vechio and in a certain sense Gény, they underlined at least a certain changeableness of Natural Law over a sometimes stable ground - but not easy to know in concrete terms.

Even human nature itself is considered changeable by Thomas Aquinas (the concept of *human nature* was obviously put into question, especially after the existentialism and some arguments issued from the Anthropology). That is what he says many times in his *Summa Theologiae.*

It is important to deconstruct this alleged immutability of Natural Law. It is either based on a religious dogma or in the universality of Reason – what was behind this stony Law was not often discovered. Certainly, many and many authors and law actors did not realize at their time, and not even after this very egg of Columbus, that we are not talking about an Angels' Law that would be untouchable by its own nature. We are simply talking about a rather important and magnificent construction of human (but only human) mind: Roman law. The spirit of Roman law, apart from some peculiarities is, of course, the natural candidate to serve as a fundamental Paradigm of the juridical *episteme*, because - may we remind it? - Roman Law was the first really autonomous Law.

Édouard Laboulaye was very acute when he painted the portrait of the theorists before Montesquieu – natural law was at the shape and image of Roman law.

That's why in many cases some scholars were (and still are)

talking about Natural Law, but in fact reasoning in terms of Roman Law. But they is not the same.

Nowadays, difficult and dilemmatic questions are shaking the sure answers that are familiar to us. New ways of relationship, consent, responsibility, privacy, cyberspace problems, bioethics, informatics, etc., are just some of the immense set of challenges for jurists. The most "age-elastic" (to use the interesting concept of Rabelais and Rorty) will be certainly lost.

Those topics and problems that certain people call - not without a slight touch of euphemism, at least in some occasions - "civilization questions", the same that show deep ideological frontiers inside the same countries, are for sure part of this context. Of course, the lack of a consensus about those matters does not help seeing the picture without many clouds around it, but those are challenges to be taken seriously on the light of principles, values and concrete situations. The laboratory of reality has never-ending questions about Justice. Jurists and philosophers of law may sleep the sleep of the just: we will always have questions to debate and conflicts to solve.

4. Juridical titles

It is amazing to notice how legal positivism has a psychological ascendant over so many jurists and even imposes itself to those who should refuse it: iusnaturalists. There are some iusnaturalists, in fact, that fall happily into the trap of legal positivism, transforming Natural Law into a certain kind of positive law. This is not the case of the reception of Natural Law by positive law, which is a normal process. This is not even the case of the reception by constitutional and international positive law (constitutions and declarations of rights) of some principles of Natural Law - or conceived as that. This latter case should be treated as "positive Natural Law".

We now mean a kind of a Decalogue syndrome: some jurists want to embrace all Natural Law codifying it, declaring it as universal rules regardless of time, space, and mainly spiritual or mental conditions. This sin of the theory is a kind of "hybris", a Promethean voluntarism.

Those universal rules, considered like the written reason have two different roots:

The religious one tends to identify Natural Law with some faith or moral rules, like the Decalogue of Moses. That version has a curious

peculiarity: according to that perspective, Natural Law would be just duties (*e.g.*: in the thoughts of Álvaro D'Ors), never rights.

In many other cases (the second root) the lists of that defined Natural Law are less ambitious, although written, positive, and, if we see them critically, not so universal. Just to give an example, one of those catalogues prescribes the respect of Sunday as a holiday. Nothing against Sunday, of course, but what about the non- Christian religions, which would prefer to have their holiday on Saturday or on Friday?

Those facts are a blessing to the theory of Natural Law. These kinds of prescriptions arise naturally when one wants to transform Natural Law into a little handbook for scouts. The shock between the *Weltanschauung* of the theory and the reality of our present is an evidence. In this case, we face the obvious phenomena of religious pluralism.

And once a weakness is revealed in a theory, everything else is contaminated. All those postulates and rules are under suspicion.

5. Ideology

The 18th century is normally considered the turning point of Natural Law – even though we could go back to the nominalism of the 14th century in some aspects, and some authors have seen eventual though not very decisive changes in the previous century. But we may not theoretically mix up what is supposed to have occurred in protestant middle and northern Europe and what happened in the catholic south and in Latin America. A consideration of 18th century's real or sociological situation - not just a theoretical one - of Natural Law is that "peripheral" areas may bring better and more clarifying light over the problem. Even Leo Strauss, who precisely starts a crucial part of his book on the subject, does not hide the problems posed by Locke's position regarding Natural Law. The facts - or data - sometimes really do not help theories. And Locke himself seems to be an obstacle to some rupture theories.

So, it is important to recognise that not everything was alike in that period and it is possible that a better knowledge of the up-to-now neglected cultural area of the Catholic Enlightenment may change the general ideas about the subject. We need more studies, and we specially need comparative ones.

It may be said that it is no more than a detail, but the fact is that when we study important authors of the Luso-Brazilian juridical Enlightenment, such as Tomás António Gonzaga, António Diniz da Cruz e Silva

and António Ribeiro dos Santos, as well as the Portuguese jurist Melo Freire we have the feeling that the radical rupture between the so-called modern, jusrationalist Natural Law and the one of classical tradition, based mythically in the trinity Aristotle/ Roman Law /Thomas Aquinas is not an evidence. We cannot see the difference of juridical reasoning apart from some details of "couleur locale", a style of the epoch.

Of course, political questions are involved in the matter. Let us not forget some important historical points in this evolution: we have had the legalism of Francisco Suarez (immediately present in his most well known title: *De Legibus ac Deo Legislatore*). We have had the voluntarism present in revolutions and in the idea of the changing of society by means of the law. And we have also had the Enlightenment despotism in the political level. All those aspects seem important for a conception of Natural Law.

However, on the methodological ground, even at the level of argumentation, of the great conceptions of law and namely in what concerns Natural Law itself may we say that important changes took place in the 17th and/or in the 18th century by comparing those "modern times" to the classical ages, the Ancient Latin-Greek and the Medieval Renaissance of Thomas Aquinas? Aren't we mainly changing the scenes and the decoration?

One important key to all the mystery is a comparative look to similar situations in historic interpretation. Let us focus on one example, which has many sides.

Some political traditionalists, such as the Iberian ones, claim the transcendent legacy of the so-called old liberties, old right, etc.

Of course such liberties or rights are almost unknown to scholars who are not from the Iberian peninsula or from Latin America. And, of course, because of the imperialism of knowledge, naturally imposing the achievements of more efficient countries in order to export their ideas and values, neither these historical realities nor the Nordic democracy or the old German rights, or eventually the African ways of composing conflicts, or the Chinese Harmony are known sometimes even in their respective countries. A Portuguese or a Mexican student, a Spanish or a Brazilian citizen knows what the American and French Revolutions were – or are at least aware of some common places about those - but normally they have never heard of these Iberian old rights and liberties. Even those countries that are more fond of their national identity are not investing in this knowledge, maybe because of pure absence of marketing from scholars who study those subjects, or perhaps

because that legacy could recall something of the colonial past - and the colonial past has a specific mythical place in the historical speech of the new countries. And old countries such as Portugal and Spain still do not pay attention to that matter, maybe because the dominant historians identify themselves more with the Modern way of protecting People than with the old way. A great deal of ideological prejudice is involved in this entire story.

On the other hand, modern defenders of human rights either do not know those old rights or distrust them, assuming that dark ages, medieval ages, even Renaissance times could not have had such a thing as real rights. And normally they mix them with the idea of simple privileges.

Traditionalists, in turn, such as the Marquis of Penalva, consider that modern proclaimed rights, mainly those of the Declarations of Rights, are like a *flatu vocis*, neither real, nor effective, due to the French Revolution. This author also considers that with the rage of giving many rights to everyone, Modern Times took away every single right from each person who already had them.

This entire quarrel may have some factual basis from one side and from the other, but the debate is mainly political. We have already understood the gap between the system of traditional liberties and the system of modern ones. The latter was not liberal in the beginning, as many liberals or post-liberals (neoliberals) and many traditionalists think. They were republican at first, at least in theory - which is also not very well known; then they were liberal, afterwards democratic, and later all these roots together became a common political and juridical heritage almost universally shared.

It is a pity that new political liberals seem not to recognize that legacy that should be theirs - some even criticise it as a pure Roman Catholic ideology.

The eclecticism of Southern and Catholic countries (and Latin American ambience is also an exception) must be considered when we try to make a general (universal) theory of the 18th century's natural law. After more than a decade of research, we arrived at the conclusion that the theoretical separation between two kinds of iusnaturalism, which are enemies and very different from each other, seems not to make sense in a contextualised view. Some clues to that were already in many disperse doctrinal aspects. For example: the different ways how contemporary authors try to classify perhaps the most important author of the Luso-Brazilian 18th century iusnaturalism, António Ribeiro dos Santos,

in political-ideological terms seems to be clarifying. Some do not hesitate to consider him as a traditionalist, others a liberal - classical liberal - some others consider him a liberal *avant-la-lettre*, but always being cautious about the classification, because of the variety of aspects of this author, who is a kind of "Portuguese Montesquieu".

The separation between the "two" iusnaturalisms seems to be essentially artificial, built by theory and it seems to have its roots in the political ground, not in the juridical one. The magnificence and importance of the Enlightenment on the State level maybe contributed to trouble the analysis. Politics, *raison d'Etat*, and so on, naturally played an excessive role in the analysis of the sense and specificities of 18th century Natural Law. That observation could, of course, see the political context, but should focus on the law itself, and specifically on the methodology and practice of daily life law in action.

Let us face these intellectual facts in a very direct way. It seems that traditionalists (more than absolutist monarchists, but some pre-absolutist monarchists with some attachments to some old liberties) did not want to be mixed up with those they see as revolutionary: the liberals, even if it is only about an "esoteric" matter such as Natural Law.

In fact, those monarchists who defended the old liberties before absolutism may be confused, in theoretical terms, or in abstract ways, with the old liberals. These were also monarchists, at least in theory and by tradition, and both groups shared the same hate towards the concentration of powers in the crown, the lack of autonomy of local governments, etc.

The Preambles of the French Constitution of 1791, the Spanish Constitution of Cadiz (1812, called "La Pepa"), and also (at least) the first Portuguese written Constitution (1822) make a bridge between the old - and not only the mythical aspect also present - and the new: forgetting or despising the old liberties is considered the root of the disgraces of the nations (absolutist disgraces). So, modern constitutions want to wake up from their secular absolutist nightmare - the constitutional Sleeping Beauty.

The classical division seems to be a very clear case of political territorial dispute transferred to the theoretical field.

6. Human Rights

So, it is also important a Dialogue between Natural Law and Hu-

man Rights.

According to Francisco Puy, Human Rights are not only today the contemporary language of Natural Law. This fact implies a certain number of strange and sometimes ridiculous quarrels. The author uses a football metaphor. We will try to translate it properly, because words are ambiguous and he is using the Spanish language, of course: some people like to play ball with their feet, but they hate football; on the other hand, there are fervent adepts of football who cannot stand playing ball with their feet.

How can we interpret this? It is not difficult: people who play ball with their feet are the iusnaturalists, those who believe in Natural Law; the football adepts are the jushumanists (or *antropodikeos*). Both are very close in many levels, in many aspects, but many of them refuse to shake hands. Fortunately not all of them, of course. Being an adept of both Natural Law and Human Rights is a heroic achievement and a proof of a deeper insight: to see the bridges above the superficial and parochial oppositions.

We have to ask ourselves: why so much opposition between the two groups - or the two groups of groups, to be more precise?

Puy did not go that far, but we can easily detect in many authors the same scope of the theory that opposes the rights to Natural Law: it is always an ideological question.

This repeating situation as we see in different aspects of historical interpretation of juridical facts, movements and institutions has undeniable political connotations and it allows us to ask more and more and to have reasonable doubts about the purely theoretical essence of some perspectives. It seems theory and science are not the main concern of some observers, because they are contemned by a previous and perhaps even not completely realised ideological prejudice.

The definitive wake up kiss to Natural Law princess should have many colours, and those are only the basic. So, our half dozen thesis:

1. Do not to seek or preach absolute perfection,
2. Do not have misunderstandings with positive law,
3. Deal with change not refusing a basic ethical consistency,
4. Resist the positivist temptation of getting in some sense codified,
5. Clarify connections with ideology
6. Be friends with Human Rights.

References

AA. VV., « Dialogue, dialectique en philosophie du droit », in *Archives de Philosophie du Droit*, Paris, Sirey, 1984, t. XXIX.

Adler, Mortimer, "How to think about truth", édité par Max Weisman, in *The Great Ideas*, Chicago and La Salle, Open Court, 2000.

Alain, "Le Beau et le Vrai", *Propos sur L'Esthétique*, 6.ª ed., Paris, P.U.F., 1991 (1.ère éd. 1948).

Althusser, Louis, *Idéologie et appareils idéologiques d'Etat*, Paris, La Pensée, 1971.

Anouilh, Jean, *Antigone*, Paris, Didier, La Table Ronde, 1994.

Arnaud, André-Jean, "Présentation" Autour d'un dialogue imaginaire entre Michel Villey et Friedrch A. Hayek, *Droit et société*, 2009 / 1, n.º 71, p. 9-25.

Atias, Christian, *Théorie contre arbitraire*, Paris, P.U.F., 1987.

Ayres de Britto, Carlos, *Teoria da Constituição*, Rio de Janeiro, Forense, 2006.

_____, *O Humanismo como Categoria Constitucional*, Belo Horizonte, Forum, 2007.

Balera, Wagner Balera / Sayeg, Ricardo, *Capitalismo Humanista*, Petrópolis, KBR, 2011.

Ballesteros, Jesus, *Postmodernidad. Decadência o resitência*, Madrid, Tecnos, 1989.

_____, "Razones a favor de una postmodernidad alternativa", in *Doxa*, n.º 6, 1989, p. 301 et suiv.

Baptista Machado, João, *Introdução ao Direito e ao Discurso Legitimador*, reimp., Coimbra, Almedina, 1985.

Barret-Kriegel, Blandine, *Les droits de l'homme et le droit naturel*, Paris, P.U.F., 1989.

Bastit, Michel, *Naissance de la Loi Moderne*, Paris, P.U.F., 1990.

Bauzon, Stéphane, *Le Métier de Juriste. Du droit politique selon Michel Villey*, Saint Nicolas, Québec, Les Presses de l'Université Laval, 2003.

Beard, Henri / Cerf, Christopher, *Dicionário do Politicamente correto*, trad. brés. par Vra Karam et Sérgio Karam, Introduction par Moacyr Scliar, Porto Alegre, L&PM, 1994.

Benoist, Jean-Marie, *Tyrannie du Logos*, Paris, Minuit, 1975.

Bigotte Chorão, Mário, *Introdução ao Direito*, I. *O Conceito de Direito*, Coimbra, Almedina, 1989.

_____, *Michel Villey, Paladino do Realismo Jurídico Clássico*, « O Direito », 121.º , 1989, IV.

Bittar, Eduardo C. B., *O Direito na Pós-Modernidade*, Rio de Janeiro, Forense, 2005.

Black, Percy, *Mirror Images behind the rhetoric of natural and positive law*, in "Vera Lex", New York, vol. XI, n.º 2, p. 36 e 38.

_____, *Natural Law and Positive Law: forever irresolvable ?* in "Vera Lex", New York, vol. X, n.º 2, 1990, pp. 9-10.

_____, *Challenge to Natural Law: The vital law*, in "Vera Lex", vol. XIV, n.ºs 1 e 2, 1994, p. 48 ss.

Black, Virginia, *Natural Law is not an Ideology*, "Vera Lex", vol. 1, n.º 2, May – June, 1980, Editorial, p. 5 *et sq*.

_____, *On connecting natural rights with natural law*, in "Persona y Derecho", 1990, n.º 22, p. 183 ss.

Bloch, Ernst, *Naturrecht und menschliche Würde*, in *Gesamtausgabe der Werke,* Band 6., Frankfurt am Main, Suhrkamp, 1961.

Bloom, Harold, *The Western Canon, The Books and the School of The Ages*, trad. port., introd. et notes de Manuel Frias Martins, *O Cânone Ocidental*, Lisbon, Temas e Debates, 1997.

Bobbio, Norberto, *Giusnaturalismo e positivismo giuridico,* Milano, Ed. di Comunità, 1984.

Bonavides, Paulo, *Curso de Direito Constitucional*, 2eme éd., São Paulo, Malheiros, 2011.

_____, *Do Estado Liberal ao Estado Social*, *Do Estado Liberal ao Estado Social*, 7.e éd., 2.e impr., São Paulo, Malheiros Editores, 2004.

Brandwein, Pamela, *Reconstructing reconstruction: the Supreme Court and the Historical Truth*, Durham, North Carolina, Duke University Press, 1999.

Braz Teixeira, António, *Sobre os Pressupostos Filosóficos do Código Civil Português de 1867*, in "Fides. Direito e Humanidades", III, Porto, Rés, 1994.

Canaris, Claus-Wilhelm, *Systemdenken und Systembegriff in der Jurisprudenz*, 2.ª ed., Berlim, Duncker und Humblot, 1983.

Gomes Canotilho, José Joaquim, *Direito Constitucional*, 5.ª ed., Coimbra, Almedina, 1991.

Carducci, Michele, *Por um Direito Constitucional Altruísta*, trad. port., Porto

Alegre, Livraria do Advogado Editora, 2003.

Carneiro, Maria Francisca, *Direito, Estética e Arte de Julgar*, Núria Fabris Editora, Porto Alegre, 2008.

Carvalho, José Liberato Freire de, *Memórias da Vida de ...*, 2.e éd., Lisbon, Assírio e Alvim, 1982 [1ère ed., 1855].

Charmont, J., *La renaissance du droit naturel*, 2.ª ed., Paris, Duchemin, 1927.

Crick, Bernard, *The Reform of Parliament*, Londres, Weidenfeld and Nicolson, 1964.

Cruz, Sebastião, *Ius. Derectum (Directum)…, Relectio*, Coimbra, édition de l'auteur, 1971.

Culleton, Alfredo, *Ockham e a Lei Natural*, Florianópolis, Editora UFSC, 2011.

D'Ors, Álvaro, *Derecho y Sentido Común. Siete lecciones de derecho natural como límite del derecho positivo*, Madrid, Civitas, 1995.

Davidson, D., *Inquires into truth and interpretation*, Oxford, Claredon Press, 1985.

Douzinas, Costas Douzinas / Gearey, Adam, *Critical Jurisprudence. The Political Philosophy of Justice*, Oxford – Portland Oregon, Hart, 2005.

Debray, Régis, *À l'ère des* people*, je parle du peuple*, entretien avec Alexis Lacroix, in "Le Magazine Littéraire", juillet – aôut 2009, n.º 488.

Dembour, Marie-Bénédicte, *Le pluralisme juridique: une démarche parmi d'autres, et non plus innocente*, in « Revue Interdisciplianire d 'Études Juridiques » n.º 24, 1990, p. 43 ss..

Droit, Nature, Histoire, IV.me Colloque de l'Association Française de Philosophie du Droit (Université Paris II, 23-24 Novembre 1984*), Michel Villey, Philosophe du Droit*, s.l, Presses Universitaires de Marseille, 1985.

Duarte, Écio Oto Ramos / Pozzolo, Susanna, *Neoconstitucionalismo e Positivismo Jurídico. As Faces da Teoria do Direito em Tempos de Interpretação Moral da Constituição*, São Paulo, Landy Editora, 2006.

Dufour, Alfred, *Droits de 1'Homme, droit naturel et histoire,* Paris, PUF, 1991.

Dworkin, Ronald*, Taking Rights Seriously,* Duckworth, London, 1977.

Edelman, Bernard / Hermitte, Marie-Angèle (prés.), *L'Homme, la Nature et le Droit*, Paris, Christian Bourgeois, 1988.

Ehrhard, Jean, *L'Idée de Nature en France a l'Aube des Lumières*, Paris, Flammarion, 1970.

Ehrhardt Soares, Rogério, *Direito Público e Sociedade Técnica*, Coimbra, Atlântida, 1969.

____, *Sentido e Limites da Função legislativa no Estado Contemporâneo*, *in* Jorge Miranda / Marcelo Rebelo de Sousa (coord.), *A Feitura das Leis*, vol. II, Lisbon, Instituto Nacional de Administração, 1986.

Farber, Daniel A. / Sherry, Suzanna *Beyond all reason: the radical assault on*

truth in American Law, New York, Oxford University Press, 1997.

____, *Legal Storytelling and Constitutional Law. The Medium and the Message*, in *Law Stories. Narrative and Rhetoric in the Law*, ed. by Peter Brooks / Paul Gewirtz, New Haven and London, Yale University Press, 1996.

Fentress, James / Wichkam, Chris, *Remembering. In social memory*, Oxford, Blackwell, 1992.

Ferreira da Cunha, Paulo, « A Fundação epistemológica do direito em Roma. *Ius redigere in artem*" in *Instituições de Direito*, I. *Filosofia e Metodologia*, Coimbra, Almedina, 1998, p. 201 et suiv..

_____, *Peccata Iuris, Do Direito nos Livros ao Direito em Acção*, Lisbon, Edições Universitárias Lusófonas, 1996.

_____, *Política Mínima*, 2ª. édition, Coimbra, Almedina, 2005.

_____, « Mythe, symbole et rituel aux racines du droit pénal », in *Le Droit et les sens*, Paris, L'Atelier de l 'Archer, diff. PUF, 2000, p. 46 et suiv..

_____, *A natural Natural Law. Michel Villey*, in "Vera Lex - International Journal of Natural Law and Right", vol. XI, n.º 1, New York, 1991.

_____, *Amor Iuris, Filosofia Contemporânea do Direito e da Política*, Lisbon, Cosmos, 1995.

_____, *Die Symbole des Rechts. Versuch einer Synthese*, Stuttgart, Franz Steiner, 1994, „Archiv fuer Rechts- und Sozialphilosophie", vol. 80, 1994, 1. Quartal, Heft 1.

_____, *Direito e Universidade. Do Pensamento juridico-pedagógico em Michel Villey*, tiré à part de "Persona y Derecho - Revista de fundamentación de las instituciones Jurídicas y de Derechos Humanos", Pamplona, 1992.

_____, *Droit et Récit*, Québec, Les Presses de l'Université Laval, 2003.

_____, *Filosofia do Direito*, Coimbra, Almedina, 2006.

_____, *La balance, le glaive et le bandeau. Essay de simbologie juridique*, in "Archives de Philosophie du Droit", Paris, Sirey, 1995.

_____, *Le Droit et les Sens,* Paris, L'Archer, dif. P.U.F., 2000.

_____, *Lições de Filosofia Jurídica. Natureza & Arte do Direito,* Coimbra, Almedina, 1999.

_____, *Michel Villey et la Philosophie juridique au Portugal*, *in* J.-F. Niort/ G. Vannier (coord.), *Michel Villey et le Droit Naturel en question*, Paris, L'Harmattan, 1994.

_____, *Mythe et Constitutionnalisme au Portugal (1778-1826). Originalité ou influence française ?*, Paris, thèse de doctorat à l'Université Paris II, 1992 (policóp.).

_____, *O Ponto de Arquimedes*, Coimbra, Almedina, 2001.

_____, *Princípios de Direito*, Porto, Rés, 1993.

_____, *Questões de Princípios*, *in* "Thèmes", VI, 20011: http://www.philosophiedudroit.org/da%20cunha,%20questoes%20de%20principios.htm

_____, *Repensar a Política*, 2e édition, Coimbra, Almedina, 2007.

_____, *Repensar o Direito. Um Manual de Filosofia Jurídica*, en préparation.

_____, *Res Publica. Ensaios Constitucionais*, Coimbra, Almedina, 1998, p. 119 et suiv..

_____, *Traité de droit constitutionnel*, Paris, Buenos Books International, 2010.

_____, *Verdade, Narração e Judicatura,* in *Verdad (Narración) Justicia*, coord. José Calvo González, Málaga, Univ. Málaga, s/d..

____, *O Tímpano das Virtudes*, Coimbra, Almedina, 2004.

____, *Pensamento Jurídico Luso-Brasileiro,* Lisbon, Imprensa Nacional – Casa da Moeda, 2006.

Ferry, Luc / Vincent, Jean-Didier, *Qu'est-de que l'homme?*, Paris, Odile Jacob, 2000.

Finnis, John, *Natural Law and Natural Rights*, 7ème reimp., Oxford, Clarendom Press, 1993.

Foucault, Michel, *A Verdade e as formas jurídicas*, édition brés., Rio de Janeiro, P.U.C., 1974.

Ferreira Filho, Manoel Gonçalves, *Notas Sobre o Direito Constitucional Pós-Moderno, em Particular sobre certo Neoconstitucionalismo à Brasileira*, in "Systemas. Revista de Ciências Jurídicas e Econômicas", vol. 2, n.º 1, 2010, p. 101 – 118.

Franca Filho, Marcílio Toscano, *A Cegueira da Justiça. Diálogo Iconográfico entre Arte e Direito*, Porto Alegre, Sergio Fabris Editor, 2011.

Friedrich, C. J., *Die Philosophie des Rechts in Historischer Perspektive*, Goetingen / Heidelberg, Springer, 1955, trad., cast., *La Filosofia del Derecho*, 3.ª reimp., Mexico, Fondo de Cultura Económica, 1964, p. 331 et suiv. (= *Idem*, in *Vanderbilt Law Review*, XIV, oct. 1961, p. 1027 et suiv.).

Gadamer, Hans-Georg, *Wahreit und Methode*, 3.ème éd., Tuebingen, J. C. B. Mohr (Paul Siebeck), 1973 (1.ère édition - 1960), trad fr. Etienne Sacre, rev. Paul Ricoeur, *Vérité et Méthode. Les grandes lignes d'une herméneutique philosophique*, Paris, Seuil, 1976.

Garapon, Antoine, *L'âne portant des reliques — Essai sur le rituel judiciaire*, Paris, Le Centurion, 1985.

Goethem, H. Van / Waelkens, L./ Breugelmans, K. (dir.), *Libertés, Pluralisme et Droit*, Bruxelles, Bruyllant, 1995.

Gomes, Luís Flávio / Oliveira Mazzuoli, Valerio de, *Direito Supraconstitucional*, São Paulo, RT - Editora Revista dos Tribunais, 2010.

González Vicén, Felipe, "La Obediencia al Derecho", in *Estudios de Filosofía del Derecho*, Universidad de la Laguna, Santa Cruz de Tenerife, 1979, p. 365 *et sq*.

Goodrich, Peter, *Reading the Law*, Oxford, Basil Blackwell, 1986.

Goody, Jack, *The logic of writing and the organisation of society*, Cambridge University Press, 1986, trad. port. par Teresa Louro Pérez, *A lógica da escrita e a organização da sociedade*, Lisbon, Edições 70, 1987.

Gordley, James, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, Oxford University Press, 1992.

Grezegorczyk, Chr. / Troper, M. / Michaut, F., *Le Positivisme juridique*, Paris, Dalloz, 1974.

Grossi, Paolo, *Novecento Giuridico : un Secolo Pos-Moderno*, Naples, Università degli Studi Suor Orsola Benincasa, 2011.

Hanefin, Patrick, *Constituting Identity*, Aldershot *et al*., Ashgate/Dartmouth, 2001.

Hassemer, Winfried, *História das Ideias Penais na Alemanha do Pós-Guerra, seguido de A Segurança Pública no Estado de Direito*, trad. port., Lisbon, AAFDL, 1995.

Hayek, F. A., *Droit, législation et liberté. I – Règles et ordre,* trad. fr., Paris, PUF, 1973.

Hervada, Javier, *Historia de la Ciencia del Derecho Natural*, Pamplona, EUNSA, 1987.

Hervada, Javier / Muñoz, Juan Andres, *Derecho. Guía de los Estudios Universi-*

tários, Pamplona, EUNSA, 1984.

Holmes Jr., Oliver Wendell Holmes, *The Path of Law*, 10 "Harvard Law Review", 457, 1897, nouvelle éd., avec une Préface par J. Craig Williams, *The Path of Law and the Common Law*, New York, Kaplan, 2009.

Hourmant, François, *Le désenchantement des clercs*, Paris, PUF, 1997.

Huisman, Bruno / Ribes, François, *Les Philosophes et la Nature*, Paris, Bordas, 1990.

Huissman, Denis, *L'Art de la dissertation philosophique*, Paris, SEDES, 1958.

Janet, Paul, *Introduction* to the *Esprit des lois*, by Montesquieu, Books I-V, 2nd edition, Paris, Librairie Ch. Delagrave, 1892 (electronic edition, Project Guthemberg, 2008).

Kaufmann, Arthur, *Naturrecht und Geschichtlichkeit*, Tübingen, J. C. B. Mohr, 1957.

Kelsen, Hans, *Reine Rechtslehre*, Leipzig / Wien, Deuticke, 1934.

Kissel, O. R., *Die Iustitia. Reflexionen ueber ein Symbol und seine Darstellung in der bildenden Kunst*, Muenchen, Beck, 1984.

Kuhn, Thomas, *The Structure of Scientific Revolutions*, University of Chicago Press, 1962.

Laboulaye, Édouard, *Introduction à Esprit des lois*, by Montesquieu, in *Oeuves Complètes*, Paris, Garnier Frères, 1875 (electronic edition).

Lalande, André (dir.), *Vocabulaire technique et critique de la Philosophie*, ed. Paris, PUF, 1972.

Landowski, Eric, «Vérité et véridiction en droit », in *Droit et Société*, n.º 8, 1988, Paris, LGDJ/CRIV, p. 45 et suiv.

Le Goff, Jacques, *Memória*, in *Enciclopédia* (Einaudi), 1. *Memória-História*, éd. portugaise, Lisbon, Imprensa Nacional-Casa da Moeda, 1984.

Leclercq, Jacques, *Du droit naturel à la sociologie*, Paris, Spes, 1960.

Leibholz, Gerhardt, *O Pensamento democrático como princípio estruturador na vida dos povos europeus*, trad. por., Coimbra, Atlântida, 1974.

Lemieux, Pierre *La force et le droi*t, http://www.quebecoislibre.org/990925-4.htm

Lenoble, Jacques / Ost, François, *Droit, Mythe et Raison: essai sur la dérive mytho-logique de la rationalité juridique*, Bruxelles, Publ. Facultés Universitaires Saint-Louis, 1980.

Lima Lopes, José Reinaldo de, *As Palavras e a Lei. Direito, ordem e justiça na história do pensamento jurídico contemporâneo*, São Paulo, EDESP, 2004, máx. p. 267 ss.

Lipovetsky, Gilles, *L'empire de l'éphémère*, Paris, Gallimard, 1987.

Lombardi Vallauri, Luigi, *Corso di filosofia del diritto*, Cedam, Padova, 1978, nova ed. 1981.

____, *Diritto Naturale e Diritto Libero*, *in* "Persona y Derecho", n.º 23, 1990, p. 25 ss.

____, *Terre, Terra del Nulla, Terra degli uomini, Terra dell 'Oltre*, Milano, Vita e Pensiero, 1990, p. 177 ss., *et passim*.

Martínez Yánez, Nora María, *La obediencia al Derecho en la España Democrática*, Madrid, Dykison, 2000.

McIntyre, Alasdair, *After Virtue. A Study in Moral Theory*, 2nd Edition, Notre Dame, 1984.

Malato, Maria Luísa, *Manual Anti-Tiranos. Retórica, Poder e Literatura*, Porto Alegre, Livraria do Advogado, 2009

Maltez, José Adelino, *Voegelin e a Procura do Direito Natural*, Préface à *A Natureza do Direito e outros textos jurídicos*, de Eric Voegelin, Lisbon, Vega, 1998.

Mari, Enrique, « *Jeremy Bentham: du 'souffle pestilentiel de la fiction' dans le droit à la théorie du droit comme fiction* », in *Revue Interdisciplinaire d'Études Juridiques*, 1985, n.º 15, p. 1 et suiv.

Marinho, José, *Teoria do Ser e da Verdade*, Lisbon, Guimarães Editores, 1961.

Maritain, Jacques, *Natural Law. Reflections on Theory and Practice*, édition et introduction par William Sweet, South Bend, Indiana, St. Augustine Press, 2001.

Mauer-Maly, D. / Simons, P. M. (ed.), *Das Naturrechtsdenken heute und morgen*, Duncker & Humblot, Berlin, 1983.

Maritain, Jacques, *Natural Law. Reflections on Theory and Practice*, édition et introduction par William Sweet, South Bend, Indiana, St. Augustine Press, 2001.

Mazzacane, Aldo, *El jurista y la memoria*, in *Pasiones del Jurista. Amor, memoria, melancolía, imaginación*, ed. Carlos Petit, Madrid, Centro de Estudios Constitucionales, 1997, p. 75 et suiv..

Meese, E., «Promoting Truth in the Courtroom», *Vanderbilt Law Review*, n.º 40/2, 1987, p. 271 et suiv.

Merêa, Paulo, *Divagações sobre a Estabilidade da Norma Jurídica* (1923), *in Estudos de Filosofia Jurídica e de História das Doutrinas Políticas*, Lisbon, Imprensa Nacio-

nal – Casa da Moeda, 2004.

Dilsa Mondardo, *20 anos Rebeldes : o direito à luz da proposta filosófico-pedagógica de L. A. Warat*, Florianópolis, Editora Diploma Legal, 2000.

Montejano, Bernardino, *Poder jurídico y derecho natural*, "Ethos. Revista de Filosofía Práctica", n.º 26, Buenos Aires, 2011, p. 39 *et sq*.

Montoro Ballesteros, Alberto, *Iusnaturalismo y Derecho Comparado*, in Francisco Puy (org.), *El Derecho Natural Hispanico. Actas de las 'Primeras Jornadas Hispánicas de Derecho Natural'*, Madrid, Escelicer, 1973, p. 403 *et sq*.

____, *Sobre las Razones Éticas de la Obediencia al Derecho*, in "Anales de Derecho", Murcia, Universidad de Murcia, 1991, p. 157 *et sq*.

Moreau, Pierre-François, *Le Récit Utopique. Droit naturel et roman de l'Etat*, Paris, P.U.F., 1982.

Moreira, José Carlos, *Lições de Direito Constitucional*, Coimbra, 1959-1960 (polic.), p. 30 et suivs.

Mota de Sousa, Carlos Aurélio / Cury, Munir / Caso, Giovanni, *Direito e Fraternidade*, LTR, 2008.

Myrdall, Gunnar, *Objectivity in social research*, New York, Pantheon Books, 1969.

____, *The Political Element in the Development of Economic Theory*, 3rd ed., Londres, Routledge & Kegan Paul, 1961.

"Natural Law", in *The New Encyclopaedia Britannica*, 15th ed., Chicago *et a*l., Encyclopaedia Britannica Inc., vol. 8, 1997, p. 559.

Niklas, Luhmann, *A improbabilidade da Comunicação*, trad. port. avec sélection et présentation de João Pissarra, Lisbon, Vega, 1992.

Perelman, Chaim, "Opinions et vérité", in *Rhétoriques*, Bruxelles, Editions de l'Université de Bruxelles, 1989, p. 425 et suiv..

_____, / Lucie Olbrechts-Tyteca, *Traité de l'argumentation*, 5.e éd., Bruxelas, Editions de l'Université de Bruxelles, 1988

Perrin, J.-F. (*et alii*), *Pour une théorie de la connaissance juridique*, Genève, Droz, 1979.

Perucho, Juan, *Las Sombras del Mundo*, Madrid, Alianza Editorial, 1995, p. 22.

Peter Degadt, *Littératures contemporaines sur la 'Topique Juridique'* , Paris, P.U.F., 1981.

Pintore, Anna, *Law and hipocrisy*, in "International Journal on Law and Semiot-

ics", IV, 11, 1991, pp. 191 ss.

Pizzorni, Reginaldo, *Il Diritto Naturale dalle Origine a S. Tommaso d'Aquino*, 3.e ed., Bolonha, ESD, 2000.

Podgórecki, Adam *et alii* (org), *Knowledge and opinion about law,* Martin Robertson, London, 1973.

Poulantzas, Nicos, *Nature des choses et droit, essai sur une dialectique du fait et de la valeur*, LGDJ, Paris, 1965.

Puy, Francisco, *Derechos Humanos*, vol. III. *Derechos Politicos*, Santiago de Compostela, Imprenta Paredes, 1985.

_____, *Teoria Tópica del Derecho Natural*, Santiago do Chile, Universidad Santo Tomás, 2004.

_____, *Tópica Jurídica*, Santiago de Compostela, Imprenta Paredes, 1984.

Quaresma, Regina / Oliveira, Maria Lucia de Paula / Riccio de Oliveira, Farlei Martins (coord.), *Neoconstitucionalismo*, Rio de Janeiro, Forense, 2009.

Ramos, Elival da Silva, *Ativismo Judicial. Parâmetros Dogmáticos*, São Paulo, Saraiva, 2010.

Rawls, John, *A Theory of Justice*, Harvard University Press, 1971.

Reale, Miguel, *Lições Preliminares de Direito*, Coimbra, Almedina, 1982.

Resta, Eligio, *Il Diritto Fraterno*, Roma/Bari, Laterza, 2002.

Ribeiro, Álvaro, *A Razão Animada*, Lisbon, Bertrand, 1956.

(Ribeiro dos Santos, António), "Sobre a Vaidade das Coisas do Mundo", *Poesias de Elpino Duriense*, Lisbon, Na Impressão Régia, 1812.

Ribeiro Moreira, Eduardo, *Neoconstitucionalismo. A Invasão da Constituição*, São Paulo, Método, 2008.

Robert, Christian Nils, *L'impératif sacrificiel. Justice pénale : au-delà de l'innocence et de la culpabilité*, Lausanne, D'en Bas, 1986.

Rocha Pereira, Maria Helena da, *Estudos de História da Cultura Clássica.* II. *Cultura Romana*, Lisbon, Fundação Calouste Gulbenkian, 1984.

Roche, Daniel, *Histoire des choses banales*, Paris, Fayard, 1997.

Roland, Henri / Boyer, Laurent, *Adages du droit français*, 3.ème éd., Paris, Litec, 1992.

Rorty, Richard, *Contingency, Irony, and Solidarity*, Cambridge, Cambridge Uni-

versity Press, 1989.

Saint-Exupéry, Antoine de, *Le Petit Prince*, nouvelle éd., Paris, Gallimard, 1987.

Sandel, Michael J., *Justice: What's the Right Thing to Do?*, Farrar, Straus and Giroux, 2009.

G. L. S. Shackle, *What makes an Economist*?, The University Press of Liverpool, 1953.

Schmitt, Carl, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 2.e éd., Berlin, Duncker und Humblot, 1926.

Schoenfeld, Walter Schoenfeld, *Vom Problem der Rechtsgeschichte*, "Schriften der Koenigsberger Gelehrten Gesellschaft. Geisteswissenschaftliche Klasse", 6, 1927.

Schwarz, Germano, *A Constituição, a Literatura e o Direito*, Porto Alegre, Livraria do Advogado Editora, 2006.

Sen, Amartya, *The Idea of Justice*, Harvard University Press / Londres, Allen Lane, 2009.

Sérgio, António, *Antígona. Drama em três actos*, Porto, República, 1930.

Serres, Michel, *Le contrat naturel*, François Bourin, Paris, 1990.

Sigmund, Paul E., *Natural Law in Political Thought*, Lanham, New York, Londres, University Press of America, 1971.

Silva Ramos, Elival da, *Ativismo Judicial. Parâmetros Dogmáticos*, São Paulo, Saraiva, 2010.

Silva, Agostinho da, "Justiça", *Diário de Alcestes*, Lisbon, Ulmeiro, 1990.

Sinha, Surya Prakash, "Why has not beeen possible to define Law", in *Archiv fuer Rechts- und Sozialphilosophie*, 1989, LXXV, Heft 1, 1. Quartal, Stuttgart, Steiner, p. 1 ss.

Skinner, Quentin, *Liberty before Liberalism*, Cambridge, Cambridge University Press, 1981.

Strauss, Leo, *Natural Right and History*, Chicago, The Chicago University Press, 1953.

Thelene, Catherine Colliot, *Le désenchantement de l'Etat*, Paris, Minuit, 1992.

Thomas, Yan, *Mommsen et 'l'Isolierung' du Droit (Rome, l'Allemagne et l'État)*, Paris, Diffusion de Boccard, 1984.

Tierney, Brian, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law,*

and Church Law 1150 1625, Grand Rapids / Cambridge, William B. Eerdmans, 1997, new edition, 2001.

Torres del Moral, Antonio, *Estado de Derecho y Democracia de Partido*s, Madrid, Servicio de Publicaciones de la Facultad de Derecho de la Universidade Complutense, 1991.

Trigeaud, Jean-Marc, « *La Théorie du Droit face aux savoirs de substitution* », in *Persona y Derecho*, vol. 32, 1995, p. 23 *et sq.*

_____, *Persona ou la Justice au double visage*, Genova, Studio Editoriale di Cultura, 1990.

_____, *Ce droit naturel que le positivisme a inventé*, in *Métaphysique et Éthique au Fondement du Droit*, Bordeaux, Biere, 1995, p. 161 ss.

Truyol y Serra, António, *Esbozo de una Sociologia del Derecho Natural*, in *Revista de Estudios Politicos*, Madrid, vol. XXIV, 1949, pp. 15 ss..

Tuck, Richard, *Natural Rights Theories. Their origin and development*, Cambridge, Cambridge Univ. Press, 1979.

Tzitzis, Stamatios, *Introduction à la philosophie du droit*, Paris, Vuibert, 2011.

_____, *La naissance du droit en Grèce*, dans l'ouvrage collectif *Instituições de Direito*, I. *Filosofia e Metodologia*, Coimbra, Almedina, 1998, p. 191 et suiv..

_____, *Le Juge et la Vérité*, «Crises», 4, 1994, p. 103 et suiv..

_____, *La philosophie pénale*, Paris, PUF, 1996.

Vallançon, François, *Alceste, Égalité, Fraternité*, in «Revue Internationale de Philosophie Pénale et de Criminologie de l'Acte», Paris, n.º 3-4, 1992-1993.

_____, *Domaine et Propriété (Glose sur Saint Thomas D'Aquin, Somme Theologique IIA IIAE QU 66 ART 1 et 2)*, Paris, Université de Droit et Economie et de Sciences Sociales de Paris (Paris II), 1985, 3 vols..

Vallet De Goytisolo, Juan, *Derecho y Verdad*, separata de "Verbo", Speiro, 1996, série XXXV, n.º 347-348.

Veatch, Henry B., *Why I am Pro-Natural Law*, "Vera Lex", Vol. I, n.º 3, Sept-Oct. 1980, p. 1-3.

Veyne, Paul, *Les Grecs ont-ils cru à leurs mythes?*, Paris, Seuil, 1983.

Viehweg, Theodor, *Topik und Jurisprudenz*, Munique, C. H. Beck, 1964.

Villey, Michel, « Abrégé du Droit Naturel Classique », in *Leçons d'Histoire de la Philosophie du Droit*, nouvelle éd., Paris, 1962.

_____, *Le droit et les droits de l'homme*, Paris, PUF, 1983.

_____, *Le Droit Romain*, 8.ª ed., Paris, P.U.F., 1987.

_____, *Jusnaturalisme, essai de définition*, in « Revue Interdisciplinaire d'Etudes Juridiques », n.º 17, 1986.

_____, *Mobilité, diversité et richesse du droit naturel chez Aristote et St. Thomas*, in « Archives de Philosophie du Droit », XXIX, 1984.

_____, *Philosophie du Droit*, II. *Les moyens du droit*, 2.e éd., Paris, Dalloz, 1984.

_____, *Polémique sur les 'Droits de l'Homme'*, in "Etudes Philosophiques", n.º 2, 1986, p. 191 ss.

_____, *Précis de Philosophie du Droit*, I, 3.ème éd., Paris, Dalloz, 1982.

_____, *Questions de St. Thomas sur le droit et la politique ou le bon usage des dialogues*, Paris, P.U.F., 1987.

_____, *Réflexions sur la Philosophie et le Droit. Les Carnets*, Paris, PUF , 1995.

_____, *Seize essais de Philosophie du Droit dont un sur la crise universitaire*, Paris, Dalloz, 1969.

Von Mises, Ludwig, *Human Action. A Treatise on Economics*, trad. fr. *L'Action Humaine. Traité D'Economie*, Paris, P.U.F., 1985.

Ward, Ian, *Introduction to Critical Legal Theory*, 2.ª ed., Milton Park / New Iork, Routledge-Cavendish, 2004.

_____, *Law and Literature*, in "Law and Critique", IV, 1, 1993.

Wacks, Raymond, *Philosophy of Law. A Very Short Introduction*, Oxford, Oxford University Press, 2006, p. 19 et suiv.

Wagner, Adolf, *Lehrbuch der politischen Oekonomie*, Leipzig, C. F. Winter, 1879.

Warat, Luis Alberto, *Do Paradigma Normativista ao Paradigma da Razão sensível*, in *Temas Emergentes no Direito*, coord. de Marcelino Meleu / Mauro Gaglietti / Thaise Nara Graziottin Costa, Passo Fundo, IMED, 2009, p. 13 *et sq.*

Weisberg, R., *Coming of age some more: 'Law and Literature' beyond the Cradle*, in "Nova Law Review, n.º 13, 1988.

_____, *Comparative Law in Comparative Literature: the figure of the 'Examining Magistrate' in Dostoievski and Camus*, in "Rutgers Law Review", n.º 29, 1986, pp. 237 ss..

_____, *Text into Theory: a Literary approach to the Constitution*, in "Georgia Law

Review", n.º 20, 1986, pp. 939 *et sq*.

_____, *The Law-Literature Enterprise*, in "Yale Journal of Law and Humanities", n.º 1,1988, pp. l ss.

Whyte, James Boyd, *Law as Language: Reading Law and Reading Literature*, in "Texas Law Review", n.º 60, 1982.

_____, *The Legal Imagination: studies in the nature of legal thought and expression*, Little Brown, Boston, 1973.

Wolff, Eric, *Das Problem der Naturrechtslehre. Versuch einer Orientierung*, Karlsruhe, C. F. Müller, 1964.

Zbankowski, Z., «The value of truth. Fact scepticism revisited", *Legal Studies*, n.º 1, 1981, p. 257 et sq.

Zippelius, Reinhold, *Rechtsphilosophie: Ein Studienbuch*, 5.e éd., Beck, Munich, 2007.

On the concept of subjectivity in the promissory theory of contracts from the perspective of Paul Ricoeur's philosophy

Marcin Pieniążek, LLM, PhD
Andrzej Frycz Modrzewski[1]

Abstract: The presentation outlines one of the crucial questions of private law, i.e. the question of subjectivity of a party to a contract. The analysis will be made on the background of the promissory theory of contracts. This theory assumes that contractual obligations originate as a result of a promise made by a party to the contract. Thus, the legal bond (vinculum iuris) in a contract results from the self-expression of the subject communicating the intention of assuming an obligation. This self-expression is valid to the degree to which the subject is capable of forming a promise. For that reason, the notion of subjectivity is defined in the presentation through the constitutive features of the being, namely a party to the contract. As a result, the main part of the presentation focuses on the ontology and ethics of a party to the contract, referring to the philosophical ideas of Paul Ricoeur.

It should be explained that Ricoeur's philosophy shows a particular compatibility with the promissory theory of contracts. A promise made (much like Kantian imperative) provides a paradigmatic pattern of self-identity within it. In reference to the ontology and ethics of the person proposed by Ricouer, it becomes possible to define the non-positivist notion of subjectivity of a party to the contract, as a being capable of valid formation of a self-bond through a promise. Contrary to Ricoeur's philosophy, it is also possible to point to the source of the law-making authority of that party. In this philosophy, keeping the obligations made is an ethically meaningful way of the subject's being (ipse), contrasted by Ricoeur with the being shaped by the variable features of the human character (idem). Thus, the source of the normative authority of the party to the contract in the light of the proposed concept is the capacity of keeping the promises made (expressed in the pacta sunt servanda principle), i.e. the capacity of continued being oneself in the ipse sense.

Keywords: Ricoeur, contracts, subjectivity

[1]Krakow University

1. The paper outlines one of the crucial questions of private law, i.e. the question of subjectivity of a party to a contract. The analysis will be made on the background of the promissory theory of contracts. This theory assumes that contractual obligations originate as a result of a promise made by a party to the contract. Thus, the legal bond (*vinculum iuris*) in a contract results from the self-expression of the subject communicating the intention of assuming an obligation. This self-expression is valid to the degree to which the subject is capable of forming a promise. For that reason, the notion of subjectivity is defined in the presentation through the constitutive features of the being, namely a party to the contract. As a result, the main part of the presentation focuses on the ontology and ethics of a party to the contract, referring to the philosophical ideas of French philosopher Paul Ricoeur.

The point of reference here is a relational theory of subjectivity (being oneself – *ipseité*) developed by Ricoeur. According to him, keeping the obligations is an ethically meaningful way of the subject's being (called *ipse*), contrasted with the being shaped by the variable features of the human character (called *idem*). Consequently, a man (so called "the-one-who-is-himself") remains himself, if he is faithful to "the intention of the good life", namely "the plan for oneself", i.e., to the word given. As Ricoeur states, *"the promise serves as a paradigmatic model of the identity of oneself". As a result, the person who remains himself is the one who – regardless of the physical and mental changes that take place inside him – remains faithful to the undertaken obligations* [also legal ones – M.P.][2]. Additionally, Ricoeur relates the issue of personal identity with the theory of subject's narrativization. The identity preservation project is considered as a narrative developed by the subject who is under the influence of his own imperative, similar to Kantian concept of self-legislation.

It should be noted that the above theory (in particular, the distinction between being oneself in the sense of *ipse* and in the sense of *idem*) can provide a satisfactory answer to the key question about the reason of the validity of contractual obligations. This answer is justified in the case of rejecting the separation of law and morals assumed by legal positivism. It can be legitimately claimed that the fact of abiding by all legally relevant agreements stems from the very ontological and ethical essence of the subject who is himself in the sense of *ipse*. I would like to point out that one of the oldest legal topoi is the ancient Roman principle of *pacta sunt servanda* ("agreements must be abided by"). In the

[2] P. Ricoeur, *The Course of Recognition*, Wydawnictwo Znak, Kraków 2004, p. 119.

light of Ricoeur's theory this topos, fundamental for law, is a concise definition of the subject who remains himself, i.e. the one who performs contractual obligations despite changing factual circumstances, the passage of time, changes in the nature, etc.

Ricoeur writes: *(..) It seems that keeping promises (…) represents a challenge to time, a denial of change: even if my desire changed, even if I changed my mind or my preferences, I "shall keep my word". (..) It is sufficient to provide a strictly ethical justification of the promise that we can draw from the obligation to protect the institution of language and of reciprocal trust of another in my fidelity*[3].

Another element of the theory of the subject of law, crucial from the legal perspective, is the reflexive relationship which combines the subject of law and Another, interpreted as the relationship of equal subjects of law.

It concerns in particular the recognition of the subjectivity of Another as a prerequisite for establishing the ontologically rooted principle of reciprocity, crucial for some branches of law, especially for law of obligations.

Ricoeur - inspired by dialogical "philosophy of the face" of E. Levinas - states that obligation is always carried out vis-à-vis Another. In other words, the "ethical narrative" of oneself is always addressed to the one vis-à-vis whom we realize ourselves. It follows that, for Ricoeur, recognition of Another's subjectivity constitutes a primordial source of validity (also legal, I presume) and complies with the assumed obligations.

Ricoeur writes that: "*Preserving one's self is, in the case of a person, such a pattern of behaviour that another person can count on us. Since someone is counting on me, I am accountable, I can be held to account (je suis comptable) in my actions vis-à-vis Another. The concept of responsibility combines both meanings: to count on …, to be accountable for … This concept connects them by adding to them the principle of answering the question: 'Where are you?', raised by Another who is calling me. The answer to that is: 'Here I am!' (Me voici!) – the answer in which preserving one's self is manifested. (...) The nagging question of 'Who am I' (...) can be incorporated into a proud statement 'That's what I hold on to!' The question is: 'Who am I, unstable, so that you could still count on me?'*"[4]

The ethical acceptance of one's actions is a derivative of recogni-

[3] P. Ricoeur, *Soi –même comme un autre,* Éditions *du Seuil, Paris*, 1990. p. 207.

[4] P. Ricoeur, *Soi – même comme un autre,* Éditions *du Seuil, op. cit*., pp. 197–198.

tion which is expressed in complying with the commitment assumed vis-à-vis Another. Ricoeur takes another step and develops on this basis the dialectic of reciprocity, in which the substitutability of the roles of "oneself" and "another" coincides with the irreplaceability of the entities as such.

He writes that: *"(...) I cannot respect myself without respecting another as I respect myself ... Thus, respecting another as yourself and respecting yourself as another become equally fundamental and crucial"*[5]. That is the way in which Ricoeur constitutes the principle of reciprocity, according to which "one should treat oneself as Another" and "Another as oneself". This equalization goes as far as recognizing Another as the onto-ethical basis of legal validity. Ricoeur makes here also certain references to Aristotle's philosophy, in particular to his concept of friendship (*philia*) as a symmetrical relationship between equals. This element confirms the accuracy of this theory in the field of obligation law, in which reciprocity assumes the form of granting equal rights and duties to the contracting parties.

These remarks allow to draw an outline of Ricoeur's theory which enables us to construct a coherent non-positivist theory of (at least) the law of contracts, the central question of which remains the issue of the nature of the bond that connects the parties to reciprocal agreements. The theory which most closely connects compliance with the contracts with the subject that assumes the commitment comes to the aid of the legal notion of obligation. It should be underlined that the conceptual background of Ricoeur's theory is coherent with so called promissory theory of contracts as developed by the Anglo – Saxon legal thought (it will be mentioned below).

2. Now I would like to introduce the possible application of the above-mentioned elements of Ricoeur's philosophy in the dogma of reciprocal agreements. As I indicated before, it is of particular convergence with the Anglo-Saxon theory of contract law, with a particular emphasis on the so-called theory of a promise.

The Anglo-Saxon theory of contract law (*contract theory*)[6] devel-

[5] *Ibidem*, pp. 225–226.

[6] As for the concept of *contract theory* see P. S. Atiyah, S. A. Smith, *Atiyah's Introduction to the Law of Contracts*, Clarendon Press, Oxford 2005, pp. 28 – 31; G. Samuel, *Law of Obligations*, Edward Elgar Publishing, Inc., Cheltenham, UK, Northampton, MA, USA, 2010, pp. 70 – 72. P. S. Atiyah, *The Modern Role of Contract Law* (in:) *Essays on Contracts*, Clarendon Press, Oxford 2001, pp. 1- 9.

oped three main positions, which attempt to clarify the nature of the bond between the contracting parties and which at the same time aim at identifying the reasons why law provides protection of that bond[7]. These theories are developed under the assumption of a necessary connection between law and morality. These are: *the reliance theory*[8], *the transfer theory*[9], and *the promissory theory*[10]. From the perspective of the continental science of civil law[11], the same issues are raised by the theories of the declaration of intent, with the greatest impact of the theory of will and the theory of the declaration[12].

The crux of the promissory theory is the assumption that the obligation arises not so much as a result of an intentional act, but rather as a result of a self-expression of the entity expressing (communicating) the intention to assume the obligation. Communication (or narrative – as I propose to put it in Ricoeur's language) is considered as a prerequisite to express the intent which shows, among others, what the entity knows about the very concept of promise. Thus, the communicated intent cannot be only the intent to take a specific action, but the intent to assume

[7] S. A. Smith, *Towards a Theory of Contract*, (in:) *Oxford Essays in Jurisprudence. Fourth Series*, (ed.) J. Horder, Oxford University Press, New York 2000, pp. 107ff.

[8] L. L. Fuller, W. Purdue, *The Reliance Interest in Contract Damages*, Yale Law Journal 1936, Vol. 46.

[9] R. E. Barnett, *A Consent Theory of Contract*, Columbia Law Review, March 1986, Vol. 86, No. 2, pp. 291ff.

[10] Ch. Fried, *Contract as Promise. A Theory of Contractual Obligations*, Harvard University Press, Cambridge, Massachusetts and London, England, 1981, pp. 7 – 27; T. M. Scalon, *Promises and Contracts*, (in:) *The Theory of Contract Law. New Essays*, (ed.) P. Benson, Cambridge University Press, Cambridge 2007, 86 – 117; W. Lucy, *Philosophy of Private Law*, Oxford University Press, New York, 2007, p. 238; critically from the perspective of *reliance theory*: P. S. Atiyah, *Contracts, Promises and the Law of Obligations*, (in:) *idem*, *Essays on Contracts*, *ibidem*, pp. 10 – 56.

[11] G. Samuel presents a comprehensive comparative analysis of contract law, including reciprocal contracts in the legal culture of civil law and common law. See G. Samuel, *Law of Obligations*, *op. cit.*, p. 358. *Cf.* J. Gordley, *Enforceability of Promises in European Contract Law*, Cambridge University Press, Cambridge 2001, pp. 2-20; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford University Press, New York 1996, pp. 1-31.

[12] Cf. A. Jędrzejewska, *Koncepcja oświadczenia woli w prawie cywilnym* [*The Concept of the Declaration of Intent in the Civil Law*], PAN Instytut Nauk Prawnych, Warszawa 1992, pp. 10 -55; Z. Radwański, *Teoria umów* [*The Theory of Contracts*], PWN Warszawa1977, pp. 37 – 61.

certain liabilities[13]. Therefore, it is emphasised in the Anglo-Saxon literature that the fact of making a legally relevant promise is not merely an additional factor that influences the decision on the performance / non-performance of obligations. A decision to perform the obligation is in fact made at the time of making the promise, while the promise itself is the first and primary source of the action on the part of the obligor[14].

The objections against the promissory theory concern, among others, the bilateral nature of reciprocal agreements in which the formation of a legal bond results from the promise given to the other party (promisee), and not only from the fact of the promisor being bound by its promise. Having in mind the theory at issue, there arises a fundamental question: what it means that the promise "is binding" in some way and what constitutes the basis of "being bound" by such a promise. The answer to these questions is provided by the promissory theory which refers to the analysed topics drawn from the philosophical achievements of Paul Ricoeur[15]. The said achievements demonstrate particular applicability in the promissory theory of contracts, combining the issue of one's own subjectivity and the subjectivity of Another man with the issue of reciprocity in the context of onto-ethics of the entity who remains himself in the sense of *ipse*[16].

---

[13] S. A. Smith, *Contract Theory*, *op. cit.,* p. 57.

[14] The following example can be provided in reference to S. A. Smith: I made a commitment to paint the roof of my neighbour's house next week, but then I changed my mind and came to the conclusion that this work is not profitable for me. I feel to some extent bound by my promise, yet my final decision is determined on the basis of another important factor, namely purely economic calculation. From the perspective of the promissory theory my reasoning is wrong, since I already made a decision when I made a promise, therefore I am obliged to perform my obligation. See S. A. Smith, *Contract Theory*, *op. cit*., p 58.

[15] It should be noted that the analysis of philosophical and legal issues constitutes an important component of Ricoeur's philosophy. A prominent place is taken here by the issue of law as "a grand narrative", developed on the level of just social institutions as well as the issue of the relations between legal interpretation and argumentation. Cf. P. Ricoeur, *Reflections on the Just*, The University of Chicago Press, Chicago, London 2007; P. Ricoeur, *Drogi rozpoznania* [*The Course of Recognition*], op.cit., pp. 194 – 200; P. Ricoeur, *Krytyka i przekonanie* [*Critique and Conviction*], Wydawnictwo KR, Warszawa 2003, pp. 167 – 181. Cf. also D. M. Kaplan, *Ricoeur Critique Theory*, State University of New York Press, New York 2003, pp. 69 – 74.; G.H. Taylor, *Ricoeur and Law: the Distinctiveness of Legal Hermeneutics* (in:) *Ricoeur Across Disciplines*, (ed.) S. Davidson, The Continuum International Publishing Group Inc., London 2010, pp. 84 – 101.

[16] The above issue was presented in the work *O sobie samym jako innym* (*Soi-même*

Most importantly, on the basis of Ricoeur's theory every promise is made by the subject of law vis-à-vis "oneself as Another", which means that the promise is perceived as ethically significant way of being the subject of law, self-determined by the rule of reciprocity[17]. I would like to emphasize that the concept of the subject of law (the one-who-is-himself[18]), derived from Ricoeur, unifies the problem of the promise and the problem of reciprocity on the onto-ethical level of the party who makes the promise. The phenomenon of abiding by agreements thus gains the basis in the very existence of the subject of law (*ipse*) – the contracting party.

Consequently, in the light of Ricoeur's views, undertaking the promise by the legal subject is equal to determining the subject itself as the party to the contract. What constitutes a prerequisite here is a primordial recognition of one's own subjectivity as well as the subjectivity of the other, as a party to the contract under reciprocity rule. The following activity, undertaken by the party to a contract, is the action which – from the perspective of the contract – constitutes an affirmation of the party's responsibility for complying with the obligation.

The opponents of the promissory theory point out that under the theory of the Anglo-Saxon law a promise is perceived as a unilateral act, while agreements are essentially bilateral in nature. Both the act of making an offer by one of the parties as well as its acceptance by the other party is necessary in order to conclude the contract; in addition, in the standard contracts the responsibilities refer to both contracting parties[19]. In other words, as indicated by Smith, the reciprocity of rights and obligations in the contract is not strictly related to a unilateral nature of the

---

comme un autre) which synthesizes a number of topics analysed by Ricoeur at the earlier stages of the development of his ideas. Cf. P. Ricoeur, *Soi-même comme un autre*, *op. cit.*

[17] Ricoeur writes: "*Preserving one's self is, in the case of a person, such a pattern of behaviour that another person can count on us. Since someone is counting on me, I am accountable, I can be held to account (je suis comptable) in my actions vis-à-vis Another. The concept of responsibility combines both meanings: to count on …, to be accountable for … This concept connects them by adding to them the principle of answering the question: 'Where are you?', raised by Another who is calling me. The answer to that is: 'Here I am!' (Me voici!) – the answer in which preserving one's self is manifested. (...) The nagging question of 'Who am I' (...) can be incorporated into a proud statement 'That's what I hold on to!' The question is: 'Who am I, unstable, so that you could still count on me?'*". P. Ricoeur, *O sobie samym*, *ibidem*, pp. 277 – 278.

[18] Cf. P. Ricoeur, *O sobie samym*, *ibidem*, research VI and VII.

[19] S. A. Smith, *Contract Theory*, *op. cit.*, p. 63.

promise (binding the legal subject). The promissory theory, referring to Ricoeur's philosophy, provides the instrument that allows to eliminate the signalled problem, in particular through the relational conception of the person, according to which every promise, also the one made by the legal subject merely vis-à-vis himself, treats as an example the act of the promise made vis-à-vis another person[20].

3. The issue of the promise and reciprocity, though crucial for the law of reciprocal agreements, constitutes a part of Ricoeur's theory which is of a more extensive importance for the theory of law. It is notable from the perspective of the definition of ethical aspirations, as proposed by Ricoeur: "intention of good life with another and for another in just institutions". If promise and reciprocity are placed in the micro scale of the ontology of the legal subject, at the same time are perceived as the foundation of interpersonal relationship. If we recognize a promise and reciprocity as the elements of a specific contract *inter partes*, they will be considered as the properties of "meso" level, referred to in the definition of ethical aspiration by means of the phrase "with another and for another". At the same time, promise and reciprocity underpin the macro scale of just institutions, among which Ricoeur places positive law. So, if promise and reciprocity in law are considered as universal rules of a formal nature, being the properties of agreements in the sphere of private law, they will be placed on the third level of the quoted definition of ethical aspiration within Ricoeur's meaning, as a part of "the grand narrative" of law[21].

The definition of ethical aspiration thus unifies onto-ethical aspect of the subject, interpersonal relationships, typical for the law of reciprocal agreements and the fair institution of positive law. Since the ethical aspiration is implemented by the subject of law simultaneously on three levels, it becomes possible to justify the individualized protection that the statutory law provides for the promise made by a contracting party. This is due to the fact that the level of just institutions becomes the basis of model and codified patterns of reciprocal agreements which are considered as typification of the common situations of making a promise.

To sum up, Ricoeur's philosophy shows a particular compat-

[20] P. Ricoeur,., *Soi –même comme un autre, op. cit*., pp. 277-278; p. 310; p. 321.
[21] P. Ricoeur, , *Soi –même comme un autre, op. cit*., pp. 322 – 336.

ibility with the promissory theory of contracts. A promise made (much like Kantian imperative) provides a paradigmatic pattern of self-identity within it. In reference to the ontology and ethics of the person proposed by Ricouer, it becomes possible to define the non-positivist notion of subjectivity of a party to the contract, as a being capable of valid formation of a self-bond through a promise. Moreover, it is possible to point to the source of the law-making authority of that party since keeping the obligations made is an ethically meaningful way of the subject's being (*ipse* - contrasted by Ricoeur with the being shaped by the variable features of the human character, i.e. *idem*). Thus, the source of the normative authority of the party to the contract in the light of the proposed concept is the capacity of keeping the promises made (expressed in *the pacta sunt servanda* principle), i.e. the capacity of continued being oneself in the sense of *ipse.*

The use of Scientific Arguments
Thinking like an expert

Margarida Lacombe Camargo[1]

Abstract: This article aims to show the problem of the use of scientific arguments by the Judiciary. The centerpiece is the Brazilian Supreme Court, which has adopted the practice of public hearings, facing the hearing of experts.

Keywords: Public Hearings, STF, Law and Science.

My goal, in this short period of time, is to bring partial results of the research I have been developing about public hearings in Brazil. They constitute a new practice in Brazilian Judiciary, but one that has been growing consistently over the past few years, according to the data attached.[2].

The implementation of public hearings in the Brazilian Supreme Court is regulated by law number 9868/99 and by the Court´s internal rules of procedure. They establish that a public hearing can take place when the chief justice or the reporter of the case believe that it is necessary to hear people with experience and authority in the area to clarify matters of fact and to understand in more detail the matter put to the court .[3]

The summon is made through a public edict, though some government authorities are personally invited. However, contrary to what happens in the United States, where in order to allow the applicants to participate, there is extensive criteria to analyze the validity of the ar-

[1] Professor at the UFRJ and Research at Casa Rui Barbosa.

[2]Some important informations can be highlighted from the graphics available in Annex 1. Firstly, with the exception of Justice Luiz Fux, any other Justice had summon a public hearing over a year. Secondly, we can notice that from 2008 to 2011 there was a progressive decrease in the number of public hearings held by the Court two to zero, while in the period 2011 to 2013, there was a steep increase from zero to five.

[3] The articles 13, XVII e XVII and 21, XVI from the STF rules enable the realization of a public hearing to hear "people with experience and authority in certain matters" to clarify "issues or factual circumstances" with repercussions or public interest.

guments brought to court, such as judicial evidence (Federal Law Rule 702 , Daubert Case and Kumho[4] Case), in Brazil this problem has not yet been raised.[5]. (by validity I understand the formal criteria for accepting evidence, experts in the matter, regardless of the evaluation of their content).

From the start, it is important to differentiate *amicus curiae* and public hearings. According to the Supreme Courts dictionary, *amicus curiae* corresponds to the intervention to assist in cases regarding the constitutionality of rules brought to court by entities that are representative of society in the matter being discussed in the case, interventions that can be relevant to the solution of the constitutional controversy.[6]

The speech of the justices responsible for implementing the public hearings, as well as the specific terms of the summons edicts, show that the legal, political and scientific points of view do not differ to a degree that would allow us to distinguish, objectively, and with as much certainty as it would be expected, the nature of public hearings: whether legal, political, or scientific.

By political aspects we understand the search for legitimacy to decide, which would demand verifying the political representative aspect of the entities that are participating. By legal aspects, we understand the arguments that relate to the appropriate interpretation and enforcement of the law in a specific case; a problem mainly of interpretation. And by scientific aspects, we understand the information obtained from experts about matters that are not legal, and that help to solve the case brought to trial.

Mapping the matter, we can distinguish two models of public hearings, that have been taking place at the Brazilian Supreme Court: the Gilmar Mendes[7] model, that comprises acceptance of legal theses, and the Luiz Fux[8] model, that avoids the presentation of legal theses.

---

[4] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) e *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[5] In relation to the selection criterias, the article 154 of the Regiment estabilishes that "proponents and opponents" must be represented in public hearings, ensuring the "various currents of opinion", but saying nothing about the qualifications of these participants.

[6] http://www.stf.jus.br/portal/glossario/verVerbete.asp?letra=A&id=533

[7] Justice Gilmar Mendes called two public hearings until this moment involving public policies: the imprisonment system and the Judicialization of Health, especially about the Public Health System, called "SUS".

[8]Justice Luiz Fux summoned four public hearings on the following topics: (i) the financ-

The edicts indicate the matters under discussion, but in the second model they are presented in a very specific way. For example: in the case discussing the burning of the sugarcane plantations, one of the questions posed concerned the relationship between cogeneration (generation of energy through the burning of biomass) and mechanic harvesting.

In the United States, even though Brown was based on research developed by the North Side Center for Child Development, the discussion about the independent validity of the scientific arguments focused mainly on the evidence obtained in the case. In Brazil, this discussion is also held by specialists in Procedural Law, as they discuss what truly happened, and define the competence of courts to discuss facts and to discuss strictly legal matters[9]. However, the institution of public hearings has been calling our attention to the move of this discussion to constitutional law, where one usually discusses abstract law. Notwithstanding the selective effect of law, as noted by Schauer[10], we believe that an investigation on the relationship between law and science focused on the Supreme Court is justified, as a way of showing the limits of legal dogmatic.

Traditionally, legal doctrine takes the role, at least in Civil law countries, of discussing what the law is, based on the legal text, on courts interpretation and on legal tradition that creates the bases for legal institutions. They create concepts that standardize legal interpretation, so that law professionals may use the law.[11] According to Kelsen, the law serves as a pattern of interpretation.[12] It qualifies a fact as a legal fact. In this way the judge, when applying the law, acts on something that has already happened. He analyses facts that are in the past, and solves them according to what the previously established law dictates. Notwithstanding the universal character of the Law, very well demonstrated by MacCormick[13], even though pointing to a future perspective, the problems of evidence, and of truth, are actually in the past.

---

ing of political campaign; (ii) the practice of fires in the sugar cane plantation; (iii) the Cable TV sistem in Brazil (free enterprise *vs.* freedom of expression and pluralism) and (iv) the ban on the sale of alcoholic beverages in federal highways.

[9] On the problematic question involving unity of facts and norms, Cf Castanheira Neves, A. *Legal Methodology*: fundamental problems. Coimbra: Coimbra Publishing, 1993, p. 163-165.

[10] *Thinking like a lawyer*, item 2.2

[11] Tércio Sampaio Ferraz Jr. *Law Science and Introduction to the study of Law*.

[12] Hans Kelsen, *Pure Theory of Law*, Charpter I, number 4. a

[13] Neil MacCormick *in Rethoric and the Rule of Law*.

In Brazil, however, the most fruitful area for one to perceive the relationship between Law and Science is the Supreme Court. Our system for using expert evidence is not adversarial. Judges name experts who they trust to present technical reports, and the parties may appoint technical assistants to present a critical opinion on the technical report.[14]

That is different from what happens at the Supreme Court, where the distinction between judicial making and judicial application is not clear. The empowerment of constitutional jurisdiction in Brazil, which can be seen from the promulgation of the 1988 constitution, brought an increase in the number of ways one can bring cases to the Supreme Court, this court that has assumed the role of final interpreter of the Constitution. The great number of Direct Unconstitutionality Actions and of Claims of Breach of Fundamental Precept as well as the *general repercussion* mechanism[15], shows the extension of cases in which the Court acts in a normative function, when it revises the actions taken by the legislator (judicial review). Additionally, it is important to consider how centralized our federative system is, and the strengthening of the constitutional supremacy theory, that contributes to the strengthening of the objective dimension of fundamental rights.

Up to this day, there have been 12 public hearings, where experts were heard, for example, to explain the problem of the use of stem cells for scientific research of abortion of anencephalic fetuses, or of the practice of burning sugar cane plantations, or still of the exploration and commercialization of products that contain asbestos, etc. The goal, according to Justice Ayres Britto, is to have some empirical datas that can be accepted as truth, due to help judge to solve problems in a safe way.

---

[14] The system of proofs is treated in Section VII, arts. 420-439, of the Brazilian Code of Civil Procedure. The credibility of responsible of the judical experts, in terms of bias and impartiality, is provided as follows: Art. 422, "The expert scrupulously fulfill the task that has been committed, regardless terms of engagement. The TAs are reliable parts, not subject to impediment or suspicion. "

[15] In portuguese, "general repercussion" is called "*repercussão geral*", which is an institute similar to *discretionary review* of the *writ of certiorari*. The difference is that the inadmissibility of the writ called "*Recurso Extraordinário*" requires, under Article 102, §3º by The Brazilian Constitution and by article 543-A of Civil Procedure Code, the justification of the Court that there is no "relevance" in economic, social, political and legal perspective, as well as the absence of "transcendence", which means the case is not representative of one group of other cases and, therefore, the judgment of this case does not go beyond the subjective interests involved. So, only if two thirds of justices decided in this way the appeal can be not hear.

The question posed is always if the constitution allows a certain conduct or not. A typical legal question: what does the law allow and what does forbid? This is relevant both to the parties, at a concrete case, and to the legislator´s action.

We can see that the content knowledge of the constitutional legal rule depends on knowing the specific facts, be them social, physical or natural (hard sciences). The evidence, however, means to show not what has happened, as occurs when a law is applied to a particular case, but to show what is real, what only scientific techniques and specific experts can do.[16]

Although it is not rare for the Justices to highlight the value of public consultation in public hearings, during the hearings they insist on the neutral, impartial character of the arguments presented. However, we can say that the judicial form of arguing, whether on purpose or not, contaminates the scientific arguments. The public hearing serves to solve a specific legal matter and helps to interpret the rule, which deals with values.[17] Not only does the law that regulates public hearings predicts that opposite opinions should be presented, when they exist, but the participants[18] speech clearly takes a position. It seems noteworthy to us that the report, in a case like the one on asbestos, shows in its text the arguments presented in the public hearing. The Justice who was reporting the case thanked publicly the participants of the hearing.

In Brazil, the Supreme Court trials are broadcast live on TV, and they stay permanently on Youtube.[19] I say this because this research is based strongly on these videos, where important *obter dictae* can be seen. For example, Justice Gilmar Mendes in the asbestos case, when the Court was about to suspend the trial for lack of Justices present, says that he does not want to miss the opportunity to speak about the increasing importance of scientific arguments in judicial decisions.

Justice Marco Aurélio, the reporter, expresses gratitude to the experts in the public hearing. He is the first to vote and, when presenting the matter, and from the beginning he highlights the balance between the benefits and the drawbacks of the use of asbestos. He stresses that

[16] See Scott Brewer, Scientific Expert Testimony and Intellectual Due Process. *The Yale Law Journal*, vol.107, 1998.

[17] It is value here the Kelsen disntiguish between what "is" and what "ought to be".

[18] That's how the experts, present in the audience, are called.

[19] http://www.youtube.com/watch?v=HPAhCpN-J38 first part; http://www.youtube.com/watch?v=21pY9yfs8-c second part; http://www.youtube.com/watch?v=YVTgd4mQReE third part.

during the public hearing some participants argued for of the complete ban of the use of asbestos, while others argued for the controlled use of the substance. What calls our attention is the term "argued for", in a normative way. The first group based their arguments on medical data, on the malignancy of asbestos, a carcinogenic substance, while the opposite point of view was brought by economists, who highlight the loss that this substance's substitution would bring. I believe that this example, which does not diverge from the other public hearings, shows how scientific data can serve as a basis for legal reasoning, especially when they can help the judge to evaluate the consequences of the measure, and then decide. Justice Marco Aurélio stresses that the virtue is in the middle ground, and Justice Gilmar Mendes tries to analyse the practical effects of the decision, so that he can decide more confident.[20]

In an environment where truth is sustained by the investigation method, when neutrality is expected, it is pertinent to question the possibility of there being "contrary opinions" based on values, (benefits and drawbacks), when the consequences of the measure are considered.

Justice Ellen Gracie, in the ADI 3510 (Embryonic Stem Cells), says that the act of judging is, first and foremost, a great exercise of humility.[21] When the beginning of life was being discussed at the court, she highlights a phrase that became famous: "we are not a science academy". Justice Gilmar Mendes, as previously mentioned, in the asbestos trial stresses to the Court the importance of expert knowledge, to avoid opinions without grounds. He says that, contrary to the legislator, who can review his positions when the results of a decision are not adequate, the Court can make no mistakes.

This way, we can conclude that: 1) the Supreme Court shows a strong tendency to seek the public consultation of experts in non-legal areas; 2) the data brought by the experts allow the justices to know reality and to guide their decision considering the practical consequences it might have; 3) the profile and nature of public hearings in Brazil is still being shaped in a way it may be better understood. I also take the opportunity to announce the hypothesis, to be analyzed at a different moment,

[20] As Stephen Breyer , Justice from the United States Supreme Court, says , "the Law must seek decisions tha fall within the bounderies of scientifically sound knowledge and approximately reflect the scientific state of the art." The Interdependence of Science and Law, in *Science and Technology Policy Yearbook*, 1999. The American Association for the Advancement of Science. http://www.aaas.org/spp/yearbook/chap9.htm

[21] By the way see the paper of John Hardwig, *Toward an Ethics of Expertise*. http://web.utk.edu/~jhardwig/expertis.htm

that, considering the proportionality analysis made by Robert Alexy, the reliability of empirical arguments prevails in the end, leading to a more pragmatic rather than moral Reading of the constitution.

References

BREWER, Scott Brewer, Scientific Expert Testimony and Intellectual Due Process. *The Yale Law Journal*, vol.107, 1998.

BREYER, Stephen. The Interdependence of Science and Law, in *Science and Technology Policy Yearbook*, 1999. The American Association for the Advancement of Science. http://www.aaas.org/spp/yearbook/chap9.htm

FERRAZ Jr., Tércio Sampaio. *The Science of Law.* 2. ed., São Paulo:Atlas, 1980.

_____ *Introduction to the study of Law*. São Paulo: Atlas, 1988.

HARDWIG, John *Toward an Ethics of Expertise*. http://web.utk.edu/~-jhardwig/expertis.htm

KELSEN, Hans *Pure Theory of Law*. [Trad. João Baptista Machado] São Paulo: Martins Fontes, 2006.

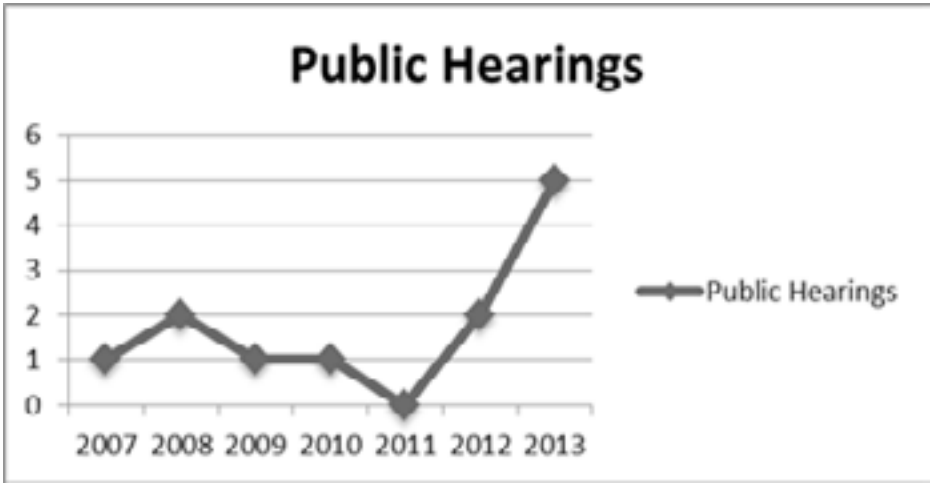
MAcCORMICK, Neil. *Rethoric and the Rule of Law*. [Trad. Conrado Hübner Mendes e Marcos Paulo Veríssimo] São Paulo: Campus Elsevier, 2008.

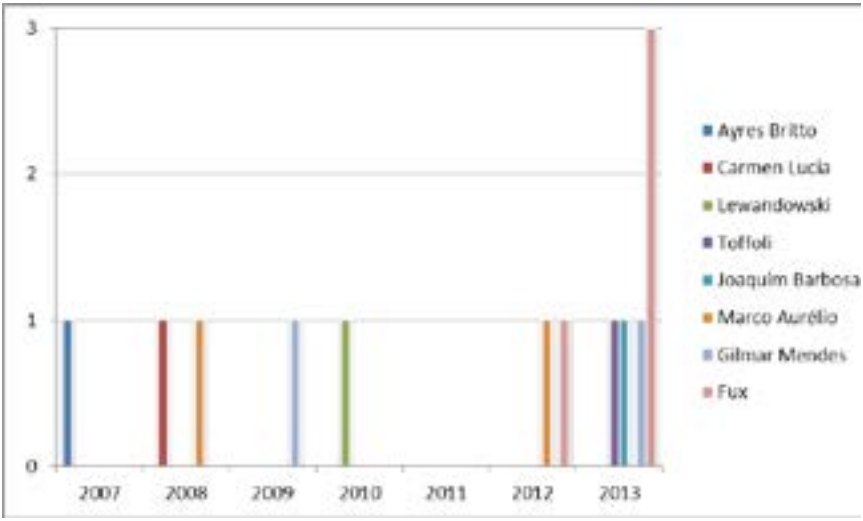
NEVES, A. Castanheira. *Legal Methodology*: fundamental problems. Coimbra: Coimbra Publishing, 1993.

SCHAUER, Frederick. *Thinking like a lawyer*. Cambridge: Harvard Universtity Press, 2009.

ANEXO 1

ANEXO 1


Public Hearings
6
5
4
3
2
1
0
2007 2008 2009 2010 2011 2012 2013
Public Hearings


3
2
1
0
2007 2008 2009 2010 2011 2012 2013
Ayres Britto
Carmen Lucia
Lewandowski
Toffoli
Joaquim Barbosa
Marco Aurélio
Gilmar Mendes
Fux

Analogical reasoning, deductive reasoning and their relationship with the enquiry of the facts of the case[1]

Carlos Magno de Abreu Neiva

Abstract: In the majority of judicial cases judges hold enquiries in order to find out the facts of the case. Judicial enquiries are a special kind of enquiry, limited and marked by the context in which they are held and by legal tradition. In Western legal systems judges justify their decisions in two typical ways: analogical reasoning (usually associated to common law systems) and deductive reasoning (usually associated to civil law systems). Although these models concern to the moment of justification and, as such, become visible after the enquiry that leads to the ascertainment of facts is finished, each one impose different constraints on the enquiry as a whole. Deductive reasoning is related to rule-based enquiries, those in which factual hypothesis is the source for the questions that conduct the enquiry. Analogical reasoning is related to narrative-based enquiries, those in which allegations of parties are the source for the questions. Narrative-based enquiries favor a better approach to the singular facts of the case and should become a pattern for every judge.

Keywords: judicial decision, facts, factual hypothesis, narrative, judicial enquiry.

1. Subject and premises

Judicial decision is the act by which a judge proclaims that according to a rule of law someone has/hasn't a right/a duty or shall/shall not be punished. Sometimes it is possible to conclude it just by interpretation of a statute or a contract, the result being normally a declaratory

[1] The original title was "ANALOGICAL REASONING, DEDUCTIVE REASONING AND THEIR *EFFECTS ON* THE ENQUIRY OF THE FACTS OF THE CASE". Commentaries made after my presentation and further reflection led me to replace the idea of "effect" (and of cause) for the idea of a relationship qualified by the aspects I analyze, which makes this relationship more complex and subtle than that of cause-effect.

judgment which provides legal certainty about the meaning of a specific provision that is binding to the parties. In this sense, declaratory judgments are future oriented. This article doesn't refer to such species of judgment but to what we may call past oriented judgments, those which deals with facts happened in the past and, consequently, judgments that are preceded by an enquiry[2].

Given the context in which the enquiry of the facts of the case is performed by the judge, it is justified to name it judicial enquiry. The central claim of this article is that judicial enquiries differ according to the type of reasoning that the judge is supposed to, or has the intention to, use to justify his or her decision. I will also sustain that one type of enquiry is more appropriate to the task of finding the facts of the case.

It is important to disclose the main premise on which this article is written, which plays an essential role in the argument: it is a requirement of justice that rights, duties and punishments are declared in correspondence to the action actually performed by the agents before they become parties of a lawsuit. For reasons that will be object of the next topic, the emphasis in this premise falls on the word 'action'.

It is also important to set the context in which I think my analysis might be valid: (i) the judge I'm writing about is a professional one who is responsible both to find the facts and to decide the case. Although some of the statements I make might apply to the finding of facts committed to jurors, it is essential to the analysis that the same person conceives the enquiry, conduct it and, in the end of the lawsuit, have the obligation of making explicit the reasons why one version about the facts and not other is taken as the true version; (ii) I suppose that the procedure is at least in some degree inquisitorial, meaning that the judge has the power, for example, to determine that parties present documents, to require documents to other authorities and to formulate questions to be answered by parties and testimonies. Consequently, the words 'judge' and 'enquirer' will be used as synonyms.

I'll start the analysis by explaining why the word 'action' is so important in the premise declared above and for the whole article. After this I will show that judicial enquiry has features that differentiate it

[2] The borders between the two referred types of judgment may sometimes not be clear. It is possible, for example, that before proclaiming a declaratory judgment about the meaning of a provision in a contract the judge wants to know which actual intentions of the parties were, a task that can only be well done after some kind of enquiry. For the modest aims of this article, however, I think the proposed distinction works well.

from other sorts of enquiries, especially scientific ones. The difference that imports for the discussion is that there are two different grounds on which the questions may be formulated that give rise to two ways of enquiry, which I will call rule-based enquiry and narrative-based enquiry. I follow by affirming that the two classical types of legal reasoning that appear in the justification of judicial decisions have something to do with these two styles of enquiry. Finally I'll sustain that one of those types of enquiry is superior to grasp the actions of the case.

2. Action terms

Excluded cases in which litigation is about the meaning of a statute or contract, what is at stake in lawsuits is always one or more actions performed or omitted by one or both parties. It is the action (or the lack of action when the agent was obliged to act) that is judged to be according or contrary to provisions of law.

Translating it into the language that interests to this article, any judicial decision presupposes a comparison between two kinds of statements that have action terms as their core:

i. The first kind is represented by rules of law, which are statements about actions previously selected as legally relevant. In these statements, actions terms may be of two types: they are whether *typical*, in the sense that the term is an abstract model represented by its definition, or *exemplary*, that is, the term is a previously concrete occurred action which, as a whole (or "in all its aspects"), is considered as a model. In both cases, the relevance derives from the fact that there is a legal consequence connected to the occurrence of the action.
ii. The second is a statement about the concrete actions of the parties of a lawsuit, which is a result of judicial enquiry.

There is no difficulty concerning the logical possibility of comparison, because both terms of comparison are statements. But there is an aspect that distinguishes the two kinds of statements: the rule-of-law statement, in its two types, is about a model; the facts-of-the-case statement is about a singular, an unique action which may, by definition, be distinguished of any other action that has ever happened or that will happen in the future. For now it is enough to enunciate this problem, which will be tackled later.

Action terms are then the core of the statements that the judge is supposed to compare, so it is necessary to know what they are about.

Action terms are essentially verbs. If the work of precising the meaning of any word is hard, this is much harder when the word is a verb, and even more difficult when this verb is stated in a rule of law. These difficulties have two main causes. First, they are related to the many implicit or explicit conditions and qualifiers of actions that are part of rule-of-law statements:

i. First, in a rule of law *intention* is usually a matter in question. Acting with or without intention is, most of the times, *the* issue that leads the judge to consider the agent liable or not. So judges are required to say whether the action was intentional or not;
ii. Second, the *circumstances* under which the action is performed are essential in at least three aspects: (a) many times they are what allows us to distinguish one legal type of action from other, either because the statute puts the circumstance as part of the definition or because the judge sees it as an important distinction; (b) many times the analysis of circumstances is the best way an essential to access the intentionality of the action; (c) they are also the more important instrument by which it becomes possible to qualify the action as reasonable, cautious, cruel and all the other different ways that someone may perform an action;
iii. Third, the *motives* of the action (the reasons that justify it) can also be important to determine if the action is legally authorized or not. Self-defense is only the most obvious case: injuring someone with a knife may be a criminal conduct or not depending on the existence or not of an actual menace.

I assume that the importance of intention, circumstances and motives for judicial decisions is not disputed. If I am right, it is not possible to avoid the challenges that these aspects of action terms bring up to the task of finding out the facts of the case. First, they give rise to problems about the kind of evidence to be taken into account. This problem is pervasive, but more important when the issue is about intention and motives: excluded confession – which is not the most reliable kind of evidence and in the majority of cases doesn't exist – judges don't conclude anything about intention and motives thanks to direct evidence.

The second source of difficulties derives from one feature of what Hart called the defeasibility of legal concepts[3]. Hart sustains that

[3] HART, H.L.A. (1948-1949), The Ascription of Responsibility and Rights. **Proceedings**

in a lawsuit

> [...] the accusations or claims upon which law courts adjudicate can usually be challenged or opposed in two ways. First, by a denial of the facts upon which they are based (technically called a traverse or joinder of issue) and secondly by something quite different, namely, a plea that although all the circumstances are present on which a claim could succeed, yet in the particular case, the claim or accusation should not succeed because other circumstances are present which brings the case under some recognised head of exception, the effect of which is either to defeat the claim or accusation altogether or to "reduce" it, so that only a weaker claim can be sustained. [...] In consequence, it is usually not possible to define a legal concept such as "trespass" or "contract" by specifying the necessary and sufficient conditions for its application. For any set of conditions may be adequate in some cases but not in others and such concepts can only be explained with the aid of a list of exceptions or negative examples showing where the concept may not be applied or may only be applied in a weakened form. [4]

According to d'Almeida[5], Hart presents two different claims about defeasibility, "one regarding the logical behavior of defeating conditions, and another concerning the structure of judicial argument". The second is the relevant one for my purposes: depending on the defenses *of fact* argued by the defendant, the judgment may have to consider alternative rules to that/those declared by the plaintiff or inferred by the judge in the beginning of the lawsuit. Think, for instance, of a Tenancy case where the plaintiff, who is a landlord, says that the defendant didn't pay the rent in time and so must be removed from the house. In this case, the applicable rule would be the one (existent, for example, in a Brazilian statute) that establishes that tenants have the obligation of paying the rent on pain of being removed from the house. In his response the defendant, although admitting that he really didn't pay, affirms that he had talked about this with the plaintiff who had agreed with two months without pay, because the defendant had spent a lot of money to replace the two centuries old water tubes for new ones. In this case, the judge needs to use more specific rules (for example, one that distributes

---

of the Aristotelian Society, New Series, 49: 171-194.

[4] Op. cit., p. 174.

[5] D'ALMEIDA, L. D. (2007), Description, Ascription, and Action in the Criminal Law. **Ratio Juris**, 20: 170–195.

the duty to pay for repairs of tubes) and, still, rules about the making of agreements orally, good faith and so on. In cases like this it is possible to say that the complexity of alleged actions gives rise to a correspondent complexity of potential applicable rules.

The importance of the term 'action' in the premise declared in the beginning of this article is now easy to understand: if action is what counts for a judgment and if concepts of actions are complex and defeasible in the way mentioned above, the enquiry that precedes the judgment must be as comprehensive as possible, on pain of judging without considering everything that is relevant. Let's see how judicial enquiry may tackle this issue.

3. Judicial enquiry

In a broad sense, the word enquiry refers to any quest performed in order to obtain knowledge about something that is not already known or to find something that has been forgotten or lost. In this sense, the possible object of an enquiry includes an uncountable variety of things, like the place where something is hidden, the reason for the existence of the universe, the time when I first noticed that I had fell in love and so on. Judicial enquiry belongs to the genus of enquiries held to set a version about facts of the past. Before we say something about it, it may be useful to say a few words about other enquiries that belong to the same genus.

Natural sciences normally work with facts of the past and do it with two distinguishable but related aims. First, scientists who approach an existent phenomenon as a problem for the first time (an earthquake, human life in the earth, the shining of the sun) hold enquiries to find causes that explain it. In this case, the phenomenon is seen as something singular and the causes eventually found refer to and explain exclusively that phenomenon. But scientists, after having made a certain number of enquiries of the first kind, hold broader enquiries that allow them to build theories and models able to explain the genus to which the singular phenomenon belongs. Singular causes are replaced by laws. In this case all earthquakes, all forms of life or the shining of all kinds of stars may be explained by the model, which is then used to understand other singular instances of the phenomenon. The existence of the model is a great achievement for many reasons, but for our discussion what is important is that using a model simplifies following enquiries establish-

ing previously what is relevant to be known and, consequently, providing the terms in which questions are formulated.

Similar enquiries about facts of the past are made by human sciences specialists. History is the obvious case: Historians relate a singular event (French Revolution, Military Dictatorship in Brazil) and try to apprehend it in terms of its more immediate or remote causes. It is also usual that an ensemble of studies on the same subject allows historians to build models about the possible causes, for example, of all revolutions and dictatorships, which helps them to understand and explain the rising of a new revolution or dictatorship.

In Law, some enquiries about facts of the past are similar to those made by natural and human sciences. Historians of Law, for example, may proceed like historians in general if their aim is to explain an event or a sequence of events. It is in this way, for example, that the origin of the distinction between systems of common law and civil law is explained. There is also the possibility that sociologists hold enquiries to know why some policies regulated by law work properly or not (for example, criminal policies concerning to rehabilitation of convicted criminals). In both cases, the understanding of singular cases will provide the sciences with elements to build models that can be used by new enquiries. Some of the results of these studies may serve as grounds for the improvement of policies and for the formulation of new rules of law. Part of what is found will probably become part of the legal culture that will be shared by legal professionals and even by citizens. This kind of enquiry is made, however, from what is known as the external point of view, that is, they are not part of the practice of Law. Our discussion is about a more specific kind of enquiry performed within law system, which is part of its ordinary and daily practice and, as such, is made from the internal point of view. When compared with scientific enquiries, this enquiry is made on different grounds, with special method and has limits that don't apply to scientific studies. This is what we call judicial enquiry.

Judicial enquiry has a very specific purpose: finding the truth about the facts of each particular case led to the scrutiny of judiciary. It differs from scientific enquiries in many features. First, it is carried out by many different agents, some of which, like scientists, act in spirit of cooperation (police, judges, clerks), but there are also some that act in competition (the parties and the scientific testimonies they indicate). Second, judicial enquiry must end in reasonable time, that is, the judge cannot postpone the conclusion until he or she is sure that all efforts to

find the truth were made. Third, contrary to what is up to scientists, it is not possible for the judge to say 'I don't know what happened' and declare the end of the lawsuit without solution. Forth, the responsibility of conclusion is committed to jurors or to a judge who are not specialists in the object of enquiry, and although they may receive help from experts, they are guaranteed some autonomy to decide contrary to these experts' opinion. Fifth, there are limits concerning the information that may be used, like the prohibition of use of illicit evidence.

All these differences are relevant but for our purposes the most crucial difference between judicial enquiry and scientific enquiries are their different starting points for the formulation of questions. Scientific enquiries formulate questions based on the true propositions of the time, normally coordinated in theories and models. In judicial enquiry the candidates to play this role are of a different kind, and this is the subject of next topic.

4. Two types of judicial enquiry, two types of reasoning

Questions are the instruments through which enquiries are held. No enquiry is a wide-open investigation without limits: the enquirer formulates questions to set the borders of the enquiry according to criteria of relevance. In judicial enquiries judges, like any enquirer, normally find out only what the terms of the questions allow coming to light. The problem is that formulating questions is not a task performed in a "natural" or a "free" manner, it depends at least on previous knowledge about the subject and on the point of view the enquirer adopts. In this topic I sustain that there are two sources of questions available to judges and that they differ both over the previous knowledge they offer and the point of view from which they are formulated.

The first source of questions is the part of rules of law known as factual hypothesis: in a rule stating that "one who kills other human being shall be imprisoned", the factual hypothesis is the act of killing a human being. Because a rule of law is the source of questions, I will call the related enquiry of rule-based enquiry.

Factual hypothesis is a strong candidate to serve as basis for judicial enquiry, first because in the very beginning of a lawsuit, just after reading or listening to the pleading, the judge is able to think of the applicable rule and its respective factual hypothesis. Second, because the terms of the factual hypothesis have normally been scrutinized by

former judicial decisions and scholars, simplifying the task of formulating questions. The results of this scrutiny are part of the previous knowledge available for a rule-based enquiry, which also includes ordinary knowledge. It is important to understand how it works.

Take the example of the act of killing. The first and most obvious question would be: "has the defendant killed the victim?" Of course this would never be the only question formulated by any enquirer, let alone by a judicial enquirer. Thanks to previous knowledge about the subject, issues about intention and motives, at least, are always present in any judicial enquiry about killing, and so are, usually, questions about the circumstances in which the action was performed. But when the terms of the factual hypothesis are the source of such questions, they will normally be open questions or, even when yes or no questions are possible, they will be formulated in general terms. Besides the already mentioned and principal question ("has the defendant killed the victim?"), we may figure out some other examples of questions: "Which were the circumstances of the crime?" "Had the defendant motives to kill?" "Has the defendant acted intentionally?" The problem is that such questions limit the results of the enquiry in a very important way: the expected answers are the ones related to the meaning that the enquirer ascribes to these terms (intention, motives, killing etc.). So every element of fact that is unexpected as an instance of the terms of the question tends to be discarded by the enquirer as irrelevant, even when they are supported by some kind of evidence. Another example: truth of exceptions and defenses, which have their own factual hypothesis, may be in principle investigated through questions derived from the terms in which they are enunciated. Think of a hypothetical enunciation of self-defense, as "justified and reasonable use of physical force upon another person who is about to hit me or so": it gives rise to questions like "Were the reaction justified/reasonable?" This offers a better example about the referred limits of factual hypothesis as a ground for the formulation of questions: the meanings of "justified" and "reasonable" are so abstract that they are not of much help as terms of a question, only the details of the facts of the case will furnish material to analyze it and these details don't come from this kind of question, but from questions derived from the second source of questions.

The second possible source of questions for the enquiry are allegations of parties, which set the basic elements of fact of a singular controversy. The plaintiff presents the pleading, the defendant responds and in some places, like Brazil, the plaintiff is allowed to comment the

defendant's response. Both the pleading and the defense have a narrative of what each party sees as the relevant events. If parties don't disagree about this matter some legal systems allow the judge to decide immediately, at least in civil cases; so no enquiry is needed. When there is disagreement, the judge has both narratives as potential grounds on which the questions may be formulated.

It is important to remark the word *narrative*. Allegations of parties come indeed in this form, that is, they tell a story developed in time, during which one or more agents perform one or more actions under certain circumstances. These narratives are not necessarily complete, that is, they normally don't cover the whole relationship among the parties, but only what they consider relevant for the case. That is why, in principle, all information provided by parties are potentially relevant to the solution of the case, what recommends that each detail referred in their allegations must be, until the end of the enquiry, presumed as relevant.

The use of allegations of parties as source to judicial enquiry gives rise to what we may call narrative-based enquiry.

Contrary to factual hypotheses, which have abstract concepts as their material, narratives bring definite information about actual persons and their actions and, as we have seen above, it is precisely the truthiness of these actions that must be the object of judicial enquiries. The questions are formulated in a concrete manner: instead of asking "has the defendant killed the victim?" the enquirer asks "has Smith intentionally shot Johnson in the corner of X Street on 14th of May around 10 pm?" and "has Johnson first menaced to hit Smith?" These questions are, of course, related to the terms of the rules (the first with "killing", the second with "self-defense") but they are specific and allow the enquirer to go straight to the relevant question of fact.

Allegations of parties are a better source of questions than the factual hypotheses that appear in rules of law because the previous knowledge they offer is richer, specific, and mainly because if I search for the truth about a fact, the best point of departure is a statement about facts, which may or may not be confirmed after the enquiry. I am convinced that many judges formulate specific questions inspirated by allegations of parties, without thinking about the logical issues that are behind it. But my point is that many judges are led to adopt the other way by a powerful logical instrument, named deductive reasoning.

Deductive reasoning, especially *modus ponens*, is the logical side of rule-based enquiries. Considered as a classical mode of justification of

judicial decisions, the formula *if p, q*, where *p* is our well known factual hypothesis, has potential to constrain judges to use rule-based enquiry, being enough for this constraint to operate that the judge thinks that his task in a lawsuit is only to find out if the rule was or not violated. If this is his or her perspective the enquiry will be held to confirm or not the factual hypothesis, what means that details of the case that are out of the terms in which it is enunciated may be discarded as irrelevant. In other words, the enquiry is made from the point of view of the rule.

I am not sustaining that judges have not, as *one* of their tasks, to find out if the rule was or not violated. I am only saying that this is *one* of their tasks, indeed it is their final task, which must necessarily be preceded by the end of his first task, which is to arrive at a conclusion about what happened. In other words, the enquiry must not be contaminated by the terms of the rule.

Again, it is useful to skip for the alternative model in order to fully understand what has just been said about deductive reasoning. Analogical reasoning is the alternative and it adopts the point of view of the facts. To reason analogically in a judicial decision is to make a comparison between the facts of the present case and those of a paradigmatic case to justify the application of the rule used in the latter. The paradigmatic case of analogical reasoning contains an example of an action that may be, in relevant features, analogue to the case that is about to be judged. The first aspect that favors the use of analogy is the fact that both terms of comparison are stated in narrative form. It means that the comparison is not between the terms of a definition and a statement about facts, but between two narratives that can be approximated by the similarity of their elements.

Contrary to what happens with deductive reasoning, where the facts of the present case are compared with the factual *hypothesis* of the applicable rule, in analogical reasoning *facts are compared with facts*. It is because the facts of the two cases, by definition, can't be the same – actions always being singular – that the only way of comparing them is by similarity, using analogy. Only after finding and demonstrating the similarity the judge is authorized to say that some facts are relevant, that others are not, and only then will he or she apply the rule of the paradigmatic case to the present case.

Analogical reasoning, then, is a way of justifying decisions that puts the facts as the core of the enquiry: it adopts the point of view of the facts, not of the rule. It demands an effort of the judge to know as much as possible about the facts of the present case, and as the applicable rule

is not previously known, narrative-based enquiry is the natural option.

Conclusion: Superiority of narrative-based enquiries

At first sight it would seem sensible to conclude that once both factual hypothesis and the narratives are useful to the enquiry the best that the judge can do is using the two of them. This Solomonic suggestion, however, disregards both the problems with the rule-based enquiry and the qualities of narrative-based enquiry. I sustain that the last is superior and should be taken as a pattern by judges

If we let the decision about the kind of enquiry to be held open to the discretion of the judge, two dangers would emerge. First, the concrete judge may be of the type who wants to find a shortcut for a quick solution of all cases. If this is the case, the rule that in the beginning of the lawsuit seems to be the applicable offers the perfect recipe: taking it as the basis for the enquiry the judge won't have many questions to answer and, after answering them, he or she will present the solution of the case with the appearance of a good decision, once the facts found will surely reproduce the factual hypothesis in a perfect *modus ponens* reasoning.

Second, even if the judge is not of the rushed species, he or she may be tricked by the perfection of the same *modus ponens* reasoning and sincerely think that the best solution can't be other than the one in which the facts fit exactly in the factual hypothesis of a single rule that initially seemed to be applicable.

The problem, then, is that the judge succumbs to one of these two temptations related to deductive reasoning: the temptation of speed and of perfection (as a practical lawyer, I am sure that in my country they often succumb to both, usually to the detriment of the defendant). One has to agree that these are not exactly weak temptations; and they are far from being a joke. In fact, they are very powerful in civil law systems, where legal professionals are not trained one single day to deal with facts, but spend all their lives studying rules. This is the reason why any sample of judicial decisions would show that the discussion about the meaning of rules is what really counts for the courts, the facts being referred only in a fragmented way.

But someone could argue that fear of temptations is not sufficient reason to say that the rule-based enquiry is not a good method. I agree. The inferiority of rule-based enquiry only becomes clear when we

consider the virtues of the alternative method, narrative-based enquiry. Its principal virtue consists to give the chance that everything that the parties allege becomes object of enquiry, taking seriously what seems to be a good rule: 'if parties say something about an event or action, this must be presumed as relevant'. The second virtue is that actual facts are the subject of narratives, contrary to what occurs with rules, where the facts are abstract hypothesis. Third, narrative-based enquiry is plainly compatible with the application of a rule in deductive mode: after the enquiry, the judge will know which facts are true and certainly will find one or more rules under which those facts can be subsumed. So, even for those who believe that deductive reasoning is a necessary part of the justification of judicial decisions – issue that is out of the limits of this article – I would say that the right time to use it is after the enquiry. Enquiries deal with facts and must be facts-based, what narrative-based enquiries guarantee.

Multicultural character of Brazilian constitutionalism

Self-determination of peoples in the 1988 Constitution and the legacy of José Bonifácio

Renata Anatólio Loureiro[1]
Danyele da Silva Machado[2]

Abstract: Asleep in the deepest roots of our country's history we find the elements needed to understand all that surrounds us today, including in relation to the legal world. As well accentuates Ricardo Marcelo Fonseca "only if comprises the Law effectively when it connects with what preceded us and what we have inherited from the past." [3] *Thus, it is never awfully avail ourselves of the birthplace of Brazilian thought in its most diverse aspects, the intention to seek the intellection of contemporary Brazil, especially from the standpoint of political-legal.*

The "intense dream" [4] *of seeing a country free from shackles oppressors and colonizers messed with many Brazilians, especially Jose Bonifácio de Andrada e Silva, who received the nickname Patriarch of Independence and had the main objective to form an independent nation, sovereign and cohesive after the decolonization process, based on liberal principles and adhering to the wave of Western constitutionalism, creating a sense of unity and belonging that would avoid the breakup of the country and the consequent formation of several small republics.*

The objective of this study is to analyze the legal and political thought of Brazil in the imperial period from the perspective of Jose Bonifácio, especially in his character integrationist widely exploited in the construction of the Brazilian State, which had to overcome the barriers imposed by extensive territorial dimension and multiculturalism, to the point of being required to sacrifice self mainly indigenous and black people.

From this integrationist much as multicultural heritage we will draw

[1] Master's in law from Universidade Federal de Minas Gerais
[2] Graduate Student from Centro Universitário Newton Paiva
[3] FONSECA, Ricardo Marcelo. **Introdução Teórica à História do Direito.** Curitiba:Juruá Editora, 2010. p. 6
[4] ESTRADA, Joaquim Osório Duque. Hino Nacional Brasileiro

a parallel with the Constitution of 1988, seeking a critical analysis concerning the development of the idea of self-determination, a breakthrough that still faces formal and informal mishaps, at the same time has great influence in society and is influenced by it.

Keyword: Multiculturalism - Self-Determination - Constitution - Imperial José Bonifacio - 1988 Constitution

Introduction

Analyze and write about the present moment is undoubtedly revive and rethink the past, reflecting the brands that events have left previous history in the construction of society, especially in the field of political and legal thought. The history of Brazil current is a reflection of events that profoundly marked their institutional construction, referring us back to the image of the Olympic torch that to keep up on, needs to pass from hand to hand. Experiences beyond the time barrier as an affront to the laws of physics, making it reverberate in the present. Observing the evolution constitutionalist notably Brazil, the main focus of our reflections, we identified its genesis in the imperial period, a time when the nation holds their first independent steps and aims to organize a sovereign National State.

It is imperative to observe the Karine Salgado notes that "the right is the result of human work and therefore built gradually through the objectification of certain values in a given historical moment." [5] This work will be developed addressing the vision of many historians and jurists about the imperial period, analyzing their observations on the main features of the economic perspective, social, political and anthropological, reflecting on these situations in the formation of the constitutional subject of the National State, mirroring in the work of Jose Bonifacio de Andrada e Silva.

The unit of the Brazilian state was structured on various aspects presented in the 1824 Constitution, especially the constitutional monarchy, the maintenance of the slavery and the insertion of the moderating power. The Brazilian Liberalism was based on the Portuguese movement, not only because the wealthier citizens studied on Lisbon land, but also because the Portuguese Crown moved to the colony Latin, bringing

[5] SALGADO, Karine. História, Direito e Razão. In: http://www.conpedi.org.br/manaus/arquivos/anais/manaus/direito_racion_democ_karine_salgado.pdf. Date:22/07/ 2013.

forth the remnants monarchists who eventually create deep roots.

Within a context organismic world, the independence movement in Brazil, as well as the development of its first Constitutional Charter that, in the words of Afonso Arinos, [6] confuses in the same historical process, is part of the liberal wave that struck Europe eighteenth century, which sought earnestly to get rid of absolutism.

Peculiarities permeate the situation of the metropolis, because the liberal movement there is not structured in the republic, which other European countries, but under the gauntlet of the monarchy. [7] That is, in this way, the monarchy was largely responsible for the development of Portuguese illustration, developing the form of the constitutional division of powers, justifying its maintenance for such a long period, in antagonism to the rest of the European continent, which aimed to end of the ancien régime.

What interests us most and will be the subject of consideration in this article is the unit based in the national identity, since the majority of the population of the newly freed colony was formed by slaves and freedmen, those without right to exercise political rights, these without the condition proper establish themselves as citizens. [8]

---

[6]. This author believes that together the political freedom of the people, following the European liberal movement, in Brazil the situation took contours of building "own national personality", consisting of the rationalization of political theory adopted. FRANCO, Afonso Arinos de Melo. **Curso de Direito Constitucional Brasileiro vol II.** Rio de Janeiro: Forense, 1960.p 9-10.

[7] In this sense Note that the reflections of Illuminist political thought echoed later in the Iberian peninsula, emphasizing understanding of the Vicente Barreto and Afonso Arinos justify this situation by "*narrow monarchical absolutism and the strong influence of the church on society and the State*", exerting strong censorship .ARINOS, Afonso. **O constitucionalismo de D. Pedro I no Brasil e em Portugal.** Brasília: Ministério da Justiça, 1994. p. 10. e BARRETTO, Vicente, **Ideologia e Política no pensamento de José Bonifácio de Andrada e Silva.** Rio de Janeiro: Zahar Editores, 1977.p, 83

[8] Census taken in 1872 showed that the Brazilian population in this period amounted to 9,930,478 inhabitants, divided about social status in 8419672 free (84.78%) and 1.510,806 slaves (15.21%). As for the races, was 38,13% White, 19.68% black, 38.28% of mixed race and 3.89% of Indians. Black and brown together, including both free and freed as slaves, came to 5.756,234, or 57,96% of the total population. Excluding slaves, came to a free colored population of 4.245,428, in other words, 42,75% of the inhabitants of the country were free people of color, so egress of slavery and their descendants, blacks and browns. CHALHOUB, Sidney. **Precariedade estrutural: o problema da liberdade no Brasil.** In: Revista Eletrônica História Social. São Paulo: 2010. p. 34-35. Disponível em http://www.ifch.unicamp.br/ojs/index.php/rhs/article/view/315/271. Date: 09/07/2013. In the same

The maintenance of slavery came into vehement discussion, behold the purity of liberalism did not allow slavery, nor the most cruel trafficking. Other hand, those responsible intellectuals and supporters of the liberation of the country made fortune using the exploitation of slave labor.

Brief outline of cultural and ethnic composition Brazilian

In the early nineteenth century - "the condition of colonial Brazil ceased with the arrival of the royal family in 1808" [9] and the steps taken to extinguish Portuguese domination of Brazilian trade - introducing an autonomy that previously was not known by the government national ex vi the opening of the ports to friendly nations, permission to industrialization, creation of the Bank of Brazil, and the elevation of Brazil to the rank of United Kingdom of Portugal and the Algarves, among others.

The economy at this time, was founded by the plantation system, based on the use of "monoculture estates and the exploration of slave labor" [10] impacting the construction and consolidation of the character of the local society and directly influencing the formation and development of social classes.

The territory was integrated by provinces - old captaincies - that contained a society quite heterogeneous, composed of white Europeans - mostly Portuguese, African blacks and mulattos - those arising from miscegenation - and Indians.

The white Portuguese and their descendants, forming the Brazilian elite held power political-economic-social due to the positions they occupied in the performance of these sectors, such as landowners, mer-

---

direction information provided by Mr Henriques de Rezende, made at the meeting of August 02, 1823, when evaluated project dealing about the possibility of naturalization of Portuguese living in Brazil: "(...) *But, Mr. President, which serves us so much vegetation, so much wealth in mines, if so vast continent is poorly tinted by a population of only four or five million inhabitants, and this whole heterogeneous and largely slave* " In: **Annaes do Parlamento Brazileiro – Assembleia Constituinte de 1823 –** Tomo Quarto. Rio de Janeiro:Typographia de Hyppolito José Pinto & Cia, 1876. p. 07.

[9] ANJOS, João Alfredo dos. **José Bonifácio, primeiro Chanceler do Brasil**. Brasília: Fundação Alexandre de Gusmão, 2007, p. 52.

[10] SPAREMBERGER, Raquel Fabiana Lopes. **Antropologia e Diferença: quilombolas e indígenas na luta pelo reconhecimento do seu lugar no Brasil dos (des)iguais.** Cap. 6. p.126. In: COLAÇO, Thais (org). Elementos de Antropologia Jurídica. Florianópolis: Conceito Editorial, 2008.

chants, civil servants in the service of the Portuguese court, politicians, etc.

The black people were brought to Brazil from Africa to be slaves, setting the workforce longer used at that time. Emilia Viotti, talking about African slavery, states that:

> "Wherever the economy was organized to supply the international market with raw materials, and whenever there was difficulty in recruiting native labor, Africans provided the necessary work. There was a precise correlation between the accumulation of capital and the use of African slaves. "[11]

The Brazilian slavery was a system of exploitation of labor based on the possession of the employee, in which the slave was treated as a thing, property of his master. [12] The cultural identity of negro was discarded, as well as their values, traditions and beliefs totally ignored, disqualifying them as citizens of the society to which they belonged. The African race was considered immoral, not human [13], treated as a single

[11] COSTA, Emília Viotti da. **Da Monarquia à República: momentos decisivos.** 3ed. Editora Brasiliense, 1985.p.236

[12] Jose Bonifacio did not agree with the thingification of the slave, stripped of all their natural rights, arguing that the right to property has been sanctioned "for the good of all," it is not lawful for any person to subtract the human condition and liberties of others, condemning them to a "vileness and misery without end." In: SILVA, José Bonifácio de. **Projetos para o Brasil.** Organização: Miriam Dolhnikoff, São Paulo: Companhia das Letras, 1998. p.61. Other hand the reason coupled with common sense pointed to him the necessity of developing a performance of inclusion. Aware of barriers political, economic and social implications for an immediate freeing of slaves, granting him the privileges of citizens, planned a gradual emancipation while they envisioned the gradual entry of the ex - slave market economics, teaching him to deal with finances. As an incentive, advocated the establishment of banks in the provinces in order to save income received. In: SILVA, José Bonifácio de. **Projetos para o Brasil.** Organização: Miriam Dolhnikoff, São Paulo: Companhia das Letras, 1998. p.48-49

[13] In the legislative session of the day September 30, 1823 Congressman France opined favorably to the gradual release of slaves, remained opposed to the abolition by considers it an offense to the supreme law of the "*salvation of the state*" by understanding that conduct an affront to property private third party, as much as it presented an obstacle to the expansion of agriculture. Adds to the delicate situation in understanding the deputy, the fact insert in society "*a bunch of men who have left the captivity, barely may be guided by the principles of freedom and understood*" In: **Annaes do Parlamento Brazileiro – Assembleia Constituinte de 1823 –** Tomo Quinto. Rio de Janeiro:Typographia de

object of sale. "The great argument of the slave was property rights, was the 'partus sequitur ventrem' of livestock. The humanity of the slave disappeared: he was animalistic as any other animal that the owner is entitled to offspring." [14]

This appropriation of the slave as something that can be sold - degraded condition his human nature - exceeded the economic sector and linked, reflexively, the social context. In this, the slaves were heavily marginalized, excluded from social circle ascending at the time, responsible for the organization of national political life. "Negros was naturally segregated in a social system that offered them few economic opportunities, excluded them from political participation and where the rise in the social scale was possible only when authorized by the white elite."[15]

Justified this conduct in the alleged immorality, irrationality and bestiality race as purposely appointed, whose coexistence with whites would grant civility required, especially on the moral point of view. Considered a race devoid of the minimum required for a healthy living and devoid of intelligence and knowledge, formed a separate segment in society.

To explain about the mulattos, Emilia Viotti [16] inserts them into a category other than those of blacks, explaining its origin miscegenation between whites and blacks formed mostly by the sons of masters to slaves. "The Brazilian elite had a tolerant attitude opposite to miscegenation, and the owner of slaves rarely Brazilian ashamed to acknowledge their descendants mulatto and ensure them manumission." Thus, the mulattos reached more easily upward mobility, but this mobility was within the boundaries imposed by the dominant group, "through a system of patronage and clientele."

Analyzing the condition of the Indians noticed your reality widely conflicting therefore raised a critical issue for national sovereignty: land ownership. The territory for this race is their livelihood and self-determination, a mechanism for transmission of affirmation and habits, religious beliefs and socio-political rules, hence, their physical and cultural survival depends on the locus in which they live. The indigenous population in 1500 was estimated at between 800.000 to 10 million in-

---

Hyppolito José Pinto & Cia, 1876. p. 205.

[14] PEREIRA, Batista. **Figuras do Império e outros Ensaios**. 3ed. São Paulo. Editora Nacional, vol. I. p.51

[15] COSTA, Emília Viotti da. Op. Cit. 1985.p.240.

[16] Ibidem

dividuals. After three centuries, these companies have lost significant amount of members [17] due to forced colonization of the tribes beyond the hegemonic appropriation of their lands.

The Portuguese did not respect their identity, their different mode of existence, or the authority before their land. There was great indigenous resistance during the period, however, they were defeated by both the military and by the Portuguese and unknown diseases brought by indigenous immune system. The remaining indigenous slavery remained, and this labor was dispensed after the arrival of the black African.

European elite, imprisoned blacks, Indians extinct or marginalized. It is worth noting the coexistence of these peoples as distinct within the same territory. Stigmatized as above, the multicultural training of Brazilian identity was extremely unevenly. We determined that since the beginning of colonization "the imposition and oppression of a culture that wanted hegemonic"[18] materialized as it was imposed the cultural homogenization process in Brazil. Indians and blacks were seen - by white Europeans - as barbarians, impure, inferior, a regression of human civilization. This ethnocentric view that underlay slavery black and indigenous, served as a vector for assimilationist policy that prevailed between society evolved and the backward people, mainly promoting cultural integration between the Indians and the other segments of society. Several justifications were found to legitimize this ownership policy, one of the most widespread is the patriarch of independence Jose Bonifácio de Andrada e Silva.

Plural society of José Bonifácio De Andrada E Silva

> "Man sows a thought and reap an action, sow an act and reap a habit. Sow a habit and reap character. Sow a character and reap a destiny. "[19]

[17] "*It is worth mentioning that there was not only reduced the population of these people, but also, and primarily, a significant decrease in cultural diversity, and hence, beliefs, cultures, traditions, customs, resulting in significant injury to these populations*". SPAREMBERGER, Raquel Fabiana Lopes. Op. Cit. p.128.

[18] KRETZMANN, Carolina Giordani; SPAREMBERGER, Raquel Fabiana Lopes. **Antropologia, Multiculturalismo e Direito: o reconhecimento da identidade das comunidades tradicionais no Brasil.** Cap. 5. p.97. In: COLAÇO, Thais (org). Elementos de Antropologia Jurídica. Florianópolis: Conceito Editorial, 2008.

[19] SIVANANDA, Swami. **Concentração e Meditação.** Tradução Zilda H. Schild Silva.

Unravel the work of Jose Bonifácio[20] and its rich contribution to the historical setting - Brazilian politician, representing the rescue anthology of ideas that took root over the years, whose reverberate today. His iconic figure is the reference when it proposes to examine the independence of Brazil. [21]The political emancipation of this country was formally on September 7, 1822 [22] and had the strongly influence the Andrada that, this time, witnessed each resolution policy rising.

The cornerstone of their ideology and political action was the conservation of the Brazilian territory [23] tied to a culturally homogeneous society, which would guarantee a reduction in internal disparities.

The dichotomous character of Bonifacio can be quickly unveiled having in mind your goals. Its relevance permeated the conservative defense of constitutional monarchy and hereditary form of government, "under the pretext that the monarchical power was unifying par excellence and only able to save the national unity in a country divided by infighting and threatened secession." [24] The patriarch of independence disliked the extremes of the republic - the writings of French heritage

---

11ª edição. Pensamento, 2001.

[20] In the words of historian Emilia Viotti Jose Bonifacio was "the son of one of the most representative families of Santos (the fortune of his father was considered the second city), and, like most young people of his time, completed his studies in Portugal, returning to Brazil with 56 (fifty six) years of age, bringing all your ideal liberal / conservative, who managed the balance required for the maturation of a sovereign nation that was beginning to develop. In: Costa, Emilia Viotti da. Op. Cit. 1985.p.56.

[21] *"Our independence was due undoubtedly to Jose Bonifacio de Andrada e Silva [...] honored in the cultural world as the land of the crib and was undeniably who transformed the colony in a sovereign nation*." In: PEREIRA, Batista. Figures Empire and other Essays. 3ed. São Paulo. Editora Nacional, vol. I. p.103.

[22] It is unison among historians understanding that brazilian emancipation began with the arrival of the Portuguese crown to its American colony, because to allow her stay with minimal infrastructure and comfort, was forced to break the shackles of colonial servitude, bringing administrative and political expansion to Brazilian soil, generating economic development that would become *"incompatible with the colonial status"*. In: JÚNIOR, Caio Prado. **Evolução política do Brasil e outros estudos.** São Paulo: Editora Brasiliense, 1980.p.48.

[23] *"It can be similarly credited to the action of Jose Bonifacio part of the effort that would result in the consolidation of the Brazilian territory as we know it today.*" ANJOS, João Alfredo dos. **José Bonifácio, primeiro Chanceler do Brasil**. Brasília: Fundação Alexandre de Gusmão, 2007.p.21.

[24] COSTA, Emília Viotti da. Op. Cit.,1985.p.132

Benjamin Constant[25] - as universal suffrage, considering that national representation should be coming from the good choice, never the quality coming from the mass population. This European liberal, belonging to the Brazilian elite doubted the intellectual capacities of Indians, Negros[26] - whether slave or free - and mestizos uncivilized, targeting a government of men endowed with wisdom and honesty, which is: a constitutional monarchy with representative exclusion popular vote.[27]

His liberal facet is evidenced mainly by the insistence on structuring a constitution which braked the excesses of absolutism, ensuring the balance of government and their struggle for gradual emancipation of slaves and the assimilation of Indians.

His conviction form the Brazilian nation has found significant impediment to the existence of different people within the same territory[28], dealing from the outset, with a plural and no tradition absorption differences for the formation of the personality of the citizen society.

---

[25] Benjamin Constant was recognized by considering democracy when exercised distorted becomes the object of despotism. Having suffered direct influence of the French Revolution, developed his theory by analyzing the performance of Robespierre in his ontological work policy principles applicable to all governments. In: CONSTANT. Benjamin. **Princípios de política aplicáveis a todos os governos.** Tradução: Joubert de Oliveira Brízida. Rio de Janeiro: Topbooks, 2007, p.104.

[26] Bonifacio regarded the slave *"ignorant, lazy, proud and rebellious"* and enslaving an expensive undertaking, because the expenses of land acquisition, instruments, maintenance of the slave with clothing, food, diseases and countless trails for Quilombo, ended up encumber the cost of crop reducing their profit. Pondered, however, the inability to remove them from captivity and immediately insert them in the society, for which he defended in his representation to the General Constituent and Legislative Assembly of the Empire of Brazil on Slavery, emancipation gradual, creating conditions assimilates him, instructing him, providing conditions for adaptability and civilizing him through contact with whites. In: SILVA, José Bonifácio de. Op. Cit.,1998. p.58.

[27] COSTA, Emília Viotti da. Op. Cit.,1985.p.70. In a passage of this book Boniface asserts: *"It had been the first to thunder against the perfidy of the Portuguese Courts, the first to preach the"* Independence and freedom from Brazil *", but a fair and sensible freedom, under the tutelage of forms"* Constitutional Monarchy "single system, he said," t*hat could save united and solid and unbroken this majestic piece of social architecture, from the Silver to the Amazon"* p. 92.

[28] As a legacy of the colonial period, Brazil had before him, in the speech of a Santista statesman, *great racial and cultural heterogeneity*, formed by a largely ignorant population composed mostly *of blacks and mestizos*, the largest slave party and whites Europeans and Jews, in addition to the indigenous. SILVA, José Bonifácio de Andrada. Op. Cit.,1988. p. 20-21.

The territorial unit depended on certain homogeneity that implied the perpetuation of a nation within the same territory, a people with the same culture[29]. It was necessary to adapt the models to other peoples of the more evolved, in other words, the parameters of the Brazilian elite that sported the necessary configuration as idealized Brazilian citizen virtues. Nabuco in his book The Abolition asserts that "the vision of Bonifácio - and revolutionaries of 1817 - was the social integration of independent Brazil, which could only occur with the abolition of slavery [...]"[30], and the integration of indigenous. [31]

The first chancellor of Brazil [32] clearly segregated the Portuguese culture of black and indigenous cultures - a reasonable thought at the time. The difference in their policy, which had a mention in this matter, understand how to deal with these disparities - which must be interpreted in light of their concerns with the territorial unity and cultural heterogeneity.

His vision of the slave coincided with other contemporary opinions, what is the perception that they were "brutal and immoral" things [...] "miserable captives", however this condition - in the opinion of Andrada - was arising from slavery, which is constituted in both cancer ravaged Brazil, moreover, this did not remove the human nature of the existence of black. [33] Bonifacio, protecting order and territorial

[29] The construction of Brazilian identity followed the same steps as the formation of Occidental universality, fruit of the Greco-Roman influence, which absorbed the Jewish and Christian culture that did not accept cultural diversity. More about the universal vision of universality in JULIEN, François. **O diálogo entre as culturas.** Trad. André Telles. Rio de Janeiro: Zahar, 2010.

[30] Nabuco, Joaquim (1988). **O Abolicionismo**. Recife. Editora Massangana.p.55 a 57.

[31] Bonifacio recognized the challenge he met ahead, considering it "*easier to propagate the lights and increasing wealth in Brazil to tackle the difficulties that oppose because of race and slavery, its residents are social with each other, and look like brothers and fellow citizens*". In: SILVA, José Bonifácio de. Op. Cit., 1998. p.184.

[32] To João Alfredo dos Anjos, "rare are those who realize that Jose Bonifacio de Andrada e Silva was the first Chancellor of Brazil". ANJOS, João Alfredo dos. Op. Cit..p.15

[33] "*But say perhaps that favor freedom of the slaves will attack property. Do not deceive yourselves, gentlemen, the property was passed for the good of all, and what the good that he takes the slave to lose all their rights natives, and become one of the thing, in the phrase of Jurists? Not because he property law, who want to defend, he's right force, because the man cannot be thing, could not be owned. If the law should defend property, much must defend personal liberty of men, which cannot be owned by anyone without attack rights of Providence, which made them free men, not slaves; attack without the moral order of society that he the strict enforcement of all duties prescribed by nature, religion, and by*

unit, feared a revolution or turmoil these people could result in "future political convulsions" [34] and / or breakdown of the territory, a threat to the status quo. Then suggest a slow and gradual emancipation[35] these in order to convert them peacefully in free, fair and virtuous men, through the gradual abolition of catechisms, education, through contact with whites, among others. For Andrada, the human nature of black existed, however, should be liberated and emancipated in order to obtain a civilized people, adequate templates for the season.

Concerning the Indians the same policy was adopted. The document "Notes for the civilization of the wild Indians of the Empire of Brazil" written in 1823, portrays this theme. "It is, in short, a program of assimilation and socialization of the 'angry' indigenous population through methods 'soft'. [36]

Bonifacio corroborates in this document, the 'savage' indigenous state, but - as in the case of blacks - he strongly said that even before this early stage, these men were equipped with the "natural heat of reason"[37], in other words, the ability to emancipate itself. Therefore, the duty would deploy a civilizational project that approached the appropriate parameters at the time, which they are the modes of the elite, that way, indigenous peoples should be socialized in the same way that blacks would be: "by using the method 'soft', which included a very wide range of actions, such as education, labor, agriculture, commerce, socializing with whites, intermarriage among others."[38]

Again, human nature is recognized, but the acceptance of differ-

---

intact policy. " SILVA, José Bonifácio de Andrada e**. Representação Geral Constituinte e Legislativa do Império do Brasil sobre a Escravatura**. 1823.

[34] UEMORI, Celso Noboru. **Escravidão, nacionalidade e "mestiços políticos".** In: < www.pucsp.br/ neils/ downloads/v11_12_Celso.pdf> Date: 08/06/2013.p.2

[35] "*The adoption of measures, effective immediately, to end slavery could lead to the reaction of slaveholding elites and possible social and territorial disintegration. Hence his protection of adopting measures for the gradual abolition of the slave trade and slavery.* "ANJOS, João Alfredo dos**.** Op. Cit..295.

[36] MOREIRA, Vânia. **Indianidade, territorialidade e cidadania no período pós-Independência** – Vila de Itaguaí – 1822- 1836. In: <www.ufrrj.br/graduacao/PEThistoria/arquivos_PET/seminarios/Indianidade, territorialidade e cidadania no período pós-Independência - Vila de Itaguaí, 1822-1836.pdf>. Date: 08/06/2013.p.4.

[37] SILVA, José Bonifácio de Andrada e. **Apontamentos para a civilização dos índios bravos do Império do Brasil.** In: CALDEIRA, Jorge (org.), José Bonifácio de Andrada e Silva. São Paulo: Ed. 34.p. 183-199.

[38] MOREIRA, Vânia. Op. Cit..p.5

ence is ignored and subjugated. The innovation presented by andradino program is directed to the indigenous, in other words, the rights of the Indians, especially the territorial rights that belonged to them, what disliked much of the ambitious agrarian elite.

It is clear, in this context, that the scenario envisioned by Bonifacio is based on a widespread ideal at the time: the theme about the evolution of civilizations along time. His persistence in the assimilation of blacks and indigenous people by European culture - civilized - demonstrates a denial of the rights of these people, the non-acceptance of their identities. Equality emphasized by the proposed pervaded the consideration of ethnic diversity as inferiority to be overcome through the emancipation of these ethnic groups, the integration into the national community. This is clearly the affirmation of integration paradigm that dominated this period, especially about the Indians.[39] This model affirms the inferior condition of the Indian and the need to emancipate them, or better, civilize them. The conclusion that can be expected is that after completion of the integration, the Indians would not be recognized as inferior, but also would not be considered Indians. In this perspective, to be considered civilized and able to participate in the national sociopolitical scenario should relinquish its historical-cultural identity and to accept and internalize a new culture, which showed hegemonic, the only effective solution to a future worthy of a men human. [40]

Until then these communities would not get the privilege to be a part of the population who actively participated in the national political scene, thus, to evolve, would not be recognized as citizens.

---

[39] Bonifácio Bonifacio advocated as the primary form of inclusion of Indian miscegenation, seeking consecration of "cultural homogeneity", using the white race as "civilizing instrument."In: SILVA, José Bonifácio de. Op. Cit., 1998. p.23

[40] According to the Representation of Civilization wild Indians of Brazil, Andrada betting on catechesis as more fruitful integration of the Indian middle therefore confer a sense of morality through a Christian education, enjoying the good temper of the Jesuits. Because of the intense appeal of this evangelizing figure, took painstaking care to have selection criteria and training of missionaries who, in turn, relied on military aid to make themselves respected, settling in the vicinity of villages "small military prisons" also advocated the establishment of "cash sink economy" so they could save money perhaps gain work done. Humanitarian tonic bonifacianos permeated the writings that bothered even with questions about hygiene and feeding time. SILVA, José Bonifácio de. Op. Cit. 1998.

Formation of identity of the constitutional subject in Brazilian constitutionalism

> "Before ask us what we do to the discovery of this diversity of cultures, it is important to understand what it means and you capture the multiple roots. And it's not as easy as it looks unreservedly accept the assertion that, in the backdrop of our modernity, in the layers that underlie our culture, there is a competition, one primordial controversy, which conditions any consciousness of what history has made of us. The story generated in multiple and diverse: this awareness should be increased to the extent that it becomes extreme embarrassment, no apparent output." [41]

Preliminarily fit placement Maria Fernanda Salcedo Repolês that the construction of the identity of the constitutional subject is a process that requires maturity, especially when we are dealing with a democratic state, "in which the 'space' of identity presents counterfactually empty and where the incompleteness is no longer seen as a problem but as a guarantee of recognition of pluralism "[42] as part of a dialogical movement.

Analyzing the formation of that national identity in the European and Latin perspective, José Luiz Quadros de Magalhaes reports that she should legitimize the exercise of sovereign power, may not allow the exclusion and sealing the exclusive identification of that with an internal ethnic group. In the case of Brazil, we talked about the impossibility of an inclusive identification of white Europeans and local aristocracy over the natives and Africans. QUADROS [43] warns that "different groups of pre-existing national state to identify conflicts or may not create insurmountable barriers of communication, as threaten the continued recognition of the power and territory of this new sovereign

[41] RICOUER, Paul. **As culturas e o tempo.** Tradução Gentil Titton.Petrópolis: Vozes, 1975.p.15

[42] REPOLÊS, Maria Fernanda Salcedo. Quem deve ser o guardião da Constituição? Do Poder moderador ao Supremo Tribunal Federal. Belo Horizonte: Mandamentos, 2008. p. 30.

[43] MAGALHÃES, José Luiz Quadros de. **O Estado plurinacional na América latina.** In: http://joseluizquadrosdemagalhaes.blogspot.com.br/2011/04/302-artigos-o-estado-plurinacional-na.html. Date: 19/07/2013.

state." However, in Brazil there was no acceptance of multiculturalism, ethnic diversity to the consolidation of their identity which, even in the words of the author, the creation of a "nationality (set of identity values)" was forged "over identities (or we can talk even nationalities) pre - existing "common values indiscriminately imposing, overwhelming self-determination of others and generating ideology of intolerance and" denial of diversity. "

The Brazilian Constitution of 1824 was who corroborated with the most widespread beliefs about this time the Indians and slaves. In truth, its omission with respect to this group revealed that the political positioning apparatus adhered, generating deep gap on the recognition of citizenship of minorities, forgetting the fruitful discussions of the Constituent 1823 on the entry of those as subjects of rights.

The concept of citizenship in the constitution was used polysemous, both assigned to what is known today as national citizenship itself. Speeches presented in the legislative sessions of the Constituent 1823 on Article 5 of the Constitution Project are precious teachings on the rights arising nationality in that sense, encompassing both the situation of foreign residents in the country after independence, the slaves and natives.

In this context, understanding transcribed by Congressman Mr. France, expressing the thinking of most political presents:

> "We can not fail to make this difference or division of Brazilian and Brazilian citizens. According to the quality of our people, the children of blacks, Creoles captives, are born in the territory of Brazil, but Brazilians are not yet citizens. We should make this difference: the Brazilian is born in Brazil, and Brazilian citizen is one who has civil rights. The Indians who live in the woods are Brazilian, and yet are not Brazilian citizens, while not embracing our civilization". [44]

The two ethnic groups were framed "in the condition of Brazilians, born in Brazil" [45], however the treatment of black citizens were denied to the ground purposely exposed, namely, the perception of the

[44] **Annaes do Parlamento Brazileiro – Assembleia Constituinte de 1823 –** Tomo Quinto. Rio de Janeiro:Typographia de Hyppolito José Pinto & Cia, 1876. p. 166. Discussões mais aprofundadas podem ser observadas nos anais da Constituinte, em especial os tomos quinto e sexto.

[45] Ibidem

constituents, as well as the majority of the active population in politics , that slaves were property, properties, for which it was not for the will itself, in other words, self-determination, beyond the certainty that they were unprepared for the exercise of legal acts of life - were not civilized. This excuse especially tied freedmen.

Regarding the non-recognition of Indians as citizens ranged before the reason given for the black slaves and can be better identified in politics developed in the First Reign. Maria Hilda states that "[...] there was a pre-condition to pass the simple condition for Brazilian citizens: to cease to forestry, in the narrower sense of the term, in other words, residents of the jungles, and 'embrace our civilization. '"[46]

It follows from this statement the distinction made by the constituents in the state among the Indians 'savage' and now 'civilized'. The causes found to motivate such differentiation were that primitive natives did not recognize the authority of the Brazilian government, were not connected to society nor shared degree of civility of said Brazilian citizens before it, could not be recognized as such. [47]

The Aboriginals already emancipated, or rather civilized, remained the recognition of citizenship[48], this was ensured with the corresponding charges, as the payment of "jurisdiction to remain in the lands of the imperial farm, like everyone else in the same position and quality." [49]

---

[46] Ibidem

[47] Again we employ the rich arguments of liberals 1823, highlighting the speech by congresses Montesuma in the session on Sept. 23: "(...) I take care of but they do not treat here are the Brazilian society, we speak of subjects of the Empire of Brazil, the only ones who enjoy the cozy of our society, and suffer his troublesome, they have rights and obligations in the social pact, the state constitution. But the Indians are outside the pale of our society. are not subjects of the empire, not recognize, nor by consequence its authorities from the first to the last, living in open war with us, they cannot possibly have rights because they have neither recognize even the simplest duties (I speak of not domesticated) as follows: consider them as Brazilian citizens? How considers them political and own sense of a constitution? ".In: **Annaes do Parlamento Brazileiro – Assembleia Constituinte de 1823 –** Tomo Quinto. Rio de Janeiro:Typographia de Hyppolito José Pinto & Cia, 1876. p. 166.

[48] The Indian policy of the First Empire demonstrates a clear willingness to consider the Indians 'citizens', since they were classified as civilized. PARAISO, Maria Hilda. Construindo o Estado da Exclusão: os índios brasileiros e a Constituição de 1824. In: Revista CLIO_ Revista de Pesquisa Histórica. Volume 28.2. ISSN 0102-9487. In: www.revista.ufpe.br/revistaclio/index.php/revista/article/viewfile/122/89>. Date: 08/06/2013.p.10

[49] Ordinance, 9th September,1824, In: Joaquim Norberto de Souza e Silva (1854: 413).

Is worth noting that besides the individualistic concept of citizenship in this period was linked directly to the right of property, which also represented the rights to liberty and equality, and maintaining close connection with legal status, in other words, the exercise of rights under the law, which did not include factual situations or the preservation of collective interests.

In this perspective, analyzing the 1824 Constitution, shall see that the condition of civilized was not the only one that prevented the Indians from exercising its active and passive citizenship. The most representative was the obstacle character census to vote and be voted. This indeed was the greatest instrument found to marginalize populations, which would be appropriate not to the standards imposed by the definition of a citizen at the time. By this criterion, actively participated in the political scene those who had equal or greater equity to the constitutionally provided for. Thus, even though the Indians were already adapted to social life, they would have no means to achieve such fortune, since social mobility was subject to the trainees and excesses of the elite.

The identity of the constitutional subject was forged within the social exclusion of minorities, on the argument regimentation of a nation that could not rely on men or wild recently - coming out of the political wilderness to form their cores. They knew, however, that these individuals should be absorbed gradually, under penalty of future breakup.

Although jettisoned citizenship rights, they would fit the silent cultural influence, the intellectual awakening the inconvenience caused by slavery and economic embarrassment generated by freedmen. Forming large population segment, looked slowly from involving themselves in the society that mitigated them, and made themselves heard.

Wolkmer reminds us that the constitution should be a resultant of forces that battled in a particular historical moment, should express plurality, materializing "a form of power that is legitimized by cohabitation and coexistence of divergent views, diverse and participatory." [50]

In this context, a new formulation of national identity, respecting the open pluralism and reworking the progress, was the answer to prophesy voices that the abolition of slavery would lead to the disman-

---

Maria Hilda, citing Joaquim Norberto emphasizes that he considered it more of a low blow against the Indians, their heritage and their rights, as they were being forced to pay for the land received from King John VI. PARAISO, Maria Hilda. Op. Cit.10

[50]WOLKMER, Antônio Carlos. **Pluralismo e Crítica do Constitucionalismo na América Latina".** Anais do IX Simpósio Nacional de Direito Constitucional.p.144

tling of a nation. The Brazilian Constitutionalist movement gained new momentum with the opening to the rereading of citizenship and needs to be formally recast.

As seen, beyond the integrationist character which pervaded thinking about cultural differences, the monetary criterion also concerned as an obstacle to the widespread reach of the nascent political participation. To erase the discriminatory past, the Brazilian constitutionalism suffered major changes over time, adapting to the most persistent demands in society. The retrograde paradigms were dismantled, and instead, shone forth new thoughts, which mainly mark the beginning of the respect and praise of cultural differences. This means that multiculturalism was not analyzed only from the ethnocentric criteria, is also recognized in the sense of otherness, of difference.

Ethnic groups, in the words of Adriana Biller Aparicio [51], formerly subjugated by hegemonic community today plead for the right to be different, "the recognition of its otherness and the right to live it freely." Author advocates said that "the new social movements in Brazil have historically been to bring 'depreciated' public scene by subject slave and elitist social order." These voices began simmering in the twentieth century, reverberating in the 1934 Constitution with political and ideological pluralism, were heard by the current Constitution, in other words the Citizen Constitution.[52]

After centuries of oppression and subjugation cultural movements decided to fight for recognition of their identities[53], publicly exposing claims that permeated the assertion of ethnic and cultural pluralism, popular participation in the political sector and equal rights as collateral for the difference, because as Aparicio "[...] the struggle of ethnic-cultural identity movements there is a demand that does not necessarily require a change in the cultural identity of 'the other'."[54]

---

[51] APARÍCIO, Op. Cit. p.80.

[52] To Menelick de Carvalho Netto "the legitimacy of the 1988 comes from its process of democratic, open and participatory drafting the Constitution," noting that supervening changes should observe the same procedure as a way of maintaining such popular acceptance. In: CATTONI, Marcelo. **Poder Constituinte e Patriotismo Constitucional.** Belo Horizonte: Mandamento, 2006. p.25.

[53] Emphasizes Wolkmer not be tradition in Latin America producing constitutions of liberal imprint, given rigorously "the needs of its major social groups, such as indigenous nations, african-American populations, the masses of peasants and agrarian Multiple urban movements". WOLKMER, Op. Cit. p.147.

[54] APARÍCIO. Op. Cit. p.81.

The performance of these social groups gained strength and solidity in the period of drafting the current constitution. Aparicio confirms that:

> "The ethnic-cultural movements were united in the popular movements called 'democratic reinvention'. Obtained, in turn, the success of crowning the Federal Constitution ethnic-cultural pluralism in the formation of the Brazilian government, which had hitherto operated with the 'myth of racial democracy' legislatively. "[55]

The 1988 Constitution has met formally to the demands of these groups, and ethnic aspect, indigenous peoples and african descent gained prominence. In this area, guaranteed "the full exercise of cultural rights" and protected "the expressions of popular, indigenous and african-Brazilian cultures, and other groups participating in the national civilizing process" (art. 215), and recognize the goods immaterial nature - as the identity, the action, the memory of the various groups of Brazilian society - as constituents of Brazilian cultural heritage (art.216).

To black people - abolished slavery in 1888 - had guaranteed ownership of the lands they possessed, locus of physical and cultural existence of these people - maroon remaining in article 68 of the Temporary Constitutional Provisions Act.

To the Indians had been destined a whole chapter - Chapter VIII - recognizing these peoples' social organization, customs, languages, beliefs and traditions, and the rights to the lands they traditionally occupy "(art.231).

In this perspective, officially become the new definition of citizenship, which will guarantee individual rights, now ensures the inclusion of new groups in the sociopolitical context.

So, based on what was stated here, in this period there was a break with the integrative paradigm - that both excludes these people - and gave rise to the paradigm is called interaction, which advocates self-determination of peoples, abandoning the domination of those considered inferior; ensures respect for difference and promotes the recognition of customs, languages, beliefs and traditions of these groups, in addition to ensuring the legitimacy of their identities. In this sense, it is an instrument of awareness of the true meaning of seeing and understanding the other. In the beautiful sayings of Sparemberger:

[55] Ibidem, p.85.

> "In a world of constant challenges and institutions, legislation and, especially, individuals need to overcome intolerance, prejudice and live with diversity. Accept such realities is to know our own history, because we are her fruit, and there is no way not to consider it. " [56]

States where minorities are perceived in the formation of citizen identity, with its sheltered effected in the constitution and civil rights, build a democracy not only representative, but participatory and especially dialogue [57]. The ideal, however, need to be realized, and this is one of the major challenges in Letter 88: provide "answers to the height of the text, which satisfy the unmistakable gaps ranging from formal constitution the full experience of the democratic rule of law" [58], including regarding the implementation of the inclusion of minorities in all levels.

We bring forth reflection if the formal devices of the 1988 Constitution allowed the formation of a plurinational state [59], entering in this context, including legal pluralism in the sources of law are not only extracted the state, but rather "a complex and diffuse of powers system, emanating dialectically society " [60], in the event screen, Indians and black people.

In Brazil we mention, by way of example, the judgment of the Indian Benkaroty Kayapo, known as Paulinho Paiakan, accused along with his wife for committing a rape [61]. At the time, the crime that brought

---

[56] SPAREMBERGER, Raquel Fabiana Lopes. Op. Cit., p.152.

[57] MAGALHÃES, José Luis Quadros. In: http://joseluizquadrosdemagalhaes.blogspot.com.br/2010/08/teoria-do-estado-10.html. Date: 18/07/2013.

[58] HORTA, José Luiz B. **História, Constituições e Reconstitucionalização do Brasil.** Revista Brasileira de Estudos Políticos, v. 94, p. 121-155, 2006.

[59] Wolkmer makes interesting placement that beyond the creation of a multidimensional state, must think of a design for a multicultural society, with practices of "judicial egalitarian pluralism (coexistence of various statutory bodies in the same hierarchy)", culminating in the so-called Andean or indigenous constitutionalism. Highlights that the Constitution of 1988, by establishing political pluralism in its article 1, section V, raised the level of understanding previously thought about the conceptualization of this plural society, because it was based on "coexistence and interdependence of various social groups (special minority , social movements, non-governmental organizations, etc..), despite their differences and their diversity as the beliefs, values and practices.WOLKMER, Antônio Carlos. **Pluralismo e Crítica do Constitucionalismo na América Latina".** Anais do IX Simpósio Nacional de Direito Constitucional p. 145 e 151.

[60]WOLKMER, Antônio Carlos. Op. Cit., p 145.

[61] HC 9403 (1999/0040887-0 - 18/10/1999) – Superior Tribunal de Justiça

the discussion about the proper legislation to be adopted *in casu* the Statute of the Indian - also blowing the controversy over a probable indigenous jurisdiction, when they were questioned about their integration into civilized society.[62]

Conclusion

The construction of the identity of Brazilian constitutional subject dates back to the dawn of civilization of our country, when the Indians who lived here have developed their culture, forming habits within their own needs, populating the territorial vastness with the simplicity and rusticity peculiar to indigenous. The first culture shock came through contact with other customs from other shores, more developed, currently interested in the Portuguese, the Spanish, the British and the French. Permeates across the habits developed by other people and their traditions, as European, Jewish, African, etc.., Which through the period of territorial expansion in Europe, crossed the Brazilian soil in this period for the colonization.

Thus, the results of this syncretism, new values were aggregated into Brazilian society still in training. The form of colonization of Brazil led to an individualist scenario, both from a political and anthropological perspective, which only worsened the diversity, whose context was only subject to firm when assessing the independence of the Portuguese yoke and construction of the National State, which had as pillars of their identity formation of the constitutional subject.

In such circumstances we point out the figure of the statesman of the city of Santos, Jose Bonifacio de Andrada e Silva, along with his brothers, had great influence on political thought of the Empire of Brazil. The Patriarch of Independence, with its liberal ideas of the European School of revolutionary dies and even Republicans, brought the ideal of reconciliation of crops in order to state unity, however disrespecting differences and imposing racial ethos of the European way of life. Proposed a gradual emancipation of African slaves, so he could go through the acculturation process; already the Indian, since civilized, might have

[62] Why consider it fully integrated "to white culture being elected, with license to drive a motor vehicle operator with financial institutions, etc.. demonstrating unequivocally perfect understanding of the facts ", was tried by ordinary courts, according dichotomy of Precedent 140 from STJ. In: HC 9403 (1999/0040887-0 - 18/10/1999) – Superior Tribunal de Justiça.

secured the minimum rights to exercise their citizenship.

Needless to say that the Constitution of 1824, serving particularistic interests, not allowed to release, even partially black people, because their labor was still needed on the farms of those who have subsidized independence. However, had been the civilized Indian citizen guaranteed certain rights. The paradigm of Bonifacio was born retrograde, but met the temporary demands of the nation. As soon as these needs have suffered arising mutation of time, the model proposed by Andrada was overcome, and since then trend, mainly in Latin - American countries, forging the identity of the constitutional subject in an integrated manner, however, in antagonism to the format designed by Bonifacio, make possible and encourages the coexistence of cultural diversities without overpowering.

Although still have a long way to go, the 1988 Constitution has in its framework respect the self-determination of peoples, with special treatment to Indian, enabling the free cultural event and the safeguarding of essential rights, also dispensing special care to communities quilombolas. Some Latin countries, whose most prominent lies with to Bolivia, see the model of the Plurinational State the effectiveness of this format that recognizes the multicultural identities within a legal-political order.

References

ANJOS, João Alfredo dos**. José Bonifácio, primeiro Chanceler do Brasil.** Brasília: Fundação Alexandre de Gusmão, 2007. 424p.

Annaes do Parlamento Brazileiro – Assembleia Constituinte de 1823 – Tomo Quarto. Rio de Janeiro:Typographia de Hyppolito José Pinto & Cia, 1876.

Annaes do Parlamento Brazileiro – Assembleia Constituinte de 1823 – Tomo Quinto. Rio de Janeiro:Typographia de Hyppolito José Pinto & Cia, 1876.

APARÍCIO, Adriana Biller. **Novos Atores e Movimentos étnico-culturais**: Antropologia Jurídica na rota das identidades. Cap. 4. In: COLAÇO, Thais (org). **Elementos de Antropologia Jurídica**. Florianópolis: Conceito Editorial, 2008.

BARRETTO, Vicente, **Ideologia e Política no pensamento de José Bonifácio de Andrada e Silva.** Rio de Janeiro: Zahar Editores, 1977.

CARVALHO, André; AHOUAGI, Eliana. **OS índios do Brasil**. 2ed. Editora Lê. Belo Horizonte, 1991.

CATTONI, Marcelo. **Poder Constituinte e Patriotismo Constitucional.** Belo Horizonte:Mandamento, 2006.

CHALHOUB, Sidney. **Precariedade estrutural:** o problema da liberdade no Brasil**.** In: Revista Eletrônica História Social. São Paulo: 2010.

CONSTANT. Benjamin. **Princípios de política aplicáveis a todos os governos.** Tradução: Joubert de Oliveira Brízida. Rio de Janeiro: Topbooks, 2007.

COSTA, Emília Viotti da. **Da Monarquia à República**: momentos decisivos. 3ed. Editora Brasiliense, 1985.

ESTRADA, Joaquim Osório Duque. **Hino Nacional Brasileiro.**

FONSECA, Ricardo Marcelo. **Introdução Teórica à História do Direito.** Curitiba:Juruá Editora, 2010.

FRANCO, Afonso Arinos de Melo. **Curso de Direito Constitucional Brasileiro vol II.** Rio de Janeiro: Forense, 1960.

FRANCO, Afonso Arinos de Melo. **O constitucionalismo de D. Pedro I no Brasil e em Portugal.** Brasília: Ministério da Justiça, 1994.

HC 9403 (1999/0040887-0 - 18/10/1999) – Superior Tribunal de Justiça

HORTA, José Luiz B. **História, Constituições e Reconstitucionalização do Brasil.** Revista Brasileira de Estudos Políticos, v. 94.

JULIEN, François. **O diálogo entre as culturas.** Trad. André Telles. Rio de Janeiro: Zahar, 2010.

KRETZMANN, Carolina Giordani; SPAREMBERGER, Raquel Fabiana Lopes. **Antropologia, Multiculturalismo e Direito:** o reconhecimento da identidade das comunidades tradicionais no Brasil**.** Cap. 5. In: COLAÇO, Thais (org). **Elementos de Antropologia Jurídica**. Florianópolis: Conceito Editorial, 2008.

MAGALHÃES, José Luis Quadros de. http://joseluizquadrosdemagalhaes.blogspot.com.br/2010/08/teoria-do-estado-10.html.

MAGALHÃES, José Luiz Quadros de; AFONSO, Henrique Weil. **O Estado Plurinacional da Bolívia e do Equador**: matrizes para uma releitura do direito internacional moderno. Revista Brasileira de Direito Constitucional – RBDC n. 17 – jan./jun.2001. p. 263-276.

MAGALHÃES, José Luiz Quadros de. **O Estado plurinacional na América latina.** Artigo publicado em http://joseluizquadrosdemagalhaes.blogspot.com.br/2011/04/302-artigos-o-estado-plurinacional-na.html.

MARTINS, José de Souza. **O Cativeiro da Terra**. 4ed. Editora Hucitec. São Paulo, 1990.

MOREIRA, Vânia. **Indianidade, territorialidade e cidadania no período pós-Independência** – Vila de Itaguaí – 1822- 1836. Disponível em: <www.ufrrj.br/graduacao/PEThistoria/arquivos_PET/seminarios/Indianidade, territorialidade e cidadania no período pós-Independência - Vila de Itaguaí, 1822-1836.pdf

NABUCO, Joaquim (1988). **O Abolicionismo**. Recife. Editora Massangana.

PARAISO, Maria Hilda. **Construindo o Estado da Exclusão**: os índios brasileiros e a Constituição de 1824. In: Revista CLIO_ Revista de Pesquisa Histórica. Volume 28.2. ISSN 0102-9487. Disponível em:

www.revista.ufpe.br/revistaclio/index.php/revista/article/viewfile/122/89>.

PEREIRA, Batista**. Figuras do Império e outros Ensaios**. 3ed. São Paulo. Editora Nacional, vol. I.

REPOLÊS,, Maria Fernanda Salcedo. **Quem deve ser o guardião da Constituição?** Do Poder moderador ao Supremo Tribunal Federal. Belo Horizonte: Mandamentos, 2008.

RICOUER, Paul. **As culturas e o tempo.** Tradução Gentil Titton.Petrópolis: Vozes, 1975.

SALGADO, Karine. **História, Direito e Razão.** In: http://www.conpedi.org.br/manaus/arquivos/anais/manaus/direito_racion_democ_karine_salgado.pdf.

SILVA, José Bonifácio de. **Projetos para o Brasil.** Organização: Miriam Dolhnikoff, São Paulo: Companhia das Letras, 1998.

SILVA, José Bonifácio de Andrada e. (2002[1823]). **Apontamentos para a civilização dos índios bravos do Império do Brasil.** In: CALDEIRA, Jorge (org.), José Bonifácio de Andrada e Silva. São Paulo: Ed. 34

SIVANANDA, Swami. **Concentração e Meditação**. Tradução Zilda H. Schild Silva. 11ª edição. Pensamento, 2001.

SOLSONA, Gonçal Mayos. **Conocimineto cultural e histórico.** In: Teoría del Conocimiento**,** F. Núñez (coord.). Barcelona: UOC, 2007. pp.1-64.

SPAREMBERGER, Raquel Fabiana Lopes. **Antropologia e Diferença:** quilombolas e indígenas na luta pelo reconhecimento do seu lugar no Brasil dos (des) iguais. Cap. 6. In: COLAÇO, Thais (org). **Elementos de Antropologia Jurídica**. Florianópolis: Conceito Editorial, 2008.

UEMORI, Celso Noboru. **Escravidão, nacionalidade e "mestiços políticos".** Disponível em: < www.pucsp.br/ neils/ downloads/v11_12_Celso.pdf>

WOLKMER, Antônio Carlos. **Pluralismo e Crítica do Constitucionalismo na América Latina.** Anais do IX Simpósio Nacional de Direito Constitucional.

Culturalism and Fundamental Rights

Raoni Bielschowsky

Abstract: This paper has as objective consider about the theoretical basis of fundamentality of fundamental rights. Therefore, first is observed some common answers about the theoretical buildings to insert an right at de dogmatic category of fundamental right. After that, the text defends an axiological-cultural basis, considering the demand to an material and substantive fundamentality.

Keywords: *Fundamentality of fundamental rights, substantive fundamentality, anthropological cultural premise.*

1. Introduction

Since the end of the II World War the "*Constitutional World"* has searched for the concepts, arrangements and, principally, for the essence of the constitutional frame that comprehends, represents and answers all the issues and fears that the *Terror* had made emerge and the Mankind would like to purge.

The major constitutional topics since the 2nd post-War can be basically resumed in two inter-related issues. One regarding the necessity to recognize an unconditional and unavoidable respect to everyone's Human Dignity, by everyone; and another concerning the mechanisms and structures to control and limit the Power. Indeed, these two issues can be well represented by the matters about Fundamental Rights and Democracy; in turn, these two aspects are what the Constitutional Theory calls fundamental principles or essential content or, even, material Constitution. For no other reason, Loewenstein (1976) affirms that the Constitution is the fundamental dispositive to control the Power process.

According to Kägi (2005), recognize the difference between *material constitution* and *formal constitution* is an important topic to overcome the juspositivism standpoint – his formalism and his supposed *scientificism* – by a desirable *material constitutional theory*. And just with this overcome we can have a more comprehensive and trustworthy Constitutional Theory adequate to the ethical and axiological nowadays State's

demands.

It is true this new axiological approach to the Right isn't uniform. Moreover, this *moment* receives several nomenclatures and is related to a lot of different streams of thoughts and "movements", as the *juridical post-positivism, neo-constitutionalism, legal moralism, juridical Culturalism* among others. However, this new constitutional moment and *status* demands a revisit to the basis of this axiological and material essence that fulfills the Right, the Constitutional Right and, particularly, the Fundamental Rights. In this paper, it will be defended all this substance and meanings are grounded on Cultural basis, characterizing the *juridical Culturalism,* which is inserted in a whole Culturalist standpoint.

A last introductory comment seems necessary. I consider is needed to make an observation considering the English idiom, which the text is written. The issues and considerations here exposed are concerning a Roman-Germanic legal system[1] (continental law, civil law). Some concepts, ideas, definitions and, even, world concepts cannot be precisely described in English as well as would be delineate in continental mother languages, because the common law and the civil law juridical-political reality are quite different. For example, we do not agree that the translation of *Rechtsstaat, l'Etat du Droit, Stato di Dirito, Estado de Derecho* or *Estado de Direito* has precisely the same meaning of *Rule of Law*, the usual translation. They are to different experiences – cultural experiences – truly differents. In fact, the *Rechtsstaat's* definition is one of the most difficult civil law institutions/experience to translate to English. On this order, "The Rechtsstaat, whether used by Heller or Schmitt, remains the 'state based on the rule of law,' even though Heller and Schmitt bring to it vastly different attitudes and meanings. It is precisely consistency that allows one to map variations in attitude that Weimar theorist had toward their common legal and theoretical heritage" (JACOBSON; SCHILINK 2002). Because that, sometimes it will be use the German term – *Rechtsstaat* – sometimes it will be used the literally translate in commons – "State of Law".

2. Four questions about the Fundamental Rights

What does make a right a *fundamental right*? Can be this conditions well answered by its structure/formal establishing? In other words,

[1] Indeed, even at this point, for example, we would prefer the precise literally meaning of the expression: system of Eight.

is the fact that the competent legislator define a right as *fundamental* that defines the *jusfundamentality*? Or does this recognition, necessarily, happen on material-axiological basis? Or, in other words, is the content protected by a fundamental right that defines its *jusfundamentality*? In this order, is there a mandatory relation between the fundamental rights and any objective value? And, following this issue: what means considering *jusfundamental* a right? Which implications of includes a right in this dogmatic category? Indeed, the answers for all this questions are closely connected and, even, inseparable.

There are a lot of responses for all this matters, for example, concerning the fundamental rights Luigi Ferrajoli (2011) proposes four different questions: a) "Which rights shall be (or to be fair) established as fundamental?"; b) "Which rights are stipulated as fundamental norms by a particular juridical order?"; c) "Which rights, for which reasons, through which processes and with which effectiveness degree is stated and are really guaranteed as fundamental in a particular space and at a specified time?"; d) "What is the meaning of legal theory fundamental rights concept?".

According Ferrajoli the answer for any of these questions just considers one particularly aspect. For the first one – "which rights shall be (or to be fair) established as fundamental?" – it is consider only an "axiological point of view of external political philosophy", therefore, it's a normative response. Because of that, the author understands this is not capable to identify a fundamental validation to the Constitutional Theory, much less to the legal dogmatic.

The second answer – to the inquiry "which rights are stipulated as fundamental norms by a particular juridical order?" – just concerns a "legal internal point, binding to the legal science", by a "positive source or legal fundament". In the same way, for Ferrajoli, it would not be enough to the legal theory.

The response to the third question neither regards the legal dogmatic. It looks for a "factually external historiography and sociology viewpoint of law", so, the "point of view of effectiveness", hence, it is an empirical assertive, considering historical background and sociological grounds. From this point, the reasons that determine a right as fundamental are its "historical origin or sociological basis, those civilization's achievements that are consider as fundamental"; its historical affirmation; from struggles and revolutions; and the consequent recognition in many jurisdictions. However, apparently, this perspective would not be enough for the legal doctrine.

At last, the answer to the interrogation: "what is the meaning of legal theory fundamental rights concept?" related to fundamental rights' basis, reason and the theoretical fundament of the definition the concept of "fundamental rights". For Ferrajoli, in his intended ideological neutrality, this is the issue of the legal theory and Theory of Fundamental Rights. Since this point of view, *the fundamental rights are all the rights universally attributed to everyone and to each one as person, as citizen, as person capable to acting* (FERRAJOLI 2011). To the author, this designation is stipulated or conventional, as other institutes and definitions of legal theory as "subjective right", for instance. Thus, this is also a structural/formal definition because only articulates 'what is the fundamental rights', but not 'which are fundamental rights' or 'what should be the fundamental rights' or 'how the fundamental rights are guaranteed as well'.

3. Culturalist standpoint

Really, these are four questions that, apparently, demand answers from quite different paradigms, but, indeed, only can be well worked and comprehended interdisciplinary.

Actually, the positivism always tends to radically split the known areas, and to isolate the "Legal Science" (Judicial Science, Science of Right, *iurisprudentia*) from the history, the sociology, the philosophy etc. However, considering the Law (the Right) as a human phenomenon – complex and dynamic – his truly comprehension demands a macro perspective, embracing interdisciplinary approach, as complex as this experience, this object itself.

Undoubtedly, the Fundamental Rights dogmatic category is characterized by a greater juridical-political protection, through a tougher normative authority, generally, marked by an immediate effectiveness, binding the constituted powers. Therefore, these rights tend to generate a harder due legislative processes, even, as entrenchment clauses.

The protections levels and models are not completely uniform in the various constitutional frames, but these elevated defense degrees are typical and, even, characterize of the constitutional model itself.

Bearing this in mid, the important question for the Constitution Philosophy and Theory is: to the Constitutionalism, any good or value can be inserted in the Fundamental Rights dogmatic category?

The *juspositivism* will respond affirmatively. To this stream, there

isn't any pre-state compromise, no axiological or anthropological necessity to the *jusfundamentality*. A formal structure and a "legitimate" imposition are enough to say that a Right is fundamental, admitting that "any right can be a fundamental right", paraphrasing Kelsen.

However, the fundamental rights dogmatic category concept requires some *exclusiveness*, some *selectivity*. After all, if anything can be considered fundamental, indeed, nothing is truly fundamental. Besides that, a merely formal definition is not really capable to comprehend the complex and holistic essence of the juridical order (PEREIRA COUTINHO 2009).

In this line, defending a strictly material basis to the *jusfundamentality* definition, Paulo Otero (2008) comprehends that by a merely formal and quantitative vision about the fundamental right – in contraposition of a substantive and qualitative dimension – necessarily, it will occur a deflation of the concept of "State of Fundamental Rights"[2]. According the author, if the legislator (constituent or ordinary) was the only competent to recognize a right as fundamental, *in thesis*, without any compromise or bounding with an axiological north, it would exist the risk to recognize fundamental rights without any link with the "State of Fundamental Rights" essential root: the Human Dignity. Therefore, strict formal definitions could subvert the own fundamental rights' logic, making ta hypothetical fundamental right could have any content, since formally adequate.

Following Paulo Otero, in some ways – at least about the existence of an axiological bound between *people will* and the human dignity – I understand the legislator is always linked to the constitutionalism's cultural-axiological background, especially important to enunciate the fundamental rights list. In de *Rechtsstaat* this background is fulfilled by the *anthropological ground*: the Human Dignity (HÄBERLE 2008).

With this position I am not aligning myself to liberal theory of fundamental rights, as describes Böckenförde (1993). I neither agree with perspectives that intent to fundament the axiological basis on the/a natural law. Indeed, build this validation based on the authority of a dogma, like the *jusnaturalist* dogma, perhaps – and just perhaps – can justify the content of the Fundamental Rights. However, for sure, this *explanation* doesn't *comprehend* the essence of the Right as a human *cultural experience*[3]. Precisely because the *jusnaturalisms* – and their transcendental

[2] *Estado de direitos fundamentais* (OTERO 2008).

[3] To a definition of culture REALE (2002).

answers – inclines to congeal the values, while the human experience, specially the contemporary society, increasingly complex and dynamic, each day presents new scientific, technological, cultural transformations, which shows more and more goods and needs of different areas of protection (VIEIRA DE ANDRADE 2011).

Indeed, I comprehend there is an axiological root that identifies and fundaments the fundamental rights on cultural basis, in a historical and dialectical development. It's a dialectical process between constitutional culture and positive law, inherent to the *Rechtsstaat* existence. In this way, to better understand the fundamental rights SALGADO (1996b) establishes it is necessary observe their development obey a historical process with three moments: a) first, the birth of the historical known of these rights in specifically historical conditions; b) second, the positive declaration of these rights in the constitutional order, representing the formal assenting of all community members; c) and, at last, the concretization and effectiveness of these rights.

Concerning this, we recognize that the Right is the *maximum* ethical, more precisely, the Right is the *maximum* ethical from a culture (SALGADO 2007). On this order, it is mandatory comprehend the basis of the Fundamental Rights since and into the *Cultural turn* and the *Culturalism*.

The fundamental rights are the apex of the *Rechtsstaat*'s history life and culture. In this same path, Smend defines: "the fundamental rights are the representatives of a concrete value system, of a cultural system that sums the meaning of the State life contained in the Constitution" (SMEND 1985)[4].

And, consisting these Fundamental Rights are the summarize of a State life, in other words, the Fundamental Rights are, exactly, what are vital to a Constitutional Culture, so, they must have a special treatment and a special protection. On this way, they are truly entrenchment clauses to the entire *Constitutionalism Culture*, and even, a necessary aspect that characterize and recognize a Constitutionalist Normative Sys-

[4] It's curious that in *Constitutional Theory* Schmitt follows Smend in this viewpoint, besides has different posterior developments: "*Significación histórica y jurídica de la Declaración solemne de derechos fundamentales*. La Declaración solemne de derechos fundamentales significa el estabelecimiento de principios sobre los cuales se apoya la unidad política de un pueblo y cuya vigencia se reconoce como el supuesto más importante del surgimiento y formación incesante de esa unidad; el supuesto que – según la expresión de Rudolf Smend – da lugar a la *integración* de la unidad estatal" (SCHMITT 2011).

tem. Because it is the material constitution respect that represents a truly Constitutional System, and not the formal constitution.

So, the respect to the fundamental rights culture is the essence of the Loewenstein's (1976) "ontological" classification of Constitutions, that lists: normative Constitutions; nominative Constitutions; semantic Constitutions. To Loewenstein the classification criterion is de concordance between the constitutional norms and the powers processes' reality. With this, the author affirms the written Constitution doesn't works/happens by itself, but just when its addressees (holders of power and recipients of power) make it for real.

Therefore, the normative Constitution is the one that is the formal and material (axiological) *constitutional*. While it is alive, lived and defended by the community (LOEWENSTEIN 1976); in other words, when the juridical Constitution has normative force; hence, when a community *has a Constitution* and *is in Constitution* (LUCAS VERDÚ 1998).

It is necessary to recognize there is a bunch of values that even the constituent legislator cannot ignore (ALEXY 2009); but, also, it is from the recognition and normative concretization of these values[5] in the normative parameter, by the fundamental rights political identification, it is possible to base the authority and validate/legitimacy of the order that presumes itself constitutional (PEREIRA COUTINHO 2010). In other words, for a "legitimate constitutional order", the normative parameter must be the positivation of this *anthropological cultural premise* of *Rechtsstaat*'s prototype: the Human Dignity.

This premise is also the axiological base that justifies the democratic frame, considering it the typical political model of the constitutionalism culture. From this ground, it derives the comprehension that the equal freedom (*liberty*) is the Constitutional Democracy axiological center, as well as, it is its *telos*. It's an inflexible dimension of good life concept of this culture's ideological plan that fulfill the "Democratic State of Law" (BIELSCHOWSKY 2013). Thus, it is properly to the Constitutionalism's coherence itself, hence the Constitutional Democracy's consistency, that the reasons of a Constitution – maximally, the fundamental rights' motives – do not get on a purely decision or by a blank standard. But, to understand that the base (and/or the *Apex*) of this structure there is a normative parameter, culturally established and committed to a *concrete freedom* (SALGADO 1996a). So, it is a needed *cultural premise* that characterizes the culture of the Constitution itself.

[5] Values that emanate from the moral (cultural) parameter, subjacent to the community.

Therefore, there is a limit of *impossible* and *necessary* (ALEXY 2008) to any fundamental right. It must be materially found in the "protection of human dignity against the dangers arising from power structures in society" (VIEIRA DE ANDRADE 2011). And, if in one hand, it is inevitable and necessary to expand the formal-positive list of fundamental rights because the dynamic society processes, in the other hand, the excessive expansion offers the risk of generating a "jusfundamentalism", when the fundamental right concept loses its special characteristics (VIEIRA DE ANDRADE 2011).

Furthermore, a Fundamental Rights' Theory is necessarily linked to a State conception/Theory of Constitution (BÖCKEFÖRDE 1993), which is a culture formulation/projection. Ergo, a Fundamental Rights' Theory also is connected to the community's cultural roots, in its turns, normatively concretized as valid legal norm in/for the State, ruled for its Constitution.

Hence, the fundamental rights are an immediate emanation of the typical occident culture (HORTA 2011). And its *jusfundamentality* comes from the closeness with the normative parameter, as well, and consequently, because they are necessary and guarantors of the constitutional model. In this line, Salgado (1996b) affirms that the fundamental rights are background to the others; they are rights which without we cannot exercise a lot of other rights; the fundamental rights are the fundament of all the other rights.

Thus, it is understood that the culture of the *Rechtsstaat* is the culture of freedom (HÄBERLE 2003). To be considered not an atomistic freedom, particularized, selfish or individual, but rather, a *concrete and universal freedom* (STRECK 2002). A freedom just possible together, in community, recognized as legal norm with validity and in constantly concretization *in* and *by* the State. Hence, a freedom parameterized in the equality of all human beings in a common mankind. So, the "Democratic State of Law" in its way to its destiny, which is the Freedom – consequently, a concretely free community –, completes the revolutionary French triad, finding in fraternity the link that allows the concatenation, connection, and especially mutual complementation of the symbols of the *Rechtsstaat* values: freedom and equality (BIELSCHOWSKY 2013).

In such a way, the fundamental rights must promote and maintain the basic conditions to ensure a quality of life to all equally worthy (CANOSA USERA 2006). And these conditions just can be maintained when the freedom of life in society results guaranteed in equal measure to individual freedom. Both are inseparability correlated. The individ-

ual's freedom can only take in a free community, as well the contrary. This freedom presupposes human beings and citizens able and willing to decide for themselves about their own affairs and to work responsibly in society publicly constituted as a community. These are the structure and function of fundamental rights: guarantee the subjective rights of individuals, but also being objective basic principles of the democratic constitutional order and the *Rechtsstaat*; principles of the rule, constituted by the rights and their order (HESSE 2001).

Thus, we believe the very understanding of the theory and categorization of fundamental rights cannot face them from a highly subjective perspective. It's properly for an axiological theory of fundamental rights understands theirs objective dimension (BÖCKENFÖRDE 1993). As a result, the impossibility of identifying immediate subjectivity of a fundamental right and the fact that it apparently only presents an objective dimension, is not consistent with the nowadays Democratic Constitutionalism frame.

Actually, the values that appear in the protection of materially *jusfundamental* goods, hence, closely related to the required normative parameter of "Democratic State of Law" – the Human Dignity – are immediately (subjective dimension) or mediately (objective dimension) linked to the very existence condition of the citizen, consequently, the community condition itself.

As a complement, we can say that *materially fundamental goods* shall be classified in the dogmatic category of fundamental rights, even when they are only protected by sets that determines State tasks – *prescriptive meaning*. In other words, it will be easy identify the *jusfundamentality* of this rights protected by this normative format, even when they cannot be clearly identified in its exclusively subjective dimension.

This happens because the basis of *jusfundamentality* cannot be simply found in a formal decision of the competent legislator, but, in the material bond that a fundamental right (and *materially fundamental good* protected) has with the normative parameter of the "Democratic State of Law", that concretizes normatively its own *anthropological cultural premise*.

Therefore, it must be recognize a fundamental rights' objective dimension, split from its subjective dimension (SARLET 2009), and do not identify a necessary relationship between individualization and atomization of the protected goods, frames of protection and legal norms that protect goods materially *jusfundamental*.

Conclusion

The Fundamental Rights question about their nature, fundaments and category, as indicates Alexy, is inserted in a bigger dichotomy: *positivistics point of views* Vs. *non-positivistics point of view*. These both standpoints are not homogeneous, and there are a lot of *positivistics* streams, in one hand, and a bunch of *non-positivistics* perceptions in the other.

Included in this second group, the *juridical culturalism*, attends to positivistims demands, as the legal certainty, formal structure and, even, integrity. But, it binds the formal norms to axiological basis. To this stream, these bases are not founded on a natural, transcendental, universal argument. On the contrary, it is a rational cultural argument.

Considering the fundamental right's normative force, hence, the recognition of their immediate effectiveness and their importance in the Constitutional frame, this link between the cultural and legal content is more necessary. Indeed, the very definition of a fundamental right, therefore, the *jusfundamentality* definition, depends of this content.

References

ALEXY, R. 2009. *Conceito e validade do direito*. São Paulo, Martins Fontes.

ALEXY, R. 2008. *Teoria dos direitos fundamentais.* São Paulo: Malheiros.

VIEIRA DE ANDRADE, J. C. 2009. *Os direitos fundamentais na Constituição portuguesa de 1976*. 4 ed. Coimbra: Almedina.

BIELSCHOWSKY, R. M. 2013. *Democracia Constitucional.* São Paulo: Saraiva.

BÖCKENFÖRDE, E.-W. 1993. *Escritos sobre Derechos Fundamentales*.. Baden-Baden: Nomos Verlagsgesellschaft.

CANOSA USERA, R. 2006. "¿Existe un verdadero derecho constitucional a disfrutar del medio ambiente?" *Anuario de Derechos Humano.* Nueva Época, vol. 72, pp.151 – 216.

FERRAJOLI, L. 2009. *Los fundamentos de los derechos fundamentales*. 4 ed., Madrid: Editorial Trotta.

FERRAJOLI, L. 2011. *Por uma teoria dos direitos de bens fundamentais.* Porto Alegre: Livraria do Advogado Editora.

HÄBERLE, P. 2003. *La garantía del contenido esencial de los derechos fundamentales.*

Madrid: Dykynson.

HÄBERLE, P. 2008. *Os problemas da verdade no Estado Constitucional.* Porto Alegre: Sérgio Antônio Fabris Editor.

HESSE, K. 2001. "Significado de los derechos fundamentales", *in* BENDA, Ernst *et all* (org.). *Manual de derecho constitucional.* 2 ed. Madrid: Marcial Pons.

HORTA, J. L. B. 2011. *História do Estado de Direito.* São Paulo: Alameda.

HORTA, J. L. B. 2006. "Teoria da Constituição: contornos epistemológicos". *Revista Brasileira de Direito Constitucional,* vol. 6, p. 346-357.

KÄGI, W. 2005. *La Constitución Como Ordenamiento Jurídico Fundamental del Estado*: investigaciones sobre las tendencias desarrolladas en el moderno Derecho Constitucional. Madrid: Dykinson.

LOEWENSTEIN, K. 1976. *Teoria de la constitución*. 2ª ed. Barcelona: Ariel.

LUCAS VERDÚ, P. 1998. *Teoría de la Constituición como ciência cultural.* Madrid, Dykinson.

OTERO, Paulo. 2008. *Instituições Políticas e Constitucionais I*. Coimbra: Editora Almedina.

PEREIRA COUTINHO, L. P. 2009. *Autoridade moral da Constituição*: da fundamentação da validade do Direito Constitucional. Coimbra: Coimbra Editora.

PEREIRA COUTINHO, L. P. 2010. "Do que é a República: uma república baseada na dignidade da pessoa humana". Disponível em: http://www.icjp.pt/system/files/Do%20que%20a%20Rep%C3%BAblica%20%C3%A9_1.pdf

REALE, M. 2002. *Filosofia do Direito*. 20 ed. São Paulo: Saraiva.

SALGADO, J. C. 1996a. *A Idéia de Justiça em Hegel.* São Paulo: Loyola.

SALGADO, J. C. , 2007. *A ideia de Justiça no mundo contemporâneo*: fundamentação e aplicação do Direito como *maximum* ético. Belo Horizonte: Del Rey.

SALGADO, J. C. 1998. "O Estado Ético e o Estado Poiético". *Revista do Tribunal de Contas do Estado de Minas Gerais,* vol. 27, n. 2, abr./jun, pp. 1-10.

SALGADO, J. C. 1996b. "Os Direitos Fundamentais". *Revista Brasileira de Estudos Políticos*, vol.82, p.15 – 69.

SARLET, I. W. 2009. *A eficácia dos direitos fundamentais*: uma teoria geral dos direitos fundamentais na perspectiva constitucional. 10 ed. Porto Alegre: Livraria do Advogado Editora.

SARLET, I. W. 2010. *Dignidade da Pessoa Humana e Direitos Fundamentais na Con-*

stituição Federal de 1988. 8 ed., Porto Alegre: Livraria do Advogado Editora.

SCHLINK, B.; PIEROTH, B. 2008. *Direitos Fundamentais*: Direito Estadual II.. Lisboa: Universidade Lusíada Editora.

SCHMITT, C. 2011. *Teoría de la Constitución*. Madrid: Alianza Editorial.

SCHNEIDER, H.-P. 1979. "Peculiaridad y función de los derechos fundamentales en lo estado constitucional democrático". *Revista de Estudios Politicos,* n.7, pp. 7-35.

SMEND, R. 1985. *Constitución y Derecho Constitucional*. Madrid: Centro de Estudios Constitucionales.

STRECK. L. L. 2002. *Jurisdição Constitucional e Hermenêutica:* uma nova crítica do Direito. Porto Alegre: Livraria do Advogado.

Communitarianism and the rescue of Hegel's conception of freedom[6] [7]

Rodrigo Antonio Calixto Mello[8]

1. Introduction

The communitarianism, thought that emerged in the 1980s and that was developed in constant controversy with liberalism in general and egalitarian liberalism in particular, rescued the classic philosophical debate between Kant and Hegel. In fact, communitarianism takes some criticism that Hegel does to Kant: while Kant mentions the existence of certain universal obligations, Hegel reverses this formulation to give priority to community ties. So, instead of valuing the ideal of an "autonomous" subject, Hegel argues that the full realization of the human being derives from the fuller integration of individuals in their community.[9]

This study specifically aims to relate the communitarianism to the Hegelian conception of freedom, because in Hegel, the concept of freedom is its concrete totality, in which there is unity between the subjective freedom of the individual freedom and the objective freedom in society.[10]

So, after a description of the basic ideas of communitarianism, it will be presented an overview of the way that is treated the idea of freedom in Hegel's philosophy.

---

[6] Paper presented at the Special Workshop Cultural Turn and Philosophy of Law and State of the XXVI World Congress of Law Philosophy and Social Philosophy held at the Federal University of Minas Gerais between July 21st and 26th of the year 2013.

[7] The direct quotations in the text are free translations done by the author to the English language according to the language contained in the reference.

[8] Student of Master in Law of the Federal University of Minas Gerais.

[9] GARGARELLA, Roberto. *As teorias da justiça depois de Rawls*; um breve manual de filosofia política. Trad. Alonso Reis Freira. São Paulo: Martins Fontes, 2008. p. 137.

[10] RAMOS, Marcelo Maciel. A liberdade no pensamento de Hegel. *In*: SALGADO, Joaquim Carlos; HORTA, José Luiz Borges (orgs). *Hegel, Liberdade e Estado*. Belo Horizonte: Fórum, 2010. p. 149.

2. Communitarianism

After resuming how the ideas of the French Revolution were treated by the great ideologies of the eighteenth and nineteenth century, Will Kymlicka argues that in the second half of the twentieth century, the ideal of community seems to have been set aside.[11] He says:

> Most contemporary liberal philosophers have little to say about the ideal of community. When this is mentioned, it is usually derived from the freedom and equality: a society honors the ideal of community if its members are treated as free and equal persons. Liberal conceptions of political do not include any autonomous principle of community, as the community of nationality, of language, of culture, of religion, of history or way of life. [12]

The communitarianism brings the ideal of community to the fore, as it has as a central thesis the "need to be concerned with the community the same way to freedom and equality, even giving it the priority".[13]

Also according to Kymlicka, this concern to the community it is also found in Marxism and enters in the definition of the communist ideal. It is, however, of a "communitarianism" that want to remake the world, while the current, closer to Hegel, has the ambition to reconcile man to his world.[14] For Will Kymlicka:

> There are indeed many similarities between the communitarian criticism to the modern liberalism and the critique done by Hegel to the classical liberal theory. Classical liberals like Locke and Kant tried to identify a universal conception of human needs or the human rationality and then invoke this ahistorical conception of the human being to evaluate the social and political organization that exists. According to Hegel, this kind of conception - which he called Moralität [morality] - is too abstract to be useful, but too individualistic, because it overlooks the fact that humans are inserted, inevitably, on historical practices and private relations. The other perspective – that Hegel called Sittlichkeit [ethics] - empha-

[11] KYMLICKA, Will. Comunitarismo. *In*: CANTO-SPERBER, Monique (org.). *Dicionário de ética e filosofia moral* – v. 1. Trad. Paulo Neves. São Leopoldo: Unisinos, 2003. p. 291-292.

[12] KYMLICKA, Comunitarismo, p. 292.

[13] KYMLICKA, Comunitarismo, p. 292.

[14] KYMLICKA, Comunitarismo, p. 292.

> sizes that the right of individuals - indeed, their very identity and their capacity for moral action - is closely linked to the communities to which they belong, as well as the particular political and social roles occupy in them.[1]

One of the books that in some way, most contributed to the task of communitarian "open fire" against liberalism was Hegel and modern society, authored by Canadian philosopher Charles Taylor and published in 1979. In this work, Taylor seeks to continue the counterpoint to the work of Kant done by Hegel, presented to the criticisms of the concept of purely formal grounds used by Kant; and criticism of the concept of "autonomy" also proposed by Kant, a concept that precisely rejects what Hegel considers of particular importance: the "immersion" of the individual in his community.[2]

The argentine professor Carlos Santiago Nino presents the contribution of Taylor to the emergence of communitarianism as follows:

> For Hegel [...] morality reaches its fullness in a community, the right is realized when society as a whole meets the demands of reason. According to Taylor, this is the point at which Hegel objects the basic intuitions of liberalism: these intuitions imply that universal obligations prevail over those that are contingent to our membership in a particular community; Hegel reversed that order, since for him the complete realization of freedom requires a society because this is the least self-sufficient human reality, our highest and most complete moral existence is that we can reach as members of one community. Hegel rejects the utilitarian Enlightenment idea that the state has only an instrumental function: to serve the purposes of individuals. Explicitly says that the state is not an abstract thing that stands opposite to the individuals, but that one is the other parts of an organic life in which no one is a mean and no one is an end. According to Taylor this implies that the identity of individuals is partly determined by their belonging to a certain community. It seems mysterious, he says, only because we have a atomistic point of view of men who do not take into account that [...] we are what we are because we are in a cultural community.[3]

---

[1] KYMLICKA, Comunitarismo, p. 292-293.

[2] GARGARELLA, *As teorias da justiça depois de Rawls*, p. 138-139.

[3] NINO, Carlos Santiago. El nuevo desafío comunitarista al liberalismo kantiano. In: _____. Ética y derechos humanos; un ensayo de fundamentación. Barcelona: Ariel,

Contrary to Rawls' idea that individuals have the ability to question and even to break its relations with any group, category, entity or community that he belongs, the communitarian group comes to defend that the identity identity as people, at least in part, is deeply marked by the fact of belonging to certain groups: "we were born inserted in certain communities and practices in which without them we would no longer be who we are".[4]

The best known critical among those made by the communitarianism against the liberal view about the conception of the person is held by Michael Sandel to John Rawls in his study called *Liberalism and the limits of justice*. Sandel contests, especially the Rawls' assumption in which the people choose their purposes, their vital goals. For the communitarian author, this possibility of choice involves setting aside a better view of the person, who recognizes the importance that he has, for each one, the knowledge of the eigenvalues of their community - values that people find looking "backwards" to the practices of the groups that they belong to.[5]

It is also emphasized that the battle waged by the communitarian to the liberal ideal of neutrality to the state. Such an ideal states a posture of neutrality of the state on the different conceptions of the good that arise in a given community, thus allowing that a public life is the spontaneous result of free agreements performed by the individuals. Conversely, the communitarianism declares that "the state must be essentially activist, committed to certain plans of life and certain organization of public life.[6]

3. Hegel's conception of freedom

It will be presented now the specific study of Hegel's conception of freedom. According to Marcelo Maciel Ramos:

> Although freedom has been studied by virtually all modern thinkers, it is Hegel, contemporary of the French Revolution, who will, in his grand philosophical system, encompass the entire Western

1989. p. 130-131.

[4] GARGARELLA, *As teorias da justiça depois de Rawls*, p. 140.

[5] GARGARELLA, *As teorias da justiça depois de Rawls*, p. 140-141. Also see: NINO, El nuevo desafío comunitarista al liberalismo kantiano, p. 131-135.

[6] GARGARELLA, *As teorias da justiça depois de Rawls*, p. 141.

> philosophical tradition that preceded it, including there the moderns.
>
> We found in Hegel the development of an idea of freedom that seeks to be faithful expression of all its stages of manifestation in the world.[7]

Hegel sees freedom as a fact of the human world that is developed in history. What he seeks is his manifest in the world, considering it not as a static object, but as a concrete movement, endowed with rationality.[8]

Being the purview of philosophy to take the history only from the point where rationality pass to manifest in life, not as a mere possibility, but as will and action, the history begins to the philosophy, according to Hegel, with the emergence of the state, truly human order, established and justified by the authority of the own human reason. Hegel has as initial reference of state the Greek *polis*, because only there the man truly released of nature, in that it has had to determine his will and his destiny, from the criteria of their own reason.[9] "Just then the man became able to know and want universal objects, that is, rational objects".[10]

In the Greek world, teaches Salgado, "there was no distinction between public and private life and, although there was no subjective freedom, there was the freedom existed understood as autonomy, whereby citizens created their own laws".[11] The individual will of the subject was immediately adapted to the objective will of the *polis*. However, at this time the objective morality had not yet been conquered in the struggle for subjective freedom. It is the Instant Spirit Moment, the moment in which freedom is the immediate unity of objective and subjective freedom.[12] This is an Immediate moment because this distinction between objective and subjective freedom "had not yet been introduced in the Spirit (world of culture), and without this split would not be possible the mutual denial of the various aspects of freedom.[13] It is important to

[7] RAMOS, A liberdade no pensamento de Hegel, p. 141.
[8] RAMOS, A liberdade no pensamento de Hegel, p. 143.
[9] RAMOS, A liberdade no pensamento de Hegel, p. 143-144.
[10] RAMOS, A liberdade no pensamento de Hegel, p. 144.
[11] SALGADO, Joaquim Carlos. *A ideia de justiça em Hegel*. São Paulo: Loyola, 1996. p. 392.
[12] RAMOS, A liberdade no pensamento de Hegel, p. 144-145.
[13] RAMOS, A liberdade no pensamento de Hegel, p. 145.

mention that for Hegel, even if "the freedom appears in the world at the moment which the thinking is released from external determinations, it will only become effective in its concept, in its entirety, in the post-revolutionary contemporary state."[14]

With the disappearance of this freedom as autonomy, freedom for which citizens participated in the decisions on the city destiny, the man needed to fetch itself the reason of its moral actions.[15]

> […] have been alienated its entire outer freedom to another one, to the lord of the Empire, it remained only to find itself an aspect of liberty that had not yet manifested, the inner freedom (thought freedom). Freedom is at the moment, so abstract, it appears only as part of freedom, although apparently is seen as an entirely freedom and to counteract the outer freedom. So, it is established the conflict between the outer and inner freedom.[16]

Faced with the impossibility of finding in itself the whole truth (the absolute or the essence), the man refers to the addition, alienating it to someone else, to a gentleman who totally submits (Moment of the stranger Spirit to himself).[17] This is the deepest cleavage of the Spirit, which becomes a stranger to his own essence, abandoning her to a transcendent 'being', which assigns all things.[18]

However, it is precisely to reach this extreme of alienation, attributing everything, including his own essence to the transcendent, that the Spirit discovers that all this is himself.

This discovery occurs through the recognition process, a process in which the self-consciousness turns reflexively to itself, knowing itself as such, and that is done "dialectically in two phases: 1) at *the life and death struggle*, in which inequality is established and 2) *at work*, by which it recovers the equality of consciousness itself.[19] "It is the Lord and slave dialetic, used by Hegel to illustrate the logical moments of the dialectic of freedom.[20]

It is possible to notice, therefore, that "*the consciousness itself* is

[14] RAMOS, A liberdade no pensamento de Hegel, p. 145.
[15] RAMOS, A liberdade no pensamento de Hegel, p. 146.
[16] RAMOS, A liberdade no pensamento de Hegel, p. 146.
[17] RAMOS, A liberdade no pensamento de Hegel, p. 146.
[18] RAMOS, A liberdade no pensamento de Hegel, p. 147.
[19] RAMOS, A liberdade no pensamento de Hegel, p. 147.
[20] RAMOS, A liberdade no pensamento de Hegel, p. 147.

only *in* and *of itself* (ie, free), when it is for both of them, (another self-consciousness) that recognizes it as such and claims to itself such recognition.[21] "It's the Time of Mediate Spirit, where" the Spirit (the self-consciousness) after passing through the demerger, the denial (mediation) of itself, reaches the knowledge of itself (of its freedom), while total moments of the process (denied, given and elevated to the concept - to know yourself)."[22]

Thereby, teaches Ramos:

> Although the freedom appears at the time when the Spirit born (the world of culture), it will only be effective, will only achieve the concept itself after operated the internal **split** of its aspects, the mutual **denial** of them and, finally, recognition in the contradiction (another of itself) of the need for each of its successive moments and their **supersession** in the unity of unity and multiplicity. The concept of freedom is therefore taken as the effective appearance of the Free Spirit in the world, which after facing the split itself, finally knows about his freedom.[23]

In Hegel, the concept of freedom is its concrete totality, in which there is unity between the subjective freedom of the individual and the objective freedom in society. It is the moment in which the individual will becomes universal will, that is, time at which it comes to identify with the objective will, with the *ethos* of which it is both work and craftsman. It is also the time when the social ethos, expressed in rules and institutions, identifies with the subjective freedom and performs it.[24]

Marcelo Maciel Ramos closes his study dedicated to freedom in Hegel's thought saying:

> Freedom is the knowledge historically effected that all human beings are free. In other words, it is the result of the historical process in which man reaches the self-consciousness as being able to rationally self-determine their own will and action, materializing by political institutions such autonomy.
>
> However, it is not a purely individual knowledge, but a dialectically constructed knowledge that from the chock between several

[21] RAMOS, A liberdade no pensamento de Hegel, p. 148.
[22] RAMOS, A liberdade no pensamento de Hegel, p. 148.
[23] RAMOS, A liberdade no pensamento de Hegel, p. 148-149.
[24] RAMOS, A liberdade no pensamento de Hegel, p. 149.

> individuals, recognizes the other as free and also understands the common sense of reason which is, at the same time, product and producer. Thus, it builds up a sense goal of freedom, that assumes and assures that, through standards and institutions, the various individual freedoms, including their renewed contradictions, to constantly rebuild the objectively common sense established.[25]

Final remarks

The rescue of key aspects of Hegel's political philosophy and, in particular, the rescue of the Hegel's conception of freedom by contemporary authors who see in interpersonal relations and community ties that are essential for the formation of individuality, such as Charles Taylor and Axel Honneth, denotes dissatisfaction with the prestige achieved in recent decades by liberal Kantian doctrines (Rawls and Habermas) and reaffirms the greatness of Hegel's philosophy as a solid ground on which you can rely even today, almost two centuries after its construction.

References

BRUGGER, Winfried. O comunitarismo como teoria social e jurídica por trás da Constituição alemã. Trad. Felipe de Melo Fonte e Paola Enham Dias. *Revista de Direito do Estado*, n. 11, jul./set. 2008, Rio de Janeiro. p. 55-84.

GARGARELLA, Roberto. *As teorias da justiça depois de Rawls*; um breve manual de filosofia política. Trad. Alonso Reis Freira. São Paulo: Martins Fontes, 2008.

KYMLICKA, Will. Comunitarismo. *In*: CANTO-SPERBER, Monique (org.). *Dicionário de* ética *e filosofia moral* – v. 1. Trad. Paulo Neves. São Leopoldo: Unisinos, 2003. p. 292-298.

NINO, Carlos Santiago. El nuevo desafío comunitarista al liberalismo kantiano. In: _____. Ética y derechos humanos; un ensayo de fundamentación. Barcelona: Ariel, 1989. p. 129-196.

RAMOS, Marcelo Maciel. A liberdade no pensamento de Hegel. *In*: SALGADO, Joaquim Carlos; HORTA, José Luiz Borges (orgs). *Hegel, Liberdade e Estado*. Belo Horizonte: Fórum, 2010. p. 139-152.

SALGADO, Joaquim Carlos. *A ideia de justiça em Hegel*. São Paulo: Loyola, 1996.

[25] RAMOS, A liberdade no pensamento de Hegel, p. 151.

Discussion, conflict and exception
Carl Schmitt and the not quite new paradigm of lawmaking

Eduardo Carone Costa Júnior[1]

Abstract: When Carl Schmitt pronounced that "openness and discussion are the two principles on which constitutional thought and parliamentarism depend in a thoroughly logical and comprehensive system", he was aiming at the liberal modus operandi of creating law within a state's border that is still presented as an integral part of our democratic way of being. Nevertheless, the gap between the contemporary discourse of democracy and the everyday practice of parliamentary lawmaking – one that already existed under the Weimar Constitution that inspired Schmitt to write his critic of the parliament – keeps growing. Openness and discussion have a distinct way of impacting the legislative process that cannot be measured, yet is constantly perceived – often in a not so generous way – by the common citizen. What the modern constitutions do to avoid the deepening of this crisis is trade democratic legitimacy for celerity in a way that can be considered a response to an undesired intervention of time in the making of the law. Schmitt's point is twofold. First, that this trade off should represent the exception when the creation of the law is concerned, not the rule. Second, that there is a paradox concerning the modern liberal state's praise for democracy and it's acceptance that what should be considered the exception in the state created after the liberal revolutions is – again - becoming the normal way of creating the law.

Keywords: Lawmaking; crisis; publicity; discussion; time intervention; exception.

1. Lawmaking in crisis

It doesn't take a scholar to realize that lawmaking is facing a crisis. The average citizen knows that this crisis - even though he can't pinpoint the moment it started or it's causes – concerns the amount and

[1] Bacharel em Direito pela Faculdade de Direito da UFMG. Especialista em Controle Externo pela PUC/MG. Mestre e Doutorando em Filosofia do Direito pela Faculdade de Direito da UFMG.

complexity of laws that impact his everyday life. He also notice that these laws are not always effective in fixing the problems politicians state as the reason for their production. These critics, almost universal, are dully reproduced by the press and have caught jurisprudence's attention for quite some time2.

To understand this situation one must remember that the legislative function bestowed upon parliament is a fairly recent development of man's evolution[3]. Only the lower middle ages put in march a series of events that culminate with the liberal revolutions and the rise of parliament to the prominent position it holds today in democratic discourse. As Kelsen noted[4], these revolutions and the fight against authoritarianism happened above all to advance the cause of parliamentarism. Unfortunately, the moment of birth for the modern parliamentary democracy is also the starting moment of parliament's crisis. Since the creation of law was put in charge of the parliament, the ever increasing intensity and complexity of social relations have only exacerbated the consequences of this crisis.

2. Discussion and openness

In recent years interest in Carl Schmitt and his vast work was revived. Even though a conservative jurist, this renewed interest in Schmitt's thought came also from the left[5] and the thinkers that have been left behind by the collapse of the Soviet Union. One could argue that, after the fall of the communist experiment, the most formidable counterpoint to the liberal democracy in the western hemisphere, Schmitt's rediscovered critique of parliamentarism and the liberal thought would be a fit substitute.

In fact, one need not accept most of Schmitt's ideas, especially those concerning dictatorship, to realize that he's got a point when he states in his *Parlamentarismus* that "openness and discussion are the two

[2] CARNELUTTI, Francesco. *A Morte do Direito*. Belo Horizonte: Líder, 2004. In 1951, The Author warned that, for some time already, the law was loosing it's double function of certainty and justice.

[3] FERREIRA FILHO, Manoel Gonçalves, 1995. The Author reminds that in the beginning there was not a proper parliament, but only an assembly whose job was to advice the governing body.

[4] KELSEN, Hans, 1993.

[5] As can be seen *in* TELOS. *Special Issue. Carl Schmitt: Enemy or Foe?*. Nova York: Telos, 1987.

principles on which constitutional thought and parliamentarism depend in a thoroughly logical and comprehensive system"[6].

Democracy presupposes more than just the ability to vote and choose one's representatives. In it's internal tension between equality and freedom, a duality that Schmitt was always keen to point out, democracy needs to warrant the citizen at least the right to be informed about the decisions that are to be taken and the right to form his own private opinion about these decisions and endeavor to make his own private opinion the accepted public opinion about the matter.

In the ancient, i.e. direct democracy of the Athenians, the citizen[7] - the male, non-slave, human beings that possessed material goods – would gather at the *Agora*, to discuss and take decisions. No more direct means of participation in the state's affairs ever existed.

The advance of civilization, the growing complexity of society, put an end to prospects of direct democracy's use in any modern state. In fact, the twilight of this form of democracy happened even before Plato had written his *Republic*. As the number of citizens grew, the opportunities for being heard at the *Agora* diminished[8]. There's a reason why *Plato* starts the *Republic* with a descent to the *Piraeus*, the aging port from which Athens begins to grow. There lays a metaphor concerning the need to return to older, better times and the origins of democracy. On their way back, when the dialogue truly begins, *Socrates* and *Glaucon* are constrained by *Polemarchus* and his friends to return with them to *Polemarchus'* house. If one considers that *Polemarchus* is a noun formed by *polemos* (war) e *arkhon* (leader), Strauss's commentary[9] that "ballots are convincing only as long as bullets are remembered", concerning the dangers to the democratic equality that unchecked freedom represents, is one that Schmitt would certainly agree with.

Representative democracy, many centuries after *Pericles'* golden age, still relies on need of discussion and openness. The citizen no longer takes active part in the making of each and every decision that affects the community but he chooses who should represent him and decide

[6] SCHMITT, Carl., 1988. P. 48. In this most excellent translation, Professor Ellen Kennedy opted to translate the original *öffentlichkeit* as openness but it could also be translated as publicity. Both words are correct and are pertinent to Schmitt's ideas on the matter.

[7] One must not confuse the Athenian citizens with the *demos*, a noun that was used to indicate to entirety of the population living at the *polis*, including, women, children and slaves.

[8] DAHL, Robert A,2000, p. 106.

[9] STRAUSS, Leo, 1964.

for him. To choose well – itself a grave decision – he should be able to discuss the merits of candidates as well as how they have behaved in the past if it's not their first time representing the majority that cannot – or will not[10] – get involved in the actual lawmaking.

If nothing else, representative democracy demands more discussion that direct democracy, since first there must be the possibility of discussion among the citizens previous to choosing their representatives and then there must be discussion, and a public discussion, notes Schmitt, among the representatives when deciding on behalf of the formers. Not to mention the necessity of discussion – and that may be the most relevant one – between state representatives and society as a mean to guarantee not only democratic accountability but also that the common citizen understands why some decisions – often unpopular ones – had to be taken.

3. Not just openness and discussion but also time

After establishing that these, discussion and publicity, are the two core values of a parliamentary democracy, Schmitt puts forward his own perception of how they were not respected in the Weimar Republic. His words[11] deserve a literal transcription as they can be attributed to virtually any contemporary parliament:

> The reality of parliamentary and party political life and public convictions are today far removed from such beliefs. Great political and economic decisions on which the fate of mankind rests no longer result today (if they ever did) from the balancing opinions in public debate and counterdebate. Such decisions are no longer the outcome of parliamentary debate. The participation of popular representatives in government –parliamentary government – has proven the most effective means of abolishing the division of powers, and with it the old concept of parliamentarism. As things stand today, it is of course practically impossible not to work with committees, and increasingly smaller committees; in this way the parliamentary plenum gradually drifts away from its purpose (that is, from its public), and as a result it necessarily becomes a mere façade. It may be that there is no other practical alternative.

[10] Gutmann, Amy. Democracy. In: GOODIN, Robert E; PETTIT, Philip; POGGE, Thomas, 2007, p. 524.

[11] SCHMITT, Carl, 1988, pp.49-50.

> But one must then at least have enough awareness of the historical situation to see that parliamentarism thus abandons its intellectual foundation and that the whole system of freedom of speech, assembly, and the press, of public meetings, parliamentary immunities and privileges, is losing its rationale. Small and exclusive committees of parties or of party coalitions make their decisions behind closed doors, and what representatives of the big capitalist interest groups agree to in the smallest committees is more important for the fate of millions of people, perhaps, than any political decision. The idea of modern parliamentarism, the demand for checks, and the belief in openness and publicity were born in the struggle against the secret politics of absolute princes […]

Is Schmitt's view relevant in the twentieth first century? It could be argued that Schmitt's writing was about the tumultuous reality of the 1920's Germany and that what's good – or bad - for the Weimar Republic does not automatic apply to other ages and places. It could also be said that he was describing a parliamentary government, where the cabinet is a delegation of the parliament and the president is merely the head of state but not head of government and, therefore, Schmitt's opinion is not pertinent to the modern presidential regime many countries adopt.

Both are valid points but are not enough to infirm the necessity of openness and discussion in a democratic government, regardless of it's peculiarities, the existence of a prime minister and a cabinet or an elected president.

What Schmitt's diagnosis of the way discussion and openness were put aside in the Weimar Republic fail to stress - even though the Author were well aware of - is that these two core values of democracy imply a way of taking decisions that subjects the modern liberal democratic state to a lot of pressure once the amount of decisions to be taken and the ever decreasing available time to take them are considered.

One can say, paraphrasing *François Ost*[12], that the origins of Schmitt's critique of parliamentarism lays in the way time intervenes, not only in law but also in politics.

Democratic lawmaking takes time; more time than it takes to create law in a non-democratic state. The essence of democracy demands enough discussion and openness as a mean to achieve a reasonable majority on each and every subject that is examined by the parliament. By contrast, lawmaking in the absolute state that preceded the liberal revo-

[12] OST, François, 2005.

lutions of the eighteenth century, would be considered swift since it was not the result of a public discussion – *auctoritas, non veritas, facit leggem.* Schmitt knew that and wrote[13]:

> The idea of modern parliamentarism, the demand for checks, and the belief in openness and publicity were born in the struggle against the secret politics of absolute princes. The popular sense of freedom and justice was outraged by arcane practices that decided the fate of nations in secret resolutions.

From a democratic point of view, the way law was created, before the liberal revolutions and the raise of parliament, despite being swift, could never be considered legitimate. On the other hand, parliamentarism gains legitimacy at the expense of celerity, which causes the risk of a delay in the creation of the law that threatens it's very own legitimacy and effectiveness. As such, the crisis that affects lawmaking and parliament was embedded from the start.

4. Legislative delegation: a consequence of time constraints upon lawmaking

The fact that creating law in a democratic and legitimate way, i.e., by means of a public discussion, demands a considerable amount of time, if the parliament is not to be a mere façade[14], as Schmitt put it, was surely noted by those involved in the quotidian decisions any modern state must make.

As time went by and the driving spirit behind liberal revolutions subdued, the impossibility of having statutory law created solely by the parliament presented itself in a clear way. The Administrative Law expert for one knows that urgent problems cannot be left unresolved, pending a discussion in parliament that might reach a compromise, genuine or not[15]. When the administration cannot afford to way for a decision created by the legislative branch, the exact boundaries between statute and bylaw becomes a pressing matter.

[13] SCHMITT, Carl, 1988, p. 50.

[14] SCHMITT, Carl, 1988, pp.49-50.

[15] SCHMITT, Carl, 2008, pp.82-88. In the chapter dedicated to the study of the positive concept of constitution, Schmitt exams the compromise character of Weimar Constitution and distinguished between the authentic, genuine compromise and the dilatory formal one.

Practical difficulties such as this have contributed for the creation of legislative delegations in most modern constitutional regimes. Parliamentarism itself implies a delegation[16], that is, voluntary transference of power to others; the cabinet is a delegate from parliament and its powers are granted because there is mutual trust between these two institutions. Presidential regimes also present other forms of delegation, such as the creation of norms by agencies.

There are two main reasons why delegations occur, say *Strøm*[17]: capacity and competence. Capacity is inextricably connected to time and is behind every delegation that happened ever since direct democracy gave way to representative democracy as a mean to make sure that the time consuming decisions, that citizens were unwilling to devote themselves to take, due to the enormous amount of discussion involved, could be made. Ever since *Plato`s Republic*, lack of competence, in the sense of knowledge and skills, is also a reason behind delegation. Ironically, the core of the most formidable philosophical theory against democracy[18] is also the reason why citizens opt to leave professional politicians discuss and take decisions on their behalf in a representative democracy.

What the widespread use of delegations implies is that the monopoly of creation of laws in a parliament formed by representatives of the people, that the mentors of the liberal revolutions prescribed as a mean to keep in check the power of the constitutional monarch[19], is no more. Reality dictates that it is not the parliament but the executive branch that has the capacity and the competence to take decisions concerning most of the themes that need state intervention these days, from the limits of the citizen's phone bill to how should obsolete TVs be disposed of. Most of these decisions are not made by elected representatives but rather by a modern officialdom[20], appointed bureaucrats that are deemed more competent to take technical decisions than professional, elected politicians[21].

---

[16] STRØM, Kaare, *Parliamentary democracy and delegation*. In: STRØM, Kaare; MÜLLER, Wolfgang C.; BERGMAN, Torbjörm, 2006, p. 56.

[17] *Op. Cit*. P. 57.

[18] DAHL, Robert A, 1989.

[19] As Cabral de Moncada puts it, the principal of legality and the antinomies that surround it as a consequence of the – not natural – alliance of two principles that draw legitimacy from different sources, the monarchical and the democratic principles. CABRAL DE MONCADA, 2002, p. 8.

[20] WEBER, Max, *Bureaucracy*. In: WEBER, Max, 2009, p.196.

[21] For merits of elected and appointed oficials, WEBER, Max, 2009, p. 201.

5. Legislative delegation: the exception or a return to the *status quo ante*?

In order to preserve representative democracy`s relevance one must view legislative delegations as the exception; not the rule. The rule must be the creation of abstract and general norms by public discussion, taking place on a parliament formed by elected representatives of the people. The exception, this other category that *Schmitt* highlights in his early work about sovereignty[22], should be the creation of such norms by non-elected officials in the executive branch.

In an ideal world, the limit between rule and exception when it comes to the creation of abstract and general rules should be established by a constitution so that Schmitt`s remarkable opening statement from *Political Theology*[23] could represent that sovereignty is exercised, at least indirectly, by the people.

Schmitt uses the exception as a political or economic situation that puts in risk the survival of the state and therefore legitimates the use of extraordinaire measures. But even though his primary concern is the state of exception and the extent of the *Reich* President`s powers under article 48 of Weimar Constitution[24], it can be said that he believes in the validity of the differentiation between rule and exception in other contexts, as reveals his quote *Soren kierkegaard`s Repetion*: "The exception explains the general and itself. And if one wants to study the general correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained [...]"[25].

For the proponents of participatory and deliberative democracy[26], technological breakthroughs may overcome or at least diminish the

[22] SCHMITT, Carl, 2005. See particularly Chapter 1.

[23] "Sovereign is he who decides on the exception". SCHMITT, Carl, 2005. p. 4.

[24] Article 48. §2. If the German Reich, public security and order are considerably disturbed or endangered, the Reichpräsident may undertake necessary measures to restore public security and order, and if necessary may intervene with the aid of armed forces. For this purpose he may suspend, temporarily, in parto r entirely, the basic rights as provided in articles 114, 115, 117, 118, 123, 124 and 153.

[25] SCHMITT, Carl, 2005. p. 15.

[26] For a starter about the various conceptions of representative democracy, see GUTMANN, Amy. Democracy. In: GOODIN, Robert E; PETTIT, Philip; POGGE, Thomas, 2007, p. 527.

need of legislative delegations since the citizen will have means to get involved in the public discussion of pressing matters without incurring in the problems created by time constraints. Maybe. But we are not there yet. What the present shows is that, more and more, legislative delegations are becoming the new normal way of lawmaking; a new normal that Schmitt would point is uncomfortably – for the liberals, he might add – close to way things were before the liberal revolutions.

It could be argued that leaving lawmaking to the executive branch is not necessarily evil; that there can still be significant public discussion this way. There are means for overcoming the intrinsic lack of democratic legitimation that the creation of general and abstract norms by non-elected executive officials dictates. Such norms could be the product of an administrative procedure that is not only regulated by previous norms created by parliament but also permeated by the legal obligation of hearing all the interested parties through, for instance, public consultations that ensure enough discussion is taking place. Yes, but the question is: wouldn't this newfound democratic legitimacy reintroduce an intervention of time on the process of creating law?

Schmitt's answer would be unequivocally yes, as demonstrates his belief that[27] "great political and economic decisions on which the fate of mankind rests no longer result today (if they ever did) from the balancing opinions in public debate and counterdebate".

One does not need to agree with him that a strong government is the only option society has got when faced with this dilemma; that the guardian of the constitution – and therefore of the public's rights and liberties – should be the *Reichpräsident*; that the creation of law through public discussion in a parliament is, historically, the exception rather than the norm. One must recognize though that in order to guarantee the survival of parliament and all it represents – and to avoid a return to the *status quo ante* – legislative delegation must remain the exception, if not quantitatively, at least qualitatively speaking, because, as Kierkegaard wrote and Schmitt quoted[28], "[…] the general is not thought about with passion but with a confortable superficiality. The exception, on the other hand, thinks the general with intense passion".

---

[27] SCHMITT, Carl, 1988. p.49. See also his obvious disdain towards the nineteenth century authors that adhere to the belief in discussion as a way to fulfill rationality's promise in political matters, personified by Alphonse Lamartine, in endnote 49 of the same page.
[28] SCHMITT, 2005, p. 15.

References

CABRAL DE MONCADA, Luís S. *Lei e Regulamento*. Coimbra: Coimbra Editora, 2002.

CARNELUTTI, Francesco. *A Morte do Direito*. Belo Horizonte: Líder, 2004.

DAHL, Robert A. *Democracy and its critis*. New Haven: Yale University Press, 1989.

_____. *On Democracy*. New Haven: Yale University Press,2000.

FERREIRA FILHO, Manoel Gonçalves. *Do Processo Legislativo*. 3. ed. atual. São Paulo: Saraiva, 1995.

GOODIN, Robert E; PETTIT, Philip; POGGE, Thomas. *A Companion to Contemporary Political Philosophy*. Malden: Blackwell Publishing, 2007.

KELSEN, Hans. *A democracia*. São Paulo: Martins Fontes, 1993.

OST, François. *O tempo do direito*. Bauru: Editora da Universidade do Sagrado Coração, 2005.

SCHMITT, Carl. *Constitutional Theory*. Durham: Duke University Press, 2008.

_____. *The crisis of parliamentary democracy*. Cambridge: MIT, 1988.

_____. *Political theology*. Four chapters on the concept of sovereignty. Chicago: The University of Chicago Press, 2005.

TELOS. *Special Issue. Carl Schmitt: Enemy or Foe?*. Nova York: Telos, 1987.

STRAUSS, Leo. *The City and Man*. Chicago: The University of Chicago Press, 1964.

STRØM, Kaare; MÜLLER, Wolfgang C.; BERGMAN, Torbjörm. *Delegation and Accountability in Parliamentary Democracies*. Oxford: Oxford University Press, 2006.

WEBER, Max. *From Max Weber*. Essays in Sociology. London; Routledge, 2009.

Carl Schmitt: critic of Positivism

Fernando José Armando Ribeiro[29]

Abstract: In contemporary history, in which a series of arguments and ideas aimed at combating legal positivism are elaborated, it is appropriate to return to who was, in his time, one of the most important critics of that school of legal thought: Carl Schmitt. A critic of modernity's own political project, Schmitt outlines with clarity some of the crucial problems of positivist thinking, its internal contradictions and some of its equivocal assumptions. However, the solutions proposed by the controversial German thinker point us to a path that should not be followed because it also would lead to an undermining of the quality of humanism that should nourish the law. Moreover, let us see that Modernity, if not a complete project, should not be banished for its failure, but rebuilt and improved in the dimension of historical time and as a human cultural achievement.

Keywords: 1. Schmitt; 2. Positivism; 3. Legitimacy.

1. Introduction

Schmitt can be included in a tradition of critical thinking regarding the project of modernity, and this criticism is expressed most strongly in the deconstruction of liberalism made by the German constitutionalist, in both its political (the Parliamentarism) and juridical (legal positivism) branches. Schmitt, as Weber, sees modernity as a time of disenchantment caused by the absence of meaning generated by the election of rationality as a paradigm of legitimacy. Modern rationality, essentially instrumental, according to Weber, would be based on the quantifiable and manageable, reducing knowledge to technique and form, thus removing the manifestation of its real substance.

It is necessary to return to Weber to understand Schmitt's critique of liberal modernity. Weber's line of thought is extremely pessimistic about the achievements of modernity. According to him we would be imprisoned in an iron cage of rationality, forged by the obliteration of

[29] PhD; Professor of Law at PUC-Minas; Judge in the state of Minas Gerais (Brazil).

the world's magic and charm through instrumental modern rationality.

Weber identifies two distinct forms of legitimation of legal *Herrschaft*: the first pre-modern, based on the insertion of an act, a ritual, in a symbolic order which would give the sense: placing a seal, a royal command, the ritual of a trial. The second is the modern form of legitimacy, relationship-based logical and rational rules embedded in a law. The second way tends to result in a bureaucratization of legal relations.

Schmitt sees this bureaucratization as the result of modern liberal technicity, which would find its perfect representation in Kelsen's legal positivism. Kelsen's belief in law as a complete system of rules turns the interpreter into a mere function of the State. Otherwise, by making the interpreter a point of normative imputation he does not consider the hermeneutic dimension, inherent to human interpretation. The problems of application are distortedly presented. Making the subject a mere "point of normative imputation", this theory excludes the human content, which should permeate the law, omitting the human being from the legal spectrum.

2. Sovereignty and Legitimacy

A central point of Schmitt's critique is the application of legal norms. For Schmitt, there is always a gap between the norm and its application, which can only be fulfilled by interpretation. According to legal positivism this gap does not exist, or if it exists it is not considered by legal science, which provides a very limited role for the interpretation.

Schmitt's opposition to legal positivism is based on his decisionist thought, which, according to McCormick is the result of his ideas about sovereignty. He also opposes liberal parlamentarism with his ideas about tradition and substantive representation:

> If substantive representation is the foil with which Schmitt negatively contrasts parliamentary representation, in *Political Form* and *Parlamentarismus*, then, as suggested in my earlier analysis of emergency powers, Schmitt's appropriation and reconstruction of the early-modern concept of sovereignty is the standard by which he criticizes liberal jurisprudence most forcefully in *Political Theology* and his subsequent Weimar constitutional writings. (MCCORMICK, 1999, p. 206)

The return to the idea of sovereignty would be more related

to the application of the rules than with a ratio of monarchical or personal power as intended by Kelsen. Sovereignty here is seen as fundamental to the application of the law, since the applicator, which should be considered in his personhood, fills the gap between the norm and reality. Something that formalists refuse to see, according to Schmitt:

> The fact that the legal idea cannot be applied by itself results that it provides who should apply it. In every transformation there is an *auctoritatis interpositio*. A distinctive determination about the individual person or concrete instance may require such authority for themselves, cannot be extracted from the sheer quality of a legal principle. (SCHMITT, 2006, p. 29)

To base the validity of norms in its position within a closed and hierachically organized system would create an illusion that would remove, for Schmitt, the legal reality of the matter: that only a hierarchy of people, within a substantial conception of sovereignty confers validity to the norm and legal decision[30]:

> Since a law cannot be applied , manipulated or run itself , cannot be interpreted or defined, nor sanctioned, cannot alone either - if it is still a standard - appoint or designate an specific person to interpret or handle the law. Neither the concept of independent judge, subject only to the law, is normativist , but a concept of order, a competent authority, a member of an order system formed by officials and administrators . That particular person is the judge not given by rules or regulations, but by a specific organization of selective justice and individual appointments. So it's true what Hölderlin wrote in a note to his translator of Nomos basileus of Pindar : "The nomos, the law is here insofar as it is the figure by which man finds himself and God, the Church and the state order and the old precepts inherited that more strictly than art, retain vital relationships, which eventually found a village and itself. (MCCORMICK, 1999, p. 218)

Schmitt criticizes the prominent role given to the form by legal positivism. According to Schmitt, this dominance stems from an incor-

[30] "This betrays his nostalgia for the concrete domination of persons over persons that is characteristic of traditional politics and part and parcel of his developing neoauthoritarianism, as much as it conveys his concern for jurisprudenctial praxis." (MCCORMICK, 1999, p. 218)

poration of the alleged objectivity of technical and natural sciences and a misunderstanding of scholastic thought about form and substance.

The fact that Kelsen, as soon as he takes a step forward beyond its methodological critique, operates with a causal concept proper to the natural sciences, shows up best when he believes the criticism of the concept of substance, by Hume and Kant, can be applied to the theory of the State. However, this would be without considering that the concept of substance of scholastic thought is something quite different from that of mathematical thinking and of the natural sciences. The distinction between substance and the exercise of a right, which found a fundamental significance in the history of the dogma of sovereignty, in any way could be understood using concepts of the natural sciences, and it is obviously an essential moment of the legal argumentation (SCHMITT, 2006, p. 39) [31]

Schmitt believes the form is important because it is what reveals the contents, but there can be no pure form apart from content, nor content that proves to be fully without form. Any thought that focuses on only one of these categories would be incomplete and incapable of solving the array of problems involved in the subject. As the positivist thought reduces the law to the norm, considered as an abstract order, it generates a series of illusions and misunderstandings about the law.

The first one is the supposed impersonal command of the norm, fiercely opposed by Schmitt. According to him normativism does not realize that legislative or "authoritative" fetishism generates a belief in the intrinsic honor and virtue of the authority of the legislature, which is theologically identified with God as the creator. All concepts of honor and dignity, fundamental in maintaining the legitimacy of the order, are vested in the figure of the legislator, which, abstractly considered, ends up exerting a veiled and illegitimate sovereignty:

> If the concept of law appropriates any relationship to reason and justice, and, while it remains on the State to legislate with its specific concept of legality it concentrates on the law the greatness and dignity of the State. So fort, any determination of any kind, all order and measure, every command addressed to any officer or

[31] "The difference between the respective uses of distinction in question, for Schmitt, lies in decisionism's ability to bring substance alive through the formal act of a decision rather than letting it lie stillborn in the letter of the law or the phraseology of the constitution. As he often states, forms or functions per se are not dangerous, they necessary to make ideas realities." (MCCORMICK, 1999, p. 220)

> soldier and every individual instruction addressed to a judge may be performed legally and legitimately, by a resolution of Parliament or of any of the bodies involved in the legislative procedure , under the "rule of law". The "purely formal" is then reduced to empty words and to the label "law", revealing its relationship with the rule of law. Exclusively and directly, all dignity and all the greatness of the law are linked- and more precisely, with meaning and effect immediately juridical-positive - this confidence in the justice and reason of the legislature itself and all participants in the process of lawmaking. All the legal guarantees and fastenings, as well as all the protection against abuse, are transferred to the person of the omnipotent legislature or to the legislative process. For something that is not deprived of reason or purely arbitrary, it is urgent that this process is dominated by the preconditions of trusts above mentioned. It is the propulsive force of the congruence of Law and of formal law. This system of legality does not exist at all, unconditionally. An unconditional equalization with the result of any formal procedure would only be an unconditional submission, or in other words, a blind decision taken by the bodies responsible for legislating without any connection with the contents of Law and Justice. It would be nothing more than an unconditional surrender to any kind of resistance. It would mean to seize the *sic volo sic juebo* in its most naive and purely psychological form, as if from the rudiments of superstition or from the waste of some previous legal religion. We can call that "positivism". But in our times this word can hide no more that the unconditional formalism consists of a claim to submit the law to purely political reasons and accompanied by a denial of any right of resistance, also driven for purely political reasons. (SCHMITT, 2007, p. 21-22)

According to Schmitt, positivism also causes another great problem, the relativization of the concept of Constitution. The relativity of this concept lies in the synonymy of the expressions "Constitution and constitutional laws". In other words, instead of fixing a unitary concept of constitution, positivism considers only concrete constitutional laws, which in turn depend exclusively on exterior features, called formal elements by traditional theory (SCHMITT , 1996: § 2, I).

In his line of thought, it is a common mistake to attribute a "formal" character to the Constitution by the criteria of being a written constitution and having its reform linked to more difficult procedures. By doing so, the main purpose is to make the concept of Constitution equivalent to a series of written constitutional laws (Constitution = *lex scripta*)

(SCHMITT, 1996: II § 2). In the end, the very meaning of Constitution will rest on the more difficult reform procedure. Schmitt warns that considering only the requirement of constitutional reform (as, for instance, the art. 76 of the Weimar Constitution) is to renounce the search for the real meaning of the Constitution. As a consequence, it will put the entire subject of the Constitution in a single norm, making it a kind of "blank law" that in each case should be fulfilled in accordance with the requirements of constitutional reform (SCHMITT 1996: § 2 III). Constitutional laws do not receive their power from the reform procedure, but to the contrary, it is the rules of reform, as all the other statutory and constitutional norms that receive their power from the Constitution.

The other illusion generated by the formal legal order is that sovereignty is a power exercised in accordance with norms. Law provides a formal structure that makes demands very precise and, if managed rationally, ensures that we can predict the outcome of our obedience or disobedience to such requirements. Thus, this rational legal structure sanctions the calculation element at the legal-rational authority. Consistency in decision making is crucial. Compared to a substantive law based on "material principles", and to a justice that would be substantial and therefore, *ad hoc*, legal formalism is predictable. The law, in turn, requires the modern bureaucratic state to provide a formal guarantee reliable for all contracts by the political authority.

This belief in an alleged causation of the real was the target for many critical thinkers of modernity, as Nietzsche.[32] But for Schmitt this

[32] " Do ye know what is for me the" world " ? I show it in my mirror ? This world, an immense power , without beginning , without end , a firm , tanned magnitude of force that does not become larger, does not become smaller , not consumed , only becomes and , as a whole, is unchangeable greatness a household budget with no spending and no losses , but likewise without growth, earnings , terminated by " nothing " as per your limit, anything that fades , nothing wasted , nothing infinitely extensive , but as a determined force in a certain space , not in a place that was somewhere "empty", rather as force throughout, as a play of forces and waves of forces, at the same time one and various, piling up here and at the same time decreasing there, a sea in stormy forces and tributaries in themselves , always changing , always flowing back , with huge years of return , with ebb and amount of its settings , expelling from simple to more complex , the calmer, more intrincate and more cold to the incandescent, the wildest , so what else contradicts itself and then , again, the fullness coming home from the simplest , from the play of contradictions back to the joy of harmony, asserting himself even that equal their routes and years , blessing itself as that which must return eternally, as a becoming that knows no becoming satisfied, no disgust, no weariness: this my Dionysian world of the eternally creating itself , the eternally destroy of itself, this mysterious world of double pleasure,

order would threaten the very idea of sovereignty that he defends so fiercely. For Schmitt the "sovereign is he who decides on the state of exception." What characterizes sovereignty is not under the command of norms, but the power to suspend them in an exceptional situation. For Schmitt, the moment of decision is shown in full force in the decision on the exception. The exception is not simply a state of necessity, but a boundary state, which cannot be predicted or encompassed by any normative order.[33]

Legal positivism does not consider the exception, regarding it as essentially irrational and not legal. It also transfers all the sovereignty to the normative order. In Schmittian thought, this position denounces a clear contradiction, since it stems from a metaphysical belief in the legal order as similar to a supposed normative order of nature. This order is identified by a metaphysical stance that the positivists, especially Kelsen, would always insist on denying:

> Schmitt locates the source of what he has thus far identified as Kelsen's jurisprudential rigidity: "At the foundation of his identification of state and legal order rests a metaphysics that identifies the lawfulness of the nature and the normative lawfulness. This pattern of thinking is characteristic of the natural sciences. It is based on the rejection of all 'arbitrariness,' and attempts to banish from the human mind every exception" (*PT,* 41). Kelsen and the legal theory he represents are a manifestation of Enlightenment thought's increasing indifference and even antagonism to the idea of the exception. But any attempt to draw attention to the exception – whatever form it takes, beneficial, banal, or, most important, dangerous – is considered irrational from the standpoint of the Enlightenment. (MCCORMICK, 1999, p. 223)

As Kelsen's method is based on the method of natural scienc-

---

this " my beyond good and evil " without end, if there is no end in a circle of happiness, unwilling , if there is good will on the ring which makes yourself - ye would have a name for this world? A solution for all its riddles? A light for you too, oh more cubby holes, stronger but fearless, more inserted at midnight ? This world is the will to power - and nothing else! And also you are will to power - and nothing else! (NIETZSCHE, 2008 , p . 512-513)

[33] "The decision on the exception is, in its most prominent sense, decision, as a general rule. It is presented by the legal principle usually valid. There can never be conceived an absolute exception, and therefore it can neither support the decision of a real and exceptional case." (SCHMITT, 2007)

es, its success depends on the identification of its own object. And this identification can only occur in an essentially metaphysical plane. It is beyond doubt that the scientific "purification" that Kelsen aims for with his project is based on the same "purgative" and reductionist procedures whereby natural sciences began in modernity. In fact, in their eagerness to reveal and identify natural laws, a project that failed, he emphasizes, the natural sciences have established that the only manifestations of reality considered worthy of study and reflection would be those ruled by such laws. This scientific reductionist method would lead to scientific positivism and expand its tentacles over the Law, already dominated by technicism. Most surprising is this method, with its belief in reality as a fact, mystifies and ignores the truth:

> Max Planck has demonstrated how the positivism of natural sciences, with its interest in achieving unconditional security only takes into account sensitive impressions. Consequently, it can not distinguish deceptive and illusory perceptions from the other; so forth, at a positivist physics there is no space for the illusion of the senses. The fate of positivism in legal theory, only interested in preventing arbitrariness and subjectivism bears some resemblance to same fact. If the normality of the concrete situation assumed by the positive norm fails, but, considering positive-legally, is imperceptible, then falls with it the strong possibility of predictable and unwavering application of the norm. Even the "justice of positivity", to quote Erich Jung, would cease. Without the coordinate system of a particular order, legal positivism fails to distinguish between right and wrong, and between objective and subjective arbitrariness. (SCHIMITT, 1996, p. 44)

On behalf of its alleged objectivity and legal security, positivism prefers to divorce itself from the contents of justice, disqualifying it as a subjective concept, incapable of being perceived by science.

> Today we perceive the decline of a mere positivistic reading of Constitutions. Positivistic reading does not provide the possibility of understanding the constitutional text as a moment of affirmation of the very ethos of a people. It does not allow the promotion of a gregarious life minimally stabilized and simultaneously articulated with an array of open and pluralist antagonistic positions. (RIBEIRO, 2004, p. 200)

This fragmentation of sovereignty would be one of the results of the ostensible increment of state bureaucracy generated by the normative intricacies of Kelsen's theory. According to Kelsen, the dimension of the will is disregarded and only the subsumption of certain events to certain norms remain. The development of strategic thinking in situations like these seems to be inevitable. That's the reason for the fact that the citizens of the State shall be had as merely numbers and statistics:

> Undoubtedly, Foucault is right in saying that the social sciences benumbed the moral fiber of our governments. Something happens to politicians who find themselves exposed to endless tabs of income levels, recidivism rates, cost effectiveness of firearms for the artillery and the like - more or less what happens to the guards of the concentration camps. Policymakers of liberal democracies come to believe that nothing matters beyond what is shown by the predictions of experts. They don't conceive their fellow countrymen as citizens anymore. (RORTY *apud* MORRISON, 2006, p. 336)

Schmitt believes that normativism prevents the real application of the law that was only made possible by a decision that fulfills the gap between norm and reality. McCormick asks whether Schmitt's critique of positivism aims to bring back the substance of the law or to create the appropriate legal conditions for domination, as heralded by Schmitt (MCCORMICK, 1999, p. 207). Even if we consider that the relationship of Schmitt with National Socialism led to an inappropriate abandonment of his considerations about law and politics for a considerable time, it would be a dangerous naivety not to relate his scientific positions to his ideology.

3. The charismatic foundations of sovereignty and violence

In its fight against Enlightenment´s rationalism, according to him merely technical and instrumental, Schmitt stands beside the charismatic representation in its pre-modern form. However, he insists that what he truly seeks are more complete scientific results that would not be possible to achieve with legal positivism.

Nevertheless, in many subjects the theories of Schmitt and Kelsen meet. Even if Habermas claim that Kelsen and Schmitt represent opposite sides of the same coin is questionable, it is a fact that there is an intriguing relationship between the two thoughts. According to Habermas

(MCCORMICK, 1999, p. 218), there is a voluntaristic basis for the theory of Kelsen even though the normative order has the function of suppressing such will. Habermas also believes there is an empty formalism in the decisionism of Schmitt, because a formal structure would be always required to keep sovereignty.

In the course of German political history those positions were mediated by the national socialism, embraced by Schmitt and rejected by Kelsen . Despite their different positions, they both helped to justify the actions of the Third Reich. On one hand, the defense of a charismatic sovereignty by Schmitt reflects the rise and the use of power by Hitler. On the other hand the technicality which comes from Kelsen´s normativism can also serve as the basis for the organization of the violent bureaucratic and administrative machinery of of the Nazi government.

The charisma of Hitler strengthened the Third Reich and enabled the use of the "final solution", but "nearly 2000 laws and administrative rules [...] designed to degrade and make German Jews even more miserable were necessary " (MCCORMICK, 1999, p. 362). They used those resources because Germany shared the modern belief in the legitimizing capacity of legality which Schmitt denounces in Legality and Legitimacy as the result of technical rules. This technicity is a common feature in all aspects of the final solution: whether in the legal and administrative spheres, or even in the development of practical instruments for the elimination of the Jews:

> Auschwitz was also a routine extension of the modern factory system. Instead of producing assets, the raw materials were human beings and the final product was death, the number of daily units was carefully recorded in the graphs of production. The chimneys, symbols of modern factory system, cast a acrid smoke produced by burning human flesh. The perfect organization of modern European railway network carrying a new type of raw material to the factories. And it was transported as any other type of load. In the gas chambers, the victims inhaled a poisonous gas that usually came from cyanide capsules produced by the advanced German chemical industry. Engineers designed the crematoria, administrators designed the bureaucratic system that functioned with a dynamism and efficiency that would make envious a lot of nations. The hole plan was generally a reflection of the modern scientific spirit upside down. What you saw there was nothing less than a gigantic scheme of social engineering.(FEINGOLD, 1983, p. 399-400 *apud* BAUMAN, 1998, 28 *apud* MORRISON, 2006, p. 367)

The collapse of Law was the fruit of the marriage between Hitler's fanatical charisma and the evilness of modern social engineering

techniques. It has been long discussed whether positivism or decisionism represented the legal form of those years. But in fact, the union of both allowed an aestheticization of politics, an act of faith in unprecedent techniques of social control, as well as a moral emptiness of political life. Both theories are also the product of their time.

An age that holds a constant threat of a return to a legalized and rationalized violence. An era which has left the indelible smell of human flesh burning in our nostrils and marked our consciences with the perennial questions about the limits of state rationality. A time when mystery and disenchantment joined in an incestuous embrace that crushed millions of lives.

References

BAUMAN, Zygmunt. *Modernidade e holocausto*. Tradução Marcus Penchel. Rio de Janeiro: Jorge Zahar, 1998.

CATTONI, Marcelo. *Jurisdição e hermenêutica constitucional*. Belo Horizonte: 2004.

DERRIDA, Jacques. Prenome de Benjamin. In ___ . *A força da lei, o fundamento místico da autoridade*. São Paulo: Martins Fontes, 2007.

FEINGOLD, Henry L. How Unique is the Holocaust? In GROBMAN, Alex e LANDES, David (Orgs.) *Genocide*: criticail issues ofthe Holocaust. Los Angeles: Simon Wiesenthal Centre, 1983. p. 399-400.

GALUPPO, Marcelo. A epistemologia jurídica entre o positivismo e o pós-positivismo. In: *Revista do Instituto de Hermenêutica Jurídica*, 2005, vol. 1, nº 3, p.195-206.

GOMES, Alexandre Travessoni. *O fundamento de validade do direito*: Kant e Kelsen. Belo Horizonte: Mandamentos, 2000.

HÖFFE, Otfried. *Justiça Política*. São Paulo: Martins Fontes, 2006.

MCCORMICK, John P. *Carl Schmitt's Critique of Liberalism Against Politics as technology*. Cambridge: Cambridge University Press, 1999.

MORRISON, Wayne. *Filosofia do Direito, dos gregos ao pós modernismo*. São Paulo: Martins Fontes, 2006.

NIETZSCHE, Friedrich.*Vontade de Poder*. Rio de Janeiro: Contraponto, 2008

_____. *Acerca da verdade e da mentira.* São Paulo: Editora Rideel, 2005

RIBEIRO, Fernando Armando. *Conflitos no Estado constitucional democrático*. Belo Horizonte: Mandamentos, 2004.

SCHMITT, Carl. *Legalidade e Legitimidad*e. Belo Horizonte: Del Rey, 2007

_____**.** *Sobre los três modos de pensar la ciencia jurídica*. Madrid: Editorial Tecnos, 1996.

_____. *Teologia Política*. Belo Horizonte: Del Rey, 2006.

_____. *Teoría de la Constitución*. Madrid: Alianza Editoria, 1996.

STRECK, Lênio L. *Hermenêutica jurídica e(m) crise*. Porto Alegre: Livraria do Advogado, 2007.

Identity, violence, reason and justice
The debate between Amartya Sen and Jonathan Glover

Fábio Creder

Abstract: In his 2006 work, "Identity and Violence", Amartya Sen addresses crucial issues for a better understanding of the social causes of violence, focusing mostly on the subject of identity. According to Sen, "many of the conflicts and barbarities in the world are sustained through the illusion of a unique and choiceless identity." Therefore, "the hope of harmony in the contemporary world lies to a great extent in a clearer understanding of the pluralities of human identity, and in the appreciation that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division" (p. xiv). However, Sen asserts that in order to achieve that understanding, we need an appropriate recognition of the role and efficacy of choice and reasoned public voice. The author reaffirms this remark in his 2009 book, "The idea of justice", resorting to the European Enlightenment to show how within this powerful tradition clear-headed reasoning was saw as a major ally in the desire to improve societies.

Nevertheless, Sen avows that "it is difficult to generalize about any overwhelming dominance of reason in the thinking prevalent in the Enlightenment period," and that, as Isaiah Berlin has shown, there were also different kinds of counter-rational strands during that age. Sen observes that it has become quite common in contemporary political discussions to argue that the Enlightenment oversold the reach of reason, and that this supposed over-reliance on reason has contributed to the propensity towards atrocities in the post-Enlightenment world. One of the voices added to this line of reproach, according to Sen, belongs to Jonathan Glover, who, in his brilliant work "Humanity: a moral history of the 20th century," argues that the ideologies that supported the tyrannies of the 20th Century are heirs of the Enlightenment tradition.

In this paper, I would like to examine the issues underlying this debate, focusing on the question whether reason is capable to avert our tendency to view identity as a destiny, or ideology and blind belief have to prevail in certain circumstances.

Keywords: Amartya Sen;Jonathan Glover;Violence.

1.

In a review of *Humanity: a moral history of the twentieth century*, the magnum opus of his longtime friend, Jonathan Glover, Amartya Sen enunciated a harsh criticism to what he considered an excessive disenchantment with the hopes of the Enlightenment and the positive power of reason.

The review was first published in 2000 in the 'New York Review of Books', and then republished, slightly revised, five years later in *The Argumentative Indian*. The question bothered Sen so much that he restated it in his important 2009 work, *The idea of justice*.[1]

Humanity: a moral history of the twentieth century was first published in 1999. In the preface to the second edition, published in 2012, Glover gave Sen an answer.

In this brief paper, I would like to examine the issues underlying this debate. I will try to argue contrary to what Sen says that both authors are very confident in the power of reason.

2.

According to Sen, a strong and self-conscious reliance on reason marked the Enlightenment. Lucid reasoning was a major ally in the desire to make societies better, and "social improvement through systematic reasoning was a prominent strand in the arguments that were integral to the intellectual animation of the European Enlightenment."

However, Sen recognizes, with Isaiah Berlin, that it is "difficult to generalize about any overwhelming dominance of reason" in the thinking prevalent in the 'Age of Enlightenment'. "There were also different kinds of counter-rational strands during the period." "And it has become quite common in contemporary political discussions to argue that the Enlightenment oversold the reach of reason", and that "the over-reliance on reason, which the Enlightenment tradition helped to instil in modern thinking, has contributed to the propensity towards atrocities in the post-Enlightenment world." (cf. Sen, p. 14)

In this context, Sen says that Glover adds his voice to this line of reproach, in arguing that the Enlightenment view of human psychol-

[1] "The Reach of Reason: East and West", in the New York Review of Books, 47 (20 July 2000), republished, slightly revised, in The Argumentative Indian (London: Penguin, 2005), essay 13.

ogy has increasingly looked 'thin and mechanical', and 'Enlightenment hopes of social progress through the spread of humanitarianism and the scientific outlook' now appear rather 'naive'.

Still according to Sen, Glover "goes on to link modern tyranny with that perspective (as have other critics of the Enlightenment), arguing that not only were 'Stalin and his heirs' altogether 'in thrall to the Enlightenment', but also that Pol Pot 'was indirectly influenced by it'." (Sen, p. 35).

However, Sen recognizes that Glover does not wish to seek his solution through the authority of religion or of tradition, since, as he notes, in this respect, 'we cannot escape the Enlightenment'. Therefore, Glover would have concentrated his fire on forcefully held beliefs, to which overconfident use of reasoning substantially contributes. The crudity of Stalinism would have its origin in this kind of beliefs.

Sen also recognizes that "it would be hard to dispute Glover's pointer to the power of strong beliefs and terrible convictions, or indeed to challenge his thesis of 'the role of ideology in Stalinism'." On the word of Sen, "the question to be asked here does not relate to the nasty power of bad ideas, but rather to the diagnosis that this is somehow a criticism of the reach of reason in general and the Enlightenment perspective in particular." Therefore, he asks,

> "Is it really right to place the blame for the propensity towards premature certainties and the unquestioned beliefs of gruesome political leaders on the Enlightenment tradition, given the pre-eminent importance that so many Enlightenment authors attached to the role of reasoning in making choices, particularly against reliance on blind belief? Surely, 'the crudity of Stalinism' could be opposed, as indeed it was by dissidents through a reasoned demonstration of the huge gap between promise and practice, and by showing the brutality of the regime despite its pretensions – a brutality that the authorities had to conceal from scrutiny through censorship and expurgation."

Sen remembers that one of the main points in favor of reason is that it helps us to scrutinize ideology and blind belief. As he says, "reason was not, in fact, Pol Pot's main ally. Frenzy and unreasoned conviction played that role, with no room for reasoned scrutiny." According to Sen, "the interesting and important issues that Glover's critique of the Enlightenment tradition forcefully raises include the question: where

is the remedy to bad reasoning to be found? There is also the related question: what is the relationship between reason and emotions, including compassion and sympathy? And beyond that, it must also be asked: what is the ultimate justification for reliance on reason? Is reason cherished as a good tool, and if so, a tool for pursuing what? Or is reason its own justification, and if so, how does it differ from blind and unquestioning belief?"

3.

In his response, Glover says that consider Sen's critiques mistaken, since he has not become an opponent of the Enlightenment and has not stopped supporting reason.

Indeed, just like Sen, Glover wants to criticize reason with tools provided by reason itself. When he says that he wants to replace "the thin, mechanical psychology of the Enlightenment" for something "more complex, something closer to reality," he means that the dark side of our psychology is not something the Enlightenment thinkers seemed to be very aware. Actually, Glover keeps saying that one of his book's purpose is to defend the Enlightenment's hope that by understanding more about ourselves we can do something to create a world with less misery.

4.

At the start of the twentieth century, most people accepted the authority of morality in Europe. As Kant, in the eighteenth century, they thought there was a moral law that self-evidently should be obeyed, that the moral progress of humanity was possible, and that viciousness and barbarism were endangered. Glover notes that at the end of the century, because of its atrocities and the hopes they frustrated, it was difficult to be confident either about the moral law or about moral progress.

Glover proposes to resort to ethics to question history. The so-called "moral resources", which are the factors that prevent people from treating each other in a strictly selfish way, and the existing reasons to accept moral restraints of conduct, are central to his approach.

The purpose of using ethics to question history is, according to Glover, to help understand, to shed light on one side of human nature often left in darkness. He argues that, in understanding history, philosophical questions about ethics cannot be ignored. Poor answers to these

questions contributed to a climate in which some of the disasters were made possible.

Glover recognizes that understanding these things is not enough to stop the horrors. However, passivity helps its perpetuation.

Glover identifies himself with philosophers more sympathetic to a more pragmatic form of ethics, in which principles are applied experimentally, in the expectation that they are shaped and modified by our answers to practical problems, i.e., to the mutual adjustment between principles and our intuitive responses. This process would lead to what Rawls called reflective equilibrium.

Nevertheless, pragmatism can be taken even further, embracing the idea that our ethical beliefs should also be revisable in the light of an empirical understanding of people and what they do. If, for example, says Glover, the great atrocities teach us lessons about our psychology, this should affect our image of what types of actions and character traits are good or bad.

Ethics is not a highly abstract intellectual discipline to which people's understanding is not important. Glover hopes to engage ethics and psychology together, a project which involve thinking about the implications of some of the things we now know that civilized people are capable of doing to each other.

At the beginning of the century, there was optimism derived from the Enlightenment that the diffusion of a scientific and human perspective would lead to the evanescence not only of the war, but also of other forms of cruelty and barbarism.

Now we would tend to realize the Enlightenment view of human psychology as fragile and mechanical, and Enlightenment hopes of social progress through the spread of humanitarianism and the scientific outlook as naive.

One of the purposes established by Glover in his book is to replace the fragile and mechanical psychology of the Enlightenment with something more complex, something closer to reality. One result, he said, is to produce a darker account. However, the other purpose of the book is to defend the Enlightenment hope of a world that is more peaceful and humane, hope that understanding more about ourselves we can do something to create a world with less misery. Glover believes that this hope is well founded. According to him there are more things, darker things to understand about ourselves than those who share this hope have generally recognized. However, although his book contains much that is uniquely dismal, the message is not mere pessimism. Glover says

that we need to look hard and clearly, some monsters inside us, but that is part of the project of caging and taming them.

Before the horrors of the twentieth century, Glover assumes that a central part of morality should be concerned with preventing the recurrence of disasters caused by man, of the kind perpetrated by the Nazis.

Glover notes that rational self-interest can eventually lead to a "reciprocal altruism". Although not all generous acts are reciprocated, a generous approach to the needs of others makes it more likely the presence of friends when they are needed. However, the narrow self-interest, as we can learn from the lesson of the prisoner's dilemma, can be self-destructive. Cooperation is not always advantageous. Simply, under certain conditions, cooperation is more advantageous than selfishness.

All we can do then is expect that decent behavior have other roots than the calculated self-interest.

Fortunately, according to Glover, there are also moral resources, certain human needs and psychological tendencies that operate against the strictly selfish behavior. These trends make it natural for people to show restraint and respect, and to care about the others. They make it unlikely that the "morality" in a broad sense perish, despite the evanescence of the moral law.

What are these moral resources?

According to Glover, they would be three: moral identity, respect and moral standing, and sympathy. Those are, as he persuasively shows in his book, very fragile resources, but they are the only resources that we can effectively at least try to rely upon.

5.

Glover's realism in fact is not quite different from Sen's realism. Indeed, in the beginning of *The Idea of justice*, his 2009 book, Sen says:

> "What moves us, reasonably enough, is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate." (Sen, 2009, p. vii).

With these inaugural words, Sen aims to clarify unequivocally the content of their goals in *The Idea of Justice*. An absolutely fair world is a utopia with which almost nobody dreams anymore. It is not the frus-

tration of a perhaps unrealizable desire what moves us to action, but the realization that there are remediable injustices, joined, of course, by a genuine desire of remediating them.

The aim of the theory of justice proposed by Sen is precise. He does not want to know the nature of the perfect justice. Therefore, complicated issues over this subject, particularly in the prevailing theories of justice in contemporary moral and political philosophy, does not seem worthy of the effort to solve them. In fact, according to Sen, the questions that must be answered do not inquire what constitutes the perfect justice, but what can be done to promote justice and remove injustice.

It seems to me that Glover would totally agree.

References

Sen, Amartya. 2009. *The idea of justice.* Cambridge, MA: Harvard University Press.

Glover, Jonathan. 2012 (2001). *Humanity: A moral history of the 20th century.* New Haven: Yale University Press.

The potential of testimony in transitional justice: what truth can it bring to light?

Laura Degaspare Monte Mascaro

Abstract: Frequently, authoritarian regimes, accompanied by extremely violent human rights violations perpetrated by the state, leave a mark on the past of a people's history, which has to be remembered and understudied for this people to be able to project its future with freedom and comprehension. Therefore, it is even worse when that period in history comes accompanied by what we call here forgetting, represented by the emergence of a gap between past and future, which prevents properly dealing with the past.

Transitional justice proceedings can be a very important stage where the memory of the past and of its horrifying events may emerge. We intend to discuss here the potential of a specific procedure usually adopted by transitional justice: the hearing of testimonies from victims and others affected by the regime.

The opening for testimonies allows the existence of a proper space, were the multiplicity of voices and truths of the victims can be heard. The testimonies go far beyond the truth of the facts and the documentary truth, reaching to memory and revelation of the identity of the victims. Evidence may not come from testimonies, but they may bring a literary, non-factual, truth (Jacques Derrida).

Also, the orality of the testimonies vivifies the experience and memory, which is not a trail here, but live expression (Jacques Derrida). Suffering dwells at the vicinity of the soul, not of the spirit, therefore how can it be disclosed to the world of appearances and signified through discourse (Hannah Arendt)?

Finally, at the testimony, the question of whether the author is an important piece of the puzzle or not for its comprehension is more clear, considering that the witness is the one having its identity and experience revealed at the stage, making possible to reach a more "spiritual interpretation" (Saint Augustine).

Keywords: Transitional Justice; memory and truth, testimony.

I. A gaze into Brazilian past and future

For the consolidation of the Brazilian Democratic State of Right, established by the Constitution of 1988, it would be fundamental to understand our dictatorial tradition, marked by violence and barbarism, which has been gradually dissolved to make room to the current democratic regime. We are driven by our temporal existence to give some meaning to tradition starting from the horizon that can be seen from the point where we are standing; in other words, we must dialogue with tradition in order to reach a comprehension that will serve as a base to our future projects (MAMAN, 2003, p. 54), individually and as a community. Accordingly, how can we create a future project of Brazilian society by ignoring its past?

The Brazilian State redemocratization process has imposed to our community in general, and to the victims and familiars of the dead and missing during the military regime in particular, a burden even heavier than the reconciliation: the onus of forgetting. At that moment, carrying out an agreement so that the redemocratization process could be accomplished in a "pacific" way went through the political understanding that the crimes perpetrated by the agents of the dictatorial regime would be somehow covered up by forgetting. This pact was sealed by the amnesty law (Law nº 6.683/1979).

People didn't realized, however, that with the veil that has been put over memory, an even greater debasement of human beings was produced, because consisted of a violence that curtailed the very possibility of care towards the human existence while it's most fundamental freedom.

The apparently gradual transition from the authoritarian regime to the democratic one has concealed a fracture of the worst kind, a disruption that cost the silence of an entire tradition and, thus, of the past that speaks through men. This fracture can be read as the one targeted by Arendt's philosophical investigations (LAFER, 1995, pp. 49-51): as a gap between past and future that prevents comprehension. What we call here forgetting represented this gap that prevents us from dealing with the past.

Thereby, only with the knowledge and understanding of the criminal violence intromission in large scale at the Brazilian State during the referred historical period will be possible to build a new model of state: that denies on solid grounds this violence and creates dialogical

forms of political action.

II. Memory versus factual truth

Memory, is important to set clear, differs from history, because chooses, selects and is lived at the present, with the concern for the future, and is characterized by the vivid remain of a past (LAFER, 2012). As in Drummond's poem *Resíduo*, is about a selection, a pool, a trace and its subjective nonfactual truth:

> (...)
> E de tudo fica um pouco.
> Oh abre os vidros de loção
> e abafa
> o insuportável mau cheiro da memória.
>
> Mas de tudo, terrível, fica um pouco,
> e sob as ondas ritmadas
> e sob as nuvens e os ventos
> e sob as pontes e sob os túneis
> e sob as labaredas e sob o sarcasmo
> e sob a gosma e sob o vômito
> e sob o soluço, o cárcere, o esquecido
> e sob os espetáculos e sob a morte escarlate
> e sob as bibliotecas, os asilos, as igrejas triunfantes
> e sob tu mesmo e sob teus pés já duros
> e sob os gonzos da família e da classe,
> fica sempre um pouco de tudo.
> Às vezes um botão. Às vezes um rato.
> DRUMMOND

Yet, how to think at the fulfilling of a collective right to memory in relation to serious human rights violations that occurred during the Brazilian military dictatorship? Further, how to conciliate the construction of such a collective memory with the search for the truth, with the right to truth. Which truth are we talking about when we refer to the work of the National Commission of Truth? With no doubt, according to Celso Lafer (2012), we are talking of factual truth. Nevertheless, can this factual truth encompass memory and understanding of the events?

The National Commission of Truth wasn't created to have a legal approach to the facts and responsibilities, which would reach a final

conclusion in a certain moment that cannot be altered, culminating in the *res judicata*. Historical judgment, on the contrary, is much more open and subject to revisions. The work of the Truth Commission comes to contribute with this last approach, however, the extent of history is really hard to be framed within a process as ephemeral as the Commission, which, by the end of its works, must produce a detailed report (LAFER, 2012).

Celso Lafer (2012) considers that, independently from the recognition of the Amnesty Law's validity and fairness, the Truth Commission has its own merits in the Transitional Justice agenda, once it (i) goes against forgetting; and (ii) represents the affirmation of the collective right to the factual truth concerning serious human rights violations.

On the other hand, according to his considerations, the fact of torture is irreparable, indelible, and the Truth Commission must be concerned with the very memory of that stain and of what is related to it (LAFER, 2012). However, the stain, the truth that arises from this suffering, not always serves the appeaser purpose that instructs, for instance, amnesty. Derrida wisely questions (2005, p. 84): "what does 'truth' means here, and what to do when the so said 'truth' can be an obstacle to reconciliation, rather than conduct towards it?"

What concerns us here is how to bring these facts to light, and, more importantly, bring them to the light of an individual comprehension, by those directly involved, as well as of a collective understanding, by the people, and even universal. The understanding, however, about the past and the authoritarian tradition must not be unique. Many voices have to be heard at the public space and many narratives built.

Then, truth commissions have the purpose of establishing "one truth" about serious human rights violations occurred during authoritarian regimes, and they are instituted for a determined period of time, having greater or smaller range. Usually, they not only have to put together an archive that ensembles sound and visual records, apart from documentation, transcriptions, deliberations, but also build a report that already operates a cut, a selection, an interpretation (DERRIDA, 2005, p. 84).

III. Testimonial truth as Saint Augustine's spiritual understanding

No doubt that the opening of the archives of the dictatorship,

while documentary sources of that period, will contribute to the reconstruction of the facts occurred at the time. These documents will be target of assessment and analysis by the historical method. As we mentioned, the comprehensive unveiling of the dictatorial period depends not only on the facts to be discovered. The big question would be: how to look at and treat the wounds of the past?

In order to fulfill its purpose of uncovering the facts once masked, the truth commission can make use of certain tools such as the disclosure of archives, access to information and testimony. Disclosure of archives and access to information usually grants experts access to documents kept in secret by the same institutions that perpetrated crimes in the past. Although it is a very valuable and necessary resource, once the truth sought is opposite to hiding and dissimulation (LAFER, 2012), we know that each unveiling entails a necessary occultation of a portion that remains concealed. Therefore, there must be different ways of accessing the facts that provides a more complete and multifaceted picture of the so called truth, which is also so fragmented.

The validity of documentation is that it usually brings a much more unchanged version of the facts. Documents are not a place of memory, since memory should be alive. They usually contain a version of the facts registered in the time of the events and conserved. They are what can be called a *trail* traced by the writing, which has to be brought to life by the expert's interpretation. They usually carry a very literal significance, which is the heart of its legal certainty and reliability.

Another thing that differs the truth brought by documents of the one brought by testimonies is the fact that documental truth is impersonal. There is no personal "I" in the discourse disclosed by a document. It is usually an institution or a "position" that subscribes it and we cannot be sure about *who* wrote it. Therefore, the speech brought by the writing in a document is not present, it is absent and so is its author.

Getting back to Plato's *Phaedrus* and Derrida's *Pharmakon*, on the myth of the invention of writing, this tool is criticized firstly because the writing is far from the speech as the speech is far from the thinking (*dianoia*) and secondly because it wouldn't be a medicine to memory, but on the contrary, a poison, once memory is a live thing that should be exercised, not substituted by a prosthesis (NASCIMENTO, 2001; COMPAGNON, 1998, p. 58).

Therefore, the dualism of thought and language is very important when we refer to memory in the philosophical and ethical fields. Aristotle's *Poetics* expresses this dualism in the separation between history

(*muthos*) and its expression (lexis). At the classic rhetoric, because of the legal structure of its original practice, such dualism is translated by the dichotomy between *intentio* and *actio*, or *voluntas* and *scriptum* (COMPAGNON, 1998, pp. 58-62).

Saint Augustine denounces the hermeneutic mistake that consists in privileging the *scriptum*, instead of the *voluntas*, considering that the writing is equivalent to the body that imprisons the spirit or the soul. Thus, Saint Augustine sides with a spiritual reading of the text, in opposition to the carnal or corporal reading, and identifies the body with the writing and the canal reading with the one that cannot go beyond the text and cannot infer other meanings apart from the literal one. However, it is clear that in the same way that the body has to be respected, he recognizes that the writing should be preserved as the starting point to the spiritual interpretation (COMPAGNON, 1998, pp. 58-62).

The distinction between carnal and spiritual interpretation is not originally from Agustin, but refers to the Pauline binomial: "*the letter killeth, but the spirit giveth life*." (AUGUSTINE, 2009, III, 5)

So, how can we bring up the presence of spirit and soul that is missing in the documents? How can we make the soul rise to the surface?

One of the important things for us to mention at this point is the opening of the Truth Commission for testimony[1]. This opening makes room for a proper space, in midst of the proceedings of the Truth Commission, for the multiplicity of voices and truths of the victims. Note that because they are discourses based on the memory of individuals – and not official documents, to which can be attributed certain certification of the truth as suitability to certain parameters – we are dealing here with the elaboration of discursive truth, from fragments of memory, the selection of these fragments and testimonial speech.

Nuremberg trials focused on documentary evidence and there was no space for the voices of the victims, which, in its turn, was found in the Eichmann trial, due to the testimonies of the victims' wide range (LAFER, 2012). In the context of the Truth and Reconciliation Commission of South Africa were also collected testimonies, which were analyzed by Derrida's brilliant lecture *Forgiveness, Truth, Reconciliation:*

[1] The space of these testimonies, however, for the construction of this truth, is not limited to the Truth Commission, having testimonies been collected before other commissions with different purposes, such as reparation and for the creation of other spaces of memory such as the Resistance Memorial in São Paulo, for instance.

What Gender? (2005). At the context analyzed, however, the forgiveness was dealt as a public subject, delegable and exploited by the political utility, what is not intended, at least not explicitly, by the Brazilian National Commission of Truth.

Derrida (2005) questioned whether the validity of testimonies as factual evidence should be trusted, once proof, evidence, will never be of the order of testimony. Maybe not, but they still have the power to bring out a truth other than the factual. Finally, perhaps the goals of the Truth Commission should not be restricted to factual truth, risking, however, having an unpredictable end.

Going back to Augustine (2009), he considers the speech more close to the "the word that we have in our hearts" than what he calls "signs". According to him:

> Just as when we speak, in order that what we leave in our minds may enter through the ear indo the mind of the hearer, the word which we have in our hearts becomes an outward sound and is called speech; and yet our thought does not lose itself in the sound, but remains complete in itself, and takes the form of speech without being modified in its own nature by the change. (AUGUSTINE, I, 12)

We can observe that Saint Augustine doesn't establish a difference between what comes from the heart and what comes from the mind, between soul and spirit. Hannah Arendt, on the contrary, does that on *The Life of the mind*, while explaining how soul could be disclosed as an inauthentic appearance.

IV. Bringing the soul to surface

First of all, appearance not only shows, but also conceals something, as what is veiled and unveiled at the *a-letheia*. According to Merleau-Ponty ([S. d.] *apud* ARENDT, 1992, p. 21), quoted by Arendt, "nothing, no side of something shows itself without effectively hiding the others". Therefore, protection might be one of the most important features of appearance.

Subsequently, Hannah Arendt (1992, pp. 23-25) operates an inversion of hierarchy between appearance and substance, considering that appearance may be more significant than the functions it conceals, which serve to the preservation of the individual and the species. Ac-

cordingly, follows the distinction between authentic and inauthentic appearances: from things that spontaneously are offered to the senses and things that only are shown in consequence of a violation of the authentic appearance.

In consequence, what is shown authentically is what distinguishes us as individuals, because from the inside we would look all the same. But why is it important to discuss the testimony? Because this analysis may be adequate not only to the functions of the body, but also to the dichotomy *spirit*/*soul* versus *language*.

Appearance shows a power of major expression compared to what is internal. The presupposition that soul and spirit are the same - because both are opposed to the body due to the invisibility that characterizes them - doesn't apply when it comes to the way of expressing and making them come to the world of appearances. What applies to the spirit doesn't apply to the soul. The metaphorical discourse is indeed adequate to the activity of thinking (spiritual), but the life of the soul is much better expressed in a look, in a sound, in a gesture, than in the speech (ARENDT, 1992, p. 26).

For the spirit, even the mute activity that doesn't appear already constitutes a kind of speech, the silent dialog of me with myself and, as stated by Augustine (2009, I, 12), isn't altered in nature when takes the form of speech. Our feelings, passions and emotions, on the other hand, have the same trouble of our internal organs to become part of the world of appearances.

When Hannah Arendt discusses the past of totalitarianism, she argues that this past has proven to be incapable of being "dominated", indicating that If the refuse to think the unthinkable has prevented us to reevaluate legal categories, that appear to be harmless side issues, what to say about the horror? This is an obstacle for the understanding, since a lot of attempts to translate experiences - which are mostly emotive and forbid the speech - have shown to be inadequate. Thereby, it is necessary to keep in mind the difference between the unspeakable horror and not so horrific experiences, but frequently repulsive. As stated by Celso Lafer (2012), the fact of torture is irretrievable; however, is the memory of this stain that must be dealt by the Truth Commission.

How, then, can we expose these experiences of suffering into the world of appearances? Every form of demonstrating that suffering, apart from physical signs, is nothing more than what the activity of thinking does with this raw material, and is distinct from the suffering itself. Involves a decision of what should appear, and how. And so, at

the moment of reflection and transfer to the form of speech, is the time to signify the feeling, through the spirit. It is this sense that is given to the experience of suffering, beyond the fact itself, that must be seized and will allow the victim to identify his or herself as such. And how the individual carries this translation, is what makes that suffering and person unique, not the suffering itself (ARENDT, 1992, p. 28).

V. The scene of the testimony and its character of presence

According to Hannah Arendt (2001, p. 199), the "stories" produced by action and by the web of human relations say a lot about their subject/character, the hero who is in the center of every story - who, however, can't be called its author, because no single individual can[2]. According to Hannah Arendt, the real story, in comparison to a fictional one, has no visible creator because isn't created and the only "who" it reveals is its hero. Therefore "we can only know who a man was if we know the story of which he is the hero - in other words, his biography (…)" (ARENDT, 2001, p. 199).

This way, another important aspect of the testimony and its differing presence is the attendance of the victim or witness in *body and soul*, as we commonly say. According to Derrida (2005, pp. 80-84), the scene of the testimony and of truth, of the unveiling of truth, stages the witness' body that can also be a victim (of torture, rape). New issues arise from this presence: the violence inflicted upon the testimonial body at the very moment of the testimony, by testimony, by its veracity, either because for the first time the woman has to unveil the traces of violence on her body, either because has to report one or several abuses. As pointed out by Arendt, in some cases, the suffering as found in the soul cannot be spoken, because it would make the victim revive or even enhance the prior violence.

Every violence inflicted on the body, is somehow, sexual abusive. For this reason, some women at the South African Truth and Reconciliation Commission couldn't reveal the truth, being incapable of manifesting what had been inflicted upon them, precisely because their public and private speech about the experience had been murdered *a priori*. Sometimes, the condition of testimony doesn't exist and, when it does, since the experience is revived by the testimony, an objection that could be made to the truth and reconciliation project in South Africa: that these two purposes couldn't be conciliated (DERRIDA, 2005, p. 78)[3].

[2] Further, humanity is an abstraction that can never be considered an active agent

[3] Far from healing the wounds, sometimes this speech reactivates the hate, even because

One of Derrida's metaphors that reinforces the aspect of presence of the testimonies is the metaphor of the theater. The limited time of operation of the Truth Commission makes it the stage of a play, when truth comes to the stage. Derrida (2005, p. 85) states that "there is a stage in which scenes, acts, must be represented, with its proper duration, namely, a finite one"[4]. Once the drama and the catharsis have occurred, the curtain must fall.

In this sense, the limited time for the search for truth is a theatrical time, controlled, as well as the structure of the stage, the actors, the acts and the scenes that take place in a particular time and space. A question that rises inevitably is whether this singular performance is enough so that these actors and the audience handle the truth presented and not presented. It is also curious that the metaphor of the theater is often used to understand and picture the court and trial[5]. Even though the purpose of a truth commission is not the same as the purpose of a trial, were the facts and the truth will be interpreted as they fit in the criminal law standards or not, both are limited in time and have the character of presence when it comes to the testimonies, which make both resemble a performance.

Not for nothing that Hannah Arendt (2001, pp. 199-200) states there are many ways to reify the content and meaning of action and discourse in a work of art, however, the best way to express the action and discourse revealing character, which is intimately connected to the live flow of speech and action, is the drama that "imitates" action. The *mimesis* element is present also in the act of writing the play; however, it only achieves its full existence when interpreted at the theater:

> Only the actors and interlocutors who reconstitute the plot of the story can transmit the whole meaning, not so much of the story itself, but of the 'heroes' that it highlights. (ARENDT, 2001, p. 200)

In terms of Greek Tragedy, the universal meaning of the story is revealed by the chorus, that doesn't mimic and whose commentaries are pure poetry. The theater, thus, is seen by Arendt as the art of politics par excellence. We must highlight the conflict of the Greek Tragedy, which

---

the character of presence of the testimonies makes the meeting between the victim and the perpetrator a very plausible possibility.

[4] Free translation by the author.

[5] As in *Jogo, Ritual e Teatro: Um Estudo Antropológico do Tribunal do Júri*, by Ana Lúcia Pastore Schritzmeyer.

is: how can one act politically (*praxis*), when one is not free?

Heidegger, in his *Parmenides*, shows an opinion on the Greek tragedy that also relates its way of representing to the character of the *polis*. The polis, as historical residence of the Greek humanity, and the stage for the *aletheia* conflict[6] has a cruel, atrocious character, where the ascension an fall of man take place[7] (HEIDEGGER, 2008, 132-133). The disclosure and concealment of the being happen on the basis of the speech and, very particularly, are pictured at the tragedy. The tragic mask that makes it so different from the subsequent dramatic arts is a symbol of the duality of *aletheia* that existed in the polis.

The way the Greeks inhabited the world and expressed themselves literarily and poetically at that original space of politics was the tragedy, making use of myth language to express the covering and uncovering of being, discussing the issue of the historical struggle of man against his fate. According to this analysis, this is the true meaning of the tragedy.

The tragedy tries to mimic the action, outlining the boundaries of freedom. The Greek tragedy essentially portrays human freedom against the fate guided by the *daimons*. The essence of tragedy, therefore, lies in the political man in full action, not in the modern political action, we must say, but in the original one, which is close to Arendt's understanding.

Consequently, we wonder if the truth revealed by the testimonies is the kind of truth pursued by the traditional historical method. Maybe the purpose of the truth commission itself, by its final report, is a supposedly objective truth, as an historian could intend to determine and fixate. However, the truth revealed in the testimonies may not be so objective, but yet fragmented and, at large, gathering multiple aspects of the so called truth, each one revealed by a unique speech that brings an singular understanding of what really happened.

As these reports are mostly informed by the live memory, than by a look that remained frozen in time, the most important aspect brought by them is not the fact or the experience itself, but what has been done with it. How it was processed and interpreted by the spirit and thinking over the years. The movement of the spirit, according to Derrida's interpretation of Hegel, is what constitutes its method and this movement is

[6] Were the beings are hidden and disclosed.

[7] It is not incidental that men are pictured like this in the tragedy, because the need for the tragedy comes from this rooting of the *polis* in the conflicting character of *aletheia.*

what is on the scene (DERRIDA, 2005, p. 69).

When a woman in the South African Commission, whose husband was kidnapped and murdered, is invited to hear his assassins' testimony, she is questioned whether she is willing to forgive them. And she isn't. With this statement she goes beyond her unique and unspeakable suffering. She signifies it, going against the sense of a forgiving taken from her by a government, or any political-legal device. Her "exact" words were: "No government can forgive. [Silence.] No commission can forgive. [Silence.] Only I can forgive. [Silence.] And I'm not willing to forgive [Silence.]"[8] (DERRIDA, 2005, p. 75).

By saying "only I", she also means that the first victim, her husband, is dead. This makes us remember Primo Levi's testimonial and literary work *Se questo è un uomo*, considering that he, as a survival, admits to write "by power of attorney", namely, on behalf of those who perished and who cannot return to tell their own death (BOBBIO, 1997). Thereby, we can see what we call intersexuality arise from the multiple references established consciously or not between one speech and the other.

Also, this woman's statement, which was translated from a local language, raises the issue of the language that is imposed to the witnesses in their testimony. The mandatory or adequate language to these commissions tends to impose certain logic, sometimes, legal or political to what is said or translated. Considering the cases of indigenous people that had entire villages or communities decimated during the Brazilian military dictatorship - as recently emerged with the "discovery" of the Figueiredo report into genocide, torture, rape and enslavement of indigenous tribes[9] -, this matter is really important to be presented.

The local languages or dialects also translate the singularity of the victims' untranslatable suffering. And the meaning of certain words or expressions can easily get lost when the witness is "advised" to use a more convenient language, or when its speech is translated or reported by other experts with their own words, belonging to a certain *métier*, let it be legal, journalistic, psychological etc. According to Derrida (2005, p. 76), "when reading the sessions memoirs, with all those filters, we no nothing, we must admit, of what really occurred. Particularly since the

[8] Free translation by the author.

[9] <http://www.theguardian.com/world/2013/may/29/brazil-figueiredo-genocide-report> Accessed on August 9th, 2013.

irreducible screen of language is at once filtrating and deforming"[10]. The character of presence of the testimony should be sheltered even concerning the language spoken.

VI. Literary memoir and oral testimony

I must make a reservation; however, in view of the option we took in this lecture to approach not all kinds of testimonial reports, but only oral testimonies. Although there are outstanding testimonies belonging to the field of literature, written narrative, *memoirs*, etc, we had to make a choice for this work, once the way of being of these two kinds of narratives are extremely different and the issues that each one raises in terms of philosophical and linguistic thinking are indeed related, but sometimes are two sides of the same coin, thus, opposed. It is important to stress, then, that testimonial language is different from the testimony itself, which we are now discussing.

Mandela's *memoirs*, for instance, written during his martyrdom in captivity for 27 years, was essential for the translation of his pain to the testimonial language. And it was essential for his reconciliation with the oppressor as well, as an intimate process, but not only. According to Derrida (2005, pp. 60-62), his narrative would serve to free the oppressed, but also his oppressor, because it was destined to the other, it brought the reconciliation speech to the other. For Mandela, the political reconciliation process has always been connected to the walk to freedom. The reconciliation appeal had always been connected to the transcendental ideal of freedom, because he intended to address this freedom not only to his people, but to the oppressors as well.

This transcendental and political meaning that was given to his personal experience and suffering shows how can the testimonial language - and the effort of turning all that was lived into a structured and temporal narrative - help us signify history itself, our past of oppression. This is the kind of reading that should be made of the testimonial language: a reading that goes beyond its literal meaning. Quoting St. Augustine (2009, III, 9): "Now, as to follow the letter, and to take signs for the things that are signified by them, is a mark of weakness and bondage, so to interpret signs wrongly is the result of being misled by error".

The carnal interpretation is typical of formal documents and reports and shouldn't be reproduced by the commissions' members and others whenever listening, of even reading, a testimony, because that

[10] Free translation by the author.

would mean the "subjection to the flesh by a blind adherence to the letter".

In addition, the literary aspect of Mandela's *memoires* made possible his discourse to be addressed to the world and to future times, surpassing the barriers of time and space. His narrative could transmute the fight for a particular cause, into a universal cause. This extrapolation is more complicated to be achieved by the oral testimony; however, it has its own merits.

References

ARENDT, H. **A Condição humana.** 10. ed. Rio de Janeiro: Forense Universitária, 2001.

_____. **A vida do espírito:** o pensar, o querer, o julgar. Rio de Janeiro: Relume Dumará/Ed. UFRJ, 1992.

ST. AUGUSTINE. **On Christian Doctrine.** Christian Classics Ethereal Library, 2009.

BOBBIO, N. Primo Levi, se questo è un uomo. In: **Nuova Antologia**. - A. 132, fasc. 2202 (apr.-giu. 1997), p. 19-23

COMPAGNON, A. **Le démon de la théorie:** Littérature et sens commun. Paris: Édition du Seuil, 1998.

DERRIDA, J. O Perdão, a verdade, a reconciliação: qual gênero?. In: NASCIMENTO, E. (org.). **Jacques Derrida:** pensar a desconstrução. São Paulo: Estação Liberdade, 2005. pp. 45-92.

HEIDEGGER, M. **Parmênides.** Petrópolis: Vozes, 2008.

LAFER, C. **Desafios:** ética e política. São Paulo: Editora Siciliano, 1995.

_____. **Justiça, História, Memória: reflexões sobre a Comissão da Verdade**. Seminário Internacional: História Contemporânea: Memória, Trauma, Reparação. Rio de Janeiro, UFRJ, IH/IFCS, 10, mai. 2012.

MAMAN, J. A. **Fenomenologia existencial do direito:** crítica do pensamento jurídico brasileiro. 2 ed. São Paulo: Quartier Latin, 2003

NASCIMENTO, E. **Derrida e a Literatura:** "notas" de literatura e filosofia nos textos da desconstrução. 2 ed. Niterói: EdUFF, 2001.

The State in crisis
Biopolitics and the state of exception

Elsa Cristine Bevian[1]

Abstract: The state as democratic sovereignty is in crisis. The economization of power relations, globally, is eroding the principles and purpose for which the state was idealized. As Bauman says, "power is global, but politics remains local." Sovereign is the capital, that rules the market, as if there were no states. A quality education, to educate citizens, is stifled by an education marketing, supporter of education competitive, revealing the failure of the state through institutional violence, permissive. There's excessive preoccupation with biological life, with the body, featuring biopolitics and resulting in the absence of reflection and critical thinking, and therefore, a society apolitical.

For Agamben, biopolitics the river runs underground form throughout history, and biopolitics, in this sense, at least as old as the sovereign exception. Foucault claims to be a phenomenon that started in the eighteenth century, when the state puts the biological life in the center of your calculations.

The power produces truths and subjection. You need to defend society from itself. How I made with analysis of reality, to be able to think again? A person's body is able, make a positive force. It is possible the body another reality, being and doing different? The truth is a constituent, is present in religious discourse, scientific, institutional. The truth is a problem and where there is no limit, there is no freedom. The practice of freedom is I always put me on edge. I'll move to new horizons, to new possibilities. The truth is tension between the limit and possibility. Instances transform limits on new possibilities. The fewer the instances of authoritarian power, the greater the possibility of freedom. Truth and freedom act as puzzles, always at opposite poles, but constitute mutually, is a game, a tension. I am the fruit of social tensions. What is truth and what grounds should I take to be legitimate or true?

We need to strengthen the rule of democratic sovereignty and this is possible only through education and training policy. Relationship of resistance

[1] Alumni of the Interdisciplinary Doctorate Program in "Ciências Humanas" at UFSC. Member of the faculty staff in the Department of Law at Universidade Regional de Blumenau/SC (FURB) teaching General and Professional Ethics, Labor Law and Collective Law. She's been performing research and extension work on the world of work.

or acceptance, as forms of expression of power, from a single instance to a higher instance. If we experience a state of exception, failure of democracy to overcome competitive social pathologies, it is necessary to overcome the passivity and neutrality in the face of important topics. You must redeem the want of will to truth and power.

Keywords: democratic sovereignty; state of exception; biopolitics.

1. The State idealized by Hobbes and its transformations

When Hobbes writes about the natural condition of the mankind regarding its happiness and misery, in Leviathan, he claims that "Nature hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he."[2]

For Hobbes, it is from equality in terms of capacities that the equality in terms of hopes derives. It is the hope to achieve our purposes. However, since many desire the same purposes, and when this is not possible, they eventually start to compete with one another, often becoming enemies, making an effort to destroy or subjugate one another; this reality of human nature generates distrust. He claims that one expects the other to ascribe the same value that he ascribes to himself, and facing all the signs of contempt or underestimate, he naturally makes an effort towards the glory, even causing damage to the other.

Facing the distrust among human beings and the constant state of war due to his survival instinct, the author claims that there must be a common power to regulate men, for where there's no regulation or law, there's no notion of good and evil, justice and injustice. For Hobbes, the justice and injustice are not part the faculties of body and mind, and these are qualities that belong to the human beings who live in society.

"The passions that incline men to peace are: fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggested convenient articles

[2] HOBBES, Thomas. Leviatã ou Matéria, forma e poder de um estado eclesiástico e civil. Thomas Hobbes de Malmesbury; tradução de João Paulo Monteiro e Maria Beatriz NIzza da Silva. 3ª ed, São Paulo: Abril Cultural, 1983. p.74.

of peace upon which men may be drawn to agreement."

In order to provide security, people abdicate their state of nature, in favor of a constitutional covenant of the State, whose role "is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will." (HOBBES, p.105) And we agree with the sanction resulting from the breach of covenant, because covenants without the sword, as the author asserts, are but words and of no strength to secure a man at all.

The social, political and economical relations have significantly changed since the XVII Century until the current XXI Century. We've gone through major revolutions in the field of ethics, the social organization, the economy and politics. We are experiencing the economical globalization revolution, which means the State is unable to ensure, through the covenants, the security for its citizens. We are experiencing times when, according to Bauman, the (economical) power is globalized, however, the politics, being the space for reflection and discussion on the social organization, remains local.

We experience the violence of one subject against another, disputes for the survival and for the power of domination, through the concentration of wealth. It is power legally permitted by the State, without limits, though, that doesn't benefit the collective welfare and security. This State, neoliberal, takes advantage of the social disorganization - the less social organization, the fewer demands, requirements, responsibilities, the less fair enforcement of the law. The State, as it was idealized by Hobbes, aimed to ensure security to its people; today, it allows lives to be snuffed. The omissions and weaknesses take place in all State branches – executive, legislative and judiciary, and in all the realms.

The democratic system is involved with buying and selling of votes, trickery and favoritisms, benefiting whoever has more money to invest in election campaigns as opposed to the public and egalitarian funding. These favoritisms and exchange of favors, are often hidden, through bidding procedures, omissions in inspections, withholding and tax exemption or other forms. There are a number of ways of corruption in the state system.

Our concerns come from the judicial work in law, as well as from working on teaching, research and extension that we accomplish at the University about the world of work and also environment issues. There is plenty of questioning that has been following us such as: 1) is it possible that law, being fruit and result of an agreement in a certain historical moment, can solve social problems? 2) Once there is the pre-

script/law there's a prescript/law, with advanced conceiving, why isn't it often enforced if it aims the social welfare? 3) What is power and how is it expressed through biopolitics? 4) Does guaranteeing participation of workers in the councils, through the law, solve their problems or the issues about them being less explored and controlled?

2. Power, biopolitics and State of exception

Foucault (1999, p.20-21) asserts that "power is that concrete one which every individual holds and whose partial or total cession enables political power or sovereignty to be established. [...] Power is essentially that which represses nature, the instincts, a class, individuals." The power, for the author, circulates, works through networks, passes through the individuals and is never held as a wealth or a property. People are not dominant or dominated the whole time. He still claims that "we have to study power outside the model of Leviathan, outside the field delineated by juridical sovereignty. We have to analyze it by beginning with the techniques and tactics of domination." (FOUCAULT, 1999, p.40)

Politics, for Foucault (199, p.23), would be "the continuation of war by other means. Politics, in other words,sanctions and reproduces the disequilibrium of forces manifested in war." For the author, law – as a fruit of politics and power, does not produce peace, and the war keeps doing damage in the inside of all mechanisms of power, even the most regular ones .

The law is, therefore, result of social contradictions, it isn't only result of constituted authorities, but result of social practices. Law, not as *a priori*, but *a posteriori.*

Foucault claims that freedom and power cannot be dissociated and that, where there's power, there's possibility for change. It takes resistance so each one can take care of himself, govern himself, and not be overruled by others. Freedom is, in itself, the politics. For such reason, the strife for ethics, about whose absence there's so much complaining, is the strife for freedom, which means fighting for the creation of prescripts, fighting for the enforcement of existing prescripts, as well as submitting the prescripts to critical thinking if we realize the distance between the legal and the legitimate/just. As we know, for Foucault (2006, p.267), "ethics is the form that freedom takes when it is informed by reflection". For him, as much as we cannot live without there being governance devices in which we are inevitably inserted, it is essential

that we diminish the states of domination, and can establish new forms of subjectivity, fighting for ethics: it is related to the articulation point between the ethical concern and the political fight for respect of rights, between the critical reflection against the abusive techniques of the government and ethical investigation that allows the institution of individual freedom." (FOUCAULT, 2006, p.285)

Agamben, in his work *Homo Sacer* (2002), uses the "bare life" as the protagonist of his work, which would be equivalent to the extinguishable being in in Roman Law, in the sense that *homo sacer*' life could be eventually exterminated by anyone without any law being violated. He asserts that "politicization of "bare life" as such – constitutes the decisive event of modernity and signals a radical transformation of the political-philosophical categories of classical thought." (AGAMBEN, 2002, p.12)

The concept of "bare life" is applied to the world of work, as the workers are found in this condition, being extremely controlled, submitted to strenuous labor conditions, with goals that are beyond physical and mental limitations. To guarantee their job maintenance, in times of globalization, with surplus labor and moreover, with low-acquisitive-power salaries, they end up submitting to this system, with no resistance and becoming eventually ill.

The current capital – financial and economical power, does not have a specific nation and moves quickly between the spaces/nations and there's no regulation or world consensus to balance the international Market. The international organizations are failing to balance the economical relations between the nations and let alone, hold the thirst for profit of the international financial system. The International Labor Organization – ILO, is limited to establishing Work Regulatory Conventions, however, the States, that proclaims themselves as "sovereign" for a constitutional principle, are not obligated to ratify these Conventions, incorporating them to their legal order. As Bauman (2009) claims, "we're living a lapse in which, virtually, everything can happen, but nothing can be performed with complete security and certainty of success. One of the main characteristics of this interregnum is the increasing divorce between power and politics. The power has become global and politics hasn't managed to transpose the local. The territory-state-nation Trinitarian principle is in crisis."

Foucault (1999, p.40) affirms that "We have to study power outside the model of Leviathan, outside the field delineated by juridical sovereignty and the institution of the State. We have to analyze it by

beginning with the techniques and the tactics of domination." For the author, this new kind of power – the disciplinary power, is one of the major inventions of the bourgeois society and was one of the fundamental tools for the implantation of industrial capitalism and the kind of society to which it is correlated.

What legitimates power? The power as institutions? We need a new economy of power relations. We experience "transversal struggles", that are effects of power of some over one another. Relations of resistance or acceptance. They start from an individual extent to a larger extent. In this sense, Foucault, in the text The subject and the Power (1995), claims that we should not look at the regulated and legitimate forms of power, but look at its extremities, at its outer limits at the point where it becomes capillary, in the local, regional institutions. He also says that we should not analyze the power on an level of the intentions or decisions (decision-making extents), but in the actual practices, where the power produces the real effects. We should not take the power as a phenomenon of massive domination, but as something that circulates, that works through network, in which the individuals are always in conditions of submitting and being submitted. It passes through our bodies, but one should not do the analysis from the center (State – legislative, executive and judiciary) to the periphery (individuals), but rather do an ascendant analysis of power, within the infinitesimal, small, located devices, peripheral, where the techniques and devices operate and produce their effects. And finally, he affirms that we should not analyze the power in terms of ideology, but its instruments and effective techniques, its fine mechanisms and where the power keeps its connection with knowledge.

We are living times of biopower – making it live and letting it die and biopolitics with the general sense of political power that operates as a formulator and an actor of a domination or nationalization of life. The purpose of biopolitics is the multiple body, the human being as a member of human species, rather than as an individual body, that was target of disciplinary power, initial form of biopower in modernity.

The biopolitics does not clash with the sovereignty theory. Agamben claims that the biopolitics is the original contribution of the sovereign power, because it is as old as the sovereign exception. For Agamben, the original structure of the sovereign power brings along a specific relation with life, a relation of exception. Sovereignty means always – for Agamben – that life is being exposed to violence and to the death power, in other words, that all the exercise of sovereignty includes in itself the

game of inclusion and exclusion, typical of the state of exception that defines all the exercise of sovereignty. Whereas for Foucault, the biopower is a specific form of power, for Agamben, all political power, all exercise of sovereignty, is always biopower.

For Agamben, sovereign is whoever decides over the state of exception, is whoever is, somehow, outside the law to establish the law, acting as if there were no law. Hobbes also sees the sovereign as such: it is only sovereign if it is not submitted to the law, if it remains in the *state of nature*.

The bare life, in other words, "the life of the homo sacer that can be killed but not sacrificed" (AGAMBEN, 2002), remains in the margins of the same society that claims to guarantee the fundamental and universal human rights to the citizens. Placing the biological life in the center of its calculus, the modern State does nothing but reconduct the secret bond that joins the power and the bare life to the light.

For Agamben, there is no point in distinguishing totalitarian phenomena and liberal democracies, because they all have in their center of preoccupation the relation between sovereignty and the bare life. The liberal democracies as well as the totalitarian phenomena have the same "hidden paradigm of the political space of modernity": camps of concentration. "our contemporary politics does not recognizes no other value than life, and while the contradictions that this implies are not solved, Nazism and Fascism, that is, regimes which have taken bare life as its supreme political criterion, are bound to remain unfortunately timely". (AGAMBEM, 2002, p. 20).

We must try to understand what happens to us, problematizing ourselves among everything. Foucault states that the scholar's task, being inspired by Kant, is to be critical and permanently critical of himself, not getting attached to truths, dogmas, in order to keep thinking. But the pursuit of autonomy can never be considered a concluded project, but rather something that is always to be completed. And making the effort for this reading is the first moral commitment. If the last Foucault is the care for oneself and the ethics as a freedom practice, it is also the one that speaks about resistance, the one that questions himself more than before: how can we eventually be less governed than we are?

We face the inertia and the submission, the subjection. Hannah Arendt has already professed the difficulty to reach the action these days, however, she alerts that the humankind needs to find the solution, like "the alive microorganisms, which through mutation, manage to survive to the action of antibiotics" (ARENDT, 1983, p.336).

We need to strengthen the State as a democratic sovereignty and this is only possible through education and political training. Relations of resistance or acceptance, as forms of power expression, starting from an individual realm (bare life) to a greater realm. If we experience a state of exception, with scarce competitive democracy to overcome social pathologies, it is necessary to overcome the inactivity and neutralism before major topics. It is necessary to redeem the will from the desire for truth and potency.

References

AGAMBEN, Giorgio. ***Homo Sacer*: o poder soberano e a vida nua**. Belo Horizonte, Edit. UFMG, 2002.

ARENDT, Hannah. **A condição humana**/ Hannah Arendt; tradução de Roberto Raposo; introdução de Celso Lafer. – Rio de Janeiro: Forense Universitária, 1983.

BAUMAN, Zygmunt. Entrevista a Héctor Pavón do jornal Clarín, 18-07-2009. http://www.rts.org.br/entrevistas/entrevistas-2009/zigmunt-bauman-sociologo, consulta em 01.08.09.

HOBBES, Thomas. **Leviatã ou Matéria, forma e poder de um estado eclesiástico e civil**. Thomas Hobbes de Malmesbury; tradução de João Paulo Monteiro e Maria Beatriz NIzza da Silva. 3ª ed, São Paulo: Abril Cultural, 1983.

FOUCAULT, Michel. **Em defesa da sociedade**: curso no Collége de France. Tradução Maria Ermantina Galvão. São Paulo: Martins Fontes, 1999.

_____. **Ética, sexualidade, política**./ Michel Foucault: organização e seleção de textos Manoel Barros de Motta; tradução Elisa Monteiro, Inês Autran Dourado Barbosa. – 2.ed. – Rio de Janeiro: Forense Universitária, 2006.

_____. **O Sujeito e o Poder**. In: RABINON DREYFUS. *Uma trajetória filosófica*. Para além do estruturalismo e da hermenêutica. Rio de Janeiro: Forense Universitária, 1995.

Working time in Brazil
Unconstitutionality direct actions filed in the Federal Supreme Court between 1988 and 2012

Eleonora Kira Valdez de Moura[1]

Abstract: Unconstitutionality Direct Actions (ADI) are instruments available for Brazilian society, provided by the 1988 Constitution, in order to ensure the unity of the internal legal order and to protect fundamental rights. This research focused the constitutional issues about working time which managed to reach Federal Supreme Court by way of unconstitutionality direct actions, since the promulgation of 1988 Constitution until December 31, 2012. Information collection was performed by reading all the initial petitions of unconstitutionality direct actions filed in this period, and then data were systematized, providing graphs and tables which have supported further analysis. The results have allowed identification of problems caused by normative reconfiguration of working time in Brazil, in the context of globalization and flexible labor rights that occurred in the 1990s, and pointed to the displacement of the conflict between capital and labor to Brazilian Judiciary. The survey has detected four groups of issues involving fundamental rights of working time presented Federal Supreme Court: weekly and daily working hours, compensation schedules via hour bank, weekly paid rest on Sundays and paid rest on holidays. The analysis of the four thematic groups has shown that Federal Supreme Court has been adopting silence, whether through a rigorous formalism to extinguish these actions without decision on merits, or delaying their trials. The challenge consists of placing this performance between two different models of constitutional interpretation: Cass Sustein's minimalism or Luigi Ferrajoli's guaranteeeism.

Keywords: working time; constitutionality control; Labour; STF.

[1] Master on Law by Universidade Federal do Rio de Janeiro. Graduated in Statistics by Universidade do Estado do Rio de Janeiro (IME-UERJ) and in Law by Universidade Federal do Rio de Janeiro (FND-UFRJ). Researcher in Institutional configurations and labor relations research group (CIRT-PPGD-UFRJ). Working at Tribunal de Justiça do Estado do Rio de Janeiro.

1. Unconstitutionality Direct Actions about working time in Brazil

The struggle for limiting the amount of time dedicated to work has resulted in the recognition and in the assertion of a set of fundamental social rights by the constitutions of the post-wars period all over the world. In Brazil, the 1988 Constitution has enshrined a comprehensive list of individual, collective and social fundamental rights, assigning them immutability clauses (CRFB, art. 60th, § 4, IV), imposing their immediate applicability (CRFB, art. 5th, § 1), attributing to Federal Supreme Court the task of protecting them (CRFB, art. 102nd) and offering a range of remedies and instruments to ensure the exercise of these rights, such as unconstitutionality direct actions (ADI).

The guidelines on working time and the respective rest periods have been set in Article 7th, items XIII until XIX, of the Constitution. Nevertheless, their interpretation is conditioned to constitutional principles and other fundamental rights norms, such as human dignity and social values of labor and free enterprise (CFRB, Article 1st items III and IV), the objectives contained in the third article, which point out to the construction of a free, fair and mutually-supporting society, eradication of poverty and marginalization and reduction of social inequalities (art. 3rd items I to IV); also the catalogue of Article 5th, concerning individual fundamental rights, among other ones, the freedom of exercising any work, occupation or profession; freedom of assembly and of association, social purpose of property, jurisdiction assurance, free access to courts and the respect of acquired rights (items XIII, XVI, XVII, XXII, XXXV and XXXVI respectively).

However, the impact of the productive restructuring has been first felt in Brazil at the dawn of 1990 and has been stretched throughout the decade, when it was promoted an intense normative reconfiguration of traditional institutions of labor law, in order to erode worker's protective constitutional mantle. Since then, it has reflected in growing demand for unconstitutionality direct actions, which motivated this re-

search[2], presented in this article[3].

Twenty-nine unconstitutionality direct actions on working time issues had been filed at Federal Supreme Court between 1988 and 2012, which represent approximately 14% of ADIs on labor matters, and about 0.57% of the whole total. The sinuous curve of Chart 1 (blue line) indicates that the rules on working time have become the subject of dispute in the Federal Supreme Court on a recurring basis, and that the year 1998 was the moment when the litigation has peaked, concentrating twelve ADIs (41%), all of them against Provisional Measures or Federal Laws authored by the Executive Branch[4], headed by then-President Fernando Henrique Cardoso[5].

---

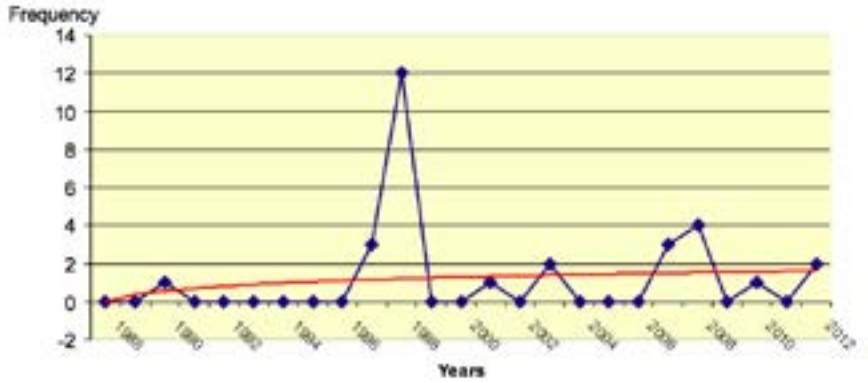
[2] The first task was reading the content of all initial petitions of unconstitutionality direct actions that have been presented to Federal Supreme Court since the promulgation of the 1988 Constitution until December 31, 2012, and cataloguing those ones that dealt with labor issues. From these, they were extracted the ones related to working time matters, resulting in a set of twenty-nine unconstitutionality direct actions.

[3] Neither index nor official statistics available at Federal Supreme Court's electronic address were taken into consideration, considering the impossibility of accessing their methodology for collecting information and data processing. Due to the possibility of detecting the effects that rules belonging to other branches of law could have on labor relations, reading ADIs initial petitions seemed to be the best choice. As labor matters (or labor issues) were considered the rights enumerated in Articles 6th to 11th, as well as those contained in Articles 5th, 114th, 133rd of the 1988 Constitution, as so Article 10th of the Temporary Constitutional Provisions Act (ADCT). Cf. SILVA, S. G. L. C; IGREJA, C. O; MOURA, E. K. V. 2009.

[4] Seven actions were filed against the Law 9,601 of 1998, submitted by the Ministry of Labor, which established the special employment contract for a limited time of time and schedule compensations via hour bank; three ADIs contested Provisional Measure 1,709 of 1998 which created part-time labor contract and extended for one year the deadline for compensation schedules via hour bank. Besides these, successive reprints Provisional Measure 1,539 of 1997 were contested by ADIs, which authorized work on Sundays to workers in commerce..

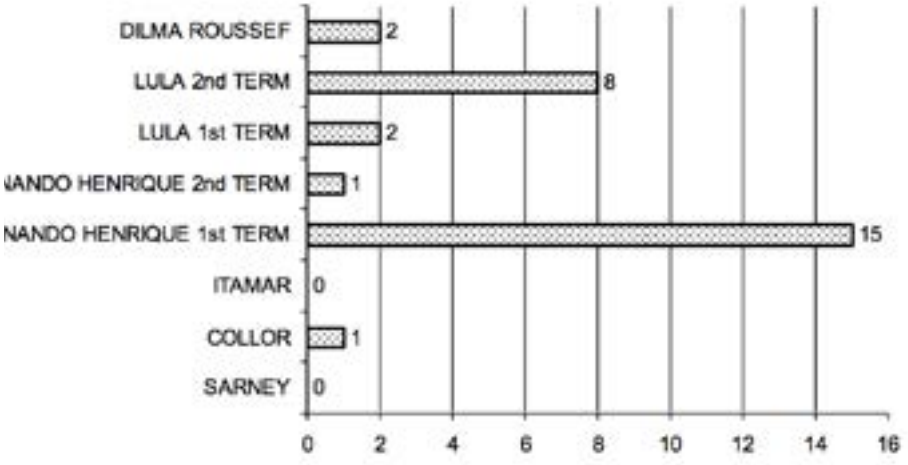
[5] Fernando Henrique Cardoso, from Brazilian Social Democracy Party (PSDB), was elected twice in a row to head the executive branch in Brazil, remaining from January 01st, 1995 to December 31st, 2002. Although PSDB brings the expression "social democracy" in its acronym, it is traditionally renowned for its alignment with neoliberal practices. Fernando Henrique Cardoso was the promoter of the Minimal State, having held numerous privatizations of public enterprises and implemented flexibility discourse of labor rights as a pretext for creating jobs, using intensively the Institute of Provisional Measures to promote reform in labor laws, especially in the years 1997 and 1998.

Chart 1 - Unconstitutionality Direct Actions on working time filed at Federal Supreme Court between 1988 and 2012



Source MOURA, 2013

Charter 2 - Unconstitutionality Direct Action about working time filed at Federal Supreme Court sorted by presidential term



Source: MOURA, 2013.

A second moment, when an increasing filing of ADIs can be noticed, has happened in the years 2007 and 2008, during the second term

of President Luis Inacio Lula da Silva[6] (Chart 2), with eight unconstitutionality direct actions about working time. Ten actions were presented throughout the two terms of President Lula, but only two ADIs have challenged acts from the Executive[7].

Brazilian Constitution has allowed some subjects to file the unconstitutionality direct actions and this research has shown that the performance of each of them has been changing, according to the political and economic circumstances[8]. Workers Trade union confederations, for example, had eleven of their twelve claims concentrated in 1997 and 1998, when normative reforms on working time were taking place. Also during this period, the claims of political parties have grown, with four of their five ADIs presented[9]. Confederations of enterprises unions have pointed out to different targets, according to the productive branch[10]. The National Confederation of Commerce (CNC), for example, has focused its efforts on obtaining the unconstitutionality declaration of four

[6] Luis Inacio Lula da Silva, of the Workers Party (PT), was the first union leader presiding Brazil. He also was elected twice consecutively and has remained in power from January, 1st 2003 to December, 31st 2010. Although President Lula had kept the measures implemented by his predecessor, like privatizing public enterprises and flexible working rules, he has promoted some social advances, such as the increase of the minimum wage, a strong program of job generation and income distribution. His intervention in labor law occurred indirectly and punctually.

[7] These are ADI 3975, filed by the National Confederation of Workers in Commerce (CNTC) which has challenged the Provisional Measure 388 of 2007 and ADI 4,027, authored by Socialism and Liberty Party (PSOL) against Law 11,603 of the same year, which had turned the mentioned Provisional Measure into law.

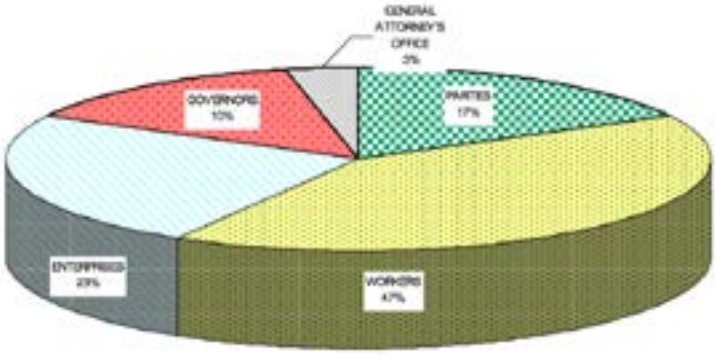
[8] In the research interval, twelve ADIs were proposed by confederations of workers unions, seven by confederations of enterprises unions, five by political parties, three by States governors and one by General Attorney's Office.

[9] They are: ADI 1,764, proposed by the joinder between the Workers Party (PT), Democratic Labor Party (PDT), and Communist Party of Brazil (PC do B); ADI 1,767, authored the Unified Socialist Workers Party (PSTU) both against Law 9,601 of 1998; ADI 1,871 brought by PT and ADI 1,888 offered by the joinder between PT and PDT, against the Provisional Measure 1,709 of 1998, which authorized working on Sundays in commerce.

[10] The computer industry was the first to file ADIs on working time, in 1990, challenging the Ordinance 3,435 of the Ministry of Labour, which had limited working hours and had granted intervals for professionals in the field of data processing. The National Confederation of Industry (CNI) proposed only one action in 1998 against the state law that established pauses and intervals during the workday in the State of Rio de Janeiro (ADI 1,862)

state laws that had laid down holidays and a District law that banned shops from operating on Sundays[11]. Governors also have contested state laws which had established holidays[12]. Finally, the General Attorney's Office appears only once in the entire range studied, what arouses interest for future research on the role of this institution in defense of the constitutional rights of workers in concentrate constitutionality control[13].

Charter 3 - Unconstitutionality Direct Actions about working time filed at Federal Supreme Court between 1988 and 2012 sorted by authors



Source: MOURA, 2013

[11] ADIs 2.560, 3.940, 4.091, 4.092 e 4.131.

[12] Those were Governors of the States of from Rio Grande do Sul, Distrito Federal and Amapá. Governor of the State of Rondônia has challenged state law 1,713 of 2007 which fixed workday of six hours for nursing professionals.

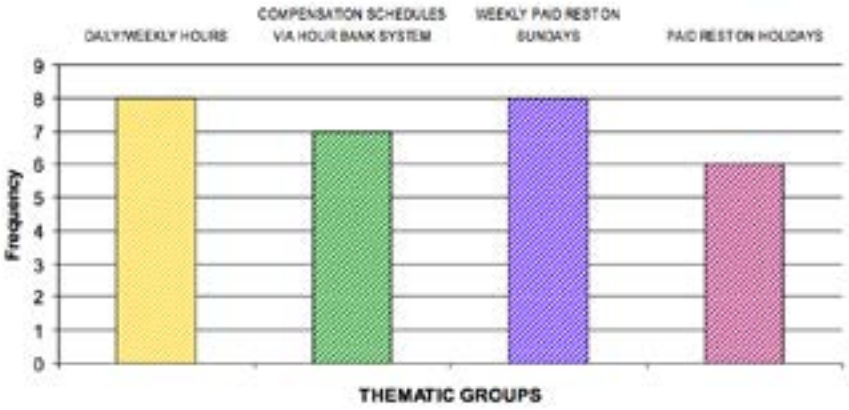
[13] From 1988 to 2012, PGR filed 10 unconstitutionality direct actions on matters related to labor law, six of which were presented in the first term of President Luis Inacio Lula da Silva, four against state standards, one on Constitutional Amendment 45 of 2004 and one on the federal Law 10,779 of 2003, which established certain requirements for granting benefits to unemployed fishermen. Although 1998 represented a moment of intense litigation in labor matters, only one ADI was filed by PGR in all two terms of President Fernando Henrique Cardoso, but even this action had not pointed out any act of this President (It was against § 2 of article 39 of Law 8,177 of 1991, a law passed before mentioned President came to power). In matters of working time, the only initiative taken by PGR took place in 2012, filing unconstitutionality direct action 4,842, against Article 5 of Law 11,901 of 2009 that has established for civilian firefighters 12 working hours by 36 resting hours.

ADIs can be classified into four thematic groups[14] (Charter 4), regarding to the rights pointed out as violated which have grounded the requests of unconstitutionality declaration. The first group comprises daily and weekly working hours matters with eight ADIs, half of which are awaiting trial, while the other half was extinct for formal reasons[15].

[14] Although no unconstitutionality direct action specifically claimed against disrespect of the rights to paid annual leave and to breaks, they were mentioned in the three ADIs that contested the Provisional Measure 1,709 of 1998, creator of the part-time labor contract (ADIs 1,871, 1,874 and 1,888) and two actions against norms for the protection of workers' health (ADI 360 and 1,862), all inserted in the first thematic group. the second group deals with the compensation schedules via hour bank, established by Law 9,601 of 1998; the third and fourth groups contain actions against rules on weekly paid rest on Sundays and the paid rest on holidays, respectively.

[15] Among these four extinct actions, three (two submitted by political parties and one by National Confederation of Workers in Commerce) had contested Provisional Measure 1,709 of 1998, which created the contract of part-time work and expanded to one year the period for compensation schedules via hour bank system. The fourth extinct action was proposed by National Federation of Technical Services on Information Technology and Similar (FENAINFO) against Ordinance 3,435 of 1990 from Ministry of Labour and Social Security, which imposed special breaks to employees in this sector. Among the actions awaiting judgment, ADI 1,862 has been presented by the National Confederation of Industries in order to obtain a declaration of unconstitutionality of State Law 2,586 of 1996, which had reduced working day hours and had set rest breaks for employees of Rio de Janeiro, for preventing repetitive strain injury (RSI) . ADI 3,894 had been proposed against Law 1,317 of 2007 from Rondonia, by the Governor of that State, because it established six hours-day work for nurses. In 2010, ADI 4,468 was presented by the National Confederation of Health against federal law 12,317 of the same year, which established the six hours workday for social assistants. Finally, in 2012, the General Attorney's Office brought ADI 4,842 before STF, contesting the validity of federal law 11,901 of 2009, which regulated non-military firefighters' working time in shifts of twelve hours working by thirty-six hours resting.

Charter 4 - Unconstitutionality Direct Actions about working time filed at Federal Supreme Court between 1988 and 2012 sorted by thematic groups



Source: MOURA, 2013.

The second thematic group brings together the unconstitutionality direct actions about compensating schedules via hour bank system[16] and it appears as a dated and concentrated phenomenon, since all actions had been proposed by a wide range of confederations of workers unions and political parties, in a single moment (1998) against the same normative act, federal Law 9,601 of 1998. In all ADIs, controversy revolved around the assumption that the flexibility principle was inserted into the Constitution Article 7th and, from this perspective, the collective negotiation to promote reduction of labor rights could prevail over legislated rules[17]. In this group, two ADIs were ended for formal reasons

[16] Hour bank system must not be confused with compensation scheme of working days previously predicted by the Consolidation of Labor Laws (CLT), which primitive text of Article 59 § 2 had allowed weekly basis system of hours compensation, previously dealt, individually or collectively, within constitutional bounds (forty-fours hours per week, eight hours per day, minimum additional of fifty per cent wage over normal hour, maximum limitation of daily two hours overtime). Law 9,601 of 1998 has brought in its Article 6th the possibility of compensation schedules on a 120 days basis without additional wage predicted in Constitution. Law 9,601 of 1998 has increased the workload compensation module, has eliminated the right to additional overtime and reduced the surplus time value . Later, Article 6th has been rewritten by Provisional Measure 1,709 of 1998 providing annual compensation.

[17] Just a few days after Law 9,601 publication in 1998, seven ADIs were brought before

and five others are still waiting for trial[18].

The third thematic group contains the actions about weekly paid rest on Sundays. It was possible to observe a continuous designing and redesigning of this institute over the years, and it appeared as a specific conflict of commercial workers, still unsolved, since that there was no pronouncement on the issue in any of the lawsuits filed since 1997[19].

The fourth thematic group brings together unconstitutionality actions about paid rest on holidays. Four ADIs were presented by the National Confederation of Commerce and two ones by Governors of States[20]. All applications pointed out the violation of item I of Article 22 of the Constitution, which provides for exclusive entitlement of federal norms on labor matters, as grounds for the plea of unconstitutionality of state laws that set out holidays. Except for the ADI 3,940, all actions were filed after Provisional Measure 388 of 2007 has authorized

---

Federal Supreme Court, in order to obtain a unconstitutionality declaration of its whole text or some parts: ADIs 1764 to 1768, ADI 1794 and ADI 1816. Although this thematic group refers to matters of compensating schadules via hour bank system, ADIs were also challenging a new type of fixed-term labor contract. This is the reason why almost all the petitions have asked for the unconstitutionality declaration of the entire normative act.

[18] On December 31, 2012, ADI 1,767 and 1,816 had already been extinguished without decision on the merits, and five remaining actions were awaiting trial with the Rapporteur Justice Gilmar Mendes. One of these actions – ADI 1,764 – still stayed in view of a request for examination elaborated fifteen years earlier by Justice Nelson Jobim, already retired, succeeded by Justice Carmen Lucia.

[19] Seven ADIs did not contest the entire normative act but just a strange article authorizing operation of commerce on Sundays, grafted in Provisional Measure 1,539-35 of 1997, which ruled employee participation in profits and enterprise results, and after numerous rewrites, it was converted into law 10,101 of 2000, which was amended by Provisional Measure 388 of 2007 which in turn was converted into Law 11,603 in 2007. Four actions authored by CNTC were dismissed due to lack of an amendment to the application when Provisional Measure 1,539 has been reissued . Two ADIs remain awaiting trial in the Supreme Court: ADI 3,975 and ADI 4,027, in which respectively CNTC and PSOL has contested mentioned Provisional Measure 388 and Law 11,603.

[20] They are: ADI 3,069, of the Governor of the Federal District against District Law 3,083 of 2002, which established the Trade Labour Day ; ADI 3,940 of Confederation of National Trade (CNC) against Rondonia Law 1,201 of 2001; ADIs 4,091, 4,092 and 4,131 of the CNC in which the laws of Rio de Janeiro which set the Black Consciousness holidays, Carnival and St. George, respectively have been contested; and ADI 4820, of the Governor of Amapá challenging that StateLaw 1,686 of 2012 , that created the holiday in honor of St. Tiago.

working on holidays in general trade, subject to the previous collective bargaining. However, the arguments of CNC remained focused around the discourse of the high costs and their impact on job creation. Justices rapporteurs of ADIs about paid leave on holidays have admitted several civil society organizations as *amici curiae*, what helped to diversify debate from an essentially economic perspective towards a pluralist discussion. Among the arguments brought to the cases, one deserves to be highlighted because it reinserts the question in terms of the legitimate exercise of the powers of the states to legislate on the protection of historical and cultural heritage and on culture as the items VII and IX of Article 24 of the Constitution.

It is also noticed that promotion initiatives for healthy and safe work, either technical standards by the Ministry of Labor or legal rules by states, have met employers' resistance whenever it demanded reduction in the time length of labor, rest on holidays or granting pauses and breaks. Economic classes have appealed of these standards always by alleging Item I of Article 22 of the Constitution. Such a reductionist interpretation would lead content of article 196 of the Constitution to embed a great paradox, since health would only be "the right of all and duty of the Union, States, Federal District and municipalities" when not related to working people, because in these cases, health would be a matter submitted to the exclusive protection of the Central Power.

As already seen, working time appeared on the scene of judicial review in 1990, but the reason why this subject has remained in the conflicts zone presented to the Supreme Court until 2012 can not be assigned solely to the normative reconfiguration promoted by legislative action. In the researched period, only one of the twenty-nine unconstitutionality direct actions about working time has obtained decision on the merits[21]. Eleven actions were finished without jurisdictional provision, which points out to a rigorous formalism adopted by the Supreme Court, almost exclusively resulting from his own case-law, such as the requirement of amendment for initial petitions every time Provisional Measures contested were reissued, or the requirement of Powers fo

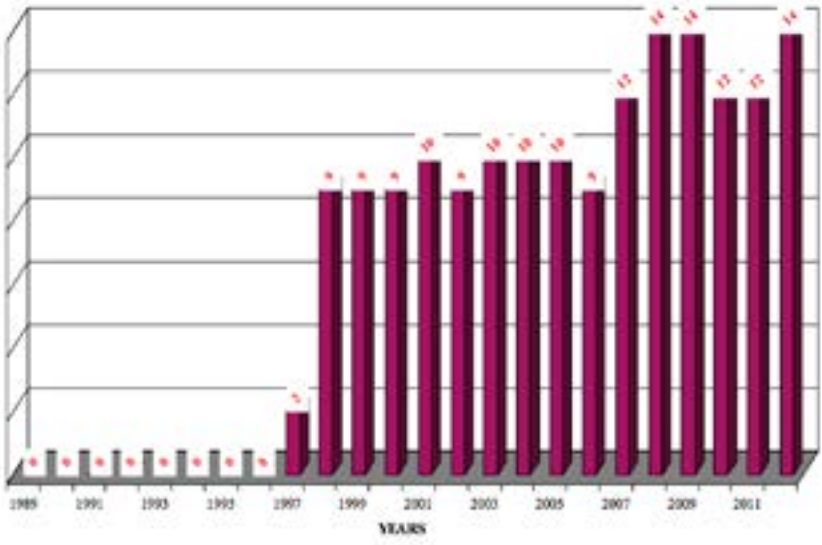
[21] This is ADI 3069, in which the plenum of the Supreme Court in 2005 unanimously welcomed the vote of the rapporteur Justice Ellen Gracie to establish that the power of declaring holidays is implicit in the Union's exclusive competence to legislate on matters labor, following two understandings of the Court, prior to the promulgation of the 1988 Constitution, one from 1959 and another from 1984. The judgment of this ADI 3,069 was used as precedent in initial petitions of CNC to corroborate its claim that the institution of holidays is purely economic issue.

Attorney with written special powers to argue the constitutionality of a norm.

In thirteen of the seventeen actions awaiting trial, the Rapporteurs Ministers have adopted the special proceeding of article 12 of Law 9,868 of 1999, according to which, given the importance of the matter and having request for an injunction, the rapporteur may, after attended the requests for information, present the cause to the plenary, to whom would be allowed final judgment of the action. Thus, there has never been any injunction statement in all of these ADIs.

Chart 5 shows the distribution of cumulative frequencies, which takes into account the amount of unconstitutionality direct actions about working time issues, that has been waiting trial in the Supreme Court since the day when each first rapporteur has been designated, year by year accumulated, demonstrating that from 1997 on, it has been emerged what it might be called *a collection of actions waiting for jurisdictional provision* on this subject.

Charter 5 - Cumulative Frequencies of Unconstitutionality Direct Actions about working time issues awaiting trial in Federal Supreme Court between 1988 and 2012



Source: MOURA, 2013

Several other discussions about working time issues took place in the context of labor courts, but failed to reach the Federal Supreme

Court by way of judicial review. Those who managed to reach it via appeal did not come to be appreciated, again due to STF case-law, even though some of these precedents had been stated before the new constitutional order[22]. Thus, the Supreme Court remained impervious to issues such as suppressing work breaks, payment of overtime in shifts of 12 hours of labor per 36 hours off, averaging *in itinere* hours, the divisor for calculating overtime and reducing the additional for night work in alternating shifts, whenever these issues were subject of collective bargaining[23].

Procrastination[24] and, consequently, the long delay in giving a jurisdictional response to a few actions which have managed to reach the Court, as well as the option for the rigorous formalism reinforce the hypothesis that Federal Supreme Court has adopted a negative activism though omission. In other words, the Court has opted for self-restraining, keeping a great silence regarding to protection of working time fundamental rights, even though such a silence would mean the strengthening of their deconstruction. Changes in plenary composition, which have been occurring since the first term of President Luis Inacio Lula da

[22] For example, Summula 454 of 1964, which has established the understanding upon which mere interpretation clauses do not allow extraordinary appeals, leaving all the rights subjected to collective bargaining without substantive examination. In addition, there is a lot of single or collective decisions of Federal Supreme Court in order not to aware extraordinary appeal whose object requires review of the validity of the clauses of collective agreement because it would require revolving material-factual evidence. Countless others lawsuits were extinct upon the argument that, if there was an offense against the Constitution, this would be reflexive, as if it would not assigned to Federal Supreme Court avoid any unconstitutionality, direct or reflexive.

[23] However, two debates on working time have overcome the narrow filter created by Federal Supreme Court: the first one resulted in Summula 675, according to which granting weekly paid rest would not disfigure alternating shifts system; the second one resulted in recognition of general repercussion in extraordinary Appeal 658,312, whether Article 384 of the Labor Code, which requires granting fifteen minutes interval for women before overtime work starts, has been receipt under 1988 Constitution.

[24] In ADI 1,764, a request to view made by Justice Nelson Jobim in 1998 has interrupted the trial, and six years after, in 2004, he not only has renewed it , but has still retained the process for two more years, until March 2006, when he retired. It's important to remark that, on December 15, 2003, then Chief Justice Mauricio Correa, lowered Resolution 278, which has established ten days as deadline to return all legal proceedings under request to view, authorizing one renewal for another ten days, after which it should return to trial, regardless of publication of the agenda. Even so, ADI 1,764 remains in Justice Carmen Lucia's cabinet, Nelson Jobim's successor, until nowadays.

Silva and have continued through President Dilma Rousseff's government, including the appointment of Justice Rosa Weber, from Superior Labor Court, raise the expectation about future trial of the unconstitutionality direct actions about working time.

References

MOURA, E.K.V. **Trabalho e Constituição: ações diretas de inconstitucionalidade e os desafios da regulação do tempo de trabalho no Brasil**. Dissertation. UFRJ, PPGD, 2013.

SILVA, S. G. L. Direitos fundamentais, Garantismo e Direito do Trabalho. **Revista do TST**. São Paulo, v. 77, n. 3, p. 274-292, jul./set. 2011.

SILVA, S. G. L. C; IGREJA, C. O; MOURA, E. K. V. **Constituição e Trabalho: um exame sobre as Ações Diretas de Inconstitucionalidade propostas perante o Supremo Tribunal Federal que versam sobre direitos do trabalho**. XXXI Jornada Giullio Massarani de iniciação científica, artística e cultural. Universidade Federal do Rio de Janeiro - CCJE. 2009.

The reduction of the weekly working journey to 40 hours in Brazil
A contemporary debate

Roberta Dantas de Mello[1]

1. Introduction

Both in the developed countries and those on the margins of capitalism[2], the claim for reducing the working journey is one of the historic banners of working class struggles. However, it is reasonable to say that in each historical period it acquires new forms.

In Brazil, the debate around reduction of the working journey and its defense to 40 hours weekly transcend the economic-financial fundamentals and, once realized, it will be one more effective means of caring for the social appreciation of work and of human dignity (fundamental rights inherent to the Democratic rule of law state).

Throughout the nation, intellectuals from various fields of knowledge openly defend the reduction of the working journey in Brazil, among those: Dal Rosso and Ricardo Antunes (sociologists), Márcio Pochamann (an economist), Valéria Marque Lobo (a historian) and Mauricio Godinho Delgado (a jurist).

Indeed, in a recent book by Mauricio Godinho Delgado, "Constituição da República e Direitos Fundamentais" (Federal Constitution and Fundamental Rights), in the article "Democracia, Cidadania e Trabalho" (Democracy, Citizenship and Work) the jurist claims that upon reflecting on work in the 21st century, one must refer to moderate work, di-

[1] MA in Employment law with PUC/, directed by Mauricio Godinho Delgado. Researcher with CAPES (2010-2012). A specialist in Employment law and Labor law. A specialist in Constitutional procedural law. Lawyer. Professor of Employment law.

[2] It is important to emphasize that Latin-American nations, although having suffered a disadvantage in time when compared to more developed capitalist countries, also fought significantly for the reduction of the yearly working journey during the decades following the Second World War.

minished in time, adjusted to productivity gains from technological and organizational achievements, unlike what we find today. He concludes that society will continue to be working society, mainly employment society, but a place where everybody works less, which necessarily implies reduction of the paid working journey institutionalized in juridical order.

Thus, it shall be seen that once the technological revolution is absorbed by the main spheres of Brazilian economy, generating increase in productivity (increasing the profits of the owners of production means), and given a favorable political context, the reduction of the weekly working journey to 40 hours will be more than necessary so that work productivity continues to progress along social development, following the guidelines of capitalism with reciprocity.

2. The contemporary debate

A short historical retrospective reveals that the capitalist production system has been marked by social struggles between capital and work for the control of time.

Since the second half of the 19th century, historical strikes and movements claiming for the shortening of working time have always had the goal of controlling the exploitation of work (survival struggle, "an existential marathon"); of creating proper conditions for the workers to have more control of their lives (struggles for humanizing work, for better quality of life) and of increasing employment (not always explicitly).

It is worth mentioning that the struggle for reducing the time dedicated to work has allowed for various action fronts (reduction of the daily or weekly working journey, lengthening of weekly rest, of leave of work periods and vacation days, retirement anticipation, reduction of the entrance age into the labor market via the requirement of primary education certification, among others). Those fronts guaranteed major accomplishments of the working class as far back as the second half of the 19th century; it has also continued to do so along the 20th century.

In Brazil, the issue was present in the Union movement at the beginning of industrialization – only in the end of the 19th century. It was marked by general strikes and even the introduction of bills, both with the aim of fixing the regular working journey at 8 hours a day, besides the 50% additional for overtime.

The first overarching law, which regulated the working journey to 8 hours a day and 48 hours a week to all workers was included in the 1931 Constitution. However, the implementation of this limited journey has not really happened. The reason is that, since that time, the employers have begun to use certain mechanisms to inhibit the fulfillment of the constitutional predicament, especially the extension of working hours by means of overtime, which was left free.

In 1943, with the implementation of CLT, even though overtime was limited to 2 hours daily, practically no significant changes were introduced in regard to the duration of the working journey, in comparison to the Constitutional Text of 1934.

The democratic period between 1946 and 1974 did not bring about any changes in the standard duration of the working hours established in CLT (8 hours a day and 48 hours a week), although it started various important advances. Clearly, during military authoritarianism (1964-1985) there was also no improvement of the juridical order concerning work in this respect.

Beginning in 1978, however, the so called *new syndicalism* appeared in Brazil organized by the Union movement of the ABC towns in the State of São Paulo. A new context emerges in civil society, influencing the development of this issue in Brazilian Employment law.

The 1985 strike represented the peak of *new syndicalism* and a landmark in Union movement and Employment law. The main demand of the metal workers of the *paulista* ABC concerned the shortening of the regular weekly working journey from 48 to 40 hours, without wage loss[3], as a means of guaranteeing the workers quality of life and generating new jobs. Due to the strategy adopted by the strikers to search for specific solutions with each company[4], the strike resulted in the attain-

[3] In fact, the great movements for reduction of the working journey that have occurred in the world **in the past 150 years** have never suffered wage loss of the workers, since the goal is to **humanize work**. In addition, the shortening of the journey without affecting the workers' life standards **increases the income available in society;** and, therefore, **demand/consumerism**.

[4] The so called **"vaca brava"** comes thereafter, since it represents a strategic review of the strikers to solve the deadlock. Any individual who placed themselves against the strikers would be attacked by them. They chose to solve the strike by means of individual agreements with the companies, rather than by labor dispute at the Labor Regional Court (they began considering that action counterproductive by virtue of the suspension clause of the effects of decisions made by a lesser court – in this case, the TRT/SP – regarding any appeal directed to superior jurisdiction– in this case, the Labor Superior

ment of 40 hour weekly journeys for a small number of workers and an average of 44 hour weekly journeys for the majority[5]. Besides, it contributed to show the 1986-88 Congress the duration of regular work that Brazilian society was ready to adopt.

The discussion about the duration of working journeys proceeded through three jurisdictions in Congress. In the first two, the *Sub-commission of Labor law and Public employees and* the *Commission of Social order*, the Union movement proposal of 40 hour weekly journeys was approved. However, the *Commission of Systematization*, which should simply present the final project of the constitutional text according to the previous jurisdictions, inexplicably decided to abandon the winning proposal and to change the weekly working journey to 44 hours in that bill. Obviously, it obtained the definite approval by the Constituent, mainly composed of legislative officers of the center to extreme right ideological spectrum, known as "*Centrão*", strongly supported by the Executive Power.

Anyway, according to labor legislation, CR/88 was modernized, mainly by reducing weekly working journeys from 48 to 44 hours, uniformly to all workers under the CLT regime[6], which represented a new initial civilizing plateau and a closer following of the limits of prevailing standards in the developed capitalist countries in the West.[7]

After two decades of CR/88's initial advance regarding reduction of work duration from 48 to 44 hours weekly, modernizing the current

---

Court – TST).

[5] The strike lasted 54 days (from April 11 to July 4) and an estimated adherence of 290 thousand workers. The strike in favor of the 40 hours, though it did not attain its goal, – signing of a convention for the whole category – ended the habitual working standard of so much as 60 weekly hours (48 hours of regular journeys plus 12 hours overtime).

[6] **The 1967 Constitution had already introduced 40 weekly hours for public employees**. Obviously, this measure led to "rise in employment regarding activities submitted to the Public employee statute, such as direct administration and governmental agencies. This effect was predictable because the State, as employer, does not use the same compensation mechanisms, such as intensification of work and appeal to overtime, which the private sector uses to counteract the reduction of the working journey."

[7] According to a **report by OIT**, published in 2008, about the rules regarding working conditions, the 40 hour weekly journey is the prevailing legal standard. More than 40% of the countries adopt this journey or even shorter ones. The majority of the industrialized countries adopt the limit of 40 weekly hours, including half the countries of the European Union, Canada, Japan, New Zealand, Norwood and the United States. Besides, in various European countries, the working journey varies between 35 to 39 weekly hours, through collective bargaining agreements.

constitutional text is of utmost necessity.

The juridical issue of work duration does not exhaust itself "as a simple repository of rules of the employment contract"; it is meaningful in "multiple dimensions, some of which beyond the typically juridical field."

By proposing to analyze those multiple dimensions, the jurist and minister Mauricio Godinho Delgado states that *the change of the journey to 40 weekly hours would have positive effects on the following areas: health, education and family relationships, as well as an important impact on the social issue of employment/unemployment and on the domestic market*, which we will summarize as follows.

Regarding health, the change would function as a "preventive measure", since it would significantly reduce the probabilities of professional/occupational diseases, or work related accidents. It would also foster productivity once rested workers make more effort, which would result in fewer errors and accidents. Thus, rules of law regulating the working journey turn out to be public health rules, too; so a 40 hour weekly working journey should be implemented as public health policy.

As for education (of both male and female workers), the reduction of the unitary length of service offers new opportunities for individual improvement, since it favors their search for further specific professional qualification and/or formal education in general. That is why the creation of greater individual availability for the working population is necessary for there to be actual *public professional qualification policies or policies of higher educational standards*. Such availability would actually occur with the shortening of weekly working journeys to 40 hours.

As for family relationships, the reduction of the weekly journey would represent *public policies of family strengthening and redemption*, specially of children and adolescents, by allowing the worker dedication to family and improvement of the children's and other dependents' educational process, thus contributing to their structural formation as individuals.

Therefore, the benefits of reduction of the weekly working journey to 40 hours are inarguable.

In view of the repercussions aforementioned, the worker (both male and female) will enjoy better quality of life, being able to further dedicate themselves to social and cultural activities and essential policies for the *full exercise of citizenship*.

The reduction of the weekly labor module in Brazilian Law will also come to serve as an important and efficient measure of *fight against*

unemployment, according to what is observed in the experience of western developed countries. Reduction of work duration "automatically opens (though not in equivalent proportion), innumerable new jobs, or – at the worst – overtly and directly hinders the pace of advancement of the unemployment rate in the labor market."

From an international point of view, the respectable political economist, Jacques Nagels ("Elementos de economia política: crítica do pensamento único"), asserts that reduction of working time is imperatively accompanied by hiring additional staff, which alone helps diminish unemployment.

Nevertheless, it should be noted that increase in work productivity as a consequence of reduction of the working journey is not proportional to job creation. In other words, "never is increase in employment proportional to the reduced amount of work".

Moreover, the change of the weekly working journey from 44 to 40 hours would promote *noticeable incentive to the Nation's domestic market*, considering the increase in purchasing power of the favored workers, potential consumers.

Every historical example of evolution of Employment law in the West shows that the reduction of the working journey is functional and compatible with the development of the economic system, even more so because the impact is diluted with time and absorbed by the businesses and by society.

It is important to emphasize that a radical measure of reduction of duration of work is not being defended here, but rather an actualization of the upper limits of the standard Brazilian journey to the maximum of 40 hours weekly as that in the developed western countries. The necessary modernization should be implemented "moderately and evenly distributed among the economic agents and the whole of the workers, neither overburdening any segment of the economy in special to benefit others, nor creating unequal domestic conditions of competition among businesses" (MGD).

It is thus understood that reduction of the working journey should be an object of regulation by public authorities, since "the regulation aims to stop market laws from being the only determining factor of employment contracts (especially the cost and duration of work); or rather, that work be treated as market goods subject to disturbances in the economic situation and currency instability."

It is worth mentioning that currently in the Nation, PEC number 231/1995 is the legislative proposal regarding the duration of work with

the greatest repercussion in the national Congress and society.

According to art. 7º of CR/88:

> Art. 7º The following are the rights of urban and rural workers, among others that aim to improve their social condition:
> XIII – duration of regular work not superior to eight hours daily and forty-four hours weekly, granted offsetting of working hours and reduction of working journeys upon agreement or collective working convention;
> XVI – payment of overtime beyond that, at least fifty per cent above normal;

PEC number 231/1995 proposes to change subsection XIII and XVI of the aforementioned art. 7º of CR/88. It suggests reduction of the maximum weekly work length from 44 to 40 hours and increase of the overtime hour in at least 75%[8] upon the regular value. The remaining rules in the constitutional text would be kept: maximal daily journey of 8 hours, possible offsetting of working hours and reduction of the journey upon agreement or collective working convention.

Ever since that proposal was presented to the Plenary (October 10, 1995) and though there have been public hearings for clarification and favorable opinions regarding its content and approval, approval of the final text of PEC number 231/1995 is still awaiting, for it cannot be subject to the restrict understanding of reduction of the weekly working journey to 40 hours only as a potentially efficient measure to fight unemployment and create new jobs. Its convenience must be contemplated under a multidimensional perspective, as approached earlier.[9]

---

[8] Regarding PEC 231/1995, **which also determines that overtime payment should have an AC increase of 75% above the value of the regular hour**, it can be said that the legislator was very clever to have associated the changes in overtime payment to reduction of the working journey. Had he not done so, a vast number of the new jobs in perspective due to reduction of the journey could be converted in overtime. Therefore, the proposed increase in payment of overtime labor represents an economic discouragement in hiring of overtime and a fundamental tool in the fight against unemployment, together with other measures.

[9] **As for the proceedings of PEC 231/1995:** In October 11, 1995, the proposition was presented to the Plenary and in November 26, 1996 the Commission of Constitution and Justice and Citizenship was unanimously in favor of its admissibility. On October 23, 1997 a special committee was constituted to analyze the proposal. It did not finish its work, so the proposal was filed (1999) on the basis of legislature changes – 2003 and 2007. On April 30, 2007 the proposal was unfiled and on February 25, 2008 a new

Regarding the potential of RJT to fight unemployment and further generate new job opportunities, I suggest a few short reflections.

The main labor leaderships propose reduction of the weekly working journey from 44 to 40 hours as a solution to job creation and also to fight the Nation's unemployment. The main argument runs as follows: if workers of the formal sector of economy have their working hours reduced (work fewer hours a week), there will be a tendency for more people to get formally inserted in the labor market. In the specialized literature, this line of reasoning is known as *work-sharing*[10]. It is expected that reduction of the journey will allow for the same work to be shared by more workers (all of them working fewer hours) and, in turn, contribute to less unemployment besides the creation of new jobs.

Furthermore, as for the socioeconomic equation of employment *versus* unemployment, the proposal of reduction of the weekly working journey to the 40 hour mode "cannot be seen as panacea when the issue is work scarcity, nor can it be justified as simply a contingent mechanism to fight unemployment". However, it can be "a useful tool if adopted at the right time and if accompanied by other equally necessary measures."

It so happens that the success of work-sharing as a policy of job generation and fight against unemployment has always been questioned by a few studies[11], to which the employers turn to.

---

special committee was created and actually settled on December 16, 2008. At that time, Congressman Vicentinho (PT-SP) was designated to deliver the opinion. The proposal received various requirements, which were approved (testimony of witnesses and public hearings, during which specialists in Labor and Social Security Law and Economy, social interlocutors, representatives of employees and employers spoke), including extension of time of the works. In June 16, 2009, during a global economic crisis, there was a favorable opinion of the Reporting Congressman to the approval of PEC 231-A, which was unanimously accepted by the Special Committee. Since then, the inclusion of this proposal in the Agenda is being awaited in the Plenary for approval of the final text.

[10] Work-sharing is a system of temporary reduction of working hours as a means to avoid unemployment. The percentage of reduction of working hours and wages is agreed upon by companies and workers. Government support has been a decisive variable for the use of work-sharing systems as an alternative to workers' dismissal. In countries, such as Germany, Italy and France, where there are aids to partial unemployment, that practice has occurred more often.

[11] To illustrate, those carried out by Guy Aznar, André Gorz, Claus Offe, Ulrich Beck and Jeremy Rifkin, who, besides being pessimist about the evaluation of the possibility of reduction of the working journey generating new jobs and fighting unemployment, "curiously" contribute to the contemporary fallacy of loss of centrality of work/employment

The arguments of the employers against reduction of the working journey, which boil down to the same old opposition of 1988, are insufficient and contaminated by an ideology in favor of unbridled capitalism, contrary to the middle way of work dignity and contemporary employment.

To illustrate, the following reflections about the main arguments of employers against any reorganization of working time for fear of loss of profit are noted:

1. A shortening of the weekly working journey from 44 to 40 hours would be equivalent to a 9,09% reduction of the worked hours and would represent an increase of 1,99% in the total cost to the company. However, such increase in cost would be minimal for it would only happen once and it would be compensated by productivity gains[12] in fewer than 6 (six) months, without loss of future profits. The companies would also amortize that ridiculous increase in cost through organizational changes and would contribute with work productivity gains[13].

2. Costs with wages in Brazil are very low, mainly when compared to those of other countries[14]. Consequently, reduction of the working journey would not harm competitiveness in Brazil.

---

in capitalism.

[12] Labor by workers with better performance due to the fact that they work less, with more intensity and concentration and less tiredness is considered "labor productivity gains". As a result of growth in labor productivity, there is also growth in "capital productivity", since more concentrated and less tired workers can better operate machines and run fewer risks of damaging them. In addition, according to Cette and Taddéi, quoted by Calvete, the growth in work productivity is around 1/3 to 1/4 of the percentage of reduction of the working journey. CALVETE, Cássio da Silva.

[13] Upon analyzing the companies' reaction to the rise in costs due to reduction of the working journey, Calvete notes that the reaction "lacks a macroeconomic and long term perspective". He also admits that salary costs would be compensated by "productivity growth and, therefore, reduction of the marginal costs". CALVETE, Cássio da Silva.

[14] *Rodrigo Garcia Schwarz* notes that "the cost of work in Brazil is much inferior that the cost of work in North America, Europe and a few Asian countries, which are considered to be extremely competitive in the global market, such as South Korea. For a long time, Brazil has been practicing an economy based on social dumping, in a way that the World Bank identifies as "arbitrage of low wages", which, in turn, is one of the main reasons of salary flattening and of the accentuation of income gaps, distinctive features of globalization". In Western Europe today, very few countries maintain working journeys superior to 40 hours weekly.

Table 1 – Hourly personnel cost in industrial output – Selected nations 1975-2007 (in US$)

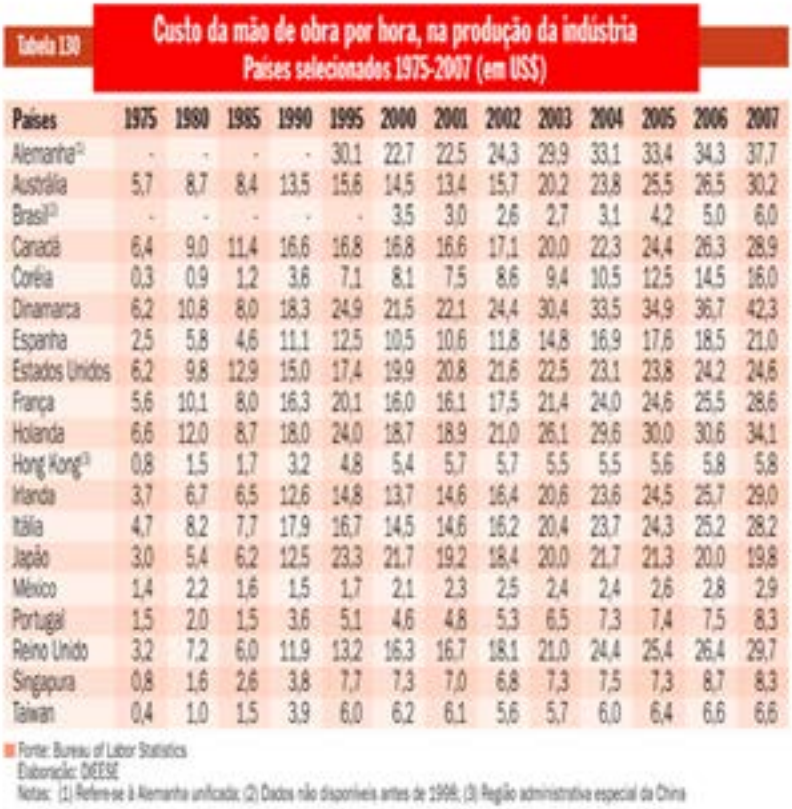


Tabela 130

Custo da mão de obra por hora, na produção da indústria
Países selecionados 1975-2007 (em US$)

Países	1975	1980	1985	1990	1995	2000	2001	2002	2003	2004	2005	2006	2007
Alemanha[1]	.	.	.	.	30,1	22,7	22,5	24,3	29,9	33,1	33,4	34,3	37,7
Austrália	5,7	8,7	8,4	13,5	15,6	14,5	13,4	15,7	20,2	23,8	25,5	26,5	30,2
Brasil[2]	.	.	.	.	.	3,5	3,0	2,6	2,7	3,1	4,2	5,0	6,0
Canadá	6,4	9,0	11,4	16,6	16,8	16,8	16,6	17,1	20,0	22,3	24,4	26,3	28,9
Coréia	0,3	0,9	1,2	3,6	7,1	8,1	7,5	8,6	9,4	10,5	12,5	14,5	16,0
Dinamarca	6,2	10,8	8,0	18,3	24,9	21,5	22,1	24,4	30,4	33,5	34,9	36,7	42,3
Espanha	2,5	5,8	4,6	11,1	12,5	10,5	10,6	11,8	14,8	16,9	17,6	18,5	21,0
Estados Unidos	6,2	9,8	12,9	15,0	17,4	19,9	20,8	21,6	22,5	23,1	23,8	24,2	24,6
França	5,6	10,1	8,0	16,3	20,1	16,0	16,1	17,5	21,4	24,0	24,6	25,5	28,6
Holanda	6,6	12,0	8,7	18,0	24,0	18,7	18,9	21,0	26,1	29,6	30,0	30,6	34,1
Hong Kong[3]	0,8	1,5	1,7	3,2	4,8	5,4	5,7	5,7	5,5	5,5	5,6	5,8	5,8
Irlanda	3,7	6,7	6,5	12,6	14,8	13,7	14,6	16,4	20,6	23,6	24,5	25,7	29,0
Itália	4,7	8,2	7,7	17,9	16,7	14,5	14,6	16,2	20,4	23,7	24,3	25,2	28,2
Japão	3,0	5,4	6,2	12,5	23,3	21,7	19,2	18,4	20,0	21,7	21,3	20,0	19,8
México	1,4	2,2	1,6	1,5	1,7	2,1	2,3	2,5	2,4	2,4	2,6	2,8	2,9
Portugal	1,5	2,0	1,5	3,6	5,1	4,6	4,8	5,3	6,5	7,3	7,4	7,5	8,3
Reino Unido	3,2	7,2	6,0	11,9	13,2	16,3	16,7	18,1	21,0	24,4	25,4	26,4	29,7
Singapura	0,8	1,6	2,6	3,8	7,7	7,3	7,0	6,8	7,3	7,5	7,3	8,7	8,3
Taiwan	0,4	1,0	1,5	3,9	6,0	6,2	6,1	5,6	5,7	6,0	6,4	6,6	6,6

Fonte: Bureau of Labor Statistics
Elaboração: DIEESE
Notas: (1) Refere-se à Alemanha unificada; (2) Dados não disponíveis antes de 1996; (3) Região administrativa especial da China

3. As for the cost of social charges[15], entrepreneurs defend the

[15] Salary charges represent that portion of the work cost that does not end up in the worker's pocket: contribution to the *Instituto Nacional de Seguridade Social (INSS),* to *Serviço Social da Indústria (Sesi),* to the *Serviço Nacional de Aprendizagem Industrial (Senai)* and the other institutions that compose the "S System"; to the *Instituto Nacional de Colonização e Reforma Agrária (Incra)*, to insurance against work accidents, to education-salary and to *Serviço Brasileiro de Apoio às Micro e Pequenas Empresas (Sebrae)*. *DIEESE*. Note to the press: immediate reduction of the working journey to 40 hours!

thesis that those represent 102% of the workers' salaries. However, they base their argument on a mistaken calculation. Many items accounted for as charges in this calculation are actually part of the worker's income. Therefore, all in all, the real value of social charges correspond to 25,1% of the total income of the worker, which can also be absorbed by employers through the gains aforementioned.

Otherwise, there is the possibility that the remaining (not compensated for) part be negotiated with the State. European practice[16] shows that there is a negotiation margin between the public and the private sector on sharing the costs of the increase in social charges.[17]

Anyway, throughout Brazilian history, marked by fights for reduction of the working journey, and even after the 1988 constitutional change, *never* did the companies have to be aided by the government ("as far as we know, not one of them broke for this reason"); and the workers had their salaries lowered;

4. Regarding micro- and small companies, employers' resistance "based on the premise of financial impossibility gets canceled once it is proved that the work charge drama" is merely apparent and emerges after failure of economic politics, through the high cost of bank loans and through unequal competition with the large groups. Following this line of thought, "for smaller enterprises, a fairer income distribution and enlargement of the layers of consumers is a survival condition, which can be initiated with reduction of the working journey without income reduction, opening up countless jobs;"[18]

5. Various categories of workers already have a reduced journey (40 hours weekly or even less), be it for special legislation disposition or via agreements or collective working conventions.[19] Therefore, the im-

[16] Calvete proves the truth of this practice through data obtained from Eurostat (European System of Integrated Social Protection Statistics – ESSPROS), where we can see that while there was a rise in social costs, during the 1990s, their financing fell to the public sector more and more often while corporate involvement decreased.

[17] As an example, there is the way opened by the French government to aid the companies that favor employment and reduce the working journey, considering that "the companies do not want to bear the cost of the shorter working journey and employment increase alone. They pass on the increased cost burden to society. This outcome happens today, when the companies have all imaginable political power within societies". DAL ROSSO, Sadi.

[18] COUTINHO, Grijalbo Fernandes. Redução da jornada de trabalho.

[19] According to MGD, "this is what happens, for example, with banks and the economic sectors, in general, with frigorific employees, telephone operators with variable working

pact is restricted to the private and state-owned sector, the later when it acts according to legislation on employment relationships and within the hours affected by the change.

6. PEC 231/95 does not impair free collective negotiation, since it does not alter the following constitutional disposition about the working journey: offsetting of working hours and journey reduction upon agreement or collective working convention.

Consequently, "the contingent flexibility supposedly necessary for the labor market concerning work duration in hours to ensure greater competitiveness for Brazilian companies" is still assured by collective negotiation. Contrary to what employers claim, collective free negotiation is still privileged and "is still one of the open paths, a subsidiary and complementary form" of reduction of the working journey and offsetting of working hours.

2.1 The desired effect of applying a policy of reduction of the working journey would happen according to certain indispensable conditions, such as[20]:

a) a favorable period of economic growth and increase in productivity (otherwise, the new jobs opened by the time policy may be hit by an eventual recession, whose origin is not the reduction of the working journey);

b) control of overtime[21] (what is intended is to exchange average worked hours for new jobs), though there may

---

hours, broadcasters, elevator boys, teachers, underground mine workers, journalists, laborers who work in nonstop shifts. In addition, there are also the employees who already enjoy this maximal weekly work duration because of collective negotiation, business legislation, contract clauses or employment custom. Beyond this whole important universe, we must acknowledge the vast spectrum of federal, state, district and municipal public-sector employees, who are also already subject to the 40 hour weekly work duration in general. In addition, there are the domestic servants who would not even be affected by a legal rule of this nature. So, we are talking of some millions of employees (and their respective employers, evidently) who would not be affected by such a normative change".

[20] As indispensable conditions, we privilege those quoted by Dal Rosso.

[21] As we defend overtime control, we also fight for proper inspection, capable of carrying out a broad and efficient examination so that the constraint of the amount of supplementary work is actually implemented.

still be resistance by employers and by part of the workers (those used to making additional profit by supplementary work);

c) effective Union intervention to bar actions undertaken by employers or regulated by law, which inhibit the employment effect (offsetting of working hours by mechanisms, such as the "hour bank" and hiring of excessive journeys, such as the 12×36, among other systematic measures that may emerge in this sense).

3. Conclusion

Given the current political-economic conjuncture, Brazil has favorable conditions to incorporate to its juridical order reduction of the weekly working journey to 40 hours. It also presents the needs that demand the adoption of that measure, given the plethora of advantages identified with it as we have shown.

As noted, reduction of the weekly working journey to 40 hours by approval of the final text of PEC 231/1995, which depends on political good will, will represent an efficient means of caring for the social appreciation of work and for human dignity (fundamental rights inherent to the Democratic rule of law sate. It will also represent protection and incentive to corporate development itself plus increase of the Nation's domestic market, by reconciling the interests of companies and workers, of capital and work, which guarantees the adequate functioning of the capitalist system.

We conclude, by paraphrasing economist Joseph Stiglitz, Economy Nobel Prize 2001, by inviting everyone to engage in political debates grounded on facts and evidence so as to give less emphasis to ideologies and to pay closer attention to what actually works.

Belo Horizonte, June 2013.

References

BRASIL. Câmara dos Deputados. Proposta de Emenda à Constituição n° 231 de 1995. Disponível em:<http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=14582>. Acesso em: 1 set.2010.

BUSSINGUER, Marcela de Azevedo. Política pública e inclusão social: o papel do direito do trabalho. 2010. 183p. Dissertação (Mestrado em Direito do Trabalho) - Pontifícia Universidade Católica de Minas Gerais, Belo Horizonte.

CALVETE, Cássio da Silva. A redução da jornada de trabalho como solução do desemprego: o mito de sísifo ou prometeu? Civitas : Revista de Ciências Sociais, Porto Alegre , v.3, n.2 , p.417-433, jul./dez. 2003.

COUTINHO, Grijalbo Fernandes. Redução da jornada de trabalho. Consulex : Revista Jurídica, Brasília , v.8,n,174,p.46-47, abr,2004.

DAL ROSSO, Sadi. A redução da jornada e o emprego. In: Seminário Internacional Emprego e Desenvolvimento Tecnológico, promoção DIEESE/PCDTC-NPq, São Paulo e Brasília, novembro 1997. Disponível em:<http://www.dieese.org.br/esp/jtrab_4.xml> Acesso: em 10 jan. 2011.

_____. O debate sobre a redução da jornada de trabalho. São Paulo: ABET, 1998. 106 p. (Coleção ABET. Mercado de trabalho;5).

DAU, Denise Motta. Benéfica para toda a sociedade. Disponível em: < http://www.fpabramo.org.br/o-que-fazemos/editora/teoria-e-debate/reducao-da-jornada-benefica-para-toda-sociedade > Acesso: em 10 set. 2010.

DELGADO, Maurício Godinho. Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos de reconstrução. São Paulo: LTr, 2006. 149p.

_____. Duração do trabalho: o debate sobre a redução para 40 horas semanais. Revista do Tribunal Superior do Trabalho, Brasília, v. 75, p. 25-34. 2009.

_____. O Direito do trabalho e a crise econômica atual. Disponível em:

<http://ext02.tst.jus.br/pls/no01/NO_NOTICIAS.Exibe_Noticia?p_cod_noticia=9898&p_cod_area_noticia=ASCS&p_txt_pesquisa=Ministro%20Maur%EDcio%20Godinho%20>. Acesso em: 26 out. 2009.

DIEESE. Boletim nº 197: o movimento sindical luta pela redução da jornada. Disponível em: <http://www.dieese.org.br/bol/cju/cjuago97.xml acesso em 28/01/11> Acesso: em 10 jan. 2011.

_____. Nota Técnica nº 57: reduzir a jornada de trabalho é gerar empregos de qualidade. Disponível em: <http://www.fenajufe.org.br/encontro6horas/arquivos/notatec57JornadaTrabalho%20dieese.pdf> Acesso: em 10 jan. 2011.

_____. Nota à imprensa: redução da jornada de trabalho para 40 horas já! Disponível em: < http://www.dieese.org.br/notatecnica/notaImprensaJornada0209.pdf> Acesso: em 10 jan. 2011.

FERNANDES, Reynaldo. Emprego, salários e redução da jornada de trabalho. Estudos Econômicos, v.21, n.1, p.41-69, jan./abr.1991.

GONZAGA, Gustavo Mauricio; MENEZES FILHO, Naércio Aquino; CAMARGO, José Márcio. Os efeitos da redução da jornada de trabalho de 48 para 44 horas semanais em 1988. Revista Brasileira de Economia, Rio de Janeiro, v.57, n.2, p. 369-400, abr./jun. 2003.

MELLO, Roberta Dantas. A crise mundial de 2007/2009 - o recente colapso do paradigma neoliberal. Reflexões e perspectivas para o mundo do trabalho. In: Congresso Ltr - 50º Congresso Brasileiro de Direito do Trabalho. 2010. São Paulo. Jornal do 50º Congresso Brasileiro de Direito do Trabalho. Disponível em: <http://www.ltr.com.br/web/jornal/direitodotrabalho.pdf>. Acesso em: 1 set. 2010.

POCHMANN, Márcio et al. A jornada de trabalho no Brasil: o debate e as propostas. Disponível em: <http://www.dieese.org.br/esp/jtrab_4.xml>. Acesso: em 1 set. 2010.

SCHWARZ, Rodrigo Garcia. A PEC 231/1995 e algumas ponderações necessárias sobre o sentido mais genuíno da redução legal da duração da jornada de trabalho. Disponível em: <http://lacasaenelaire.wordpress.com/2010/04/12/a-pec-n-%C2%BA-23195-e-algumas-ponderacoes-necessarias-sobre-o-sentido-mais-genuino-da-reducao-legal-da-duracao-da-jornada-de-trabalho/> Acesso: em 10 jan. 2011.

Constitutionality control about working matters in Brazil between 1988 and 2012

Sayonara Grillo Leonardo Coutinho da Silva[1]
Eleonora Kira Valdez de Moura[2]

Abstract: The Federal Constitution of 1988 inaugurated a new social order in Brazil, since it has brought a catalogue of fundamental labour rights and also provided remedies, guarantees and mechanisms that could enable not only the promotion and realization of these rights, as well as standardize the legal framework to the new constitutional order. The Direct Actions of Unconstitutionality (ADI) presented to Supremo Tribunal Federal (STF) appear as one of the instruments available for the Brazilian society able to guarantee the unity of the new constitutional system. In the context of investigations undertaken by the research group "Institutional Settings and Labor Relations" (CIRT) at Law School of the Universidade Federal do Rio de Janeiro, it emerged as relevant matters the actions presented to Supremo Tribunal Federal in the control of labor reforms carried out in violation of the fundamental rights of workers protected by the 1988 Constitution. Since the lack of information about the utilization of Direct Actions of Unconstitutionality in labour matters was detected, a database was built in order to support the Group's researches. In this article it

[1] PhD and MS in Legal Sciences from the Pontifical Catholic University of Rio de Janeiro (Pontifícia Universidade Católica do Rio de Janeiro - PUC-Rio). Associate Professor at the National Law School (Faculdade Nacional de Direito - FND), where she is part of the Postgraduate Program in Legal Sciences at the Federal University of Rio de Janeiro (Universidade Federal do Rio de Janeiro - UFRJ) and working on a line of research involving "Decision Theories and Institutional Designs". Leader of the Institutional Settings and Labor Relations Research Group (Configurações Institucionais e Relações de Trabalho; CIRT) – part of the Directory of Research Groups at the National Council for Scientific and Technological Development (Conselho Nacional de Desenvolvimento Científico e Tecnológico – CNPq).

[2] LL.M from Universidade Federal do Rio de Janeiro. Bachelor of Statistics (Institute of Mathematics and Statistics at the State University of Rio de Janeiro - Instituto de Matemática e Estatística da Universidade do Estado do Rio de Janeiro - IME-UERJ) and Legal and Social Sciences (FND-UFRJ). Researcher linked to the Institutional Configurations and Labor Relations Research Group (CIRT). Judicial Technician at the Rio de Janeiro Court of Justice (Tribunal de Justiça do Rio de Janeiro - TJ-RJ).

is presented the construction process of this database and preliminary analysis of its information.

Keywords: Institutions; Judicialization; Labour; STF.

1. Introduction

In Brazil, the *constitution of labor* – consisting of a decent job that establishes the conditions for a life of dignity and of the exercise of a more autonomous existence – passes through the activity of multiple institutions, including political, union and judicial institutions, to shape the meaning of *labor in the Constitution*. In the judiciary, the interpretation of the Brazilian Supreme Court (Supremo Tribunal Federal - STF) regarding the rules, norms and principles of social justice, the subordination of the economic order to a social purpose and valorization of labor have gained increasing importance in labor world. Constitutional jurisdiction itself has been transformed and, with it, the institutional architecture that is geared toward the adjudication of labor disputes. The Supreme Court's role has been enlarged with respect to interpreting topics previously reserved primarily for the Labor judiciary and its Superior Labor Court (Tribunal Superior do Trabalho - TST), which is the court tasked with standardizing labor interpretation with the Constitution.[3]

These transformations are processed in a) the reframing of labor norms through the activity of interpreters; b) the institutional design of the Brazilian judiciary and conforming institutional spaces that authorize and allow the judge's interpretation of the text; and c) the role of the judiciary in controlling legislative reforms that affect labor law and undermine the assumptions of labor law theory. To understand these transformations, we developed investigative practices that focus on institutional arrangements and argumentative and judicial practices with

[3] Because there is a clear division of responsibilities in most areas of law, the Superior Court of Justice does not judge appeals based on constitutional claims. Those extraordinary appeals that challenge Regional Court decisions are directly addressed to STF, whether they originate in Federal Regional Courts or State Courts of Justice. However, all appeals of review filed against rulings by the Regional Labor Courts are directed to the Superior Labor Court – even if they have Constitutional foundation – which is in accordance with the rule expressly provided in Article 896th , paragraph c of the Brazilian Labor Code (Consolidação das Leis do Trabalho; CLT).

respect to fundamental labor rights. Therefore, a methodological tool for monitoring, classifying and cataloging was built, which enables monitoring of concentrated control of constitutionality undertaken by the STF.

The article presents this research and its immersion in both the theoretical and political contexts that arise from the debate about judicialization in the next section, as well as an overview of the actions filed in STF concerning to labor rules and the role performed by STF in judging such unconstitutionality direct actions (

2. A brief contextualization of the debate.

Due to the variability of the uses of the word "judicialization" (MACIEL; KOERNER, 2002), a brief introduction is required as regards to understanding the judicialization of politics as it refers to the expansion of the judiciary's influence in the decision-making process in contemporary democracies (TATE; VALLINDER, 1997). In this sense, judicialization can be adopted as a suitable category to describe changes in contemporary democracies that have enabled courts to assume a greater role in the governance and life of nations. In Brazil, it is repeatedly used as a phenomenon that is understood as resulting from 1988 Constitution, which have increased instruments of judicial protection, access to courts, collectivization of interests etc. (MACIEL; KOERNER, 2002, p. 115).[4]

In a perspective that understands the phenomenon as positive, greater judicial participation in public life would derive from multiple factors, originated in the post-World War II world stage: the creation of the International Courts, the strengthening of legal institutions, the transformation of State and Law and the affirmation of the values of contemporary constitutionalism (VIANNA; BURGOS; SALLES, 2007, p. 39-40). Overcoming the liberal tradition of regulating the present from

[4]Strictly speaking, observes Werneck Vianna, the judicialization of politics refers to the constitutionality of control of the executive branch. This control is exercised by the courts at society's request. It affects the relationships between branches and the Republican canon of majority will; thus, it provokes an *institutional mutation of the Republican scene (*VIANNA, 2013, p.207). Brazil has experienced one of the strongest and most unique experiences of judicialization that would correspond to a new type of relationship between branches in the expansive context of the law, according to the author, and would be far from a pathological phenomenon.

the past derived from legal certainty towards another tradition which regulates future from present – typical of the *welfare state* – would have allowed an expansion of the open texture of rules and increased normative indeterminacy (VIANNA et al, 2007). A greater porosity of law in social relations, including protection of vulnerable groups and intervention in the economic order, would have conferred new roles to the judiciary branch. The rise of neoliberalism, the deconstruction of protections by the way of flexibility or deregulating rights, and the weakening of executive action in the formulation and implementation of public policies would have guided toward the judiciary the debate about the absence or inadequacy of public policies.

For these matters, the 1988 Constitution is a watershed on the national context. VIANNA *et al* have already emphasized that transferring the interpretation of the constitutional text for civil society, through its institutions, placing itself as an instrument of social transformation, had promoted democratization of the republican tradition. Converting access to justice into an essential public policy would have produced a new arena for disputes between principles and values and would have brought about limitations on the will of the majority (VIANNA *et al*., 1999, p. 9-11). Then, it would have been consolidating democratic constitutionalism in Brazilian legal culture, which would subordinate legislative action to its commands, throughout the means provided for society to obligate, via judiciary branch, respecting for the constitutional bonds. In such a formulation, with wide dissemination and acceptance in the field of law, judicialization in our country is more closely related to the 1988 Constitution, which "made the law a feature of its engineering to achieve the fundamental rights it declared" (VIANNA *et al.*, 2010, p. 14), than with legal activism itself. The judiciary, activist or not, expanded and is shown to be "a central institution of Brazilian democracy, whether in its political expression, or with regard to intervention in the social sphere" (VIANNA *et al.*, 1999, p. 9).

This is an important reflection that emphasizes the debate from a normative point of view and is connected to the relationship between democracy and the Constitution, which guided the first set of studies on the topic in sociology, political science and Brazilian law, albeit from a critical perspective. From the perspective of the relationship between judicialization and labor relations, the uniqueness of the field, the diversi-

ty of the phenomena[5] and the historical specificity[6] encourage an inquiry into the feasibility of using the category of judicialization to describe institutional transformations in the sphere of class relations because it is possible to speak of a fall in the rate of judicialization (or "dejudicialization").

From an analytical point of view, a second set of studies addresses the institutional and political environment and focuses on measuring

[5]The collectivization of conflicts promoted by the 1988 Constitution, with the opening of the judicial system to collective actions, caused a shift in the debate from the arena of politics to that of the judiciary. This is one of the novelties of the Brazilian context, which is highlighted by research that characterized the judicialization of social relations and the associated positivity for democratic consolidation. However, that description is not echoed in the landscape of collective labor relations. The first decade following the 1988 Constitution saw the collectivization of rights and the expansion of collective redress that stimulated social actors to take action in the judicial system in defense of the rights of groups and communities. However, the labor sphere trod a discordant path. Restricting the unions' access to justice was a cornerstone of the Labor Court, either through a limited interpretation of procedural substitution (SILVA, 2008, 2012) or through a greater formalism in judging the legal grounds inherent in the handling of collective bargaining actions (SILVA, 2008, p.398-419). That specificity prevented an "explosion of litigation" with an increase in individual labor claims filed before the Labor Court. However, the possible explanatory variables are more related to the delegitimization of legal norms by capitalists (and therefore labor law itself), including, for example, the expansion of constitutional rights, such as the increase from 10% to 40% for compensation for arbitrary dismissal or dismissal without cause from the Severance Pay Fund (Fundo de Garantia do Tempo de Serviço – FGTS) (CARDOSO, 2002). In the sphere of individual conflicts, the *judicialization of class relations* would result from numerous factors, including the weakening of other institutions, such as labor inspection, and the coercive power of the unions, which would substantially reduce the cost of non-compliance with rules and encourage employers to promote the "thawing of a cold labor market" (CARDOSO, 2002, p.495).

[6]Labor relations in Brazil have always been "judicialized." Werneck Vianna is concerned with recognizing certain peculiarities of the Brazilian republican experience. In a recently published text, he states: "The bourgeois modernization that came to us from the Revolution of 1930 took the institutions and procedures of the law as one of its main supports to achieve economic and social change. This brought two crucial dimensions of social life under its jurisdiction: that of the political 'market' and the labor market. Special courts were created for their regulation: the Electoral Justice and the Labor Justice courts. Here, then, judicialization is born from a process of modernization imposed asymmetrically on society by the State, then formatted according to corporate modeling and acting for the protection and social control of workers' associational life" (VIANNA, 2013, p. 211).

and evaluating the phenomenon of judicialization.[7] Judicial behavior is studied under different methodological matrices. Currently, there is some consensus on the importance of institutions and their designs, and neoinstitutionalist approaches are increasingly used as an explanatory basis for understanding the expansion of the judiciary's role.[8] From a more realistic political perspective with a less prescriptive bias, it is possible, for example, to correlate a transfer of power from the legislative and executive spheres and reduced discretionary legislative will with the constitutionalization of rights and with the strategic perspective of political elites.[9] In this field, an increase in the institutional spaces of decision does not necessarily lead to the judicialization of politics.

Judicialization can also be studied using the political strategies of the actors and the scenario in which such choices develop (TAYLOR; DA ROS, 2008). This indicates the varying use of the courts by political actors, mainly by the opposition, to demand new problematizations to explain, for example, "that different patterns of judicialization may

[7]From an analytical perspective that favors a judicial behavior approach, Carvalho describes the attitudinal model – which examines the correlation between judge, ideology and action – and the strategic model. In the strategic model, "the judges understand that their ability to achieve certain goals depends, in turn, on their ability to take into account the preferences of other political actors, the choices they expect them to make and the institutional context in which they operate." (CARVALHO NETO, 2004, p.123).

[8]See Hall; Taylor (2003).

[9]Arantes emphasizes the duality of interpretations regarding the massive transfer of political institutions' authority to the judiciary: "The first, of a more normative character, attributes a positive sense to this transfer, associating it with the decentralization and domestication of political power, whether in new democracies or consolidated democracies. Constitutionalizing rights and creating/strengthening constitutional control mechanisms would be forms of improving democracy against the old trend of tyranny by the legislative majority and/or the hypertrophied executive branch. The second way, itself from a realist-inspired political science, questions why politicians would be interested in transferring authority to non-parliamentary and non-executive power entities, such as constitutional courts, as well as reducing its discretion through the constitutionalization of rights. Unlike the first approach, this second appeals to the strategic character of the behavior of political elites and seeks to build explanations based on the idea of delegation of power motivated by self-interest. To the authors of this second perspective, the decision to constitutionalize rights and transfer authority to constitutional courts is directly related to the framework of political forces of the constituent moment and with the expectations of diverse parties in relation to the future." (ARANTES, 2012, p. 197). Under this approach, judicialization should not be naturalized as an expression of a democratic progress.

emerge from virtually identical institutional contexts" (TAYLOR; DA ROS, 2008, p. 829). In a comparative study of the similarities and dissonances of judicialization in two distinct periods of post-1988 Brazilian political life, Taylor and Da Ros observed distinct *uses of judicialization*, which is the rhetoric of the justification for the appeal used.

As distinct *uses of judicialization*, Taylor and Da Ros propose three categorizations: *judicialization as opposition tactic*, *judicialization as arbitration of conflicting interests*, and *judicialization as a government instrument* (2008, p. 838-843). In the first type, the suit is proposed to explain a rule to the opposition, to disqualify government public policies and/or to denounce, veto or delay government practices that the claimants have deemed are misleading. From the actors' point of view, the courts are used as arenas or instruments of opposition.

Judicialization as arbitration of conflicting interests refers to an action aimed at contesting rules that involve assignments and redistributions of powers and responsibilities to parties, federal entities, political entities, courts, etc. With this type of appeal, the negative impacts on conforming power resources that are allocated to institutions of various types are expected to decrease, which will reduce political and economic losses.

More recently, the judiciary has been used for overcoming legislative impasses, decision-making paralysis, "correcting mistakes" of previous administrations, disregarding approved laws without the political support of the government, removing legal statutes unfavorable to the executive, etc.[10] This is a third type of use of judicialization, which is understood *as a government instrument* that the government can use to express its opposition to congressional actions that are contrary to its interests or simply unpopular, as occurs with an increase in the spending and salaries of political agents (TAYLOR; DA ROS, 2008, p. 843).

Conversely, as a result of the debates about judicialization, old objections to constitutional control and the actions of judicial courts have reappeared. The discussion about the (lack of) legitimacy of judges to exclude the application of a rule is replaced by other terms, and the debate is renewed. Moving from the axis of judicialization, institutionalist approaches examine interpretative and argumentative models,

[10]"Inspired by the lessons of Whittington (2005, 2007) on the important role of the United States Supreme Court, are the cases in which one seeks the 'helping hand' of the highest institution of the Judiciary Branch so that it implements or rules favorably on public policies in the interest of the government."(TAYLOR; DA ROS, 2008, p.842).

possible constitutional dialogues, etc. It is possible, then, to reflect on the interaction between political, social and business actors – and the interaction between these actors and the Judiciary – by employing the uses and strategies adopted in the judicialization of labor policies.

3. The Supreme Court and Labor.

The importance of labor in the Constitution dates to the origins of social constitutionalism. The emergence of the constitutional right of labor denotes the relevance of the regulation of economic and labor statutes in shaping the paradigms that define the ideals of social justice and the role of the state in the twentieth-century economic domain to promote the spread of democracy and to incorporate new dimensions to citizenship. After the Mexican (1917), Weimar (1919), and Brazilian (1934) constitutional precursors – and those that emerged post-war that refused authoritarian and exclusionary options for liberal-nationalism (Italy, 1947; Germany, 1949; Brazil, 1946) – strong changes in the structure of law and capitalism that were promoted by the welfare state and Keynesian economics reshaped social and political relationships. All this occurred before the redemocratization processes bequeathed to us by the Spanish (1978), Portuguese (1976) and Brazilian (1988) charters at the end of the twentieth century. This was the culmination of the twentieth century's process of expanding civil, political and social rights on a national basis. In terms of the demand for equality, recognition and affirmation of rights in public and private relationships, labor is a precursor for the enlargement of constitutionalism and fundamental rights.

The 1988 Constitution moved labor regulation from the domain of economic relationships to the domain of fundamental rights, which means replacing the predominant focus on the market and state intervention in the economic domain. This move is heir to a tradition of breaking with previous legal culture, which separated the Constitutional text from disputes, and ensures a quality assurance system of collective autonomy against the public/State by introducing a democratic openness that opens up the guarantees and means to implement norms to citizens. It distributes and redistributes power resources to actors and institutions. The expansion of active legitimate subjects to manage mechanisms of access to the STF through actions that directly trigger the concentrated control of constitutionality was added to a set of constitutional writs that are directed to avoid serious problems arising from

omissions in the regulations of the Constitution (such as a writ of injunction and an action of unconstitutionality by omission). This expansion is in addition to the enlarged rights of freedom of association (which allowed the formation of unions of public servants), an increase in the number of trade union confederations[11], management of a collective writ of mandamus and collective actions for the defense of multiple interests, whether for themselves as public civil actions (Ações Civis Públicas - ACPs) or for the rights of others, procedurally replacing the members of the represented categories (Constitution of the Federative Republic of Brazil – Constituição da República Federativa do Brasil - CRFB, Art. 8, section III).

Given the significant number of labor rights that still require regulation (CRFB, Article 7) and with the legitimacy of access to the Supreme Court by class entities or national union confederations, it was expected that there would be a greater emphasis on writs of injunction and actions of unconstitutionality by omission. The first non-concrete, or subsidiary, action of the Supreme Court only recognized legislative inertia and determined that the regulation's pending rule should be drafted. This action certainly contributed to the low level of importance of such writs in the configuration of the judicialization of social relations. Conversely, the intense legislative activity and great controversy among political, economic and social forces in the post-constitutional period boosted the STF's activity and allowed for the formation of an information repository that was capable of supporting investigations related to this phenomenon.

Database construction has been undertaken through direct[12] and continuous collection of information[13] and is intended to identify the STF's position on the concentrated control of the constitutionality of the norms that address labor issues[14], beginning with the preparation of ta-

[11]With the exception of the rule requiring recognition by presidential decree.

[12]Direct collection does not use any sampling technique. Information is collected directly from the population.

[13]The research's chronological limit defines the date of the Constitution's enactment (October 5, 1988) as the starting point. The database was successively updated from 2008 to the end date presented here, December 31, 2012. To enable it to work within such an extensive timespan, it was necessary to define a limit for the object of research, so as to include only issues concerning the contractual relationship of employment in the survey of the actions of constitutionality. Therefore, statutory relationships that are typical of public servants were not contemplated.

[14]It was established that the definition of "labor issues" would take into account not only

bles and historical series[15] that are able to support analyses of the judicialization of labor relations.

In the name of information reliability, the official statistics available at the STF's website were dismissed because it was not possible to access their methodology for data collection and processing[16]. Thus, initial petitions were adopted as the sample universe[17]. All initial petitions alleging direct actions of unconstitutionality (ações diretas de inconstitucionalidade; ADI), declaratory actions of constitutionality (ações declaratórias de constitucionalidade; ADC) and complaints of breach of fundamental precept (arguições de descumprimento de preceito fundamental; ADPF) were read. The extracted information was systematized into a summary table[18] that enabled a quantitative analysis of the primary variables – both in isolation and in correlation with one another – through data tabulation and graphs.

The preponderance of ADI among the instruments that require the Supreme Court to exert concentrated control is unequivocal. The comparison between the frequency distributions of actions (Graph 1) reveals that there were 199 labor-related ADIs between 1988 and 2012,

---

the catalogs listed in Articles 6 to 11, but also the rules of Articles 5, 114 and 133 of the Constitution and Article 10 of the Temporary Constitutional Provisions Act.

[15]A historical series, chronological or temporal, is a graph that brings together information observed according to time.

[16]The STF portal advises that the results are presented without human interference, automatically, as they are inserted into the database. However, during information extraction, inconsistencies were detected in the calculation of total ADIs over the years. The official statistics available on the STF's electronic portal, updated through December 31, 2012, reported that 4,820 ADIs had been filed since 1988. The survey found that, between 2009 and 2012, 44 ADIs did not exist in the numbering sequence. If these actions had been computed by the Supreme Court's statistics, the last ADI proposed in 2012 should have received the number 4864. However, this ADI is classified on the STF portal with the number 4893. Taking 4893 as a reference, and subtracting the missing 44 actions, the total number of ADIs distributed since the promulgation of the Constitution until December 31, 2012, totals 4849. Problems in the indexing performed by the STF's electronic portal were also found because approximately half of the actions do not show the branch of law that their content addresses.

[17]Sampling universe, population universe, or simply universe designates every set whose elements have shared features from which samples can be extracted. In this work, sampling techniques were not used because all petitions available at the STF's website were read, and the selection of actions focused on those petitions that met the search parameters.

[18]For a description of the database construction methodology, see CIRT, 2012.

whereas there were five[19] ADCs and 33 ADPFs. As a result of the quantitative and qualitative importance of ADIs in the panorama of concentrated control of constitutionality, this study focuses on presenting those actions according to priority.

The expected war of regulation announced by political analysts soon after the end of the constitutional process, particularly in light of the deadlock in the vote on labor and union rights, did not occur exclusively in Congress. The regulatory arena was wider than expected because of the role of the executive branch, the antagonism of corporate and union forces around their interests and values and the great ideological and political polarization in the economic arena, together with the action (active or silent) of the STF, which was prodded by ADIs to assess the new laws adopted. An examination of the contested provisions' content also suggests a shift from regulation to deregulation, or rather to regulation that relaxes rather than strengthens constitutional rights.

Considering the classification proposed by Taylor and Da Ros on the uses of judicialization to bring labor-related ADIs, we consider the following categories of judicialization: *judicialization as arbitration of conflicting interests*, *judicialization as opposition tactic*, and *judicialization as a government instrument*.

Through ADIs, the dispute of labor reforms promoted over the Constitution's first 25 years can be observed, particularly those guided by the avalanche of discourse on relaxation that governments and judicial institutions indulged in during the first 15 years of the 1988 Constitution. Nevertheless, it is possible to consider periods of greater or lesser dispute over the time-span studied. For this reason, we are concerned with relating the actions to the moments of greater or lesser forcefulness of reforms.

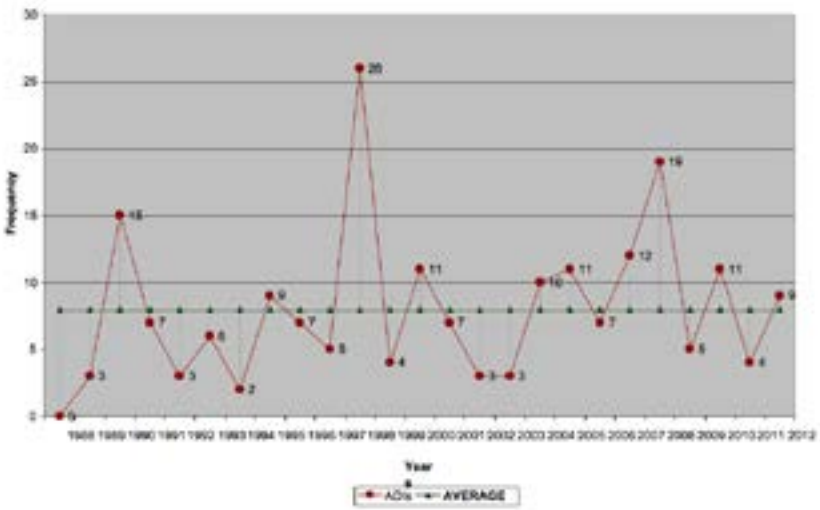
As shown in Graph 1, there was no uniform demand for ADIs, but there was a significant increase in the number of actions filed during several years over the timespan researched. Labor issues remained under debate in the STF for the Constitution's 24 years, with an average[20] of approximately eight per year and with a significant number of ADIs filed in 1990, 1998, 2007 and 2008, with 15, 26, 12 and 19 actions filed,

[19]The five ADCs were proposed in the years 1997, 1998, 2005, 2007 and 2009.

[20]The mean $\overline{X}$ of a population or sample corresponds to the measurement that coalesces the most observed frequencies around itself. There are different types of mean, and here we used the simple arithmetic mean, which corresponds to the quotient obtained by dividing the total sum of the frequencies by the number of years of the series.

respectively.

Graph 1
Comparison between the annual frequencies and the mean ($\overline{X}$ =7.96) of labor-related ADIs between 1988 and 2012)

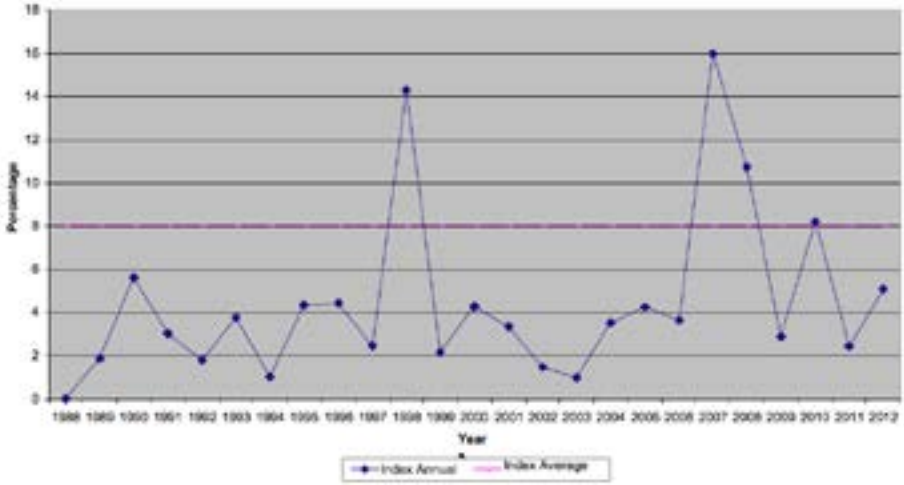


Source: CIRT Group-PPGD-UFRJ Database

Although labor issues are historically judicialized, it is possible to understand the moments when such disputes were more intensively taken to the STF, not only by comparing the annual frequency with the mean but also through a judicialization index[21].

[21]The judicialization index of labor issues in the STF in concentrated control through the direct pathway consists of a percentage that results from dividing the number of actions based on labor issues by the total number of ADIs filed each year.

Graph 2
Index of judicialization of the constitutionality of the control of labor issues in Brazil between 1988 and 2012



Source: CIRT Group-PPGD-UFRJ Database

As is clearly presented in Graph 2, the 199 labor-related ADIs that have been filed since the promulgation of the Constitution represent an annual average of approximately 4% of the 4,849 ADIs filed before that Court. Although this mean percentage suggests that the concentrated control of unconstitutionality through labor-related ADIs is relatively low when compared year-by-year to total actions filed, graph 2 shows that this index doubled in 2010, more than doubled in 2008, more than tripled in 1998 and quadrupled in 2007. Thus, the context of those periods in which the intensification of judicialization occurred should be explored.

In 1990, President Collor de Mello[22] issued successive economic

[22]The government of President Fernando Collor de Mello began on March 15, 1990 and lasted for just over two years; it ended with his resignation on October 1, 1992. Collor de Mello began the neoliberal discourse in Brazil, diagnosing inflation and the public deficit as chronic effects of a strong state presence in the economy; these problems could only be solved through a program of privatization and administrative reform that aimed to minimize the size of the state. There were 29 material defects that were the subjects of 15 ADIs in 1990. In the field of fundamental individual rights, the most frequent is the violation of the principle of acquired rights (CRFB, Art. 5 XXXVI),whereas in the

plans through which he promoted the trade liberalization of the Brazilian market, caps on prices and wages, a tight monetary policy and confiscation of private savings, all of which combined to generate a severe recession in Brazil that was caused primarily by a lack of liquidity. In this context, the loss of the purchasing power of wages caused by the inflationary spiral took center stage in the political debate surrounding labor relations particularly with respect to the successive changes in the policy of wage adjustments that resulted in injury to workers. Anticipating that disputes over salaries would be taken to the judiciary, President Collor issued Provisional Measure 190 of May 31, 1990, which provided in Article 1 that "in collective bargaining agreements of an economic or legal nature, to avoid serious injury to the public order or economy, the President of the Superior Labor Court, at the request of the interested party, may suspend, by reasoned order, wholly or partly, the implementation of decisions of the Regional Labor Courts until the final judgment of the decision pronounced in the respective appeal." With this, the procedural issue remained at the same level as the salary issue, with the addition of 11 of 15 actions involving disputed acts involving the Executive Branch.[23] Seven ADIs were presented by unions representing workers[24], five by political parties[25] and only one by an employer organization[26],

context of social rights, the highest incidence is found in the breach of the principle of irreducibility of salary (CRFB, Art. 7 VI).

[23]Between May and December 1990, four Provisional Measures (Medida Provisória - MP) were contested in eleven ADIs (five with respect to MP 190, one with respect to MP 185, two with respect to MP 193 and three with respect to MP 211), in addition to Executive Order 99,684 (one ADI), Ordinance 3435 of the Ministry of Labor (one ADI) and Normative Instruction 09 (two ADIs). All these acts were issued that same year.

[24]Both the Central Union of Workers (Central Única de Trabalhadores - CUT) and the National Confederation of Metalworkers (Confederação Nacional de Trabalhadores Metalúrgicos - CNTM) filed two actions, while the General Workers Central (Central Geral dos Trabalhadores - CGT), the national union of taxi drivers and the union of commerce workers of the State of Rio de Janeiro each presented one action each.

[25]The Brazilian Social Democracy Party (Partido da Social-Democracia Brasileira - PSDB) was the claimant in two ADIs and a total of three more were filed by the Democratic Labor Party (Partido Democrático Trabalhista - PDT), the Communist Party of Brazil (Partido Comunista do Brasil - PCdoB) and the Workers Party (Partido dos Trabalhadores - PT).

[26]The National Federation of Information Technology Companies (Federação Nacional das Empresas de Serviços Técnicos de Informática e Similares - FENAINFO) challenged Ordinance 3435 of 19 June 1990 of the Ministry of Labor and Social Security, which addressed norms for worker ergonomics in the data processing area, setting a five-hour

which demonstrates the confluence of interests between the business community and the government of Fernando Collor at that time.

In 1998, in a context marked by the negative activism of the Superior Labor Court (SILVA, 2008, p. 485-487), unions sought new instances of dispute; among these, the ADIS before the STF stand out. Unlike 1990, when only the national confederation of metal workers and the central unions filed ADIs, a myriad of professional confederations, separately or together, resorted to this mode of action, which highlighted the prominence of commercial entities as plaintiffs. The filing of ADIs was concentrated mostly in the hands of workers and political parties, with 11 and eight of the 26 ADIs in 1998[27], respectively, which verified the recurrent use of *judicialization as opposition tactic* at that time.

The labor issues at the center of the contested acts were essentially concerned with the duration of work and new forms of contracting. Indeed, that year, the executive branch adopted a "legal activism" (VIANNA *et al*., 2010) approach to make both entry into the employment relationship and the duration of work more flexible: the circumstances under which contracts were permitted for a specified amount of time were expanded and the system of compensating hours through a bank of hours was created (Law 9601 of 1998); rules for part-time contracts with the annualization of the 44 hour week for the purpose of compensation was introduced (MP 1709 of 1998), and several changes that addressed paid rest on Sundays (numerous reissues of MP 1539 of 1997).

In 2007 and 2008, the biggest news was related to the eight ADIs that addressed State statutes[28] because – for the first time – they exceed-

limit for effective data entry work, in addition to a ten-minute break for every 50 minutes worked, which allowed, however, for the use of the remainder of the working day for other tasks.

[27]The actions proposed by employers' confederations were directed at state and local standards and a decision by the TRT for the 18th region, whereas political parties and professional confederations challenged provisional measures and laws arising from their conversion. Within these, 87 material defects were identified, with most of the claims relating to social rights, both generically (CRFB, Art. 6) and specifically, as with the irreducibility of salary, limitation of the workday and the right to overtime.

[28]In 2008, among the six contested state laws, four were from the State of Rio de Janeiro. Three of these created state holidays and one established mandatory preventive screening for breast cancer in workers. A law in Rondônia that prohibited commercial fishing in state rivers was also the subject of an ADI, in addition to a law establishing that companies must hire a minimum of 5% of people over the age of forty-five in the Federal District.

ed the number of ADIs directed at federal laws (four ADIs) and interim measures (five ADIs). The data suggest that disputes over labor standards encompass multiple regulatory bodies, including State governments. Thus, such disputes began to be heard in other regulatory bodies outside of Congress or the Presidency of the Republic.

As indicated in Graph 2, the year 2007[29] stands out from the others by presenting an annual rate (16%) four times greater than the average rate of labor actions as a percentage of the total number of claims filed (4%). Of the 75 ADIs proposed in the STF during that year, 12 were related to labor issues and analysis reveals the emergence of a new configuration of the judicialization of labor relations in the STF, with the emergence of other actors in more than half of the labor writs: State Governors are the plaintiffs in four ADIs[30] and class entities in three ADIs[31].

[29]This period falls within the government of President Luis Inácio Lula da Silva of the Workers Party (PT), the first trade unionist elected President in Brazil, who was sworn in on January 1, 2003, and reelected to remain there until December 31, 2010.

[30]These are ADI 3894 – in which the Governor of Rondônia challenges Law 1201 of 2001 of that State, which fixed the workday of nursing professionals at six hours – and ADIs 3899 and 3953, in which the Governor of the Federal District challenges District Laws 3923 and 3916, both from 2006. The first norm ensures employment for bus fare collectors by stipulating the necessity of this function, and the second governs the profession of hairdresser in that federated unit. Finally, ADI 3960 was authored by the Governor of São Paulo in which he disputes Law 12,252 of 2006, which prohibits the bus driver from performing the job of fare collector. With the exception of this last, which was dismissed, the others were awaiting decision on December 31, 2012.

[31]Two actions, 3928 and 3993, dealt with contributions. The first, filed by the Brazilian Association of Radio and Television (Associação Brasileira de Rádio e Televisão - ABRATEL) challenged Normative Instruction No. 20 of the Ministry of Social Welfare and Assistance for including portions of the "thirteenth salary" (annual year-end bonus) corresponding to the previous notice period and the previous notice period compensated on the basis of calculating pension contributions; the second was the initiative of the Federal Board of Nursing with respect to Decree 5773 of 2006, which exempted higher education teaching professionals from professional contribution. Both were dismissed without judgment on the merits. This group's third action, ADI 3961, is notable for the group chosen for activism: the National Association of Labor Court Judges (Associação Nacional dos Magistrados da Justiça do Trabalho - ANAMATRA) questions the constitutionality of Federal Law 11,442 of 2007, according to which the nature of relationships between the transportation company and the autonomous carrier will always be commercial; the claim was made using the argument that this norm encourages the practice of illegitimate contractual relations and prevents the recognition of employee relations and promoting fraud of constitutional labor rights. The action in question was awaiting judgment on December 31, 2013.

This change in configuration is confirmed by analyzing the year 2008, when three phenomena can be found. For the first time since the promulgation of the 1988 Constitution, employers' confederations took the lead in contesting rules through ADIs, accounting for nine of the 19 filed during the period, whereas union confederations of workers and political parties appear balanced, with three actions each. Although control of constitutionality was intensely focused on provisional measures in previous periods, both in the Collor de Mello Government and in the two terms of President Fernando Henrique Cardoso, this number was drastically reduced during the tenure of President Luis Inácio Lula da Silva, with only four interim measures contested during his two terms together.[32] Finally, the eight ADIs that challenged norms originating in States and municipalities exceeded the number of ADIs targeting federal laws (four ADIs) and interim measures (five ADIs) for the first time. These factors together reveal that labor disputes are now contested in other regulatory bodies that are outside of Congress or the Presidency of the Republic[33].

In addition to the peak years represented in the graphs, there was an increased incidence of labor-related ADIs in the STF in 2000, 2005 and 2010, when 11 ADIs were filed in each of those years. Although not representing an increase as significant as other years that have previously been analyzed, a closer look at the *use of judicialization* in these periods is warranted.

[32]This does not mean, however, that acts originating in the Executive Branch have passed unscathed. During the two terms of President Lula, nine ADIs were directed against four Ordinances of the Ministry of Labor and Employment and in 2008, five actions challenged Ordinance 186 of April 10, 2008.

[33]In addition, throughout the period of Luis Inácio Lula da Silva's government, there is a sharp decline in the filing of ADIs by political parties. Only three ADIs were filed by political parties during this period: ADI 4067 proposed by the Democrats party (DEM) questioned the formal recognition of central unions, challenging Law 11,648 of March 31, 2008; and the Brazilian Social Democracy Party (PSDB) filed ADI 4015 in order to stop Ordinance 218 of the Regional Labor Court - 8th region, which fixed the amount of debts to be paid by Small Value Requisitions (Requisições de Pequeno Valor - RPV). The Socialism and Liberty Party (Partido Socialismo e Liberdade - PSOL) authored ADI 4027, focusing on Law 11,603 of 2007, which authorized general commerce labor on holidays. This decrease can be explained by the fact that the parties that traditionally filed the ADIs formed the foundation of the government after 2002, in addition to the "parsimony" with which President Luis Inácio Lula da Silva used the "impulse toward relaxation," preferring to attack labor legislation "laterally" (VIANNA et al., 2010, p. 113).

In 2000, four of the 11 ADIs disputed Article 1 of Law 9958, passed on January 12, 2000, which created conciliation commissions to which any labor claims should be submitted. Three of these ADIs were filed by union confederation professionals and one by a joinder between opposition political parties[34], which made explicit the *use of judicialization as opposition tactic*, at least as a strategy of worker resistance to the continuity of the relaxed reforms of neoliberal bias.

In 2005, judicialization resulted from disputes over rules related to Constitutional Amendment No. 45 of 2004, which promoted the reform of the judiciary. Eight of the 11 ADIs that were filed that year related to the unconstitutionality of several of that Amendment's provisions concerning the jurisdiction of the Labor judiciary (Figure 1). Union confederation professionals were the plaintiffs in three actions (ADIs 3423, 3431, 3432) whereas the remaining five actions are distributed between other legitimate parties: one by the National Confederation of Liberal Professions (ADI 3392), one by the Union Confederation of Educational Institutions (ADI 3520), two by associations of judges, one by federal judges (ADI 3395) and one by state judges (ADI 3529), in addition to one by the Attorney General (ADI 3684). In these instances, there is no *use of judicialization as opposition tactic* because no political party took the initiative to file the ADIs. In any case, the presence of two associations of judges as plaintiffs, in addition to requests from Confederations concerning *mutual agreement*, suggests the *use of judicialization as arbitration of conflicting interests*. The challenges before the STF in those cases were, at the core, about the rules involving redistributing powers and competences to the judicial branches. The Confederations hope, in turn, to reduce the negative impacts of conforming the resources of power that were transferred to them with the possibility of introducing a regulatory

[34]These are ADIs 2139, 2148, 2160 and 2237, initially distributed to Minister Octavio Galotti. They are awaiting trial with a partially issued order from 2009 to give an interpretation according to the Constitution of Article 625-D, which was introduced by the contested provision, to ensure free access to the courts under individual bargaining. ADI 2139 was filed by the Brazilian Communist Party (Partido Comunista Brasileiro - PCB) in an active joinder with the Communist Party of Brazil (PCdoB), the Democratic Labor Party (PDT) and the Brazilian Socialist Party (Partido Socialista Brasileiro - PSB); the remaining actions had as plaintiff, respectively, the National Confederation of Workers in Educational Institutions (Confederação Nacional de Trabalhadores em Estabelecimentos de Ensino), the National Confederation of Commerce Workers (Confederação Nacional de Trabalhadores no Comércio) and the National Confederation of Liberal Professions (Confederação Nacional das Profissões Liberais).

body without the requirement of *mutual agreement*.

Finally, in 2010, there is the *use of judicialization as arbitration of conflicting interests* by business union confederations because they have mostly involve ADIs related to laws in the states of São Paulo, Rio de Janeiro, Paraná and Rio Grande do Sul that focused on state minimum wages, regulation of professional practices and labor restrictions that are required for the participation of companies in bidding processes.

However, there are other examples of the *use of judicialization* as a government instrument during the research period.

In the timespan investigated, State Governors resorted to the STF 15 times to challenge state laws that contained labor issues that were beneficial to workers in almost all cases[35]. The distribution of ADIs among the political parties that the State Chief Executives belonged to indicates that governors from the PSDB were the plaintiffs in five actions, followed by representatives of the DEM and the PMDB in three actions each, the PSB in two actions and the PPB and PT, in one action. At this time, the phenomenon of the *use of judicialization as a government strategy* can be identified from the initiatives of several governors in challenging state laws.

4. Conclusions

In this article, we analyzed the judicialization of labor-related actions before the STF to understand the frequency and greater incidence of such actions and to relate them to the political strategies of the actors and the context in which they developed those choices (TAYLOR, DA ROS, 2008).

The actions examined show that professional and economic union confederations, analogously to political parties, make *use of judicialization as opposition tactic* – engaging the STF as a resource of resistance – although the prospect of success is irrelevant or distant[36].

[35]ADI 3282 and 4015 are the exceptions. They were filed by the Governors of the State of Rio Grande do Sul and Pará respectively, with respect to norms originating in the judiciary, which regulated the payment of convictions in small value requisitions. Action 3282 is awaiting judgment under the review of Minister Teori Zavascki. ADI 4015 was granted an injunction and is awaiting judgment on the merits, under the review of Minister Celso de Mello.

[36]As with ADI 1627, challenging Decree 2100 of 1996, which denounced ILO Convention 158, and with ADI 4568, which was filed by the PPS, the PSDB and the DEM in 2011 with respect to Law 12,382 of 2011, which addressed the policy of raising the min-

Recourse to *judicialization as arbitration of conflicting interests* has been used at different times. The classical limits of the judicialization of labor were topics brought to the STF, with ADIs filed against the new wording of Article 114, paragraphs 2 and 3 of the Constitution, by the 45th Amendment, which established the need for mutual agreement to file collective bargaining complaints, restricted the normative power of the Labor Court and reduced the power resources granted to unions (ADI 3392, 3395, 3423, 3421, 3432). In the case of Judicial Reform, the dispute concerns the procedural rules that limit the powers of the unions and the Labor Court itself. The ADIs that challenge Ordinance 186 of the Ministry of Labor and Employment on union registration (ADIs 4120, 4126, 4128 and 4139) can also be classified as the *use of judicialization as arbitration of conflicting interests* because they are initiatives that seek to avoid regulations that cripple union confederations and the monopoly of representation by previously established unions.

The use of *judicialization as government instrument* and "helping hand" continues to occur in the labor realm. Although barely visible in the study of ADIs, it is forcefully expressed in the use of Declaratory Actions of Constitutionality. A test case can be found in the judgment of ADC 16, which addresses the outsourcing and accountability of public administration through breach of duty. Although it falls outside the objectives of this article (which is focused on the study of ADIs), it demonstrates the richness of the monitoring and updating functionalities of the database that was designed and developed within the scope of CIRT/PPGD/UFRJ: A panel of design and redesign activities, institutions, norms and practices of Brazilian labor.

References

ARANTES, R. B., 2013. Cortes Constitucionais. In: AVRITZER, L, et. al. (Org.) *Dimensões políticas da justiça*. Rio de Janeiro: Civilização Brasileira, pp. 195-206.

BARROSO, L. A., 2009. *Judicialização, ativismo judicial e legitimidade democrática*. Revista Direito do Estado, Salvador, year 4, no. 13, 29p., jan./mar. In http://www.plataformademocratica.org/Publicacoes/12685_Cached.pdf. Viewed 18 oct.2012. *ISSN 1981-187X.*

BOSCHI, R. R and SILVA, J. M., 2013. *Direito e empresariado*. In: AVRITZER, L, and others (Org.) Dimensões políticas da justiça**.** Rio de Janeiro: Civilização Brasileira, pp.411-420.

---

imum wage.

BONAVIDES, Paulo, 2006. *Curso de direito constitucional*. 18ª ed. São Paulo: Malheiros.

BRANCO, A. P. T., 2009. *O ativismo judiciário negativo investigado em súmulas editadas pelo Tribunal Superior do Trabalho*. In: COUTINHO, Grijalbo Fernandes et al. (org.). Jurisprudência do TST: leituras críticas em defesa do direito do trabalho. São Paulo: LTr.

CARDOSO, A. M., 2002. *Direito do Trabalho e Relações de Classe no Brasil Contemporâneo*. In: VIANNA, L.W. A democracia e os três poderes no Brasil. Rio de Janeiro: IUPERJ. pp. 493-546.

CARVALHO, A. C., 2011. *Direito do Trabalho: Curso e Discurso*. Aracaju: Evocati.

CARVALHO, L. and VIEIRA, J. R., 2011. *Desafios da Constituição: democracia e Estado no século XXI*. Rio de Janeiro: UFRJ.

CARVALHO NETO, E. R. de., 2004. *Em Busca da Judicialização da Política: Apontamentos para uma Nova Abordagem*. In: Revista de Sociologia e Política. no.23, pp. 115-124. *ISSN 0104-4478.*

CASAGRANDE, Cássio, 2008. *Ministério Público e a judicialização da política: Estudos de casos*. Porto Alegre: Sergio Antonio Fabris Ed.

CASTRO, M. F. de, 1996. *O Supremo Tribunal Federal e a Judicialização da Política.* Revista brasileira de Ciências Sociais. Vol. 12 no. 34 São Paulo. Available from: http://www.anpocs.org/portal/index.php?option=com_content&view=article&id=203:rbcs- 34&catid=69:rbcs&Itemid =399 Viewed jan,03rd., 2013.

CHIARELLI, C. A. G and GRAZZIOTIN, M. R., 2012. *Trabalho na Constituição*. Direito Individual com jurisprudência e direito comparado. 2 ed. São Paulo: LTr.

DELGADO, M. G and DELGADO, G. N., 2012. *Constituição da República e Direitos Fundamentais*. Dignidade da pessoa humana, justiça social e direito do trabalho. São Paulo: LTr.

_____., 2013. *Justiça do Trabalho*. In: AVRITZER, L, et. al. (Org.) Dimensões políticas da justiça. Rio de Janeiro: Civilização Brasileira, pp. 297-314.

EISEMBERG, José, 2002. *Pragmatismo, direito reflexivo e judicialização da política*. In: VIANNA, L.O. (Org). A democracia e os três poderes no Brasil. Belo Horizonte: UFMG; Rio de Janeiro: IUPERJ/FAPERJ.

ENGELMANN, Fabiano, 2006. *Sociologia do campo jurídico: juristas e usos do direito*. Porto Alegre: Sérgio Antônio Fabris Ed.

FARIA, J. E., 1992. *Justiça e conflito: Os juízes em face dos novos movimentos sociais*. 2. ed. São Paulo: Revista dos Tribunais. *ISSN 0034-9275.*

_____. , 2004. *O sistema brasileiro de Justiça: experiência recente e futuros desafios*. Estudos Avançados (USP. Impresso), São Paulo, vol. 18, no. 51, pp. 103-125.

ISSN 0103-4014.

FERRAJOLI, Luigi, 2007a *Sobre los derechos fundamentales*. In: CARBONELL, Miguel. Teoría del neoconstitucionalismo. Madrid: Trotta.

_____., 2012. *Constitucionalismo garantista e neoconstitucionalismo*. Anais do IX Simpósio Nacional de Direito Constitucional. pp. 95-113. Available from: http://www.abdconst.com.br/revistas_interna3.php Acesso em nov,22nd.2012

FREITAS, L. B., 2011. *"Desjudicialização" da política ou a insuficiência dos conceitos de judicialização …* In: MOTA, MAURICIO JORGE PEREIRA; MOTTA, LUIS EDUARDO PEREIRA. (Org.). O Estado democrático de Direito. Rio de Janeiro: Elsevier, pp. 245-266.

_____., 2011. *A Política e o TST na Constituição dos Direitos do Trabalho*. 1ª ed. São Paulo: LTr, vol.1, p. 112.

GARRIDO, Alexandre; *et al*., 2008. *O Supremo Tribunal Federal e a Força Normativa dos Fatos*. Revista Jurídica da Faculdade Nacional de Direito da UFRJ. vol.1, no.3, dec,2008. *ISSN 1984-0950.*

GOMES, A. de C and PESSANHA, E. G. da F., 2010. *Trajetórias de Juízes.* Porto Alegre, POA, TRT 4ª.

GOMES, F. R., 2013. *Direitos Fundamentais dos Trabalhadores: critérios de identificação e aplicação prática*. São Paulo, LTr.

HALL, P. A. and TAYLOR, R. C. R., 2003 *As três versões do neo-institucionalismo.* In: Lua Nova, 58. pp. 193-223. *ISSN 0102-6445.*

HESSE, Konrad, 1991. *A força normativa da Constituição.* Trad. Gilmar F. Mendes. Porto Alegre: Sérgio Antonio Fabris.

HORN, C. H and TEDESCO, M. S. R., 2010. *A expansão recente da demanda da Justiça do Trabalho e a distribuição setorial das ações...* Revista de Direito do Trabalho (São Paulo), vol. 137, pp. 11-44. *ISSN 0102-8774.*

HORN, C. H. (Org.) and COTANDA, F. C. (Org.)., 2011. *Relações de trabalho no mundo contemporâneo: ensaios multidisciplinares.* 1. ed. Porto Alegre: Editora da UFRGS,. vol. 1. 848 p.

LOBATO, M. S. C., 2006. *O valor constitucional para a efetividade dos direitos sociais nas relações de trabalho.* São Paulo: LTr.

LOPES, J. R. L., 1989. *A Função política do poder judiciário*. In: José Eduardo Faria. (Org.). Direito e justiça: a função social do judiciário. 1ª ed. São Paulo: Ática, vol. 1.

MACIEL, D. A and KOERNER, A., 2002. *Sentidos da judicialização da política: duas análises.* In: Lua Nova, no 57, pp. 123-124. *ISSN 0102-6445.*

MARTINS, C. E., 2009. A *superexploração do trabalho e a economia política da dependência.* In: SADER, E. SANTOS, T. (Coord.) A América Latina e os desafios

da globalização. Ensaios dedicados a Ruy Mauro Marini**.** Rio de Janeiro: PUC-Rio. São Paulo: Boitempo. pp.189-216.

MOURA, E. K. V., 2013. *Trabalho e Constituição: Ações diretas de inconstitucionalidade e os desafios da regulação do tempo de trabalho no Brasil.* Dissertação (Mestrado em Teorias Jurídicas Contemporâneas) Programa de Pós-Graduação em Direito. Universidade Federal do Rio de Janeiro.

OLIVEIRA, M. A., 2002. *Política trabalhista e relações de trabalho no Brasil: da Era Vargas ao Governo FHC*. Tese (doutorado) – Instituto de Economia, Universidade Estadual de Campinas, Campinas.

OLIVEN, R. G; RIDENTI, M. and BRANDÃO, G. M., 2008. *A Constituição de 1988 na vida brasileira*. São Paulo: Hucitec/Anpocs.

PAESE, Raquel, 2011. *A Constituição Brasileira de 1988 e a atuação dos sindicatos nos espaços de regulação do trabalho*. HORN, C. H. (Org.); COTANDA, F. C. (Org.). In: Relações de trabalho no mundo contemporâneo: ensaios multidisciplinares. 1ª ed. Porto Alegre: Editora da UFRGS. vol. 1.

PESSANHA, E; ALEMÃO, I. and SOARES, J. L., 2009. *TST, Dissídios Coletivos, Demissão Massiva: Novos Desafios para a Justiça do Trabalho*. In: O Mundo do Trabalho, vol.1. Leituras críticas da Jurisprudência do Tribunal Superior do Trabalho. Hugo Melo Filho et. al. (Orgs.) São Paulo: LTr, pp. 77-94.

RAMOS FILHO, Wilson, 2012. *Direito Capitalista do Trabalho: história, mitos e perspectivas no Brasil*. São Paulo: LTr.

SARLET, I. W., 2001. *O Estado Social de Direito, a Proibição de Retrocesso e a Garantia Fundamental da Propriedade*. Revista Diálogo Jurídico, Salvador, CAJ - Centro de Atualização Jurídica, vol. I, no. 4, jul. In: http://www.direitopublico.com.br Acesso em: may, 1st, 2008. *ISSN 1982-4858.*

SENNETT, Richard, 2009. *A corrosão do caráter*. 14ª Ed. Rio de Janeiro: Record.

SILVA, S. G. C. L., 2009. *Decisões judiciais e (des)construção dos direitos: uma revisita à interpretação dos direitos coletivos pelos tribunais superiores*. In: COUTINHO, F.C et alli. O Mundo do Trabalho. Leituras críticas da jurisprudência do TST: em defesa do direito do trabalho. São Paulo: LTr, pp.418-438.

_____., 2008. *Relações Coletivas de Trabalho: configurações institucionais no Brasil contemporâneo*. São Paulo: LTr.

_____., 2012. *Direitos fundamentais, Garantismo e Direito do Trabalho* (republicação). Revista OAB. Rio de Janeiro, vol. 27, p. 115. *ISSN 1984-2627.*

_____., 2011. *Reforma do Judiciário e Justiça do Trabalho: Esboço para a avaliação do legado reformador no âmbito do direito de greve*. In: O que estão fazendo da Nova Competência da Justiça do Trabalho? Análise crítica da jurisprudência do STF, do TST e do STJ após a EC 45/2004. COUTINHO, Grijalbo, FAVA, Marcos Neves (Org.) São Paulo: LTr, pp. 611-639.

SILVA, S. G. C. L.; IGREJA, C. O. and MOURA, E. K. V.. 2009. *Constituição e Trabalho: um exame sobre as Ações Diretas de Inconstitucionalidade ...* XXXI Jornada Giullio Massarani de iniciação científica, artística e cultural. Universidade Federal do Rio de Janeiro – CCJE.

SILVA, S. G. C. L. and others, 2013. *Ações Diretas de Constitucionalidade, Inconstitucionalidade e Arguições de Preceito ...* Rio de Janeiro, Grupo de Pesquisa Configurações Institucionais e Relações de Trabalho. CIRT - PPGD-UFRJ, Apr, 2013.

SUNSTEIN, C. R., 1999. *One case at a time: judicial minimalism on the Supreme Court*. Cambridge: Harvard University.

SÜSSEKIND, Arnaldo, 2004. et al. *Instituições do direito do trabalho*. 21 ed. vol. 2, São Paulo: LTr.

TATE, C.N and VALLINDER, T., 1997. *The global expansion of judicial power*. New York: New York Univerity Press.

TAYLOR, M. M. and DA ROS, L., 2008. *Os partidos dentro e fora do poder: a Judicialização como resultado contingente da estratégia política*. Revista Dados. vol. 51, no. 4, Rio de Janeiro, pp. 825-264. Available from: http://www.scielo.br/pdf/dados/v51n4/02.pdf. *ISSN* 0011-5258.

TOLEDO FILHO, M. C., 2010. *El caso Embraer y el ordenamiento brasileño*. In: Revista Latinoamericana de Derecho Social, no. 11, Available from: Revistas.unam.mx, 2010. *ISSN* 1870-4670.

VIANNA, L.W. et al., 1999. *A judicialização da política e das relações sociais no Brasil.* Rio de janeiro: Revan.

_____., 2002. *A democracia e os três poderes no Brasil*. Rio de Janeiro: IUPERJ.

_____., 2010.*A constitucionalização da legislação do trabalho no Brasil: uma análise da produção normativa entre 1988 e 2008.* Centro de Estudos Direito e Sociedade (Cedes). Brasília: Fundação Astrogildo Pereira (FAP). *ISSN* 1982-1522

_____., 2013. *A judicialização da política.* In: Avritzer, L, et. al. (Org.) Dimensões políticas da justiça. Rio de Janeiro: Civilização Brasileira, pp. 207-214.

VIANNA, L.W; BURGOS, M. B. and SALLES, P. M., 2007. *Dezessete anos de judicialização.* Tempo Social, vol. 19, no. 2. nov, 2007. pp.39-85. ISSN 0103-2070.

WALDRON, Jeremy, 2009. *A Right-Based Critique of Constitutional Rights*. Boston University Law Review. Apr, 2009. 478p.

The question of irregular migrant workers between a rights based international approach and national regulation

Daniela Muradas Reis[1]
Pedro Augusto Gravatá Nicoli[2]

Abstract: The analysis of the work rendered by immigrants in an irregular migratory condition reveals an existing disparity of positions on the issue. On one hand, national legal orders with merely repressive characteristics are silent on the specificity of the labour question or simply deprive migrant workers from protection, as a form of punishment and inhibition of migration. On the other hand, international human rights rules are dedicated to the matter, declaring the absolute necessity of protection in relation to the work performed. In this scenario, the essay proposes a critical comparison between the migration laws in Brazil, consolidated by the Statute of the Foreigner, and the approach of the issue by the International Labour Organization, to conclude in the direction of the necessary protection of the dignity of the worker, which cannot be adjourned.

Keywords: Labour Immigration; Brazilian Statute of the Foreigner; ILO's Rights Based Approach.

I. Introduction

[1] Daniela Muradas Reis holds a master degree in Philosophy of Law and a Ph.D. in Law from the Federal University of Minas Gerais (UFMG). She is a Labour Law Professor in the graduate and post-graduate Law School (master and doctorate) of the Federal University of Minas Gerais.

[2] Pedro Augusto Gravatá Nicoli holds a master degree and is currently a doctorate student in the Ph.D. in Law program from the Federal University of Minas Gerais, with scholarship from the Brazilian government (CAPES). Currently, he is in a research stage at the Collège de France, Paris, as part of "doctoral sandwich" program (2013-2014), under the supervision of Professor Alain Supiot.

It is not hard to perceive the relevance of the issue of international migration in the contemporary world. That occurs because this is an area of recurrent and serious affronts to human dignity, especially when it comes to work and the challenges related to the labour protection of the so-called undocumented immigrants. Antônio Augusto Cançado Trindade sees the problem in its amplified dimension, in the context of the advertised "globalization", presenting sharp criticism:

> "In times of the so-called 'globalization' (the misleading and false neologism which is en vogue in our days), the frontiers have been opened to the capitals, goods and services, but have sadly closed themselves to human beings. The neologism which suggests the existence of a process which would comprise everyone and in which everyone would participate, in reality hides the fragmentation of the contemporary world, and the social exclusion and marginalization of increasingly greater segments of the population. The material progress of some has been accompanied by the contemporary (and clandestine) forms of labour exploitation of many (the exploitation of undocumented migrants, forced prostitution, traffic of children, forced and slave labour), amidst the proven increase of poverty and social exclusion and marginalization"[3].

There are also situations of problematic interaction between irregular migrants and host societies, under the influence of complicating factors such as racism and xenophobia. Teresa Sales highlights:

> "Illegal or clandestine migration has been the focus of international bodies mostly from the 70's, when clandestine migration appeared stronger, generating movements of intolerance and discrimination against immigrants and their families"[4].

---

[3] CANÇADO TRINDADE, Antônio Augusto. *Concurring Vote*. *In* INTER-AMERICAN COURT OF HUMAN RIGHTS. Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03. San Jose, September 17, 2003. Avaliable at em http://www.corteidh.or.cr/docs/opiniones/seriea_18_esp.pdf. Access on February 2, 2014.

[4] SALES, Teresa. Brasil migrante, Brasil clandestino. *Revista São Paulo em Perspectiva*, São Paulo, 8(1), p. 107-115, jan./mar. 1994, p. 112. In the original: "As migrações ilegais ou clandestinas têm sido foco de atenção dos organismos de foro internacional sobretudo a partir dos anos 70, quando as migrações clandestinas se manifestam com mais vigor, gerando movimentos de intolerância e discriminação contra os imigrantes e suas famílias". Translation of the authors.

In this context, the analysis of the treatment given to unauthorized migrants reveals that there are quite dissimilar positions that reflect on the way legal labour protection of these individuals is perceived — guaranteed or deprived. The movement of hardening of migration laws around the world is well known, and sanctions to those who violate the migration legislation fulfill a central role as a policy to inhibit migration itself. At the same time, international bodies, such as the International Labour Organization, point in the direction of the necessary perception of the conditions to which these individuals are subjected and the need to protect their basic rights, such as the protection of labour performed.

It is essential to analyze the work performed by immigrants, since one can identify in almost every flow of people in the international scenario the presence of relations that have as its object the performance of human labour. National borders are almost always crossed with the intent of searching for better living conditions, what is generally mediated by work. That is because, after all, work is the lever to all the accomplishments of what may be called "human culture", as well punctuates Antônio Álvares da Silva.

Therefore, this article will address the essential difference that still exists in the perception of migrant workers by the Brazilian Statute of the Foreigner and by the standards of the International Labour Organization that deal with the subject, in order to provide a brief overview in which one can claim the incidence of a more humanized regulation, which does not lose sight of the size of the dignity of undocumented immigrants and the need to protect the work performed by them.

II. The condition of unauthorized migrant under Brazilian Law

The broadest definition of irregular migration, taken in view of the countries of origin and destination, as well as considering the legal assets involved, is synthesized by Eduardo Geronimi:

> "Irregular migration can be defined as all international movement that takes place outside of the legal regulation of the countries of origin, receipt, of both (...) or of passage. As definition, irregular migration is the result of a law that is enacted to control the migration flows (…), and it is a violation — or a offense under the criminal system of national legislation — against the State's

sovereignty"[5].

Under the perspective of domestic law, a migrant can be considered unauthorized in Brazil whenever the prerequisites of the applicable legislation are not obeyed (namely Law 6.815/80, the so-called "Statute of the Foreigner"), in regard to the *entrance*, *permanence* and/or *activities performed* within the national territory. The national legal order established a long series of conditions needed so that the migration occurs in perfect consonance with what the country requires, aiming to protect, under the terms of article first of the Statute, "national security, institutional organization, political, socio-economical and cultural interests of Brazil, as well as the defense of national workers"[6].

As to the entrance, the foreigner will be in an irregular condition whenever the adequate visa to enter the national territory is not duly conceded. This first group is named "clandestine" immigrants[7] ("*imigrante clandestino*") by the Statute of the Foreigner (cf. art. 125, I of the Statute). In regard to the permanence, the irregularity will exist whenever the immigrant does not have any visa or, once expired the term of the visa, the immigrant stays in the country. To these the Law gives the denomination "irregulars" ("*irregulares*") (art. 125, XII). Finally, are also considered irregulars those who perform activities that are incompatible with the type of authorization that is guaranteed by the visa, as, for example, the bearer of a tourism visa who performs paid activities. Those

[5] GERONIMI, Eduardo. Aspectos jurídicos del tráfico y la trata de trabajadores migrantes. *Programa de Migraciones Internacionales*. Geneva: International Labour Organization, 2002, p. 4. Originally: Las migraciones irregulares pueden definirse como todo movimiento internacional que tiene lugar fuera del marco regulatorio de los países de envío, de recepción, de ambos (...), o de tránsito. Por definición, la migración irregular es el resultado de la legislación promulgada para controlar los flujos migratorios (...), y es una infracción — o delito, según el sistema penal de las legislaciones nacionales — contra la soberanía del Estado". Translation of the authors.

[6] In the original form: "à segurança nacional, à organização institucional, aos interesses políticos, sócio-econômicos e culturais do Brasil, bem assim à defesa do trabalhador nacional". Translation of the authors

[7] The technical inaccuracy of the expression clandestine migrant (or illegal migrant), once it expresses the odd idea of an "illegal person", apart from its ideological weight, makes it inappropriate for scientific use. One prefers, here, more accurate expressions, such as migrant in an irregular condition, undocumented migrant, unauthorized migrant and other expressions that reveal the irregularity restricted to the migratory condition. In any case, the wording of the Law 6.815/80, as it is currently, keeps the unfortunate expression "clandestine migrant".

are called "impeded" ("*impedidos*"), under the terms of Law 6.815/80 (see, for instance, art. 125, VII).

It is also important to highlight what the article 38 of the Statute of the Foreigner establishes, affecting directly the destiny of immigrants in irregular conditions. The article states to be "denied the legalization of the permanence of clandestine and irregular migrants, and the transformation in permanent of the transit, tourist, temporary (article 13, items I to IV and VI) and courtesy visas"[8]. Once can clearly notice that such provision is aligned with the essentially repressive feature of the Statute when dealing with irregular migration.

And the entire regulation in regard to the admission of migrants embraces the same logics, in an utilitarian view of borders' security, away from the line of human rights, legatee of an authoritarian inspiration and of the world view from the moment that the Statute came into force.

III. The sanctions of the Statute of the Foreigner for unauthorized migrants

There are essentially three sanctioning measures of compulsory expatriation under Brazilian legal order: *deportation*, *expulsion* and *extradiction*. It is important for this essay especially the concept of deportation, once "both extradition and expulsion presuppose the existence of a criminal offense" [9], as summarized by Miguel Florestano. This same author completes, stating that "in order to give rise to the first [*extradition*] the offense shall occur in foreign territory, and, for the second [*expulsion*], the crime must occur in national soil"[10]. That is, expulsion and extradition are concepts that are not correlated with the condition of irregular migration in itself, which is the object under discussion here[11].

[8] In the original form: "à segurança nacional, à organização institucional, aos interesses políticos, sócio-econômicos e culturais do Brasil, bem assim à defesa do trabalhador nacional". Translation of the authors.

[9] FLORESTANO, Miguel. Da deportação. *In* FREITAS, Vladimir Passos de (org.). *Comentários ao Estatuto do Estrangeiro e opção de nacionalidade*. Campinas: Millennium, 2006, p. 140.

[10] FLORESTANO, *Da deportação*, *In* FREITAS, *Comentários ao Estatuto do Estrangeiro e opção de nacionalidade*, *cit.*, p. 140.

[11] An immigrant in irregular condition can, naturally, commit a criminal offense in the country, with no correlation with its migratory status. In these cases, however, the crime perpetrated does not concern the legal condition of undocumented migrant,

Deportation is defined by the Statute of the Foreigner as a measure consisting in the compulsory leave of the foreigner (art. 58), in the cases of illegal entry or residence, without voluntary departure (art. 57). Deportation is also applicable for a frontier worker who starts living in the country illegally (art. 21, §2º), foreigners who try to circumvent the entry inspection (art. 24) or perform activity that is prohibited for the type of visa (art. 98 *et seq*.)

Thus, a migrant worker on irregular conditions has deportation as the maximum penalty by Brazilian legal order. The expression "irregular conditions" is taken here in a broad and general manner, to cover irregular entry ("clandestine" in the words of the law), irregular stay ("irregular") and work carried out irregularly ("impeded"). For those so-called "clandestine" and "impeded" deportation is immediate (art. 125, I and VIII of the Statute of the Foreigner). Now for the "irregular", the law provides a period for voluntary departure, imposing the penalty of deportation in the event of noncompliance, besides fines in proportion to the days of illegal permanence (art. 125, II of the Statute).

It can be seen, especially here, that Brazilian Law still embodies an attitude of treating irregular migration as a matter of mere repression of offenders, through the implementation of the penalty of deportation, without providing assistance to potential victims, and it does not express major concerns about protections that may ensure a condition of dignity to these individuals that are, many times, for example, subject to trafficking or smuggling schemes. Therefore, the complaint presented by Rosita Milesi about the penalty of deportation under Brazilian law seems appropriate:

> "A legislation that presents such characteristics and, above all, the extreme rigor with which it is applied, deserves to be revised not only in isolated aspects or provisions. It is suitable to rethink life in a society as a space of universal horizons, where human beings that are bearers of values, contributions, wealth and dignity that go beyond national frontiers and geographic limits of a country live"[12].

---

reason why it does not relate to the object here proposed.

[12] MILESI, Rosita. O Estatuto do Estrangeiro e as medidas compulsórias de deportação, expulsão e extradição. *Centro Scalabriniano de Estudos Migratórios*. May, 2004. Available at www.migrante.org.br/artigo _deportacao_expulsao.doc. Access on January 22, 2014. In the original: "Uma legislação que apresenta tais características e, sobretudo, o extremo rigor com que esta é aplicada, merece ser revista não apenas em aspectos ou

It is not being claimed, obviously, there not to be migratory sanctions. The criticism that is presented, nevertheless, is to the *exclusively repressive* treatment, added to the discriminatory criteria for the visas. There is no doubt that the act of disobeying the legal order and entering into a country without the due authorization is serious. The national sovereignty is violated, with a behavior that attempts against the own autonomy of a State to establish norms of migratory control. The sanction, therefore, exists as a response to a violation, as an attempt to recompose the order. This is the coercive reality of Law, recognized by Edgar de Godói da Mata Machado, in a classical lesson:

> "To deny the concrete presence of coercion in a legal order would be to adopt a simply utopian attitude. Coercion is the result of the existing conditions of mankind. (…) There will always be in society those *protervi et ad vicia proni*, whose threats should be restrained by force and fear"[13].

The controversy is placed as to labour rights to migrants who work in an irregular condition. The Statute of the Foreigner is silent (in an actual eloquent silence), not foreseeing the consequences of the migratory irregularity for the labour contracts eventually entered into by the immigrant. To be highlighted, hence, that *the sanctions that the migration legislation foresee are restricted to the question of the condition of the migration itself, not imposing the destitution of work rights as a form of punishment to the migration irregularity, or either as an inhibition policy*.

In theory it could be possible to conceive the denial of work protection as a form of sanctioning the individual in an irregular condition, for the illegality of his behavior when entering the country. Likewise, one could recognize the penalization by such way as an attempt of restraining the practice of illegal immigration, once the migrant would no

---

disposições isoladas. Comporta que se repense a convivência da sociedade como um espaço de horizontes universais, onde vivem seres humanos portadores de valores, de contributos, de riquezas e de dignidade que ultrapassam as fronteiras da nacionalidade e dos limites geográficos de um país". Translation of the authors.

[13] MATA MACHADO, Edgar de Godói da. *Direito e coerção*. São Paulo: Unimarco, 1999, p. 244. In the original: Negar a presença concreta da coerção na ordem jurídica seria assumir atitude simplesmente utópica. A coerção é fruto das condições existenciais do homem. (...) Sempre existirão na sociedade aqueles *protervi et ad vicia proni*, cujas ameaças devem ser coibidas pela força e pelo medo". Translation of the authors.

longer be assisted by labour rights that would prevail in a situation of regularity. This position, however, ought to be criticized, due to the systemic pertinence of the sanction, considering, above all, the well known structural lines of Labour Law in the country.

As to the fundamentals of Labour Law, long thoughts are not necessary, being enough to recall the prevalence, under the Brazilian legal system, of principles such as the social value of work (art. 1º, IV of the Constitution of 1988), of the human dignity (art. 1º, III of the Constitution) and of equality (art. 3º, IV and art. 5º, *caput*, of the Constitution). These prescriptions shall orient the legal treatment of *work in itself*, performed in the national territory, in spite of formal irregularities.

For this same reason, the criticism as to the denial of legal labour effects to the employment contract eventually entered into by an undocumented immigrant is also valid. The legal discipline of the work effectively done differs from the one directed to the entrance and permanence of foreigners in the country. Irregularities that may occur in the condition of migrant will be sanctioned by the normative categories of the applicable legislation (in the present case, Law n. 6.815/80, the Statute of the Foreigner).

That is to say the absence of legal labour protection for the undocumented migrant worker, as a form o sanction to the subjective condition of irregularity, does not seem compatible with the prescriptions of Brazilian legal order and with the developments of the protection norms to human labour under the perspective of human rights. Therefore, to deny the worker the labour rights arising from the employment relationship established (even if not expressly and regularly entered into), as a means to sanction an illegal situation of the International Law sphere, does not seem reasonable.

This does not mean, it is worth repeating, a denial of the repressive function of Law in face of a violation of its prescriptions. Nor there is a sense of condescension or an elevating intent towards irregular migration. Obviously the balance and pertinence of sanctions are fundamental to achieve fair and humanized treatment to individuals in a condition of vulnerability.

Thus, it is fundamental to face the question in its human dimension, analyzing it in a careful and non-alarmist manner, always within the juridical parameters that ought to format it.

Still in the Labour Law aspect, the bill n. 5.655/2009, of a new Statute of the Foreigner, going through the National Congress, includes, in its art. 5º, sole paragraph, the following prescription:

> "Sole paragraph. Shall be extended to foreigners, independently of the migratory situation, observing what is stated in the art. 5º, *caput*, of the Constitution:
> I – access to education and health;
> II – the benefits arising from the accomplishment of the legal and contractual obligations regarding labour relationships, under the employer's responsibility; and
> III – measures of protection to the victims and witnesses of traffic and smuggling of persons and migrants"[14].

Hence, it is noticeable that the new proposal of law embraces the directive of promoting human rights also to migrants in an irregular condition, not depriving them from minimal patterns of protection as a form to punish a migratory illegality. On the other hand, it keeps the punishments to the irregularities in the migration level, such as deportation.

From the sanctions viewpoint, the path of balance between control and supervision of frontiers, access and permanence, and the guarantee of a minimal standard of rights pertaining the human dignity appears to be the inclination of the legislative and political reforms on the matter in Brazil. Given the constitutional and international normative developments, this seem to be a solution that harmonizes the exercise of national sovereignty with the social value of work and the universal protection of the human being.

IV. ILO's Rights-Based Approach

The International Labour Organization has its own approach to the question, consolidated by normative instruments and studies, which contrast sensibly with the way Brazilian legal order deals with the theme. This contrast with national legislations, in fact, reinforces the relevance of the matter to ILO and the need to a human approach to the question, which is placed within the priority agenda of the institution.

[14] The bill 5.655/2009 is available in Portuguese at http://www.planalto.gov.br/ . Access in February 1, 2014. In the original form: "Parágrafo único. São estendidos aos estrangeiros, independentemente de sua situação migratória, observado o disposto no art. 5º, *caput*, da Constituição: I - o acesso à educação e à saúde; II - os benefícios decorrentes do cumprimento das obrigações legais e contratuais concernentes à relação de trabalho, a cargo do empregador; e III - as medidas de proteção às vítimas e às testemunhas do tráfico de pessoas e do tráfico de migrantes". Translation of the authors.

Prefacing a detailed report of practices and principles with recommended adoption, ILO's Director-General Juan Somavia indicates the dimension of the problem:

> "Many migrant workers, especially low skilled workers, experience serious abuse and exploitation. Women, increasingly migrating on their own and now accounting for almost half of all international migrants, face specific protection problems. In the face of rising barriers to cross border labour mobility, the growth of irregular migration, and trafficking and smuggling of human beings constitute major challenges to protection of human and labour rights"[15].

It is noticed that, in face of this serious situation, ILO emphasizes in the quoted report the need of what it calls a "*rights-based approach to labour migration*", as an alternative for the path of exclusive repression. It is important to clarify that one is not claiming the inexistence of surveillance and control, but preference is being given to the development of policies that capture the human dimension involved in irregular migration.

To understand the so-called clandestine migration in its causes of origin and reflexes to the States and people involved, in such a way to consolidate and implement this "*rights-based approach*", is a task of extreme complexity. Simplified readings tend to highlight, many times in a distorted manner, isolated aspects of State sovereignty, claiming that, once each country has the prerogative of selecting the migrants it wills to receive, those who do not comply with such norms should be divested from any protection.

To this rights-based approach it is necessary, however, to understand the question in all its facets, comprehending, among other aspects, the dilemma of poverty in many countries of the world, factor that contribute to the intensification of irregular migration flows. In this panorama, Carlos B. Vainer points out to the systematic cruelty that permeates irregular migration and its traditional treatment by States:

---

[15] SOMAVIA, Juan. Preface. *In* INTERNATIONAL LABOUR ORGANIZATION. *ILO's multilateral framework on labour migration*: non-binding principles and guidelines for a rights-based approach. Geneva, 2006, p. V. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_178672.pdf. Access on January 15, 2014.

> "In the world which appears to approach the complete fulfillment of the neoliberal utopia, many millions are the compulsorily displaced, replaced, refugees and returnees and deportees, and the expelled and clandestine. Forbidden to stay, confined, prohibited from entering, forced to leave, they tell us of the evil nature of freedom operated under the hegemony of the contemporary globalization: the deterritorialized and border free world of some is the same territorialized and ghetto world of others"[16].

This alarming scenario is aggravated by national laws that are extremely repressive, feeding the intolerance and the marginal condition of irregular migrants, making the interaction with the receiving society even more problematic[17].

See, for instance, the emblematic example of the legislation of the North-American state of Arizona, which criminalized the condition of undocumented migrant, foreseeing also police prerogatives of extreme truculence. Enacted on April, 2010, the State Law 1.070 was considered

---

[16] VAINER, Carlos B. As novas categorias de uma sociologia dos deslocamentos compulsórios e das restrições migratórias. *In* CASTRO, Mary Garcia (org.). *Migrações internacionais*: contribuições para políticas. Brasília: CNPD, 2001, p. 182-183. In the original: "No mundo no qual parece se aproximar a realização plena da utopia neoliberal, muitos milhões são os deslocados compulsórios, os reassentados, os refugiados e repatriados e deportados, os expulsos e clandestinos. Proibidos de ficar, confinados, interditados de entrar, obrigados a sair, eles nos dizem da natureza perversa da liberdade operada sob a hegemonia da globalização contemporânea: o mundo desterritorializado e sem fronteiras de uns é o mesmo mundo territorializado e guetificado de outros". Translation of the authors.

[17] The debate as to the sanction to be applied to the irregular migrants has a great repercussion in the countries of the central capitalism, above all in Europe and United States. As explained, there are dissents, inclusively as to the criminalization of the condition of irregular migrant, given the magnitude of migration flows in these countries. Italy debates, currently, the criminal offense of "being an illegal immigrant", with an initiative of the Berlusconi administration for the creation of this criminal category. In this regard, the conclusion of Stefano Rodotà, Civil Law Professor at the University of Rome La Sapienza, published in the Spanish newspaper *El País*: "It is converted in a criminal offense a simple personal condition, the fact of being a foreigner, in contrast with what is established in the Constitution in the matter of equality". Cf. RODOTÁ, Stefano. Italia y los 'empresarios' del miedo. *Jornal El País*. Avaiable at http://elpais.com/diario/2008/05/24/opinion/1211580013_850215.html. Access on January 14, 2014. In the original: "Se convierte en delito una simple condición personal, el hecho de ser extranjero, en contraste con lo que establece la Constitución en materia de igualdad". Translation of the authors.

authoritarian and discriminatory, causing reactions in the international level, such as the express repudiation of UNASUL (Union of South American Nations)[18]. Brazilian government has also expressly disagreed with the norm, publishing a note by means of its Foreign Affairs Ministry[19].

[18] Cf. http://www.bbc.co.uk/portuguese/noticias/2010/05/100504_marcia_arizona_rc.shtml. Access on December 4, 2013.

[19] Part of the note n. 278 from Itamaraty, dated 05.03.2010: "The Brazilian government has received with great concern the news that the U.S. state of Arizona approved on April 22 a law criminalizing illegal immigration. The Brazilian government has spoken out strongly and repeatedly, in bilateral and international forums, against the improper association between irregular migration and crime. In the new law from Arizona, the discretionary powers to police to verify immigration status and arrest of foreigners come to the sacrifice of human rights of migrants. The Brazilian government considers that to grant the same treatment to undocumented migrants and to criminals undermines basic notions of humanity and justice. It deems that the way forward is not the one of criminality,but the regulation of migration, as exemplified by the approval of Brazilian Law 11,961, July 2009, which promoted extensive regularization of immigration status of foreigners in Brazil. The Brazilian government joins the protests against the anti-immigration law in Arizona. It hopes that such legislation is reviewed so as to avoid violation of the rights of millions of foreigners who live and work peacefully in the United States, such as the Brazilians who are in that country". In the original: "O governo brasileiro recebeu com grande preocupação a notícia de que o Estado norte-americano do Arizona aprovou, em 22 de abril, legislação que criminaliza a imigração irregular. O governo brasileiro tem-se pronunciado firme e reiteradamente, em negociações bilaterais e nos foros internacionais, contra a associação indevida entre migração irregular e criminalidade. No caso da nova lei do Arizona, o poder discricionário conferido aos agentes policiais para verificação da situação migratória e prisão de estrangeiros virá ao sacrifício dos direitos humanos dos migrantes. O governo brasileiro considera que conceder o mesmo tratamento a indocumentados e criminosos subverte noções elementares de humanidade e justiça. Julga que o caminho a seguir não é o da criminalização, mas o da regularização migratória, de que é exemplo a aprovação da Lei brasileira nº 11.961, de julho de 2009, que promoveu ampla regularização da situação migratória dos estrangeiros no Brasil. O governo brasileiro se une às manifestações contrárias à lei anti-imigratória do Arizona. Espera que tal legislação seja revista, de modo a evitar a violação de direitos de milhões de estrangeiros que vivem e trabalham pacificamente nos Estados Unidos, como os brasileiros que se encontram naquele país". Translation of the authors. MINISTÉRIO DAS RELAÇÕES EXTERIORES. *Nota à imprensa 278*. Brasília, 2010. Available at http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/lei-anti-imigratoria-do-arizona. Access on December 10, 2013.

V. ILO's Convention 143: Protection of All Migrant Workers

One of the main normative instruments consolidating ILO's rights-based approach to labour migration is the Convention 143 of the Organization. Dating back to 1975, the Convention 143 entered into force in the international order in 1978 and it deals with migration in abusive conditions and the promotion of equality of opportunities and treatment to migrant workers.

By means of the Convention 143, as mentioned by Rodrigo de Lacerda Carelli, "the International Labour Organization seeks the due and equal protection, at least in regard to fundamental rights, to all workers in the world"[20], whether they are migrants in conditions of regularity or irregularity.

In this intent, the first article of ILO's Convention 143 establishes that "each Member for which this Convention is in force undertakes to respect the basic human rights of *all* migrant workers".

Thus, from the opening article of Convention 143, one can already tell what its main differential point is: the inclusion of migrants in a situation of irregularity in the large group of workers to be protected. And, further on, on article 9 of the statute, this directive becomes even clearer:

> "The migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits".

What is clear, here, is that the treatment given to irregular migration starts to be taken more as a question of protecting human rights than a national security issue only. It is important to clarify, however, that the Convention does not lose track of migratory control, for instance when establishing that the States shall take the measures to "suppress clandestine movements of migrants for employment and illegal employment

[20] CARELLI, Rodrigo de Lacerda. *Trabalho do estrangeiro no Brasil*. Boletim do CEDES – Centro de Estudos Direito e Sociedade. March, 2007. Available at http://www.cis.puc-rio.br/cedes/PDF/cidadaniatrabalho/trabalho%20do%20estrangeiro%20no%20Brasil.pdf. Access on January 21, 2014. In the original: "busca a Organização Internacional do Trabalho a devida e igual proteção, pelo menos quanto a direitos fundamentais, a todos os trabalhadores do mundo". Translation of the auhtors.

of migrants" (art. 3, "a" of the Convention). The rights-based approach, conversely, sets the tone of the instrument and reveals a very clear position in the direction of protecting the work performed personally by the immigrant.

Summarizing the protection architected by the Convention, Patrick Taran and Eduardo Geronimi affirm:

> "The migrant worker has rights to remuneration for work performed, including any normally paid indemnities upon termination of contract, and whatever unused annual vacation benefits may be payable according to national practice, regardless of whether status was legal or not"[21].

In other words, the convention understands the labour protection as an inalienable right of the human being, which will not be harmed in face of a migration irregularity status. This directive is the result of an international process of setting the bases for the protection of migrant workers.

Convention 143 faces accentuated problems of acceptance among the countries around the globe, given the maximum priority that it proposes on the guarantee of human rights concerning the work performed by an undocumented migrant. There are only twenty three[22] ratifications up to the present moment, almost all of them from countries that are not major receivers of immigrants[23].

The Convention has not been ratified yet by Brazil, not being, therefore, a formally cogent statute under the national legal order.

It is interesting to report that, on September, 2008, the Tripartite Commission on International Relations of the Ministry of Labour and Employment (*Comissão Tripartite de Relações Internacionais do Ministério do Trabalho e Emprego*) approved — with the support of the governmental, workers' and employers' representation — the submission of the

[21] TARAN, Patrick A., GERONIMI, Eduardo. *Globalization, labour and migration*: protection is paramount. Geneva: International Labour Organization, 2003, p. 14.

[22] On August, 2011, as per information available at ILO's website.

[23] The exception among the countries that ratified Convention 143 is Italy, country that receives a considerable amount of migrants. However, in spite of having ratified the document, Italy is going through a moment of actual contradiction as to migration regulation, once it has hardened its internal rules, even making the condition of irregular migrant a criminal offense.

Convention to the ratification of the National Congress[24], embracing the claim of several social movements that, along the years, vindicated the ratification of the Convention (such as the Pastoral Care of Migrants, for example) and demonstrating a solid intention of the country to adopt the statute[25].

One can affirm that ILO's Convention 143, together with Convention 97 of the same institution and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of the UN, from 1990, form the mainstay of the international protection to migrant workers. On the words of Patrick Taran and Eduardo Geronimi:

> "These three Conventions together provide a comprehensive 'values-based' definition and legal basis for national policy and practice regarding non-national migrant workers and their family members. They thus serve as tools to encourage States to establish or improve national legislation in harmony with international standards. They are not simply human rights instruments. Numerous provisions in each add up to a comprehensive agenda for national policy and for consultation and cooperation among States on labour migration policy formulation, exchange of information, providing information to migrants, orderly return and reintegration, etc."[26].

This juridically oriented view is adopted in the present article, which shares the idea that international regulation on the subject consolidates directions that deserve immediate implementation, with the elimination of national norms that are go in a different direction from the idea of a humanized treatment to the migration issue.

VI. Conclusion

The legal thoughts over the question of migration currently de-

[24] See news on the website of the Ministry of Labour and Employment: http://www.mte.gov.br/ sgcnoticia.asp?IdConteudoNoticia=3732&PalavraChave=imigracao,%20cnig,%20oit. Access on July 18, 2011.

[25] The International Labour Organization itself has already pointed out Brazil as one of the possible countries to ratify the Convention 143. Cf. http://www.migrantsrights.org/ILO_report 101199.htm. Access on July 18, 2010.

[26] TARAN, GERONIMI, *Globalization, labour and migration*, *cit*., p. 15.

mand the construction of a platform of treatment based on the protection of fundamental rights of human beings, in all dimensions, under the backdrop of solidarity. The work rendered by immigrants, in this context, deserves consistent juridical regulation, in standards that are in line with the advances promoted by International Labour Law.

Inflows of two kinds are received here, both of them towards the same direction. First, the protection of the immigrant person, who cannot be discriminated due to reasons of ethnical ascendance, having to be taken by Law with the essential human condition. Second, the progressive development of labour protection, which shall be regulated and associated with rights to the worker as an essential element for a dignified life.

The own notion of justice as a constant exercise of virtue for the other — considered the dimension of the apparent difference of a migrant, who, inevitably, becomes "the other" — the observance to these axiological standards historically built is indispensable, otherwise an inadmissible deviance of the own purposes of Law would take place.

The regulation of the matter at the international level is a reflex of this directive, and along the last decades several normative instruments and commitments with global, regional and local reach were established, reaffirming the principle of non-discrimination and embracing the development of protection to migrants, also by means of guarantee of labour related rights. It is the emergence, here, of what Antônio Augusto Cançado Trindade calls a "universal juridical conscience" that determines "the necessity of prevalence of the dignity of the human person in any circumstances"[27].

There is no way, however, to deny the incongruity between national legislations regarding the theme — Brazilian therein included —, once many of the so-called developed countries insist on prioritizing the dimension of national security, treating immigration as an issue of police only. This situation, nevertheless, only reinforces the need of concrete plans of action for making the international commitments become a reality, as a way of implementing ethical determinations that do not admit postponement.

---

[27] CANÇADO TRINDADE, Antônio Augusto. *Concurring Vote*. *In* INTER-AMERICAN COURT OF HUMAN RIGHTS. Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03. San Jose, September 17, 2003. Avaliable at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

Irregular immigration, in this portrait, is a subject o major concern in the international agenda, once thousands and thousands of human beings are every day submitted to the risks of irregular crossing of national borders, hoping for a better life (aim that can hardly be disapproved).

Coming from poor countries, it is possible to affirm that undocumented migrants, not rarely are, "refugees for subsistence" [28], in the striking and precise metaphor from Cristiane Maria Sbalqueiro Lopes. That is to say, they run away from conditions of extreme poverty and lack of perspectives in their countries of origins to seek for a new life in more developed nations, which, in turn, respond generally in a harsh manner.

Hence, in face of undocumented migrants questions tend to be extremely unsettling, bringing together elements of outstanding difficulty. In any event, one has to bear in mind that the condition of human being cannot be adjourned in face of the condition of irregular migrant. To get distant from the evaluation of undocumented migrants as criminals and be closer to a perception of them as victims of a cruel industry of poverty, which involves them in odious trafficking schemes and exploitation of forced labor is essential to the analysis of the theme in the way that was presented here.

Brazil has a very unique position in this scenario. Historic inheritor of active participation of immigrants in the formation of the national culture, the country lives currently a moment o changes in its migratory vocation. Nowadays, Brazil sends more migrants to abroad than it receives, reflex of the internal social panorama. Despite that, the flow of immigrants in conditions of irregularity, coming above all from South America grows considerably in Brazilian large cities, what can be confirmed by the situation of Bolivians in the city of São Paulo. And announcing that these flows will grow in the upcoming decades does not seem to be and unfounded forecast.

Thus, the migratory issue will certainly recover its relevance in the national legal agenda, being mandatory the alignment of the migration regulation and policies of the country to the major lines of the international discipline in this regard. This measure can be implemented in many ways, such as, for example, the enactment of the new Statute of the Foreigner, the approval of a new migration policy for the country,

[28] LOPES, Cristiane Maria Sbalqueiro. *O direito do estrangeiro numa perspectiva de Direitos Humanos*. Seville: University Pablo de Olavide, 2007, p. 35.

besides the ratification of the most relevant international conventions for the subject (such as UN's Convention of 1990 and ILO's Convention 143)[29].

This way Brazil will consolidate a human and balanced position for the treatment of the migration theme, what shall be allied with the participation in international programs of combating trafficking and smuggling of people and migrants, besides multidisciplinary initiatives of elimination of any and all forms of work in a similar condition to slavery.

This is also a strategic option for the country. Only by taking a stand in favor of the human protection of documented and undocumented migrants shall Brazil be able to demand equal treatment to the many of its nationals that reside irregularly in other country, victims of the own evils of Brazilian social development.

As to the work performed by immigrants, there are many paths for a same conclusion, which embraces the "primary purpose, historically determinant of Labour Law: protection of employees against all forms of exploitation they may suffer"[30], in the lesson of Jean-Claude Javillier. Whether it is by means of an anti-discriminatory directive, of the application of the labor law theory of nullities, of a fundamental right to dignified work, of the development of the universal protection to labour, of the international statutes, in short, the essential answer will be that the *work performed by an immigrant, whether in regular or irregular migration status, will deserve full protection, as the only way to enable a dignified existence*.

References

CANÇADO TRINDADE, Antônio Augusto. *Concurring Vote*. *In* INTER-AMERICAN COURT OF HUMAN RIGHTS. Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03. San Jose, September 17, 2003. Avaliable at http://www.corteidh.or.cr/docs/opiniones/ seriea_18_ing.pdf.

CARELLI, Rodrigo de Lacerda. *Trabalho do estrangeiro no Brasil*. Boletim do

[29] In this sense: SÜSSEKIND, Arnaldo. *Direito Internacional do Trabalho*. 3rd ed. São Paulo: LTr, 2000, p. 363.

[30] JAVILLIER, Jean-Claude. *Manual de Direito do Trabalho*. Translated by Rita Asdine Bozaciyan. São Paulo: LTr, 1988, p. 30. In the Portuguese version: "finalidade primordial, historicamente determinante do direito do trabalho: a proteção dos assalariados contra todas as formas de exploração que possam sofrer". Translation of the authors.

CEDES – Centro de Estudos Direito e Sociedade. March, 2007. Available at http://cedes.iesp.uerj.br/PDF/cidadaniatrabalho/trabalho%20do%20estrangeiro%20no%20Brasil.pdf. Access on July 17, 2010.

CASTRO, Mary Garcia (org.). *Migrações internacionais*: contribuições para políticas. Brasília: CNPD, 2001.

FREITAS, Vladimir Passos de (org.). *Comentários ao Estatuto do Estrangeiro e opção de nacionalidade*. Campinas: Millennium, 2006.

GERONIMI, Eduardo. Aspectos jurídicos del tráfico y la trata de trabajadores migrantes. *Programa de Migraciones Internacionales*. Geneva: International Labour Organization, 2002.

JAVILLIER, Jean-Claude. *Manual de Direito do Trabalho*. Translated by Rita Asdine Bozaciyan. São Paulo: LTr, 1988.

LOPES, Cristiane Maria Sbalqueiro. *O direito do estrangeiro numa perspectiva de Direitos Humanos*. Seville: University Pablo de Olavide, 2007.

MATA MACHADO, Edgar de Godói da. *Direito e coerção*. São Paulo: Unimarco, 1999.

MILESI, Rosita. O Estatuto do Estrangeiro e as medidas compulsórias de deportação, expulsão e extradição. *Centro Scalabriniano de Estudos Migratórios*. May, 2004. Available at www.migrante.org.br/artigo_ deportacao_expulsao.doc. Access on August 10, 2011.

RODOTÁ, Stefano. Italia y los 'empresarios' del miedo. *Jornal El País*. Avaiable at http://www.elpais.com/articulo/opinion/Italia/empresarios/miedo/elpepuopi/20080524 elpepiopi_13/Tes. Access on January 14, 2011.

SALES, Teresa. Brasil migrante, Brasil clandestino. *Revista São Paulo em Perspectiva*, São Paulo, 8(1), p. 107-115, jan./mar. 1994.

SOMAVIA, Juan. Preface. *In* INTERNATIONAL LABOUR ORGANIZATION. *ILO's multilateral framework on labour migration*: non-binding principles and guidelines for a rights-based approach. Geneva, 2006, p. V. Available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents /publication/wcms_146243.pdf. Access on April 27, 2011.

SÜSSEKIND, Arnaldo. *Direito Internacional do Trabalho*. 3rd ed. São Paulo: LTr, 2000.

TARAN, Patrick A., GERONIMI, Eduardo. *Globalization, labour and migration*: protection is paramount. Geneva: International Labour Organization, 2003.

The equal legal treatment of paternity leave and maternity leave
The path to equality sexist labor market

Maria Cecília Máximo Teodoro[1]
Miriam Parreiras de Souza[2]

Abstract: Women's work is today mainspring of the capitalist system and its recovery is a major challenge of modernity. The woman does not experience extremely isonomic conditions in the labor market as a result of a typical system based on unequal forces - capitalism. Historical, philosophical, cultural and physiological reasons attempt to explain the differential treatment received by women in the labor market.

For a long time the woman took care of the housework, while men fit to provide families and homes. From the standpoint of philosophical and cultural, the woman carries the stigma of a human being more fragile, more emotional and benevolent. Since man is understood to be a more rude, rigid and rational. Physiologically, only the woman was given the gift of gestating life. Thus, it would be the woman the greater responsibility of caring for children and the home.

Men and women hold in the Brazilian Federal Constitution the status of equal rights and duties. But this equality is affirmed as a human right just because men and women are different in the reality, in the world of facts. Operators fit the legal acumen to understand the different, what better way to give different treatment, and when the unequal treatment effectively generates isonomic conditions. Already a breakthrough achieved by fundamental social rights, have become universalized and value provided in our Constitution (art. 7, XX, CF), still indeed to give special incentives to the women's labor market.

In Brazil, the law provides for the welfare of the wage maternity benefit, for the mother or adopter, for 120 days, which is not levied directly the employer

---

[1] TEODORO, Maria Cecília Máximo. Post-Doctorate in Labor Law from the Universidad Castilla-La Mancha, with research grant from CAPES; Doctor in Labour Law and Social Security from the USP; Master in Labour Law from PUC / MG; Teacher in Master and Graduate of PUC / MG.

[2] SOUZA, Miriam Parreiras de. Master in Labour Law from PUC / MG; Professor in Graduate of PUC / MG. Lawyer.

because it is paid by Social Security. Already paternity leave gives the father the right to be absent from work for only 5 days.

Thus, in order to meet the contemporary challenges of achieving social justice, the objective is to demonstrate in this article that maternity leave gives an illusory equality between men and women and exempts the employer only indirectly. And the constitutional provision of so short paternity leave, in fact, generates inequality, rather than equality, because it hinders the access and retention of women in the labor market and creates greater cost to the employer who hires workers.

Relying on broader social, economic and legal reasons, we intend to demonstrate the need to give equal treatment to men and women with regard to maternity and paternity leave.

Keywords: Parental leave. Maternity leave. Paternity leave.

1 Introduction

The female population growth in the Brazilian labor market was one of the most significant social changes occurring in the country in recent decades. The women's presence in the Brazilian labor market is becoming more intense and diverse and shows no tendency to retreat, despite the successive economics crises that have plagued the country since the 80s.

This reality, however, does not mean that women have achieved the same men's working conditions. Remuneration differences, occupying lower positions and discrimination of various kinds are a few examples of differential treatment that is aimed at women in the labor market.

According to research conducted by the Brazilian Institute of Geography and Statistics[3], the average remuneration of Brazilian women is equivalent to 72.3% of the men's average remuneration, it means that women's payments remains 28% lower than men's. Even in occupations where higher education is required, the wage gap is shown to be higher among men and women.

The reason for this difference is the object of this article. It intends to demonstrate that one of the main factors preventing the improvement of women's working conditions is the fact that they get pregnant.

[3] IBGE. Salário das Mulheres permanece 28% inferior aos dos homens nos últimos três anos. 2012. Available in http://saladeimprensa.ibge.gov.br/noticias?view=noticia&id=1&busca=1&idnoticia=2096. Acess in 16.09.2013.

The most striking distinction between man and woman is undoubtedly the pregnancy, since only the woman has a phase of life that is devoted exclusively to maternal care and not to their work. On the other hand, the man has no such feature, because even when he is presented by parenthood, moves away from work for few five days and then is back available to your job.

Labour Law, in turn, has undergone several changes in recent decades regarding the protection of women's work. And among these changes, several studies conclude that women's overly protection, when not based on the special characteristics of being female, can generate an opposite effect from that expected by the legislator, leading to a women's withdrawal from the labor market and to the deterioration of their working conditions.

The Proof of this is that the Law 7.855/89 expressly repealed the original writing of articles 379 and 380 of the Labor Code, which used to prohibit the women's work in night shifts. The same thing happened to Law 10.244/01, repealed because the article 376 of the Labor Code used to prohibit the women's work in extraordinary journey.

In this context, it is important to note the maternity leave institute. Despite its eminently protective character, which seeks to ensure the women's dignity during pregnancy and postpartum period, nowadays this right has becoming an obstacle to women's labor market access and permanency. That's because, when man becomes a father, enjoys a extremely reduced license period compared to woman's one, becoming men the greater privileged to enter and remain in the labor market.

In this article, will be shown that women's working conditions differences, in most cases, are guided by the fact that they are holding the guarantees that are not also men's guaranteed.

For proof this, the legal ground of women's market labor will be discussed, although it is recognized the importance of the study of other issues related to racial and gender elements that permeate the subject.

2 The present women's status in the labour market

The women's position in society has undergone many changes throughout the history. With regard to the labor market and the applicable rules, the changes were even more significant.

In antiquity, the women were seen only as the procreative and must complete obedience to men, they used to submit only to domestic

life, creating and raising children. Soon after, in the Middle Age, became to be regarded as an apprentice. However, despite being seen as an inferior human being, begins to exercise exclusivity with certain trades, such as spinner and silk weaver[4]. In the same period, agriculture starts to be a women's job, as the work of tapestry, gold casting and clothing[5].

With the Industrial Revolution, the female labor was submitted to all shorts of exploitation, without any kind of protection. The woman complied with long working hours and received really low payments. The European word industrialization process experienced in the nineteenth century was characterized by the exploitation of labor calls "half-strength", which was the women and children's work because they were less expensive and more docile[6]. It is in this endeavor that begins to emerge in England, France and Germany, the first protectionist legislation relating to women at work.

Moreover, women's work was one of the first matters to be subject by international organization's regulation and its scope operating costs was uniform in order to avoid unfair competition in the international market[7].

In Brazil, the first Federal Constitution that treated about the issue, was enacted in 1937, which prohibited women's work in hazardous industries (art. 137, k), in addition to ensuring hygienic and medical assistance to pregnant women, providing a home before and after childbirth without loss of pay (art. 137, l).

The 1946 Constitutional Charter, otherwise, in addition to those elements arranged in the previous Constitution, has added the remuneration distinction's prohibition due to gender (art. 157, II), denying women's work in hazardous industries (art. 157, IX), and increasing the pregnant women's right by the addition of an rest period before and after childbirth without loss of job, besides the already established concerning about the salary (art. 157, X). It also provided pensions in motherhood's favor (art. 157, XVI)[8].

---

[4] PANUZZIO, Daniele; NASCIMENTO, Grasiele Augusta Ferreira. Proteção ao Trabalho da Mulher no limiar do século XXI – O Direito e a Ética na Sociedade Contemporânea: Alínea, 2006, p.163-164.

[5] BARROS, Alice Monteiro de. Curso de Direito do Trabalho. 7ª Ed. São Paulo: LTr, 2011, p. 854.

[6] Idem.

[7] Ibidem.

[8] QUADROS, Grazielle de Matos. A discriminação do trabalho da mulher no Brasil. Available in http://www3.pucrs.br/pucrs/files/uni/poa/direito/graduacao/tcc/tcc2/tra-

The 1967 Federal Constitution went further, banning the remuneration distinction, as well as criteria for admission on grounds of sex (Article 158, III). Kept sealed women's work in unhealthy industries (art. 158, X), rest assured paid to pregnant women before and after childbirth, without loss of job and salary (art. 158, XI). Continued to ensure the welfare, aimed at protecting maternity (art. 158, XVI). This new constitution, however, gave the woman's right to retirement after 30 years of work with full pay (art. 158, XX)[9].

The 1988 Constitutional Charter granted several women's protective principles according to which the constitutional legislation should retain compatibility. In this sense, art. 3, IV, of the Federal Constitution makes clear its objectives, among then the promotion of the good of all, without prejudice and without discrimination. Moreover, in the art. 5 is ensured men and women's equality between about rights and obligations under the Constitution.

The art. 5 's highlights of the necessary observance of equality principle's exercise under the Constitution, however clearly indicates its mitigation, because although it is the assurance of equality between men and women, it cannot but admit obvious biological differences between them. Although juridically equal, men and women are physiologically and psychologically unequal, therefore can be treated unequally without implying, according to the will of the original Constitution, violence to equality, but unequal treatment with corrective focus inequality[10].

Also in the 1988 Constitution, art. 7, XXX, is more specific with regard to the substantive equality principle between men and women, highlighting the need to be guaranteed them equal functions and the same admission and pay criteria.

Given these provisions, it is clear that in Brazil there is a regulatory system that seeks to protect women in the labor market, avoiding inequality and discrimination on grounds of sex. However, some of the legal safeguards provided for women produce opposite effects from those expected. That's because not enough social prejudices, sometimes women find legal obstacles that prevent them from having access to the labor market or, sometimes end up producing a reverse discrimination.

Every standard intended to protect women, without pay atten-

---

balhos2011_2/grazielle_quadros.pdf. Acess in 10.09.2013

[9] Idem.

[10] MARTINEZ, Luciano. Curso de Direito do Trabalho. 3ª Ed. São Paulo: Saraiva, 2012, p. 629.

tion specifically to the differences it has in compared with man, ultimately generates a discriminatory effect, not desired. The Labor Law Compilation excluded women from night work, in unhealthy activities, and in dangerous and difficult conditions is a great example, which was repealed by Law 7.855/89. In the same way, Article 376 of the Labor Code prohibiting the women's extraordinary work, except force majeure, which was also repealed by Law 10.244/01.

All these legal provisions, whose tried to protect the women's working conditions, ended up restricting their labor market access, since the employer had no interest in hiring a unlimited workforce. Thus, while woman means a docile and easier to domesticate workforce, the employer before it translates into a hardworking full of limitations, which will not meet the company's profit expectations.

The man, on the other hand, has no such limitations. Thus, their labor market access is facilitated compared to the woman. Obviously, the employer will certainly prefer the male workforce, due its no limitation about the kind of developed activities and working hours. Thus, the repeal of CLT prohibiting rules of women's workforce in certain conditions was great.

However, it still persists in Brazilian law the institutes of maternity and paternity leave that due to its inequality's periods generate the same women discriminatory effect, regarding the remuneration gap and their labor market access.

Recent studies show that women's participation in the labor market has been growing in recent years. The records of the Annual Report of Social Information (RAIS) of the Labor Department shows that the employment's level of a women formal contract grew 5.93% in 2011, compared to the previous year[11]. However, this labor market women's growth is not accompanied by antidiscrimination policies on grounds of gender. For this reason, current research also shows that the gap remuneration between men and women is continuous in all kinds of work, even in those where higher education is required.

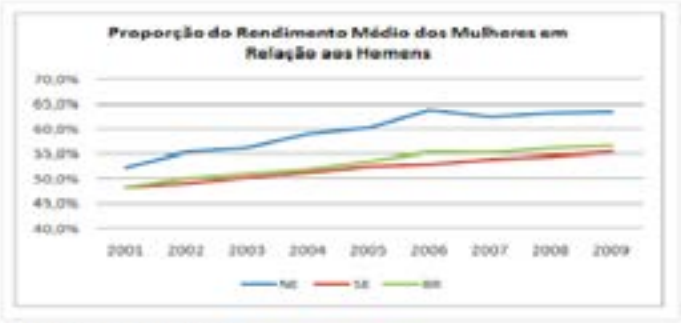
The Brazilian Institute of Geography and Statistics (IBGE)[12], in

[11] RAIS. Registros de emprego com carteira assinada cresceu 5,93% em um ano. 2013. Available in http://portal.mte.gov.br/imprensa/cresce-a-participacao-da-mulher-no-mercado-de-trabalho/palavrachave/mercado-de-trabalho-rais-mulheres-crescimento-das-mulheres.htm. Acess in 16.09.2013.

[12] IBGE. Salário das Mulheres permanece 28% inferior aos dos homens nos últimos três anos. 2012. Available in http://saladeimprensa.ibge.gov.br/noticias?view=noticia&id=1&busca=1&idnoticia=2096. Acess in 16.09.2013.

March 2012, revealed that the average income of Brazilian women is equivalent to 72.3% of the average income of men, which means that women's pay remains 28% lower than men's.

On the other hand, the labor market women's occupation and qualification is not so different from men's ones. The same survey showed that although women have more schooling, the gap wage compared to men following stable since the 2009 year. The following charts show the distinctions mentioned.



Fonte: PNAD/IBGE

Fonte: PNAD/IBGE

The gender gaps wage can achieve up to 40% and are presented as a persistent feature of the Brazilian economy, and can not be explained by gender differences, neither productivity nor qualification.

So, in fact, most of the differences seem to be due to unequal pay for men and women with identical observable characteristics working in the same occupation.

3 The symbolic law governing women's workforce

Facing the hypothesis about the differentiation of labor market women's treatment, what generates a patent discrimination in wage levels and occupations; it is necessary to investigate which is the problem that legitimizes this practice.

As discussed above, over the years, the legislature was concerned to issue rules that would give women's special protection, trying to ensure them dignity and equality compared with man.

But such standards do not always generate the expected effect, because many times end up producing deleterious effects, putting women away from the labor market, and not assuring the expected dignity.

Therefore, a considerable amount of laws ultimately play latent social functions contradicting their normative- legal effects, which means an opposed to its legal literal sense.

In this context, the German theoretician Harald Kindermann developed what he called symbolic legislation, under the one there is a hypertrophy of the norm symbolic function in place of the normative legal text concretization.

The Kindermann doctrine is treated in Brazil by Marcelo Neves[13] and is perfectly applicable to the discussed subject in this article.

According to Kindermann, the legislation symbolic function is present "when the legislature is restricted to formulate a claim to produce standards, without taking any action in order to create the conditions for effectiveness, despite being able to create them "or when the" texts production whose reference expresses the reality is normative - legal, but serving primarily and hypertrophic, the character not specifically normative- legal political purposes"[14].

Kindermann trichotomy theory proposed a model for the symbolic legislation identification. He said that legislation could be used to confirm social values, demonstrate the state ability and to postpone the social conflicts solution by delaying commitments[15].

---

[13] NEVES, Marcelo. **A constitucionalização simbólica**. São Paulo: Martins Fontes, 2007, p. 50.

[14] KINDERMANN, Harald. apud NEVES, Marcelo. **A constitucionalização simbólica**. São Paulo: Martins Fontes, 2007, p. 32.

[15] LOPES, Fernanda Ravazzano Azevedo**. O conceito não revelado e as funções não declaradas da ressocialização:** a resposta garantista à manipulação da linguagem. 2009. 244fls. (Dissertação de Mestrado em Direito). Universidade Federal da Bahia. Programa de Pós-Gradução em Direito Público, Bahia, 2009. p. 76. Available in http://www.biblio-

Another German philosopher who works the symbolic legislation question is Michael Foucault, in developing his biopolitics theory. According to Foucault, the symbolic legislation lacks normativity, which means a lack enforce ability, since it reflects only as a form of power mechanism's exercise, through the truth discourses creation.

> We have to produce the truth as, after all, we must produce wealth. And, on the other hand, are also the truth subjected, in the sense that the truth is the norm, it is true discourse which, at least in part, decides, it conveys himself propulsion power effects[16].

Thus, the truth discourses production is continuous, and the developed role of rule in this context is really significant today.

The rule belief, the idea that what the law says is a truth in itself, is a common sense thinking that constantly permeates modern society. This truth discourse, which is potential, which translated into the standard, is the essence of the driving force that uses symbolic legislation[17].

Arcelo and Gontijo[18], analyzing the Foucault theory, argue that symbolic norms serves the to fundamental rights violation, precisely because they have the effect of declaring that such rights exist and must be recognized. However, despite declared, the symbolic rules are characterized by their low normativity.

In the case of women's work, currently the legal principle that has more symbolic fulfilled this function refers to maternity leave, when compared to paternity leave.

In this sense, art. 7, XVIII of the 1988 Federal Constitution, guarantees the maternity leave women' right for a period of one hundred and twenty days. In XIX, the same article, paternity leave is ensured to man, but your period should be fixed by the infralegislation norm. Seeking to give effect to that provision, Art. 10, first paragraph, of the Acts

---

tecadigital.ufba.br/tde_arquivos/17/TDE-2010-05-24T064553Z-1652/Publico/FRavazzano%20seg.pdf. Acess in em 14 dez. 2012.

[16] FOUCAULT, Michel. **Em defesa da Sociedad**e. São Paulo: Martins Fontes, 2005, p. 29.

[17] SILVA JÚNIOR. Arnaldo. **A legislação aparente na construção de uma constitucionalização simbólica**. Available in <http://www.ribeirosilva.com.br/content/pdf/1410201171346.pdf>. Acess in: 30 jan. 2013.

[18] ARCELO, Adalberto Antônio Batista; GONTIJO, Lucas de Alvarenga. **A Biopolítica nos Estados Democráticos de Direito:** a reprodução da subcidadania sob a égide da constitucionalização simbólica. Belo Horizonte, 2011, p. 10.

of the Transitional Constitutional Provisions (ADCT) prescribes that the paternity leave period of paternity would be five days, until the infra law shall regulate the Constitutional text provisions.

Given this scenario, women tend to suffer more discrimination with respect to their access to the labor market as well as working conditions in general.

This disparity turns to the same problem faced before, about the prohibition of women's nigh work, in unhealthy and dangerous activities or in extraordinary journeys.

With dissonant license's periods, the standard that should ensure women protection during pregnancy and postpartum period, ends up discriminating them, whereas this disparity makes employers also prefer to hire male and make them more protection during the work contract, not to run the risk of hiring women.

This explains the fact that the women's wage level is much less than men's. However, employers prefer to pay men's higher salaries, due the fact they do not depart from work for a period of one hundred and twenty days, forcing the employer to hire a replacement. The woman, meanwhile, even still occupying the same position and have the same qualification that man, during pregnancy means a loss to the employer.

Although the maternity leave benefit is offered by social security, women's work becomes more costly for the employer, because during the license period, this will have to hire a replacement and cover its costs, or reorganize internally to meet the working lack.

Thus, this legislation seeks only to confirm social values and ultimately differentiate social groups, in this case, men and women, giving them different values. For this reason, totally fits the symbolic legislation concept handled by Kindermann.

4 The equal legal treatment of paternity leave and maternity leave

Being proven that distinct leave periods for men and women generate discrimination in women's labor market, now is necessary to make a new interpretation of the subject, in order to adapt the norm to the function for which it was created, ensuring their effectiveness normative- legal.

Initially, it should be emphasized that, in establishing the parenthood license, the Federal Constitution is intended to protect not only

the figure of workers, but especially the child that is being generated, allowing their parents, fathers, to have time to devote to basic care in their first months of life.

The proof of this is that the motherhood wage, which is the women remuneration received during the leave period, is paid by Social Security not only to the insured employee, but also for all other worker's types (with no regular work contract) of the General Provident Fund Scheme, pursuant to art. 71 of Law 8.213/91, since not only the mother employee should be protected, but first of all the newborn child.

Its important to observe that Social Security has contributory and supportive character, given that men and women contribute to the INSS on equal terms, with no differences based in gender rates. This done, the parental leave granting in equality with maternity leave already have a funding source, which are the men's contributions because the exercised work activity.

Moreover, with the licenses temporal difference, there is a strong trend and an incentive for women to reduce their employment and assume most of the responsibilities in childcares. On the other hand, men are deprived of the opportunity to actively participate in raising their children.

Of course, it's not ignore the fact that woman has more rest needed after delivery, once your body undergoes profound changes with gestational period, which does not happen with the man. However, this fact also explains the male's presence indispensability to help her in the child take cares, allowing woman better recovery.

Moreover, in adoption cases by homo-affective marriage and in death or disability postpartum mother is very likely that man fulfills the child caregiver role. For these reasons, in our times it is stated that the license benefit is smaller's intended for and not worker's.

In this sense, the arts. 226 and 277 of the 1988 Federal Constitution says that the family, as the society basis, has special State protection. Says yet that the family, the society and the state have the child, adolescent and young's life responsibility.

The family, in contemporary society, presents a new conformation. Gender relations progressed; women actively entered the job market and the man is no longer the only home provider. For this reason, the man actively participates in childcare.

But, with such small paternity leave period, man is deprived of an active participation in the family, which infringes directly the family protection constitutional text.

The jurisprudence has coming changing to ensure the man's paternity leave right for the same maternity leave period, but this has occurred only in mother's death or disability events and in homo-affective union adoptions cases.

By the way, the Brazilian federal justice has already granted to a Federal Police server, whose wife had died during childbirth complications, the right to maternity leave. In the same way, the Paraná State second appellate court granted the maternity pay right, from Social Security, to a man due to his seven-months pregnant wife death, making necessary an emergency surgery and the anticipation baby delivery[19].

The National Congress (the Brazilian parliament) is processing the Constitutional Proposed Amendment No. 5473/2012, submitted on April 25, 2013 by the Henrique Oliveira's congressman, who previews the paternity leave grant likewise the maternity leave to newborn's parents in child's mother's death cases or in mother's temporary or permanent disability cases.

However, the license's equalization need cannot be restricted to cases where the woman is unable to the child take cares. Even when the woman is healthy, the father's presence in the family is essential in this delicate life moment.

But above all, what matters to the Labor Law is the granted of equality between men and women, stopping gender discrimination in labor relations. On the topic discussed herein, this equality will be achieved only with the parental leave institute assimilation.

Due to the equality constitutional principle, the same treatment should be ensured to men and women in the labor legislation and in the labor market. However, the distinction between maternity and paternity leave becomes the woman a more expensive market hand labor, hindering their labor market access and hurting their working conditions.

Surely, this practice confronts with the most basic labor law principles and objectives. That's why is required a shift in focus from protection to women's work, to promote gender equality in the work world. This equality is reflected both in equal opportunities in the labor market and in the care and responsibility sharing with the child.

---

[19] MASCARO, Sônia. O direito do pai viúvo à licença maternidade. 2012. Available in http://www.amaurimascaronascimento.com.br/index.php?option=com_content&view=article&id=433:o-direito-do-pai-viuvo-a-licenca-maternidade&catid=93:doutrina&Itemid=248. Acess in 10 set. 2013.

5 The interpretation according to the Federal Constitution

Given this explanation about the symbolic law governing the women's workforce, it is necessary to reach a new constitutional interpretation puts this symbolism away from the norm and which generates fundamental right's effectiveness, without produce a change in the constitutional text.

Initially, it should be noted that the Constitution is composed of rules with several peculiarities. But, before perform an effective constitutional interpretation, is necessary to understand that.

Constitutional rules have legal superiority in legal State ordainment. Is this superiority that confers the tying and paradigmatic character of the whole system, so no legal action can validly exist if goes against the Constitutional rules meaning[20].

The Constitution also contains a normative force that stimulates and coordinates the relationship between citizens and the state, and among them. She has, by itself, legal effect, as can be shown through the modern Constitutional hermeneutics' doctrine, whose are repeatedly adopted by jurisprudence[21].

However, this Constitutional norm's effectiveness does not occur without the human will's cooperation. Thus, legal practitioners must walk in order to reach increasingly fundamental right's realization, as proposed by Konrad Hesse already back in 1959 and featured in the homeland doctrine, by Paul Bonavides[22].

Hesse teaches that constitutional interpretation is significant for the Constitutional normative force's consolidation and preservation. For him, the appropriate interpretation is the one that can realize the provi-

---

[20] BARROSO. Luís Roberto. **Interpretação e aplicação da Constituição**: fundamentos de uma dogmática constitucional transformadora. 6. ed. rev. atual. e amp. São Paulo: Saraiva, 2004, p. 107.

[21] TEODORO, Maria Cecília Máximo; DOMINGUES, Gustavo Magalhães de Paula Gonçalves. Adicionais de Insalubridade e periculosidade: base de cálculo, cumulatividade e efeitos preventivos e pedagógicos. In: XX ENCONTRO NACIONAL DO CONPEDI. 20.2011, Belo Horizonte: **Anais do Recurso Eletrônico do XX Encontro Nacional do Conpedi**. Florianópolis: Fundação Boiteaux, 2011, p. 3.270.

[22] TEODORO, Maria Cecília Máximo; DOMINGUES, Gustavo Magalhães de Paula Gonçalves. Adicionais de Insalubridade e periculosidade: base de cálculo, cumulatividade e efeitos preventivos e pedagógicos. In: XX ENCONTRO NACIONAL DO CONPEDI. 20.2011, Belo Horizonte: **Anais do Recurso Eletrônico do XX Encontro Nacional do Conpedi**. Florianópolis: Fundação Boiteaux, 2011, p. 3.270.

sion meaning when facing a concrete fact[23].

For this reason, constitutional interpretation must always seek the standard implementation, which cannot be achieved solely on the logical subsumption or conceptual construction interpretation's methods[24].

Currently, in addition to the traditional constitutional interpretation's methods interpretation - grammatical, systematic and historical - the modern doctrine has pointed out some principles that help the interpreter in this arduous mission to find the rule true meaning and apply it to the case in order to achieve the desired justice.

One of these principles, which assist greatly in the women's work analysis, is the interpretation according to the Federal Constitution's principle.

By this principle, is preached that when there are plausible and alternatives legal text's interpretations, which allow them to be according with the Federal Constitution meaning, so the rule should not be declared unconstitutional. "It means the choice for a legal rule interpretation line, among others that the text contains"[25].

However, this principle has several consequences that go beyond its original concept. One is that it is necessary to seek an interpretation that not necessarily derives from the most obvious legal text reading. And, besides it, it is from its nature that the interpretation do not contravenes the Constitution.

Luis Roberto Barroso[26] extracts four elements from the interpretation according to the Federal Constitution's principle, namely:

---

[23] SOUZA, Josafá Jorge de. **A força normativa da Constituição** – Konrad Hesse (resenha). 2005, p. 1. Disponível em: <http://www.viajus.com.br/viajus. php?pagina=artigos&id=350&idAreaSel=
16&seArt=yes>. Acesso em: 14 dez. 2012.

[24] TEODORO, Maria Cecília Máximo; DOMINGUES, Gustavo Magalhães de Paula Gonçalves. Adicionais de Insalubridade e periculosidade: base de cálculo, cumulatividade e efeitos preventivos e pedagógicos. In: XX ENCONTRO NACIONAL DO CONPEDI. 20.2011, Belo Horizonte: **Anais do Recurso Eletrônico do XX Encontro Nacional do Conpedi**. Florianópolis: Fundação Boiteaux, 2011, p. 3.270.

[25] BARROSO. Luís Roberto. **Interpretação e aplicação da Constituição**: fundamentos de uma dogmática constitucional transformadora. 6. ed. rev. atual. e amp. São Paulo: Saraiva, 2004, p. 189.

[26] BARROSO. Luís Roberto. **Interpretação e aplicação da Constituição**: fundamentos de uma dogmática constitucional transformadora. 6. ed. rev. atual. e amp. São Paulo: Saraiva, 2004, p. 189.

> a) It is the choice of a legal standard interpretation that keeps harmony with the Constitution, amid other interpretive possibilities that the text admits.
> b) This interpretation seeks to find a possible norm direction, which is not totally visible or clear in the legal text.
> c) It allows the quickly exclusion of other possible interpretations, that would lead contrasting results with the Constitution.
> d) Therefore, the interpretation according to the Federal Constitution becomes a judicial review way, through the one is possible to declare the legitimation of a particular standard reading.

In the same sense, Jorge Miranda points out that:

> The interpretation according to the Federal Constitution is not exactly choose between possible and normal senses of any precept, which is more in line with the Constitution, but to discern the limit - on the unconstitutionality border - a meaning that, although not apparent or not arising other interpretation's elements, it's the necessary meaning able to made possible by virtue the Basic Law conformation form[27].

However, this interpretative effort to preserve the law in face of the Constitution, finds its limits, since the interpreter can not twist or tamper the word's meaning against the clear legislature intention, even if the focus is to save the law, because is not admissible an against interpretation law[28].

In women's work case, this interpretation type is very applicable. When the constituent legislator fails in establish the constitutional text the paternity leave period, delegating this function to the infraconstitutional norm, surely a parameter should be fixed taking into account the other institutes and constitutional principles applicable to Labor Law.

Due to this constitutional interpretation, any Constitutional rule incompatible sense must be discarded, because its incompatibility with the constitutional text itself. Allow a paternity leave period shorter than that maternity leave period is totally incongruous with the constitution-

---

[27] MIRANDA, Jorge. **Manual de Direito Constitucional**. 2. ed. Coimbra: Ed. Coimbra, 1983, p. 233.

[28] BARROSO. Luís Roberto. **Interpretação e aplicação da Constituição:** fundamentos de uma dogmática constitucional transformadora. 6. ed. rev. atual. e amp. São Paulo: Saraiva, 2004, p. 192.

al principles governing the employment relationship, particularly the equality principle.

On the other hand, considering that gender equality is a Constitutional guaranteed fundamental human right, the rule interpretation providing different period of paternity leave putts women at a disadvantage in the labor market, also finds an obstacle on the consistent interpretation principle because it hurts one of their bases.

Thus, the only interpretation that meets the Constitutional legislator objectives is the one that assures to the man the parental leave right in equal woman conditions, ensuring them to get the same participation rights in child care and family life.

6 The subject in the comparative law: maternity leave, paternity leave and parental leave

In Comparative Law, the worker's leave right granted because of the child's birth has several conformations, beginning by the institute of parental leave in addition to maternity and paternity leaves.

Parental leave is a relatively long license granted to the father or mother to take care of their child after the maternity or paternity leave period. The provisions relating to parental leave vary considerably from country to country, reflecting broader concerns within society, such as concerns related to child development, the fertility rate, the supply of skilled labor, gender equality and distribution income[29].

The advanced European countries adopt parental leave and parent's support of two ways: by granting license with stability or the financial support during the license period. Furthermore, the license can protect the both parents or just one of them. The Center of Economic and Politic Research examined the parental leave in 21 countries and found that Finland, Norway, Sweden and Greece have high performance systems by adopting five practices: the paid leave period is really generous with no transferable quotas to each parent. Furthermore, there is universal coverage combined with simple eligibility restrictions and financing structures that distribute the cost among various employers and there is also a programming flexibility license[30].

[29] OIT – Organização Internacional do Trabalho. Notas da OIT: Trabalho e Família. Disponível em http://www.oitbrasil.org.br/sites/default/files/topic/gender/pub/br_nota_6_700_726.pdf. Acesso em 19.09.2013.

[30] OIT – Organização Internacional do Trabalho. Notas da OIT: Trabalho e Família.

In some countries, like France and Germany, there is a minimum that must be taken by each parent in respect of maternity and paternity leave, and a remainder period that can be freely chosen between the couple, which of them will enjoy the remoteness to work to devote to child care, parental leave would be. In France, the couple has a set of 21.8 weeks leave period, and that the woman should have at least sixteen weeks and the man at least two weeks. The couple can freely adjust the remainder period. All these periods are remunerated[31].

In Portugal, after the son or daughter birth, mother and father are entitled to initial parental leave for 120 or 150 consecutive days, which can be shared enjoyment after delivery. The mother can take the initial parental leave license within 30 days before childbirth. It is mandatory enjoyment, by the mother, of six weeks leave after the birth. In mother or child hospitalization's case during the license period, this period is suspended for the hospitalization duration. In case that the father take the parental leave shorter than 30 days, he receives a higher subsidy, and the leave duration can be increased with 30 days, if the parents wish, achieving 180 days.

Moreover, it is mandatory the father's enjoyment of 10 days parental leave after the child's birth, consecutive or interleaved, but since that the 5 first days be enjoyed immediately after delivery. After this period, the father still has the right of a 10 days leave, consecutive or interleaved, if enjoyed simultaneously with the mother's parental leave.

The Portuguese legislation also created the Extended parental leave, where any of the parents can enjoy plus three months leave, achieving a total of six months subsidized by social protection, corresponding to 25% of gross remuneration, which in practice allows both parents the possibility of children's taking care in their first year's life.

Research results are best shown in the graphs below.

Disponível em http://www.oitbrasil.org.br/sites/default/files/topic/gender/pub/br_nota_6_700_726.pdf. Acesso em 19.09.2013.

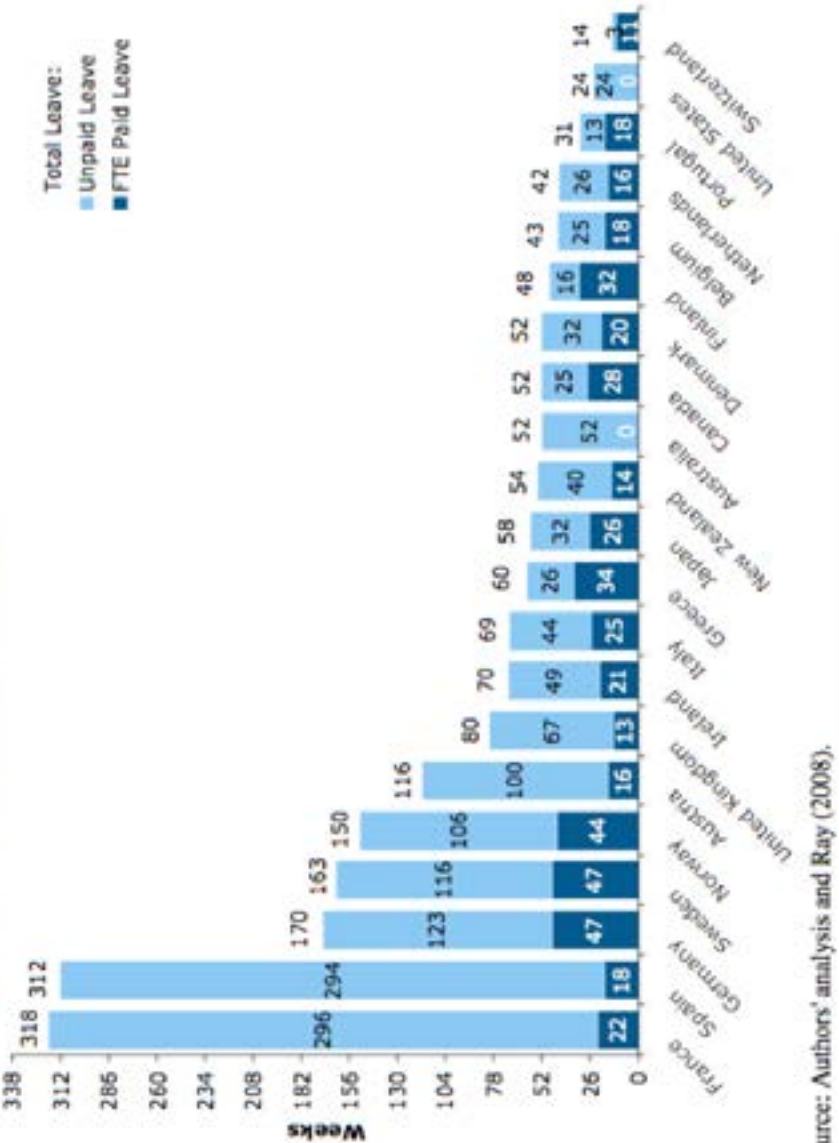
[31] Idem.

TABLE 1
Minimum and Maximum Parental Leave Allotments, in Weeks of FTE Paid Leave

Country	Couples' FTE Paid Leave	Mothers' FTE Paid Leave		Fathers' FTE Paid Leave	
		Minimum	*Maximum*	*Minimum*	*Maximum*
Australia	0.0	0.0	0.0	0.0	0.0
Austria	16.0	16.0	16.0	0.0	0.0
Belgium	18.0	13.9	13.9	4.1	4.1
Canada	27.5	9.4	27.5	0.0	18.2
Denmark	19.6	9.0	18.6	1.0	10.6
Finland	31.7	11.7	29.0	2.7	21.3
France	21.8	16.0	19.8	2.0	5.8
Germany	46.7	14.0	42.0	4.7	28.0
Greece	34.1	17.0	33.5	0.6	17.1
Ireland	20.8	20.8	20.8	0.0	0.0
Italy	25.1	17.3	25.1	0.0	7.8
Japan	26.0	8.4	26.0	0.0	17.6
Netherlands	16.4	16.0	16.0	0.4	0.4
New Zealand	14.0	0.0	14.0	0.0	14.0
Norway	44.0	9.0	38.0	6.0	35.0
Portugal	18.0	6.0	17.0	1.0	14.0
Spain	18.0	16.0	16.0	2.0	2.0
Sweden	46.9	6.9	40.0	6.9	40.0
Switzerland	11.2	11.2	11.2	0.0	0.0
United Kingdom	13.0	12.6	12.6	0.4	0.4
United States	0.0	0.0	0.0	0.0	0.0

Note: The first column is the sum of various combinations of leave taken by the two parents. In countries where the total entitlement is affected by the distribution between parents, we have assumed the shortest entitlement. For Finland and Portugal, the sum of mother's minimum and father's maximum is greater than the couple's total FTE paid leave. In Finland, if fathers take the last two weeks of parental leave, they receive two additional weeks, raising their total FTE paid leave from 31.7 weeks to 33.0 weeks. Similarly, in Portugal, if the fathers take two weeks of parental leave, that leave is paid (although it is unpaid if mothers take it). Thus, if fathers take their maximum FTE paid leave, it raises the total FTE paid leave from 18 weeks to 20 weeks.
Source: Authors' analysis and Ray (2008).

FIGURE 1
Total and FTE Paid Parental Leave for Two-Parent Families



Source: Authors' analysis and Ray (2008).

In Brazil, although the parental leave model doesn't exist yet, which would be desirable, is possible to reduce gender inequality existing today by granting equal maternity and paternity leave. Moreover, with the match of license's periods, will occur a men's recognition as an important holder of rights in the exercise of family's responsibilities and the work and family's reconciliation possibility. On the other hand, shall be provided the women's free access to the labor market and better conditions during the labor pact, which meets the objectives of the Labour Law and the Democratic State of Law.

Nowadays, in Brazilian arrangement's diversity society it's not acceptable that women exclusively exercise the child's birthrights. So is deeply necessary to recognize the fatherhood's rights importance and its exercise as a man of rights.

7 Conclusions

Gender equality, besides being a constitutional principle, is pursued by Law operators since its inception goal.

Men and women have unquestionable physical and psychological distinctions. By this way, in some instances, the law itself provides them different rights, in order to meet their specific in regard to the principle of equality under the material focus.

However, in this respect, the woman has always been the most affected person, since it is being more fragile, because of your physical weakness compared with men, and due the fact of being the only one able to get pregnant. Because of this supposed fragility, the legislature was concerned to establish an especially regulatory system applicable to women, seeking to ensure a free market access and better working conditions.

But such protective standards lead to an opposite and unexpected effect. Once the women become the legal protection's recipient that is not committed to man they becomes a more expensive and less attractive workforce to the employer. Thus, the women's discrimination begins in the labor market access, persisting during the all labor contract period.

Even woman having the same man qualification and occupying the same job, recent research shows that she still receives much lower salary. This shows that the women's presence in the labor market is not well accepted by employers.

With the aim to reduce such inequalities, the Brazilian legislation

had being modified to exclude some women's protections, such as the prohibition of night work, in unhealthy activities, and in dangerous and extraordinary journeys. However, a large discrepancy still exists in the Brazilian legal system related to women's work, which makes it much impaired in the market, which is the maternity leave period, because of its longer term compared to father's leave.

While the maternity leave is guaranteed by a hundred and twenty days, to woman take care of her child; the father takes a five days leave, what legitimizes the women's discrimination in the labor market.

After all, its possible to realize that women becomes a more expensive work hand for the employer. So, their access to the labor market is difficult, and when it is reached, your salary has to be lower to compensate the spending on replacement during the maternity leave.

Comparative Law, in addition to the maternity and father's leaves, has the figure of parental leave, which is a paid or unpaid additional leave period, where parents decide which of them will be with the childcares during the period. In addition, many countries have minimum and maximum periods of maternity and paternity leave, providing opportunities for parents to choose which of them will be with the child in the first months of life.

In Brazil, this additional period called parental leave does not exist, only the woman has a license for a considerable period to take of the child, and the men does not have the same warranty, because they have so small license period that doesn't allows them an actively participation in child firsts years life.

By adopting an interpretation according to the Federal Constitution, based on the equality principles and in Brazilian Democratic State goals, its required a new look at the institutes of maternity and paternity leave, equating this durations in order to achieve gender equality, so dear to the Labour Law, dignifying women's work.

References

ARCELO, Adalberto Antônio Batista; GONTIJO, Lucas de Alvarenga. **A Biopolítica nos Estados Democráticos de Direito:** a reprodução da subcidadania sob a égide da constitucionalização simbólica. Belo Horizonte, 2011, p. 10.

BARROS, Alice Monteiro de. **Curso de Direito do Trabalho**. 7ª Ed. São Paulo: LTr, 2011, p. 1980,

BARROSO. Luís Roberto. **Interpretação e aplicação da Constituição**: funda-

mentos de uma dogmática constitucional transformadora. 6. ed. rev. atual. e amp. São Paulo: Saraiva, 2004, p. 786.

IBGE. **Salário das Mulheres permanece 28% inferior aos dos homens nos últimos três anos**. 2012. Disponível em http://saladeimprensa.ibge.gov.br/noticias?view=noticia&id=1&busca=1&idnoticia=2096. Acesso em 16 set. 2013.

FOUCAULT, Michel. **Em defesa da Sociedad**e. São Paulo: Martins Fontes, 2005, p. 207.

LOPES, Fernanda Ravazzano Azevedo**. O conceito não revelado e as funções não declaradas da ressocialização:** a resposta garantista à manipulação da linguagem. 2009. 244fls. (Dissertação de Mestrado em Direito). Universidade Federal da Bahia. Programa de Pós-Gradução em Direito Público, Bahia, 2009. p. 76. Disponível em http://www.bibliotecadigital.ufba.br/tde_arquivos/17/TDE-2010-05-24T064553Z-1652/Publico/FRavazzano%20seg.pdf. Acesso em 10 set. 2013.

MARTINEZ, Luciano. **Curso de Direito do Trabalho**. 3ª Ed. São Paulo: Saraiva, 2012, p. 1945.

NEVES, Marcelo. **A constitucionalização simbólica**. São Paulo: Martins Fontes, 2007, p. 658.

MIRANDA, Jorge. **Manual de Direito Constitucional**. 2. ed. Coimbra: Ed. Coimbra, 1983, p. 987.

MASCARO, Sônia. **O direito do pai viúvo à licença maternidade**. 2012. Disponível em http://www.amaurimascaronascimento.com.br/index.php?option=com_content&view=article&id=433:o-direito-do-pai-viuvo-a-licenca-maternidade&catid=93:doutrina&Itemid=248. Acesso em 10 set. 2013.

OIT – Organização Internacional do Trabalho. **Notas da OIT: Trabalho e Família**. Disponível em http://www.oitbrasil.org.br/sites/default/files/topic/gender/pub/br_nota_6_700_726.pdf. Acesso em 19 set. 2013.

PANUZZIO, Daniele; NASCIMENTO, Grasiele Augusta Ferreira. **Proteção ao Trabalho da Mulher no limiar do século XXI – O Direito e a Ética na Sociedade Contemporânea**: Alínea, 2006, p.163-164.

QUADROS, Grazielle de Matos. **A discriminação do trabalho da mulher no Brasil**. Disponível em http://www3.pucrs.br/pucrs/files/uni/poa/direito/graduacao/tcc/tcc2/trabalhos2011_2/grazielle_quadros.pdf. Acesso em 10 set. 2013.

RAIS. **Registros de emprego com carteira assinada cresceu 5,93% em um ano**. 2013. Disponível em http://portal.mte.gov.br/imprensa/cresce-a-participacao-da-mulher-no-mercado-de-trabalho/palavrachave/mercado-de-trabalho-rais-mulheres-crescimento-das-mulheres.htm. Acesso em 16.09.2013.

SILVA JÚNIOR. Arnaldo. **A legislação aparente na construção de uma constitucionalização simbólica**. Disponível em http://www.ribeirosilva.com.br/content/pdf/1410201171346.pdf. Acesso em: 30 agost. 2013.

SOUZA, Josafá Jorge de. **A força normativa da Constituição** – Konrad Hesse (resenha). 2005, p. 1. Disponível em: http://www.viajus.com.br/viajus.php?pagina=artigos&id=350&idAreaSel=16&seArt=yes. Acesso em: 30 agost. 2013.

Pre-contractual discrimination towards different types of disabilities

The *infra-discrimination* on the employer's choice

Maria Rosaria Barbato[1]
Flávia Souza Máximo Pereira[2]

Abstract: This article analyzes the phenomenon of infra-discrimination, which is a kind of pre-contractual discrimination towards persons with disabilities, due to the mere imposition of the homogeneous quota system of hiring disabled persons applied isolatedly in the entrepreneurial environment, leading the employer to choose the candidate with the disability less severe and more viable to the company, which means the disability that requires lower social adaptation or business investment. First, is examined the importance of performing a job for those with disabilities from the perspective of independence and self-determination. Successively, the legal provisions aimed to avoid the discrimination towards persons with disabilities in the access to the labor market are analyzed, emphasizing the quota policy and its effectiveness in the entrepreneurial environment. Afterwards, the phenomenon of infra-discrimination is discussed, considering its perspective related to economic factors, such as the adequacy of the physical industrial space, as well its social one. Finally, are mentioned some European examples which are complementary to the homogeneous quota system and a brief conclusion is elaborated on the subject.

Keywords: People with Disabilities; infra-discrimination; Pre-contractual Discrimination.

[1] Professor at the Labour Law Department of the Federal University of Minas Gerais, Brazil. Coordinator of PRUNART (University Program of Support of Labour Relations and Administration of Justice) and coordinator of the Union Relations area. PhD in Labour Law by the Università degli Studi di Roma Tor Vergata, Italy.
[2]PhD student in the Labour Law Program at the Università degli Studi di Roma Tor Vergata, Italy.

1 Introduction: the importance of performing a job for those with disabilities

The work occupies a central figure in contemporary sociability. It is the fundamental element enabling human interaction with the environment and with other people. It is the continued achievement of work that defines the specificity of the social being, as it is a tool for the construction of culture and because it acts directly on the building of interactive actions with other social beings. According to Lukács, the work

> (...) Is in its nature an inter- relationship between man (society) and nature, with the inorganic nature (...) , as with the organic one (...) which is characterized above all by the working man, starting from the purely biological being to the social one (...) . All determinations which, as we shall see, are present in the essence of what is new in the social being are contained in the act of working. The work, therefore, can be seen as a an original phenomenon, as a model, as the *protoform* of the social being (*apud* ANTUNES, 2009, p. 19 – free translation[3])

Work as the *protoform* of the social being: the work not only as way of producing, but as part of the constitution of the social being (ANTUNES, 2009, p. 21). The work has an ontologically sense towards the *humanization process* in a broad sense, since it is the basis for generating other forms of social interaction, such as politics, religion, ethics, philosophy and art.

It is in this sense that should be discussed the social inclusion of persons with disabilities in the labor market. Is not a purely legal discussion. It is a debate essentially legal but eminently sociological and philosophical. For those with disabilities, to perform a job is essential to self-determine their human nature from the perspective of equality, freedom independence and sense of usefulness[4]. Lukács discusses the

[3] "(...) é em sua natureza uma inter-relação entre homem (sociedade) e natureza, tanto com a natureza inorgânica (...), quanto com a orgânica, inter-relação (...) que se caracteriza acima de tudo pela passagem do homem que trabalha, partindo do ser puramente biológico ao ser social (...). Todas as determinações que, conforme veremos, estão presentes na essência do que é novo no ser social estão contidas in nuce no trabalho. O trabalho, portanto, pode ser visto como um fenômeno originário, como modelo, protoforma do ser social".

[4] Accordingly with the North American theory of social empowerment combined with

impact of performing a job on the transformation of human nature:

> The central question of changes in the inner man is to attain a conscious control over himself. (...) This control of the human body by consciousness, which affects a part of the sphere of his consciousness, that is, the habits, instincts, emotions, etc., is a basic requirement which exists even in the most primitive job, and should give a decisive representation that the man forms about himself (...) (*apud* ANTUNES , 2009, p.25, free translation[5])

It is through performing a job that persons with disabilities exercise their self-control and express their independence. It is producing something of value that disabled persons define their own human condition. It is through work that a person with disability is defined as subject of rights, as a participant subject and not as an object of social pity (GOES; BUBLITZ, 2010, p. 105).

Law's role towards persons with disabilities is exactly this: not allow that they become a target of public charity, but ensure that they could be able to develop their skills and capacity to produce (OLIVEIRA, 2000, p. 85).

However, are the current laws able to ensure the access of these persons to the labor market? Such laws are able to curb pre-contractual discrimination towards persons with disabilities? These are questions that we intend to discuss in this brief study of a peculiar form of discrimination that arises in the pre-contractual stage during the choice of the worker with disabilities by the employer: the *infra - discrimination*.

---

the psychological empowerment of persons with disabilities, there is a need for building relational contexts capable of openness and solidarity combined with the self-empowerment of patients with disabilities, which coincides with the perception of opportunities that go beyond difficulties caused by its deficiency: a person with disability would be the person who feels powerless and useless.

[5] "A questão central das transformações no interior do homem consiste em atingir um controle consciente sobre si mesmo. (...) Esse domínio do corpo humano pela consciência, que afeta uma parte da esfera de sua consciência, isto é, dos hábitos, instintos, emoções etc., é um requisito básico até no trabalho mais primitivo, e deve dar uma marca decisiva da representação que o homem forma sobre si mesmo (...)".

2 Legal provisions aimed to avoid the discrimination towards persons with disabilities in the access to the labor market: the quota policy and its effectiveness in the entrepreneurial environment

Human dignity and equality, expressed by non-discrimination and the materialization of parity of opportunities, are the assumptions and limitations of the legislation to protect the employee with a disability in the access to the labor market, as they had introduced in the legal order the duty of reciprocal respect, in order to ensure a minimum level of civility to such citizens.

Since 1923, there is a Recommendation of the International Labour Organization (ILO) which demands that all signatory countries adopt national laws mandating public entities and private companies to reserve a number of vacancies for the disabled, in order to promote the employment of numerous disabled persons after the First World War (MAIA,2008, p. 35).

In 1975, it was approved by the United Nations the Declaration on the Rights of Disabled Persons (Resolution no 2.542/75), recognizing internationally that persons with disabilities have the inherent right to be respect for their human dignity, whatever the origin, *nature and severity of their disabilities*, which implies first and everything, the right to enjoy a decent life, as normal and full as possible. The declaration was the starting point to facilitate the process of social integration of persons with disabilities, highlighting the inclusion in the labor market:

> Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions. (UNITED NATIONS, 1975)

Similarly, the Convention no 159 of the ILO on Vocational Rehabilitation and Employment for Disabled Persons, aiming the free access to the labor market for persons with disabilities, established on its article 4 the principle of equal opportunity between disabled workers and workers in general (INTERNATIONAL LABOUR ORGANIZATION, 1983).

The Recommendation 99 of the ILO on Vocational Rehabilita-

tion of Disabled Persons predicted affirmative actions for the access and maintenance of employment for disabled persons, establishing that there must be a certain percentage of job vacancies reserved for persons with disabilities, as well as the reservation of certain jobs (INTERNATIONAL LABOUR ORGANIZATION, 1955). Subsequently, the Recommendation 168 supplements such precepts, adopting the principle of equal access, assuming the use of affirmative actions in order to maintain the balance in the access to the labor market between persons with and without disabilities (INTERNATIONAL LABOUR ORGANIZATION, 1983).

In Brazil, the first law to establish the quota policy was the Organic Law of Social Security - Law 3.807/1960 that on its article 55 imposed percentages of 2% to 5% quota for rehabilitated employees for companies above 20 employees. In the Federal Constitution of 1988, the elevation of human dignity as a fundament of the democratic state and the article 5º, *caput*, which guarantees equality, without distinction of any kind, ensures access of persons with disabilities in the labor market, curbing any kind of discrimination. We can also highlight the art. 7, XXXI, which prohibits discrimination in terms of wages and hiring criteria towards persons with disabilities and the article 37,VIII, which requires that the law reserve a percentage of public employment for persons with disabilities and will define the criteria for their admission.

Besides the Federal Constitution, the Law 7.853/1989 created the National Coordination for the Integration of Persons with Disabilities. Subsequently, the Law 8.213/1991, on its article 93 established a minimum guarantee of employment for people with disabilities, imposing the quota policy in the entrepreneurial environment, transcribed:

> Article 93: The company with one hundred (100) or more employees are required to complete 2% (two percent) to 5 % (five percent) of their positions with rehabilitated or disabled, enabled, as follows:
> I - up to 200 employees: 2%
> II - 201 to 500: 3%
> III - 501-1000: 4 %
> IV - from 1001 onwards: 5%
> § 1 The dismissal of workers rehabilitated or disabled at the end of fixed-term contract with a deadline of more than ninety (90) days, and that one without cause with a contract for an indefinite term, can only occur after hiring substitute worker with a similar condition .
> § 2 The Ministry of Labour and Social Security is expected to generate statistics on the total number of employees and vacancies filled

> by rehabilitated or disabled persons and provide them, on request, to unions or organizations representing the employees (free translation[6])

However, that law above mentioned was only effective when the Decree nº. 3.298 of 1999 regulated the Law 7.853/89 on its article 36, establishing the policy of reservation of quotas for rehabilitated or disabled person.

Currently, the Chamber of Deputies analyzes the Bill 2973/11, elaborated by Aguinaldo Ribeiro, which seeks to amend the art. 93 of the Law 8.213/1991, increasing the mandatory quota percentage for hiring persons with disabilities. The proposal establishes the obligation for companies with more than 30 employees and increases the maximum percentage to 8 % instead of the current 5%. According to the proposal, the job vacancies shall be filled in the following proportion: companies that have 30-200 employees must reserve mandatorily 2% of its jobs for persons with disabilities. For companies that have 201-500 employees, the quota reserved for disabled persons is 4%. For those companies which have 501 to 1,000 employees, the quota should be 6%. For companies with 1,001 or more employees, the quota reserved to disabled persons must be 8%. The bill, which is on the conclusive stage at the Parliament, will be now analyzed by the Committees of Economic Development, Industry and Trade; Labor, Public Service and Administration; Social Security and Family and by the Committee of Constitution, Justice and Citizenship.

There is no doubt that the role of international and national legislation that deters discrimination towards disabled persons is vast. However, are the current laws able to ensure the access of these persons to the labor market? It is questionable whether this quota system can elim-

---

[6] "Art. 93. A empresa com 100 (cem) ou mais empregados está obrigada a preencher de 2% (dois por cento) a 5% (cinco por cento) dos seus cargos com beneficiários reabilitados ou pessoas portadoras de deficiência, habilitadas, na seguinte proporção:I - até 200 empregados: 2%; II - de 201 a 500: 3%; III - de 501 a 1.000: 4%; IV - de 1.001 em diante: 5%. § 1º A dispensa de trabalhador reabilitado ou de deficiente habilitado ao final de contrato por prazo determinado de mais de 90 (noventa) dias, e a imotivada, no contrato por prazo indeterminado, só poderá ocorrer após a contratação de substituto de condição semelhante. § 2º O Ministério do Trabalho e da Previdência Social deverá gerar estatísticas sobre o total de empregados e as vagas preenchidas por reabilitados e deficientes habilitados, fornecendo-as, quando solicitadas, aos sindicatos ou entidades representativas dos empregados".

inate discrimination during the employer's choice: the mere law imposition of hiring disabled persons is able to achieve the social inclusion for all types of disabilities? In the words of Walküre Lopes Ribeiro da Silva

> The problem facing the disabled is not the absence of laws. From the point of view of the validity, we have laws that would be perfectly applicable to concrete cases. The big issue is the effectiveness of the existing standards (p.176, 1997, free translation[7])

Undoubtedly, the Brazilian law 8.213/91 which established the quota system for those with disabilities be able to access the labor market is a major achievement and extremely necessary in the fight against the pre-contractual discrimination. Furthermore, the systematic reading of this law in view of the Brazilian Constitution makes this law one of the world's most advanced legislation in order to protect and support persons with disabilities.

Therefore, we reject initiatives such as the Bill 112/2006, elaborated by the Senator José Sarney, which aims to reduce dramatically the maximum percentage of vacancies in the companies reserved for persons with disabilities from the current 5% to 3% and also outsources the workers with disabilities in order to fulfill the quota established by the law 8.213/91; we also disagree of the Bill 234/2012, created by the Senator Benedito de Lira , which proposes to divert to the FAT (Workers Support Fund) the funds for hiring people with disabilities by companies, reducing the maximum percentage from the current 5% to 0.5% .

However, although beneficial and necessary, the homogeneous quota system is not effective in curbing the pre-contractual discrimination against any kind of disability, revealing a kind of gap between the protective legislative framework and its application inside the companies. We are not questioning here the protection established by the system of quotas, which is sorely needed, but the way this protection is conducted and also its application.

The crucial problem is that the quota system applied isolatedly overestimates the power of the law. That is because we have to face the inertia of the State on providing effectiveness to the legislation, especially regarding to the accessibility of disabled persons in the companies.

[7] "O problema que enfrenta o portador de deficiência não é a ausência de leis. Sob o ponto de vista da validade temos leis que seriam perfeitamente aplicáveis aos casos concretos. O grande problema é o da eficácia das normas existentes".

The State acts predominantly as fiscal and not as a co-responsible with private companies.

We recognize the existence of preventive actions performed by the Ministry of Labor, which maintains a Permanent Committee to Study the Integration of Persons with Disabilities in the Labour Market, as well the role performed by the National Council of Persons with Disabilities - CONADE, part of the structure of the Presidency Special Secretariat for Human Rights, which consists on a decision-making body set up to monitor and evaluate the development of a national policy for the inclusion of persons with disabilities.

Nevertheless, the State action is predominantly composed by fiscal and investigative actions (monitoring companies through labor inspectors; establishing civil investigations through the Ministry of Labor, that proposes gradual fulfillment of the vacancies reserved for disabled persons by Terms of Adjustment of Conduct; imposition of fines),which may result in a public civil lawsuit.

Thus, the inclusion of persons with disabilities in the labor market is legally imposed by the State, but there is an omission in order to enable this policy. The State had transferred the responsibility of the social inclusion of persons with disabilities to the companies, establishing only goals to be achieved through the quota system.

Therefore, given the legal imposition on hiring workers with *any type of disability* and considering the lack of structure in the companies to receive workers with certain kinds of disabilities, - not just regarding the physical work environment, which demands some equipment and infrastructure endowed with accessibility, but also regarding the staff training, so they could be able to relate productively with this new worker with disability - companies choose the worker who has the *less severe disabillity*, such as a hearing impair worker instead of the worker in the wheelchair or the mentally impaired, unleashing a new kind of pre-contractual discrimination presented as a side effect of the legal system of homogeneous quotas in Brazil.

3 The side effect of the inefficiency of the homogeneous quota system on the employer's choice: the phenomenon of *infra-discrimination*

Due to the inactive position of the State regarding the feasibility of the legislation and due to the obligation imposed by the homo-

geneous quota system of hiring employees with *any type of disability*, it appears that during the choice of the employer, there is a preference for the kind of disability that is *less severe and more "viable"* to the company, which means the disability that requires lower social adaptation or business investment.

This assertion can be proven by a research held by the Ethos Institute with the 500 largest companies in Brazil, which has concluded that, at the operational level, only 1.9% of employees were people with disabilities in 2007. Most of then were physically disabled. Only 0.1% of those hired were visually impaired and 0.1% had multiple disabilities (ROLLI, 2013, p. 01).

The isolated imposition of the homogeneous quotas system for disabled workers in the companies, without the articulation of an social education policy inside them; without the analysis of the reality of each business activity and without the State incentive in order to provide the adequacy of the physical industrial space in the companies, does not allow the development of the social consciousness of the employer.

Practically, the employer hires the person with disability not because he believes that this is a person with rights and the work can be a tool for social inclusion. Given the unique obligation of hiring imposed by the homogeneous quota system, the employer works through the logic of number of vacancies to be filled at any cost, which is why most of persons with disabilities are employed in work activities of low complexity[8]. Therefore, the employer ends up choosing the worker with *the disability that requires lower adaptation of the company, which will offer less risk and investment.*

Francesca Limena comments similar contradiction on the Italian law that promotes the policy of quotas and alerts to the risks of segregation among persons with disabilities:

> (...) The law transforms the inclusion of the person with disabilities on a commodity exchange, which the disable person is in a position of object instead of subject, in a trade contract in which is left as a lower priority the primary objective of social integration and working inclusion of the person with disability in a business environment (2004, p. 53, free translation[9]).

[8]Also due to the factor of low qualification of such workers, who were also mostly deprived of educational and training.

[9] "(...) a ordem legal transforma a inserção do portador de necessidades especiais em uma mercadoria de troca, que se encontra em uma posição de objeto, em vez de sujeito,

The establishment of quotas disregarding the types of disabilities, without the analysis of the activities performed by the companies, without a study of their structure and without social awareness of their professionals, leads to the choice of the employee who has the kind of disability *less severe* in terms of economical (adequate equipment and space) and social barriers (staff unprepared).

We are facing a phenomenon of pre-contractual discrimination that affects a group that is already marginalized. There is an internal discrimination, overlapped, among persons with disabilities, manifested during the choice of the employer, due to the mandatory homogeneous quota system and the lack of incentive for its feasibility: the worker chosen is always that one who will be *less costly* for the company. We may denominate this phenomenon as *infra-discrimination*.

We can illustrate this concept better: During a recruitment process, an employer, faced by the obligation to hire a person with disability in the terms of the quota law, without the State incentive to provide an adequate physical infrastructure, between a candidate with a hearing impair and a candidate who has to use a wheelchair, he will choose the candidate with hearing loss. This choice is justified by the range of investments in terms of accessibility that the employer will have to make in case of hiring the worker who uses the wheelchair.

Cybele Goldfarb comments this new type of pre-contractual discrimination that arises as a side effect of the homogeneous quota system, which is supported by the lack of social responsibility of companies

> By doing so, companies continue undermining disabled creating informal classifications, levels of employability or "castes" among them, ceasing to hire persons with more severe disabilities, who require adaptive equipment, and maintaining their exclusion of the formal labor market. We believe that this type of argument by companies is the result of an erroneous view, which considers only the profitability in a short term, denying its social function and damaging a portion of society that needs support and law compliance (2009, p. 32, free translation[10]).

---

em um acordo comercial no qual é deixado em segundo plano o objetivo primário da integração social e da inclusão laborativa da pessoa portadora de necessidades especiais em um ambiente empresarial".

[10] "Agindo desta forma, as empresas continuam prejudicando os deficientes, pois, informalmente acabam criando classificações, níveis de empregabilidade ou "castas" entre eles, preterindo a contratação das outras pessoas com deficiência mais severa, as quais

We should emphasize that the *infra-discrimination* is not only caused by architectural reasons or by companies' physical structure. According to British social theory of disability, this should be considered a social construction, which means, the disability is the result of social behaviors and social structures. Persons with disabilities are a minority group that experiences discrimination, just as other minority groups, in the hands of a dominant[11] one (HARLAN; ROBERT,1998 p. 412). Unfair treatment could be generated by models of domination and oppression, considered as an expression of a struggle for power and privilege (GRAMMENOS, 1995, p. 63).

Given the social theory of disability, we can understand the phenomenon *of infra-discrimination* as a result not only of the absence of adapted physical structures inside the companies, but also as a consequence of the social interaction between people and their behavior in the workplace.

We can use as an example workers with intellectual impairment: for they reach a better work performance, it is necessary to create an environment in which they are able to concentrate, perform their duties and interact with colleagues. Moreover, the work dynamics is directly linked to the psychological support which that employee receives and needs. The employers should be aware that the tasks delegated to mentally impaired workers should be in accordance with their capabilities and their production time must be respected. Therefore, during a selection process considering the imposition of the homogeneous quota system, between a person who uses a wheelchair and another with and

---

necessitam de equipamentos adaptados, e mantendo sua exclusão do mercado formal de trabalho. Consideramos que este tipo de argumento por parte das empresas é fruto de uma visão errônea, que considera somente a rentabilidade em curto prazo, renegando sua função social e prejudicando uma parcela da sociedade que necessita de apoio e cumprimento das leis".

[11] The social model of disability is a reaction to the dominant medical model of disability, which in itself is a functional analysis of the body as a machine to be fixed in order to conform to normative values. The social model of disability identifies systemic barriers, negative attitudes and exclusion by society (purposely or inadvertently) that means society is the main contributory factor in disabling people. While physical, sensory, intellectual, or psychological variations may cause individual functional limitation or impairments, these do not have to lead to disability unless society fails to take account of and include people regardless of their individual differences. The origins of the approach can be traced to the 1960s; the specific term emerged from the United Kingdom in the 1980s.

intellectual impairment, the employer will definitely choose the worker physically disabled, resulting on segregation among persons with disabilities.

The doctor Joseph Schwartzman Solomon warns about the generalization that quotas treat the disabled:

> Brazilian law makes no distinction on its treatment of different types of disabilities, and this is a big problem, because the levels of disability are distinct, as well as its severity. We can not treat all cases the same way as if all had the same capacities (PEZZUTTO, 2012, p. 02, free translation[12]).

Moreover, most of these companies do not analyze the disability of each worker in a specific way, which means, the few accessibility adaptations adopted are made in a general way, disregarding the real needs of the individual: the person with disabilities that must adapt to the company and not the opposite.

We can demonstrate the phenomenon of *infra-discrimination* on job advertisements, on which they disclose a preference for a specific type of disability, *regardless the function that will be performed by the employee:*

> **Industrial Assistant** - complete or incomplete primary education, preferably people with hearing or mild physical disability, 18-45 years (NÚCLEO DE APOIO AO TRABALHADOR, 2012, free translation)
> **Administrative Assistant** in São Paulo. Vacancy for persons with hearing impairment. Will perform administrative tasks. Knowledge in Office suite. English will be a plus. Training: Desirable to have higher education on administration (NÚCLEO DE APOIO AO TRABALHADOR, 2012, free translation)
> **Production Assistant**: Salary: 4.10 p / hour + full benefits. Job intended for persons with hearing disabilities. (NÚCLEO DE APOIO AO TRABALHADOR, 2012, free translation[13])

[12] "A lei brasileira não faz distinção no tratamento dado aos diferentes tipos de deficientes, e isso é um grande problema, pois os níveis de deficiência são distintos, assim como sua gravidade. Não se pode tratar todos os casos da mesma forma, como se todos tivessem as mesmas capacidades".

[13] "**Auxiliar de Produção** – ensino fundamental completo ou incompleto, *preferência por pessoas com deficiência auditiva ou física leve*, de 18 a 45 anos; **Auxiliar administrativo (PCD)** - PCD em SAO PAULO. *Vaga preferencial para deficientes auditivos.* Irá

Thereby, there is a kind of pre-contractual discrimination which is a side effect of the homogeneous quota system, which segregates a group that is already marginalized - the disabled, which causes a classification into categories types of disability, which strongly violates the principle of equality.

The Law 8.213/1991, on its article 93, by establishing a minimum percentage of employment for persons with disabilities, imposing quotas that must be filled by the companies; without the State's encouragement to facilitate such policy and no specific criteria for such percentages; ignoring the reality of each business activity and the specifically reality of each person with a disability, culminates in an irrational choice of the employer, who judges the type of disability *less severe*, that will be more convenient for his business activity.

The *ratio* of the quota law is to promote a differentiated legal protection for reasons of social solidarity, which gives all disabled persons legal superiority to compensate their limitations, so they can achieve equal opportunity in the labour market (NERI, 2003, p.12). As Hugo Mazzilli asserts:

> Becomes necessary to understand that the true meaning of equality, constitutionally guaranteed, is to treat unequal differently, in that it seeks to compensate legal inequality, equalizing them into opportunities. To achieve this purpose, the law may establish special conditions for access to employment, to the benefit of the rehabilitated or disabled without that characterizes discriminatory practice, as provided in the Paragraph 4 of the Convention. 159 ILO (1996, p. 15, free translation[14]).

The principle of equality should not be applied only between disabled and non-disabled workers, but also in a deeper level, between

---

atuar com rotinas administrativas. Conhecimentos no pacote Office. Inglês será um diferencial. Formação: Desejável possuir ensino superior em Administração; **Ajudante de Produção**: Salário: 4,10 p/hora + todos os benefícios. Vaga destinada a pessoas com deficiência auditiva".

[14] "Torna-se preciso compreender que o verdadeiro sentido da isonomia, constitucionalmente assegurada, é tratar diferentemente os desiguais, na medida em que se busque compensar juridicamente a desigualdade, igualando-os em oportunidades. Para alcançar essa finalidade, a lei pode estabelecer condições especiais de acesso ao emprego, em benefício do reabilitado ou deficiente habilitado, sem que isso caracterize norma discriminatória, conforme preceitua o art. 4º da Convenção n. 159 da OIT".

workers with disabilities, rather than to treat all types and degrees of disability at the same way, which can damage the attempt to provide better living and working conditions for persons with disabilities (FERRETTI, 2012, p. 05). The group of persons with disabilities is not homogeneous. The difference in the nature of each disability demands a different inclusive measure in order to promote the equality of opportunity in the access to the labor market. Consequently, the nature of the disability is an important factor for the development of social policies and strategies.

4 Possible alternatives: experiences on comparative law of the European Union

After verify the phenomenon of *infra-discrimination*, we can conclude that the homogeneous quota system, by itself, does not solve the problem of the exclusion of persons with disabilities of the formal labor market. To have the full inclusion of persons with all types of disabilities in the labor market, policies and programs in education, health, awareness and competency and vocational rehabilitation should be implemented in a coordinated manner.

However, it should be noted that currently there is no other measure that might help in a direct and almost immediate way a disabled person to access the labor market as the quota system. The system is still not ideal, but is able to introduce many disabled employees in companies, and it is the inclusion mechanism more effective at the time, considering the Brazilian context. Cibelle Goldfarb affirms that at the moment should be recognized the importance of the quota system that, despite of its problems, should be maintained (2009, p. 25).

Also in the European Union, despite the criticism, in most States, the programs based on the quota system remained as the main permanent policy in favor of the inclusion of persons with disabilities in the labor market.

However, we must consider alternative policies that must act together to prevent or reduce the phenomenon of *infra-discrimination* in order to build a network of articulated public policies in the areas of education, training, rehabilitation, awareness and financial support for companies. The main issue is combine elements of the quota's law with elements of economic and social stimulus.

4.1 The Combined System of Quota-Contribution

As an alternative to the homogeneous quota system there is the combined system of quota-contribution, which is based on the principle that companies have a responsibility to create favorable conditions for those persons who have a disability. This system exists in France, Germany and Austria, where companies should provide jobs for disabled, however, when this is not possible, they must donate a certain value to an institution for the training and education of persons with disabilities, compensating thereby the portion of the legal quota unfilled. The contributions can also be used to stimulate companies to fill quotas by adaptations on their industrial space and on the working tools.

This system gives awards to companies that employ a number of disabled persons above of the level required. In France, 50% of funds from contributions turn to companies as incentives for incorporating disabled persons in its workforce (GHENO; BOLIS, 2005, p. 195). Importantly, the contribution occurs as a last resort, because the priority is to employ persons with disabilities.

Such system can be considered beneficial in the long term for persons with disabilities, because despite not being hired immediately, they will have the opportunity to prepare themselves to any activity that will eventually be engage in the company. Furthermore, companies respond better to economic stimulus and punishments than legal penalties (LOPES, 2005, p. 96). According to Pastore

> The use of the quota system-contribution generates resources to improve the situation on the supplier side (the disabled to be hired) and creates incentives for the demander side (the hiring companies) (...) The combined system of quota-contribution makes a constructive interconnection between supply and demand, as it serves the needs of disabled people (in the field of qualification) and the needs of companies (in removing barriers) (2000, p.114, free translation[15])

[15] "A utilização do sistema de cota-contribuição gera recursos para melhorar a situação do lado da oferta (os portadores de deficiência a serem contratados) e cria estímulos para o lado da demanda (as empresas contratantes) (...) O sistema de cota contribuição faz uma interligação construtiva entre a oferta e demanda, na medida em que atende as necessidades dos portadores de deficiência (no campo da qualificação) e as necessidades das empresas (na remoção de barreiras)".

However, we believe that the possibility of the company not hiring people with disabilities and, in return, contribute economically to a fund of support should be discussed as an alternative limited to special cases, when that is proven the inability of the company to employ a person with disabilities. This measure should be used as a last option and should be applied with strong supervision, since it can mean the *monetization* of the policy of inclusion of persons with disabilities and the loss of the *ratio* of the protective standard, which is the performance of the labor activity by disabled, by which them can experience self-control and independence.

4.2 The sheltered system

The sheltered system is designed not only to workers with disabilities, because it aims to the working insertion of all disadvantaged workers, which means anyone who has difficulty on entering in the labor market without assistance.

This system includes persons with disabilities who are not able to get or keep a regular job in regular companies. Labour units of the sheltered system provide jobs for those with severe disabilities and prepare them for future employment in the regular labor market, providing rehabilitation services and employment training. The sheltered system provides employment to about 500,000 people across the European Union and exists in Sweden, Belgium, France, Spain, Italy and Scotland (GHENO; BOLIS, 2005, p. 196).

Labour units of the sheltered system can be inside the structure of companies or in special separated centers. The units that operate in the very structure of the company, entering in the competitive market and acting locally, are those with greater economic and social outcomes.

In Spain and France there are special care centers of employment and work and in Italy the social cooperatives perform an important role in this system. The Italian social cooperatives are created and administered by the government and fight against specific forms of exclusion towards not only persons with disabilities, but also ethnic minorities, drug addicts and other groups considered disadvantaged.

Besides the social cooperatives, the sheltered system in Italy involves sheltered workshops, which are autonomous units exclusively for persons with disabilities that are not directly administered by the government. The economic operator of these sheltered workshops

should be a legal entity in accordance with the law that operates in a stable economic organized activity; must show that the integration of disabled persons is one of the goals of the institution; should have the most of its own workers with severe disabilities that not allow them to exercise a professional activity under normal conditions.

The percentage of job abandonment in this system is very low, since people with disabilities feel safe in such jobs because they receive physical and psychological care without suffering the economic pressure which exists in an ordinary job. However, it should be noted that such organizations also have competition rules, because they attempt to reproduce an environment as close as possible of the working life of regular companies. For this reason, according to the decision of the European Court of Justice (Betray case 344/87), people with disabilities who work in Labour units of the sheltered system acquire the status of employees (GHENO; BOLIS, 2005, p. 197).

This system could be efficient against *infra-discrimination*, since it allows persons with severe disabilities to work. Nevertheless, this system also must be used with caution, since it may cause a permanent isolation and segregation of persons with certain types of disabilities who do not experience socialization in the regular work environment, which is why the units that operate inside structure of the company are those with greater economic and social outcomes.

4.3 The heterogeneous quota system

In Belgium, the legal homogeneous quota system is deeply criticized:

> The government believes that the system contradicts the philosophy that preaches supremacy of acceptance and reintegration of disabled persons in normal life. The authorities argue that coercive measures generate negative psychological effects to employers, to persons with disabilities and coworkers (PASTORE, 2000, p. 234, free translation[16])

The policy adopted by the State does not consist in set homoge-

[16] "O governo considera que o sistema contraria a filosofia que prega a supremacia da aceitação e reintegração dos portadores de deficiência na vida normal. As autoridades argumentam que medidas coercitivas geram efeitos psicológicos negativos para os empregadores, portadores de deficiência e colegas de trabalho".

neous quotas, but set rules for the establishment of quotas, which means there are no rules that establish percentages for companies, the quotas for each sector are established between government representatives, trade unions, employers and such shares may only be filled by those who are enrolled in their programs of disabled funds support.

This policy could be interesting against *infra-discrimination*, because it represents a local act of collaboration for the establishment of specific quotas for each sector, analyzing the type and risk of business activity, as well as the worker's type of disability.

However, for such policy to be effective, must be ensured conditions for a fair and equal debate among the representatives, in order to set a balanced percentage of quotas in each sector. Moreover, this policy must be followed by a program of social awareness inside the companies, which still mostly consider the worker with disabilities as a cost and not as an investment.

4.4 The State as a social co-responsible

It is observed in many European countries the existence of a philosophy which complements the traditional homogeneous quota system by a "support network" in order to educate, train, rehabilitate, inform, mediate and create incentives to introduce and retain persons with disabilities in the labor market. The isolated application of the homogeneous quota system is inefficient, generating *infra-discrimination.* The quota system should be coordinated with awards, subsidies and benefits provided by the State.

In France, there is a network of programs of stimulus and government subsidies for employers to carry out those policies of inclusion of disabled persons in the labor market: the objective is to transfer resources from public funds to companies to develop an environment suitable to this worker. From 1987, large companies were encouraged to develop integrated programs covering training, rehabilitation and retention and those which adopt this system are free of payment of the quota-contribution mentioned above. In Spain, the State assists in the recruitment of persons with disabilities, promotes tributaries deductions and provides resources for adapting the physical work environment.

As already mentioned, some equipment that workers with certain kinds of disabilities require have a high cost and this is one of the reasons that may lead companies to hire only workers who have mild

disabilities that do not require many adaptations to perform regular duties. One of the possible ways for these costs being reduced is by loans provided by the government, with low interest rates, specific for the purchase of this equipment.

Another suggestion to curb *infra-discrimination* is the possibility of exemption of taxes on such equipment to facilitate their purchase by these companies. This initiative, already under study by the secretariats of the Rights of Persons with Disabilities and Finance of São Paulo, has application planned for the second half of this year. The idea is to define a minimum list of goods and allow businesses and independent professionals with disabilities acquire them free of taxes, serving as an incentive to hire persons who have certain types of disabilities. The list of products that may be benefit from this exemption has not yet been drafted. Among the possibilities are screen readers, scanners for the visually impaired, special printers to print text into braille and electronic devices to assist persons with difficulty to handle papers and documents. Furthermore, if the company has its tax burden relieved certainly passes this benefit to consumers, reflecting on the decrease in the price of the product or service.

5 Conclusion

The mere imposition of the obligation on hiring persons with disabilities through the homogeneous quotas system, applied isolatedly, without the articulation of education policies; without the analysis of the reality of each business activity and without the State encouragement regarding the adequacy of the physical industrial space, causes the phenomenon of *infra-discrimination*, which is a kind of pre-contractual discrimination caused by the employer's choice, who has a preference for that candidate with a disability *less severe and more viable* to the company, which means, the disability that requires lower social adaptation or business investment .

According to the British social theory of disability, we can also affirm that the phenomenon of *infra - discrimination* is a result not only of the absence of adapted tools and structures in companies, but also as a consequence of the interaction between people and their behavior in the workplace.

We had concluded that the quota homogeneous system, by itself, does not solve the problem of the exclusion of persons with disabilities

in the formal labor market. To have a full inclusion is necessary to complement the homogeneous system of quotas with a " support network " that would act to educate , train , rehabilitate , inform, mediate and create incentives to enter , retain and replace the disabled in the labor market , and once inserted , provide them assistance.

It was mentioned in this article some additional systems that have been adopted in Europe, as the combined system of quota-contribution, the sheltered system, the heterogeneous quota system and some State mechanisms of incentives that can transform the State into a social co-responsible in the inclusion of persons with *all types of disabilitie*s in the labor market, which can serve as an example to Brazil.

However, it should be noted that currently there is no other measure that might help in immediate way a disabled person to access the labor market as the quota system. The system is still not ideal, but is able to introduce many disabled employees in companies, and it is the inclusion mechanism more effective at the time, considering the Brazilian context.

References

ANTUNES, Ricardo, 2009. *Os Sentidos do Trabalho: Ensaio sobre a afirmação e a negação do trabalho,* São Paulo: Ed. Boitempo.

FERRETTI, Amanda Teixeira Silva, 2012. *O mercado de trabalho para deficientes visuais nas empresas privadas a partir da Constituição*. [viewed 17 September 2012]. Available from: http://jus.com.br/artigos/22468/o-mercado-de-trabalho-para-os-deficientes-visuais-nas-empresas-privadas-a-partir-da-constituicao

GHENO, Stefano; BOLIS, Antonio, 2005. *Il lavoro diverso. Per una nuova politica di inserimenti delle persone disabili,* Milano: Ed. Guerini e Associati.

GOÉS, Maurício de Carvalho, BUBLITZ, Michelle Dias, 2010. *Breves Comentários acerca da inclusão social dos portadores de deficiência através do cumprimento da lei de cotas*. Porto Alegre: Revista da Justiça do Trabalho.

GOLDFARB, Cibelle Linero, 2009. *Pessoas Portadoras de Deficiência e a Relação de Emprego - O Sistema de Cotas no Brasil.* Curitiba: Ed. Juruá.

GRAMMENOS, Stefanos. 1995. *Disabled Persons. Statistical Data. Eurostat, Theme 3, Population and Social Conditions,* Brussels, Ed. Centre for European Social and Economic Policy (CESEP), Statistical Office of European Communities.

HARLAN, S.L; ROBERT, P.M, 1998.*The social Construction of disability in organizations: why employers resist reasonable accommodation,* Arizona. Work and occupation, 25 (4), pp. 397-435

INTERNATIONAL LABOUR ORGANIZATION (ILO), *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and Recommendation (No. 168)*, Geneva, 1983.

INTERNATIONAL LABOUR ORGANIZATION (ILO), IL*O Vocational Rehabilitation (Disabled) Recommendation (No. 99)*, Geneva, 1955.

LIMENA, Francesca, 1996. *L' accesso al lavoro dei disabili,* Milano. Ed. CEDAM.

LOPES, Glaucia Gomes Vergara, 2005. *A Inserção do Portador de Deficiência no Mercado de Trabalho: A Efetividade das Leis Brasileiras,* São Paulo, Ed. LTr.

LUKÁCS, Gyorgy. *The Ontology of Social Being: Labour*: London, Merlin Press In: ANTUNES, Ricardo, 2009. *Os Sentidos do Trabalho: Ensaio sobre a afirmação e a negação do trabalho,* São Paulo. Ed. Boitempo.

MAIA, Luiz Fernando, 2008. *A cota de deficientes físicos,visuais,auditivos e mentais nas empresas – Inconsistências de Inconstitucionalidades do decreto nº5.926/2004,* Porto Alegre, Revista IOB trabalhista e previdenciária, 19, (225), pp.34-46.

MAZZILLI, Hugo Nigro, 1996. *A pessoa portadora de deficiência e o Ministério Público, em Direitos das pessoas portadoras de deficiência,* São Paulo, Ed. Saraiva.

NERI, Marcelo Cortez, 2003. *Política de cotas no mercado de trabalho para pessoas com deficiência.VIII Encontro Nacional da Associação Brasileira de Estudos do Trabalho – ABET,* São Paulo, Ed. Revista da ABET.

Núcleo de Apoio ao Trabalhador**,** 2012. *Anúncios de emprego* [viewed 15 July 2012]. Available from: empregos.jangadeiroonline.com.br/vagas-para-deficientes/nucleo-de-apoio-ao-trabalhador-oferta-vagas-de-emprego-para-pessoas-com-deficiencia

OLIVEIRA, Sebastião Geraldo, 2000. *Proteção Jurídica ao Trabalho de Pessoas com Deficiência* em Discriminação, Coord. Márcio Túlio Viana e Luiz Otávio Linhares Renault, fSão Paulo. Ed. LTr.

PEZZUTTO, Ana Carolina, 2012. *Os desafios da inclusão de deficientes intelectuai*s [viewed 15 May 2012]. Available from: http://exame.abril.com.br/brasil.noticia/os-desafios-da-inclusao-de-deficientes-intelectuais.

ROLLI, Cláudia, 2013. *São Paulo estuda incentivo para incluir deficiente* [viewed 18 april 2012]. Available from: http://www.deficienteonline.com.br/sp-estuda-incentivo-para-incluir deficiente.htm

SILVA, Walkure Lopes Ribeiro, 1997. *Seguridade Social e a Pessoa Portadora de Deficiência, in Direitos da Pessoa Portadora de Deficiência,* São Paulo, Coleção Advocacia Pública e Sociedade (IBAP), Ed. Max Limonard.

UNITED NATIONS (UN), – *United Nations Convention on the Rights of Persons with Disabilities*, 1975.

The Pension Fund as an additional labour and pension instrument for promoting social inclusion in the Democratic Rule-of-Law State[1]

Érica Fernandes Teixeira[2]

1. Initial Comments

Private pensions were institutionalised in Brazil during the military regime, under the government of Pres. Ernesto Geisel, with the enactment of Law No. 6,435, in July 1977. After this initial milestone, the market for private pensions was very much expanded, and these activities started to be controlled and governed by the State. Before that, the institutions operated without any kind of state control, operating in isolation. The Private Pension System was thus officially born in our country, with provisions being made setting a time frame for the regulation of the existing institutions.

In the terms of Article 4 of Law No. 6,435 of 1977[3], Private Pensions were divided into open pension institutions and closed entities, depending on the institutions' relationship to the respective participants. The closed institutions of private pensions have been given the name of *Pension Funds.* Originally, these were exclusively for the use of the employees of a given company or group of companies, known as sponsors. The other institutions fell within the category of open pension institutions. Decree No. 81240 of 24/01/1978 defined the aforesaid closed entities, in its Article 1.

Since their creation, the open pension institutions have always offered individual pension plans made available to anyone. However, as mentioned in Article 26 of Complementary Law 109 of 29/05/2001, they also offered group plans, seeking to offer pension benefits to individual

[1] TEIXEIRA, Érica Fernandes.

[2]Doctor and Master in Law from the Pontifical Catholic University of Minas Gerais; Professor of Law and Labour Lawsuits (IEC/ PUC/MG). Professor at the University of Brasília (UnB). Solicitor.

[3] Repealed by Complementary Law No. 109, of 29.5.2001.

people who are directly or indirectly linked to a hiring Corporation.

The benchmark of evolution of complementary pensions was established after Constitutional Amendment No.20, of 1998, which included the private pension regime within the social order chapter of the Constitution of the Federative Republic of Brazil. In Brazil, this private regime became part of the pension system, as a complement to own regimes and the general pension system.

Constitutional Amendment No. 20/1998 changed the wording of Article 202 of the Federal Constitution as passed in 1988. The scope of the constitutional regulation laid bare the relevance of the issue, and also showed the main guiding principles behind Private Pensions, also bringing them under state control. For this reason:

> even though there is contractual freedom in the private pension system, the constitutional accessory side ends up subjecting the private model (impregnated by the judicial institutes of Private Law) to the forecasts and changes as enforced by the Government.[4]

This regulation, as set out in the header of the previously mentioned Article 202 of the Federal Constitution, was implemented by Complementary Law No. 109, while the regulation of Paragraphs 3 to 6 was the object of Complementary Law No. 108, with both these Complementary Laws having been passed into law on 29/05/2001, thereby repealing Law No. 6,435/77.Article 31 of Complementary Law 109/2001 makes the following definition:

> Article 31. Closed institutions are those which, in the manner set out by the regulatory body and inspection organisation, are available exclusively:
> I –to the employees of a certain company or group of companies, and for servers of the Federal Government, States and Municipalities, as also of the Federal District, these being institutions known as sponsors;
> II – to associations or members of professional, class or sectorial institutions, known as institutors.
> According to the teachings of Wladimir Novaes Martinez, "The main characteristics of Complementary Pensions, as listed below, allow us to establish the essence and the scope of such pensions,

[4] WEINTRAUB, Arthur Bragança de Vasconcellos. *Previdência Privada:doutrina e jurisprudência*. [Private Pensions: Doctrine and Jurisprudence]. São Paulo: Quartier Latin, 2005, page 75.

> compatible with the reality of this protective social instrument: optional characteristic, accessory function, solidarity, and individual or group savings, private option, as well as its characteristic of being an institutional source of investment.[5]

Complementary Law No. 108/2001 shall be highlighted for its role of democratisation of such Funds. This is because it regulated the participation of the quota holders at the Funds, thereby setting the parity on the Board of Directors and the Tax Board, that is, between representatives of the sponsor and the participants thus receiving assistance, in line with Articles 11 and 15 of Complementary Law (CL) No. 108/2001.

The study of the closed Private Pension entities, often simply called *Pension Funds*, as additional instruments of social and economic inclusion within the capitalist system has proved to be essential. Considering the significant growth which these institutions have achieved, it was possible to progress from a situation of paltry savings back in the 1970s to a mammoth volume of R$ 537.04 billion at the end of 2010, and this only considering Pension Funds, which account for 14.6% of the Brazilian Gross Domestic Product (GDP).[6] Even so, this growth is still somewhat timid, especially compared with developed countries, where the asset ratio exceeds 100% in many cases. This fact shows the sheer and as yet untapped potential for the growth of such institutions in Brazil, in line with a series of incentive measures which the Brazilian Government has adopted as from the year 2003.

The portfolio managed by Brazilian pension funds has advanced 15% per year on average over the last 10 years, having posted the best performance out of all the leading markets in this segment. The segment of closed complementary pensions in the country is now well consolidated and this is well proven by the way the market behaved during the crisis experienced in 2008.

2. Pension Funds: main characteristics

As mentioned before, Pension Funds are exclusively for the employees or a company or a group of companies, as also for employees of

[5] MARTINEZ, Wladimir Novaes. *Primeiras lições de previdência complementar*. [First lessons in complementary pensions] São Paulo: LTr, 1996. p. 33.

[6] Available at: http://www.mpas.gov.br/arquivos/office/4_110408-152746-030.pdf. Accessed on 01/07/2012, at 1720 hours.

the Federal Government, Federal District, States and Municipalities, or also associates or members of professional, class or sectorial corporate bodies.

Article 2 of Decree No. 4206/2002, repealed by Decree No. 4,942 of 30/12/2003, includes the definitions of sponsors and institutors, which are still valid. This means that a sponsor is defined as company or group of companies, the Federal Government, Federal District, States and Municipalities, their mixed-capital companies, foundations, joint stock companies and other public institutions that offer their employees or collaborators a pension benefit plan through a closed society. An Institutor is a Corporation of professional, class or sectorial type, that sets up a pension benefit plan for its associates or members.[7]

Article 1 of Complementary Law No. 109/2001 sets the same principles as outlined in Article 202 of the Federal Constitution of Brazil, namely: the merely complementary character of the private regime and also this regime's independence in relation to the official Government Pension Scheme (*Previdência Social*). Thus, they stress the fact that participation is optional, and also the need to establish reserves that ensure the concession of the benefits. According to Weintraub:

> The judicial nature of Private Pensions is based on its complementary nature and also the optional nature of pensions, within the scope of social protection. It can be said that the judicial relationship in private pension plans develops through a contract based on succession, randomness and participation, thus being an equity mutual of consumption. Private pension plans shall be governed, within legal criteria, by the principle of certain rights, which can be easily proven by means of the contractual documents.[8]

Pension Funds do not seek profit, and are established under the form of a foundation or a civil society.[9] To be established and start op-

---

[7] Article 2 of Decree No. 4206/2002. Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/D4206a.htm. Accessed on 20/07/2012, at 1430 hours.

[8]WEINTRAUB, Arthur Bragança de Vasconcellos. *Previdência privada – doutrina e jurisprudência*. [Private Pensions: Doctrine and Jurisprudence] São Paulo: Quartier Latin, 2005, p.46.

[9]Non-Profit Civil Societies ceased to exist with the Brazilian Civil Code of 2002, also having to be adapted to the new rules within one year, as according to Article 2031 of this document.However, MPS/SPC Directive No. 2, of January 2004, exempted pension institutions from the changes, due to the specificity of CL 108 and CL 109/2001. In:

erating, the private pension institution needs to get authorisation in advance from the Government (Article 33, I and 38, I of CL 109/2001)

Different from the case of open entities, that can also carry out other economic activities, provided they are accessory in nature, the pension funds seek exclusively the management and execution of pension benefits plans, except health services, provided these were already available as at 30/05/2001, on publication of CL No. 109, as established in Article 76.

As mentioned in Article 14 of Complementary Law No. 109/2001, the benefits of Pension Funds shall offer a deferred proportional benefit due to the ending of the relationship of employment with the sponsor or associative with the institutor, before acquiring the right to full benefits, to be granted as soon as the eligibility requirements are met. This is the process called vesting, in which the participant gets a benefit proportional to what would be due, for having stopped their contributions in specific cases, such as unemployment.[10]

The funding of complementary pension plans for closed institutions is made through contributions from the participants (workers who decide to take part), those assisted (dependents of the workers, who may also join the plan) and the sponsor (employer). According to Weintraub, "the contribution of the company is a form of encouragement for the employees, who may maintain their current standard of living when not actively working."[11]

To understand the dynamics behind Pension Funds, one must present the core concepts of the PAYG regime and also the capitalisation regime.

In PAYG (Pay As You Go) regimes there is an agreement between generations, with solidarity prevailing between the participants. The active insurees pay the benefits for the inactive ones. Thus, the payment of your own benefits depends on future generation, which means the entry of new workers into the pension system, in order to keep the pact between the generations. This regime can be found in the benefit plan

---

IBRAHIM, Fábio Zambitte. *Curso de Direito Previdenciário*. [Course in Pension Law] 17th edition. Rio de Janeiro: Impetus. 2012. page 778.

[10] IBRAHIM, Fábio Zambitte. Idem. page 782.

[11] WEINTRAUB, Arthur Bragança de Vasconcellos. *Previdência Privada. Atual conjuntura e sua função complementar ao regime geral da previdência social.*[Private Pensions: The current situation and its function as a complemente to the general Government pension regime] 2nd edition. São Paulo: Juarez de Oliveira, 2003. page106.

as defined.[12]

In capitalisation regimes, each generation makes reserves to finance their individual benefits. Workers themselves, during their active lives, generate the funds that are necessary to cover the value of their retirement. Capitalisation occurs in the plans where there is a fixed contribution.[13]

The criticism that has been received by the capitalisation regime says that it is not considered a pension plan, but rather a financial investment. Thus, they feel that the whole responsibility and risk regarding retirement and financial security of the family is transferred to the worker himself or herself.

Practical results have shown major success in the publicity of pension funds, having imparted upon wild capitalism a process of humanisation, taming and general cleansing, as we shall show later on in this work.[14]

Article 16 of Complementary Law No. 109/2001 states that the plans must be offered to all participants. However, participation must not be forced either by the sponsor or the institutor, as participation is optional.

3. Pension Funds as additional instruments for social and economic inclusion within the capitalist system

[12] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?*[The Lula Administration, Trade Unions and Pension Funds: a cleaning up of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page209.

[13] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?*[The Lula Administration, Trade Unions and Pension Funds: a cleaning up of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page209.

[14] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?*[The Lula Administration, Trade Unions and Pension Funds: a cleaning up of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page210.

The policies for the creation and management of Pension Funds, which have become established as a key issue of Government interest, as well as that of trade unions and trade union associations, particularly within the banking and electricity segments, characterise what has been called the "cleansing and/or taming of capitalism", as they tend to invest sums arising from speculation in productive activities, that could generate jobs and income for the workers.[15]

In this regard: "The social inclusion projects during the two terms of former president Lula have always involved the market: microcredit, the Popular Bank of Brazil, and particularly Pension Funds, are some examples of this fact."[16]

The heavy volume of financial resources handled by institutional investors have made these people become leading players in the financing of the economy and in setting rules for corporate management. For this reason, quoting Plihon, Jardim states that: "Institutional investors such as Pension Funds have become the strongest operators in both national and foreign markets, and are regarded as key players in what has been called 'new capitalism'."[17]

This means a new *version* for the capitalist system, bringing a (re)significance of the concepts of work, of the social, of the State, seeking their social niche within the changes and complexities of modern society."[18]In the contemporary capitalist system, Pension Funds have

[15] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?*[The Lula Administration, Trade Unions and Pension Funds: a cleaning up of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page 199.

[16] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?*[The Lula Administration, Trade Unions and Pension Funds: a cleaning up of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page 199.

[17] PLIHON, Dominique. *Le noveaucapitalisme*. [The New Capitalism] Paris: Le Découvert, 2003. In: JARDIM, Maria A. Chaves. *Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] In: JARDIM, Maria A. Chaves.*A natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page 13.

[18] JARDIM, Maria A. Chaves .*Fundos de pensão, sindicalistas e recomposição da elites.*

taken on a key role, defining the new social players. Following the logic behind corporate governance[19], through these institutions, even the minor shareholders have become owner shareholders of many companies. In those cases where the Funds are majority shareholders, the control is even tighter. Thus, "through the logic of corporate governance, the Pension Funds have disciplinary power and also the power to carry out surveillance of the companies, being their main creditors."[20]Thus, the author continues:

> [...] governance changes the essential data for sharing of income, division of social classes of capitalism, and also social roles of capitalism and of the worker. Through the logic of the shareholders' capitalism, if the Funds control the companies then, at least in theory, it is the workers who control the company, as this is a case of workers' savings. In this sense, corporate government rethinks the role of the capitalist and also of the workers.[21]

Here we see a strong link between Pension Funds and the issue of social and economic inclusion in plural societies. This makes clear the strengthening of real democratic instruments, which agree with several

---

[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] In: JARDIM, Maria A. Chaves.*A natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page 14.

[19]According to the Brazilian Institute for Corporate Governance: "Corporate Governanceis a system throughwhichsocieties are managed and monitored, involvingrelationshipsbetween Quota Holders/Shareholders, Board of Directors, Directors, IndependentAuditors and TaxCommittee. Best practices of corporategovernanceseek to increase the value of the society, makingaccess to capital easier, and contributing to the survival of the Corporation". Available at: http://www.ibgc.org.br. Accessed on 18/07/2012, at 1623 hours.

[20] JARDIM, Maria A. Chaves. *Fundos de pensão, sindicalistas e recomposição da elites.* [The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] In: JARDIM, Maria A. Chaves.*A natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page 20.

[21] JARDIM, Maria A. Chaves. *Fundos de pensão, sindicalistas e recomposição da elites.* [The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] In: JARDIM, Maria A. Chaves.*A natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.*[The Social Nature of Finance: Pension funds, trade unions and the recomposition of the elites] Bauru, SP: Edusc, 2011. page 20.

institutions for worker protection, which are part of Labour Law, especially defensive principles, which are part of this branch of Law. The empowerment of the worker, making him or her an active citizen within the company and with a better salary, is a valuable result obtained with the creation and development of Pension Funds in our country.

Domeneghetti[22]states the importance of Pension Funds and also lists factors that stress the role of these institutions. Among these, he lists the limit on the cap on Government pensions and also changes to the minimum age to seek retirement through the official Government pension system, the INSS. He also stresses the strong regulations to which pension funds have been subjected. About this strong regulatory action, he continues:

> [...] with the limitation of fixed-income investments, variable-income investments, derivatives, real estate, stakes in companies, and operations involving participants and people assisted, also considering that these regulations are being implemented by the majority of Pension Funds (EFPCs), having an influence on the financial management and mobility thereof. These factors are restrictive, but ensure greater strength to the system as a whole and reduce occurrences of actuarial deficits and breaches of contract that could hinder the establishment of the new EFPCs – Pension Funds. especially in the institutor segment (corporate persons of professional, class or sectorial nature).[23]

The author also mentions that the strength of the system firmly rejects non-compliance with contracts, as was the case with the insolvency of AERUS, which was the pension fund of now-defunct Brazilian airlines VARIG, CRUZEIRO and TRANSBRASIL, and which did not honour its commitments regarding top-ups of retirement pensions and also payment of other pensions to the airline workers. During the 1970s, the *MONTEPIOS* (charity institutions and private institutions of voluntary participation to provide small loans on terms more favourable than

[22] DOMENEGHETTI, Valdir. *Previdência complementar: gestão financeira dos Fundos de pensão.* [Complementary Pensions: financial management of pension funds] Ribeirão Preto, SP: Inside Books, 2009. page 3.

[23]DOMENEGHETTI, Valdir. *Previdência complementar: gestão financeira dos Fundos de pensão.* [Complementary Pensions: financial management of pension funds] Ribeirão Preto, SP: Inside Books, 2009. page 3.

those of the market) also went bankrupt.[24]

According to the author, the increase in the population's life expectancy means a need to use new mortality tables.[25] In this way, to avoid future deficits, as a result of greater need to amass sufficient capital to cover the increase in actuarial liabilities, there is a need to change the investment policy, seeking profitability above the actuarial target as an alternative to increased contributions from participants and people assisted. Because of all this, it is relevant to adapt the method of management and cash flows to the degree of maturity of the EFPCs – Pension Funds. In this regard, the more *mature* pension funds (whose inactive participants outnumber the active ones)should prioritise investments that generate present cash flow to honour the increasing volume of disbursements. On the other hand, in the case of *non-mature* Pension Funds, there should be priority for long-term investments with greater return on investment, seeking to exceed the actuarial target. In this way, it is possible to generate larger volumes of cash flow in the future, or increase the value of the benefits to be paid, or even bring about a reduction in monthly cost contributions. All these measures bring benefits for the participant and for the person assisted, and therefore strengthen the Pension Funds.[26]

Previ, which is the pension fund for employees of the Bank of Brazil, is the largest pension fund in the country. It was in 24th place

[24]DOMENEGHETTI, Valdir. *Previdência complementar: gestãofinanceira dos Fundos de pensão.* [Complementary Pensions: financial management of pension funds] Ribeirão-Preto, SP: Inside Books, 2009. page 3.

[25]According to data of the Brazilian Institute of Geography and Statistics (IBGE) about the mortality table, "in 2010, the life expectancy at birth in Brazil was 73.48 years (73 years, 5 months and 24 days), which is an increase of 0.31 years (3 months and 22 days) compared with 2009, and 3.03 years (3 years and 10 days) compared with the indicator for the year 2000.With the increased life expectancy among Brazilians, there shall be an average reduction of 0.42% in the value of the benefit for workers who retire as from 1/12. This is because the Complete Mortality Tables from Brazil are used by the Ministry for Pensions as one of the parameters to establish the pension factor, when calculating the pensions of retired people within the general Regime of Social Pensions." This data reflects the importance that pension funds have been taking on as part of the maintenance of the standards of living of the citizens above the limit of the INSS in their retirement years. Available at: http://www.ibge.gov.br/home/estatistica/populacao/tabuadevida/2010/default.shtm, Accessed on 23/07/2012, at 2034 hours.

[26] DOMENEGHETTI, Valdir. *Previdência complementar: gestãofinanceira dos Fundos de pensão.* [Complementary Pensions: financial management of pension funds] Ribeirão-Preto, SP: Inside Books, 2009. page 4.

in the whole world, with over 190 thousand participants. In 2011, the payment of benefits to more than 88 thousand retired people and pensioners from Previ came to R$ 9.04 billion, which was the greatest sum already paid by the institution in one single business year.[27]The growth sustained by PREVI, when compared with the list published in 2010, referring to the business year of 2009, was 12.6%, which means an increase of over US$ 10 billion. With assets of more than R$ 155 billion, this pension fund is nearly three times the size of Petros, the pension fund of national oil company Petrobras, which is the second largest foundation in the country with assets of R$ 58 billion.[28] Here we point out that this advancement was achieved with contributions of participants and sponsor having been suspended since 2007, and also the fact that Plan 1 was mature and going through a period of increased payment of benefits. Last year also saw a record number of sign-ups to the Previ Futuro plan, with the percentage of participation in the Plan exceeding 93%. Previ is present in the most important Brazilian companies, such as mining company Vale, and also has a majority stake in meat-processing company Perdigão, as well as being the Pension Fund with largest investments on the stock market. In addition, this Pension Fund is the owner of, and partner in, several major real estate developments in Brazil. The fund was set up back in 1904, before the implementation of the Brazilian Government pension system. Previ handles resources which essentially come from personal and employer contributions, as well as other special complementary contributions as set out in their statutes.[29]

5. Final Comments:

The pension market is undergoing rapid expansion. We can see that the transactions involving Pension Fund cash has boosted the capitals market, making these institutions important institutional investors in the country.

Brazil manages some 369 pension funds, offered by Government

[27]Available at: http://www.previ.com.br/portal/page?_pageid=57,1915440&_dad=portal&_schema=PORTAL. Accessed on 23/07/2012, at 1708 hours.

[28]Available at: http://www.valor.com.br/financas/2675686/previ-e-um-Fundo-de-pensao-como-nenhum-outro#ixzz21fPuxxX4Accessed on 23/07/2012, at 1810 hours.

[29] Data available at: ttps://conteudoclippingmp.planejamento.gov.br/cadastros/noticias/2012/5/26/ricardo-flores-deixa-o-comando-da-previ/ Accessed on 24/07/2012, at 0913 hours.

and private companies to their employees and also by associations, handling a total asset worth of R$ 460 billion, which corresponds to 18% of the Gross Domestic Product (GDP) in Brazil, according to information supplied by the Brazilian Association of Closed Pension Institutions – ABRAPP.[30]The sums managed by Complementary Pensions edged up by 14.7% in 2010, which is the largest growth among the thirteen largest markets in the world, according to the study by the name of*Global Pension Assets Study 2011*,of the responsibility of Towers Watson. The study also showed that, last year, the asset holdings of the thirteen largest industrial companies in the world had an average rise of 12% compared with the previous year, meaning a total volume of US$ 26.49 trillion on a world scale. Since the year 2000, Private Pension assets have already

risen by 66%, in 2010 reaching a level equivalent to 76% of the world's Gross Domestic Product (GDP), compared with 71% in 2009 and 61% in 2008.[31]

Here we see the growing importance of these funds on the world scene, particularly in Brazil. The number of Brazilians who would benefit by the system reaches a level around 8 million, distributed between participants, dependents, and the people who are given assistance.[32]They have an important social role, as they supply a top-up to the sum which is the cap of INSS pensions, to preserve the quality of life and well-being of citizens linked to them. They act as real instruments for the perpetuation of socioeconomic affirmation – made possible by Labour Law during the worker's active life. For this reason, in the periods of inactivity, Pension Funds are financial props seeking to make sure that the citizens have worthy standards of living. They are, therefore, members of the Pension Law System that reproduce the protective aims that are inherent to Labour Law.

In relation to the companies that participate in a Pension Fund, one cannot deny the fact that they take on a distinctive threshold, showing their social role in the fullest possible manner. According to Eros Roberto Grau, the idea of the social function gives the property *"a specific content, thus moulding a new concept*."[33]In addition, Pension Funds are, for

[30] Available at: http://www12.senado.gov.br/noticias/entenda-o-assunto/Fundos-de-pensao. Accessed on 23/07/2012, at 1823 hours.

[31] Available at: http://www.abrapp.org.br/Lists/Revista/VisualizarConteudo.aspx-?ID=523. Accessed on 23/07/2012, at 1345 hours.

[32] Available at: http://www12.senado.gov.br/noticias/entenda-o-assunto/fundos-de-pensao. Accessed on 23/07/2012,at 18:23 hs.

[33] GRAU, Eros Roberto. *A ordemEconômicanaConstituição de 1988*. [The economic or-

companies, valuable instruments within the human resources policy. In this regard:

> This is the case, for example, with companies related to research into high technology, in which there is an evident and highly justifiable effort, not only to attract talents but also to make efforts to retain them. In general, we assume that companies of this nature wish to encourage long-term contracts, as they invest in training and incur high costs to terminate a contract, as well as adverse effects on productivity when a worker leaves the company, as production depends on a well-structured team. For this reason, a benefit such as a complementary pension may have an important impact on the policies that seek such results. Thus, a simple decision by the company about the implementation of a complementary pension plan could define, for example, if the company shall hire younger workers and get them to retire sooner or if, as an optional method, they encourage the workers not to stay with the company for too long a period.[34]

Also for the companies, quoting Flávio Rabelo, says Denise Delboni, the advantages of participating in a Pension Fund are the following:

> a) keeping the company competitive in relation to the labour market, b) advantages in the attraction of qualified personnel, c) retainment of qualified personnel, d) remuneration strategy and e) a reward system, rewarding longer periods with the company.[35]

---

der in the 1988 Constitution] 3rd Edition. São Paulo: Malheiros Editores, 1997. P. 249.

[34] DELBONI, Denise Poiani. *A Previdência ComplementarcomoInstrumento da Política de RecursosHumanos: EstudoemEmpresas do SetorFarmacêutico* [Complementary Pensions as an Instrument of Human Resources Policies: A Study of Pharmaceutical Companies]. 2003. 225 f. Thesis (Doctorate in Business Management) - EAESP –Business Administration School of São Paulo, Getúlio Vargas Foundation. São Paulo. 2003. p. 43.

[35] RABELO, Flavio M. *Perspectivas de expansão da previdênciaprivadafechada no Brasil*. [Prospects for Growth of closed private pension schemes in Brazil]. In: RAE - Revista de Administração de Empresas, São Paulo, v. 40, n. 4, pages 56-69, Oct./Dec.2000. In: DELBONI, Denise Poiani. *A Previdência ComplementarcomoInstrumento da Política de RecursosHumanos: EstudoemEmpresas do SetorFarmacêutico* [Complementary Pensions as an Instrument of Human Resources Policies: A Study of Pharmaceutical Companies]. 2003. 225 f. Thesis (Doctorate in Business Management) - EAESP – Business Administration School of São Paulo, Getúlio Vargas Foundation. São Paulo. 2003. p. 70.

Apart from these advantages, companies tend to humanise their human resources policies, on creating, for example, conditions so that older employees may retire as soon as possible, thereby allowing the renewal of the workforce in an organised and rational way, thus generating new job openings.[36]

In terms of the employees, the results are also positive:

> Thus, in theory, the employees who are most satisfied with their benefits shall be most likely to have a greater commitment with the company, seeing their benefits not only as part of the remuneration policy but, most importantly, as a contribution towards security in the future.[37]

Apart from getting better retirement pensions, the employees also benefit with the Pension Funds for obtaining credit on more attractive terms. Thus:

> There are also studies confirming that credits obtained as a result of the existence of a Pension Fund become more significant during periods of recession, when the real salaries and job opportunities decline, showing that the associate members manage, during these periods, to get better rates to which other people would not be entitled.[38]

---

[36] DELBONI, Denise Poiani.*A Previdência Complementar como Instrumento da Política de Recursos Humanos: Estudo em Empresas do Setor Farmacêutico* [Complementary Pensions as anInstrument of HumanResources Policies: A Study of Pharmaceutical-Companies]. 2003. 225 f. Thesis (Doctorate in Business Management) - EAESP –Business Administration School of São Paulo, Getúlio Vargas Foundation. São Paulo. 2003. p. 70.

[37] DELBONI, Denise Poiani.*A Previdência Complementar como Instrumento da Política de Recursos Humanos: Estudo em Empresas do Setor Farmacêutico* [Complementary Pensions as anInstrument of HumanResources Policies: A Study of Pharmaceutical-Companies]. 2003. 225 f. Thesis (Doctorate in Business Management) - EAESP –Business Administration School of São Paulo, Getúlio Vargas Foundation. São Paulo. 2003. p. 62.

[38] Dutton, Gail. Benefits soften up, HR Focus, New York, vol.75, issue 11, p. S9-S10. Nov.1998. p.10. In: DELBONI, Denise Poiani. *A Previdência Complementar como Instrumento da Política de Recursos Humanos: Estudo em Empresas do Setor Farmacêutico* [Complementary Pensions as anInstrument of HumanResources Policies: A Study of PharmaceuticalCompanies]. 2003. 225 f. Thesis (Doctorate in Business Management) - EAESP –Business Administration School of São Paulo, Getúlio Vargas Foundation. São Paulo. 2003. p. 70.

It is therefore possible to say that Pension Funds bring about domestication, moralisation and the humanisation of capitalism.[39]For this reason:

> The prevailing logic is that of using Pension Funds in social projects for the nation, and transform the funds arising from high interest rates and speculation into productive capital which can bring employment and income. The negation of 'wild capitalism' is therefore made quite clear.[40]

Even for the trade unions and institutions representing professional categories, Pension Funds have shown themselves to be important. It cannot be denied that the establishment of a benefits plan brings the worker closer to his or her representative institution. For this reason, it is possible to say that this approximation leads to a path for the strengthening of trade unions and also reinforcement of group conscience. According to the teachings of Maria Chaves Jardim:

> Backed up by the discourse of corporate governance, social responsibility and ethical investment, democratic management of the Funds, protection of workers' savings and the fight against capitalism, using their own weapons, the Brazilian trade unionists have taken the legitimacy accumulated in the labour space over to the financial sphere. For this, they have struck up a dialogue with the elites in the financial field and also with those of the political area. The arguments they have defended in these dialogues is that they are morally legitimate in the management and protection of workers' savings.[41]

---

[39]Characteristicsassigned by Maria A. Chaves Jardim. In: JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?* [Lula Administration, Trade Unions and Pension Funds: A moralisation of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.* [The social nature of finance: Pension Funds, TradeUnionists and the recomposition of the elites]. Bauru, SP: Edusc, 2011. P. 223.

[40] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?* [Lula Administration, Trade Unions and Pension Funds: A moralisation of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.* [The social nature of finance: Pension Funds, TradeUnionists and the recomposition of the elites]. Bauru, SP: Edusc, 2011. P. 223.

[41] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do*

Thus, the author continues:

> [...] trade unions are more and more present on the financial market. The strategy of some segments of the trade union movement is that of creating and, more importantly, managing the funds from workers' pension funds, (re)signifying the traditional forms of trade union struggle, and the relationship between work and capital. Similarly, pension funds also appear as an option rather than the possible 'crisis of strategies and traditional purposes' of this sector. It is in this perspective that the research suggests that the creation and management of Pension Funds can also be interpreted as being new strategies for trade union fights.[42]

We see that, therefore, Pension Funds have a strong democratic role to play, also within the sphere of trade union activism. It is therefore expected that the trade union representation, through protective actions, lead the market to incorporate, more and more, the basic aims of social inclusion. In a democratic scenario, which would be unimaginable without the strength of the Pension Funds, "the trade union, financial and political elites find themselves on the same discussion tables, to decide on the future of the retirement of Brazilian workers, as also the lives of the retired people."[43]

All these factors, together with the imperative actions of the Government, encourage the strengthening of Labour Law, tending to reduce

---

capitalismo? [Lula Administration, Trade Unions and Pension Funds: A moralisation of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.* [The social nature of finance: Pension Funds, TradeUnionists and the recomposition of the elites]. Bauru, SP: Edusc, 2011. P. 200.

[42] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?* [Lula Administration, Trade Unions and Pension Funds: A moralisation of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.* [The social nature of finance: Pension Funds, TradeUnionists and the recomposition of the elites]. Bauru, SP: Edusc, 2011. P. 224.

[43] JARDIM, Maria Chaves. *Governo Lula, Sindicatos e Fundos de pensão: moralização do capitalismo?* [Lula Administration, Trade Unions and Pension Funds: A moralisation of capitalism?] In: JARDIM, Maria Chaves (org.). *Natureza social das finanças: Fundos de pensão, sindicalistas e recomposição da elites.* [The social nature of finance: Pension Funds, TradeUnionists and the recomposition of the elites]. Bauru, SP: Edusc, 2011. P. 224.

inequality while raising the standard of living of the general population. The presence of a strong trade union, with a valued and satisfied employee, with assurance of the maintenance of a good standard of living when the employee retires: these are the fundamental qualities for the expansion of company activities on the world scene.

As mentioned in Article 202 of the Federal Constitution of 1988, the company has the right to participate in a pension fund. For this, there is a need for Government policies that are specifically for the creation of tax incentive mechanisms of different orders, so that the Pension Funds become more general.

There are several types of incentive for companies, such as allowing them to deduct, from their profit, for corporate income tax purposes, the contributions that they have made to private pension institutions to benefit their employees; generation of distinctions on taxation, in the case of individuals, exempting from taxes any contributions which have been correctly invested in a pension plan, and taxing benefits only when they are received.[44]

[44] DELBONI, Denise Poiani. *A Previdência Complementar como Instrumento da Política de Recursos Humanos: Estudo em Empresas do Setor Farmacêutico* [Complementary Pensions as anInstrument of HumanResources Policies: A Study of Pharmaceutical-Companies]. 2003. 225 f. Thesis (Doctorate in Business Management) - EAESP –Business Administration School of São Paulo, Getúlio Vargas Foundation. São Paulo. 2003. p. 51.

Reflections on the concept of poverty and social change in Brazil
An analysis of the "Bolsa Família" program

Tainah Simões Sales[1]

Abstract: The paper aims the analysis of the concept of poverty, searching a broader concept, which can reflect the real social needs, and the analysis of social changes that have occurred with the development of policies in Brazil, with emphasis on the Bolsa Família Program, which is the largest income transfer program in the country. We will study the traditional conceptions of poverty, the problems in adopting exclusively monetary criteria for measuring the levels of poverty and development, data about social inequality in Brazil, the characteristics of the Bolsa Família Program, philosophical and sociological aspects related to social change and its relation to Law and finally we will analyze the conception of Law as promoter of social change.

Keywords: Poverty. Social inequality. Development.

1 Introduction

The Brazilian government is increasingly concerned about promoting welfare policies, serving the citizens who need it the most. Several policies have been created, especially after the promulgation of the 1988 Constitution. The Bolsa Família Program, created in 2004 (Law No. 10.836/04), is the largest income transfer program in the country.

In this paper, we will study the implications of the adoption of monetary criteria for measuring poverty and social inequality. We propose the adoption of a broader conception, attentive to the individuals real needs and considering aspects such as the deprivation of liberties

[1] Currently, is Master student in Law from Federal University of Ceará (UFC), with scholarship provided by *Fundação Cearense de Apoio ao Desenvolvimento Científico e Tecnológico* (FUNCAP), researcher at the Center for the Study of Constitutional Law at UFC (CEDIC), coordinator of the research line named Constitutionalization of Private Relations, researcher at Democracy and Public Finance Group, from UFC. Lawyer. E-mail: tainahsales@gmail.com.

and opportunities, emphasizing the indispensability of effective policies related to the quality of the education, health, labor, sanitation etc.

Further, we will analyze data related to social inequality in Brazil and compensatory policies developed, with emphasis on the Bolsa Familia Program and its particularities. We sought to answer the following question: income transfer programs and, more specifically, the Bolsa Familia Program, are sufficient to change the condition of poverty of the individual?

It is a topic of not only academic relevance, but mainly social. Discussions about this topic should be promoted, so that urgent solutions to the problems concerning the efforts to eradicate poverty and ensure social development can be found. That is the purpose of this paper.

2 The concept of poverty

Activities aiming poverty eradication exist for many years but now it is possible to say that the governments are more concerned about creating policies in this regard, trying to make effective human rights.

However, for those policies to be effective and satisfactory, it is essential to understand and discuss the meaning of the term "poverty". The criterion used in most studies around the world to evaluate the level of development of a city or a nation as well as the degree of poverty in a community is the monetary. Therefore, social development and poverty are measured according to the personal income.

But using this criterion without considering other important aspects, such as the individual's freedoms, their needs and their ability to choose between different opportunities makes the results unsatisfactory and inconsistent with reality[2].

Moreover, it should be noted that economic development does not always result in social development. Not if it depends only on the increase of personal income. On the opposite: the social development seems a process that can be vital for sustained economic development[3]. Economic growth depends on investments to improve people capabilities, from a democratic society perspective. Increase income without im-

[2] SEN, Amartya. **Desenvolvimento como liberdade**. Translation by Laura Teixeira Mota. São Paulo: Companhia das Letras, 2000, p. 77.

[3] KLIKSBERG, Bernardo. **Repensando o Estado para o desenvolvimento social**: superando dogmas e convencionalismos. Translation by Joaquim Ozório Pires da Silva. São Paulo: Corteza, 1998.

proving basic aspects of existence, such as health, sanitation, education and housing cannot characterize, in fact, long-term development[4].

In Brazil, it is adopted a policy of compensatory measures: the adoption of various programs to "compensate" poverty, unemployment and social inequality. The idea is to ensure assistance to the needy urgently: one should give more to those who have less[5].

Encouraging such assistance programs stems from the fact that they are immediate and urgent, and also because the costs are lower than investing in policies to promote education, health, sanitation, housing, among others. Moreover, they are important instruments to acquire votes in elections.

The first discussions on income transfer programs in Brazil occurred in the 1970s, however, it was only in 1991 that there was a project to effect policy accordingly. The project aimed to create a negative income tax, which would benefit people over 25 who had an income under a certain level, which at the time corresponded to 2.5 times the minimum wage[6].

After that, other programs were created, linking the possibility of earning supplementary income to the requirement of providing schooling for dependents in 1995. There were also the Eradication of Child Labor Program, including, besides the monetary benefit and the need for school enrollment, incentives to cease child labor, the Bolsa Escola Program and Bolsa Alimentação Program.

The Fome Zero Program was created by the Federal Government in 2003 in order to actualize the right to food, without the focus on the individual's income. But, the program was widely criticized and did not show satisfactory results. The model of income transfer seemed more effective and more economical than the model adopted by the Fome Zero Program.

Thus, on January 9th, 2004 the Federal Government created the Bolsa Família Program (Law No. 10.836/04, regulated by Decree No. 5.209/04), setting the income transfer according certain conditions set by legislation, such as the number of children, the condition of school

[4] SEN, Amartya. Development thinking at the beginnig of 21st Century. In: BID. **Development thinking and practice conference**, Washington, set. 1996.

[5] COHEN, Ernesto; FRANCO, Rolando. **Avaliação de projetos sociais.** Petrópolis: Vozes, 1993, p. 30.

[6] BRITTO, Tatiana; SOARES, Fabio Veras. **Bolsa família e renda básica de cidadania:** um passo em falso?. Available: <http://www.senado.gov.br/senado/conleg/textos_discussao/TD75-TatianaBritto_FabioSoares.pdf>. Access: Nov. 17th 2011.

enrollment etc. Currently, the program benefits more than 13 million[7].

For the Bolsa Familia, extremely poor people are those who survive with monthly income of up to R$ 70.00 (seventy reais) and poor people are the ones who earn up to R$ 140.00 (one hundred and forty reais) monthly[8]. By November 16th 2011, the Brazilian Government published the result of Population Census 2010: 6.3% of the population still lives with a monthly income of up to R$ 70.00[9].

From this, it is noticed that, for purposes of analysis of national poverty, important factors such as the needs, the opportunities (or its lack), the culture, the rights and freedoms of those individuals are not being considered.

Indexes for measuring poverty exclusively based on income present often incomplete or misleading results. It does not mean, however, that the money is not an important criterion. We just want to expand the current concept, since it is insufficient. According to Amartya Sen, poverty must be seen as the deprivation of basic capabilities rather than merely as low income, which is the traditional criterion of identification of poverty [10].

Poverty is a multifaceted phenomenon and must be analyzed through the prism of the deprivation of liberties and opportunities. Based on this concept, the Government may draw up policies in order to effectively contribute to the reduction of social inequality and the strengthening of citizenship, instead of worrying only with increasing individual's income.

Besides, income transfer programs such as Bolsa Familia should not be implemented on a permanent basis, because they may lead to accommodation, ie, to the resignation to social status. It is important to note that we are not trying to deny the importance of welfare policies. We are just stating that, perhaps, if those income transfer programs were not permanent they would effectively contribute to the purpose

---

[7] BRITTO, Tatiana; SOARES, Fabio Veras. **Bolsa família e renda básica de cidadania:** um passo em falso? Available: <http://www.senado.gov.br/senado/conleg/textos_discussao/TD75-TatianaBritto_FabioSoares.pdf>. Access: Nov. 17th 2011.

[8] These values correspond approximately to $ 140 and $ 280, respectively.

[9] **INDICADORES Sociais Municipais 2010: incidência de pobreza é maior nos municípios de porte médio. Instituto Brasileiro de Geografia e Estatística, Brasília, 16 de novembro de 2011. Available:** < http://www.ibge.gov.br/home/presidencia/noticias/noticia_visualiza.php?id_noticia=2019&id_pagina=1>**.** Access: Nov. 17th 2011.

[10] SEN, Amartya. **Desenvolvimento como liberdade**. Translation by Laura Teixeira Mota. São Paulo: Companhia das Letras, 2000, p. 120.

for which they propose. If they are implemented on a permanent basis, there may be distortions of the program goals, causing stagnation or even social backlash.

Moreover, government actions aimed at improvements in education, public health system and sanitation, for example, are fundamental and more effective for poverty reduction. What is proposed is that, in addition to giving money directly, other factors must be considered, as already mentioned, to measure development and poverty and to promote satisfactory policies.

Eradicate poverty considering only monetary criteria is very easy: the Government must only give money and the problem is solved. But these people will still live without health, education and they will remain without job opportunities and without social assistance. They will remain marginalized. Their problems will not be solved. Their opportunities will be reduced. Is this real freedom? Do they really will no longer be poor and need government assistance? Surely the answer is negative.

3 Analysis of "Bolsa Família" program

According to art. 1 of Law No. 10.836, of January 9th, 2004, the Bolsa Família Program emerged with the purpose of unifying the existing income transfer programs, mainly Bolsa Escola, Auxílio Gás and Cartão Alimentação programs.

Aurelio Weisshemer[11] states that the program strategy to guarantee poverty eradication has three main elements: income transfer; strengthening the right to basic health services, education and social assistance; and integration with other initiatives and government programs and also with society. Besides, it is important to note that the main objectives are: fighting poverty and promoting the emancipation of these families.

The Bolsa Família Program was implemented by the Ministry of Social Development and Fight Against Poverty counting on the aid of the municipalities, which play an important role by controlling the program and transferring funds to the beneficiaries. The decentralization of the program's management and execution is regulated by Law

[11] WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 34.

No. 10.836/04. The federal states have the technical support function and must supervise the municipalities involved.

The National Secretariat of Citizenship Income (SENARC) has an important role in the management of the benefits, providing setting criteria of beneficiaries and the amounts to be transferred, the procedures relating to the blockade and the suspension of benefits, and the questionnaire to be answered by those responsible for the household before the registry[12]. The Department of Assessment Information (SAGI) studies the positive and negative impacts of the program[13].

Currently, the Bolsa Família benefits 13.530.000 families[14] with per capita income of up to R$ 70.00 (being considered extremely poor) or up to R$ 140.00 (being then considered poor) [15]. This is the largest cash transfer program in the country. According to Sergei Soares and Natalia Sátyro[16], the Bolsa Familia only is surpassed, in number of beneficiaries, by the National Health System, which in principle covers the entire Brazilian population, the public education, serving 52 million students, and the social security, which boasts 21 million benefits.

To acquire benefits, the family must fulfill certain conditions regulated by law. According to art. 3 of Law No. 10.836, the conditions are as follows: in the case of families with school-age children, they must prove frequency of 85% in a regular education establishment; if they have children 0-6 years old, they must follow the vaccination schedule; pregnant women should observe pre and postnatal examinations, nutritional and breast-feeding monitoring, in addition to other conditions

[12] Regulated by Decree No. 6,135, of June 26th 2007.

[13] BICHIR, Renata M. O Bolsa Família na berlinda? **Revista Novos Estudos**, n. 87, jul. 2010, p. 120.

[14] Dependência do Bolsa Família quase triplica no Estado. **Diário do Nordeste Online**. Available: <http://diariodonordeste.globo.com/materia.asp?codigo=1185156>. Access: Jan. 10th 2013.

[15] When the Program was created, the values were R$ 50.00 R$ 100.00, respectively, for inclusion of poor and extremely poor families, being subsequently adjusted to R$ 60.00 and R$ 120,00. SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada (Coord.). **Avaliando o Bolsa Família**: unificação, focalização e impactos. São Paulo: Cortez, 2010, p. 33.

[16] SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. IPEA, **Texto para Discussão**, 2009, n. 1424, p. 12. Available: < http://desafios.ipea.gov.br/sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013.

that can be established later[17]. These are the beneficiaries' counterparts, demonstrating its commitment to the State and society. Thus, the counterparts charged are those that we should all observe and fulfill[18].

The control related to educational counterpart is performed by the municipal government and also by the Ministry of Education. The counterparts related to health are monitored by the Ministry of Health, with the assistance of local health departments.

It should be noted that if the family receives the benefits but then stop fulfilling the requirements, the benefit will not be ceased immediately. The Ministry of Social Development and Fight Against Hunger (MDS) will evaluate the reasons for non-compliance so that the beneficiary is not impaired. After all, we know that often the requirements are not fulfilled not by a beneficiary's negligence, but because of the deficiencies in the provision of public services by the State, for example, the lack of places for school enrollment in some localities; absence or limited access to public transport for schools or hospitals; absence of professionals and beds in health centers and public hospitals, among others.[19]

Furthermore, in relation to the educational counterpart, Soares and Satyro[20] affirm that if the child has absences in excess of 15% due unjustified or unknown reasons, the beneficiary receives a letter of notification and also a warning on the terminal screen of the bank used by him for the withdrawal of values. If, even after the notifications, the absences continue to occur, after two months, new notifications will be sent and the benefit will remain temporarily locked and can be withdrawn in the next month.

If, after the third scan, the frequency is still below 85%, new notices will be sent and the benefit will be suspended for one month and

---

[17] BICHIR, Renata Mirandola. O Bolsa Família na berlinda? **Revista Novos Estudos**, n. 87, jul. 2010, p. 123.

[18] SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. IPEA, **Texto para Discussão**, 2009, n. 1424, p. 15. Available: < http://desafios.ipea.gov.br/sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013.

[19] SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada (Coord.). **Avaliando o Bolsa Família**: unificação, focalização e impactos. São Paulo: Cortez, 2010, p. 100.

[20] SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. IPEA, **Texto para Discussão**, 2009, n. 1424, p. 16. Available: < http://desafios.ipea.gov.br/sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013.

it would not be able to be withdrawn in the next month. In the fourth round, it will suspend the benefit for a period of two months. Finally, if the absences persist, the benefit will be canceled.

Research conducted by the National Secretariat of Citizenship Income (SENARC) indicated that since the beginning of the program until the year 2008, only 4% of families had benefits canceled because of the failure of the educational counterpart[21].

Since 2004, the benefit is granted for an initial period of two years (if the family fulfill the requirements). After this period of time, the government must provide the updating information of families in order to check whether they are still eligible and can continue to get the values or if they are emancipated. If the family get some other kind of income that becomes ineligible to receive the benefit, ie, if the per capita income is above the limits, established by law for the assessment of values, both the family and the respective municipality should be informed that the benefit will be blocked. If is verified that the family no longer fits the program profile, the benefit will then be canceled so that another family can begin to receive[22].

An important detail about the Bolsa Família is that not all families in need have been benefited, yet fulfilling the requirements of legislation. This happens because the budget is limited. Once exhausted the budget, no one can begin receiving the benefit, at least until there is extra credit. People criticizes this rule, since it seems impossible to ascertain who is the most needy of all who fulfill the legal requirements, which makes the choice unfair and often arbitrary[23].

In case of death of the person responsible for receiving the values , there is no cancellation of the benefit, because the values are for the whole family and not to a specific person. The family must update the

[21] SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. IPEA, **Texto para Discussão**, 2009, n. 1424, p. 17. Available: < http://desafios.ipea.gov.br/sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013

[22] SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. IPEA, **Texto para Discussão**, 2009, n. 1424, p. 13. Available: < http://desafios.ipea.gov.br/sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013

[23] SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. IPEA, **Texto para Discussão**, 2009, n. 1424, p. 11. Available: < http://desafios.ipea.gov.br/sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013.

registry and replace the responsible. While the substitution is not performed, the benefit is not blocked.[24]

The benefit may vary between R$ 32.00 and R$ 306.00[25]. They are granted by the following form[26]:

a) Basic Benefit of R$70.00 is paid to families considered extremely poor, with incomes of up to R$70.00 per person[27].

b) The Variable Benefit of R$32.00 is paid to poor families with monthly income of up to R$140.00[28] per person, if they have children and teenagers up to 15 years, or if there is a woman pregnant and/or breastfeeding. Each family can receive benefits up to five variables, ie, up to R$160.00[29].

c) The Variable Benefit Linked to Teen (BVJ) of R$38.00[30] is paid to all families who have teenagers attending school. Each family can receive benefits for up to two variables related to adolescents, ie, up to R$76.00[31].

d) The Extraordinary Variable Benefit (BVCE) is paid to families who had financial losses with the migration of the other assistance programs to Bolsa Família. The benefit amount varies from case to case.

Currently, about 55 million Brazilians are living in poverty and 22 million are considered indigent, although advances can be identified: according to estimates from the Institute of Applied Economic Research (IPEA), between 2003 and 2007 , about 16.5 million people were able to overcome the poverty line[32].

In Ceará, a state of Brazil, according to a study conducted by the Laboratory for Poverty Study (LEP) of the Federal University of Ceará,

---

[24] WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 65.

[25] Converting to U.S. dollars, this equals $ 65 and $ 615, approximately.

[26] BRASIL**. Valores dos benefícios**. Available: <http://www.mds.gov.br/bolsafamilia/valores-dos-beneficios>. Access: Jan. 10th 2013

[27] U$140, approximately.

[28] U$280, approximately.

[29] U$320, approximately.

[30] U$76, approximately.

[31] U$152, approximately.

[32] WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 19.

in 2012, about 1.44 million people have escaped poverty line[33]. Studies state that the benefits from Bolsa Família Program contributed to the improvement of these indices.

However the question is: Does the Bolsa Familia provide a substantial change in the individual condition of poverty, if we analyze it by a broader concept, which includes the freedoms and the real needs of individuals, beyond the monetary criteria already mentioned? This is what will be discussed below.

3.1 The income and the substantial change in the individual condition of poverty

There are many debates about the Bolsa Família Program. People discuss if the program should be temporary or permanent; many people say that the amounts received are negligible and do not modify the state of misery of the individual; social scientists question the monetary criteria for the characterization of poverty; some say that the conditionalities are not efficient and do not have a relevant role, creating overspending for the government, which now have to monitor and evaluate the evidence of conditions imposed by law; people question the situation of dependency of beneficiaries, resulting disincentive to work and social conformation; others discuss the issue of corruption, creating a situation where people in need are not included on the program, and who is not in need, in turn, receive the values; there are also debates about the need to implement other policies and the positive and negative consequences of the program, among other issues.

However, we know that for those who have practically nothing, receive some financial aid, although small, create a great impact on the lives of their families[34]. A research made by the Center of Social Research, from Federal Fluminense University (UFF) [35], showed that, before the

[33] Dependência do Bolsa Família quase triplica no Estado. **Diário do Nordeste Online**. Available: <http://diariodonordeste.globo.com/materia.asp?codigo=1185156>. Access: Jan. 10th 2013

[34] WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 24.

[35] For more details about this: WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 125.

creation of Bolsa Família, 34.9% of the interviewed families could buy enough food for just one week, 34% could buy for two weeks; 20.2% for three weeks and only 10.9% said that their families could buy food for the entire month. After Bolsa Família, the numbers have changed: 16.1% said they were able to buy food only for a week, 29.4% for two weeks, 33% for three weeks and 21.5% responded that they were able to buy food for the whole month.

Thus, it appears that, although the program is subject to criticism, and relevant reforms must be urgently done, the contribution of Bolsa Família is very significant for those who receive it. Some say it provides concrete and immediate possibilities of improving life conditions for a large part of population that often has no income[36].

Although the amount received is not sufficient to significantly modify the poverty condition of the individual, no one can deny that income transfer programs contribute to reducing levels of inequality and poverty, reducing the limitations and deprivations of numerous families. At least they could have something to eat[37]. So, it is possible to assert that, although not enough to eradicate poverty in the country, the Bolsa Família Program represents an advance for welfare policies in Brazil, which adopted, especially after the 1988 Constitution, the character of Welfare State.

The government needs to attend to the citizens' concerns and needs, increasingly policies that expand the individual freedoms and opportunities, so that everybody can have equal opportunities to live as one wants.

Aurelio Weisshemer[38] affirms that a child or a young person does not learn in school if he or she is not healthy. Likewise, if health is not

---

[36] SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada. Caracterizando o Bolsa Família: uma aproximação ao processo de unificação dos programas de transferência de renda no Brasil. In: SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada (Coord.). **Avaliando o Bolsa Família**: unificação, focalização e impactos. São Paulo: Cortez, 2010, p. 107.

[37] SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada. Caracterizando o Bolsa Família: uma aproximação ao processo de unificação dos programas de transferência de renda no Brasil. In: SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada (Coord.). **Avaliando o Bolsa Família**: unificação, focalização e impactos. São Paulo: Cortez, 2010, p. 93.

[38] WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 15.

ensured, the fundamental rights to food, clean water, sanitation and housing may be impaired. He also says that it should be created policies to effect the transition from the state of dependence on income transfer programs for a sustainable phase characterized by social inclusion that combines participation in the labor market with guaranteed rights[39].

Therefore, it is essential that, in addition to the improvement of programs like Bolsa Familia (which has, as already seen, many structural problems such as the definition of poverty based on monetary criteria), other policies should be discussed and implemented. It cannot be expected that a single income transfer program solves all problems related to poverty and inequality that exist since the beginning of history[40].

Poverty is a complex phenomenon and should be analyzed through the prism of deprivation of liberties and opportunities. Based on this concept, the Government may draw up policies in order to effectively contribute to the reduction of social inequality and the strengthening of citizenship.

Conclusions

It is concluded that it is essential to change the concept of poverty based on money due to the failure of its meaning. If poverty is analyzed by one-dimensional view, several important aspects, such as the needs, culture, history and opportunities of individuals will not be considerate. Eradicating poverty just transferring income directly to those in need it is a not effective way maily if you consider a long-term development based on actual human and social needs.

This does not mean that the monetary criteria is not important or that the money received by those families does not make any difference. We are just saying that this alternative is not enough, because they will still need access to health, education, housing, among others.

Bolsa Familia has the merit to calm the hunger of millions. But the path towards development is much more complex, and much remains to be done. The Government cannot consider his part done only by creating this program to transfer income, and also society cannot be

[39] WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010, p. 68.

[40] BICHIR, Renata Mirandola. O Bolsa Família na berlinda? **Revista Novos Estudos**, n. 87, jul. 2010, p. 126.

silent, believing that much has been done. This was only the first step. Only with the awareness that poverty is more than lack of income is that effective changes can be observed and those individuals may be, in fact, free.

References

BICHIR, Renata Mirandola. O Bolsa Família na berlinda? **Revista Novos Estudos**, n. 87, jul. 2010.

BRASIL. Constituição (1988). **Constituição da República Federativa do Brasil**, Brasília, DF, Senado, 1988.

_____. **Economia.** Available: <http://www.brasil.gov.br/sobre/economia/indicadores/disoc_rdcg/indicadorview>. Access: Jan. 16th 2013

_____. **Lei ordinária nº 10.836 de 9 de janeiro de 2004**. Cria o Programa Bolsa Família e dá outras providências. Available: < http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/l10.836.htm>. Access: Jan. 16th 2013

_____. **Decreto nº 5.209 de 17 de setembro de 2004**. Regulamenta a Lei nº 10.836, de 9 de janeiro de 2004, que cria o Programa Bolsa Família, e dá outras providências. Available: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5209.htm>. Access: Nov. 10th 2011.

_____. Ministério do desenvolvimento social e combate à fome. **Bolsa Família.** Available: <http://www.mds.gov.br/bolsafamilia>. Access: Nov. 17th 2011.

_____. **Programa Fome Zero**: O que é. Available: < http://www.fomezero.gov.br/o-que-e>. Access: Nov. 17th 2011**.**

_____. Ministério do desenvolvimento social e combate à fome. **Valores dos benefícios**. Available: <http://www.mds.gov.br/bolsafamilia/valores-dos-beneficios>. Access: Jan. 10th 2013.

BRITTO, Tatiana; SOARES, Fabio Veras. **Bolsa família e renda básica de cidadania:** um passo em falso?. Available: <http://www.senado.gov.br/senado/conleg/textos_discussao/TD75-TatianaBritto_FabioSoares.pdf>. Access: Nov. 17th 2011**.**

COHEN, Ernesto; FRANCO, Rolando. **Avaliação de projetos sociais.** Petrópolis: Vozes, 1993.

DEPENDÊNCIA do Bolsa Família quase triplica no Estado. **Diário do Nordeste Online**. Available: <http://diariodonordeste.globo.com/materia.asp?codigo=1185156>. Access: Jan. 10th 2013.

INDICADORES Sociais Municipais 2010: incidência de pobreza é maior nos municípios de porte médio. Instituto Brasileiro de Geografia e Estatística, Brasília, 16 de novembro de 2011. Available: <http://www.ibge.gov.br/home/presidencia/noticias/noticia_visualiza.php?id_noticia=2019&id_pagina=1**>.** Access: Nov. 17th 2011.

KLIKSBERG, Bernardo. **Repensando o Estado para o desenvolvimento social**: superando dogmas e convencionalismos. Translation by Joaquim Ozório Pires da Silva. São Paulo: Corteza, 1998.

MEDEIROS, Marcelo; BRITTO, Tatiana; SOARES, Fábio. Transferência de renda no Brasil. **Revista Novos Estudos**, n. 87, jul., 2010.

SILVA, Maria Ozanira da Silva e; LIMA, Valéria Ferreira Santos de Almada (Coord.). **Avaliando o Bolsa Família**: unificação, focalização e impactos. São Paulo: Cortez, 2010.

SEN, Amartya. **Desenvolvimento como liberdade**. Translation by Laura Teixeira Mota. São Paulo: Companhia das Letras, 2000.

SOARES, Sergei; SÁTYRO, Natália. O Programa Bolsa Família: desenho institucional, impactos e possibilidades futuras. Instituto de Pesquisa Econômica Aplicada. **Texto para discussão**, n. 1.424, out. 2009. Available: < http://desafios.ipea.gov.br/

sites/000/2/publicacoes/tds/td_1424.pdf>. Access: Jan. 10th 2013.

WEISSHEMER, Aurélio. **Bolsa Família** - Avanços, limites e possibilidades do programa que está transformando a vida de milhões de famílias no Brasil. 2. ed. São Paulo: Perseu Ábramo, 2010.

Truth, Hermeneutics and Judicial Decision

Fernando José Armando Ribeiro[1]

Abstract: Modern hermeneutics teaches us that everything that is perceived and represented by human beings refers to a process of interpretation, and that the world comes to mind through language. Therefore, Law depends on the hermeneutic mediation. Without hermeneutics there is no law, only normative texts. This paper makes use of the philosophical hermeneutics by Gadamer to investigate the limits and possibilities of judicial interpretation. The paper explores the contribution of philosophical hermeneutics to a new model of rationality and how can it influence the application of Law, and not only legal theory. Therefore, we will examine some of the most important themes of the legal debate today in Brazil and the USA. What should be the role of the judge in a democracy? What can we understand by judicial activism and by correct interpretation? With this theoretical background we analyze some cases, always trying to show the better way to legitimize the judicial decision and the contribution that hermeneutics and the new dimensions of language can bring to it.

Keywords: 1. Hermeneutics; Judicial decision; 3. Democracy.

1 Introduction

Law is not only what is contained in the texts of statutes and precedents. These legal texts only set forth abstract commandments, able to regulate interpersonal relations. Therefore, the search for law in legal texts is fruitless if it does not consider the role of the interpreter and the plurality of all the other norms that compose the legal system which by themselves are the product of interpretation.

Modern hermeneutics teaches us that everything that is perceived and represented by the interpreter refers to a process of interpretation, and that the world comes to mind through language. If language is already a form of interpretation, hermeneutics is inseparable from human life and, therefore, inseparable from Law.

Hence, Law depends on hermeneutic mediation. Without herme-

[1] PhD; Professor of Law at PUC-Minas; Judge in the state of Minas Gerais (Brazil).

neutics there is no law, only normative texts. Only through discourse can Law express the valid and invalid, the reasonable and unreasonable, and the dialectical affirmation of human freedom.

To investigate and reflect the application of law in a democracy and in the context of pluralism requires the recognition of the inevitability of reflective interpretation of texts. In this sense, Gadamer's philosophical hermeneutics can be considered indispensable to the study of Law. It demonstrates its critical and reflective dimension when understood as a dialogue with tradition. Making use of Gadamer's philosophical hermeneutics, this paper investigates the limits and possibilities of judicial interpretation of law.

2. The role of the judge: some reflections

In the Civil Law system, in the beginning of the modern era the law as an incarnation of the State found the very meaning of its sovereignty through the statutes. To the judge, understood as a simple instrument of the State, rested the role of applying the law according to the model of syllogistic application. Member of a power of reduced importance, the Constitution would lie beyond judiciary reach, considering that the concept of law did not cover the normative force of the Constitution, a dimension able to establish the public space (STRECK, 2010, p. 81). When legal positivism came to its peak, with its concern about the abstract system of Law, judicial interpretation was also separated from the force of tradition, as well as from the possibility of rescuing the fundamental principles of the legal system itself.

The formalist perspectives can be explained by different reasons. Among them, with prominent evidence, is the historical evolution of the law that led it through medieval times to the modern age. If the people became the new sovereign, and they speak through legislation, laws and statues should be seen as their voice. The more systematic and precise legislation is, the more interpretation is restricted and so the, self-government principle will be more respected as the will of the people. Law's interpretation could then be reduced to a subsumptional process.

This idea was properly incorporated into the ideology of the Liberal Modern State. It can be understood by Montesquieu's (1979) words, written in the *Le sprit des lois*, according to whom the judge should be merely seen as "*la bouche de la loi*", the law's mouth, responsible only for pronouncing what was already contained in legal statutes.

However, the tragic events that happened under the totalitarian states of the twentieth century demonstrated with strong force that the rationality of the Law should not be separated from the normative order of morals. The search for justice, reborn in contemporary law meant, firstly, that Law depends on principles and the interpreter should have a more relevant role in the application of the law.

3 The evolution of hermeneutics and the contribution of Hans-Georg Gadamer

The model of hermeneutics, from the scholastics to the historic-evolutionary system, consists in the study of the processes used to establish the meaning and the reach of language's expressions. However, since Heidegger, hermeneutics studies cannot be conceived as a mere instrument to make the subject of study understandable.

Following the path of his master Heidegger, Gadamer (2006, p. 470) says, "being that can be understood is language". The language in the context of Gadamer's Philosophical Hermeneutics is the total mediation of the experience of being. And, in these terms, the limit is imposed on all hermeneutical experience of meaning. For Gadamer (2006, p. 471-472) being can never be understood in its totality, because for everything that triggers language always refers beyond the statement as such. The self cannot be understood in its entirety and cannot therefore claim to be a complete interpretation. It is noteworthy that, in the preface to the 2nd edition of Truth and Method Hans-Georg Gadamer (2006, p. XXV) states that "if there are any practical consequences of the present investigation, it certainly has nothing to do with an unscientific 'commitment'; instead, it is concerned with the scientific integrity of acknowledging the commitment involved in all understanding".

For Gadamer, if the experience of art proves that the truth rests beyond the sphere of methodical knowledge, something similar is true for all the sciences of spirit (*Geisteswissenchaften*) in which historical tradition is transformed into an object of research. *Truth and Method* is proposed to expose the truth as happening, always an actualization, but already steeped in tradition (GADAMER, 2006, p. XXV). In this sense, Gadamer presents some important contributions that should be noted. The historical horizon is the possible range of view from a particular point in history, i.e., the result of the dialectical contrast of past

and present. In the words of Gadamer (2006, p. 390), "the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says".

The historic experience shows that man's access to the world comes from the point of view of his hermeneutical situation, which is his specific position in front of the phenomena. Prejudices would be an advance and diffuse prior meaning of the text influenced by the tradition in which the interpreter is situated. In other words, they are the product of the intersubjective relationship the interpreter keeps with the world. Prejudice – or pre-understanding – is a part of understanding itself. In sum, it ontologically constitutes comprehension.

Understanding is formed through pre-understandings. According to Gadamer (2006, p. 484)., "there is undoubtedly no understanding that is free of all prejudices, however much the will of our knowledge must be directed toward escaping their thrall" We do not know something in its integrity, but always something as something. Gadamer points out that the historical horizon does not mean enclosure, but opening. Tontti (2004, p. 28) observes that awareness of the historical horizon allows a better glimpse of it towards a more correct standard. The concept of historical perspective comes to the consciousness of the plurality of meanings in which there is a constant shifting of changing meanings over time.

The understanding that comes through the hermeneutic dialogue involves merging the horizon of the interpreter with the horizon of what is interpreted. And from the inter-relationship of the interpreter's own horizon with the horizon of the text, a new one is born. For Gadamer (2006, p. 390), the fusion of horizons is what takes place in conversation in which something that is not only my author's, or mine but in common, is expressed. The interpreter's understanding is part of an event that stems from the actual text that needs interpretation. In the fusion of horizons rests the idea that the truth of the text is not in unconditional submission to the opinion of the author, and not only in the interpreter´s preconceptions.

It should be noted that the fusion of horizons involves another kind of fusion, that one between understanding, interpretation and application. In a reversal of the classic position, according to which first comes interpretation and then understanding, Gadamer shows that something always needs to be understood before being interpreted. Ac-

cording to the philosopher for the interpretation there must be a previous understanding (prejudice or pre-understanding). However, for Gadamer the application is not a third moment in a process of understanding and interpreting. For Gadamer, interpretation is nothing more than an explicit understanding and not a specific moment distinct from it. The application will not proceed further than the very act of understanding.

However, the authority of tradition does not take away the freedom of the interpreter, as it can be rationally controlled. Therefore, the recognition of the history of effect does not mean the absence of critical sense. The other way, facing a future time when the prejudices originating from tradition no longer respond, brings the possibility of differentiation between true prejudices, those which make our understanding possible, and those false prejudices that only bring misunderstanding (GADAMER, 2006, p. 298).

We should always consider the new meaning of language beyond Gadamer's hermeneutics. The German philosopher states "language is the universal medium in which understanding happens." Only through language can we understand. And language cannot be understood merely as the description of objects. It is through language that we can create and act in the world (GADAMER, 2006, p. 390). This allows Gadamer to interrelate the intrinsic dialectic in the relationship between thought and speech as a conversation. And also the dialectic relation between question and answer is relevant to the interpretation of any text. In this sense the author says, "the linguisticality of understanding is the concretion of historically effected consciousness"(GADAMER, 2006, p. 391).

Not only tradition, but also the very nature of linguistic understanding has a fundamental relationship with linguistics. As Gadamer (2006, p. 443) points out, the world itself is the common ground, not trodden by anyone and acknowledged by all, that unites all who speak to each other. All forms of community life are forms of linguistic community, and moreover, are forms of language. The linguistic worldliness of the world in which we have always lived is the condition for all of our concepts and thoughts. There is no possible perspective outside of history, as there is no history without language. The speculative character inherent to language is then understood.

4 What can Law learn from traditions?

The modern Law was built over some patterns such as predictability and security, and it has been a difficult task for judges and lawyers to face the inevitable open texture of Law. So far, whether in the Common Law or in the Civil Law systems, jurisprudence has tried to cover this inherent "imperfection" using some interpretation tools and patterns in order to limit the level of generality. Among those, the appeal to the original intention has been one of the most important.

The originalism defended, among others, by Justice Antonin Scalia and Robert H. Bork, frequently refers to historical traditions as a source of Law, or as something able to provide meaning to legal texts, or craft the precedents with a special consistency and objectivity.[2] It would be the only way to really interpret the Constitution. All the other approaches would be trying to change the Constitution, and not to interpret it. But the use of historical traditions suggested by Scalia is very different from that one came from the philosophical hermeneutics. As some scholars have noted, in Scalia's argument there is an implicit suggestion that historical traditions come equipped with instruction manuals explaining how abstractly they are to be described (TRIBE e DORF, 1991, p. 98). If we consider the historical traditions this way, they become subtle to serious manipulations, what compromises the objectivity, strongly advocated by the originalist school. There will always be a question remaining unanswered, which is how can we identify the appropriate time to reject historical traditions, and what should we reject about them? We can find in Scalia a paradoxical answer which strengthen even more the difficulties to understand his coherence, and shows the contradictions of the originalist proposal. Scalia (1989, p. 856-857 says that "even if it could be demonstrated unequivocally that public flogging and hand-branding practices were not cruel and unusual measures in 1791, these practices would not be sustained by our courts").

As questioned by Tribe and Dorf (1991, p. 101), what precisely is the "most specific level at which a relevant tradition "exists? Are positive laws more or less specific than social attitudes? Are social attitudes about one subject, say gender, more or less specific than social attitudes about another, such as religion? That's why the originalism cannot es-

[2] To a broader understanding of the originalism, see the following works: SCALIA, Antonin. *A matter of interpretation*, Princeton, NJ: Princeton University Press, 1997; BORK, Robert H. *The tempting of America*, New York: Free Press, 1990; WHITTINGTON, Keith E. Whittington. *Constitutional interpretation*: textual meaning, original intent and judicial review. Lawrence: University Press of Kansas, 1999.

cape from the hermeneutical approach. Only through hermeneutics and argumentation one can answer the questions came before the historical search for intentions. As put by Sortirios Barber (2007, p. 82), originalism

> […] assumes the theorist have done their philosophic work successfully – assume they've shown who ought to count as framers, what should count as evidence of their intentions, how to deal with disagreements among leading framers, and so forth. Intentionalist theorists still would face the question – a philosophic question – of what kind of interpretation their judges should seek: *abstract intentions* or *concrete intentions*?

The use of traditions is a form to make contextualization or to limit constitutional rights. The risk brought by the originalist approach is to flatten human language, action and comprehension. It can lead to a distortion of history in history's name (BARBER, 2007, p. 107). A provocative insight about the constitutional interpretation and its reflexive dimension was conceived by Michel Rosenfeld (Jan. 1995), in his article "The identity of the constitutional subject". In an analysis of the deconstructive discourse Rosenfeld shows how the interpretation can forge the constitutional identity, and how the traditions can be used by the law. The fact, presupposed by Rosenfeld (Jan. 1995, p. 1095) is in accordance with the hermeneutic conception, and it departs from the inherent incompleteness of the constitutional text. As he explains:

> A written constitutional text is inevitably incomplete and subject to multiple plausible interpretations. It is incomplete not only because it does not cover all subjects that it ought ideally to address, but also because it cannot exhaustively address all conceivable issues arising under the subjects that it does encompass. Moreover, precisely because of the incompleteness of the constitutional text, constitutions must remain open to interpretation; and that, in most cases, means open to conflicting interpretations that appear to be equally defensible.

To Rosenfeld, the interpretation issue must never be put apart from the problem of understanding and integrating traditions. That's because the constitutional interpretation depends on a reflexive comprehension of the constitutional identity. And the constitutional identity is inevitably related with other identities such as the national, the ethnics, religious and cultural identities which are always in tension under

the pluralistic dimension of contemporary constitutionalism. As said by Rosenfeld (Jan. 1995, p. 1051)

> […] constitutional interpreters cannot be completely stripped of their national or cultural identity. Accordingly, the key question becomes how constitutional identity can distance itself sufficiently from the relevant identities against which it needs to forge its own image while, at the same time, incorporating enough elements from these identities to remain viable within its own sociopolitical environment.

According to Rosenfeld, the tools for the reconstruction are the negation, the metaphor and the metonymy. He recurs to Hegel in order to explain the **negation**. The way to conform the so called identity of the constitutional subject is reflexive and hermeneutical. It evolves three stages. At the first stage, the relation with the tradition is one of negation. There is a search for a different identity. An identity different from the one came from the pre-constitutional one. The features of this first stage are the repudiation of the pre-revolutionary past, the rejection of the traditional identities and the exclusion of the aggressive and anti-pluralist traditions (ROSENFELD, Jan. 1995, 1071). The second stage is characterized by the selective incorporation of the traditions left behind and not by a mere return to them. The traditions are evoked as long as they are compatible with the interests of the constitutionalism. At this moment we have a negation of the negation, i.e. the pluralism must reincorporate the conceptions of good previously denied, adopting an activist profile, knowing that the resulting tradition came from its own work.

The use of the **metaphor** corresponds to the Freudian concept of condensation. To combine and organize complex and multifaceted elements in terms of similarities it becomes possible to better apprehend the identities. To Rosenfeld (Jan. 1995, p. 1078), the metaphor plays a fundamental role in the legal rhetoric as well as in legal interpretation. An example could be found in the American dictum that "the Constitution is colorblind". It should be seen as a metaphor to emphasize the similarities among the races, or in other words, what they share in spite of their differences.

The dissenting opinions in *Bowers v. Hardwick* did not consider the homosexuality among different cultures in history. They focused at the similarities between homosexuals and heterosexuals through the individual view, considering that they both have "the same interest in

deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome" (ROSENFELD, Jan. 1995, p. 1079).

The **metonymy** goes in an opposite direction of that one adopted by the metaphor. While the last one points to the similarities, the metonymy leads to a larger contextualization. And concerning constitutional rights, the use of the metonymy can lead both to its enlargement as well as to its restriction. It can be well illustrated by the majority opinions in *Bowers v. Hardwick*. The Supreme Court's majority refusal to extend intimate association privacy rights to protect consensual homosexual sex, was considered to be justified by traditional repudiation through criminalization of homosexual acts and by hostility towards homosexuality rooted in the Judeo-Christian religious tradition. The idea of the autonomous individual left alone to decide about his or her intimate associations was denied by the Justices in the majority in Bowers. The idea of the autonomous individual had to be contextualized with the historical traditions and the precedents, in order to show the inapplicability of Griswold, which was considered to involve the right of privacy in the context of the marital relationship.

The process of interpretation is a process of reconstruction. But it does not mean that law should be seen as if really were a mirror for the readers. Even if it was possible to return to the original intention of the authors, as of the Framers – and, as Gadamer shows, it is not possible – this would be no guarantee for a proper interpretation. We must take the text seriously, because without text we don't have norms (TRIBE, 1995). Or, in Gadamer's lesson: who wants to understand a text must, first of all, let the text tell him something. The best way to interpretation is to search for the meaning in the dialectical interplay between the text and the attribution of meaning.

Law requires a perennial interpretation considering that the words of the law are not unequivocal. As Dworkin (1986, p. 16-19) has shown, the reflexive (or philosophic) approach is the only interpretive dimension which is coherent to a written Constitution. It continues the tradition, but it will be a tradition of cultivating citizens who can think critically for themselves about the meaning of the common and shared lives, as well as their duties and commitments. The interpretative process of law does not mean the discovery of unequivocal or right direction, but, instead, means a productive interpretation originated from a process of understanding. In this process, the hermeneutic situation of

the jurist merges with the legal text expressing something that is not only the prejudices of the interpreter, and not only the text. It is something that comes from the inherent difference between them, and appears as something new.

An interpretation can only be improved on a given context, and therefore, the concrete case becomes important. The case reflects a new situation in which the interpreter (the judge is primarily an interpreter) has to renew the effectiveness of the norm. Such effectiveness is not achieved by simply trying to reconstruct the original intent of the legislature. It is an attempt doomed to failure whereas the interpreter's pre-understanding takes part of the interpretive process. Renewing the effectiveness of the norm means to create a new meaning for the norm applied to a case. The horizon of the interpreter, with all his pre-understandings (his life experiences, study and knowledge of law) merges with the horizon of the legal case. From the inter-relationship of the horizon of the interpreter himself with the horizon of the case, a new meaning is born. This meaning needs to be deepened by the interpreter. Otherwise there will certainly be misconceptions and inauthentic preconceptions. Thus, the norm's text is only the beginning of a whole process of interpretation, since understanding is not a simple act of reproduction of the original meaning of the text.

Justice Stephen Bryer (2005, p. 32) has said very appropriately that

> [..] as history has made clear, the original Constitution was insufficient. It did not include a majority of the nation within its `democratic community`. It took a civil war and eighty years of racial segregation before the slaves and their descendants could begin to think of the Constitution as theirs. Nor did women receive the right to vote until 1920.

It is valid to remember, with Justice Cardozo (1921, p. 51), that a legal principle, once enunciated, will tend to expand its logical limit, occupying fields for which it was not crafted. The danger, also noticed by the renowned Justice is that, in striving for a coherent and consistent body of law, we might so exalt abstract principles that we would lose sight of the commonsense of justice. But if a legal text – and a precedent is also a text – could cover all the hypotheses of application, then

it would be a "perfect norm".3 It would be as if we could draw a map that was perfectly set accordingly to the earth. But then, what advantages could we take from it? As said by Lenio Streck (2007, p. XXXIV), if the reality could be transmitted as it is, we would be facing a paradox. And paradoxes are things about which we cannot decide. Law always demands decision. Therefore, it has to deal directly with the problem of interpretation, with all its difficulties, conflicts and problems.

5 Analyzing a case

In Brazil, we can find a very important example of the contribution of the hermeneutic dimension of language on a judicial decision. The writ of *Habeas Corpus* 82.424-2, decided by the Brazilian Supreme Court (*Supremo Tribunal Federal*) became an emblematic decision, a leading case not only about "hate speech" and "freedom of speech", but also for the important discussion about the limits of judicial interpretation concerning legal concepts. In this case, the Brazilian Supreme Court was judging a writ of *habeas corpus* concerning the possibility of freeing Siegfried Ellwanger, charged and imprisoned for having committed the crime of racism. His crime, typified by law, consisted of having edited, distributed and sold anti-Semitic books, as a writer and editor in chief of the private Press called *Revisão Editora Limitada*. According to the prosecution, the books contain and support anti-Semitic, racist and discriminatory messages. They intend thereby to induce and incite racial discrimination, sowing in their readers feelings of hatred, contempt and prejudice against people of Jewish origin (BRASIL. Supremo Tribunal Federal, 2004). The other side, the defense, although recognizing the discriminatory effects of the publications, argued that the Jews are a people and not a race. Therefore, Ellwanger could not have committed the crime of racism, which is non-bailable and imprescriptible according to the Brazilian Constitution (Article 5, Clause XLII).

Justice Moreira Alves, who did not recognize the crime of racism, opened the main discussion. His opinion was for the concession of the *habeas corpus*. In his analysis, the historical element is fundamental for constitutional interpretation. It shows that, when there is no sufficient time for a significant change in the use of the concepts, the use of

[3] HABERMAS, Jürgen. *Between facts and norms*: contributions to a discourse theory of law and democracy, 1999; GÜNTHER, Klaus. *The sense of appropriateness*: application discourses in morality and law, 1993.

the word must be considered in its most common meaning. According to the Justice, in the case, the word "racism" is designated to protect the historically persecuted races in Brazil, or, in other words, the black people (BRASIL. Supremo Tribunal Federal, 2004, p. 14). The Jews are not properly a race, and so the crime committed by Siegfried Ellwanger cannot be considered racism.

We can see in Justice Moreira Alves' opinion the problems that came from the semantic use of language. In a passage of the opinion, the Justice used some dictionary and encyclopedia definitions of the term. In the end, his vision of race tended to be limited by a biological meaning combined with a certain traditional use in the past. This was the main critique that came from the opinion of Justice Mauricio Corrêa. Inaugurating the divergence, Justice Corrêa emphasized that we cannot use the concept of race in a mere biological meaning. We should never limit our interpretation to the literal meaning of the term. We must combine it with its sociological and anthropological senses (BRASIL. Supremo Tribunal Federal, 2004, p. 25). In a very important moment, the Justice points out that, nowadays, science does not give support for a definition of human races. Biologically speaking, there's no human race because all human beings are biologically equals. Then he concludes:

> Although we cannot recognize anymore, under a strict scientific perspective, any division of human races, racism still exists as a social phenomenon. And that leads us to say that the existence of different races comes from historical, political and social conceptions, which must be considered in the law's application. It is this social aspect, and not the biological one, which inspires the normative regulation of the crime, with its imprescriptibility established by Clause XLII, Article 5 of the Constitution (BRASIL. Supremo Tribunal Federal, 2004, p. 30).

There was also an argument that cannot be forgotten. It said that the original intention of the Constitution was to consider racism only the crime committed against black people. Here we can clearly see the potential danger to consider the effects of a strict originalist approach in legal interpretation. There was really a predominance of references about black people during the constitutional debates. But we should never forget that this award granted to black people in the constitutional debates could have come from the natural indebtedness of Brazilian society with the black community. This conscience predominated during

the debates, but it never meant to lose sight of the broader coverage of the normative innovation that was being formulated by our new and democratic Constitution.

Therefore, to take tradition as a parameter to legal interpretation requests that the interpreter never forget the intrinsically open nature of traditions, in their constant and dialectical evolution. As Gadamer taught, the "hermeneutical horizon" is not the horizon of the past, but the fusion of present, past and future in an open and continued construction.

The Ellwanger case shows with great clarity that treating normative concepts such as race, by mere reference to the intention of its creators, can lead to the exclusion of minorities, or even of majorities, from a fundamental protection of rights. Should only the black community be considered the racially protected group of twenty first century Brazil? Why should we not consider the largest Japanese community outside Japan, living in São Paulo and struggling to keep loyal to their traditions? Should we forget the Arabic people, or the Italian and German communities in Southern Brazil? And last but not least, should we once more forget the Indians, the first inhabitants of the country, fighting hard to preserve the integrity of their diverse communities?

If we look at the problem through this veil, it becomes almost self evident that the answer can only be a reverberating no. We cannot interpret race literally, because the other way, it would lead racism to become an impossible crime, for absolute lack of subject. After all, if there is no other human race than the human race itself, the crime of racism losses its purpose and meaning. We also cannot interpret race according to the original intents, because the concepts in Law must always be conceived as a web of concepts and practices, and, as Gadamer demonstrates, the conceptual content can never be separated from the other concepts and pre-concepts (prejudices) that conform to our world view and understanding.

6 Conclusions

The adoption of the reflexive model of hermeneutics in law casts judges as policy makers as well as representative of one of the dimensions of society's "public reason". This dimension is the one of the "rule of law". So, if we add to this the democratic vector as a key element in the system's architecture, we will understand how the judicial process

can be a fundamental part of the concept of the right to freedom. It will be a freedom that acquires a more concrete dimension, so far as it can catalyze a new concept of political representation. This will come not only through the abstract voice of the legal statutes, but from the "we the people actually speak", as conceived by Ackerman (1984, p. 1013 ss.; 1989, p. 453 ss.).

The courts mission will be to become a policy agent, in the sense that the judges will act as representatives of the people, and on behalf of the people, to prevent and control the abuses eventually perpetrated by the pattern of the so called "normal politics" (Ackerman). These abuses will not only be those contrary to the majority's institutionalized will through law, but also those abuses committed against the procedurals of the minority's will. The courts major function will be to create conditions of reliability and trust that these fundamental legal edges will not be overcome. Therefore, this model of democracy leads the Judiciary to become an instrument of society, and not merely of the State.

Reference

ACKERMAN, Bruce. Constitutional politics/constitutional law, *Yale Law Journal,* 1989, vol. 99, p. 453-470.

_____. Discovering the constitution, *Yale Law Journal,* 1984, vol. 93, p. 1013-1043.

BARBER, Sortirios. *Constitutional interpretation*: the basic questions. New York: Oxford University Press, 2007.

BORK, Robert. *The tempting of America.* New York: Free Press, 1990.

BRASIL. Supremo Tribunal Federal. *Crime de racismo e anti-semitismo:* um julgamento histórico do STF (Habeas Corpus n. 82424). Brasília: Brasília Jurídica, 2004.

BREYER, Stephen. *Active liberty*: interpreting our democratic constitution. New York: Alfred Knopf, 2005.

CARDOZO, Benjamin. *The nature of the judicial process*. New Heaven: Yale University Press, 1921.

DWORKIN, Ronald. *Law's empire*. Cambridge: Harvard University Press, 1986.

GADAMER, Hans-Georg. *Truth and Method*. 2nd. ed. Translated by Joel Weinsheimer and Donald Marshall. New York: Continuum, 2006.

GÜNTHER, Klaus. *The sense of appropriateness*: application dis-

courses in morality and law. New York: Sate University of New York Press, 1993.

HABERMAS, Jürgen. *Between facts and norms*: contributions to a discourse theory of law and democracy. Boston: MIT, 1999.

MICHELMAN, Frank. *Brennan and democracy*. Princeton: Princeton University Press, 1999.

MONTESQUIEU, Charles Luis de Secondat, Baron de la Brède et de. *De l'esprit des lois*. Paris: Garnier-Flammarion, 1979.

PALMER, Richard. *Hermeneutics* – interpretation theory in Schleiermacher, Dilthey, Heidegger and Gadamer. Evanston, IL: Northwestern University Press, 1969.

ROSENFELD, Michel. The identity of the constitutional subject. *Cardozo Law Review*, Jan. 1995, vol. 16, p. 1049-1109.

SCALIA, Antonin. *A matter of interpretation*, Princeton, NJ: Princeton University Press, 1997.

_____. Originalism: the lesser evil. *University of Cincinnati Law Review*, 1989, vol. 57, p. 856-857.

STRECK, Lênio. *O que é isto – decido conforme minha consciência*?. Porto Alegre: Livraria do Advogado, 2010.

_____. Interpretando a constituição: Sísifo e a tarefa do hermeneuta. In TRIBE, Laurence e DORF, Michael. *Hermenêutica constitucional*. Belo Horizonte: Del Rey, 2007.

SUNSTEIN, Cass. *Designing democracy*. *What constitutions do.* Oxford: Oxford University Press, 2002.

TONTTI, Jarkko. *Right and prejudice*: prolegomena to a hermeneutical philosophy of Law. Burlington: Ashgate, 2004.

TRIBE, Laurence. Taking text and structure seriously. *Harvard Law Review*, 1995, vol. 108, nº 6, p. 1221-1303.

TRIBE, Laurence e DORF, Michael. *On reading the constitution*. Cambridge: Harvard University Press, 1991.

WHITTINGTON, Keith. *Constitutional interpretation:* textual meaning, original intent and judicial review. Lawrence: University Press of Kansas, 1999.

Philosophical and Jurisprudential Issues on Domestic Violence and Gender Discrimination

Marcia Nina Bernardes[1]

Abstract: In this paper, I want to examine issues concerning gender discrimination present in the application of Brazilian Law 11340/ 2006, the so called Lei Maria da Penha. First, I claim that gender violence is both a cause and consequence of gender discrimination. Then I look into definitions of gender-based violence by the Rio de Janeiro State Appeal Courts. I contend, resorting to Judith Butler's definition of gender performance, there is no fixed, stable and uncontroverted definition of the categories women and of gender, and I discuss some to the complications that this raises for women's protection

Keywords: gender discrimination, distinction sex/gender, gender performance

1. Introduction:

In this paper, I want to examine issues concerning gender discrimination present in the application of Brazilian Law 11340/ 2006, the so called Lei Maria da Penha. It is our first Brazilian statute against domestic violence, enacted in 2006 as the result of a great mobilization of domestic and transnational feminist networks. In fact, after a joint effort of different governmental bodies and civil society organizations, the draft bill prepared by the Feminist Consortium was discussed and unanimously approved in Congress with practically unaltered language.

I will divide my presentation into two parts: a brief introduction

[1] Professor of Law at the Pontifical Catholic University of Rio de Janeiro (PUC-Rio). Academic Coordinator of the Human Rights Center (PUC-Rio Law Department). Juridical Science Doctor (NYU School of Law 2007). Hauser Global Scholar (NYU School of Law 2001). I would like to thank Adriana Vidal for profitable discussions on this topic, which informed many of the most fundamental insights in this paper. I would also like to thank Noel Struchiner. His comments on a earlier version of this paper helped me envision further complications for judicial adjudication raised by a Butlerian framework. I owe him many of the points highlighted in the conclusion. I thank CNPq and FAPERJ for providing the funds for the research that originated this paper.

to the phenomenon of domestic violence, to make the case that it is both a cause and consequence of gender discrimination, and then an analysis of judicial controversies on the definition of a gender-based action. I will look into decisions by the Rio de Janeiro State Appeal Courts, and, for this analysis, the work of American philosopher Judith Butler will be referential. I contend that there is no fixed, stable and uncontroversial definition of the categories women and of gender, and I discuss some to the complications that this raises for women's protection.

2. On Domestic Violence and Discrimination

To be sure, women are not the exclusive victims of domestic violence and other social groups, such as children and the elderly, may also be victims. However, domestic violence affects women disproportionately and hinders their participation in social conditions of parity with men. No other social group is so affected by this problem, which is "one of the most serious causes of homelessness, disease and disability in women."[2] In fact, according to the United Nations, women and girls aged 15 to 44 are more likely to suffer rape or some form of domestic violence than cancer, car accidents, wars or malaria.[3] In Brazil, according to the Secretariat for the Promotion of Policies for Women, women are the victims of 74% of domestic violence incidents recorded in public hospitals. In 53% to 70% of the reported cases, the abuser is the husband or partner.[4] Although significant, these numbers are not accurate. Most episodes of domestic violence are not reported. Given the seriousness of this scenario, it becomes critical to understand the contours of this problem and the reasons that allow for its perpetuation and its systematic character.

Part of the difficulty lies in the fact that this kind of violence does not translate into individual episodes, but into continuous situations where the seriousness of the violence should be measured not only by

[2] MEYERSFELD, Bonita. *Domestic Violence and International Law*. Hart Publishing, 2010, p.1.

[3] *Resources for Speakers on Global Issues, Ending Violence Against Women and Girls*, United Nations, http://www.un.org/en/globalissues/briefingpapers/endviol/index.shtml, Last visited on Feruary 13th, 2013.

[4] Política Nacional de Enfrentamento da Violência Doméstica. Secretaria de Promoção das mulheres. 2011, p. 11-13. Available at em http://www.sepm.gov.br/publicacoes-teste/publicacoes/2011/politica-nacional

the severity of the physical harm caused but also by the degree of vulnerability and isolation that it causes to the victim. In fact, we know that domestic violence can be equated to torture in terms of the intensity of physical and psychological (in addition to the moral) suffering inflicted on the victim.[5] But even mild forms of injury in the context of domestic violence and the subordination of women acquire a seriousness that they would not have in other contexts. Domestic violence is somehow invisible; these forms of violence are either normalized and naturalized or are so extreme that people won't believe the victim and the woman is simply discredited.[6]

Likewise, the intimacy with the offender - who is her father, husband, partner, boyfriend – makes it harder for the victim to acknowledge she is in an abusive relationship, and then to gather the courage to get out of it, facing all the economic and personal consequences of this decision. In fact, Bonita Meyersfeld says that the intimacy element complicates the understanding of victims of violence, their ability to escape from it and society's reaction to their experience.[7] Often, these victims are economically dependent on the abuser and feel pressured to stay in the abusive relationship by the extended family, by their children or even by her own notions of her role as a woman. To report or to leave that abusive situation can be perceived as a "failure" of the female obligation to ensure the family harmony. Moreover, the element of intimacy facilitates the perception of this situation as a private matter in which

[5] Cf. International Criminal Tribunal for Former Yoguslavia (ICTY), Appeal Chamber, *Prosecutor v Kunarac et. al*, 12 de junho de 2002, paras. 151-152. Inter-American Court on Human Rights, *Case González et. al. vs. México* (Cottonfield case). Judgement on november 16th, 2009 (Preliminary Exceptions, Merits and Reparation). Concurrent opinion Judge Cecilia Medina Quiroga, paras.1, 8-9. Cf. Article 2 of the Inter-American Convention Against Torture. On rape and domestic violence as forms of torture, see MacKinnon, Catharine (1993), 'On torture: A feminist perspective on human rights', in Mahoney & Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge*, Martinus Nijhoff', p. 22.

[6] Cf. Amnesty International & Redress, *Gender and Torture: Conference Report*, Available at http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf

[7] MEYERSFELD, Bonita. *Domestic Violence and International Law*. Hart Publishing, 2010, p. 122. The following analyzis is largely influenced by Meyersfeld's book on State International Responsibility for domestic violence. According to her, there are five fundamental elements that should be present: the severity of the harm, the continued aspect of violence, the intimacy between the victim and the offender, group vulnerability and state failure in preventing such violence.

society should not get involved. The intimacy between victim and aggressor expands the role that gender stereotypes play in the dynamics of naturalization and justification of discrimination and violence against women.[8]

One should also add to this picture the lack of trust in public institutions. The fear that nothing will happen to the perpetrator may discourage many victims. Therefore, these women, when they manage to seek help in the public sphere, need a proper response from the state. The phenomenon of double victimization refers to the common situations in which women are once again discriminated against, now by public officials, based on gender stereotypes. Questions like: "What did you do to make him that angry?" or, "What were you doing out that late?" can be terribly intimidating, in effect blaming the victim for the violence she suffered.[9]

In light of the seriousness of this scenario, the Maria da Penha Law is commonly regarded as an important achievement in terms of rights protection. It is the result of a social understanding, gradually and painfully achieved, about the relationship between domestic violence and gender discrimination. However, after it was enacted, a number of issues arose in the Judiciary. One of the loudest controversies, already settled by the Brazilian Constitutional Court (the Supreme Federal Tribunal, "STF," in Portuguese) revolved around the fact that its protection is applied only to women who are victims of domestic violence.[10] Several lawyers and judges argued that this restriction violates the non-discrimination principle, (Article 3, IV and Article 5, I of the Brazilian Constitution), and, therefore, the statute should also be declared unconstitutional. The STF, in 2012, upheld its constitutionality, ending

---

[8] CASTILHO, Ela Wiecko. "Estereótipos sexuais na justiça brasileira" in COOK, Rebecca. *Rebecca Cook entrevistada por Débora Diniz*. Rio de Janeiro: EdUERJ, 2012, p. 51-62. FREITAS, Lucia Gonçalves de. "Representações de papéis de gênero na violência conjugal em inquéritos policiais" in *Cadernos de Linguagem e Sociedade*, v. 12, p. 128-152, 2011. COOK, Rebecca & CUSACK, Simone. *Gender Stereotyping: Transnational legal perspectives.* University of Pensylvannia Press, 2010.

[9] In the Cotton field case, decided in 2009 by the Inter-American Court on Human Rights, there are a number of examples of double, or secondary, victimization. Cf Inter-American Court on Human Rights, *Case González et. al. vs. México* (Case Cotton Field). Judgment on November 16th, 2009 (Preliminary Exceptions, Merits and Reparation), par. 151-154, 196-208.

[10] Law 11.340/2006, articles 1, 2 and 3. Available at www.brazilink.org/tiki-download_file.php?fileId.

the dispute over this topic in lower courts.[11] It broadly accepted the feminist argument that men and women are not in comparable situations, given that only women carry the inferiority stigma and, therefore, face a greater challenge when trying to leave a violent environment.

However, in the next section, I want to examine other controversies in the Judiciary, related to the interpretation given by different courts to the related notions of gender oppression, gender discrimination and vulnerability.

3. An Analysis of Brazilian Case Law on Gender Violence

The judicial controversies in which I am interested emerge because the statute defines domestic violence, in Article 5, as any kind of action or inaction "based on gender" causing women's death, injury or physical, sexual or psychological suffering, or patrimonial, or moral damage. Such action or inaction may take place in a "space shared by people with or without family ties" as well as in "the scope of the family" or even in any "intimate relationship of affection." However, when exactly is an action or inaction "based on gender"? This is the fundamental starting question. The same acts, if not based on gender, would be tried according to the gender-neutral Brazilian Criminal Code.

At stake here is a dispute over the meaning of "gender" and, thus, of "gender oppression". The term "gender" has been used in opposition to "sex": the former refers to the biological reality of male and female bodies, whereas the latter refers to a social construct about what is proper for men and women to do, to think, and to feel.[12] It is in this sense that Simone de Beauvoir famously said that "one is not born but, rath-

[11] Ação Direta de Constitucionalidade 19, decided in February 8th, 2012. In this action, Brazilian Executive Branch, in support of the Law, asked the Court to declare that the following provisions are constitutional: Article 1 (establishing the right of *women* to be free from domestic violence in compliance with Brazilian Constitution and International Obligations derived from International Treaties), articles 33 and 41, which, combined, changed the classification of minor bodily injures derived from domestic violence from misdemeanor to crimes, to the jurisdiction over theses case from the Special Criminal Courts to newly created Special Domestic Violence Courts.

[12] The World Health Organization thus defines both concepts: (i) sex is "the biological and physiological characteristics that define men and women", (ii) gender is the "socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women." Available at http://www.who.int/gender/whatisgender/en/. (visited on January 20th, 2014).

er, becomes a woman."[13] Judith Butler reminds us that this disjunction between nature and culture allows for different cultural interpretations of a female bodies and breaks from the fixity of women's (and men's) identities. Moreover, the subordinate status of women in patriarchal societies is not a natural given, but a social construct.

> the distinction between sex and gender has been crucial to the long-standing feminist effort to debunk the claim that anatomy is destiny; (…)With that distinction intact, it is no longer possible to attribute the values or social functions of women to biological necessity(…). the presumption of a causal or mimetic relation between sex and gender is undermined.[14]

Butler notices that there is an ambiguity in the expression "become a woman": it can be interpreted as referring to a social construct that is "imposed on identity", shaping it via different constraints, but it also can be understood as a "project" of constructing ourselves.[15] In this second sense, if gender is a "choice", one would have to be positioned some place outside gender, from which to choose what to be. That brings all sorts of philosophical puzzles related to the assumption of an ontological subject prior to language and culture. On the other hand, the first option also poses difficult questions. Questions of agency and resistance become problematic at the same time that it also assumes a "female self-identical being" who is distorted and oppressed by culture:

> Does this system [patriarchy] unilaterally inscribe gender upon the body, in which case the body would be a purely passive medium and the subject, utterly subjected? How then would we account for the various ways in which gender is individually reproduced and reconstituted? What is the role of personal agency in the reproduction of gender?[16]

As a social construct or as a personal project, rather than a nat-

[13] BEAUVOIR, Simone. *The Second Sex*. New York: Vintage Books, 1973, p.301.
[14] BUTLER, Judith. "Sex and Gender in Simone de Beauvoir's Second Sex". *Yale French Studies,* No. 72 (1986), p. 35.
[15] BUTLER, Judith. "Sex and Gender in Simone de Beauvoir's Second Sex". *Yale French Studies,* No. 72 (1986), p. 36. Later, in her book *Gender Trouble: Feminism and the Subversion of Identity*. (New York: Routledge. 1990), Butler questions the expression "project" and chooses the word "strategy", as we will see later in this section.
[16] BUTLER, Judith. "Sex and Gender in Simone de Beauvoir's Second Sex". Yale French Studies, No. 72 (1986), p. 36.

ural fact, one may wonder if gender relations may vary. That poses the question if gender hierarchies subordinate all women, even if to different degrees. Can we think of women's emancipation in this scenario? Are there subjective requirements that should be assessed in each individual case in order to determine if there is a situation of subordination, or should the verification of objective elements be enough? Back to the application of Maria da Penha Law, will episodes of violence between brothers and sisters, parents against children, adults against the elderly, between same sex couples, and employers against maids necessarily fall under the law's scope as long as the victims are women? Or should we assess which women are vulnerable to domestic violence based on gender?

Our Constitutional Court, in the 2012 decision mentioned above, did not provide a direct answer on this topic. But it declared null and void the statute's provision that established the victims' consent as a condition for the criminal prosecution of minor bodily injuries, alleging that women, due to gender coercion, are not in a position to grant a truly free consent. This implies the perception of domestic violence as a structural problem and, as such, affects all women. However, lower courts, when deciding on which law – the Maria da Penha or the Criminal Code – they should apply, have construed the idea of gender-based action in different ways, not entirely consistent amongst each other. Both objective and subjective analyses played a role in these decisions.

A survey of Rio de Janeiro case law, between February 8th 2012 and February 8th 2013, indicates conceptual difficulties in the application and interpretation of law.[17] Some of the cases surveyed establish "the subjugation of women" as the defining characteristic and most decisions analyzed stress "vulnerability or physical and economic inferiority of women in intimate relationships" as a definition of gender-based violence, attaching great importance to biological elements in order to explain the subordination of women and their vulnerability to violence.[18]

[17] In a research I conducted at PUC-Rio, we read all decisions by the Rio de Janeiro State Court of Appeals, issued between February 2012 and February 2013, settling conflicts of jurisdiction between Domestic Violence Special Courts and Regular Criminal Courts. According to Brazilian Law, cases of minor bodily offenses will be judged by regular criminal courts unless it was "based on gender". In the 52 decisions we saw, these types of courts disagreed on whether a given offense was based on gender or not and the Court of Appeals settled the dispute. I thank Mariana Braga and Daniella Ferrari, who diligently assisted me in this research.

[18] On the primacy of the biological element in the definition of gender-based violence by

Likewise, another biological element, puberty, is often used to define if an episode of violence against children and adolescents was based on gender or on age. It is fair to say that to many judges in Rio de Janeiro, "woman" is defined by a biological reality, despite the decade-long efforts to distinguish nature from nurture when it comes to sex and gender. And because biology is given, fixed and universal, the decisions based on this understanding do not tackle the question of agency or resistance, in order to assess the victim's vulnerability.

Lets bracket the agency problem for a moment and focus on the biology versus culture problem. According to the logic above, one could argue that travestites and trangender individuals, to the extent that they would not be in principle "biologically vulnerable", could not be victims of gender-based violence. To be sure, Amini Haddad Campos and Lindinalva Campos Rodrigues Correa, respectively judge and prosecutor in a Domestic Violence Court in Mato Grosso for a few years, state in a book they wrote on women's rights that "only women, legally and biologically recognized as such, can be considered as a victim of the crime of domestic violence against women, for obvious reasons".[19] However, isn't it precisely because of their social performance similar to a woman, betraying the conduct of a "real macho", that they suffer this violence? [20] To what extent is the use of biological arguments suitable to reveal the vulnerability of a social group and to justify State measures that can protect them more or less widely?

Gender performance is a key concept for Judith Butler, which has called into question the very distinction sex/gender. For her, both sex and gender are only meaningful concepts within culture and discourse. After all, is there a sexed body which is not, from the start, gendered? Is there some being which becomes a gender on a given point of

---

Rio de Janeiro State Courts, see the Procedures *Conflitos de Competência* No. 0053878-15.2012.8.19.0000, 0047795-14.2011.8.19.0001, 0010627-44.2012.8.19.0000, 0048425-39.2012.8.19.0000. For cases resorting to the fragility/vulnerability/inferiority argument, see *Conflitos de Competência*. 0016705-54.2012.8.19.0000, 0032898-47.2012.8.19.0000, 0037024-43.2012.8.19.0000, 0028450-31.2012.8.19.0000, 0062788-31.2012.8.19.0000, 0037100-67.2012.8.19.0000, 0063544-40.2012.8.19.0000.

[19] CAMPOS, Amini Haddad & CORREA, Lindinalva Rodrigues. *Direitos Humanos das Mulheres*. Editora Juruá, 2007.

[20] On homophobia as gender violence, see GOMEZ, Maria Mercedes. "Violencia por prejuicio" in MOTTA, Cristina & SAEZ, Macarena (org.) *La mirada de los jueces: sexualidades diversas em la jurisprudência latino-americana*. Bogotá: Siglo del Hombre Editores, 2008, pp. 90- 190.

her life and how did she do that?[21]

To correlate sex to nature resulted in an association of sexuality to reproduction. That, in turn, contributed to the construction of matrix, which naturalizes heterosexuality and divides humanity into males and females. In Butler's conception, the natural fact of "sex", assumed in the sex/gender distinction, imposes limits on the possibilities of cultural constructions of gender, and allows for the "naturalization" of gender stereotypes. Speech acts, repeated over time, stabilize the division of bodies in two groups along sexual lines, at the same time that each of these groups are, in turn, perceived as more or less homogenous. This claim is not intended to deny differences between male and female bodies, but to emphasize that, in this matrix, existing similarities between these bodies become irrelevant, and so do the differences between different bodies of the same assigned sex.[22] Resorting to Foucault's analysis on sexuality, she also claims that such division is an expression of power, creating hierarchies between bodies.[23] The notion of "sexual differences" made possible the distribution of social roles between man and women as if it were a natural given. The consequence, she claims, is that the emancipatory content intended in the distinction sex-gender is, thus, lost.

> Collectively considered, the repeated practice of naming sexual difference has created this appearance of natural division. The "naming" of sex is an act of domination and compulsion, an institutionalized performance that both creates and legislates social

[21] BUTLER. Judith. *Gender trouble: feminism and the subversion of identity*, p.89. Butler criticizes various feminist theories because of their resort to the foundational categories of : "natural sex", "real women". According to her, "categories of true sex, discrete gender, and specific sexuality have constituted the stable point of reference for a great deal of feminist theory and politics. These constructs of identity serve as the points of epistemic departure from which theory emerges and politics it, self is shaped. In the case of feminism, politics is ostensibly shaped to express the interests, the perspectives, of "women." But Is there a political shape to "women," as it were, that precedes and prefigures the political elaboration of their interests and epistemic point of view? See also VIDAL, Adriana de Oliveira. *A constituição da mulher brasileira: uma análise dos estereótipos de gênero.* Doctoral Dissertation presented to PUC-Rio Law Department. April, 2012. Available at http://www.dbd.puc-rio.br/pergamum/tesesabertas/0721432_2012_pretextual.pdf.

[22] VIDAL, Adriana de Oliveira. *A constituição da mulher brasileira*. Op.cit.

[23] FOUCAULT, Michel. *The History of Sexuality, Vol I, An Introduction* Nova York: Vintage, 1990.On the relevance of speech acts in Butler's theory, see BUTLER, Judith. *Excitable Speech: a Politics of the Performative*. Routledge, 1997.

> reality by requiring the discursive/perceptual construction of bodies in accord with principles of sexual differences.[24]

Butler defines as "heterosexual matrix" this "performative", not natural or biological, association between sex, gender and desire. According to her, patriarchy should be understood as a compulsory heterosexual matrix structured by a binary logic which excludes subjectivities that do not align perfectly to these binaries. For her, discourse forges subjectivities - the "normal" male and "normal" female - assigning to each social behaviors, gender identities and specific sexual behaviors. In this conception, the intelligibility of concepts like body, sexual orientation and social role is only possible within the repeated and naturalized performances in this matrix, and, thus, the distinction between sex and gender becomes problematic, as mentioned above. On the one hand, male bodies are associated with a masculine identity determinant of manly behavior and sexual desire for the opposite sex. On the other hand, the female body is correlated to a passive identity and sexual desire also for the opposite sex.

> I asked what configuration of power constructs the subject and the Other; the binary relation between "men" and "women," and the internal stability of those terms? (…) Are those terms untroubling only to the extent that they conform to a heterosexual matrix for conceptualizing gender and desire? What happens to the subject and to the stability of gender categories when the epistemic regime of presumptive heterosexuality is unmasked as that which produces and reifies these ostensible categories of ontology?" [25]

Butler rejects the conception of the body as grounds for a substantial, pre-discursive identity, which, in her account, is always "performed" instead of expressed, and is always "discontinuous" and not stable or solid. In this framework, gender should be understood as a "doing" and not a "being", and identity as a result, not an assumption, of performance. In her book *Gender Trouble*, she recalls Beauvoir in order to make clear her own conception of "gender":

> And in my earlier reading of Beauvior, I suggest that gendered bodies are so many 'styles of the flesh.' These styles all never fully

[24] BUTLER, Judith. *Gender Trouble*. Op.cit. p. 147.
[25] BUTLER, Judith. *Gender Trouble.* Op.cit., p. XXX.

> self-styled, for styles have a history, and those histories condition and limit the possibilities. Consider gender, for instance, as a corporeal style, an 'act,' as it were, which is both intentional and performative, where 'performative' suggests a dramatic and contingent construction of meaning.[26]

She goes on to say that rather than conceiving gender as a "project", as she did in an earlier article, it should be conceived as a strategy of cultural survival, always inscribed in historical power relations with "clearly punitive consequences." [27] In fact, she says that "discrete genders are part of what 'humanizes' individuals within contemporary culture; indeed, we regularly punish those who fail to do their gender right."[28] Adriana Vidal illustrates this humanizing process of gendering someone resorting to the first question a pregnant woman is asked: "Is it a boy or a girl"?[29] Those who 'fail' to do their gender right, such as LGBTI individuals, are constructed as "the other", the abject, who at once transgress and affirm the boundaries of culturally permissible identities.

Thus, whenever the heterosexual binaries are subverted either by LGBTI individuals, or by women with aggressive manners or men with gentle temper, patriarchy reacts, usually violently. How should law respond to that? Back to our question: who should be protected against domestic violence, since gender violence is reproduced in gay relationships, in relationships between transgender women and heterosexual men, between intersex individuals and their families? Should transgender women and transvestites be included in the legal definition of women for the protection against patriarchal violence? Can we de-stabilize the category "women" without weakening the protection?

In a case decided in a lower court in the state of Goias, the judge applied the Maria da Penha Law in a case of domestic violence against a tranvestite, based on the concept of "social sex", which approaches the idea of performative sex. According to her, "there was no doubt regarding the victim's social sex, that is, the identity that she assumes before society." [30] This interpretation, nevertheless, has been given in a so far

---

[26] BUTLER, Judith. *Gender Trouble.* Op.cit., p.380 (my emphasis).

[27] BUTLER, Judith. *Gender Trouble.* Op.cit., p.381

[28] BUTLER, Judith. *Gender Trouble.* Op.cit., p.381

[29] VIDAL, Adriana. *A constituição da mulher brasileira*. Op.cit.

[30] See lawsuit nº 201103873908, decided in 2011 by a judge in the Goiás State: "Destarte, não posso acolher o respeitável parecer ministerial e ignorar a forma pela qual a ofendida se apresenta perante a todas as demais pessoas, não restando dúvida com relação ao

isolated case in Brazil.

If Butler is right and gender is a social performance that constitutes subjects, how can we think of agency? Are all women necessarily subjugated? Is women's emancipation possible? In a controversial decision, one of the chambers of the Rio de Janeiro Court of Appeals decided that one cannot assume vulnerability and that it has to be found in each specific situation. The facts of the case related to an episode involving two famous actors, then boyfriend and girlfriend, in which he allegedly slapped her in the face and pushed her to the floor, because she showed her breasts during a play she was performing in. The panel of judges argued that Maria da Penha law protected women that were vulnerable to violence due to gender oppression, providing an interesting interpretation of the sex/gender system. The decision quotes the Statute to say that gender oppression is socially constructed and that it would be wrong to raise any biological justification for the hierarchy between genders. Thus, it further argues (and here is the novelty), it is not because one is biologically a women that she is vulnerable. It is notorious, the panel says, the actress in question has never been oppressed or subjugated by men in any sense, therefore the Maria da Penha Law should not be applied in the case.[31] The panel used the distinction sex-gender to weaken women's protection, instead of strengthening it.

There are a number of considerations to be made here. It is clear that this decision assumes a liberal perspective and ignores, or doesn't sufficiently account for, the pervasive and constitutive character of gender oppression. According to the panel, power is perceived as an asset a subject may have or not, and epistemically, the decision assumes that there is a subject who is ontologically free and autonomous, which may be "later" oppressed by culture. In this framework, law should make sure that there are no unjustifiable constraints on one's autonomy. In

---

seu sexo social, ou seja, a identidade que a pessoa assume perante a sociedade. Somados todos esses fatores (a transexualidade da vítima, as características físicas femininas evidenciadas e seu comportamento social), conferir à ofendida tratamento jurídico que não o dispensado às mulheres (nos casos em que a distinção estiver autorizada por lei), transmuda-se no cometimento de um terrível preconceito e discriminação inadmissível, em afronta inequívoca aos princípios da igualdade sem distinção de sexo e orientação sexual, da dignidade da pessoa humana e da liberdade sexual, posturas que a Lei Maria da Penha busca exatamente combater."

[31] The court, then, denied the application of the Maria da Penha Law and decided that the gender-neutral Criminal Code should be applied. See *Embargos Infringentes* number 0376432-04.2008.8.19.0001, decided on July 1st, 2013.

this case, the court found none and concluded that law should remain neutral.

However, structural approaches to power, such as Foucault's and Butler's, highlight its pervasive character and criticize dyadic models, which focus on the relation between oppressors and oppressed. Power constitutes male and female subjectivities in both public and private realms, backed by publicly institutionalized practices and discourses. Oppression is not merely a result of abusive acts of some mean people, as Iris Young, also influenced by Foucault's analysis of power, explains:

> Its causes are embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional rules and the collective consequences of following these rules. (…) In this extended structural sense, oppression refers to the vast and deep injustices some groups suffer as a consequence of often unconscious assumptions and reactions of well-meaning people in ordinary interactions, media and cultural stereotypes, and structural features of bureaucratic hierarchies and market mechanisms – in short, the normal processes of everyday life.[32]

In Judith Butler's terms, there is no way out of culture, which will always impose on our bodies and genders a given intelligibility. Both actors involved in the case were performing according to the heterosexual matrix. The actress in question does seem to be a very powerful woman, as the Court noted, and yet, she was hit by him. She subversively dared to defy the stereotype of a well-behaved woman, she dared to confront

[32] YOUNG, Iris. "Five Faces of Oppression" in George Henderson and Marvin Waterstone (eds.) *Geographic Thought: a Praxis Perspective*. New York: Routledge, 2009, p.56. Her five faces of oppression are: exploitation, marginalization, powerlessness, cultural dominance and violence. To be sure, not every individual in an oppressed group will be a passive victim. There are different and sophisticated ways in which one may explain agency and empowerment of individuals who are members of vulnerable social groups. In Butler's framework the concept that approaches that idea is the concept of "subversive bodily acts". See the last part of her book *Gender trouble: feminism and the subversion of identity*. She explains those subversive acts linguistically in the book *Excitable Speech*. On the question of agency and structural character of power, see BIROLI, Flávia. "Autonomia, opressão e identidades: a ressignificação da experiência na teoria política feminista". *Revista Estudos Feministas*, Florianópolis. vol. 21, nº 1, pp 81-105, 2013. In Butler's framework the concept that approaches that idea is the concept of "subversive bodily acts", which she explains in her book *Gender Trouble*. She explains those subversive acts linguistically in the book *Excitable Speech*.

him when inquired about it, and he felt authorized to hit her. In fact, in this case, it seems it is because she was empowered that she was hit. This is the meaning of oppression or subordination: the fact that some people – empowered or not – will have to navigate through obstacles and challenges that do not exist in regard to individuals differently positioned in society.

4. Concluding remarks

If we take into consideration Butler's analysis on gender, the reliance on stable and fixed categories of women and men become problematic. As we saw, despite the great awareness of the cultural character of gender social roles, the search for these categories's foundations will take us back to some cientific and supposedly incontroversial fact: women are naturally vulnerable or women are not naturally vulnerable. The performative aspect of being a women is, thus, rendered invisible.

However, law and public policies proceed via more or less rigid categories. Should judges, then, in their decisions, de-stabilize the category women in the application of the Maria da Penha Law to include transvestites and exclude seemingly empowered women, for instance? In fact, de-stabilization prescriptions may maximize much discussed Herbert L. Hart's penumbra problems and Ronald Dworkin's hard cases. That is a question to be answered by an adjudication theory that goes beyond the scope of this paper.

Precedent as a typological term upon the Court of Justice of the European Union Decisions

Bartosz Greczner, PhD[1]

Abstract: This Article addresses the concept of precedent on the grounds of the European Union. It analyzes the methodological status of the term and determines under which conditions it is an adequate research tool for the European Union courts decisions examination. The Article argues that the methodological status of the term "precedent" present in the literature is incorrect. Studies presented in the article led to conclusion that the term precedent has typological character and only having such methodological status a term precedent is suitable for analysis of the case law of the CJoEU.

Keywords: Precedent, Court of Justice of the European Union, Typological term.

The legal order of the European Union is constantly developing creating dynamically changing legal reality. This new legal order which is in the process of formation sets up new quality and often cannot be unambiguously described through categories peculiar for civil law as well as common law system.

In this paper I will pay my attention to one of the categories which is present in both legal systems, even if very often it is connected with one of them - that is to precedent. The theoretical problem discussed in this paper can be expressed in the form of the following question: Is the term precedent an adequate research tool for the European Union courts decisions examination and under what conditions as to its methodological status? In other words the aim of the research is the analysis of the Court of Justice of the European Union (the Court; CJoEU) trial rulings, for determining whether in the rapidly evolving EU legal order exists the phenomenon, the study which conceptual apparatus associated with the concept of precedent is useful. Raising this problem seems to be appropriate especially as the term precedent is ambiguous. Diversity of

[1] Wrocław University.

the contexts of its use which leads to the terminological chaos within its scope is noticeable.

Precedent is a term widely used within the jurisprudence to denote a specific type of judicial decisions. Commonly it is associated with Anglo-Saxon legal culture however since over time precedent began to be used also within the civil law culture. While comparing the two systems of law one can notice the variety of the contexts of its use. This variety leads to the ambiguity of the analyzed term. "Terminological chaos" which results from different usage of the term precedent can be explained by its cultural character[2]. This explanation however is not sufficient in my opinion.

It must be remembered that the concept of precedent is an example of purely theoretical construct. It constitutes an abstract model which consists of some standards - essential features, which do not refer to phenomena that could be known in an objective, empirical manner. The lack of possibilities to verify its essential characteristics in empirical manner is conductive to discussion of its shape and can be a cause of diversity between the particular definitions developed even within one legal culture.

The result of the discussion, carried out in the conditions described above, is an excessive expand of the "terminological net", which we can see when we look at the types of precedent distinguished in legal-theoretical literature. The main problem is not their richness, but the lack of logical correctness between them. The scopes of various terms overlap.

Reasons for above described state of affairs, that is, the conceptual chaos arising on the grounds of jurisprudence in relation to the concept of precedent, I personally ascribe to the lack of reflection on the methodological statues of the term.

As the result of the analysis I have determined two key constructive elements of the term precedent. These are: normative novelty and the real impact on the decisions made in the future, ie. so called influence. No doubt both elements are the foundation or rather a core content of the concept, regardless of the legal culture based on which we analyze the term which is the subject of research. In principle the presence of the two elements mentioned above, allows to classify a particular judicial decision among the precedential decisions. Their absence, on the other hand, exclude the affiliation of such a decision into this class.

---

[2] Zirk – Sadowski, M., *Precedens a tzw. decyzja prawotwórcza*, PiP, 1980, no. 6, pp. 70

However, these two key features of the concept do not always occur in objects known as precedential decision in a similar form. Both normative novelty and influence can take many forms. In exceptional cases, the normative novelty may even be subject of complete disappearance, which however does not rule out the possibility of determining these objects as a precedent decision. As an example we can indicate declaratory precedents in which normative novelty element is hard to find. This lack is usually compensated by the intensified presence of the other key feature.

In the context of the normative novelty one can speak of at least three different forms of it. Logical (semantic) and axiological forms are distinguished in the literature. One can not forget, however, that the normative novelty may take the form of involving the direct creation of new legal norms (principles or rules), as the judges in the common law system do.

The above mentioned various forms of normative novelty are a manifestation of its alternating intensity (the importance for the system of law).

Assuming the position, according to which the highest level of normative novelty can be observed in the latter form, where the change in the sphere of duty is the most radical, while placing the logical novelty on the opposite end (in this case a charge of normative novelty is the smallest) I presume gradating character of a normative novelty. In other words, I am on the position that the normative novelty when appearing in precedential decisions may appear in them with different intensity taking on various forms of this intensity. Presented arrangement, however, lacks the units of measurement, as analyzed items are phenomena, among which there are no empirical relationships (these items are not the subject of direct observation and measurement). Therefore, the scale used is the ordinal (importance) scale.

In case of influence, as a rule, two main forms can be distinguished. They are: bounding and persuasive influence. These, however, as rightly observed by A. Peczenik are further disaggregated. Within the boundedness, you can point out: boundedness in the strongest sense so-called boundless boundedness, boundedness in the strong sense so-called revoking boundedness and boundedness in the weak sense. In case of persuasive influence the form characterized by the power of "revoking" and "undermining" can be distinguished. Accepting the Peczenik's position five distinct forms of the influence can be seen. Like normative novelty influence has also gradating character. At the highest

point of the scale of intensification of that element the boundedness in the strongest sense is placed and persuasive influence in its undermining sense is placed on the opposite end.

It is worth mentioning at this point that, in contrast to the normative novelty (which in exceptional situations can be absent in the precedent decisions) the influence is a sine qua non condition for the recognition of a particular decision as a precedent. That is why influence element can never fully disappear. Occurrence of this element is common to all objects classified as a group of precedential decisions. As in case of normative novelty, arrangement presented above lacks the units of measurement and that is why is an example of an ordinal (importance) scale.

The awareness of the gradating character of the constructive elements of the term precedent together with possible decline of one of them is central to the debate on its methodological status. In this light previously encountered in the literature perception of the concept of precedent as a classifying concept appears to be incorrect. Classifying terms allow, at most, a division of a particular set of objects, due to a property attributed to them into two subsets: items with search feature (features) and subjects without it (them). Lack of indicated features makes it impossible to classify the particular items to the given class. With this assumption classifying terms do not take into account the gradating character of their constructive elements. Therefore classifying terms, do not deal with the analysis of the similarity of the features of the objects not qualified for the class with the characteristics of the objects that have been assigned to it. In other words, they do not analyze the gradating characteristics of the considering items. However, the classification of particular decisions among the class of precedential decisions is based on the perceived similarity between the elements of the decision subjected to classification and the decisions already included in the created class.

Due to the gradating nature of the constructive elements the assignment is based not on their identity, but the general similarity. If we add to this, as I have mentioned before, that judgments which form a group of precedential decisions do not always have both highlighted elements, (the lack of the mentioned features is not an obstacle for their classification to the class), one can see clearly that term precedent can not be considered as a classifying term. In other words, if the concept of precedent would have classifying nature, all legal decisions included by the science among the precedential decisions should always have

present both of the above-mentioned features with the same intensity. However, since the analysis of the case law referred to as precedential does not indicate the presence of this regularity, we should look for the answer to the question about the methodological status of the term precedent directing our attention towards typological terms which function as a standard/model. They are the gauge/hallmark of the characteristics features, fundamental for the particular term. Thanks to them, we can not only rule on an object belonging to a group forming a scope of a particular term, but also assess the degree of similarity between the elements of the object with the model due to the intensity of the characteristics features. What is worth to mention, the absence of the features included in the essence of a term does not necessarily mean, in case of typological terms automatic exclusion from the scope of the particular term, as long as sufficient similarity to the model is possible to demonstrate. Thus, the gradation of the key features can result from a situation of their full occurrence, to their almost complete disappearance (and in extreme cases even complete disappearance of some of them).

Thus, studies have led me to conclusion that the term precedent has typological character. Accepted in such form methodological status of the term increases its usefulness in the field of systematization measures of the law sciences, because it leads to the construction of the type row of the emerging precedential decisions. It helps to organize the types of precedential decisions in terms of presence and intensification of their influence and a normative novelty. Depending on which element of the content of the term comes to the front and will be deemed as important we will be able to offer different type rows. If we recognize the normative novelty as a significant feature, the designed type row would include adequately: a norm (principle) precedent, axiological precedent, logical precedent and final example will be decisions where normative novelty is missing. In the above row there will be a possibility to distinguish and rank particular subtypes because of the different intensity of the second element that is the influence.

To confirm the conclusions as to the methodological status of a term precedent, set out in the paper, I referred myself to the judicial material of the Court of Justice of the European Union, and in particular to preliminary rulings.

However before placing them in one of the proposed type rows I compared the practice of the CJoEU with a theoretical depiction of the doctrine of precedent and discussed the similarities and differences that exist between them.

Perceived similarities between the theoretical depiction of the precedent doctrine and practice of preliminary rulings made by the Court of Justice of the EU are so clear that they authorize us to make a thesis which assumes the formation of case law system on the grounds of the European Union. Obviously this is not detailed mapping of the common law system solutions, however, solutions introduced by the Luxembourg judges are very close to them. Thus, the Court of Justice of the European Union can be considered as a "court of precedent"[3], while the preliminary ruling issued by CJoEU can be classify as precedent decisions.

It can be done without fear of making the terminological chaos bigger especially since CJoEU decisions are characterized by the presence of two key elements of the term precedent. Both the normative novelty and the influence are elements that without any doubt can be seen if we take a closer look at the preliminary rulings. The first element however is not present in all the decisions with the same intensity. Normative novelty, which we have to deal with in the preliminary decisions take the form of logical, axiological novelty and norms novelty, that is the novelty which creates legal principles or rules which do not existed yet in the legal system. In addition to the judgments "equipped" in it in the judicial reality decisions, which are only a part of the emerging or already formed case-law and do not create but only confirm the validity of pre-made solutions, can also be found. This type of judgments creates an additional group of decisions different from the decisions equipped in normative novelty element. Using therefore the normative novelty criterion at least four types of preliminary rulings can be distinguished and are a subject of gradating due to the different intensity of that element. Thus, it is possible to rank the preliminary rulings under one type row of precedent decisions proposed in this paper.

The concept of precedent used in jurisprudence (and certainly on the European Union law ground) is not a classifying but typological term.

I would like to sum up by saying that as a result of my analysis I came to the following conclusions:

1 The existing terminological chaos is a result of the treatment of the term precedent as a classifying term.

2 Its actual methodological statutes due to gradating character of

[3] Balcerzak, M. *Zagadnienie precedensu w prawie międzynarodowym praw człowieka*, Toruń, 2008, pp. 23

its constructive elements should assume its typological character.

3 Only as the typological term precedent is suitable for analysis of the case law of the CJoEU (especially a preliminary rulings) without fear that we make terminological chaos even bigger.

The right to justification and the Rule of Law
Towards a "justifiable" legal argumentation theory

Rafael Cascardo Cardoso dos Santos[1]

Abstract: The fundamental core of moral rights is far from being an undisputed matter among philosophers and scholars in general. Here, I intend to show a possible interpretation of moral rights as having a common ground: the right to justification. The whole construction of this argument relies upon Rainer Forst's book: The Right to Justification. In the mentioned book, the author defends that the content of this right is reconstructed by looking at the contexts of people's relations in society. Although firstly developed in the moral context, I also look to show how this right could be applied to the basic structures of society (here I also rely to Rainer Forst's ideas, however, in a more loose manner). Institutions, however, are limited in internalizing the requirements of the right to justification, since they work inside a pre-established design and not in a pure normative way. Considering these limitations, I will try to show how the Legislative and the Judiciary could act in harmony to enforce this right and to help each other in a synergic manner. To justify the application of the moral notion of the right to justification to institutions, a parallel between this right and the Rule of Law is a useful resource, since the concept proposed here of Rule of Law seems to be close to what we could call an institutional ground to the right to justification. Finally, I will expose how the growing studies on legal justification and argumentation theories could improve with the normative idea of the right to justification. By doing so, my goal is not to show a correct legal argumentation theory, but rather to give an important ground to construct analytical rules and principles of justification in legal reasoning.

Keywords: Justification; Political Constructivism; Rule of Law.

1. Introduction

Prior to starting the work itself, I will briefly outline its sections. Firstly, the components of a moral right to justification will be exposed and analytically decomposed. In this first part, I will focus on the idea

[1] Undergraduate student of State University of Rio de Janeiro (UERJ).

shown by Rainer Forst on his book *The right to Justification*. Following this first description of Rainer Forst's normative conception of the foundation of moral and human rights, the second part shifts its attention to the basic structures of society. This part will show, by the method of political constructivism, how institutions – notably the Legislative and the Judiciary bodies – ought to play its roles inside the requirement of the right to justification and the Rule of Law. There are limits that prevent an institution from achieving an optimal result in theirs deliberative activity and these limits will be exposed not only descriptively, but also in order to suggest ways of making a better deliberation process. Furthermore, I will draw some remarks on Brazil's recent institutional experience and try to diagnose its problems with the help of the approach of the right to justification to political/judicial institutions. Finally, the last section is focused on legal argumentation theories and how they could be affected by the right to justification.

2. The core of moral rights: the basic right to justification

Rainer Forst formulates the right to justification as being the ground of morality, which "lies in the re-cognition of the human responsibility to reciprocally and generally justify one's actions in moral contexts in relation to all others affected"[2]. Moreover, he emphasizes the fact that the action must be reasonably (which means generally and reciprocally) nonrejectable rather than acceptable. This right has two important consequences, one as being positive and the other negative: it grants the affected a right to say in the matter (positive aspect) and a – qualified[3] - veto right against norms and structures that cannot be justified within the two exposed criteria and bring the disadvantaged unjustifiable inequalities (negative aspect).

The first important idea is the criteria of reciprocity and generality. According to Forst, reciprocity "means that no one may refuse the particular demands of others that one raises for oneself (reciprocity of content), and that no one may simply assume that others have the same values and interests as oneself or make recourse to 'higher truths' that are not shared (reciprocity of reasons). Generality means that reasons

[2] FORST, Rainer. *The Right to Justification: Elements of a Constructivist Theory of Justice*. Translated by Jefffrey Flynn. Columbia University Press, New York, 2012. p. 42.

[3] Rainer Forst characterizes this right as 'qualified' "in the sense that the moral appeal as 'veto' itself must observe the criteria of reciprocity and generality". p 214.

for generally valid basic norms must be sharable by all those affected"[4]. These criteria provide a common ground by which human rights can be "constructed" and against which no good reason can be raised. However, the principle of justification that gives rise to the duty to justify cannot itself be justified (or "constructed") and we must reconstruct the various contexts of human practices to conclude that the criteria of generality and reciprocity are always present in the intersubjective expectation of individuals. Again, Forst asserts that human beings are justificatory beings and "if we want to understand human practices, we must conceive of them as practices bound up with justifications; no matter what we think or do, we place upon ourselves (and others) the demand for reasons, whether they are made explicit or remain implicit (at least initially)"[5].

The methodological aspect of the criteria of justification applies primordially to the validity claims of moral relevant actions and norms. In his words, "a comprehensive analysis of practical and normative justification would thus have the task of examining the various contexts of justification within the framework of a recursive reconstruction of the validity claims raised in each context to identify the conditions for redeeming those claims"[6]. It is also very important to emphasize the contextual aspect of the discursive process of justification and its primary addresses: "those affect in relevant ways. This is far more in accord with the meaning of morality, which consists in respecting the justified claims of vulnerable beings. These claims find their way directly into the moral justification"[7]. Therefore, in the discursive procedure of justification, in order for the validity claim of the norm or action to be considered justifiable, the addresses – the most affected in relevant ways – must assess its reciprocal and general validity. The conclusion that we can reach is that, for Forst, the norms that pass the referred test have a "morally unconditional normative character and are in a strict sense categorically binding as norms against whose validity no good reasons can speak"[8]. The moral reasons which justifies the moral claims must be shared reasons, "in order to do justice to the openness of the procedure of justification and to underscore the (in this sense counterfactual) moment of recipro-

[4] FORST, Rainer. *Idem*. p. 6
[5] FORST, Rainer. *Ibidem*. p. 1
[6] FORST, Rainer. *Ibidem*. p. 16.
[7] FORST, Rainer. *Ibidem*. p. 20.
[8] FORST, Rainer. *Ibidem*. p. 21.

cal and general acceptability – or better, nonrejectability – independent of the factual acceptance or nonacceptance of reasons"[9]. These reasons "arise within a practice of mutual and general justification, and constitute a 'space of justification', which is not a space that contains a stock of moral truths that are fixed once and for all, but one that must always be reactualized and newly validated in concrete practices of justification"[10].

However, this categorical and unconditional binding gives rise to the question of how to conciliate the autonomy of morality and the morality of autonomy. Forst answers this questions with a second-order practical insight, which is an insight not in how to justify – which is explained by the principle of justification -, but into the unconditional duty of justification. This duty, according to Forst, is not derived from an obligation, "but rather as one that a person has in virtue of one's capacity for being a moral person"[11] and that "this means recognizing that (and how) one is accountable to others as an autonomous person, without any further reason"[12]. This insight into the moral point of view combines the "cognitive (the capacity for justification), volitional (willingness to give justification and act justifiably), and affective (the sensorium for moral violations) components"[13]. Forst creates his own view of Kant's idea of human being as an end in itself, affirming that "moral persons recognize one another in accordance with this duty as persons who have an irreducible right to justification. This, on my account, is precisely what it means to regard oneself and others as ends in themselves (…) Without this insight into, and acceptance of, the duty to provide justifications the principle of justification would be left hanging in the air"[14] and saying that "morality is in the first instance concerned with the dignity of other persons"[15].

Another interesting point of Rainer Forst's concept of the right to justification is the advantage of the negative formula – moral norms must be such that cannot be generally and reciprocally rejected – over the affirmative formula of merely saying that moral norms must be gen-

[9] FORST, Rainer. *Ibidem*. p. 21.
[10] FORST, Rainer. *Ibidem*. pp. 21-22.
[11] FORST, Rainer. *Ibidem*. p. 35.
[12] FORST, Rainer. *Ibidem*. p. 35.
[13] FORST, Rainer. *Ibidem*. p. 39.
[14] FORST, Rainer. *Ibidem*. p. 57.
[15] FORST, Rainer. *Ibidem*. p. 55. Here, Rainer Forst is criticizing Kant's perspective on the primary concerning of morality with oneself rather than with the dignity of other persons.

erally and reciprocally accepted. According to Forst, "it leaves open the possibility of morally admissible norms that could be legitimately rejected – and hence that are not categorically binding – but that can also be reasonably accepted because they concern actions that are supererogatory. Second, and more importantly, the criteria of general and reciprocal rejectability make it possible to test the character of the claims raised and to determine when a claim can be or could be reasonably rejected even in cases of (expectable) disagreement or of 'false' agreement (based, for example, on illegitimate influence, intimidation, or lack of information)"[16]. The possible limitation of the discourse of justification in the core of the definition of the right to justification makes it an interesting concept, especially regarding the next sections that will focus on institutions, which are, by definition, limited. The right to justification is compatible with dissent[17], recognizing that pure consensus theories are highly fictitious. Rainer Forst makes another good observation, paraphrasing Hannah Arendt, asserting that "reflection on the finitude of human beings also includes becoming aware of the finitude of reason and the impossibility of being able to resort to 'ultimate' and unquestionably certain grounds in procedures of moral justification. This impossibility grows more concrete as a moral problem is posed, from which, of course, the impossibility of justifying reasons does not follow, but rather the necessity of always reciprocally and generally reassessing the justifications provided. A morality of justification is a morality that can be criticized and revised in its details: a human morality 'without a banister' that cannot in principle exclude the possibility of failures and errors"[18].

To conclude this first part, it is important to emphasize that Forst finds the concept of justice – the core meaning of it being the right to justification -, as having its fundamental opposition in arbitrariness. His moral theory is thoroughly directed to fight arbitrariness, trying to make persons "understand and embrace the responsibility for finding a common 'ground' for their action on which they can stand and stand their ground: not an 'ultimate' ground, but still a stable ground precisely because of its openness to a critique in which 'nothing [is] so holy' as the

[16] FORST, Rainer. *Ibidem*. p. 49.

[17] "In contrast to a pure consensus theory, the criteria of reciprocal and general justification make it possible in cases of dissent (which are to be expected) to distinguish better from worse reasons" – FORST, Rainer. *Ibidem*. pp. 5-6.

[18] FORST, Rainer. *Ibidem*. p. 39.

'agreement' or the 'veto' of each"[19]. Therefore, even though the right to justification is the base from which derives all other human rights; it does not give each of these human rights full potential. Instead, it delivers only a basic framework than can be developed on different grounds than the one offered by this right to justification[20].

3. Political Constructivism[21], institutions and The Rule of law

This section is divided in three parts: the first one makes the shift from moral theory to the formation of society's basic structures (focused on the Legislative, Executive and the Judiciary) and the role of the right to justification there (3.1); the second is a little bit more focused on how the connection of the role of the right to justification and the referred institutions can be conceptually binding, so it treats how the right to justification can penetrate the notion of Rule of law (3.2); and the last is especially dedicated to some remarks on Brazil's institutions and the contribution that could be made by accepting the right to justification as a mechanism of moral correction of these institutions (3.3).

3.1 The Right to Justification as a legit basic ground for institutions

So far, we have exposed Rainer Forst's moral constructivism based upon the right to justification. Now I am going to turn my attention to the possible effect of this right when applied to state institutions. Although I am going to gradually detach myself from Rainer Forst's lessons, I will start with some of his conceptions, remarkably by his view on political constructivism.

Rainer Forst affirms that political constructivism is on the second "discursive construction" level of a constructivist conception of human rights, on which "conceptions of legal, political, and social structures need to be developed in which these general rights are concretely justified, interpreted, institutionalized and realized as basic rights in given

[19] FORST, Rainer. *Ibidem*. p. 42.

[20] This "weak" aspect of the right to justification is important to make it more manageable in other contexts of justice which are not pure normative and have more complex constraints to the interaction of the actors.

[21] Although introduced by John Rawls in *Political Liberalism*, the concept here is used in a different, but similar away. The difference between the conception here defended and Rawls's can be seen at FORST, Rainer. *Ibidem*. Chapter 4.

historical and social contexts"[22]. The first level is composed by the already exposed moral constructivism.

The two levels are at the same time autonomous and dependent from each other. They are autonomous, since they work in different contexts – "moral norms have to be justified in the moral community of all human beings, whereas norms of political and social justice are to be justified in particular political communities"[23] -, but they are dependent because "moral justification is – in a normative-formal sense – the core of political justification"[24].

In fact, the moral construction must be integrated by political constructivism, since the general list of moral rights that appear by the method of moral constructivism can only be enforced and "concretely justified, interpreted, institutionalized (…) within a legally constituted political order"[25]. However, even though political discourse has limitations, it "may not violate the basic right to justification or the criteria of reciprocity and generality. What is valid in the universal moral context must also be demonstrably valid in particular political contexts"[26].

Nevertheless, since political contexts are situated socially and historically, they do not merely institutionalize moral rights previously established. The rights that are going to be legally prescribed depend on the demands that are going to appear in each political context. Then, it is important to say that "a legally binding interpretation, institutionalization, and realization of these rights can be supplied only in a law-governed state, a state in which the citizens confer upon themselves a right to justification and recognize the rights that are justifiable on the basis of this right (in the form accepted by them)"[27]. The concept of "law-governed" state can be interpreted as a state that is inside the framework of the Rule of Law.

Every state that works inside the Rule of Law has a constitution – written or not – that represents its fundamental legal base. Following Forst, "a constitution has the double task of fixing a list of basic rights that citizens of a democratic order who respect one another's basic right to justification have to grant and guarantee one another (…) and of lay-

[22] FORST, Rainer. *Ibidem*. p. 213.
[23] FORST, Rainer. *Ibidem*. p. 217.
[24] FORST, Rainer. *Ibidem*. p. 218.
[25] FORST, Rainer. *Ibidem*. p. 218.
[26] FORST, Rainer. *Ibidem*. p. 218.
[27] FORST, Rainer. *Ibidem*. p. 219.

ing down the principles and rules of fair deliberative procedures"[28]. These aspects reflect the constitution as "the result of a moral construction of a just basic structure and the groundwork for the political construction of a just political and social order"[29].

However, for the success of this continuous "process of moral and political construction", a special commitment from people is necessary. As Dworkin states in his community model of principle "(…) people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise. Politics has a different character for such people. (…) In short, each accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community"[30]. Therefore, we can see integrity as central to politics[31] and as a useful virtue, even if ideal, that a political community should have to lay down the referred principles and rules of fair deliberative procedures that fits inside the requirement of the right to justification.

Klaus Günther also contributes to the matter, taking an intersubjective perspective rather than an individualist one that seems to be on the background of Dworkin conception. Günther affirms that "the principle of coherence, to which legislation is also subject, implicitly manifests this interconnection between societal solidarity and an intersubjectivist concept of law. Because every new right is valid always only in the context of consideration of other rights, they are embedded in relations of mutual recognition from the very beginning"[32]. Here, it is useful to go beyond Günther and say that not only rights are to be justified, interpreted and validated intersubjectively and interconnected to others rights, but also to affirm that in this complex chain all of them are ultimately related to the right to justification and its criteria of generality and reciprocity. Günther continues to affirm that "by 'equal concern and respect', one could mean the idea of impartiality (…) as a rule of argumentation in practical discourses. For this rule operationalizes only the universal-reciprocal sense of the idea of impartiality, namely, that

[28] FORST, Rainer. *Ibidem*. p.182.
[29] FORST, Rainer. *Ibidem*. p.182.
[30] DWORKIN, Ronald. *Law's Empire*. London: Fontana Masterguides, 1986. p. 211.
[31] DWORKIN, Ronald. *Idem*. p. 216.
[32] GÜNTHER, Klaus. *The Sense of Appropriateness: Application Discourses in Morality and Law*. Translated by John Farrell. Albany: SUNY Press, 1993. p. 283.

of equally considering the interests of each individual when justifying a norm"[33]. Here it is important to observe that, in spite of considering the concrete interests when justifying a norm, he does not give a special consideration to the potentially affected in the context of justification, falling short to obey the criteria of the right to justification.

Now turning specifically to the concretization of rights by deliberative institutions following the criteria imposed by the right to justification, there are two points that should be mentioned. Firstly, the cultural background is an important factor to enhance the democratic deliberation. The culture aspect is optimized in the already referred scenario of Dworkin's model of principle community. Similarly, Rainer Forst says that a community of responsibility is important to develop relations of political trust between citizens. According to him, "trust is a normative resource of special importance in a democracy, for citizens need to trust both that other citizens will accept their responsibilities and that social institutions will work according to justifiable rules and norms, even if no 'perfect' institutionalization of democracy and of democratic supervision can be established"[34]. Secondly, the institutions themselves should enable effective and fair participation and argumentation. Freedom of speech concretized in efficient mechanisms of direct participation of citizens is crucial, in order to make the input of information and the accountability of the output provided by state decisions more democratic. As Forst affirms "political institutions in a narrower sense, most importantly parliamentary decision-making bodies, also have to be 'designed' so that the 'force' of the better argument can become a real political force"[35].

Nonetheless, if majority institutions fail to make justifiable outcomes, which will always happen to a certain degree, since institutions do not work in ideal deliberative conditions, judicial review is there to check political decisions. In fact, the institutional task of Judiciary related to the right to justification is to examine "political decisions with respect to the question of whether the criteria of reciprocity and generality have been satisfied, that is, whether important moral (reciprocally and generally nonrejectable) reasons have been neglected or trumped by inappropriate considerations, and with respect to the question of whether the procedures of political participation, inclusion, and justification

[33] GÜNTHER, Klaus. Idem. p. 282.
[34] FORST, Rainer. *Op. cit*. p. 180
[35] FORST, Rainer. *Idem*. pp. 181-182

have been adequately followed"[36].

Analyzing the matter of judicial review, Humberto Ávila proposes normative standards that should be followed by the Judiciary which are in accordance with the separation of powers. According to him, the Judiciary should be more self-restrained when "(1) there is a doubt about the future effects of the norm; (2) the matter is of a difficult and technical nature; (3) the constitution permits an open balance by the Legislative on the matter"[37], whereas when there is a restriction of fundamental rights and the premises on which it is founded are clearly mistaken, the Judiciary should act in a more activist (in a non-technical sense) way. Adopting a more restrained perspective, in a defense of judicial minimalism, Cass Sunstein asserts that "minimalism tends to be the appropriate course when the Court is operating in the midst of reasonable pluralism or moral flux, when circumstances are changing rapidly, or when the Court is uncertain that a broad rule would make sense in future cases. (…) When a democracy is in a state of ethical or political uncertainty, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right"[38]. In spite of making this presumption in favor of a minimalist approach, Sunstein also says that "Sometimes minimalism is a blunder; sometimes it creates unfairness. Whether minimalism makes sense cannot be decide in the abstract; everything depends on context, prominently including assessments of comparative institutional competence"[39].

Although the Judiciary has an important role in democratic societies, its importance should not be overestimated. In fact, taking a critical-descriptive approach, Forst asserts that "what is necessary then is the general and unimpeded possibility of raising objections to decisions by pointing out that reciprocally nonrejectable claims or reasons have been ignored. This is a task that is often fulfilled by courts, with all the disadvantages of turning political questions into legal questions and of excluding certain claims which may not be easily phrased in the

[36] FORST, Rainer. *Ibidem*. p. 182.

[37] ÁVILA, Humberto. *Teoria dos Princípios: da definição à aplicação dos princípios jurídicos*. 12ª Edição, 2011. Malheiros. p. 187 (translation made by the author of this paper). For the role of burden of proof in restriction to fundamental rights, see also SILVA, Virgílio Afonso da. *Direitos Fundamentais: conteúdo essencial, restrições e eficácia*. 2ª Edição, 2010. Malheiros. pp. 168-183.

[38] SUNSTEIN, Cass. *One case at a time – judicial minimalism in the Supreme Court*. Cambridge: Harvard University Press, 2001. p. 263.

[39] SUNSTEIN, Cass. *Idem*. p. 262.

established legal language; therefore – and dhis is even more important in large-scale democratic orders such as the European Union- it should be a task taken up by political institutions designed for that purpose"[40].

Therefore, the risk of a "juristocracy" is always imminent and should be taken seriously[41]. The Judiciary cannot go beyond the institutional design to correct a flaw from the Legislative, since there are institutional rules to which it should be deferent. Sometimes suboptimal outcomes are not only institutionally inevitable, but also required by the legal system. In the case of a flaw of a majority institution, it is even relevant to adopt a second-best choice in the legal decision, since in the future the majority can recognize its error by seeing the bad effects it had caused (which the Judiciary could not reassess, due to institutional limitation) and correct it by itself. In a similar way, Schauer points out that "in operating in this fashion, law does not intend to be perverse. It does, however, intend to take institutional values especially seriously, and it does that in the hope that in the long run we may be better off with the right institutions than we are when everyone simply tries to make the best decision"[42].

3.2. The Right to Justification as institutionally binding – some remarks and contributions on the debate of the concept of Rule of Law

The best way to analyze the right to justification as a required component of institutions is by tracing its similarity with the Rule of Law in its common aspect: the fundamental opposition to arbitrariness[43].

Nevertheless, the concept of the Rule of Law has been much disputed nowadays between scholars. The core idea of its opposition to arbitrariness is, however, an idea shared by almost all of them, even though they diverge in matters of defining the content of the Rule of

[40] FORST, Rainer. *Op. cit*. p. 182.

[41] For a dense account of institutional and democratic critiques of judicial supremacy, see BRANDÃO, Rodrigo. *Supremacia Judicial versus Diálogos Constiucionais: a quem cabe a última palavra sobre o sentido da constituição?* 1ª Edição. 2ª Tiragem, 2012. Editora Lumen Juris. Chapter 5, pp. 183-197.

[42] SCHAUER, Frederick. *Thinking Like a Lawyer: A new Introduction to Legal Reasoning*. Cambridge: Harvard University Press, 2009. p. 233.

[43] However, it is clear that they recognize that eradicate arbitrary power completely is an impossible task.

Law. Here, I will briefly expose the view of Finnis and Raz which are two of the most recent and eminent scholars writing about the subject and then I will give reasons to provide an alternative structure for the Rule of Law.

Before starting, it is important to emphasize some other aspects that the authors consider common grounds. They all acknowledge that the Rule of Law in a certain State may be more or less followed, in other words, it doesn't follow the common binary code of judicial system of legal/illegal, being its implementation a matter of degree. Also, they all seem to follow[44] at least the eight requirements proposed by Lon Fuller, as being necessary to any law that exists in a State submitted to the Rule of Law[45]: generality, promulgation, no retroactivity, clarity, no contradiction, possible commanding, constancy through time, congruency between official action and declared rule[46]. At last, they agree on two basic functions of the Rule of Law: that the government should be ruled by law and that the law should be formulated as being able to guide human conduct[47].

Beginning with Finnis, it is important to say that he has both a substantial and procedural approach to the Rule of Law, although it seems, as it will be exposed, that the former always prevails over the latter. He draws his position referring to the Rule of Law as a necessary constraint in the relationship between rulers and ruled, in the sense that the rules must act towards the ruled based on a procedure fairness and reciprocity, aiming to achieve the common good[48]. A virtuous State in

[44] It is important to mention that Raz has quite a different elaboration of these requirements, saying that some may not comply with what he sees as the two basic functions of the Rule of Law. In addition, he discards some of them criticizing Fuller's view that they have a value in itself, asserting that they are not independent from the two main functions of the Rule of Law and if they cannot guarantee that these goals will be achieved, other principles shall be established for that purpose. See RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford University Press, 1979. pp. 214-219.

[45] FULLER, Lon. *The Morality of Law (revised edition)*. Yale University Press, 1969. pp. 46-91

[46] Although the authors agree in these components, they develop them in a different way. However, the exposition of these differences escapes the purpose of the present paper. For a dense approach to the development of these components, see MARMOR, Andrei. *Law in the age of pluralism.* Oxford University Press, 2007. pp. 10-33.

[47] Again, the different insights given in the topic of these functions of the Rule of Law will not be explored.

[48] FINNIS, John. *Natural Law & Natural Rights.* Oxford University Press. Second edition, 2011. p. 274.

terms of the Rule of Law would be the one that puts the common good as it main goal.

Finnis goes on to say that following the Rule of Law sometimes is not enough to attain the common good and then suggests that one should depart, "temporarily, but perhaps drastically, from the law and the constitution"[49]. Therefore, even if the law obeys the eight procedural requirements, which Finnis acknowledges as being necessary components of the law in the Rule of Law, provided it does not achieve the common good in a satisfactory way, the agent should not apply the law. It is important to mention that common good in the Aristotelian approach proposed by him seems to include other moral values and virtues (dignity and equality, just to mention two of them). Proceeding this way, Finnis is not being clear on which extent the common good is a substantive component of the Rule of Law, not offering a methodological way to verify it. Therefore, Raz is right in his criticism that the Rule of Law is not the Rule of the good Law, since if it was this way, "the term lacks any useful function"[50].

On the other hand, Raz offers a more minimalistic conception of Rule of Law[51]. He affirms that "it is the virtue of efficiency; the virtue of an instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such"[52]. However, he asserts that although not being a value in itself, it is of a great moral value, since it "enable(s) the law to perform useful social functions; just as it may be of moral importance to produce a sharp knife when it is required for a moral purpose"[53]. In addition, one of his main notions is that "the Rule of Law is essentially a negative value. The law inevitably creates a great danger of arbitrary power--the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people's freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself"[54]. He concludes by saying that "since the

[49] FINNIS, John. *Idem*. p. 275.
[50] RAZ, Joseph. *Op. cit*. p. 211.
[51] For a refutation of Raz's perspective, see MARMOR, Andrei. *Op. Cit*. pp. 50-54.
[52] RAZ, Joseph. *Op. Cit*. p. 226.
[53] RAZ, Joseph. *Idem*. p. 226.
[54] RAZ, Joseph. *Ibidem*. p. 224.

rule of law is just one of the virtues the law should possess, it should be expected that it possesses no more than prima facie force. (...) Conflict between the rule of law and other values is just what is to be expected. Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better--other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals"[55].

The notion of Rule of Law that I will expose here is within a different paradigm. It has become a common ground nowadays that the Rule of Law must also presuppose the idea of a democratic State. By saying this, it is true that one gives a substantial value to the rule of law. However, I propose here that by giving the democratic characteristic to the Rule of Law, one necessarily incorporate the notion of the right to justification to the Rule of Law. The logical implication is that the eight procedural criteria mentioned above are not enough to describe the Rule of Law in democratic States. Nevertheless, the criteria of generality and reciprocity, as defined in the right to justification, makes it complete. In fact, Rainer Forst develops the concept of the right to justification in the basic structures of society taking as presupposition that these societies are democratic[56].

Finally, it is important to assert that the Rule of Law with the requirement of the right to justification makes the process of elaboration of the law to comply with the criteria of reciprocity and generality (and also the other eight original standards of the Rule of Law exposed before). The analysis is one of degree, since it is humanly impossible[57] to require the deliberative institutions (notably the Legislative) to achieve an optimum procedure referred to the right to justification. Furthermore, in a rather weak sense, the Rule of Law also requires a substantive approach regarding the approved law by the Judiciary in terms of judicial review. As it was shown, the right to justification demands that the law

[55] RAZ, Joseph. *Ibidem*. p. 228.

[56] It is very important to emphasize that this is only one context in which the right to justification can be applied. In this specific context of basic institutions of the State, the right to justification requires a democratic State. In other contexts, this requirement may not be raised. Forst's argument for a right to justification is context-based. This right can also be applied in transnational perspective – which is usually done by Forst – and in this context it has other requirements. However, it is not the purpose of this article to analyze other contexts of justice than the ones of basic institutions within the national State.

[57] We can generally say that it is humanly impossible to achieve the practical discourse ideal conditions, since institutions invariably work in a suboptimal empirical context.

must be such that it cannot be generally and reciprocally rejected, so the content will be analyzed in this manner, taking into account this aspect in a procedure of balancing based on the principle of proportionality.

3.3. A normative approach especially elaborated for Brazil's case

Before going further to the next section, I would like to make some remarks related to Brazil's institutional experience. Institutions do not work in a vacuum and we have to take into account the peculiarities of each State institution, in order to evaluate them. And now I have to do so, since, in my opinion, the second-best choice reasoning in the format that I just mentioned in section 3.1 is not a good way of reasoning by second order arguments in Brazil's institutions. I say that because the chance of the suboptimal decision taken by the Judiciary generating a dynamic effect to encourage the majority institutions of correcting its flaws by themselves in Brazil is very little. In fact, Brazil's majority institutions are under a very big crisis of representativeness[58]. Considering this scenario, scholars have worked a lot in order to justify the Judiciary activist approach inside the institutional design. However, it seems to me that the important issue to deal with now is to enhance the mechanisms of direct participation. Again, with Forst, it has been presented that the trust of citizen in each other is a strong value for the institutional democratic deliberation to be optimal. This is a important beginning to form a political culture that will make institutions to work inside justifiable rules and principles. However, Brazil does not have an ingrained culture of republican virtues, on the contrary, it possess a historical antirepublican tradition. Therefore, one alternative is trying to make a political reform[59] and expand the mechanisms of direct democracy to

[58] I am not forgetting here that this phenomenon is not exclusive of Brazil, but there the matter has taken critical patterns.

[59] For a proposal of political reform in Brazil, see BARROSO, Luís Roberto. A Reforma Política: Uma proposta de Sistema de governo, eleitoral e partidário para o Brasil. *RDE I Revista de Direito do Estado*. Ano 1, nº 3. Jul/set 2006, pp. 287-360. However, the scope of political reform here defended is more vast than the one in Barroso's, since it does not exclude mechanisms of direct participation not mentioned in the referred text (by saying so, I certainly do not mean to affirm that Barroso does not agree with mechanisms of directed participation). Another demand that would make democracy in Brazil on its way to a concretization of the right to justification in a specific context would be that of giving provisory prisoners the right to vote, since the rejection to it has no justifiable grounds (see SARMENTO, Daniel. *Por um Constitucionalismo Inclusivo*. 1ª Edição,

encourage the participation of citizens and the growth of republican virtues. In parallel to this, it is important that the Judiciary, ultimately the STF (Supremo Tribunal Federal), makes decisions that keep democracy alive with its substantial and procedural requirements, even taking a representative role when necessary[60].

Moreover, even though, as exposed in section 3.2, we can derive constitutionally the requirement of the right to justification in the context of institutions by the framework of the Rule of Law comprehended in a democratic State, the Brazilian Constitution[61] has other normative statutes that can be interpreted as requiring the referred right. The institutional duty of public administration to act in accord with the principle of morality[62], being a general command, can be interpreted as requiring the observance of the right to justification, since it has an ultimate moral basis. As for the institutional duty of the Judiciary, there is an explicit prevision of the duty to provide justified decisions[63]. Furthermore, the Brazilian constitutional system seems to comply with a moral interpretation that confers to some of its vague texts the reading that gives rise to a duty to justification by institutions of the State and the corresponding implicit right to justification by the people. Nevertheless, the lack of compliance to this duty by the institutions in Brazil is a problem observed empirically.

To help finding a solution to the posed matter, Forst considerations are always elucidative. He affirms that the "most important in institutional designs is the institutionalization of the possibility of what

---

2010. Editora Lumen Juris. pp. 311-333).

[60] For an example of typical representative approach by the STF, see ADI 4650 about campaign finance reform. For a detailed treatment of the issue, see SARMENTO, Daniel; OSÓRIO, Aline. *Eleições, dinheiro e democracia: A ADI 4650 e o modelo brasileiro de financiamento de campanhas*. Available from: http://www.oab.org.br/arquivos/artigo-adi-4650-362921044.pdf

[61] It is also important to mention that Brazilian Constitution declares in its first article that its bases rely upon the legal democratic State.

[62] "Article 37. The direct or indirect public administration of any of the powers of the Union, the states, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, morality, publicity and also the following:"

[63] "Article 93. A supplementary law, propose by the Supreme Federal Court, shall provide for the Statute of the Judicature, observing the following principles:

IX. All judgments of the bodies of Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, and the law may, if the public interest so requires, limit attendance in given acts to the interested parties and their lawyers, or only to the latter;".

one could call reciprocal objection. (…) Ideally, this kind of raising objections should already be part of the proper process of decision making, but given its constraints, this may not always be possible: thus, the need for additional checks that would require some institutional imaginativeness"[64]. The relation between the normative criteria of reciprocal and general justification and the concrete imperfect justification makes "democracy necessarily a self-critical enterprise"[65]. Therefore, the institution of mechanisms that confer a critical "veto" for relevant decisions interposed not only by structures of the state that aren't the authority in question, but also by associations of people, are important to strengthen the power of democracy in Brazil. However, as stated in section 3.1., there are other values to be taken into account and there are costs related to the establishment of a decision-making process more complex by the possibility of continuous objections. This empirical approach is a very relevant tool when evaluating the perfect equilibrium between raising the quality of democracy and not damaging too much governability. The way to make it concrete is a task for our time.

4. Legal Argumentation Theories, the Rule of Law and the Right to Justification – a possible approach

The moral right to justification as conceived by Rainer Forst, which is the idea that is being adopted in the whole paper, was not originally applied to legal argumentation theories. However, there is no reason to think that the criteria of reciprocity and generality could not be raised in the context of analyzing legal argumentation theories. According to Thomas Bustamante, "legal argumentation theories are theories about the use of arguments and its weights in the discourse of justification of the legal decision, looking to increase the rationality in the process of justifying and applying the law to an optimal degree"[66].

The possibility of linking the right to justification and legal argumentation theories becomes clearer if we accept Alexy's "special case" thesis[67]. The "special case" thesis affirms that legal reasoning is a special

[64] FORST, Rainer. *Op. cit*. p. 182.
[65] FORST, Rainer. *Idem*. p. 186.
[66] BUSTAMANTE, Thomas da Rosa de. *Teoria do Direito e Decisão Racional: temas de teoria da argumentação jurídica*. Editora Renovar. 1ª Edição, 2008. pp. 362-363.
[67] ALEXY, Robert. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Argumentation*. Oxford: Clarendon Press, 1989. Translation by Ruth

case of practical discourse, since it involves practical issues and these issues discussed have a claim to correctness, in spite of the discussion being framed within institutional limitations (the deliberation occurs inside a pre-established system of rules and procedures).

Moreover, procedures of judicial decision-making are not only institutionally limited, but also have an immense variety of constraints, being they internal or external to law. Fernando Leal states that "procedures of judicial decision-making are invariably limited. These factors will be separated within three big groups. The first consists of language and rationality limitations (extrinsic limitations), the second consists of typical limitations of judicial rationality (intrinsic limitations), and the third consists of institutional limitations"[68].

Therefore, it is easy to see that the right to justification will have a limited non-ideal penetration in legal argumentation theories, in a way similar to the limitations observed in the last section. However, by seeing specially the influence of the right to justification in legal argumentation theories, it is possible to know more accurately and analytically the manner by which the Judiciary will respond to society and to other state institutions with most of its responses being raised upon reciprocally and generally valid claims.

In addition, Peczenik states that the Rule of Law requires legal decisions to be simultaneously predictable and morally acceptable[69]. Nevertheless, there is a tension here between legal certainty and the other moral values, but this tension is only apparent since "1 - The law-giver cannot predict in advance or acceptably regulate all cases that occur in future practice. The evaluations to be done in legal practice, among other things concerning the question whether a decision of a given kind is just are easier to make in concrete cases, not in *abstracto*. 2 – Historical evolution of the method of legal reasoning has adapted it to the purpose of weighing and balancing of the wording of the law and moral demands. The judge has a far greater practical experience in applying this method to concrete cases than any legislative agency can have"[70].

Adler and Neil MacCormick . p. 212.

[68] LEAL, Fernando. Ônus de Argumentação, relações de prioridade e decisão jurídica: mecanismos de controle e de redução da incerteza na subidealidade do sistema jurídico. Tese de doutorado defendida em 2012 na Universidade do Estado do Rio de Janeiro. pp. 28-125.

[69] PECZENIK, Aleksander. *On Law and Reason*. Law and Philosophy Library. Dordrecht: Kluwer, 1989. p. 25.

[70] PECZENIK, Aleksander. *Idem*. p. 27.

However, the way Peczenik finds to solve this apparent tension is by his idea of coherence, which have ten quantitative criteria[71]. Two of these ideas are general and reciprocal justification[72], but not in the way that I am using here. Peczenik's choice to use the idea of coherence for a coherent system leads to a stability of practical opinion. Moreover, according to him, the ten quantitative ideas would lead to a moral result, since they would fulfill the demands of rationality. Peczenik says that "legal interpretatory statements are not true in the literal sense. But they can fulfil the requirements of Logical, Supportive and Discursive rationality. They thus can be both coherent and acceptable in the light of both morality and the legal paradigm. Consequently, they can fulfil important criteria of truth, coherence and consensus. For that reason, L-, S-, and D- rationality are indications of their correctness"[73].

Peczenik's idea seems to be the closest to an ideal normative and rational theory of justification of legal sentences. In spite of its analytical efforts, it seems that this theory would not achieve the requirements of the right to justification, since it does not pay enough attention to the various contexts of justification and to the addressees of the moral relevant norm. In addition, Peczenik's concept of coherence seems to rely too much on logic and rationality. As it was exposed, human rationality is limited, it is doubtful that theory that relies that much on human rationality would be altogether successful, not to mention the institutional and time limitation of gathering information. In brief, one could say that his theory talks too much about logical coherence and gives little attention to an equal – and sometimes more – important moral coherence[74].

It is important now to turn to another theory, which considers the time and rationality limits as important constraints to legal reasoning. Klaus Günther seems to propose a theory in this manner[75], by redefining the notion of integrity made by Dworkin[76]. According to Günther, "the principle of integrity can be understood as a principle for appropriateness argumentation. In this form of argumentation, societal

[71] PECZENIK, Aleksander. *Ibidem*. Chapter 4.

[72] PECZENIK, Aleksander. *Ibidem*. pp. 132-144.

[73] PECZENIK, Aleksander. *Ibidem*. p. 171.

[74] For an analysis of the concept of moral coherence, in a critical reference to the idea of Dworking's integrity, see MARMOR, Andrei. *Op. Cit*. pp. 41-44.

[75] GÜNTHER, Klaus. *Op. cit*. p. 43.

[76] Dworkin's theory is not going to be analyzed here since the refined version proposed by Günther appears to have ameliorated it, if we examine through the lens of the right to justification, making sufficient the evaluation of the latter.

relation of recognition are given effect in such a way that the network of concrete rights is applied equally in each particular case. (…) The right to be treated as an equal with concern and respect appears here as the right to equal treatment, that is to say, treating like cases alike not with reference to an individual norm, but with reference to a coherent set of principles as rights. This kind of equal treatment systematically creates differences and conflicts. But the very structure of such conflicts and a structure leading to the consideration of differences is the structure of appropriateness"[77]. Provided that by differences, Günther means potentially affected persons in the context of justification, then his structure of appropriateness obeys the criteria of reciprocal and general justification.

Finally, it is important to expose briefly the relation between the principle of contradictory and the right to justification. In judicial process, "the contradictory must be seen as a right to influence, which has a correspondent duty to debate, inherent to the cooperative structure of process"[78]. It is easy to conclude that "it is not possible to talk about motived decision, if it does not face explicitly the reasons brought by the parties in their manifestations"[79]. Since the parties in the process are the potentially affected in the judicial sentence, it is valid to see a context-related component of justification as presented in the relation between the principle of contradictory and the right to justification. However, in order to give a complete account of motivation of sentences that is not only context-related, but that also observes the criteria of reciprocity and generality, the following requirements of justification"(a) the enunciation of the choices made by the judge to; (a1) individualization of applicable norms; (a2) assentation of factual allegations; (a3) juridical qualification of factual support; (a4) juridical consequences derived from the juridical qualification of the fact; (b) the context of the nexus of implication and coherence between the statements and (c) the justification of statements related to criteria which put in evidence the rational quality of judicial decision"[80] may not be enough or relevant in all cases. In fact, these requirements may suffice in the concrete case to give effectiveness to the right to justification, may go even further than

[77] GÜNTHER, Klaus. *Idem*. pp. 283-284.

[78] SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de Direito Constitucional*. 1ª Edição; 2012. Editora Revista dos Tribunais. p. 667.

[79] SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Idem*. p. 667.

[80] SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Ibidem*. p. 668.

the basic requirements or may not be enough to comply with them. The point here is that the right to justification with its criteria of reciprocity and generality does not require specific standards that make it more concrete, since these standards may eventually fail in the concrete case to translate the idea behind the right to justification. On the other hand, the best approach is to see it as a metacriterion of correctness of concrete standards of legal argumentation theory, whether for the content of the standard itself or for its application. It is only by this way that the right to justification is read within legal argumentation theories as it is in the basic structures of society: at the same time being an internal feature that the justified standard (or application of the neutral standard) has and being a transcendental concept, since it is ultimately a moral concept that lies beyond the standard.

Conclusion

After seeing the application of the right to justification in different political contexts, I tried to show that none of them is sufficient by itself. All things considered, it is easy to acknowledge the synergy between the contexts of justification. Even though we recognize the limits of human rationality and of the basic institutions of society (especially the Legislative and the Judiciary bodies that were analyzed here), it is always possible to have the right to justification as a goal and a parameter to make institutions work better. If we conceive ourselves as human beings that live in an "order of justification"[81] with our basic institutions and our relation to others "governed by" the procedural criteria of reciprocal and general justification, then we can start talking about contextualizing the ideal notion of "forceless force of the better argument"[82]. This ideal should serve as a guide to a never-ending pretension to correction of concrete institutions.

References

ALEXY, Robert. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Argumentation*. Oxford: Clarendon Press, 1989. Translation by Ruth Adler and Neil MacCormick

ÁVILA, Humberto. *Teoria dos Princípios: da definição à aplicação dos princípios jurídi-*

[81] FORST, Rainer. *Op. cit*. p. 192.
[82] FORST, Rainer. *Idem*. p. 7.

cos. 12ª Edição, 2011. Malheiros.

BARROSO, Luís Roberto. A Reforma Política: Uma proposta de Sistema de governo, eleitoral e partidário para o Brasil. *RDE I Revista de Direito do Estado*. Ano 1, nº 3. Jul/set 2006, pages 287-360

BRANDÃO, Rodrigo. *Supremacia Judicial versus Diálogos Constiucionais: a quem cabe a última palavra sobre o sentido da constituição?* 1ª Edição. 2ª Tiragem, 2012. Editora Lumen Juris.

BUSTAMANTE, Thomas da Rosa de. *Teoria do Direito e Decisão Racional: temas de teoria da argumentação jurídica*. Editora Renovar. 1ª Edição, 2008.

DWORKIN, Ronald. *Law's Empire*. London: Fontana Masterguides, 1986.

FINNIS, John. *Natural Law & Natural Rights.* Oxford University Press. Second edition, 2011.

FORST, Rainer. *The Right to Justification: Elements of a Constructivist Theory of Justice*. Translated by Jefffrey Flynn. Columbia University Press, New York, 2012.

FULLER, Lon. *The Morality of Law (revised edition)*. Yale University Press, 1969.

GÜNTHER, Klaus. *The Sense of Appropriateness: Application Discourses in Morality and Law*. Translated by John Farrell. Albany: SUNY Press, 1993.

LEAL, Fernando. Ônus de Argumentação, relações de prioridade e decisão jurídica: mecanismos de controle e de redução da incerteza na subidealidade do sistema jurídico. Tese de doutorado defendida em 2012 na Universidade do Estado do Rio de Janeiro.

MARMOR, Andrei. *Law in the age of pluralism.* Oxford University Press, 2007.

PECZENIK, Aleksander. *On Law and Reason*. Law and Philosophy Library. Dordrecht: Kluwer, 1989.

RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford University Press, 1979.

SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de Direito Constitucional*. 1ª Edição; 2012. Editora Revista dos Tribunais.

SARMENTO, Daniel; OSÓRIO, Aline. *Eleições, dinheiro e democracia: A ADI 4650 e o modelo brasileiro de financiamento de campanhas*. Available from: http://www.oab.org.br/arquivos/artigo-adi-4650-362921044.pdf

SARMENTO, Daniel. *Por um Constitucionalismo Inclusivo*. 1ª Edição, 2010. Editora Lumen Juris.

SCHAUER, Frederick. *Thinking Like a Lawyer: A new Introduction to Legal Reason-*

ing. Cambridge: Harvard University Press, 2009.

SILVA, Virgílio Afonso da. *Direitos Fundamentais: conteúdo essencial, restrições e eficácia*. 2ª Edição, 2010. Malheiros

SUNSTEIN, Cass. *One case at a time – judicial minimalism in the Supreme Court*. Cambridge: Harvard University Press, 2001.

Law and science in public hearings:
Between the legislator's discretion and scientific (un) certainty of the Brazilian Federal Supreme Court

Margarida Lacombe Camargo[1]

Abstract: The text deals with the problem regarding the weight and the importance of the scientific arguments on the judicial review, in Robert Alexy Fundamental Rights Theory. The question is to what extent scientific certainties or uncertainties prevail in the decisions? Or: How judges decide when faced with uncertainties about the empirical premisses that explicit the case? Some examples were extracted from the brazilian Supreme Court decisions.

Key words: Judicial Review. Robert Alexy. Law and Science.

In the context of the research on the use of scientific arguments by the Judicial branch, we highlight the role of public hearings in the Brazilian Federal Supreme Court. From it, we aim to examine to what extent the practice of public hearings emphasizes the importance of what Robert Alexy calls empirical epistemic discretion, with regard to the interpretation and enforcement of fundamental rights.

It is increasingly common in the Brazilian Federal Supreme Court, the consultation of experts on non-legal matters, when it is seen as necessary to the understanding of the problem brought to trial. Altogether, there already have been 12 public hearings held since 2007, with about 40% of them concentrated in the first semester of 2013, which indicates a strong tendency of the Supreme Court to summon public hearings. This shows the interdependence of law and science, as the Court realizes that the practice of science depends on sound law, as well as the law itself requires access to sound science[2].

This practice of public hearings has been concentrated within the

[1] Professor at Federal University of Rio Janeiro (UFRJ) and researcher at Casa Rui Barbosa Foundation.

[2] See Stephen G. Breyer, The Interdependence of Science and Law. *Judicature*. Vol.82. n.1, July-august, 1998, p. 24-27.

judicial review, especially on decisions of "*general repercussion*"[3] of the appeal to Supreme Court and binding effect of some constitutional actions, on a matter constitutional rights. In these cases, it is not rare that the Court faces the problem of balancing competing constitutional rights. It has happened in all the cases that led to public hearings , such as: 1) the use of embryonic stem cells for research purposes in curing neurodegenerative diseases (right to life *vs*. right to decent life or to health); 2) the abortion, also called termination of pregnancy, of anencephalic fetuses (freedom and women's health *vs.* right to life of the fetus);3) the importation of used tires (sustainable environment *vs.* free enterprise), 4) the ban on the sale of alcoholic beverages in federal highways (right to life *vs.* free enterprise); 5) the ractice of fires in the sugar cane plantation (right to health *vs.* right to work and free enterprise) 6) the Electromagnetic Field Power Transmission Lines (right to health *vs.* free enterprise); 7) the imprisonment system (human dignity and freedom *vs* public safety); 8) the financing of political campaign (political participation *vs.* political participation); 9) the affirmative action policies of access to public universities (material equality *vs*. formal equality), 10) use of asbestos (right to health / life and sustainable environment vs. right to work and free enterprise); 11) Judicialization of Health, especially about the Public Health System, called "SUS" (right to life and health *vs.* other social rights); 12) the Cable TV (free enterprise *vs.* freedom of expression and pluralism).

The complexity of these issues underlines the topical aspect of Law"[4], which requires multifaceted reasoning as opposed to linear reasoning. It is not possible, *for example*, to solve the problem of the use of embryonic stem cells by simply seeking the meaning of the word "life" and make the classic syllogism: a) the Constitution protects life, b) the embryo is life, c) therefore, the embryo is inviolable.

Thinking in this way does not face the problem of leftover un-

[3] In portuguese, "general repercussion" is called "*repercussão geral*", which is an institute similar to *discretionary review* of the *writ of certiorari*. The difference is that the inadmissibility of the writ called "*Recurso Extraordinário*" requires, under Article 102, §3º by The Brazilian Constitution and by article 543-A of Civil Procedure Code, the justification of the Court that there is no "relevance" in economic, social, political and legal perspective, as well as the absence of "transcendence", which means the case is not representative of one group of other cases and, therefore, the judgment of this case does not go beyond the subjective interests involved. So, only if two thirds of justices decided in this way the appeal can be not hear.

[4] Theodor Viehweg, *in Topics and Law*.[Trad. Tércio Sampaio Ferraz Jr.] Brasília: Ministério da Justiça, 1989.

used embryos in the process of artificial insemination, frozen for more than three years, and without the possibility of being implanted in the womb by an explicit statement of the parents, keeping in mind the fundamental right to seek the cure of diseases and scientific knowledge.

In order to understand this problem, it must be known, for instance, what the geneticists define as life; the efficacy of embryonic stem cell research compared to adult stem cells; if there is an accurate diagnosis of non-viable embryos; what stance Brazil takes in the international scenario of patents, etc.

Even while taking into consideration the political assessment of the legislator to choose the best practice for Brazilian society, the question does not dispense legal analysis, insofar as it implies the incidence of fundamental rights prescribed by the constitution.

Robert Alexy discusses the tension between constitutional rights and democracy in the postscript to the Theory of Fundamental Rights, in 2002, instigated by the criticism of Jürgen Habermas. Alexy focuses on the question of the legislator's discretion, but we can say that delimiting the legislator's competence also implies in delimiting the competence of the Constitutional Court. Like Alexy, we understand that recognizing the discretion means recognizing the competence in some measure: the area that is available to the decision maker.

To analyze this problem, we will take into account the manifestations of Justices regarding the uncertainties about the content of constitutional rule. For example, if we ask whether the Federal Constitution allows or not the use of white asbestos, of the chrysotile kind, when we question the constitutionality of a federal law or state law that regulates the matter, we are actually asking whether white asbestos violates the constitutionally protected right to health. In other words, if there is no possibility of safe and controlled use of the substance, which justifies its banishment.

Robert Alexy is right when he distinguishes rules from principles, relating the latter with the balancing values. However, our hypothesis is that the principle of proportionality does not necessarily imply in a moral reading of the Constitution, to use the words of Dworkin. In fact, Alexy brings the problem of factual uncertainty to the formula weight: "the greater... the greater". The author aims to establish a distinction between "intensity" and "weight" to justify his new proposal of weight formula. The intensity would be the characteristic of the concrete weight formula, which measures the degree of non-satisfaction or affectation of a constitutional right by "the material importance of the reasons sup-

porting the intervention", while the weight of the intervention grows in the same proportion to increases the degree empirical uncertainty about the competing principles.

Knowing whether the legislator is legally capable, as Alexy says, is knowing if the intervention in the constitutionally protected right to freedom satisfies the principle of minimal protection. In the case of the acquisition and possession of products derived from *cannabis sativa,* for personal consumption, the German Federal Constitutional Court held that the prohibition established by the legislator was valid, given the scientific uncertainty about the consequences of drug use[5].

Through our verification, the increasing implementation of public hearings in Brazil is due to a necessity to have safe and objective knowledge about the situations that lead to the restriction of constitutional rights. Unlike the post-positivist theories suggest[6], it is not the arguments of principle that prevail, rather those based on evidence, which indicates a pragmatic dimension of Law. The knowledge of the consequences of legislative action, controlled by constitutional courts, is what has guided decision making, at least from what we see in practice in the Brazilian Federal Supreme Court. In the asbestos trial[7], the Justice Gilmar Mendes, in *obiter dicta*, stressed the increasing importance of consulting experts to avoid misconceptions and decide safely. Unlike the legislator, who can review his decisions when the results do not prove adequate, he says, the Court can make no mistakes, otherwise risk losing its institutional credibility . It is believed that the desired safety can come from the knowledge of experts.

The stance of Justice Gilmar Mendes increases the power of the Court, and decreases, therefore, the discretion of the legislator. This equation is directly related to the greater or the lesser degree of certainty and knowledge that the Court has on empirical premises that inform

[5] See the main parts of decision at book about 50 years of German Constitutional Supreme Court: http://www.mpf.gov.ar/docs/RepositorioB/Ebooks/qF655.pdf See also the interpretation of this case of, available at Robert Alexy, postscript *in Theory of constitutional rights*. Translated by Julian Rivers, Oxford university press, 2002 , p. 414-415.

[6] Just like post-positivist theories, we understand that the speech is the medium binding required between law and morality. Jürgen Habermas, Robert Alexy, Ronald Dworkin, Manuel Atienza. See paradigm shift explained by Luiz Afonso Figueroa, "El paradigma jurídico del neoconstitucionalismo. Un análisis metateórico, una adhesión y una propuesta de desarrollo. En A. García Figueroa (comp.). Racionalidad y Derecho. Centro de Estudios Políticos y Constitucionales: Madrid, 2006.

[7] ADI 3937 e ADI 3357 in www.stf.jus.br

the case. Regarding the collision of constitutional rights, as pointed out in the cases that justified public hearings, knowledge of the facts reduces the level of empirical uncertainty of the legal decision maker, and increases the capacity and legitimacy to decide.

Alexy, considering the intensity of interference in the collision of constitutional rights, indicates three levels of intensity control, according to the degree of uncertainty of the facts involved:

a) an intensive content control, supported by the highest degree of certainty of empirical premises;

b) a medium control, based on the plausibility and defensibility of empirical premises; and

c) a weak control when the empirical premises are not qualified as false and there is the lowest level of certainty.

Although there is no clear methodology of this, the fact is that the greater or the lesser knowledge of the subject allows us to decide with greater or lesser degree of certainty, which makes the Constitutional Court also find a greater or lesser degree of legitimacy to their own decisions, which is responsible for the final word on what the Constitution means.

Justice Ellen Gracie, in the ADI[8]_3510 (Embryonic Stem Cells), says, adequately, that the act of judging is, first and foremost, a great exercise in humility.[9] When the beginning of life was being discussed at court, she highlighted a phrase that became famous: "we are not a science academy".

The problem with capacities and institutional designs[10] relative to this subject has not received the attention that it deserves in Brazil. There is no admission nor validity criteria for scientific evidence in the constitutional legal process. However, the fact is that the complexity of the issues that come to the Federal Supreme Court has demanded knowledge beyond the legal system, which leads us to inquire about the scope and deference on the studies of experts as they occur in public hearings. As the Justice Stephen G. Breyer said, *"I believe that in this age of*

[8] This kind of action can be suit directly in the Federal Supreme Court to the declaration of unconstitutionality of an administrative act or statute. It´s one of various actions of the Brazilian system of "judicial review".

[9] By the way, see John Hardwig, *Toward an Ethics of Expertise*. http://web.utk.edu/~-jhardwig/expertis.htm

[10] Cass R. Sunstein and Adrian Vermeule. Interpretation and Institutions. *Michigan Law Review*, vol 101:885, February, 2003, p.885-951.

science we must build legal foundations that are sound in science as well as in law."[11] In same perspective, I believe that the public hearing, according Brazilian practiced, helps to build bridges to connect the right to science.

References

ALEXY, Robert. Postscript *in Theory of constitutional rights*. Translated by Julian Rivers. Oxford university press, 2002 .

BREYER, Stephen G. The Interdependence of Science and Law. *Judicature*. Vol.82. n.1, JulyAugust, 1998.

FIGUEROA, Luiz Afonos. "El paradigma jurídico del neoconstitucionalismo. Un análisis metateórico, una adhesión y una propuesta de desarrollo. En A. García Figueroa (comp.). Racionalidad y Derecho. Centro de Estudios Políticos y Constitucionales: Madrid, 2006.

HARDWIG, John. *Toward an Ethics of Expertise*. http://web.utk.edu/~jhardwig/expertis.htm

SCHWABE, Jürgen [Org.] Cinqüenta Años de Jurisprudência del Tribunal Constitucional Federal Alemán. Bogotá: Colômbia, 2003.

SUNSTEIN, Cass R. and VERMEULE, Adrian. Interpretation and Institutions. *Michigan Law Review*, vol 101:885, February, 2003, p.885-951.

VIEHWEG, Theodor. *Topics and Law*.[Trad. Tércio Sampaio Ferraz Jr.] Brasília: Ministério da Justiça, 1989.

[11] See Stephen G. Breyer, The Interdependence of Science and Law. *Judicature*. Vol.82. n.1, July-August, 1998, p. 24-27..

To whom it serves to conciliate?
Reflections on the access to justice in neoliberal times

Gabriela Maia Rebouças[1]
Mariana de Faro Felizola[2]

Abstract:The National Council of Justice (CNJ) has determined as one of its goals to grant effectiveness to the principle of access to justice. In order to achieve it, campaigns have been set to promote alternative methods of resolution of conflicts, such as conciliation and mediation. Among the campaigns' objectives is the reduction of the backlog of cases, nowadays common in the judicial system, and the promotion of satisfaction and agility on the resolution of conflicts. In order to attain these goals, CNJ has approved the resolution 125/2010, in which it states that State and Federal Courts should maintain a uniformed database about conciliations and mediations. This study is going to consider conciliation/mediation and its part as a method to guarantee access to justice, based on results obtained on a scientific initiation research intended to evaluate the degree of implementation of this resolution in Sergipe's State and Federal Justices between 2011 and 2013. The philosophical reflection will allow us to question the foundation of this estate model, frankly neoliberal, which manipulates the access to justice in statistic and quantitative terms, leaving less room to promote a qualitative access to justice that would be able to empower the parties of the process. Especially because the neoliberal state in which we live encourages the surpassing of goals as an end in itself, and the judicial sphere is not excluded of this phenomenon. As much as the promises of speed and access to justice are important, they alone are not enough to accomplish a qualified access. On the other hand, the game of big litigants, whether big companies, financial institutions or the State itself, so close to the judicial system, is always prejudicial to

[1] Doctor in Philosophy of Law by the Federal University of Pernambuco UFPE (2010). Researcher of the Institute of Technology and Research IRP/SE at the social technologies centre, leader of the "Access to justice, human rights and resolution of conflicts" research group active at CNPq. Graduation and post-graduation professor at UNIT and FITS. Author of Links Between Subjectivities and Law: A Constitution of the Subject in Michel Foucault and the Systems of Resolution of Conflicts, published in 2012 by Lumen Juris. "gabrielamaiar@gmail.com"

[2] Law student at Universidade Tiradentes (UNIT), Aracaju-SE. Scientific Initiation student by CNPq. "marifelizola@gmail.com"

the citizen, accentuating the disparity between the access of different parties. The importance of this study rests, therefore, in observing if the path of promoting these alternative methods of resolution of conflicts – conciliation and mediation –, does not simply result in a doubly disadvantageous dimension to the access of justice: on one hand, the judiciary with its more effective justice by way of being cheaper, selling the illusion of access, and on the other, the big litigants cunningly forcing deals in cases in which their side always wins and the citizen always loses.

1. Introduction

Because of the consolidation of the Democratic State of Law in Brazil, the last eight years witnessed, as of the constitutional amendment no. 45/2004, best known as Judiciary Reform, an increase in the number of discussions and actions around the Judiciary System in the pursuit of an effective access to justice. That principle has been originated from the Liberal State, yet with only a merely formal characteristic in order to preserve the power sphere of individual rights.

As the social rights evolved and the Welfare State reforms went through, the principle gained effectiveness. Therefore, the State had to provide the population with information and means to seek solutions to their disputes in the best possible way[3].

A worldwide movement connects the actions and strategies that made the Judiciary a privileged Republic protagonist. That is an expansion movement of opportunities to apply Law and commitment in search of effectiveness of human rights.

It is essential to mention, amongst other aspects, the growing judicialization of rights promoted by our Constitution driven by the best public interest. Not to mention the judicial activism converting the Judiciary into the grand materializer of rights reinforcing contrariwise the insufficiencies of the other powers.

On the other hand, the experiment of pluralism and of democratic society has increased the belief and the necessity for more communicative and non-violent procedures to lead our lives. Thus, the focus became the self-composing systems of disputes as a more viable alternative to the resolution of conflicts.

---

[3]MAYER, Larissa Affonso. Métodos alternativos de resolução de conflitos sob a ótica do direito contemporâneo. **Jus Navigandi**, Teresina, ano 16, n. 2997, 15 set. 2011. [cited 11 February 2014] Available from: <http://jus.com.br/artigos/19994>.

In doing so, the National Council of Justice (CNJ) has determined as one of its goals to grant effectiveness to the principle of access to justice. In order to achieve it, campaigns have been installed to promote alternative methods of resolution of conflicts, such as conciliation and mediation.

The dissemination of conciliation as a procedure to resolve disputes is notorious when we analyze the Brazilian Post-Constitution Legislation of 1988, either through the incorporation of the preliminary conciliation hearing, or through the Special Courts of Law of 1995. Furthermore, what we may observe is a bet on dialogue and consensus as a type of resolution of conflicts at federal law as of 2001; therefore, a special inter-subjective method.

The importance of this dissemination lies in the idea that these resolution mechanisms aim to end the conflict completely, starting from its origins; not simply that dispute in which the parties are eventually engaged. Because "(...) a disputa não é o conflito, mas uma decorrência do conflito."[4] Thus, when a third party (judge) sentences a dispute, most of time it will not end the conflict.

This study is to reflect upon conciliation/mediation, and its part as a method to guarantee access to justice. The analysis was founded on data gathered through a scientific initiation research. This program evaluated the implementation degree of CNJ Public Policies in the Justice System of the State of Sergipe from 2011 to 2013.

The starting point of the research was the implementation of strategies by the National Council of Justice (CNJ) concerning Public Policies to implement a Judiciary Statistics System, focusing on the Resolution No.125 of 2010, which determined specific statistical management criteria set out for the centres of conciliation and mediation.

The philosophical reflection will allow us to question the foundation of this State model, frankly neoliberal, which manipulates the access to justice in statistic and quantitative terms, leaving less room to promote a qualitative access to justice that would be able to empower the parties of the process.

[4] COSTA, A. Cartografia dos métodos de composição de conflito. In AZEVEDO, A. G. E*studos em arbitragem, mediação e negociação*. Porto Alegre: Fabris, 2001, p. 3. "(...) the dispute is not the conflict, but a consequence of the conflict." (author's translation)

2. To whom it serves to conciliate?

Conciliation and mediation are amongst the systems of resolution of disputes, in which the participation of parties grows as the obliging power of the third party weakens. During conciliation, the intervening third party may still propose a deal and ponder resolutions jointly with both parties. Conversely, the mediator cannot even do that. He is restrict, regarding the deal, to the duty of creating a communication channel and, therefore, allow the parties to transform the conflict[5].

Admittedly, the conciliation culture appeals to a society that intends to cope with its own conflicts in a more pacific and participative way by expanding the access to justice in every possible perspective. The conciliator must conduct the analysis of the case in search for possible suggestions so that the parties themselves may settle the conflict. By doing so, what matters is that the decision may satisfy both parties, opposing to the decision made by a judge, which would inevitably make the parties take the roles of winner and loser.

In general, the mediation constitutes the method chosen for family cases, in view of the need to, besides ending the dispute, to restore the subjective relations. For it is in the family conflict that the parties have more contact and normally more emotional connection. By stimulating these alternative methods,

> " O Judiciário passaria a desempenhar um papel subsidiário na estrutura Estatal, na medida em que seria acionado quando outros meios de resolução de conflitos não atinjam a utilidade desejada para satisfazer as partes[6].

In this perspective, it is not possible to work by the idea of winners and losers anymore, neither with other common dualisms (victim/attacker, right/wrong, guilty/not guilty), which excludes the pacifist characteristic of the method based on the idea of complementarity

[5] REBOUÇAS, G. M. T*ramas entre subjetividades e direito.* Rio de Janeiro: Lumen Juris, 2012.

[6] MAYER, L. A. Métodos alternativos de resolução de conflitos sob a ótica do direito contemporâneo. *Jus Navigandi*, Teresina, ano 16, n. 2997, 15 set. 2011 [cited at 11 February 2014]. Available from World Wide Web: <http://jus.com.br/artigos/19994>."The Judiciary would take a subsidiary role in the State structure, as it would be called for when other methods of resolution of disputes don't live up to the parties expectations." (author's translation)

> (...) que pressupõe, em todo conflito, a presença *ativa* de dois opositores *responsáveis* pela sua manifestação e manutenção. Ativa aqui não é sinônimo de violência, como passiva tampouco é sinônimo de vitimização [7].

The unequal forces of bargain create a tension always present in the negotiation and also reflect in conciliation. Despite imagining a horizontal field of arguments and counter-arguments, of relations and interactions between interests and solicitations, where it's not possible to idealize a communicative rationality which allows the parties to put themselves in a position of equality, it is needed to not lose sight of a uneven field of forces.

Through the rhetorical and argumentative instruments and the appeal to the common ideals of society, particular interests are imposed when not dissonant from the discourses that try to legitimate the pact. In which case, is important to accept the striking ideas of Laura Nader, when the *cohercitive harmony* of the juridical models is analyzed: "In every case that I have examined, the rule is that the weakest party goes in search for the law while the strongest tries to negotiate."

Therefore, beyond conciliation's legal configuration in the judicial process, what matters is to recognize that there has been a significative effort from the Judiciary since the National Council of Justice's Movement for Conciliation, which aims to use this self-composing method of resolution of conflicts to accelerate, minimize and grant effect to the process, seeking a way to guarantee the access to justice.

The judicial system, therefore, supported by an amount of rights and procedures which guarantee a certain predictability in the decision while at the same time, establishes as its ideal an equal treatment, intermediated by this third party – impartial and distant from the dispute itself –, if not capable of being the guardian of the expectations of those vulnerable by economical and social conditions, at least allows the dispute to not be abandoned under a field of forces that are certainly adverse to the ones with no information, status or economical power. This argument imposes a certain obstruction to the self-composing system of resolution, whose impositions may also be disguised by a discourse of

[7] MUSZKAT, M. *Mediação de Conflitos*: Pacificando e prevenindo a violência. São Paulo: Summus Editorial, 2003, p. 35. "(...) that presupposes, in every dispute, the active presence of two opponents responsible for the manifestation and management. Active in this case is not a synonym of violence, as passive neither is synonym of victimization."(author's translation)

harmony and consensus.

However, the theoretical implications of conciliation's adequacy in the course of the judicial process are contrasted by a lot of advertisement and investment, especially during the times when the major litigants request conciliation hearings. This has happened over the last years, starting from a posture taken by the Judiciary itself, but later supported by the other powers and above all by both republican pacts firmed between the chiefs of all three powers, respectively in 2004 and 2009[8]. In this sense, it is important to observe that:

> "O cotidiano forense não se modifica porque novas legislações têm vigência, antes, para a eficácia jurídica e social de uma instituição jurídica, prescinde que ocorram mudanças na visão de mundo dos atores jurídicos[9].

It is needed, therefore, to investigate if the Judiciary has materialized its own rules regarding the juridical administration. And, at the same rate, it is also needed to question said rules from a critical point of view, so that it is possible to determine their effectiveness.

Let it not be denied that the necessity of public policies is real in order to reach a larger dissemination of the conciliation culture. But it is even more important to investigate the real objective behind the discourse of access to justice.

3. Reflections on the access to justice in neoliberal times

It seems that what has made the Brazilian Judiciary System search for public policies that aim to stimulate conciliation and mediation is not only the achievement of access to justice. The CNJ (National Council of Justice) has tried to establish the conciliation culture inside Brazilian's judicial system through campaigns such as the Conciliation

[8] IWAKURA, C. R. *Conciliar é legal?*. Jus Navigandi, Teresina, ano 15, n. 2579, 24 jul. 2010. [cited at 11 February 2014]. Available from World Wide Web: <http://jus.com.br/revista/texto/17035>.

[9] STAMFORD, A. *Conciliação judicial e ação comunicativa*: acordo judicial como negociação versus consenso. In: Anuário dos cursos de pós-graduação em direito, n.13, 2003, Recife: Edição do Programa de pós-graduação em direito da UFPE (2003). "The forensic daily routine does not change because new legislations have validity. Previously, in order to maintain the judicial and social efficacy of a juridical institution, it is necessary to change the vision that some of the juridical actors have of the world." (author's translation)

Week and through the resolution 125/2010.

> "A padronização objetiva conciliar crenças sociais e especificidades locais, neste país de dimensões continentais e de vasta diversidade cultural. Unifica a práxis sem uniformizá-la, evita disparidades de orientações e de práticas e, ao mesmo tempo, propõe assegurar a boa execução desta política pública."[10]

But the most important objective seems to be the statistical management of the number of processes, in order to optimize expenses and diminish the volume of demands in all of magistrate's courts. Supported by the marketing of celerity, joint efforts and incentives to conciliation are advertised through every judicial sphere.

The observations taken form the state of Sergipe's justice between 2011 to 2013 revealed a less than democratic method of managing this disputes (despite all of conciliation's benefits). It enables the big litigants, who are the financial institutions, to send to conciliation only the demands that they find already lost (in general, the ones on the execution phase).

The conciliation process will evaluate whether the winner part wants to receive a lesser value instead of waiting the enormous amount of time required by the justice system. This means that its malfunction is the primary argument used by the big debtors so that they can diminish the values of the agreements. And so, the distinction pointed out by Cappelletti[11] between "casual" litigants and "customary" litigants comes true. The customary litigants are the ones with advantage in the juridical transaction for lots of factors, but mainly because of their greater experience with the law.

On the other hand, the time to conciliate is not enough and the conciliators lack in preparation and incentive to work. The conciliation is then reduced to a mere number to be managed statically. And poorly

---

[10] LEVY, F. et al. *Resolução n. 125 do Conselho Nacional de Justiça*: Leitura Comentada. DJ-e nº 39/2011, 01/03/2011, p. 1. [cited at 11 February 2014]. Available from: <http://www.foname.com.br/wp-content/uploads/2011/10/MEDIACAO-CNJ-RESOLUCAO-GUIA-PRATICO-final.pdf.>. "The standardizing aims to conciliate social beliefs and local specifications, in this country of continental dimensions and of great cultural diversity. It unifies the praxis without uniforming it, avoids orientation and practices disparities and, at the same time, proposes to assure the good execution of this public policy." (author's translation)

[11] CAPPELLETTI, M. and GARTH, B.. *Acesso à justiça*. Porto Alegre: Fabris, 1988.

managed! The data retrieved from Sergipe revealed that the rules established by the Council of Justice have not been taken too seriously, which can be stated due to the countless inconsistencies present. It starts with how the data is collected: the conciliator himself, by the end of the day, reports how many conciliation hearings there were and how many were effective. By doing so, they make it impossible to verify which processes were not conciliated and which ones were. Besides, the numbers do not match mathematically and they do not represent the entire state of Sergipe, only those made by the conciliators at the Conciliation Centre, which is far from representing the number of courthouses in the state. Not even the State's Justice Court organizes the data of conciliations conducted there.

The resolution 125/2010 also determines that citizenship services be instituted in Sergipe's justice but they paradoxically do not exist in the Judicial Centre of Resolution of Conflicts and "Citizenship". The same happened to the institution of the Permanent Nucleus of Consensual Methods of Resolution of Conflicts – department which should be in charge of managing the National Judicial Policy on the Adequate Treatment of Conflicts of Interest – its creation is not clear, though they argument that it was introduced together with the Centre, but there is no practical distinction between them.

It is important to point out that the resolution 125/2010 is not the only one regulating the subject, there are two others which operate within the state's judicial sphere: the resolutions 11/2011 and 35/2012. The first one states the Permanent Nucleus of Consensual Methods of Resolution of Conflicts and in its article nine determines the application of the rules instituted by the resolution 125/2010, also it modifies the name of the *Centre of Conciliation* to *Judiciary Centre of Solution of Conflicts and Citizenship*. The later determines the attributions of the Nucleus instituted by the resolution 11/2011, the attributions of the Centre of Solution of Conflicts and Citizenship and the conciliator's duties.

Besides these resolutions there are different projects of law, which regulate conciliation and mediation, such as the Project of the New Procedural Civil Code, which intends to systematize those institutes. There is also the Project of Law 1028/11, which authorizes the lieutenants to promote conciliations in crimes of minor offensive potential even before the investigation.

Still trying to insert culturally the practice of these alternative methods of resolution of conflicts, it has been set since 2005 the Conciliation Week as part of the National Council of Justice's program, which

mobilizes the Brazilian justice. It is an initiative in which for five days the Judiciary incentivises conciliations for open cases, not to mention the other joint efforts that take place year-around.

As an example of previous research done in the area, entitled "The impact of the National Movement for Conciliation by the National Council of Justice on the State's Common Courts in Sergipe through 2006 to 2010", an investigation about Sergipe's quantitative data on conciliation began. Reaching the emphatic conclusion that despite the Council's marketing about the rise of conciliations around Brazil, there never was reliable statistical data to conclude such rise. The reason lies in the uneven method through which the data has been collected, either because the Council itself had been modifying every year the information that should be collected by the Centre, or because the refusal to use a technological system that would prevent simple human mistakes. And thus obstructs the precise verification of the impact caused by the conciliation's campaigns around all of Brazil.

Now after the standardizing of the collectable data, which was done by the National Council of Justice through the resolution 125/2010, it is not yet possible to verify any evolution on the results.

4. Final remarks

Through the analysis of conciliation as a mean of access to justice it is possible to conclude that the promotion of the alternative methods of resolution of conflicts constitutes an extremely important measure to the National Judiciary. Nevertheless, caution is necessary when dealing with the methodology in which they are imposed; otherwise it would be easier to neglect the qualitative concept inherent in conciliation.

The truth is the discourse of harmony and Peace, which surrounds the Centre of Solution of Conflicts and Citizenship, is rather weak when compared to the human subjectivity. In the collectivity, however, reside the means to make it function properly through the union of the litigants and the conciliators.

> "Para que se alcance a função pacificadora dos conflitos, os magistrados e as partes envolvidas, incluindo-se aqui os colaboradores e serventuários do Poder Judiciário, devem adotar uma postura condizente com o mecanismo conciliador, deixando-se por um momento as relações humanas em evidência e abrindo-se mão da tecnicidade excessiva, para que se viabilize assim um resultado

> satisfatório e mais aproximado da realidade dos fatos e das características pessoais dos litigantes12.

In other words, at the moment the self-composing methods are somehow set so that the parties' symbiosis becomes tangible, an initial step will be taken towards the end of the crisis in the Judiciary. It is certain that the existent public policies are not enough to do it in a short amount of time but they represent essential measures on the search of this path.

The immediate goal may be the decrease in the number of judicial actions but in the future the foresight of a new mapping of methods of resolution of disputes, "em que todos os métodos sejam compreendidos como estratégias específicas no tratamento jurídico da conflituosidade social e, não mais como elementos auxiliares da jurisdição (...)"[13] perhaps will arise.

But for now, it is crucial to question the presentation of data – mere numbers without true meaning – as improvement in access to justice. Specially because of the neoliberal state in which we live in, where the attempts to surpass goals as an end in itself remains and the judicial sphere is not excluded from this phenomenon.

Even if the promises of celerity and access to justice are important to the resolution, they alone are not enough to reach a qualified access. However, the game of the big litigants, such as companies, financial institutions or the State itself – so close to the judicial system as they are – is always disadvantageous to the regular citizen, accentuating the inequality of the parties' conditions.

---

[12] MAYER, L. A. Métodos alternativos de resolução de conflitos sob a ótica do direito contemporâneo. **Jus Navigandi**, Teresina, ano 16, n. 2997, 15 set. 2011 [cited at 11 February 2014]. Available from World Wide Web: <http://jus.com.br/artigos/19994>."In order to accomplish the pacifist function of the disputes, the judges and the parties involved, including here the collaborators and servants of the Judicial Power, must adopt a posture which reflects the conciliatory mechanism, leaving aside for a moment the evident human relations and the excessive technicality, so that a satisfactory result could be possible and closer to the reality of facts and to the personal characteristics of the litigants." (author's translation)

[13] COSTA, A. Cartografia dos métodos de composição de conflito. In AZEVEDO, A. G. *Estudos em arbitragem, mediação e negociação*. Porto Alegre: Fabris, 2001, p. 6. "(…) through which all the methods are comprehended as specific strategies in the juridical treatment of social disputes and no longer as auxiliaries of the jurisdiction (...)" (author's translation)

The importance of this study rests, therefore, in observing if the path of promoting these alternative methods of resolution of conflicts – conciliation and mediation –, does not simply result in a doubly disadvantageous dimension to the access of justice: on one hand, the judiciary with its more effective justice by way of being cheaper, selling the illusion of access, and on the other, the big litigants cunningly forcing deals in cases in which their side always wins and the citizen always loses.

References

CAPPELLETTI, Mauro; GARTH, Bryant. *Acesso à justiça*. Trad. Ellen Gracie Northfleet. Porto Alegre: Fabris, 1988.

COSTA, Alexandre Araújo. Cartografia dos métodos de composição de conflito. In: AZEVEDO, André Gomma (org). *Estudos em arbitragem, mediaç*ão e negociação. Porto Alegre: Fabris, 2001. Vol.3

IWAKURA, Cristiane Rodrigues. *Conciliar é legal?*. Jus Navigandi, Teresina, ano 15, n. 2579, 24 jul. 2010. [11 February 2014]. Available from: <http://jus.com.br/revista/texto/17035>.

LEVY, F. et al. *Resolução n. 125 do Conselho Nacional de Justiça***:** Leitura Comentada. DJ-e nº 39/2011, 01/03/2011, p. 1. [cited 11 February 2014]. Available from:<http://www.foname.com.br/wp-content/uploads/2011/10/MEDIACAO-CNJ-RESOLUCAO-GUIA-PRATICO-final.pdf.>.

MAYER, Larissa Affonso. Métodos alternativos de resolução de conflitos sob a ótica do direito contemporâneo. **Jus Navigandi,** Teresina, ano 16, n. 2997, 15 set. 2011. [cited 11 February 2014] Available from: <http://jus.com.br/artigos/19994>.

MUSZKAT, Malvina. *Mediação de Conflitos:* Pacificando e prevenindo a violência. São Paulo: Summus Editorial, 2003.

REBOUÇAS, G. M. *Tramas entre subjetividades e direito*: a constituição do sujeito em Michel Foucault e os sistemas de resolução de conflitos. Rio de janeiro: Lumen Juris, 2012

STAMFORD, Artur. *Conciliação judicial e ação comunicativa*: acordo judicial como negociação versus consenso. In: Anuário dos cursos de pós-graduação em direito, n.13, 2003, Recife: Edição do Programa de pós-graduação em direito da UFPE, 2003. p.75-109.

Regnum legis hic et nunc

Daniel Nunes Pereira[1]

> "I'm the king of my own land. Facing tempests of dust, I'll fight until the end. Creatures of my dreams raise up and dance with me! Now and forever, I'm your king!" – Outro – M83

Abstract: This study examines the bases upon which lies our idea of Democracy and Rule of Law. Also, it show the tensions inherent and inborn with the democratic state based on a Constitution and its Judicial Review. Yet, the paper tries to foresee some kind of relation between Rule of Law, Constitutional Jurisdiction and the Real and Ideal instances of the Law.

Keywords: Democracy, Constitution, Rule of Law.

I

The form, the substance and meaning of 'Democracy' proved a conceptual problem for ordinary people, scholars and statesmen in various parts of the world, in various periods of human history. Even Sir Winston Churchill, as a guise of illustration, questioned his parliamentary colleagues and his cabinet ministers.

> "How does the right hon' Gentleman conceive democracy? (…) Many forms of Government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time"[2].

[1] Grad. Student – Sociology and Law; Political Science – UFF – Universidade Federal Fluminense – Brazil.

[2] CHURCHILL, Winston Leonard Spencer. Speech in the House of Commons

If conceptually 'Democracy' is a problem, its defense and institutional maintenance becomes an intellectual battleground undermined by quandaries and seemingly insurmountable philosophical tensions. While problematic, this issue has to be riddled, at least *ad hoc*, to sustain the most wholesome, enduring and cherished categories to Western Civilization, such as the defense of freedom and human dignity.

This study focuses on the question of how to defend the hodiernal idea of democratic state (understood as Rule of Law or *Rechtsstaatlichkeit/Rechtsstaat*) under three paradigms: a) a nearly consensual concept of Democracy, b) the problem of democratic legitimacy of a constitutional court as a defender of democratic rule of law c) the tension between the real and ideal dimensions of law as a civilizational foundation issue.

II

The political experience went through several trials, thus, there are several "possible worlds" for academic usage of democracy as concept. Therefore, themed cutouts are made towards fitting Democracy in an alleged political model of nowadays material consensus.

Under the so called contemporary theory of democracy converge three major traditions of political thought (BOBBIO, MATTEUCCI, 1998: 319): a) the Classical Theory, disclosed as Aristotelian theory about the three forms of government, according to which democracy is the government of the people, of all citizens, i.e. those who enjoy the rights of citizenship, the monarchy stands the Government of a sole person, and the aristocracy, the Government of few; b) the Medieval Theory, originated in classical Rome, based on popular sovereignty, based under the conception that supreme power derives from the people and becomes representative, or it derives from the *Princeps* and is transmitted by delegation from the upper to the lower social strata; c) the Modern Theory known as the theory of Machiavelli, born with the notion of the Modern National State in the form of large monarchies, whereby the historical forms of government are essentially two: the monarchy and republic, and the former Democracy is nothing more than a form of republic (the other is the aristocracy), which originates the characteristic of pre-revolutionary period over exchanges between democratic ideals and repub-

11/11/1947. In. "The Official Report, House of Commons (5th Series)" vol. 444, cc. 206–07. Available at: http://hansard.millbanksystems.com/commons/1947/nov/11/parliament-bill#column_206

lican ideals and the Government genuinely popular is called, instead of democracy, a republic.

From these three historical matrices is possible to trace an overview of modern/contemporary (the last two centuries) theoretical horizon, whereupon some authors whose seminal works highlight on the subject of Democracy, namely: Schumpeter, Mises, Popper, Hayek, Tocqueville and Kelsen. These authors may be divided, for this study's sake, among those with a theory on formal democracy and those concerning a theory on material democracy – namely, the late is more useful to this intellectual effort than the first one. Thus, under the present paradigm, are more fruitful to study the theories of Kelsen and Tocqueville, understanding as more fragile the theses of Schumpeter, Mises, Hayek and Popper, since they have in common, the aim on formal democracy and not material, that is the crux of this study.

The basis of our *weltanschauung* concerning Democracy probably is the idea of popular deliberations on political matters. Deliberative democracy was first envisioned by Aristotle, which is evident on "*Politica*" and ethica *Nicomachēa*" (ARISTOTLES, 1981, 2000) born from exposure to collective opinions that diverge and converge, tending to form an intense dialogue that aims the scope of practical truth, which guides all political action. Thus, in Aristotle, the basis of democracy is the practical reason, understood as prudence, which, in turn, seeks a practical truth. The teleological conception of the world of Aristotle must be observed so that you can understand deliberative democracy as a form of government capable of bringing the man's realization of its *Telos* (purpose). However there is a highly utopian character on Aristotle propositions, of course, not by chance, in line with his work. Thus, in order to address a more immanent theory, we must counter this Aristotelian transcendence.

This highly idealized Democracy on Aristotle's shall be complemented with Kelsen's procedural democracy, understood as a method capable of creating a social collective order (KELSEN, 1993: 102-104). It is contemplated the Majority Rule as the essential characteristic of procedural democracy, which allows the lien of freedom for greater number of individuals in society. Towards this purpose a relativistic view of the world shall be adopted (KELSEN, 1993: 161) which explains philosophically the "kelsenean democracy", based on freedom, and therefore self-determination concerning creation and foundation of one's truth and moral values.

In the work of Kelsen one can only understand procedural de-

mocracy as a method capable of creating a collective social order, *id est*, the form of government that provides rules and procedures that allow citizens to make decisions. These rules do not pertain to the content of the decisions, but they operate in order to establish who are the citizens able to take legal and political decisions and how such decisions are attained: *"(... democracy is only one way, only one method of creating social order (...)"*(KELSEN, 1993: 103). Thus understood as the Majority Rule, lies an essential characteristic of procedural democracy and this is what preserves the freedom of the greater number of individuals in society.

The concept of Democracy hereby presented and problematized demands a political anthropology understanding the individual as antisocial and self-interested by nature, demanding freedom, wanting to impose their will for their own interests, ultimately opposed by the coercive power of the State. However, unlike the eminently liberal authors such as Mises, Hayek and Schumpeter, this *kelsenean* theory do not admit "a rational man *stricto sensu"* (as in Rational Choice), but a psychological man who brings reverberations of his psyche to the social and political world, according to Freudian theory (KELSEN, 1993: 301).

The ontological necessity of social demands power to regulate human relations, the natural liberties and freedom must undergo on some kind of cleavage, as seen on Tocqueville and Burke, thus "the natural liberty becomes a social or political freedom." (KELSEN, 1993: 28).

This social freedom comprehends self-determination, i.e., one is truly free when the law comprises its will. Since it is impossible to reconcile all individual volitions with the social order "(...) the existence of society or the state assume that there may be disagreement between social order and individual volition." (KELSEN, 1993: 30).

The worth of equality is linked to value freedom, but is understood as secondary unlike to thinkers accustomed to classical liberalism. "It is the value of freedom and not equality that defines, firstly, the idea of democracy" (KELSEN, 1993: 99). The 'equality issue' on a procedural democracy is a formal idea, that is, parity of political rights: "(...) because everyone should be free to the greatest extent possible, everyone must participate in the shaping of the will of the State and, consequently, in the same degree"(KELSEN, 1993: 99).

Trussing the concept of democracy hereby developed, an analogy shall be proposed between political theory and disciplines of philosophy, namely, epistemology and Values Theory. In Kelsen's theory, ultimately with *phyto* merely argumentative and didactic, there are two antagonistic forms of state: democracy and autocracy. And in philoso-

phy, both in epistemology and the Values Theory, there is antagonism between philosophical absolutism and philosophical relativism.

> "(...)There is not only an outer parallel, but an internal antagonistic relation between autocracy / democracy on the one hand, and philosophical absolutism / philosophical relativism on the other. Autocracy, understood as political absolutism, is coordinated with the philosophical absolutism, while democracy, as political relativism, is coordinated with the philosophical relativism" (KELSEN, 1993: 161).

The examination of the philosophical basis of democracy should neither objectify nor constitute a justification for absolute democracy, which would focus on the paradox of skepticism, like on the thought of Sextus Empiricus (KOLAKOWSKI, 2009: 88). A philosophical speculation riddled with absolute thoughts, typical of metaphysics and religion, leans to do not recognize any social value towards the inclusion of the other.

Therefore, the only permitted vindication for Democracy lies on a relativistic and science-based philosophy, with a few phenomenological caveats (HUSSERL, 1976: 302, 331, 371), *ergo* a functional justification. Such justification leaves the decision about the social value to be put in place over the individuals active in political reality. In this step, democracy finds its functional foundation under the hypothesis of individuals active in political reality understanding that freedom and equality are values that should be put in place. Thus behold, the main difference between Kelsen and Schumpeter, Mises and Hayek. Democracy is justified, therefore, to be the form of government most functionally adjusted to achieve the values of freedom, liberty and equality.

Since Kelsen, with mainstay in Aristotle and denying Schumpeter and other liberals, proposes Democracy as form, yet he worries about its materiality. Therefore, there is a question and problematization over the legitimacy and the possibility of a dictatorship of the majority (KELSEN, 1993: 178, 179), leading us to infer that shares some of Tocqueville thinking.

Tocqueville asserts that the exercise of full and unconditional volition of the majority, without observing the upper limits of the law, tends to erode the equal freedom required by the rules of democratic government (TOCQUEVILLE, 2005: 294). This possibility is identified by Tocqueville as a tyranny of the majority, identified when the ele-

ments of democracy are not reachable or guaranteed for all the citizens.

> "The freedom of some derives from the prohibitions imposed on others. There is a famous phrase of Tocqueville that implies similar definition: 'despots themselves do not deny that freedom is good, they just want it for themselves, and abide that all other people are absolutely unworthy of it'. Therefore there is no difference concerning the opinion about freedom, but on the greater or lesser value that is attributed to men "(ARON, 1985: 205).

It shall be, therefore, under this normative horizon comprised on Kelsen, Tocqueville and Aristotle that assertions about the Rule of Law under contemporary institutional issues will be developed.

III

Democracy as a concept, and within the parameters set out above, lies in tension with the democratic legitimacy of the Constitutional Jurisdiction, since this is (under kelsenian understanding) the Guardian of the State under Rule of Law. However, this is a juridical guard of political and oft philosophical matter.

If the law[3]deals with the rationalization of facts and its logical sequence, to what extent the Constitutional Jurisdiction shares (or should commune) of a generalized logic, immanent, and functional through assumptions and conclusions? The legality of the decisions of a Constitutional Court shall be consistent under a notion of legal system conjoint to the assumption of Rule of Law as the basis of Democracy.

The clou of constitutional norm (which should be sheltered by the Constitutional Court) derives from the fundamental elements of its legal ratio and distinction of moral standards (which would have been out the scope of the Constitutional Court). These rules are structured towards the subject of law, videlicet, the dynamic between objective and subjective rights and duties. Moreover, this bilateralism can be seen as the basal distinguishing mark between moral and legal norm. The moral rule would establish a merely duty unilateral, no one can demand compliance. The rule of law is imperative, because it establishes commands that must be compulsorily observed. This compulsoriness is guaranteed by the sanction imposed by the State (KELSEN, 1998:113). Thus, since

[3] Jus, not *Lex*, i.e., *Rechts* and not *Gesetz*.

the legal rule is a statement written and demanded by the State, in other words, the rules of law is formulated by the State, or recognized by its imperative attributes, with some kind of special treatment when Constitutional in nature, since its closer to the so called *Grundnorm*. (KELSEN, 2003: 215).

This notion of legality is inferred from the cognition of Legal System, a polysemous and elusive concept. Such system is conceptualized in various notions, but only under the sign of two elements, namely, order and unity (CANARIS, 2002: 20). From order is inferred a staggered arrangement of norms, which comprise a apprehensible rationality of certain plight of things. Furthermore, the unit serves as preventing any source of dispersion. Under such notion of system congruous to the signs of order and unity, it emerges the very idea of Law (*Jus*). The order referenced to the system, is embodied by the staggering of rules, which has its empirical apex in the Constitution. Thus, the need for decisions under the Constitution can be interpreted as the last guarantor of systemic unit towards the Democratic State and the Rule of Law.

However, this catenation of thought is opposed by the work of Carl Schmitt, powerful mind, penman of writings endowed with great and terrible wisdom that can lead political philosophy and *iuris prudetia* towards dangerous and bleak places. Schmitt opened strange doors that we'd never close again[4]…

In theory there would be some *aporiae* in the juxtaposition of categories such as 'Constitution', 'Basic Norm' and 'Constituent Power' (SCHMITT, 1996: 63, 96). Also, another stalemate, the idea of Constitutional Jurisdiction deals the issues of multiplicity of meanings for Category of Constitution, *id est*, according to the author in comment, there may be in the Constitution antithetical concepts, such as Absolute, Relative, Positivist and Ideal (SCHMITT, 1996: 29, 37, 45, 58). In Schmitt's perspective, despite being an *auteur maudit*, there are important links between the legality of judicial decisions and multiplicity of concepts about constitutional reality and its categorical contrapositions.

The very wrangle concerning the concept, scheme and purport of Democracy, when tensioned to issues relative to Judicial Review, must be retraced and redacted on the light of the critical model pleaded by Carl Schmitt himself.

---

[4] *"She opened strange doors that we'd never close again"*. BOWIE, David. "Scary Monsters and Super Creeps" In. "Scary Monsters (And Super Creeps) - Album". London/New York: RCA.1980.

Can the judicial system of courts, namely the Constitutional Court, become the hegemonic instance regarding interpretation of the Constitution and usurp the legislative function? How to ensure respect for the Constitution despite the popular and political *animorum*? Such questions illustrate the complexity upon imperious quarrels concerning the legitimacy of the Constitutional Jurisdiction within certain democratic political order.

Considering the paradigm about democracy explained above (founder of social order and lying between the Majority Rule and the protection of minorities) arise questions regarding the role of the Constitutional Jurisdiction. Thus, regarding the expansion of the judiciary in the contemporary constitutional democracies identified for this study, there are three main criticisms upon democratic legitimacy of the Constitutional Jurisdiction (BARROSO, 2009: 11) - a) political ideological criticism b) misgiving upon institutional capacity, c) seeming limitation of debate.

The political ideological criticism lies in the fact that judges may ot be not elected officials[5], in other words, investiture is not derived from the popular will. Furthermore, when judgment is upon acts of the Legislature or the Executive branch, the judiciary plays a role that is clearly political.

The institutional capacity of the Judiciary is put to the test whilst understood as the power "the final, ultimate and indefeasible word". In theory, the three constituted Powers, can and should interpret the Constitution and guide their activity based on it. The exception is the divergence, and, to this matter, the "final word" appertains to the Judiciary, woefully the constituted power that undergoes on such huge democratic deficit.

Finally, once the parley and moot are placed, *ultima ratio*, at the hands of the judiciary, there are restrictions derivative of dialogism and semiotics of law.

> "The world of Law has its own categories, speeches and proper methods of argumentation. The mastery of this instrument requires technical knowledge and specific training, not accessible to most people. The first consequence of the drastic judicialization is the gentrification of the discussion and excluding those who do not master the language or have access to the locus of legal parley. Legal institutes such as public hearings, 'amicus curiae', law-

[5] Brazil and United States of America's case, for instance.

> suits perpetrated by civil society organizations, mitigate but not eliminate this problem. Thus arose the danger of producing apathy in social forces, who would be waiting for providential judges. "(BARROSO, 2009: 14).

These three problems regarding the Constitutional Control towards protection of the Democracy and the Rule of Law, verily conceal another issue, much more profound and deep-seated at the very ontological relations between the phenomena of juridicity and society itself – the conflict between real and ideal.

IV

There are two instances in the Law (*Jus*), namely a real or factual dimension, and another one, the Ideal or critical. In both instances there is tension between social efficiency and ideal rights as well claims of moral correctness. Such coexistence and tension between the two dimensions, not incidentally appears in the work of Kelsen, influenced by Hume and Kant. In the first, the "is-ought problem" (HUME, 2009: 509) that form the basis of his meta-ethics, while the latter used the terms "*Sein*" and "*Sollen*" to indicate that man lives two different dimensions, as a member of nature and subject to its rules, and as founder of some project concerning correction of the natural world. Thus, from Hume and Kant to Kelsen, the issue of tension between Ideal and Real gains importance for an analysis intended to keep the Rule of Law and Democratic State by legal institutions.

The Ideal parameters of the Law, according to Kant, concerns a claim to a essential adjustment (ALEXY, 2009: 10), which includes a claim to moral correctness, which is the source of the relation between law and morality. This moral adjustment operates in the maintenance of the Democratic State, *id est*, there is a theoretical construct of how democracy should be institutionalized. In Accordance with Kant, the cognition regarding State, is undoubtedly a legal idea, so what ends up characterizing the activity of the State is therefore a legal activity. Even in a situation of social inequality is necessary to consider the legal equality - to imagine how a democratic state should be is to institutionalize the means to achieve it. The attainment of a Democratic State is not only wanted to achieve, but the path towards it is important, videlicet, beyond the existence of the Rule of Law is imperious to institutionalize its means, *exempli gratia*, Judicial Review.

The factual side is reflected in the defining elements of the formally adequate production and social efficacy of the law (ALEXY, 2005: 29). Is possible to ascertain the law as the rationalization of human volitions and desires, i.e. "Reason is, and ought only to be the slave of the passions" (HUME, 2009: 451). It seems, therefore, that yet holding to rationalists dictates, the law is deduced from volitional expressions, not always rational, which lies in the dimensions of Real/*Sein*.

In the instance of Real or "Being" (*Sein*), there are two realities that overlap each other: a complex society (sometimes called postmodern) and existential human condition.

Western societies are structured upon capitalism and have been thriven in a multicultural context, composed of very different identities, under the ideological background of an alleged homogenization and universalization. The multiple cultures in those societies are part of a general culture where the logic of capital puts its manifestations in a network of mass production oriented towards endless consumption. There is a recrudescence of the interrelationships between individuals, understood as products and concomitantly producers of social reality, magnifying the individualistic organization and individualism. Considered as an ideology and moral base structuring of capitalist society, individualism is under constant mutation, showing strong tendency to radicalization, amid an abundance of human resources which, strictly speaking, would be sufficient to provide human happiness.

In the other hemisphere of "*Sein*" lies the existential human condition, which presents itself as a dramatic and hopelessly sore narrative in which man remains torn between two realities co-dependent and mysterious that cannot be defined, namely, the existence and transcendence (JASPERS, 1994: 173-178). Transcendence gains importance when the known cognizable through empiricism and science it is not self-sufficient and does not explain itself. Thus, Man being himself infinite yet tied in a finite human experience, is reified by Law through its institutions.

Therefore, these two sides of the *Sein* become problem to the Law, when it is placed to defend the democratic order. However, both sides of Real/*Sein* are reverberated on the Ideal the instance of Law, namely, the ultimate justification of legal and political experience - humankind itself.

Legal rules have underlying existential justifications, standards of justice or principles against arbitrariness. Thus, one can observe that

rules are not obeyed only by the emanation of authority, but because it contains values that transcend its own text. In order defend values and goals that go beyond the text of the norm, it is possible, for instance, to overcome it, through *contra legem* acts.

Every law, yet inscribed on the Ideal instance, aim to protect the Man himself. Each of the rules of a particular legal system, including the Basic Law, concerning democracy and/or the Constitutional Jurisdiction, aims to defend the humankind.

Thus, it is concluded, the defense of Democracy and the Rule of Law is not an end in itself, since such categories are mere abstractions. The Law (*Jus*) serves the Democratic Ideal insofar protects every individual in his private universe, within and beyond his or her existence amidst the "here and now" of today's multifaceted society. In *every* law, *every* rule, *every* decision of each Court, there is a transcendence of text itself and its prompt objectives. Likewise, in *every* gesture of compassion, in *every* act of justice and even in *every* struggle for survival, lie the reasons and justifications of Democracy and the Rule of Law - ourselves.

References

ALEXY, Robert. "*Begriff und Geltung des Rechts*". Freiburg: Alber Verlag. 2005.

ALEXY, Robert. "*Principais elementos de uma teoria da dupla natureza do Direito*". In: "*Revista de Direito Administrativo*". N.253. Rio de Janeiro: Editora FGV Direito Rio. 2010. pp. 9-30. [ALEXY, Robert. *"Hauptelemente einer Theorie der Doppelnatur des Rechts*", In. "*Archiv für Rechts — und Sozialphilosophie*", v. 95, N. 2, p. 151-166, abr. 2009].

ARISTOTLES. "Nicomachean Ethics". Cambridge: Cambridge University Press. 2000.

ARISTOTLES. "The Politics". Harmondsworth: Penguin.1981.

ARON, Raymond. "*Estudos Políticos*". Brasília: Editora UNB, 1985. [ARON, Raymond. "*Études politiques"*, Paris: Gallimard, 1972]

BARROSO, Luis Roberto. "C*onstituição, Democracia e Supremacia Judicial*". In: "*Revista de Direito do Estado*", Rio de Janeiro: Renovar, 2009, v.16, p. 3/42.

BOBBIO, N. MATTEUCCI, N. "*Dicionário de Política*". Brasília: Editora UNB. 1998. [Dictionary of Politics: *Diccionario de Politica*. French & European Publications, Incorporated. 1983]

CANARIS, Claus Wilhelm. "*Pensamento sistemático e conceito de sistema na Ciên-*

cia do Direito".Lisboa: Fundação Calouste Gulbenkian, 2002. [CANARIS, Claus Wilhelm. "*Systemdenken und Systembegriff in der Jurisprudenz"*. Berlin: Duncker und Humblot. 1969].

HUME, David. "*Tratado da Natureza Humana*". São Paulos: Editora UNESP. 2009. [HUME, David. "A Treatise of Human Nature". London: NuVision. 2007].

HUSSERL, Edmund. "*La Crise dês Science Européenes et La Phénoménologie Transcendantale*". Paris: Gallimard. 1976.

KELSEN, Hans. "*A Democracia*". 1ª ed., São Paulo: Editora Martins Fontes, 1993 [This Brazilian edition comprises the following original works: KELSEN, Hans. "*Vom Wesen und Wert der Demokratie*", Tübingen: Mohr. 1920; KELSEN, Hans. "*Das Problem des Parlamentarismus*" Wien: Braumüller, 1924; KELSEN, Hans "Foundations of Democracy" In. "Ethics - LXVI". Number 1, 1956; KELSEN, Hans. "*Der Begriff des Staates und die Sozialpsychologie. Mit besonderer Berücksichtigung von Freuds Theorie der Masse*" In. "Imago", Vol. VIII, 1922, pp. 97-141; KELSEN, Hans. "Absolutism and Relativism in Philosophy and Politics". In. "The American Political Science Review" XLII, N. 5. 1945].

JASPERS, Karl."Philosophical Faith and Revelation". In. OAKES, Edward T. [Org.]. "German Essays on Religion". New York: The Continuum Publishing Company. 1994.

KELSEN, Hans. "*Teoria Geral do Direito e do Estado*". São Paulo: Martins Fontes. 1998. [KELSEN, Hans. "General Theory of Law and State". Cambridge: Cambridge University Press .1945]

KELSEN, Hans. "*Teoria Pura do Direito*". São Paulo: Martins Fontes. 2003. [KELSEN, Hans."*Reine Rechtslehre*", Wien: Mohr Siebeck. 1934]

KOLAKOWSKI, Leszlek. "Sobre *o Que nos Perguntam os Grandes Filósofos – Vol. 1*". Editora Civilização Brasileira: Rio de Janeiro. 2009. [KOLAKOWSKI, Leszlek. "*O co nas pytaja wielcy filozofowie Trzy*". Krakow: Knak. 2008].

SCHMITT, Carl. "*Teoría de la Constitucíon*". Madrid: Alianza Editorial. 1996. [SCHMITT, Carl. *"Verfassungslehre".* München: Duncker & Humblot 1928.]

TOCQUEVILLE, Alexis de. "A democracia na América". São Paulo: Martins Fontes, 2005. [Tocqueville, Alexis de. "*De la Démocratie en Amérique".* Cambridge: Schoenhofs Foreign Books. 1986].

From autonomy to democracy

Mou Chengwen[1]

Abstract: This paper mainly discusses about the relationship between autonomy and democracy: autonomy is prerequisite of existence of democracy and democracy is only the possibility result of development of autonomy. As far as subject of being is concerned, there are three intermediary links from autonomy to democracy which are identification and confirmation of right boundary of aseity, identification and confirmation of right boundary of other's existence, and cultivation and practice of democratic spirit. Therefore, autonomy may develop into democracy, at least by going through the above-mentioned three intermediary links.

Keywords: Autonomy Democracy Right Boundary Democratic Spirit

What is the relationship between autonomy and democracy? Now, there are two typical viewpoints on it. One is that both are identical in meaning, the other is that nothing is in common between them. In author's opinion, both views need to be discussed . Autonomy and democracy are neither identical in meaning, nor nothing in common between them. Autonomy is the prerequisite of democracy, and hence it can only be regarded as a lower form of democracy. Democracy is a possible outcome of autonomy, and hence what the democracy demonstrate to autonomy is inevitably the development prospects of autonomy . As thus, there are many intermediary links between autonomy and democracy. It is such intermediary links that constitute either differences or inevitable connections between them.

What intermediary links are there from autonomy to democracy in the *being* subjects? In the author's view, there are at least three links such as the identification and verification of right range of aseity and

[1] Scientific Socialism Research Institution, Institute of Political Science, Central China Normal University, Wuhan, Hubei.

of the other's existence and the cultivation and practice of democratic spirit. The author intends to start further discussion on this issue.

I

Autonomy has only demonstrated an accidental form of democracy, or just unveiled democracy from an obscure state to an obvious state in an accidental way. While democracy has demonstrated development trends of autonomy, which can only exist by accident. The whys and wherefores for that is as follows: if autonomy only takes aseity as an ultimate aim of its existence, it will stand still and decline to move forward ultimately. Only if autonomy takes its existence as an intermediary link of its existence or a post house of the democratic development, can it become democracy.

The process from autonomy to democracy must first of all go through identification and verification of right range of aseity, which is the intermediary link or a must post house from autonomy to democracy.. Lingering in this post house, autonomy must be subject to identification and verification of the right range of aseity firstly.

As for the *being* subject, self-cognition starts with recognizing aseity, and cognition of aseity starts with recognizing the right range of aseity. Therefore, a *being* subject with complete self-consciousness firstly is a kind of existence which has complete self-consciousness of the right range of aseity. To achieve recognition of right range of aseity, it is necessary to identify and verify right range of aseity. To identify and verify the right range of aseity, identification is of first importance, and the identification has mainly expressed a priori comprehensive survey . In order to identify the right range of aseity , it is necessary to distinguish mission, position, need, influence, value and significance of aseity in society in light of social context, and define responsibility of aseity to social existence and society's protection to aseity, in other word, what can aseity provide for social existence? What can social existence offer for aseity? How can aseity interact with social existence effectively? If aseity can take itself as an intermediary link with positive correlation of social existence and take social existence as a link with positive correlation of itself, related interaction with positive correlation between them can be constructed in the epistemology which is identification of right range of aseity. It needs a reasonable premise of epistemology to construct a reasonable identification. The reasonable premise of episte-

mology should include at least four aspects as follows: relatively complete related knowledge, sound self-consciousness, acute philosophical inspiration and reasonable guide of Era Spirit.

If identification of right range of aseity is taken only as an initial stage of self-consciousness, verification of right range of aseity should be re-identification to this initial stage. Why does the human-existence need this re-identification? There are such reasons as follows. Firstly, existence of identification itself is in the flowing state, identification is always flowing beyond itself. Secondly, existence of identification itself cannot become the standard and yardstick of aseity, therefore, it is necessary to transcend the scope of the existence of "identification" itself to judge the identification. Thirdly, only by transcending the scope of the existence of "identification" itself is it possible to understand the value and significance of identification.

Why can the verification form the re-identification of the identification? Because the verification is the nearest to the identification, the distance between them not only reflects a physical significance but also or more importantly expresses a psychological or philosophical significance. It is this situation that determines that the verification become reinforcement to the identification which can only provide some materials to the verification.

The verification of right range right range of aseity can provide subjects the value and significance in at least three aspects in political philosophy . Firstly, it can offer an opportunity to take an acquaintance of existent power as a kind of relative stability, and then this acquaintance can turn intuition into rational and then becomes a *being*-- which is worth being grasped and can be grasped. Secondly, it can offer spiritual nourishment to self-consciousness which will therefore become more vivid and richer and more colourful than before. Thirdly, it can offer a post house to the identification which will not be a kind of accidental existence in the verification.

II

The process from autonomy to democracy also includes the intermediary link of the identification and verification of right range of the other's existence as well, which is a post house which autonomy must pass through before turning into democracy . Autonomy lingering in the intermediary link must identify and verify right range of the other's

existence.

As for the being subject, isolated individuals cannot achieve its independence and freedom. To achieve independence and freedom, one must transcend an isolated individual or isolated self-consciousness and enter into the other's world. Of course, this entry doesn't mean infringing on the other's legal airspace, exceeding the other's legal domain and treading the other's rights underfoot. This entry is a kind of reasonable cognition, understanding and digestion to the other and their existence, by which one will obtain a kind of existent spirit on the mankind. Since it is so, it is necessary to identify and verify the right range of the other's existence. Because it is only this that makes the cognition, understanding and digestion to the other's existence not become infringement on the other's legal airspace, transgression beyond the other's legal domain and violation of the other's rights.

Firstly, the identification of right range of the other's existence is a prerequisite of reasonable cognition, understanding and digestion to the other's existence. The others are the selves different from selves and are in a community with the selves. Speaking intuitively, the others are out of the selves and the selves are out of the others. Speaking bluntly, there are some distances between the others and the selves which cause existent disagreements among different subjects, which frequently are comprehended a kind of philosophical disagreement in ontology and result in some spiritual distances among beings. In the specific context, the spiritual distances can transform into apathy of each other. If this apathy becomes a governing structure, different subjects may be indifferent to each other, and even scorn of or dogfights of each other. In this way, there is the possibility that narrow aseity will become a universality. Overcoming and transcending this state means cognizing, understanding and digesting the other's existence reasonably. How to cognize, understand and digest the other's existence reasonably by the identification of right range of the other's existence? Firstly, the selves must be reflected, by which inspiration, experience and terrace of correct cognition about the other's existence can be obtained. Secondly, the history of existence must be criticized rationally, by which a reasonable understanding of the process of evolution on existence of kind can be grasped, and then the conception about existence of the integrity can be longitudinally achieved. Thirdly, the other's existence must be looked closely with overall look, tolerant spirit and analytic perspective, by which spirit about existence of the integrity can be achieved transversely.

Secondly, the identification of the right range of other's existence needs to be re-identified, so it is necessary to verify of the right range of the other's existence. How to verify the right range of the other's existence? At first, it is necessary to standardize duty with will. If the will is a priori principle of rational beings, it is evitable to standardize duty with will. The existent processes of the subjects should be in duty. The duty of the self- existence of being needs to be shouldered by the self. They must possess a consciousness and a spirit of shouldering for entirety while the existent subjects understand and verify the other's existence. Next, it is necessary to take self-discipline as a superlative goodness. It is the self-discipline of the existent subjects that can realize the identification of right range of the other's existence, because it is the self-discipline that can restrain and improve the self-consciousness of the existent subjects. If the self- discipline can be understood as the superlative goodness, it can become an internal self-consciousness. Only if the self-discipline is regarded as the superlative goodness can the self-discipline be the greatest reward of the regulatory existence. It is the greatest reward that can change the self-discipline into the inner self-consciousness. Following this, it is necessary to take forgiveness as happiness. Forgiveness should be apprehended as a rational extension rather than an outward coerce in the internal spirit. So, forgiveness must bring good effects to the being subjects, inevitably, and make the being subjects feel happiness. If forgiveness is only comprehended as one or external existing mechanism, and then it must become the being subjects' repugnant things which will not bring any happiness to the subjects necessarily. To make one final point, it is necessary to take honest as virtue. Feigned actions mainly stem from covetous thoughts of some people in the market economy, whose appetites are so uncountable, endless and complicated that they can be changed into abnormality, irregularity and infringement of rules. If the award to the subjects is always labeled as a material satisfaction, the covetous thoughts will be audacious and unprincipled, and wantonly harass the people's homeland just like predators in flood. The award of the subjects, however, should be labeled as honest which should be defined as virtue. Only in this way can the subjects discipline and examine themselves' and other's existence with a fair, impartial and just yardstick and in a fair, impartial and just sight.

III

From autonomy to democracy, the subjects also need the cultivation or practice of the democratic spirit for selves as an intermediary link. Such an intermediary link is also a post house which the autonomy to become democracy must pass through. And autonomy staying in this link requires the subjects to cultivate and practice the democratic spirit.

In author's opinion, the being subjects should start with the cultivation of the democratic spirit in following four aspects:

Firstly, it is necessary to strengthen learning and accumulating democratic knowledge. Democracy is either a Given existence or a changeable existence. Its Given existence means that it is an integration of ways, skills, experience and ideologies about the power's division and application which abstract from processes of the subjects on its natural existence, and tracing in ontology, its existence correlated with its natural existence at first, therefore, it is not beyond its history and process of existence. Its changeable existence means that democratic values, significance and norms are an effect of human or creative existence rather than of natural existence, which, meanwhile, always transcends the scope of its existence to individuals. Therefore, the subjects need to learn and accumulate democratic knowledge in order to enhance democratic skills and cultivate the democratic spirit. Democratic knowledge includes the knowledge of politics, law, philosophy, sociology and all kinds of ideologies, etc, inherited from human history. And the process of learning and accumulating is one of drawing, refining and practicing democratic knowledge.

Secondly, it is necessary to cultivate and train the democratic consciousness, which is an acquisition from nurture rather than from born gift and mainly stresses that the subjects can understand their subjective existences. The subjectivity can reflect on not only the subjects' themselves governing themselves but also the subjects' themselves coexisting with others in amity. And it is rational one that can exhibit in the double-stressing and combining proportionally of the right and the obligation rather than narrow one that can only focus on the right and set aside the obligation, or only underline the obligation and turn blind eyes to the right. The essence of democratic consciousness fundamentally reflects in the double-stressing and combining proportionally of the right and the obligation. Any un-equilibrium in the stressing of the right and the obligation should be a misunderstanding of the essence of the

democratic existence. In today's society where social relations are becoming more and more intimate, democratic development stresses the importance of this essential existence more comprehensively than ever before, for any specific subjective existence may be the intermediary link for others' existence or the barrier for other's existence. Every subject may become the intermediary link for others' existence if one can be trained effectively in the perfect democratic environment and abide by the democratic rules. Conversely, one can only become the bar of other's existence. So, it is necessary to cultivate and train the democratic consciousness.

Thirdly, it is necessary to develop and cultivate the freedom consciousness. Only if the subjects have understood the freedom in the un-freedom or the un-freedom in the freedom can they get freedom, or not. Freedom does not mean that one's existence can override others' existence, or impose one's freedom on other's un-freedom. Hence, if one wants to gain freedom, one should pay costs equal to the freedom that one wants to gain. The premise as an existent freedom only evinces a metaphysics; the freedom as a real being only can be in the price paid for freedom by the specific subjects. It requires that the subjects should set up and practice above thought and conception to cultivate and shape the democratic spirit. Because it is necessary to have the freedom consciousness participate in shaping of the democratic spirit, which needs the subjects to foster and cultivate the freedom consciousness.

Fourthly, it is necessary to develop and cultivate the fair consciousness which is one that surpasses the narrow consciousness of individuality. The subjects with the fair consciousness are an existence in which they can examine closely the existence of itself and other and its mutual association and can surpass the narrow existence of the self-consciousness and of being in self. To nurture and cultivate the democratic consciousness, it is necessary to nurture and cultivate the fair consciousness, likewise, in order to nurture and cultivate the fair consciousness, it is necessary to nurture and cultivate the democratic consciousness and the freedom consciousness. Consequently, in order to cultivate the democratic spirit ,it is necessary to nurture and cultivate the fair consciousness certainly.

In author's opinion, practicing of the democratic spirit should defer to three aspects as follows.

Firstly, the being subjects should be good at joining in the democratic activities. The ultimate goal of the democratic practicing is to practice democracy in the real world, so, the democratic practice must

become the destination of nurturing the democratic spirit which needs to be inspected, improved and enhanced in the democratic practicing. Thus, that the subjects should be good at joining in the democratic activities will become the touchstone and the base of the being subjects' surpassing and improving themselves.

Secondly, the being subjects should be good at rising to challenges by which the being subjects can be steeled, enhanced and improved. The being processes of the being subjects are those that the subjects go on continuously meeting, taking on and overcoming challenges. The challenges are the best teacher of the being subjects. It is in the challenges that the being subjects can be improved and perfected. And likewise, there must be a lot of challenges in the practical process. Only dare to meet, take on and overcome the challenges can the being subjects become winners ultimately.

Thirdly, the being subjects should be good at accumulating, summing up, and completing experience in the practical processes where accumulating experience is regarded as re-practice, summarizing re-thinking, and perfecting re-lifting. Therefore, only going on continuously accumulating, summarizing and perfecting experience can the subjects be going on consolidating the gains of the democratic practice, improving of the subjects' themselves and pushing the social democracy forward.

The process from autonomy to democracy is a development course either which the special subjects as democratic citizens must undergo, or which democracy as a mature system must go through in a specific social context. The mature democracy is an institutional, conceptual and practical existence which must go through many practical links and be moulded comprehensively and deeply. Any attempt to skip these links to build the mature democracy must forfeit its future, which is the truth proved by history repeatedly.

References:

[1]Martin Heidegger *Being and Time*[M].Beijing Sanlian Bookstore,2006.

[2]Edmund Husserl *Time Consciousness Phenomenology*[M].Beijing Commercial PressMar,2009.

[3]Immanuel Kant *Practice Rational Criticism*[M].Beijing People's Press,2003.

The hardships faced in the path of democratisation:
Democratisation against conservatism and Turkish experience[1]

Dr. Zeynep Üskül Engin[2]

Abstract: Social changes are the common features faced in all socities with its societal surges, processes of ambiguity and transition phases. These changes, therefore, pose a vital role in order to maintain the existence of the society. These can emerge in the technical and political organisation of the society, in its culture and various institutions, and thus can be profound and efficient in affecting the structure of the society. Besides, these changes can be slow/fast, smooth/tough, long-term/short-planned, regular/random, planned/unplanned and permissive/oppressive. For some countries democratisation may mean a societal change in this sense. Adoption of Western values, opening its doors to the West's culture of law and changing the existing political system is an extensive alteration bringing along many others. Hence, for the jurists it is highly striking that the laws are being utilised to establish this change. Above all, laws emerge as an exerting force in the hands of the ones holding the political power. Societal engineering by the help of the laws can create possible alternative outcomes in order to apply the desired; however in traditional and conservative societies a resistance can occur, and there can always be a likelihood of the segregation of the multi-lingual or multi-religious socities. If these mentioned societies, once ruled by a single authority, the difficulties are multiplied. In spite of the political, social, economic and cultural efforts in order to root the changes in the society there can occur some serious reactions and resistance. The acceptance of material culture is much easier than the spiritual one; that is the reason why, for example, when members of the society accept technological changes rapidly (i.e mobile phones), they cannot show the same tendency against the alterations in laws (i.e. capital punishment), and this eventually stands as an obstacle against the emergence of culture of law. Under the circumstances where there is less reaction against democratisation, naturally each country's history, moral structure, socioeconomic situation and societal balance are influential.

[1] The research has been financially supported by Galatasaray University Research Found.
[2]Associate Proffessor, Galatasaray University Law Faculty.

The aim of this article is to discuss the hardships that faced Turkey in the path of democratization. The main objective is to open mentioned issues into discussion which would based on experience.

Keywords: Democratization, Conservatism, Turkey.

Introduction:

Social changes are the common features faced in all societies with its societal surges, processes of ambiguity and transition phases. These changes, therefore, pose a vital role in order to maintain the existence of the society. These can emerge in the technical and political organisation of the society, in its culture and various institutions, and thus can be profound and efficient in affecting the structure of the society. Besides, these changes can be slow/fast, smooth/tough, long-term/short-planned, regular/random, planned/unplanned and permissive/oppressive.

Examining a country which is perfectly in order and has solved most of its problems can reach to fine scientific conclusions; however, it can also be claimed that the search can thus be ordinary and reach to less appealing results. Actually, for a social scientist it is rather interesting to examine Turkish society. Each society is in motion but Turkish society has been experiencing the greatest breakings, and has been presenting itself as a society of ongoing change. Even, there have been numerous changes since the moment when the title of this article was chosen and the time when it started to be written. Plus, during this period everyone has given astounding reactions, and thus embodying features that would affect the course of this study.

As an example that can be given to this is that in late May, what attracts the whole Turkish country and the entire world - receiving support from Brazil, and more or less at the same period there have been concurrent large-scale protests in Brazil - are the protests against a construction of a shopping mall in the city centre in Gezi Park, Taksim, İstanbul. What actually lie under these are the reasons related to social, political, cultural and legal history. In order to understand the demands here, acknowledgement of past and recent issues is strongly required because Turkey's social construction is quite complex. Ethnic identities, differences in religious sects, class distinctions, cultural differences stand as a couple of factors that can be counted. Although the

project of transforming the park has been a subject which is the main interest of the environmentalists and Taksim residents, and has stood as a peaceful protest, the police have used disproportionate force and the protests have become nationwide. Despite the fact that the protests have lasted for 20 days and become popular in domestic and foreign grounds, demands of freedom and democracy have not been fully understood.

This incident has shown us directly that a society can embody two trends that are totally opposing to each other. One of them is what can be called as "individuals" adopting a western lifestyle and demanding an area of freedom where he/she can live within a democratic state. Their claim is that they have been oppressed and suppressed. The other group is a community adopting capitalist values and claiming that they have developed the country. They also put forward the traditional, paternal and religious values alongside with conservative moral approach. Another issue they bring forward is that they have once been unfairly oppressed by the former group. In order to understand the recent developments, it can also be explanatory to state that the conservative part of the society has been the ruling power for over ten years and the representing voters constitute about 50% of the population. The ruling power was the first saying that "Democracy is for everyone". However, democracy is defined as holding the majority and the authority of asking every decision without the need of a consensus.[3] This creates the cultural fault line in Turkey.

Initially, it has to be well understood that the basis of all is mainly related to the trials of Westernisation that had once put Turkey into motion.[4] Although this had embodied the efforts to save the Ottoman Empire itself, the goal had not been achieved to do so. However, we all know that these efforts were transformed in order to lay the foundation of a new state: The societal transformation that had yet to be established by the ones in the first years of the foundation of this new state resulted in some humble steps towards civilisation, modernisation, interiorisation of the Enlightenment Age and eventually democracy. Turkish Republic was founded thanks to a revolution, thus it cannot be said that the goals had been reached in the first years, however certain steps were taken afterwards. An evidence of this can be given as the quick attempt to establishing a multi-party system soon after the foundation of the Re-

[3] Oktay Uygun, *Demokrasi* (İstanbul: XII Levha Yayıncılık, 2011), 260.

[4] Halil İnalcık, *Rönesans Avrupası-Türkiye'nin Batı Medeniyetiyle Özdeşleşme Süreci* (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2013), 316-317.

public.

Yet, it seemed that the old habits, traces and cultural values that emerged from the Ottoman Empire that lasted for 6 centuries could not be eliminated once and for all. That was the reason why a social engineering process had begun. It is a well-known fact that this process has been long criticised by the conservatives. And when it was the time for them to hold the power by the great support they received from the public, they wanted to reverse this process. It may be possible to say that the tension that has been going on in Taksim -in front of the eyes of the world-is not on the grounds of environmental concerns, it is actually the tension between the parts of the society that have been transformed previously, and the ones that have been questioning and criticising as they think that these acts are unethical and inappropriate with their religious values.

Modernisation used to be a process which was in accordance with democratisation, and now it can be regarded as a country evolving in economic terms and modernity. However, this modernisation takes place by undermining the human rights which is a priority for democracy. The acceptance of material culture is much easier than the spiritual one; that is the reason why, for example, when members of the society accept technological changes rapidly (i.e mobile phones), they cannot show the same tendency against the changes in laws (i.e. capital punishment), and this eventually stands as an obstacle against the emergence of culture of law. This definitely lies in the past of Turkey. That is why this should be covered briefly.

I) Attempts at Democratisation of Turkey

The attempts at changing a society can embody positive intentions but they can still cause great problems. These problems generally are not due to the change itself but to the obstacles and delays in the process of this change.[5] The history of Turkey's democratisation can be written as the resistance against this. The religious powers' resistance against the renovation of the system in Ottoman Empire, the assassination of a Sultan (III. Selim), the reactionary demonstrations in 1909, the opposition of the religious leaders to the War of Independence can be given as examples. These reactions were all remembered well and when

[5] Sezgin Tüzün, *Değişmenin ve Geçiş Toplumunun Sosyoloğu: Mübeccel Belik Kıray* (İstanbul: Bağlam Yayıncılık, 2012), 27.

the new state was established these were all taken into consideration.[6] In the historical process, it has to be said that supporters of Westernisation have been influential, not the conservative trends.

As a result of this, Turkey has become the first and the sole secular country with the majority of the Muslim population. Above all, it has always been needed to prevent the reactions of the opposition to modernisation, and hence leading to some practices like monitoring religion. Turkey, with a desire to be a secular country, has applied these practices through state institutions.[7] There have been some extreme cases, though.

a) The Historical Roots of Democratisation

When searching the roots of Turkish Republic's democratisation trials, attempts in constitutionalisation take a significant place due to the loss of land that Ottoman Empire had experienced. Although the sultans were not in favour of sharing their ultimate power, they had to accept the new constituitional order in order to keep the diversified population of different languages and beliefs unified. Therefore, it can be said that Turkey has had a parliamentary experience for 150 years.[8]

Another restriction of the power of the Sultan through constitution is the effect of the winds of modernisation from the West.[9] It can be observed that there had been considerable legal, economic and social changes during this modernisation process.[10] However, even during this process some regulations were strictly opposed by the conservationalists. They had been thinking that the collapse of the Empire could have been hindered by religion, and thus raising voice to the reforms.[11]

---

[6] Suna Kili, *Atatürk Devrimi* (Ankara: Türkiye İş Bankası Kültür Yayınları, 1981), 268-269.

[7] Zeynep Özlem Üskül, "L'Affirmation de la Laïcité en Turquie: Un Gage de Modernité", *Politique et Sécurité Internationale,* No: 3 (1999): 23. H.N. Kubalı, Anayasa Hukuku. Genel Esaslar ve Siyasi Rejimler (İstanbul: Ersa Matbaacılık Koll. Şti, 1965), 356.

[8] E. Günal, *Türkiye'de Demokrasinin Yüzyıllık Serüveni* (İstanbul: E Karakutu Yayınları, 2009), 24-31.

[9] Öktem, N. "La Philosophie de la Révolution Française et l'Empire Ottoman", İÜHFM, No: 1-4, 1987, 150-152.

[10] Aydın, M. A. İslam-Osmanlı Aile Hukuku, Marmara Üniversitesi İlahiyat Fakültesi Yayınları, No: 11, İstanbul, 1985, 127. Kılıçbay, M. A. "Osmanlı Batılılaşması", in *Tanzimat'tan Cumhuriyet'e Türkiye Ansiklopedisi,* Tome: I, İletişim Yayınları, İstanbul, 1985, 150-152.

[11] Tüccarzade İ. H. "Aile Hayatımızda Avrupalılaşmanın Tesiri", in *Sosyo-Kültürel*

b) Atatürk's Republic and Attempts in Modernisation:

Turkish Republic, which was founded in a much smaller land than the Ottoman Empire, has been aiming at eliminating false beliefs hampering the development of the country and ending the intervention of religion to state affairs. Instead, scientific, positive and Western values should be the main goals.[12] Democratisation brings along the modernisation, and modernisation is directly used as the synonym for Westernisation. Democracy is a product of western philosophy which has its roots in Ancient Greece, and today democracy is mainly based on human rights; in short it can be named as a participatory democracy. That is the reason why democracy is not solely the governance of the ones holding the power. It is more the reflection of an earthly social philosophy to some extent.[13]

The process of Turkey has been quite different from other developing countries and the West: Turkey has not been colonised. Therefore, the criticism against the claim that it has been left underdeveloped like countries in South America and Africa is not valid.[14] Plus, it has never colonised, it created its own statism.[15] However, for some time there has been an authoritative political tutelage period when passing through democratisation. The reason why the term "tutelage" is used[16] is that the target was a structure of a state which is Westernised, modern and contemporary. Yet, it is indicated that it is this "tutelage" period which led the way to the multi-party democracy.[17] A single-party governance was preferred at the beginning because it is attributed that Turkish society was classless, unprivileged and a collaborative society.[18] Besides, the

---

Değişme Sürecinde Türk Ailesi, (Ankara: T. Başbakanlık Aile Araştırma Kurumu, 1992), 1076.

[12] Tüccarzade, "Aile Hayatımızda Avrupalılaşmanın Tesiri", 1079.

[13] İnalcık, *Rönesans Avrupası-Türkiye'nin Batı Medeniyetiyle Özdeşleşme Süreci, 363.*

[14] Anthony Giddens, *Sosyoloji/ Kısa Bir Eleştirel Giriş* (Ankara: Siyasal Kitabevi, 2012), 135.

[15] B. Lewis, "Why Turkey is the Only Muslim Democracy?", *Middle East Quarterly,* http://www.meforum.org/216/why-turkey-is-the-only-muslim-democracy (accessed 12.6.2013).

[16] Levent Köker, Modernleşme, Kemalizm ve Demokrasi (İstanbul: İletişim Yayınları, 2012), 17.

[17] Köker, *Modernleşme, Kemalizm ve Demokrasi,* 17. Ahmet Taner Kışlalı, *Forces Politiques Dans la Turquie Moderne* (Ankara: Sevinç Matbaası, 1968), 16.

[18] Köker, *Modernleşme, Kemalizm ve Demokrasi,* 245.

early Parliament was not homogeneous embodying the revolutionists and conservationalists. Although the parliament did not have a multi-party structure, with its controversies and tensions, it operated as a pluralist parliament.[19] Consequently, blaming Atatürk with dictatorship stays as unfounded allegations by the conservationalists who have been opposed to change from the very beginning.

Besides, the revolutionists as being in favour of modernisation and secularism and familiar with Western culture eased the way of democratisation. It is not possible to establish a democratic government without secularism. Kemalism was considered an anti-religious ideology, but it is important to say that it had nothing against the Islamic religion, his point is to deny religion as a source of political power.[20]

c) Imposition of a New Way of Life

If democracy is a product arising from a series of economic and cultural changes during the Renaissance period, then there raises the question how the non-Westernised countries shall be democratic. Westerners think that for democratisation, capitalism, adequate economic development and cultural improvement level should be essential. For this reason, the necessary conditions for democracy and the social cultural structure brought by modernity is an economic sub-structure relying on capitalism. Then, the non-Western and anti-democratic societies have to go through a very quick transition phase so as to accelerate the process and to have a democratic system.[21] This certainly creates the necessity of acceleration by a direct interference to build modernity and democracy which was established by a more natural process. Therefore, in order to implement this speeding up process a multi-directional infrastructure started to be formed in the fields of law, education and especially in lifestyles.[22]

For Turkey democratisation meant a significant societal change. The process of a society that was once ruled by a Sultan into a democratic, constitutional and a legal state is at the same time signifies the history

[19] T. Z. Tunaya, *Devrim Hareketleri İçinde Atatürk ve Atatürkçülük* (İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2007), 181.

[20] Emre Kongar, "Turkey's Cultural Transformation", http://www.kongar.org , 9 (accessed 15.4.2013).

[21] Köker, *Modernleşme, Kemalizm ve Demokrasi*, 16.

[22] Mübeccel Belik Kıray, *Değişen Toplum Yapısı*, (İstanbul: Bağlam Yayınları, 1998) 7.

of Turkish Republic. Accepting people as individuals and not as a part of a religious community and basic human rights and adoption of legal structure and institutions led way to a comprehensive change in social structure. Through the laws there have been great changes to especially educational institutions and family during this period.

Social engineering by laws can create positive outcomes in societies; but multi-lingual and multi-ethnical societies with traditional cultural values, possessing a long historical past can face some serious resistance. If the changes are towards democratisation and if the society is exposed to authoritative governance, democracy can be a regime which can attract considerable amount of reaction. It is not possible to say that these changes were accepted once and for all. Surely, social engineering implementers are like the engineers, they must work with resistive materials[23], that is why they have taken economic (financial aid to the formal wives of the Korean and Second World War soldiers only on the condition that they have civil marriage[24]), cultural (encouraging positive sciences, teaching of western philosophy, support to arts, dress code), societal (changes in the family law) measures through laws. Still this did not protect them from social reactions, and thus created the problems of Turkish sociology of law despite their existence until today.

It has always been appealing to study the efforts and the obstacles since the first years of the Republic. It is not possible to mention all in this study, the conservative attempts to stand against modern Turkish society is to be explained in certain limits. As exemplifying them would be more enlightening, two areas are to be mentioned: Family and Education. The basic reason why these have chosen them is that the first step of democratisation is in family and secondly, education provides the basic principles of this area theoretically and practically for various people coming together. Besides, these two institutions are handled by laws. The controversy that has been stated above is the reflection of the uncompromising views of two parts of the society.

aa) Family and Social Transformation:

Democratic societies have noticed that the individuals of which

[23] K. Makkar, "Law is a Tool for Social Engineering in India", http:// www.manaputra.com (accessed 10.4.2013)

[24] S. Timur, "Türkiye'de Aile Yapısının Belirleyicileri", in *Türk Toplumunda Kadın* (Ankara: Türk Sosyal Bilimler Derneği, Çağ Matbaası, 1979), 169.

are formed in the families and enough importance should be given to education. In today's world, education starts at the age of three and preschooling becomes increasingly important and formal education should go on until the students are at the age of seventeen or eighteen.

When looking at the history of Turkey the modernisation acts in Ottoman Empire were reflected on the family law. In these years, the Ottoman intellectuals believed that some changes were needed related to families and that the Empire could be saved only by this way. Above all, they were defending that women should be educated and the obstacles hindering the development of the society could only be removed by science.[25] Nevertheless, this reflection did not open a radical way for a change. Some legal regulations were made in civil law (Mecelle), but being hesitant due to the possible reactions of the conservative part of the society, family law and law of inheritance were excluded.[26] Later although a regulation was made related to the family law, (Hukuk-ı Aile Karanamesi) this was mainly to inform the state about the marriages; otherwise the applications of religious principles were not restricted. Early marriages (girls at the age of 9 and boys at the age of 12) and polygamy on religious basis were allowed.[27] This situation creating a main inequality and other inconveniences, could not be changed due to the possible reactions of conservative part of the society. The regulations related to family, changed to great extent by the reception of Swiss Civil Code in 1926. There was then a new family model that was wanted to be created, and this model was significant because it would lay the foundation of a democratic country.

During this period, some circles that wanted the application of religious principles had been insisting on acceptable issues by the secular and democratic countries. The priority was of polygamic marriages: In fact, apart from the Sultans and statesmen in Ottoman society mo-

[25] İ. H. Tüccarzade, "Aile Hayatımızda Avrupalılaşmanın Tesiri", in *Sosyo-Kültürel Değişme Sürecinde Türk Ailesi* (Ankara: T. Başbakanlık Aile Araştırma Kurumu, 1992), 102.

[26] Cem Baygın, "Atatürk'ün Hukuk Devrimi", *Atatürk'ün 125. Doğum Yılında Armağan* (Erzincan: Erzincan Üniversitesi Hukuk Fakültesi, 2007), 21. Bülent Tahiroğlu, "Tanzimat'tan Sonra Kanunlaştırma Hareketleri", in *Tanzimat'tan Cumhuriyet'e Türkiye Ansiklopedisi* (İstanbul: İletişim Yayınları, 1985), 594.

[27] Halil Cin and A. Akgündüz, *Türk Hukuk Tarihi, Özel Hukuk* (İstanbul: Osmanlı Araştırmaları Vakfı, 1996), 87. H. Aktan, "İslam Aile Hukuk", in Sosyo-Kültürel Değişme Sürecinde Türk Ailesi (Ankara: T. Başbakanlık Aile Araştırma Kurumu, 1992), 102.

nogamy was more common.[28] Yet, it can be clearly stated that polygamy is an orientalist legend, not a fact of the period.[29]

The newly adopted civil law did not reflect the traditions and customs of the society; on the contrary what was expected from the Civil War was to change these laws.[30] This law was one of the most important steps taken for the modernisation of Turkish Republic. What was understood from modernisation was Westernisation, development and creating a new culture is inevitable for a societal transformation. This law appeared as one of the most important tools for social transformation through laws.[31] The forcing power of modernisation found its place in this law which was mainly aiming at being contemporary. When taking into account the parallelism between modernisation and women, there were some regulations enhancing the status of the women that could be named as "state feminism"[32] in the first years of the Republic. Creating a legal system in which the men and women are equal has the utmost importance for democratisation because it is not possible to name an individual or a society as a democrat where there is a distinct discrimination between men and women.[33] With this law, instead of a paternalist culture a new approach was to be established. Accordingly, reception of the Swiss Civil Code was not only meant to make a brand new regulation but also to reach the same level of the host country and culture[34], segregate religion only to conscience and make it retreat from the public domain.[35] It is also very important to mention this point: Westernisation

[28] A. M. Aytaç, "Türkiye'de Ailenin Tarihsel Dönüşümü", in *1920'den Günümüze Türkiye'de Toplumsal Yapı ve Değişim* (Ankara: Phoenix Yayınları, 2012), 308.

[29] Fanny Davis, *Osmanlı Hanımı. 1718'den 1918'e Bir Toplumsal Tarih* (İstanbul: Yapı Kredi Yayınları, 2006), 103. Ö. Demirel and A. Gürbüz and M. Tuş "Osmanlılarda Ailenin Demografik Yapısı", in *Sosyo-Kültürel Değişme Sürecinde Türk Ailesi* (Ankara: T. Başbakanlık Aile Araştırma Kurumu, 1992), 102. Alan Duben, *Kent, Aile, Tarih* (İstanbul: İletişim Yayınları, 2012), 143.

[30] Nilüfer Göle, *Modern Mahrem* (İstanbul: Metis Yayınları, 2011), 105.

[31] H. Çetin, "Gelenek ve Değişim Arasında Kriz: Türk Modernleşmesi", *Doğu-Batı,* Yıl: 7(2003-2004), 25.

[32] Ülker Gürkan, "Türk Devleti ve Kadına Yönelik Hukuk Politikası", *20. Yüzyılın Sonunda Kadınlar ve Gelecek* (Ankara: Türkiye ve Ortadoğu Amme İdaresi Enstitüsü, 1997), 13.

[33] Emre Kongar, *Demokrasimizle Yüzleşmek* (İstanbul: Remzi Kitabevi, 2007), 79.

[34] Cahit Can, *Türk Hukukunun Kökenleri ve Türk Hukuk Devrimi* (İstanbul: Kaynak Yayınları, 2012), 164.

[35] A. Davison, *Türkiye'de Sekülarizm ve Modernlik* (İstanbul: İletişim Yayınları, 2012), 315-316.

during Ottoman period had been directed by some Western countries for their own interest, but in the later case the decisions for westernisation and modernisation were taken independently soon after the war that was won against the Western nations.[36]

The legal grounds that are needed for the family law are required by the secularity. For this reason, there is a close relationship between secularity and civil law regulations in Turkey. Naturally, conservative part of the society was highly worried that the nation would be anti-religious due to reception of the law from a Christian country, and that it was being a democratic law including principles of equality between men and women.

The revolutionisers were for modernisation, and this resulted in the basis of separation between the parts of the society as modernisers and conservationalists.[37] The main reason for that is the perception that the essence of Western civilisation is Christianity.[38] The answer given to this is as follows: The foundation of this civilisation is not on a religious basis; it is on a philosophy which is based on reasoning of concepts developed by Ancient Greek. This philosophical approach does not depend on a religious dogma but on a rational humanism.[39]

Early in the period as the communication networks and especially transportation was underdeveloped, the public did not know much about the Civil Code, and consequently failed to adapt themselves to a certain extent. However, as the people of a newly founded country they tried to do their best to implement the requirements of the new law due to the excitement of the period when the war had recently ended. It has been alleged that after the acceptance of the Law there have been great changes in legal and social circumstances.[40] Nonetheless, there have been some complaints that the implementers of the Law were careless and suffered from the lack of knowledge.[41] And, unfortunately these complaints and criticisms are even valid for today.

When we have a look at today' s problems:

---

[36] Can, *Türk Hukukunun Kökenleri ve Türk Hukuk Devrimi* ,165.

[37] Köker, Modernleşme, Kemalizm ve Demokrasi, 18.

[38] S. S. Onar, "Medeni Kanunun İçtimai Bünyemiz Üzerindeki Tesirleri ve İçtimai Kıymeti", İş, No: 30-31, (1953), 184.

[39] İnalcık, Rönesans Avrupası, 276.

[40] Onar, "Medeni Kanunun İçtimai Bünyemiz Üzerindeki Tesirleri ve İçtimai Kıymeti", 182.

[41] Ibid, 185.

1. Early marriage is a social practice that is still applied today and is based on religious, economic and traditional reasons. In fact, every citizen is considered as immature until 18 and has to be educated. Some exceptional reasons are required for marriages of under 18 and judicial decisions are only for the ones who completed the age 17.
2. The Civil Code did not prohibit religious marriage ceremonies; however civil marriage is compulsory, and upon request religious marriage can be performed along with civil marriage. This article was added in order to prevent polygamy. But, this regulation has been an issue of concern after the acceptance of Civil Code.[42] Especially, illegitimate children are excluded from the rights that are provided by the laws.[43]
3. In some areas because of the economic, traditional reasons polygamy continues. There have been some efforts to increase the girls' level of education in order to eliminate this situation leading to social and legal problems.
4. And again for economic and traditional reasons there has been an ongoing problem of dowry because of the poor situation of women in households. The law did not prohibit this, yet ignored it. This situation has resulted in some controversial verdicts of the Supreme Court. Besides, in some areas of the country, in order to avoid dowry, brides are still exchanged in religious marriages, which is named as "berdel".

As it can be clearly understood from the points that are stated above, a conflicting condition is the point in question of traditions and implementation of laws. A renowned Turkish historian says "In families social engineering cannot be applied".[44] It is for sure that changing a conservative institution like family would receive reactions. Yet, from the Ottoman period the situation has been quite different. There have occurred a body of women who are educated, work and are aware of their rights. However, the pressure of the conservative part of the society on girls and the bringing up of the boys in strong family values stand

[42] M. Şekib, "Monogami Meselesi", İş, No: 1 (1953), 142.
[43] Yücel Turgay, "Les Traits Essentiels du Droit Familial en Turquie", in *Le Droit de la Famille en Europe* (Strasbourg : Presses Universitaires de Strasbourg, 1992), 173.
[44] İlber Ortaylı, *Osmanlı'yı Yeniden Keşfetmek* (İstanbul: Timaş Yayınları, 2006), 44.

as an obstacle against the individualisation of women.

In the application of the Civil Code and on legal basis the conservative resistance has been proceeding. As a matter of fact, important steps have been taken in conservatism in the last ten years, a new social engineering movement has begun. To illustrate, Article 50 of the constitution that says "the young, women and the physically and emotionally incapable shall be protected."- the word 'women' proves another masculine point of view. Apart from this, in accordance with the latest policies the title of "Ministry of Women and Family" has been changed and instead "Ministry of Family and Social Policies" has been established. Another example is in marriage. Religious ceremony is not allowed before the civil marriage. In the previous criminal law, this was considered as a serious offence and the offenders were to sentenced to imprisonment from a term of 2 to 6 months. And if the man is already married, the sentence was from a term of 6 months to 3 years. Specifically, this subsection was included in order to avoid fellow briding.

In the period of the conservative government this law was changed as thus: "Anyone who holds a religious marriage ceremony without a civil marriage shall be sentenced to imprisonment from a term of two to six months. However, if a civil marriage is carried out, any public proceedings, sentences and other consequences thereof should be cancelled."[45] In this case, there can be some individuals who would prefer religious marriage until divorce, which may help them demonstrate themselves as married couples in the society.

The traces of an understanding which wanted to take women to the centre of the society are being erased by another social transformation movement. This country which has evolved in terms of democracy, has been tried to be converted into its religious features embodying family values, traditions and religion. In this country, where the process of being a social state has not been completed yet, women are encouraged to have more than one child. Apart from this, the conservative government are dictating the medical procedures to have children, and the majority of women-especially educated- stand against this situation as the right of abortion is being taken away and pregnancy is not kept confidential and recorded without the will of the pregnant women.

[45] Zeynep Özlem Üskül Engin, *Hukuk Sosyolojisi Açısından Türkiye'de Evlenmenin Evrimi* (İstanbul: Beşir Kitabevi, 2008), 201.

bb) Education:

aaa) Special Importance Given to Girls:

In this country, education of girls because of tradition and religious reasons have always been a controversial issue. Girls are not educated and this is mainly because of a paternalist attitude. Girls being monitored by codes like chastity, suppression they are facing, unconditional obedience to men and economic dependence hamper their education.[46] Especially in rural areas, girls are to be given up easily in terms of education.[47] A part of the unschooled girls are forced to marry in spite of the age limit defined by the Civil Code. By this way, both ignorance and early marriage bring along many problems (miscarriages or death in childbirth). According to some researches, families have sent their daughters to some courses in order to make them learn Arabic; but these girls have failed in learning and using Turkish.[48] In Islamic sect of the society, there is a strong circle in Central Anatolia tagging themselves as "Islamists, not concessive, conservative in changing the identity and ideas" , who are in accordance with this part of the society. This kind of resistance is more in adopting new styles and structures and internalising them.[49] Clearly, these girls would not be educated and thereof would not change.

The foundation of a democratic and a modern country is equality between men and women, Kemalist revolution paid adequate importance to women's rights. For example, the right to vote and stand for election was hold before any European country in 1934. An educational mobilisation started, and women were taught that they had rights. Everybody was given the right of education; and therefore equality was established in this field. In 1923 and 1924 the number of female students were 62.954 while this figure was 256.061 in 1937-1938.[50] Nevertheless, during this period the female students were expected to reflect this edu-

[46] Aksu Bora and İlknur Üstün, *Sıcak Aile Ortamı* (İstanbul: Tesev Yayınları, 2008), 19-21. Üskül Engin, *Hukuk Sosyolojisi Açısından Türkiye'de Evlenmenin Evrimi,* 91.

[47] Mübeccel Kıray, "Sosyal Yapı ve Nüfus Artışı Etkileşimi", *Toplumsal Yapı Toplumsal Değişme* (İstanbul: Bağlam Yayınları, 1999), 164.

[48] Durmuş Tezcan, *Türklerle İlgili Stereotipler (Kalıp Yargılar) ve Türk Değerleri Üzerine Bir Deneme* (Ankara: Ankara Üniversitesi Eğitim Fakültesi Yayınları, 1974), 91.

[49] Ali Bayramoğlu, Çağdaşlık Hurafe Kaldırmaz (İstanbul: TESEV Yayınları, 2006), 88-89.

[50] Nurgün Koç, Köy Enstitüleri (İstanbul: İdeal Kültür Yayıncılık, 2013), 48.

cation eventually at home in spite of the importance given to education. "The order of the house is the order of the country" was the widespread thought.[51] At the girl's institutes the curriculum was mainly based on household chores. Their educational policies were aiming at, "the training of girls as prospective mothers who are going to raise a new nation"[52], and were seen as the "spreader of the Western civilisation"[53] in the first years of the Republic. The values of the Republic wanted to be internalised in these institutions.

And for the ones who wanted to continue their education, instead of being a doctor they are expected to become nurses since nursing and care is a continuation of their household activities.[54] Alongside the fact that women are trained for these professions, in education, the textbooks have been designed to serve the purpose of permanent gender roles. To exemplify, in these coursebooks women have been portrayed as mothers making pickles and jam, but fathers while reading paper coming home from work.[55]

When observing the situation of today definitely considerable improvement has been made. Certainly, there are problems. These problems are trying to be solved from many aspects. Such as, private enterprises have been contributing by building schools and dorms for girls. This is highly important because then families would be able to send their daughters to a further place to have education. To encourage, state has been honouring the aider by giving his/her name to the schools or make them benefit for tax reduction. Media have been launching campaigns for the schooling of girls by the help of celebrities. NGOs have been showing great efforts to support schooling of girls. In rural areas, civilian authorities have been collaborating with the teachers to persuade the families.[56] Through the laws supporting social engineer-

[51] Elif Ekin Akşit, *Kızların Sessizliği Kız Enstitülerinin Uzun Tarihi* (İstanbul: İletişim Yayınları, 2012), 183.

[52] Akşit, *Kızların Sessizliği Kız Enstitülerinin Uzun Tarihi,* 145.

[53]Ibid, 196-197.

[54] M. F. Hatem, "19. Yüzyıl Mısır'ında Sağlık Mesleği ve Kadın Bedeninin Denetlenmesi", *Modernleşmenin Eşiğinde Osmanlı Kadınları* (İstanbul: Tarih Vakfı Yurt Yayınları, 2000), 64-68. L. Şimşek-Rathke, *Dünden Kalanlar. Türkiye'de Hemşirelik ve GATA TSK Sağlık Meslek Lisesi Örneği* (İstanbul: İletişim Yayınları, 2011), 14.

[55] F. Gümüşoğlu, "Cumhuriyet Döneminin Ders Kitaplarında Cinsiyet Rolleri (1928-1998)", in *75 Yılda Kadınlar ve Erkekler* (İstanbul : Tarih Vakfı Yayınları, 1998), 106.

[56]"Yeter ki Kızlar Okusun", http://egitim.milliyet.com.tr/yeter-ki-kizlar-okusun/ilkogretim/haberdetay/04.05.2010/1233400/default.htm (accessed 4.5.2010).

ing, the families who do not send their children to schools are fined, or imprisoned.[57] This is also a very positive development for the boys who can also face the risk of being used in labour force. Nonetheless, an ongoing deficit in teaching staff and ideological changes that were made by every ruling power resulted in a dead end road.

bbb) Education as a Tool of Secularisation and Modernisation

The efforts to create a new society caused grand expectations from the society. Education is used as a fundamental instrument of reshaping society in the social transformation progress.[58] The education system laid on a reaction against Ottoman religious education and erased its traces.[59] The aim of the revolution was to create an individual not a religious community, a society not a communion.[60] Consequently, the anti-revolutionists have always emphasised the importance of religious education and wanted some regulations for wiping out the traces. From time to time, even some parties that are for revolution have supported these regulations for the sake of increasing their votes.[61] Nowadays, educational policies intend to build a more conservative society. And the instrument has always been religion lessons. That is why the opponents of revolution have emphasised the importance of religious education and asked for some regulations to erase the traces of revolution.

In Ottoman Empire, illiteracy rate was high and people were uneducated. It is a well-known fact that despite the significance given to education, the rate of literacy could not be increased. One of the most important cultural and educational reforms was the change of the alphabet from Arabic to Latin letters on 1 November 1928.[62] Latin alphabet was more convenient and easier than the Arabic alphabet. Elementary school students can learn how to read and write just in two months. Naturally, this change was criticised: The change of the alphabet was

[57] Turhish Civil Code Article 55.

[58] Ercan Uyanık, " II. Meşrutiyet Dönemi'nde Toplumsal Mühendislik Aracı Olarak Eğitim: İttihat ve Terakki Cemiyeti'nin Eğitim Politikaları (1908-1918)", *Amme İdaresi Dergisi*, 42/ 2(2009), 68.

[59] Emre Kongar, *Kültür Üzerine* (İstanbul : Remzi Kitabevi, 2008), 75.

[60] Ortaylı, *Osmanlı'yı Yeniden Keşfetmek*, 268.

[61] Çetin Yetkin, *Karşı Devrim (1945-1950)* (Ankara: Kilit Yayınları, 2011), 447.

[62] Kongar, Turkey's Cultural Transformation, 11.

"the first phase of purificationism". That purificationism caused "a cognitive rupture" and this movement made it impossible to establish communication with the past.[63]

One of the changes that were made for secularisation was the law on unification of education (1924). Through this law, the Moslem theological schools were closed, and education has become completely secular.[64]

It is a republic target to create a democratic, individual and modern society. Conservatives, on the contrary, has been thinking that education does not mean seperation from tradition and that the community should come before the individual. Modern, the new innovative-traditional Islamic part of the society adapting themselves to the capitalist system have encouraged to apply technology in the classrooms; but at the same time favoured a less creative and analytical education system, and have made legal regulations to establish this starting from the elementary school. Besides the number of high schools giving religious education has been increasing dramatically; and these schools are taking the place of the regular schools. Graduates of these can become doctors, lawyers or judges. The objection to this is thus: A person who has a religious education cannot relate the principles of law. and his educational background can contradict with these.[65] While these high schools were a vocational school raising clerks, these now have become a widespread educational institutions. Another problem is that religious education is given for only one sect, the others are left out. Even the members of one sect with its high population of 10 million people are obliged to get the same education. Clearly, this is not a democratic approach.

ccc) Dispute of Head Scarf and Education:

On the basis of this dispute lies the laws of revolution. Atatürk, by a dress code, was aiming at the modernisation and westernisation of Turkish society. By then, women would leave the head scarf and wear modern clothes. In fact, Turkish women were excluding themselves

---

[63] Keleş, F. "Modernization as State-led Social Transformation: Reflections on the Turkish Case", *Journal of Development and Social Transformation*, 5. http://www.Maxwell,syr.edu/uploadedFiles/moynihan/Keles.pdf?n=4211 (accessed 3.3.2013).

[64] Bozkurt Güvenç, Türk Kimliği. Kültür Tarihinin Kaynakları (İstanbul : Boyut Yayıncılık ve Tic. A.Ş., 2010), 255.

[65] Kongar, Demokrasimizle Yüzleşmek, 72.

from men and covered her hair. That was the reason why conservatives objected also to this subject.

The dispute of head scarf started when the girls were accepted to religious schools in 1951. The female students want to cover their heads due to the education they receive from school. For a long time, wearing headscarf in universities –because they were seen as areas of public domain- has been regarded as anti-secular since headscarfs are seen as a symbol of political Islam. The ones who thought that this was the violation of human rights, applied to the European Court of Human Rights, but the Court did not convict Turkey.[66]

Upon this, the conservative party in power have made some regulations cancelling the ban on head scarf. It is also important to mention that this created a certain amount of reaction from the secular sect of the country. Now, female students wearing head scarfs can have university education, but in elementary and secondary education this is still banned. The discussion is currently on labouring them in public domain because women with head scarfs can enter public domain but cannot work as a public officer or a lawyer, for example.

ddd) Koran courses:

After the 1980 *coup d'etat* religious courses (only for Sunni sect) became compulsory at schools. Just like the vocational schools, there are some high schools that educate clergy. As it can be clearly understood, no matter what their religious background is they have to get the same education. The ones who want to have religious education are contend with this, but the rest (like the ones belonging to Alevi sect) have applied to European Court of Human Rights.[67] The reason underlying these is one: the standard teaching of one sect. Recently, "the life of prophet" or "teachings of the religious book" have been added to the curriculum.

Apart from these there are other courses giving religious education. These are named as "Koran courses". There are two types of these courses. The boarding ones and the regular ones. And these schools provide a weekly 30-hour-education. There is an exit exam at the end of

[66] Ulusoy, A. "Avrupa İnsan Hakları Mahkemesi'nin Üniversitelerde Türban Yasağına İlişkin Kararları Üzerine Notlar", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 2004, 125.

[67] Güvenç, Türk Kimliği. Kültür Tarihinin Kaynakları , 247.

each term. Furthermore, there are summer courses that give a 5-day-education, and on each day there are three hours. The reason given for the opening of these courses are given as the demand of the public, which can be true to an extent that especially in summer time in rural areas these schools have some considerable popularity.

These courses are regulated by a guideline. For example, according to Article 8 "the personnel should act and be known to act accordingly to the Islam traditions". In this case, a non-practising Muslim or a Christian cannot work at those schools even as a chef. Certainly, teaching staff should be Muslim but it is unclear why the other staff should comply with this condition. This is a discriminative article and should be reconsidered.

These courses should be an educational institution and require a certain number of students, and in that case a mosque can be allocated for this purpose. (article 19/2) Thinking that the believers of a sect like Alevis do not go to mosque, it can be said that these courses are established and supported to spread one single religious view. Apart from these, the curriculum is designed by The Presidency of Religious Affairs. (article 21/3) The Presidency has been criticised as being the representative of only the Sunni sect[68], and education is provided in these courses accordingly. This is against the freedom of religion and liberty of conscience. The extra curricular materials are to enhance national, spiritual and moral improvement of the attendants. Plus, attendance is compulsory and if the attendant decides to leave, the reason is imprinted to the registry book. (article 36/1-2). Additionally, the commission which would evaluate the end of year performance have to be women for the courses where there is female enrolment. (article 43/1).This rule is discriminative and against the secular and democratic republic stated in the constitution.

Especially for poor families, children who do not attend a formal education programme spend all summer in vain, which creates a problem for the families. Although summer schools can be a solution to this problem, still millions of children attend Koran courses in summer and get Arabic religious education. This means that this education is not analytical since they do not know Arabic as a language. These courses are not related to the Ministry of Education, funded by some foundations, and these are against the Law of Unification of Education. Koran courses, like the religious high schools, have always been supported by

[68] Erdoğan Aydın, İslamcılık ve Din Politikaları (İstanbul: Kırmızı Yayınları, 2006), 262.

the conservative power, thinking that they would be the voters of their cause. In short, the new target is to create a "religious generation".[69] However, in Kemalist secularity it is stated that religion cannot be used for personal interests and political aims, and thus religion is limited to personal area of beliefs.[70] This area is being carried to the public domain, and there are serious changes in the education system, which created some serious concerns for some parts of the society.

ee) Village Institutes

A mobilisation of education movement started when the reasons of underdevelopment and bigotry were identified as the lack of education. One of the parts of this mobilisation was the village institutes. The most important educational leap to insert technology to the society was the establishment of these schools.[71] One of the other reasons was to raise the intellectual capacity of the peasants and by this way to help spread the Kemalist Revolution in the countryside.[72] In these schools intelligent peasant children would be educated and this education would be transferring to other villages. As a result, village institutes appeared as an institution both raising its own teacher and helping the development of the village. These schools were the institutions where agricultural practices such as beekeeping or viticulture were taught. Building, tailoring, forging, carpentry, healthcare and masonry were being taught. Apart from these, intellectual improvement was highly significant, so playing a musical instrument and reading classical books were the liabilities. Both girls and boys were admitted to the institutes and had both genders in the classrooms.

These institutions were founded in 1940 and closed in 1954. The closing was ideological: It was claimed that communists were educated.[73] The antidote of communism is religion.[74] For example one of the criticisms against it was that the new teachers did not show a good example

---

[69] Güvenç, *Türk Kimliği. Kültür Tarihinin Kaynakları,* 249.

[70] Köker, *Modernleşme, Kemalizm ve Demokrasi* ,175.

[71] Kongar, *Kültür Üzerine,* 76.

[72] M. Asım Karaömerlioğlu, "The Village Institutes Experience in Turkey", *British Journal of Middle Eastern Studies,* No: 25, No: 1(1998), 47.

[73] Güler Yalçın, *Canlandırılan Ütopya. Köy Enstütüleri* (İstanbul: E Yayınları, 2012) 78-79.

[74] Yetkin, *Karşı Devrim* (1945-1950) 438.

from the religious standpoint.[75] The other reason was denominational. The representatives of the dominant class were scared that there would be a structural change in society. The conservative political power in the 50s missed the opportunity of the development of villages because of their religious attachments and Ottoman links.

If one can speak of an original institution in the field of education we can say that the village institutes were truly an original Turkish creation. Schooling is still a problem in rural areas. School buildings are needed for sure, but specially trained teachers, capable of meeting the particular needs of the villagers who still complain that the teachers are not teaching useful things, are required.[76]

The transition of Turkish education from a religion based understanding into a science based one has required a long and burdensome process. This process has also evolved in accordance with the democratisation process in the Turkish history. [77]

The last words that can be said about education are that we still need radical changes for every stage of education. Turkish education system is not completely analytical, and lacks directing to meet the technological needs of the society. Because of this, it does not help either free thinking or creative abilities of an individual.[78] Today, the demonstrators of Gezi Park are well-educated youngsters following technology. Education fosters questioning. For democracy, free thinking is a must. Restructuring education and allocation of resources would contribute to democracy.

Conclusion

Turkey, as holding the Muslim majority in its population, and is governed by democracy, has set a unique and positive model.[79] Turkey's democratisation process continues with its ups and downs. It is for certain that democratisation would be beneficial for every part of the society. But, democratisation is used by the ruling power to move

[75] Alexandre Vexliard and Kemal Aytaç, "The 'Village Institutes' in Turkey", *Comparative Education Review, 8/ 1* (1964), 45.
[76] Vexliard and Aytaç, "The Village Institutes in Turkey", 46.
[77] Süleyman Çelenk, "Secularization Process in the History of Turkish Education", http://www.krepublishers.com (accessed 21.6.2013).
[78] Kongar, Kültür Üzerine, 77.
[79] Bahattin Akşit *et al.* Türkiye'de Dindarlık (İstanbul: İletişim Yayınları, 2012), 52.

along with their ideologies. It can be clearly observed that political regimes legitimize themselves by taking democratisation as a reference and shape society according to their own ideology. This can also be seen in both secular and conservative parts of the society. The part of the society that can be named as contemporary or secular positioned traditions and modernity as opposing patterns. As tradition is accepted as the negative side of modernity, the traditionalists have been convinced that they have been alienated.[80] Now that the conservatives are the ruling power, they think that it is now their turn. The fault line is cultural here and now deeper than ever.

Due to the fact that for the last ten years the military has disappeared in the political arena, the EU has supported Turkish government. In order not to lose this support, the government has acted as if they were seeking for the acceptance to the EU. The achievement of leaving the military out of the political arena, has made the government reluctant about the acceptance to the EU. This situation brings along the idea that the project of making the society more conservative is now easier and less challenging. For this reason, the conservatives have intervened the ordinary lives of the secularists, and made some regulations that can be regarded as opposed to principle of separation of powers, harming the sense of justice and limiting the freedom. Consequently, this part of the society with a foundation of revolution, and taking place in opposition has become more conservative. The reason for this is the fear of losing the system although it is not a fully democratic one. This obstructs the development of the society. There is an urgent and strong need to root the system in which everybody enjoys freedom and an area to live.

The contemporary problem of identity occurs when integrating people.[81] It seems that the conflict between longing for the roots in our country and contemporary search for identity will go on for some time. What is important here is to create a consensus not in every area, but just in one. And that is mutual respect to freedom and living together. A secular legal state can establish this. Tolerance is needed, and when this develops, Turkey will be a more democratic country.

A large part of the society is left alone in many fields by exerting an authoritative and violent methods in political, economic and cultural

[80] Tayfun Atay, "Gelenekçilikle Karşı 'Gelenekçiliğin Gelgitinde Türk 'Gelenek-çi' Muhafazakârlığı, in *Modern Dünyada Siyasi Düşünce* (İstanbul: İletişim Yayınları, 2003), 155.

[81] Güvenç, *Türk Kimliği. Kültür Tarihinin Kaynakları, 6.*

choices, allocation of resources or regulating daily lives. But they don't lose the wish to live in democracy accepting the differences. After all, the only option is democracy since it is a system which would assemble all ethnic, sectional, religious and gender diversities. It is possible to say that the actual Turkey's prior problem is not economic but democratic.

References:

Akşit, B. and Şentürk, R. and Küçükural, Ö. and Cengiz, K. *Türkiye'de Dindarlık*, İstanbul: İletişim Yayınları, 2012.

Akşit, Elif Ekin. *Kızların Sessizliği Kız Enstitülerinin Uzun Tarihi* , İstanbul: İletişim Yayınları, 2012.

Aktan, H. "İslam Aile Hukuk", *Sosyo-Kültürel Değişme Sürecinde Türk Ailesi*, Ankara: T.C. Başbakanlık Aile Araştırma Kurumu, 1992.

Armağan, M. *Türkçe Ezan ve Menderes*, İstanbul: Timaş Yayınları, 2011.

Atay, T. "Gelenekçilikle Karşı 'Gelenekçiliğin Gelgitinde Türk 'Gelenek-çi' Muhafazakârlığı", *Modern Dünyada Siyasi Düşünce*, İstanbul : İletişim Yayınları, 2003.

Aydın, E. İslamcılık ve Din Politikaları, İstanbul: Kırmızı Yayınları, 2006.

Aydın, M. A. İslam-Osmanlı Aile Hukuku, İstanbul: Marmara Üniversitesi İlahiyat Fakültesi Yayınları, 1985.

Aytaç, A. M. Türkiye'de Ailenin Tarihsel Dönüşümü, *1920'den Günümüze Türkiye'de Toplumsal Yapı ve Değişim*, Ankara: Phoenix Yayınları, 2012.

Baygın, C. "Atatürk'ün Hukuk Devrimi", *Atatürk'ün 125. Doğum Yılında Armağan*, Erzincan: Erzincan Üniversitesi Hukuk Fakültesi, 2007.

Bayramoğlu, A. Çağdaşlık Hurafe Kaldırmaz, İstanbul: TESEV Yayınları, 2006.

Bora, A./ Üstün, İ. *Sıcak Aile Ortamı*, İstanbul: TESEV Yayınları, 2008.

Can, C. *Türk Hukukunun Kökenleri ve Türk Hukuk Devrimi*, İstanbul: Kaynak Yayınları, 2012.

Cin. H./ Akgündüz, A. *T*ürk Hukuk Tarihi, Özel Hukuk, İstanbul: Osmanlı Araştırmaları Vakfı, 1996.

Çelenk, S. "Secularization Process in the History of Turkish Education", http://www.krepublishers.com (accessed 21.6.2013).

H. Çetin, "Gelenek ve Değişim Arasında Kriz: Türk Modernleşmesi", *Doğu-*

Batı, No: 7 (2003-2004).

Davis, F. *Osmanlı Hanımı. 1718'den 1918'e Bir Toplumsal Tarih*, Trad.: Bahar Tırnakçı, İstanbul: Yapı Kredi Yayınları, 2006.

Davison, A. *Türkiye'de Sekülarizm ve Modernlik*, Trad.: Tuncay Birkan, İstanbul: İletişim Yayınları, 2012.

Demirel, Ö./ Gürbüz, A./ Tuş, M. "Osmanlılarda Ailenin Demografik Yapısı", *Sosyo-Kültürel Değişme Sürecinde Türk Ailesi*, Ankara: T.C. Başbakanlık Aile Araştırma Kurumu, 1992.

Duben, A. *Kent, Aile, Tarih*, İstanbul: İletişim Yayınları, 2012.

Giddens, A. *Sosyoloji/ Kısa Bir Eleştirel Giriş*, Trad.: Ülgen Yıldız Battal, Ankara: Siyasal Kitabevi, 2012.

Göle, N. *Modern Mahrem*, İstanbul: Metis Yayınları, 2011.

Günal, E. *Türkiye'de Demokrasinin Yüzyıllık Serüveni*, İstanbul: Karakutu Yayınları, 2009.

Gümüşoğlu, F. "Cumhuriyet Döneminin Ders Kitaplarında Cinsiyet Rolleri (1928-1998)", *75 Yılda Kadınlar ve Erkekler*, İstanbul: Tarih Vakfı Yayınları, 1998.

Gürkan, Ü. "Türk Devleti ve Kadına Yönelik Hukuk Politikası", *20. Yüzyılın Sonunda Kadınlar ve Gelecek*, Ankara, Türkiye ve Ortadoğu Amme İdaresi Enstitüsü, 1997.

Güvenç, B. *Türk Kimliği. Kültür Tarihinin Kaynakları*, İstanbul: Boyut Yayıncılık ve Tic. A.Ş., 2010.

Hatem, M. F. 19. "Yüzyıl Mısır'ında Sağlık Mesleği ve Kadın Bedeninin Denetlenmesi", *Modernleşmenin Eşiğinde Osmanlı Kadınları*, Ed.: Madeleine C. Zilfi, Trad.: Necmiye Alpay, Tarih Vakfı Yurt Yayınları, İstanbul, 2000.

İnalcık, H. *Rönesans Avrupası-Türkiye'nin Batı Medeniyetiyle Özdeşleşme Süreci*, İstanbul: Türkiye İş Bankası Kültür Yayınları, 2013.

Karaömerlioğlu, M. A. "The Village Institutes Experience in Turkey", *British Journal of Middle Eastern Studies*, No: 25/ 1, 1998.

Keleş, F. "Modernization as State-led Social Transformation: Reflections on the Turkish Case", *Journal of Development and Social Transformation*.

http://www. Maxwell,syr.edu/uploadedFiles/moynihan/Keles.pdf?n=4211 (accessed 3.3.2013)

Kılıçbay, M. A. "Osmanlı Batılılaşması", *Tanzimattan Cumhuriyet'e Türkiye Ansiklopedisi*, Tome: I, İstanbul: İletişim Yayınları, 1985.

Kıray, M. B. *Değişen Toplum Yapısı*, İstanbul: Bağlam Yayınları, 1998.

Kıray, M. Sosyal Yapı ve Nüfus Artışı Etkileşimi, *Toplumsal Yapı Toplumsal Değişme,* İstanbul: Bağlam Yayınları, 1999.

Kışlalı, A. T. *Forces Politiques Dans la Turquie Moderne*, Ankara: Sevinç Matbaası, 1968.

Kili, S. *Atatürk Devrimi*, Ankara: Türkiye İş Bankası Kültür Yayınları1981.

Koç, N. *Köy Enstitüleri,* İstanbul: İdeal Kültür Yayıncılık, 2013.

Kongar, E. *Demokrasimizle Yüzleşmek*, İstanbul: Remzi Kitabevi, 2007.

Kongar, E. "Turkey's Cultural Transformation", http://www.kongar.org (accessed 15.4.2013).

Köker, L. *Modernleşme, Kemalizm ve Demokrasi*, İstanbul: İletişim Yayınları, 2012.

Kubalı, H.N. *Anayasa Hukuku. Genel Esaslar ve Siyasi Rejimler*, İstanbul: Ersa Matbaacılık Koll. Şti, 1965.

Lévi-Strauss, C. *Modern Dünyanın Sorunları Karşısında Antropoloji*, Trad.: Akın Terzi, İstanbul: Metis Yayınları, 2012.

Makkar, K. "Law is a Tool for Social Engineering in India", http:// www.manaputra.com (accessed 10.4.2013).

Onar, S. S. Medeni Kanunun İçtimai Bünyemiz Üzerindeki Tesirleri ve İçtimai Kıymeti, İş, Türk Medeni Kanununun XV. Yıl Nüshası, 30-31, No: VIII (1955).

Ortaylı, İ. *Osmanlı'yı Yeniden Keşfetmek*, İstanbul: Timaş Yayınları, 2006.

Öktem, N. La Philosophie de la Révolution Française et l'Empire Ottoman, *İÜHFM*, Tome: 1-4, (1988): 1-4.

Lewis, B. "Why Turkey is the Only Muslim Democracy?", *Middle East Quarterly*, http://www.meforum.org/216/why-turkey-is-the-only-muslim-democracy (accessed 12.6.2013).

4, 1987.

Şekib, M. Monogami Meselesi, İş, No: 1, (1953): 19.

Şimşek-Rathke, L. *Dünden Kalanlar. Türkiye'de Hemşirelik ve GATA TSK Sağlık Meslek Lisesi Örneği*, İstanbul: İletişim Yayınları, 2011.

Tahiroğlu, B. "Tanzimat'tan Sonra Kanunlaştırma Hareketleri", *Tanzimat'tan Cumhuriyet'e Türkiye Ansiklopedisi*, İstanbul: İletişim Yayınları, 1985.

Timur, S. "Türkiye'de Aile Yapısının Belirleyicileri", *Türk Toplumunda Kadın*,

Ed: Nermin Abadan-Unat, Ankara: Türk Sosyal Bilimler Derneği, Çağ Matbaası, 1979.

Tunaya, Tarık Zafer. *Devrim Hareketleri İçinde AtatürkAtatürkçülük*, İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2007.

Turgay, Yücel. "Les Traits Essentiels du Droit Familial en Turquie", *Le Droit de la Famille en Europe*, Strasbourg: Presses Universitaires de Strasbourg, 1992.

Tüccarzade İbrahim Hilmi. "Aile Hayatımızda Avrupalılaşmanın Tesiri", *Sosyo-Kültürel Değişme Sürecinde Türk Ailesi*, Ankara: T.C. Başbakanlık Aile Araştırma Kurumu, 1992.

Tüzün, Sezgin. Değişmenin ve Geçiş Toplumunun Sosyoloğu: Mübeccel Belik Kıray, İstanbul: Bağlam Yayıncılık, 2012.

Ulusoy, Ali. "Avrupa İnsan Hakları Mahkemesi'nin Üniversitelerde Türban Yasağına İlişkin Kararları Üzerine Notlar", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, (2004).

Uyanık, Ercan. " II. Meşrutiyet Dönemi'nde Toplumsal Mühendislik Aracı Olarak Eğitim: İttihat ve Terakki Cemiyeti'nin Eğitim Politikaları (1908-1918)", *Amme İdaresi Dergisi*, 42 : (2009): 2.

Uygun, Oktay. *Demokrasi*, İstanbul: XII Levha Yayıncılık, 2011.

Üskül, Zeynep Özlem. "L'Affirmation de la Laïcité en Turquie: Un Gage de Modernité", *Politique et Sécurité Internationale*, No: 3, 1999.

Üskül Engin, Zeynep Özlem. *Hukuk Sosyolojisi Açısından Türkiye'de Evlenmenin Evrimi*, İstanbul: Beşir Kitabevi, 2008.

Vexliard, Alexandre/ Aytaç, Kemal. "The 'Village Institutes' in Turkey", *Comparative Education Review*, 8/ 1, 1964.

Yalçın, Güler. *Canlandırılan Ütopya. Köy Enstitüleri*, İstanbul: E Yayınları, 2012.

Yetkin, Çetin. *Karşı Devrim (1945-1950)*, Ankara: Kilit Yayınları, 2011.

Democracy in the presence of liberalism and its enemies: the history of a concept[1]

Laurenio Sombra[2]

Abstract: Western political history has been marked and shaped by so-called liberal democracies. In the 1990s, Francis Fukuyama decreed the "end of history", with the promise of a definitive consolidation of these liberal democracies. Behind this optimism, however, lies an ideological concealment: 'democracy' and 'liberalism' represent two constructs that have not marched hand in hand since the dawn of modernity. If the essential values of liberalism were constituted on the philosophy of John Locke, the modern idea of democracy has, at least since the French Revolution, been presented as something attractive on the one hand, while also being dangerous and frightening. According to Tocqueville, although democracy is inevitable, its harmful effects must be ameliorated. A whole series of conservative thinkers, dating at least as far back as Edmund Burke, have set themselves up to react against and reduce these effects. In this sense, it is worth handling with the foundations of modern democracy and the requirement that the exercise of state power is vested in the people, through a perspective in which collective and community values take a certain precedence over individual ones; a stronger concept of social equality, while the concept of liberty acquires the positive notion of political liberty, with support from authors such as Jean-Jacques Rousseau. The question is: how does the historical process since the French Revolution demanded the transformation of the concept of democracy? At the same time: in what way this same process weakened the concept of democracy.

Keywords: Politics; democracy; liberalism.

[1] Translated by Cressida Evans.

[2] Laurenio Sombra is Professor of Philosophy atUniversidade Estadual de Feira de Santana (UEFS), Bahia, Brazil. Master of Philosophy at Universidade de Brasília (UnB), Brazil. Researches in philosophical hermeneutics and political philosophy.

In the summer of 1989, the political scientist Francis Fukuyama produced a highly controversial article, called The *End of History*?, based on a Hegelian reading of history, in which he decreed that we have reached "the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government".[3] At the time, Fukuyama sustained the excitement created by his prediction with certain crucial facts. Firstly, the recent fall of the Berlin wall, an episode that served as a byword for the overthrow of the Eastern Europe Socialist Bloc, bringing to a practical end any hope of implementing successful Marxist-Leninist or Maoist inspired governments, since China had already radically changed direction. Secondly, because of the increasing retreat of social democracy in Western countries, with the rise of conservative governments such as those of Ronald Reagan and Margaret Thatcher, as well as disappointment with the rise to power of supposedly socialist governments, such as those of François Mitterrand (France) and Felipe González (Spain), who pushed through measures heavily influenced by neoliberal doctrines, later repeated in the United Kingdom under Tony Blair and even with Fernando Henrique Cardoso in Brazil.

Many things have changed since Fukuyama's prediction: we have had September 11, the American crisis of 2008, the Arab Spring and the current European crisis. The latter, apparently, precisely because of the European Union governing power's insistence on neoliberal solutions to a crisis which seems to require the precise opposite. All these factors appear to confer on history a complexity that makes this classic article risible. However, Fukuyama does not need to surrender so easily. He had already admitted, in a seminal article, that the real world would still produce crises and facts. In his words, "the victory of liberalism has occurred primarily in the realm of ideas or consciousness and is as yet incomplete in the real or material world. But there are powerful reasons for believing that is the ideal that will govern the material world in the long run"[4]. To explain: since Fukuyama is based on Hegel, the suggested victory was principally a victory of "spirit", in other words, of the most advanced human consciousness, a consciousness that, sooner or later, will inevitably spread to all peoples. The material implementa-

[3] Fukuyama, Francis. The End of History? *The National Interest*, Summer 1989 [online] Available from internet via: http://ps321.community.uaf.edu/files/2012/10/Fukuyama-End-of-history-article.pdf [Viewed 12 February 2014], p. 1.

[4] Fukuyama, Francis. The End of History?, p. 1-2.

tion of this victory of spirit may come about slowly, but is inevitable.

What, then, are liberal democracies? Certain attributes appear to have consensus: free elections, universal suffrage, basic individual rights secured or at least defended by the State, freedom of the press and of expression, alternation of political power and a free market – for the latter, read a capitalist system. However, the way that these attributes are arranged appears to disguise a notion of an ideological nature: if we talk of "liberal democracies", what contribution does each of these terms (democracy and liberalism) provide? Alternatively, do they merely serve to reinforce one another, having become the same and inseparable amalgam? Are there no internal sources of tension between liberalism and democracy that should be re-thought? Thinkers of different ideological hues, such as Norberto Bobbio and Chantal Mouffe, think so, which invites us to reflect a little more on this matter.

Such a reflection needs to adopt a combined approach. It requires a conceptual investigation about the concepts of liberalism and democracy, particularly the latter. However, from the beginning of modernity, historical facts have revealed important tension factors within developed concepts, which have constantly been updated to take these into account. Therefore, this does not merely involve establishing fixed ideas and testing them against reality. This approach begins with an assumption that a conceptual discussion, principally within the context of political philosophy, must be scrutinized and assessed in terms of the tension in real life. We cannot simply fix on a concept and analyse reality through this fixed model. If we were to do so, there would be a trend for increasingly anachronistic analysis, one that was probably nostalgic and which, principally, would overlook the contributions that history has brought us. This perspective may be supported by Wittgenstein's apparently strange assertion from On Certainty: "it is a system within which consequences and premises give each other mutual support."[5]

On the other hand, it is not simply a matter of changing the meanings of a word in full agreement with the term's historical evolution. The evolution of this article itself must be explicit, since the task is equally inadequate to the purpose. We will argue that, with respect to the concept of democracy, some of the term's semantic transformation has virtually emptied out the concept. Simply to incorporate what we currently normally call democracy would mean abdicating the very critical possibility that this work seeks to provide.

[5] Wittgenstein, Ludwig. *Da Certeza [On Certainty].* Lisboa: Edições 70, 1969, p. 53.

The first modern thinkers about democracy and liberalism

Our reflection about liberalism and democracy takes place within the context of modernity. It is true that *democracy* is a term deeply rooted in Greek theory and practice, but here the concept is considered directly. *Liberalism*, on the other hand, is a way of thinking only justified since the modern era.

We may think of modernity as an historical era directly associated with Western Europe, through which the notion of the *individual*, from a political point of view, has gained increasing prominence. As this notion gains ground, the social system is increasingly less structured on a previous hierarchy (which may be thought of as structured by God, the king, the aristocracy and/or a superior Law) and more on the individuals who make up society. Added to this is the consideration that, as the hierarchical consciousness disintegrates, these individuals are ideally presented as having equal rights in relation to all other individuals.

With John Locke, this process begins to take on a shape associated with liberalism. It is reasonable to consider Locke as the first great liberal thinker. Certain very clear features of liberalism are inscribed in this author's work, particularly in the *Second Treatise on Civil Government*, his most important political work. The "state of nature" that Locke describes, influenced by the natural law of Grotius and Hobbes, indicates a certain universal condition, prior to any political order. This contains rational individuals who enjoy their *property* rights, an ambiguous term that embraces both an individual's possessions while also, in the broader sense, includes their life and liberty - everything, therefore, which is his own. Any political State must have a primary function to protect such individuals, to protect their property. A State that does not achieve this mission, or betrays it, is not worthy of being maintained, and it falls to the citizens to constitute the "right to rebellion", to overthrow a government that does not fulfil its role.[6]

In Locke's formulation, on can already see the fundamental seeds of liberalism. On the one hand, an emphasis on individual rights, including the liberty of each citizen. On the other, are the first glimpses of the idea of the State as a "necessary evil", a State whose power must be contained and whose mission must be established in the best interests

[6] Locke, John. In: Weffort, Francisco (Org). *Os Clássicos da Política Vol. 1.* 13dr ed. São Paulo: Ed. Ática, 2005.

of its citizens, since a transcendent authority that legitimises and justifies, once and for all, is no longer acceptable.

Either way, we may see John Locke as a thinker who considers the seeds of democracy, although Jean Jacques Rousseau is certainly better described as a kind of "father of modern democracy". Rousseau defined clearer notions about the idea of popular sovereignty, through which a united people form a joint body (materialized in the notion of *general will).* General will is formed by a social contract that unites the people in a single will, not aimed at selfish ends, but for the common good. As Rousseau describes it, "to find a form of association which will defend and protect with the whole common force the person and the goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."

This formulation has certain points in common with liberalism. The suggested association aims to protect "the person and the goods of each associate", in something that appears to recognize the importance of individual property. However, we need to consider this more carefully, since in his *Discourse on the Origin and the Basis of Inequality Among Men* Rousseau had already announced that the defence of property represented a form of illusion of the rich in constituting a law that favours them.[7] We therefore need to pay more attention to another aspect of the contract, the fact that the individual "is obeying himself" in obeying the general will.

According to Rousseau, "whoever refuses to obey the general will shall be compelled to do so by the whole body, which means nothing less than that he will be forced to be free".[8] In relation to property, he asserts that, "the right which each individual has to his own estate is always subordinate to the right which the community has over all".[9] There is clearly a difference here in relation to the individual rights claimed by liberalism, a difference that is further highlighted when Rousseau talks of "the total alienation of each associate, together with all his rights, to the whole community".[10] Also associated with the risk of rupture from

[7] Rousseau, Jean-Jacques. In: Weffort, Francisco (Org). *Os Clássicos da Política, Vol.* 1 p. 220.

[8] Rousseau, Jean-Jacques. In: Weffort, Francisco (Org). *Os Clássicos da Política,* Vol. 1 p. 222.

[9] Rousseau, Jean-Jacques. In: Weffort, Francisco (Org). *Os Clássicos da Política,*Vol. 1 p. 222.

[10] Rousseau, Jean-Jacques. In: Weffort, Francisco (Org). *Os Clássicos da Política,* Vol. 1 p.

popular sovereignty is Rousseau's controversial defence, which essentially rejects representative democracy, in the name of direct democracy, in other words: direct popular participation in the construction of the essential laws of the nation.

The basis of Rousseau's proposal, however, is the notion that the people, as a single body, must run the State. In liberalism, this basis is founded on a series of individuals; in democracy, in a kind of new "personality", which is shaped by the single will of the people, which gains such power that individuals themselves must be subordinate to this general will.

Democracy and liberalism after the Revolutions

Thus, Locke and Rousseau made an indelible mark on modern political thought, demarcating two different and partially conflicting forms of thought about the legitimacy of the State. Following their works, two significant historical facts shaped the political world. On the one hand, the War of Independence in the United States, which managed to liberate itself from the yoke of England. The so-called American "founding fathers" were heavily influenced by liberalism, directly and indirectly based on John Locke's thinking and on republican ideals from Roman history, ideas that rejected the monarchist model, which was seen as corrupt and illegitimate.

The other historical fact, clearly, was the French Revolution, which marks the end of the *Ancien Régime* in France, proclaiming the equality of all citizens, independent of their origin and bringing an end to the monarchy. In terms of the French Revolution, we see the famous *Declaration of the Rights of Man and of the Citizen,* which demonstrates the inspiration taken from the natural rights of natural law advocates, particularly of Locke, and from the American Revolution itself. However, France's revolution was much more accentuated, with a strong emphasis on the idea of popular sovereignty.

In France, the challenge of overcoming the *Ancien Régime* was much more brutal and, just as the struggle for equality fascinated many thinkers, such as Kant and Hegel, the so-called revolutionary Terror also frightened many such thinkers, paving the way for conservative reactions, such as those of the Irish thinker and politician Edmund Burke, who reclaimed the importance of traditions, initiating a long series

220.

of anti-Enlightenment reactions, still seen today. Democracy became something dangerous and, for some, to be entirely rejected.

Even in countries that were more moderate, such as the United States, the liberal thinker Alexis de Tocqueville heralded the arrival of democracy with a mixture of fascination and fear. Tocqueville considered it inevitable, but perceived negative aspects that needed to be minimized. Democracy was associated with an ideal of equality that tended to homogenise man, removing his power of singularity. Worse than this, however, was Tocqueville's fear of it transforming into a kind of tyranny of the majority, suffocating individual freedoms, which have greater value than liberalism. In a statement addressed to the democrats, but which appears to be a response to Rousseau, he confirms:

> …our contemporaries imagine a single, omnipotent, tutelary power, but one that is elected by the citizens. They combine centralization and popular sovereignty. This gives them some respite. They console themselves for being treated as wards by imagining that they have chosen their own protectors…[11]

The installation of Marxist ideology and the consolidation of the left

However, one thinking that exploded onto the 19th century scene was Marxism. Marx (and Engels, his eternal partner in intellectualism and militancy) comes from a socialist tradition of thinking, which had been gaining ground since the 18th century. The central idea of socialism is essentially opposed to the fundamental principles of liberalism, entirely structured on individual property, while socialism prioritizes collective property. Marx consistently manifests this opposition and from his early works onwards denounces the illusion of "political freedom", which does not effectively achieve human freedom.

As his examination deepens, it increasingly denounces the foundations of modern thinking and the modern State, which are structured

[11] Tocqueville, Alexis de. *Democracy in America*. Quoted by Bobbio, Norberto. *Liberalismo e Democracia* [Liberalism and Democracy]. 6dr. ed. São Paulo: Ed. Brasiliense, p. 59. Due to lack of space, we do not also address the important ideas of John Stuart Mill, who reinforces the fear of the "tyranny of the majority", addressing the importance of antagonism and proposing representative government, in opposition to Rousseau's direct democracy.

on economic dominance and the interests of a dominant class. In opposition to this, the *class struggle* is a central element for the transformation of human history. Such definitions are essential to the democratic discussion, since in the capitalist system the proletariat must be thought of as the truly universal class that will overcome the contradictions of this system. This is the class that must initially occupy the State (in the so-called "dictatorship of the proletariat") and be the driving force for a new period, a classless society, in which the State will no longer be necessary.

The definition of the proletariat as the "popular" class contains quintessentially ambiguous notions, which require clarification. The term *proletariat* is of Roman origin - the *proletarii* were the poorest, those *without property*, who could neither contribute taxes nor provide military service. In the Marxist context, the specific preoccupation with the capitalist mode of production presents the industrial proletariat as the proletarian class, par excellence, those who have the greatest historical conditions to confront the contradictions of capitalism and overcome them.

This does not mean, however, that Marx and Engels formulated a policy that disregarded components of the other popular classes. According to Rosenberg, "for Marx and Engels, the democratic movement was altogether an alliance of workers, peasants and the petty bourgeoisie. However, within this coalition, the proletariat, necessarily, should take over."[12]

Advanced democratic processes in Europe emerged, in general, *pari passu* with the constitution of socialist and/or leftist parties, as well as with coalitions of union federations that fought for a range of issues such as universal suffrage (in some cases, including that of women), eight-hour days, better working conditions, and others. These issues were frequently at odds with the anarchists, who, at the end of the 19th and beginning of the 20th century, were still fighting for the attention of the left.[13]

At the end of the century, the left, still in major dispute with anarchism, was increasingly influenced by Marx as well as by Engels' consolidation of Marxism in editing the unpublished volumes of Capital,

[12] Rosenberg, Arthur. *Democracia e Socialismo* [Democracy and Socialism]: história política dos últimos cento e cinquenta anos. 1789-1937. São Paulo: Global Editora, 1986, p. 94.

[13] Eley, Geoff. *Forjando a Democracia*

coordinating the international socialist movements and transforming, as the historian Geoff Eley asserts, "Marxism into the social democratic movement's official creed."[14]

Since the French Revolution, democratic struggles were ever-present in the Western consciousness and were associated with popular class struggles for several ends: universal suffrage, tax reduction, a reduction in the working day, and others. Given that the first socialist thinkers were hardly involved in the political struggle[15], it was the democrats who instilled fear in the elites. As Rosenberg asserts, "at that time, only democracy […] smelt of blood and barricades."[16]

If 1848 was a particularly revolutionary year in Europe, Rosenberg considers the counterrevolutionary developments of this period to be fundamental to a primary semantic transformation of the notion of democracy. The struggle for universal suffrage[17] had always been a cornerstone of the democratic struggle. The French experience, however, with its many ramifications, demonstrated that the achievement of universal suffrage did not effectively guarantee democratic achievements. According to Rosenberg, after a long series of clashes against the elite, but also following internal divisions between popular parties and sectors, it was clear that the dominant sectors had the full capacity to control real political power, including preparing the army and police for the repression of popular uprisings, if necessary. However, for the popular classes this did not represent the effective abandonment of democracy as an ideal of struggle, but a first sign of despair, the beginning of a growing perspective in which democracy was no longer a target to be achieved, but at most an intermediate stepping stone towards the effective liberation of the working class.

With this semantic transformation, *socialism* increasingly became a point of reference for the proletarian struggle. Moreover, this reference is increasingly associated with Marxism, although still in the context of a growing struggle against anarchists, inspired by Proudhon and later by Bakunin, who directly confronted Marx. One could say that Marx and Bakunin set out two models of democracy. In the case of Marx, joint ac-

[14] Eley, Geoff. *Forjando a Democracia*, p. 67.

[15] Thinkers such as Saint-Simon and Fourier were particularly focused on socialist experiments in the form of cooperatives undergoing wide-scale transformation through political mechanisms. Militants influenced by Proudhon manifested greater militant participation, albeit in a context resistant to participation in the State.

[16] Rosenberg, Arthur, *Socialismo e Democracia*, p. 70.

[17] A notion that, in the 19th century, did not often include women.

tion is essential in a model that participates in the struggle for the State (including through elections) and, finally, occupies it (the famous dictatorship of the proletariat) so that it may later be destroyed. For Bakunin, however, the political struggle must reject the State from the outset, not participating in the electoral game but destroying it through revolution. The Marxist concept, however, becomes progressively more dominant. Moreover, it presupposes an action that may still be considered democratic. Socialists carried on participating in the democratic game and fighting for victories for the popular classes, particularly the working class. This trend has a more symbolic example in the German Social Democratic Party (*Sozialdemokratische Partei Deutschlands*: SDP).

At the end of the 19th and beginning of the 20th century, one can confirm that *democracy* was still a dangerous word, such that in most Western European countries universal suffrage was only obtained at the beginning of the 20th century. However, this danger was increasingly attenuated. The SDP represented a model of democratic socialism that progressively retreated from its popular roots, and when it was in a position to take up power at the beginning of the Weimar Republic (1918), allied itself to more conservative sectors, rather than more radical ones. It achieved some social progress, such as universal suffrage, an eight-hour day and union recognition, but its operations were more often cautious, aggravated by the context of a Germany weakened by defeat in the I World War, and immediately having to abide by a series of humiliating measures imposed by the victors through the Treaty of Versailles.

Reformist and revolutionaries: the Russian Revolution and the new communist parties

The beginning of the 20th century saw the increasing consolidation of large capitalist companies, which, instead of cultivating the old liberal values of the rising bourgeoisie, meddled in the State, requiring decisive imperialist activities of it in the search for new markets and, chiefly, for the raw material required for their development. As Rosenberg perceived, from the 1890s onwards, large companies had consolidated their cartels and trusts. The "new liberalism" defended greater state intervention in other countries and demanded that internal uprisings should be repressed, for the better functioning of business.[18]

However, with the I World War things changed a great deal.

[18] Rosenberg, Arthur. *Socialismo e Democracia.*

"Dynasticism and divine right effectively disappeared as plausible means of legitimating political rule. And the war swept away all four great continental empires: the German, the Habsburg, the Russian and the Ottoman"[19]. The entire feudal structure lost even more of its foundations. "It was not just state forms that suffered a tremendous loss of legitimacy. A whole-European order of deference and clearly defined feudal or quasi-feudal hierarchies was destroyed, or at least profoundly shaken"[20]. This change required the construction of new elements that substituted the "transcendent element" of the monarchies, and the pathway identified was through the consolidation of *constitutions*, reinforcing a fundamental aspect of the "Rule of law", according to Bobbio's thinking:

> In liberal doctrine, the rights-based state means not only that public power of every kind is subject to the general laws of the country [...], but also that the laws themselves are subject to the material limitation stemming from the recognition of certain fundamental rights which are constitutionally, and thus as a matter of principle, taken to be 'inviolable'".[21]

On the other hand, a large-scale extension of the right to vote took place. As Müller confirms, "Before the war, women had been allowed to vote only in Finland and Norway; in 1918, Britain introduced universal manhood suffrage and the vote for women over thirty"[22]. Between 1918 and 1919, several other European countries extended suffrage.

From the point of view of popular uprisings, significant disputes about the pathway to socialism broke out in Germany and Russia. If the German SDP formally followed Marxism, its trend, through the militancy of Engels following the death of Marx, was to avoid the violent assumption of power at any cost. Arthur Rosenberg sees this process as beginning in the 1870s, and associates it with socialist struggles against the apparently ineffective violence of the anarchists.[23]

This anti-revolutionary perspective was defined most moderately by Bernstein and his "evolutionary socialism", which almost scan-

[19] Müller, Jan-Werner. *Contesting Democracy:* political ideas in twentieth-century Europe. New Haven and London: Yale University Press, 2011, p. 16.
[20] Müller, Jan-Werner. *Contesting Democracy*, p. 18.
[21] Bobbio, Noberto. *Liberalismo e Democracia,* p. 18-19.
[22] Müller, Jan-Werner, *Contesting Democracy*, p. 20.
[23] Rosenberg, Arthur. *Socialismo e democracia*, p. 217.

dalously accepted liberal values and asserted that, "there is no liberal thought that is not also part of the intellectual equipment of socialism"[24]. However, it also took place in Germany with the intellectual formation of Karl Kautsky, who practiced a form of "passive radicalism". If Kautsky defended the orthodox acceptance of the principles of Marxism, this had to signify the inevitable fall of capitalism, through crises arising from its own development. It should involve a kind of passive position in relation to that moment. In Kautsky's famous phrase, "it is not our task to organize the revolution, but to organize ourselves for the revolution"[25]. Part of this ideology also considered that there were countries not yet sufficiently "mature" for socialism, since their capitalist development had not yet reached the stage appropriate to its own downfall.

Positions such as that of Kautsky and Bernstein were profoundly challenged by Marxist thinkers, such as Rosa Luxemburg and Vladimir Lenin. At the beginning of the century, Luxemburg had already developed her well known *Reform or Revolution*, in opposition, above all, to Bernstein's "reformist" theories. Rosa Luxemberg's more revolutionary position was also embraced by Lenin, key intellectual and political leader for the thinking of the popular Russian uprisings, and also for leading and governing the revolutionary process which culminated in the 1917 revolution.

Rosa Luxemburg and Lenin, however, diverged radically in one fundamental aspect in understanding the ramifications of the socialist revolution and the relationship, in both theory and practice, between these ramifications and democracy. Lenin's intellectual work was extremely ambiguous, even contradictory, regarding the relationship between a vanguard party and the masses. The great challenge was, to use Marxist terminology, how to guarantee that a class "in itself", in the concrete stage in which it found itself, effectively transforms into a class "for itself", one, in other words, with a revolutionary consciousness.

In What is to be done?, his first truly relevant work published in 1902, Lenin presents a categorical solution, one that was resoundingly rejected by the defenders of democracy: the proletarian class does not in itself possess a revolutionary consciousness. For him, "the workers cannot even have a social democratic consciousness. This may only be introduced from outside,"[26] and he adds that the foundation of revolu-

[24] Bernstein, Eduard. Quoted by Müller, Jan-Werner. *Contesting Democracy,* p. 55.

[25] Kautsky, Karl. Quoted by Müller, Jan-Werner. *Contesting Democracy,* p. 55.

[26] Lênin, Vladimir, *Que fazer?* [What is to be done?]: problemas candentes do nosso

tionary theory itself comes about within the "radical bourgeois intelligentsia". In another fundamental aspect, he asserts that "the organization of the revolutionaries must consist […] of people whose profession is revolutionary activity […]. Such an organization must perforce not be very extensive and must be as secret as possible."[27]

There is a significant difference between this proposal and Marxism. In Marx's formulation, the essential revolutionary transformation takes places within the proletarian struggle itself, a context which reveals, in the core of the struggle itself, a reality within which the intellectual and the party leader must face one another. In Lenin's What is to be done?, consciousness comes about "from outside" and must drive the revolutionary party. It was this differentiation that caused the famous clash between Lenin and Rosa Luxemburg. For her, Lenin's point of view is "of a crude centralism […]. The central committee appears as the real active nucleus of the party; all the remaining organizations are merely its executive instruments"28. She claims "the collective ego of the working class, which reclaims the right to commit the same mistakes and learn the dialectic of history for itself"29, a position shaped by the idea that "the errors committed by a truly revolutionary movement are infinitely more fruitful and worthwhile historically than the infallibility of the very best Central Committee."30

The facts that follow the popular uprisings in Russia seem to confirm Luxemburg's assertions, since the constitution of the soviets (the popular factory councils that came together during the popular uprisings) was not top down. Lenin seems to have completely accepted this new reality and made profound modifications to his theoretical formulation, in opposition to what he had said in *What is to be done?,* the work which he himself considered outdated in many ways. If this, for some time, was Lenin's theoretical formulation, the new Bolshevik govern-

---

movimento. 2dr ed. Lisboa: Editora Avante, 1978, p. 39.

[27] Lênin, Vladimir, *Que fazer?,* p. 126.

[28] Luxemburgo, Rosa. Quoted by Silva, Ozaí. O dilema da socialdemocracia. Rosa Luxemburgo e Lênin: concepção de partido e reformismo. Maringá: *Revista Espaço Acadêmico*, 119. April 2011, pp. 129-137, p. 131.

[29] Luxemburgo, Rosa. Quoted by Silva, Ozaí. O dilema da socialdemocracia. Rosa Luxemburgo e Lênin: concepção de partido e reformismo. Maringá: *Revista Espaço Acadêmico*, 119. Aprill de 2011, pp. 129-137, p. 131.

[30] Luxemburgo, Rosa. Quoted by Silva, Ozaí. O dilema da socialdemocracia. Rosa Luxemburgo e Lênin: concepção de partido e reformismo. Maringá: *Revista Espaço Acadêmico,* 119. April de 2011, pp. 129-137, p. 131.

ment practice was at some distance from this. The Party assumed power very rapidly and effectively retreated from the participation of the people. In 1919, the VII Party Congress (under Lenin's rule) assumed that "the Russian communist party must gain exclusive dominance of the soviets and the practical control of all their work."[31] This clearly anti-democratic perspective was strengthened in practice by the increasingly concentrated power of the party and was reinforced by intense fighting, arrests and assassinations of "counterrevolutionaries". In practice, this revolutionary confrontation meant combatting any questioning of the model set up by the party. As quoted by Müller, "when, in 1921, workers and sailors in Kronstadt near Petrograd demanded 'Soviets without Bolsheviks', Lenin sent in the troops. Even internal criticism within the party was now severely curtailed"[32].

After the Russian Revolution, the parties of the left divided into those that were inspired by Marxist-Leninism (becoming the so-called communist parties) and socialist or social democratic parties, who continued primarily to invest in electoral contests. However, from the outset, the communist parties associated with the Russian Komintern gave up any real attempt at democracy and faithfully followed the definitions from Moscow, which led to an even greater concentration than that considered by Lenin. Instead of parties of the vanguard, all of them submitted to one party of the vanguard, the "Soviet".

Due to lack of space, we will not here consider another fundamental period during the 1930/40s - the rise of fascist governments, led by Italy and Germany, which were only defeated at the end of the II World War. We would simply like to record the following: at the end of the War, the Soviet Union was strengthened by its fundamental support for the struggle against Nazism and dominated all of Eastern Europe, including some of Germany, under the rule of a totalitarian dictatorship led by Stalin. Added to this, was a profound consciousness amongst European peoples, seriously wounded by the horrors of Nazism, particularly the calculated and unprecedented slaughter of millions of Jews and other persecuted groups (gypsies, homosexuals, and others).

In Western European countries, certain fundamental liberal rights were maintained and consolidated into a constitutional regime that protected fundamental liberal rights from outbursts of immediacy

[31] Quoted by Carlo, Antonio. A concepção do partido revolucionário em Lênin. Córdoda-Argentina: *Passado y Presente*, 43, July/December 1973, pp. 67-113, p. 96.
[32] Müller, Jan-Werner, *Contesting Democracy*, p. 39.

and won important gains for the democratic struggles for universal suffrage, which in almost all countries included the women's vote. For those who followed the context of popular uprisings in the 19th century, this framework was still some way from being a "victory for democracy" but one cannot deny that it constitutes important progress.

Post-War democracy

To cite Ernesto Laclau: "we know, from Saussure, that language (and by extension the entire system of signification) is a system of differences, that linguistic identities – values – are purely relational".[33] If we consider the concept of democracy from this perspective, we may, with some facility, understand what occurred in the Post-War period. On the one hand, there was the almost unanimous horror of German Nazism and Italian Fascism, political systems that had come about through a broad system of oppression and exclusion, fed by exacerbated nationalism and facilitated by the radicalizations common during periods of war. On the other hand, there was a growing horror of Soviet repression, with Stalin's great purges, millions incarcerated, hundreds of thousands dead, leadership rotations and a climate of repression, although there was not a great deal of clarity about this information, which was frequently taken as capitalist counter information. Soviet socialism still nourished many hopes. However, both Khrushchev's denunciation of Stalin in 1956 and the repressive activities of the post-Stalin USSR in Hungary (1956) and, particularly, in Czechoslovakia, progressively exhausted such hopes.

Through a different relationship, the concept of democracy was transformed, at least for the elite commanders of Western Europe, into a notion ever more distant from the popular and threatening origins that it had constituted in the 18th and 19th century. The term was increasingly associated with a more procedural notion of secured liberal rights, and representative mandates through universal suffrage, although these same mandates contained a number of limitations for the endorsement of their representation.

Paradoxically, at the same time that the term "democracy" was increasingly associated with Western capitalist countries, these very countries were carrying out activities that reduced the impact of politi-

[33] Laclau, Ernesto. *Emancipação e Diferença* [Emancipation(s)]. Rio de Janeiro: EdUERJ, 2011, p. 68.

cal discussion on their governance– including by strengthening constitutional courts, the European community and even union agreements between employers and employees. As Müller asserts, "stability was to become a major goal – in fact the lodestar – of the post-war Western European political imagination"[34].

It is important to note that, since the 1930s, liberalism as an economic agenda in the capitalist world has lost a great deal of its force, as a result of capitalist crises provoked by liberal-inspired approaches. Since then, a number of interventionist activities of a Keynesian nature have occurred through growing social investment, particularly in more developed countries, creating a kind of social safety net for citizens, through an active redistribution policy arising from the high taxation of higher incomes. Thus, if on the one hand, the necessary measures were taken to curb political activity, huge resources were injected into the construction a new covenant, thereby avoiding social unrest. Once again, the system of differences is essential to understanding this, since the socialist threat (not merely from Eastern Europe, but from China and independent Trotskyists as well) drove developed capitalist countries to strengthen the social protection of their citizens. In contrast, anti-communist fear in Latin American countries more often led to military coups.

The implementation of the social contract in the post-war period suffered its first fundamental setback to public consciousness in the uprisings of the 1960s. In this decade, the United States saw the intensification of the struggle for civil rights, crowned by the publication of the Civil Rights Law in 1964, with several later ramifications. Large-scale protests against the war in Vietnam also emerged during this period. In France, the demonstrations known as "May 68" broke out. The post-May 68 uprisings provoked particularly cultural changes, although they also had an important impact on the political process over the long term. According to Umberto Eco:

> …even though all visible traces of 1968 are gone, it profoundly changed the way all of us, at least in Europe, behave and relate to one another. Relations between bosses and workers, students and teachers, even children and parents, have opened up. They will never be the same again[35].

[34] Jan-Werner. *Contesting Democracy*, p. 128.
[35] Jan-Werner. *Contesting Democracy*, p. 200.

Feminism was possibly the first great struggle shaped by the uprisings of the 1960s, with important developments in the 1970s. It activities changed the very nature and meaning of political struggle. As Eley states,

> The feminist insistence on the relationships between politics and daily life, on the importance of sexuality, on the connections between body and mind, on pleasure and not on discipline, on consumption and not on production, transformed the starting points for thinking about political change, expanding the premises on the left about what the political category contains. 'The personal is political' gave new meaning to individual autonomy.[36]

Between the 1960s and the 1970s, a huge range of struggles occurred against racism, colonialism and misogyny, gay movements and pacifist movements as well as others that transformed the political landscape. Macro-political disputes increasingly could not afford to overlook these elements. Politics was no longer only a class struggle or a matter for the public authorities. The need for populist coalitions in the struggle against hegemony gained unprecedented complexity and required new theoretical formulations to encompass them, as proposed by the philosophers Ernesto Laclau and Chantal Mouffe[37]. This series of political struggles, called the "new social movements", injected new vitality into democratic struggles and brought the notion of a merely procedural democracy into question.

On the other hand, the beginning of the 1970s also witnessed the emergence of neoliberalism to a degree that seriously threatened the legitimacy of popular demands. From the economic point of view, this phenomenon came about within the context of the oil crisis of the 1970s, with the Welfare State experiencing some financial fatigue, but also with a growth in the service sector, in detriment to workers and peasants, who formed the historical foundations of populist uprisings.

Neoliberalism introduced a growing idea of State reduction, particularly in terms of social investment, but also in weakening the unions. It was an idea that introduced a new economic and financial model, accompanied by a moral discourse. Ideas were reclaimed, such as those of

[36] Eley, Geoff. *Forjando a Democracia*, p. 438-439.

[37] Laclau, Ernesto e Mouffe, Chantal. *Hegemonia y Estrategia Socialista* [Hegemony and Socialist Strategy]: hacia uma radicalización de La democracia. 2dr ed. Buenos Aires: Fondo de Cultura Económica de Argentina, 2004.

Hayek, which associated social measures with "servitude". The conservative philosopher Michael Oakeshott talked of "the individual *manqué* – human beings incapable of bearing the burden of making their own choices"[38]. The Welfare State clearly fitted the context that Oakeshott criticized. For Oakeshott, the modern European individual, celebrated by thinkers such as Montaigne, Hegel and Tocqueville, was at risk of extinction.

Fundamental to the neoliberal idea was the containment of democratic struggles, particularly when these involved claims for the redistribution of State funds.[39] To this end, it was important for the liberal idea to constitute a body of policies that would curb these struggles. One such preoccupation was found in the Trilateral Commission of the United States, formed in 1975 by three intellectuals, who feared a "democratic surge" in a context whereby, "too many people wanting too many things from government and ultimately also too much participation in government made statecraft ever more difficult"[40].

This preoccupation was tackled theoretically in formulations such as those of the German sociologist Niklas Luhmann. According to Müller, "he offered the most coherent and sophisticated theoretical justification for why policy-making should be shielded from widespread participation and essentially be left to bureaucrats".[41] Luhmann thought of society in terms of complex systems and subsystems with some degree of autonomy, making counterproductive the interference of one system in another; this included the economic subsystem.

Formulations such as these, of a technical and moral nature, provided the foundation for real efforts to concentrate the main economic measures within a ruling elite coordinated by the major economic powers, with a very low level of popular interference in such decisions. What was at play appeared to be too complex to be discussed with the population or to attend to popular will. In Europe, this process became even more marked through currency unification and the concentration of power in the European Central Bank, to the point that when, in 2011, the Greek Prime Minister proposed a referendum to discuss the bailout

[38] Oakeshott, Michael. Quoted by Müller, Jan-Werner. *Contesting Democracy,* p, 224.

[39] This perspective creates a paradox that merits attention. The struggles of the "new social movements" could be partially absorbed into the set of liberal rights. They only become an effective problem for the neoliberal State when, in their essence, they include a struggle for State funds.

[40] Quoted by Müller, Jan-Werner. *Contesting Democracy,* p. 204.

[41] Müller, Jan-Werner. *Contesting Democracy,* p. 204.

measures associated with the government's "Greek rescue" plan, this was treated as a scandal and required him to back down.[42] In several countries, processes have taken place to promote the autonomy of central banks and "market-based" flexible exchange rates, amongst a range of other measures that erode both popular activity and even that of the political class. These aspects appear even more definitive when parties supposedly on the left assume power and essentially maintain such measures.

Final Considerations

It is not easy to measure our current degree of democracy. Popular struggles have always been the target of curbs by the major powers. However, it is reasonable to point to neoliberalism and its ramifications as factors that erode this policy. Several aspects appear to have sustained this erosion, but economic ideology, which argues that the technical aspects of economic policies cannot and must not be deliberated through democratic decisions, appears to be extremely powerful.

What seems to further confirm this diagnosis is a general feeling of paralysis, since no exits are provided. There no longer exists a clearly alternative model, such as that announced by Marxism in the 19th and 20th centuries. There are, however, at least two aspects that may provide potential pathways for further investigation.

Firstly, it is worth noting the approach of Ernesto Laclau and Chantal Mouffe. According to them "the economy's very space is configured as political space and […] in this space […] hegemonic practices […] fully operate"[43]. If we follow this approach, we must understand that the "economic subsystem", to use Niklas Luhmann's terminology, is always composed of an intense power game, which must be publicized. At the heart of these relationships, we should see the major economic groups as true centres of power, not politically controlled[44]. Thus, if neoliberalism has decided to move politics away from the economy, the challenge is precisely the opposite: *to politicize the economy*, and to

[42] Something that also occurred in Brazil in 2013 when President Dilma Roussef proposed a plebiscite for political reform.

[43] Laclau, Ernesto e Mouffe, Chantal. *Hegemonia y Estrategia Socialista*, p. 113.

[44] In many countries, such as Brazil and the United States, the fact that the electoral game itself operates through the legal and illegal funding of these economic groups makes their involvement an even more serious matter.

this end it is essential that the government choices involved in major economic decisions form part of the field of political discussion.

Secondly, and in apparent contrast to the first point, we should not ignore the neoliberal argument that some features of governance are highly complex and may not be the target of democratic deliberation, which could result in counterproductive activities that affect the basic stability of the State. Here, we do not have room for the wider discussion that this subject merits, but we may begin with the following argument. If the idea of popular sovereignty emerges in the modern era through Rousseau's general will, it is essential that we understand that in philosophy the idea of *will* should not be confused with simple desire[45], but implies a fundamental human condition that is always in dialogue with reason and liberty. It is for this reason that Rousseau warns us that general will does not merely represent the sum of private interests, or even the will of the majority. If we consider popular sovereignty as general will in the terms put forward by Rousseau[46], we must also consider the mechanisms through which the population's free option may be an option mediated by the possibilities involved, a factor that necessitates profound dialogue with technical agents. We should not forget that Rousseau himself talked about "when the people being sufficiently informed deliberate…"[47] If we may make an analogy here - only a doctor is skilled in conducting surgery and only he may have the technical capacity to present us with the risks and benefits involved. To make such a decision without a prudent medical assessment would be entirely counterproductive. However, such factors of a technical nature should not stray from the fundamental point that, under general conditions the decision of the surgeon has to be that of the patient. The growing curbs to democracy as an ideal, which have reached their apex with neoliberalism, appear to advocate that it is the doctor who should decide…

Finally, certain points require further study and we should not forget the victories that seem to have been won. History shows us the

[45] Without taking into consideration the psychoanalytic connotations that give this term a more complex connotation.

[46] Albeit tempered by liberal critiques. The much-criticized "complete submission" to Rousseau's general will must be accompanied by the necessary protection of individual rights. These formulations may be reconciled if we consider that they form part of the general will of contemporary "liberal democracies" to maintain such rights.

[47] Rousseau, Jean-Jacques. In: Weffort, Francisco (Org). *Os Clássicos da Política Vol. 1, p. 228.*

meaning and importance of individual rights, which, in the final analysis, we may consider as based on old political liberalism. Reasonable political proposals that do not respect these rights do not seem to be on the horizon, although in many countries they remain some way from attainment. Moreover, the struggle for such rights has been further extended by the cultural revolution that swept the western world with the uprisings of the 1960s and the developments that followed. Out of these, a new agenda of political claims (and rights) has become manifest and includes women, black people, homosexuals, ethnic minorities etc. It is essential that with all the progress sought one does not lose sight of the significance of these victories. In this sense, in the face of the eternal confrontation between democracy and liberalism, we may see that democracy cannot reject liberalism, but should always place it in tension, so that it further extends the rights agenda. In addition, it should admit the always-feared popular sovereignty, which is the basis for any democracy that wishes so to be called.

References

Bobbio, Norberto. Liberalismo e Democracia [Liberalism and Democracy]. 6dr. ed. São Paulo: Ed. Brasiliense.

Carlo, Antonio. A concepção do partido revolucionário em Lênin. Córdoda-Argentina: *Passado y Presente*, 43, July/December 1973, pp. 67-113.

Eley, Geoff. *Forjando a Democracia* [Forging Democracy]: a história da esquerda na Europa, 1850-2000. São Paulo: Ed. Fund. Perseu Abramo, 2005.

Fukuyama, Francis. The End of History? *The National Interest*, Summer 1989 [online] Available from internet via: http://ps321.community.uaf.edu/files/2012/10/Fukuyama-End-of-history-article.pdf [viewed 12 February 2014].

Laclau, Ernesto. *Emancipação e Diferença* [Emancipation(s)]. Rio de Janeiro: EdUERJ, 2011.

Laclau, Ernesto and Mouffe, Chantal. *Hegemonia y Estrategia Socialista* [Hegemony and Socialist Strategy]: hacia uma radicalización de La democracia. 2dr ed. Buenos Aires: Fondo de Cultura Económica de Argentina, 2004.

Lênin, Vladimir, *Que fazer?* [What is to be done?]: problemas candentes do nosso movimento. 2dr ed. Lisboa: Editora Avante, 1978.

Müller, Jan-Werner. *Contesting Democracy*: political ideas in twentieth-century Europe. New Haven and London: Yale University Press, 2011.

Rosenberg, Arthur. *Democracia e Socialismo* [Democracy and Socialism]: história política dos últimos cento e cinquenta anos. 1789-1937. São Paulo: Global Editora, 1986.

Silva, Ozaí. O dilema da socialdemocracia. Rosa Luxemburgo e Lênin: concepção de partido e reformismo. Maringá: *Revista Espaço Acadêmico*, 119. April 2011, pp. 129-137.

Weffort, Francisco (Org). *Os Clássicos da Política Vol. 1*. 13dr ed. São Paulo: Ed. Ática, 2005.

Wittgenstein, Ludwig. *Da Certeza* [On Certainty]. Lisboa: Edições 70, 1969.

Between agreement and disagreement:
A search for the best conception of democratic jurisprudence

Ana Luisa de Navarro Moreira

Abstract: The sense in which the idea of democracy should be understood becomes an important philosophical theme, due to the ever-closer relationship between democratic values and the institutionalization of the Rule of Law. In this sense, this paper, in the first section, will approach two conceptions of democracy: democracy as majoritarian decision-procedure, proposed by Jeremy Waldron, and democracy as deliberative political will formation, proposed by Jürgen Habermas. Despite both advocate a normative theory, Waldron accepts the idea of a constant disagreement, while Habermas, on the other hand, aims at achieving an agreement, the consensus reachable through a rational understanding which is made possible by discourse theory. After expounding, in the second section, these two principles, the principles of agreement and disagreement, are better developed. As a result of the proposed debate, we conclude that, even though the conceptions of democracy and legality proposed by Waldron seem more "compatible" with the democratic states which have a high degree of diversity of cultural traditions, as noted in Brazil, the model proposed by Habermas to explain the political process on the basis of the discursive theory of law provides a more robust idea of citizenship, participation and, especially, of democracy.

Keywords: democracy, disagreement, rational acceptability.

I. Introduction

Over the recent years we can notice an ever-closer relationship between democratic values and the institutionalization of the Rule of Law. With the defeat of totalitarian states and the development of institutionalized democracies, history has witnessed the recognition of human beings as true citizens, especially as persons endowed with public and private autonomy.

The right to liberty and the right to equality, which have been put in check during the biggest part of the 20th Century, both gain the

attention and protection of the Western legal systems and become inseparable from the idea of legality or the Rule of Law.

In this context, the question of what is the sense in which the idea of democracy should be understood becomes an important philosophical theme, which must be placed at the root of any significant jurisprudential theory of law and will gain our attention in this paper.

The first section of the paper addresses two conceptions of democracy: democracy as majoritarian decision-procedure, proposed by Jeremy Waldron, and democracy as deliberative political will formation, proposed by Jürgen Habermas. Although both authors share the same methodological stance, advocating a normative theory that explores the relation between the value of democracy and the concept of law, they are based in two ideas that seem to be diametrically opposed. While Waldron accepts the idea of a constant disagreement in the community, since people disagree considerably on issues of law and justice, Habermas, on the other hand, moves towards the idea of an agreement, the consensus reachable through a rational understanding which is made possible by discourse theory.

In the second section, after clarifying these conceptions of democracy, the two ideas stated above (the acceptance of disagreement and the advocacy of a consensus) are better developed. What is the extent of the relation between each concept of democracy and those ideas? What are the characteristics of each one? Apparently, the risk of disagreement is imminent, especially in societies composed of moral and political projects so diverse. But how deal with them?

Finally, as a result of the proposed debate, we conclude that, even though the conceptions of democracy and legality proposed by Waldron seem more "compatible" with the democratic states which have a high degree of diversity of cultural traditions, as noted in Brazil, the model proposed by Habermas to explain the political process on the basis of the discursive theory of law provides a more robust idea of citizenship, participation and, especially, of democracy.

II. Democracy as majoritarian decision-procedure

Democracy by Jeremy Waldron involves that people themselves establish the rules they are going to follow. In others words "includes the idea that rules are chosen by people whom they rule" (WALDRON, 2008, p. 8).

The principle of equality is central in this argument, and it involves that people act, vote and deliberate as equals. Thus, the right to participate in the making of the laws is crucial, so that there cannot be a democracy unless each individual possess the regular exercise of the right to political participation, which is called the "right of the rights" (WALDRON, 1999, p. 232). People are equally entitled to participate in the debate that determines what their rights are.

In this sense, democracy and individuals rights are not incompatible; on the contrary, there is a natural congruence between them: people need a democratic procedure to claim theirs rights. Every time that a disagreement arises, everyone must have their right of participate preserved, because if it is not preserved, if someone is excluded or the process is unequal, them "both rights and democracy are compromised" (WALDRON, 1999, p. 283).

Since the individuals are identified as a right-bearer, each one should decide the grounds on which they are governed, the principles of their coexistence and the content of their laws.

But members of a community constantly disagree about everything (WALDRON, 2002, p. 4). They disagree about meaning of life, existence of God, about what makes a good life, what someone should do in determined situation, and, likewise, they disagree about which individuals rights should be preserved, what is justice in some special cases and, in particular, which grounds, principles and contents the laws of a community should have. It is fairly natural, therefore, that people come into disagreement.

Then, as people disagree, they need procedures to come to decisions to handle these disagreements. These procedures shall be governed by the principle of political equality: they shall ensure that every individual (1) has secured an equal opportunity to express herself by participating, so that all the people have the same status of participation and no one is regarded as more important or entitled of having different opportunities to speech than the others (2).

Waldron's democratic jurisprudence, thus, is attentive to those who (1) participate in the making of the laws (the people) and how (2) the laws are maid (as equals). In this sense, the solution that he offers to settle those constant disagreements is the majoritarian decision-procedure, in which everyone has an equal vote to decide (one-person, one-vote).

The defense for majoritarian procedures is based on the argument that only a democratic decision-making is authoritative to estab-

lish law. Democracy presupposes that "the people are entitled to govern themselves by their own judgment, including judgments with regard to reasonably controverted questions of justice and morality" (WALDRON, 1999, p.264).

Waldron choose the majority rules, because it at least allows "a voice and a vote in a final decision-procedure to every citizen of the society", unlike other procedures that instead "proceed to make final decisions about the rights of millions on the basis of the voices and votes of a few" (WALDRON, 1999, p. 299). As democracy itself involves equal respect for individual moral agency, the disagreement shall be resolved politically by equal voting procedure.

The argument, thereby, is based on the principle of political equality.

Lastly, for this procedure to be appropriate one needs the assumption that the members of the community are committed to the rights and that every one of them is endowed with moral capacities of thinking responsibly about their own interest and the interest of others. This capacity to consider conscientiously the relation about individual interest and collective interest is indispensable, because is the "primary basis of democratic competence" (WALDRON, 1999, p. 282).

Since every individual are mutually respectful of each other's different views and since it is a form of procedure of "deliberation and majoritarian voting that treats the opinions of those citizens as equals" (WALDRON, 2002, p. 9), then the settlement should stand.

Therefore, Waldron's argument of the right of political participation constitutes the core of his intellectual defense of democracy as majoritarian decision-procedure.

III. Democracy as deliberative political formation

Habermas, in the same way, believes it is possible for a community to be self-organized by free and equal citizens, even under the conditions of complex communities (HABERMAS, 1996, p. 7). But his arguments go beyond the principle of political equality, as he develops the idea of communicative power connected with the principle of democracy. To consolidate this idea, he proposes that democracy is intrinsically related with the exercise of political autonomy (1), which is secured by the discourse conception of law (2).

The political autonomy (1) must be explained on the basis of an

internal connection between human rights (private autonomy) and popular sovereignty (public autonomy) (HABERMAS, 1996, p. 101)

The liberal conception of autonomy conceives human rights as the expression of moral self-determination (close to the Kantian tradition); thereby, the priority of human rights guarantees personal liberties which protect private autonomy. Hence, democracy turns into an instrument for the defense of private interests and its exercise set limits on the sovereign will. On the other hand, the republican conception of autonomy interprets popular sovereignty as the expression of ethical self-realization (close to Roussean idea of social contract). In this manner, it presupposes an ethical community oriented to the common good, where all citizens have political virtues. It is a system of collective decisions where democracy allows the State to be proactive in the task of consolidating of that common good.

In the first view the system of rights is reduced to a moral reading of human rights while in the second one it is an ethical reading of popular sovereignty (HABERMAS, 1996, p. 104). Both views, because of their specific characteristics, seem contradictory; but, on the contrary, they needed to be integrated in an evenly balanced manner, which is called political autonomy.

The public autonomy is only well exercised when private autonomy is also ensured, so that individual rights are sufficiently independents in a way that everyone turn into an effectively real citizen and the sovereign will formation becomes possible (HABERMAS, 2002, p. 293). In this sense, private autonomy and public autonomy presuppose one another. Both are equally fundamental, and only through law they interact properly.

Thereby, the system of rights must contain and guarantee the individual rights that citizens mutually grant one another (as recipient of law), so that they can legitimately regulate their lives in common by the democratic procedures governed by the discourse principle (as authors of law), in this sense Habermas develops the discourse concept of law (2).

The discourse principle (D) determines that are valid only those standards that all possibly affected persons accepted and agree as participants in rational discourses (HABERMAS, 1996, p. 107). This principle has an important and indispensable element: rational discourses.

The rational discourse includes the attempt of reaching an agreement of controversial claims by discursively grounded procedures based on equal opportunities for the political use of communicative power.

Each individual has the same status of participation and the same conditions or opportunities of speech.

But only through a legal structure both deliberative procedure and discourse principle are applied. In this sense, "in assuming a legal shape, the discourse principle is transformed into a principle of democracy" (HABERMAS, 1996, p. 121).

Then, the discourse conception of law presupposes this intrinsic connection between the Rule of law and democracy (HABERMAS, 1996, p. 449), in which the principle of democracy establish a procedure of legitimate lawmaking but also guides and controls the medium of law itself. In other words, the discourse principle institutionalizes the political will formation but at the same time must provide the medium in which this political will formation can be expressed as the will of free and equal members of a community.

The discourse theory proposes that democratic legitimacy depends on the legally institutionalized procedures and communicative presuppositions, because in this way the lawmaking process leads to rational outcomes (HABERMAS, 1996, p. 414). Hence, the agreement is reachable only through a rational understanding between the parties, which is made possible by discourse theory.

Therefore, the Habermasian defense of the exercise of political autonomy secured by the discourse concept of law constitutes the normative core of his conception of democracy as deliberative political will formation.

IV. Waldron's view: The pervasive disagreement and the circumstances of politics

Waldron's defense of the conception of democracy as majoritarian decision-procedure is a reflection of his view on disagreements (WALDRON, 2002, p. 8)

The disagreement is intrinsic to plural societies. Since the development of cultural and moral pluralism, the gap among the individuals who constitute the people has grown in large proportions, so interpersonal relationships became extremely complex.

Cultural, political, economic and moral transformations provided the emergence of a pluralistic and open community, which has the ability to integrate and disassociate opinions that were previously consolidated consensually or were apparently taken as consensus.

Thus, the worldview that previously presupposed an implicit consensus and a relative stability in the conceptions of goods suffers from an intense questioning.

Consequently, a pervasive disagreement among individuals is expected. Diversity on these matters is a permanent feature of the public culture of democracy. In other words, we face the inescapability of disagreement (WALDRON, 1999, p. 106).

In this sense, Waldron believes in the existence of persistent and durable disagreement within society. All men and women have different views of everything, especially about rights and justice.

But, even with this constant disagreement, there is a strong commitment among the members of the community to the idea of individual rights (WALDRON, 2006, p. 1364). Furthermore, the requirement of settlement of the controversies about rights is recognized, especially because the settlement is indispensable to providing the foundation for common action when it is needed.

However, issues of rights and justice are not easy to deal with. That is why the disagreements need to be confronted by a political decision procedure which shows equal respect for each individual (WALDRON, 1999, p. 114).

Waldron's view is that voting and majority-decision procedures can be the solution for that problem, and to support this argument he introduces the idea of 'circumstances of politics'.

The circumstances of politics is the necessity of a "common (1) framework or decision or course of action on some matter, even in the face of disagreement (2) about what that framework, decision or action should be" (WALDRON, 1999, p. 102).

Therefore there are two significant elements of the circumstances of politics: the felt need for common action (1) in face of reasonable disagreements (2).

The disagreements (2), as explained, are inevitable. It is not unnatural to think that reasonable people disagree (WALDRON, 1999, p. 225). People in good faith constantly oppose their opinions and values with one another, even after deliberation (WALDRON, 1999, p. 112), and they disagree especially in substantial political issues, making it harder to act together.

Hence, since is undeniable there is an enormous difficult for people to act together and even more difficult for them to reach an agreement, the circumstances of politics requires the importance of establishing a specific policy despite the existence of all these disagreements.

The felt need for common action (1) demonstrates that it is better to have a reasonable action or decision than not having any. But for this reasonable action to be possible, the procedure must have some distinctive features.

In such pervasive disagreement, the decision-procedure needs to be neutral with regards to the merits of the decision, in such a way that any of us identifies the policy established by that procedure as ours. In this sense, it has to be technical (a) and also a method that is morally respectable to each individual (b).

The majority-voting for Waldron satisfies both requirements.

Concerning a technical decision (a), all individuals can identify the common policy decision as the one chosen by the majority; regardless of agreements about its merits (WALDRON, 1999, p. 108). Thereby, people do not have to share a common view on the merits about philosophy, ethics or even religion involved in the decision, but they need a procedure for settling these moral controversies.

In the circumstances of politics the important thing is to find a way of choosing a single policy among others, where the people participate and are respect the final decision, rather than finding a single policy that everyone agrees as the best moral choice. The process of majority-voting allows everyone to participate and does not require anyone's view to be placed down (WALDRON, 1999, p. 111).

Thus, apart from its technical character, it is a procedure which respects each individual (b) whose votes it aggregates. Firstly, the individuals do not need to pretend that there is a consensus when there is none; secondly, they can keep theirs beliefs, since it does not require anyone to stop having their own views about justice and about common good; and, thirdly, its essence is the principle of respect, which is preserved by the guarantee of equal weight and equal potential decisiveness to individual votes.

By the principle of respect, an individual truly respect other opinion in such a way the final decision is adopted as if they all decided even if the individuals don't agree with its merits. This attitude of respect stem from the importance of toleration among people, which is also a political principle (WALDRON, 2013, p. 2).

In this sense the majority-decision is also a respectful procedure, because political equality preserves the respect between people.

Therefore, the circumstances of politics are indispensable for understanding Waldron's argument for a procedural decision-rule as majority-decision in face of such pervasive disagreements.

V. Habermas view: The possibility of agreement and the elemensts of communicative power.

The pervasive disagreement is the guiding idea of Waldron's choice for majoritarian decision-procedure. Habermas, on the other hand, faces the existence of this permanent feature of democratic communities, but believes in the consensus reachable through a rational understanding which is made possible by discourse theory.

First, one thing needs to be clarified. The disagreements do not cease to exist on Habermas's proposal. By the same token, this author deals with the ever-present risk of disagreement and sees the high costs of dissension from the view point of action coordination (HABERMAS, 1996, p. 21).

The disagreements reflect the characteristic pluralism in democracies, which is one of the foundations of the democratic Rule of Law. In this sense, it has to be preserved and not eliminated (ensuring private autonomy). Besides, it is indispensable that all people's values and interests can be also performed freely and equally in the political procedures (ensuring public autonomy).

Hence, the individuals still maintain different moral views about the themes which are presented for debate and only in face of them it is possible to sort out the possibilities for an agreement through discourse (HABERMAS, 1996, p. 309).

The difference from Waldron's view subsists on what (1) happens when these moral disagreements emerge and how (2) citizens react in face of those disagreements.

With the linguistic turn, language now is conceived as a universal medium for embodying reason, and with the communicative power the use of language is oriented to reaching an understanding (HABERMAS, 1996, p. 8).

Thus, in Habermas' theory, rationality is directly linked to the language, as communicative rationality is essentially discursive. Therefore, the expression of these free and equal values and interests occurs through a dynamic process where citizens communicate through language.

So, when the disagreements emerge the individuals, who participate with the same conditions or opportunities of speeching, must deliberate rationally (1). The political will-formation must be consolidated through a discursive process in a communicative process that consti-

tutes the discourse principle (HABERMAS, 1996, p. 51).

Hence, the understandings are constantly modified through an inter-subjective relation where the communicative rationality is rooted in the structures of communication that bind people to a fair discursive procedure (HABERMAS, 1996, p. 148).

The reflexivity of argumentation and constructive interpretation are elements of this rational deliberative procedure, so that "the rationalization of a lifeworld is measured by the extent to which the rationality potentials built into communicative action and released in discourse penetrate lifeworld structures and set them a flow" (HABERMAS, 1996, p. 98).

In consequence, the communicative action enables the debate leading to democratic will-formation. The public sphere constantly thematizes itself, because it must always preserve the discursively grounded procedures based on equal opportunities for the political use of communicative power.

The communicative power, therefore, lies at the heart of the communication model of the democratic political process because "all political power derives from the communicative power of citizens" (HABERMAS, 1999, p.170).

At the same time the citizens, once deliberating, adopt a performative attitude in search for the best argument (2). Those who participate in the debate must assume a performative attitude because they all must act to reach an understanding with one another about something, and still, they can expect one another to take the same stand on reciprocally raised validity claims (HABERMAS, 1996, p. 119).

Only by the mutual orientation for validity claims (HABERMAS, 1989 , p. 42) people can attempt to deliberate about competing interpretations of the situation at hand, harmonize their disagreements and, thereby, recognize the "force of the better argument' (HABERMAS, 1996, p. 11).

Hence, the presuppositions of communication power that undergird legitimate lawmaking are the rational deliberation and the performative attitude in the search for the best argument, where disagreements don't subsist.

The individuals have the capacity of reaching rational agreements through discursive and argumentative procedures (HABERMAS, 1999, p. 500). In other words, through the language oriented to mutual understanding, communicative reason can convince individuals to agree without coercion.

Therefore, Habermas' defense of an agreement doesn't make the disagreement disappear; but it completely influences the bases on his normative framework. When he combines a procedural account of democracy with deliberative politics, the legitimacy of democracy becomes dependent on the discursive structure of the opinion will-formation.

The essential point here is not the achievement of the agreement in itself, but it is much more important the improvement of the conditions of debate and discussion, in other words, "the discursive level of public debates constitutes the most important variable" (HABERMAS, 1996, p. 304).

VI. Conclusion: Radical democracy as morally desirable

The democratic nature of the democratic Rule of law depends on the nature of democracy, which involves the universality of the concept of individual (all men are equal) and the universality of political participation of each of them (all men are free).

Each citizen has the right to free and equal voice and the same possibility of speaking up, so that only by the political autonomy people are guaranteed to be both author and recipient of the rules that institutionalize the legislative process.

In this sense, the public sphere becomes the scene of a constant tension between conceptions of good and conceptions of fairness, or, in other words, the tension between the lifeworlds and the character of the Constitution. But, despite the search for agreements being central for the stabilization of law at each historical moment, what predominates in the discourse of the Brazilian people are the disagreements, mainly because of the differences that bulged between them.

However, a democratic society is not marked by homogeneity; on the contrary, difference and disagreements are their distinctive features.

Thus, democracy necessarily requires the harmonious coexistence between those who are different. The difference must be tolerated when it manifests itself in the exercise of political autonomy on the verge of constant disagreements.

So, at that, who has the best option and the best conception of democracy? In which basis should we try to solve the problem of how constitutional democracy can be consolidated in complex societies?

Both authors intend to build a community of free and equal citi-

zens with self-organization. Both propose a model centered in respect of worldviews and forms of life of each individuals. Both share the same methodological stance, advocating a normative theory that explores the relation between the value of democracy and the concept of law. But they are apart from each other in fundamental features.

First, Waldron reaches important achievements with the defense of the principle of political equality and the proposal that people should act, vote and deliberate as equals. Yet his conception of democracy as majoritarian decision-procedure misses the legitimating force of a discursive process of opinion and will-formation.

The influence of language and the rational deliberation on the democratic procedures governed by the discourse principle deserves a much greater attention than it has received in his political philosophy.

Secondly, he starts with the precious idea that the members of the community are committed to the rights and that every one of them are endowed with moral capacities of thinking responsibly about their own interest and the interest of others. However, he insists on pervasive disagreement and he apparently does not give credit to deliberation.

According to his scheme, people are committed to rights but in a lonely and individual way, and not through an inter-subjective relation where communicative rationality enables a performative attitude in search for the best commitment, the best argument. In this sense, the potential of self-government is underestimated.

The public sphere functions as a normative concept. The discursive and argumentative procedures enable people to discover relevant issues for the society and for contributing with possible solutions for existing problems, by means of the construction of good arguments. Through the language oriented to mutual understanding, the interests of others are truly taken into consideration. Everyone becomes an effectively real citizen and the sovereign will formation becomes possible.

Third, Wadron keeps his procedural choice because it is also a respectful procedure. Nevertheless, only the communicative mastery is the source of solidarity and cooperative regulation, where people decide together through deliberation, demonstrating equal respect for each individual moral agency and argumentation.

Therefore, deliberative political will formation is the procedure which best guarantees the principle of respect, because by it individuals truly respect other opinions and the final decision is adopted as ours.

Habermas' theory of democracy affirms those normative notions without neglecting the difficulties from complex communities when he

emphasizes the communicative presuppositions and procedural conditions of democratic will-formation as the source of democracy legitimacy.

So, even though the conceptions of democracy and legality proposed by Waldron seem more "compatible" with the democratic states which have a high degree of diversity of cultural traditions, as noted in Brazil, the model proposed by Habermas to explain the political process on the basis of the discursive theory of law provides a more robust idea of citizenship, participation and, especially, of democracy.

Finally, regardless of which institutional framework is accomplished today, on this view, it is always good to be subjected to a critical evaluation, so that it can be reachable by the democratic procedures indispensable for a real and genuine democratic will formation.

References

CATTONI DE OLIVEIRA, M. A. . A coesão interna entre Estado De Direito e democracia na teoria discursiva do direito de Jürgen Habermas. Revista Brasileira de Estudos Jurídicos, v. 1, p. 77-88, 2006.

HABERMAS, J. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Translated by William Rehg. The MIT Press, Cambridge, Massachusetts. Second printing, 1996.

A inclusão do outro: estudos de teoria política. 2. ed. São Paulo: Edições Loyola, 2002. Cap. 10.

The teory of communicative Action. Tr. Thomas McCarthy. Boston: Beacon Press. 1999.

Consciência moral e agir comunicativo, Trad. Guido Antônio de Almeida. Rio de Janeiro: Tempo brasileiro, 1989.

WALDRON, Jeremy. Toleration: Is there a paradox? New Your University School of Law. Public Law & Legal Theory Research Paper Series. Working Paper No. 12/75. January 2013.

Law and disagreement. J.C.A. Gaskin ed, Clarendon Press. Oxford Univ. 1999.

Can there be a democratic jurisprudence?" (2008). New York University Public Law and Legal Theory Working Papers. Paper 97.

Introduction: disagreements on justice and rights. 6: 1 Journal of Legislation and Public Policy (2002): 5-10.

The core of case against judicial review. 115: 6 The Yale Law Review (2006): 1346-1406.

Interpreting Law:
Democracy and decision procedures

André Almeida Villani

Abstract: This paper states the relationship between one's conceptions of democracy and specific decision procedures that take place in contemporary western States. In order to do so, this work is based on the conflicting ideas of two authors, Ronald Dworkin and Jeremy Waldron. What these philosophers have in common is that both share the same meta-theory of law, purporting to explain existence of theoretical disagreement in legal reasoning. In other words, there are disagreements about what are the real grounds of law. The latter information is the reason why both philosophers give us a post-positivist account of law, which matches with their conceptions of contemporary democracy. However, they disagree when the subject is decision- procedure: Dworkin is a famous supporter of the judicial review of legislation, while Waldron claims that the final decision, in issues of fundamental rights, should be taken by the Parliament. The grounds of the dissent between these philosophers are exactly the conceptions of democracy advocated by each one of them, which lead to different conclusions about who should interpret the law and how it should be interpreted.

On that basis, this paper is formatted in two main parts. The first one is dedicated to study the different conceptions of democracy, where particular problems are developed, in order to set them out and to compare them, such as: what does it take to an institution to be democratic? What legitimates democracy? And finally, how can individual rights be respected when they conflict with other interests of society? All those questions are, of course, strictly related to each other, and they help us to understand some fundamental criteria to choose between these different conceptions of democracy. The second part, in turn, discusses the two decision procedures mentioned and points out the critics aimed directly to them. At this point, the focus and what links this part to the former is, specially, the possibility to make a decision procedure that satisfies the democratic criteria established before. This paper ends by considering then the conditions for democracy and what is, probably, in account of these conditions, the best decision procedure when rights are taken.

Keywords: Democracy, interpretation, decision procedures.

I. Introduction.

In the few moments H.L.A. Hart uses the word *democracy* in his most famous book he says that "judges are not usually elected and in a democracy, so it is claimed, only the elected representatives of the people should have law-making powers" (HART, 1994, p. 275). The statement is located on Hart's postscript, where he discusses his theory of positivism after the critics Dworkin has made, especially the ones about the foundations of law, the existence of principles and also the types of disagreements that participants in a legal reasoning process seem to have. Although the debate between these two philosophers is certainly one of the most important dialogues in Jurisprudence's history, the focus of this paper is, in some form, on the ideas proposed by the quote above. In other words, in many democratic States, such as Brazil, Germany and the United States, there is a Supreme Court that has the power to make decisions in hard constitutional cases, while in other States (e.g. England and New Zeland), that are also democratic States, this task is entitled to the Parliament. But the question remains: which system is better considering the democratic principles and its claims? Which of them can in a better way satisfy the conditions imposed by democracy?

To answer this question it is first necessary to demonstrate what we understand as democracy. Obviously this is not an easy task. A great amount of philosophers and political scientists have dedicated their lives to give us an objective answer to that problem. Therefore, what is here demonstrated does not have any purpose to give an *absolute* answer, but only a partial, although reasonable one, just to make possible the argument on the best decision-procedure in legal reasoning. But, before entering in the material aspect of the problem of defining democracy, I want to give a formal description of interpretative concepts that shall help in the sequence of this text.

Dworkin, as a legal philosopher, has developed a very consistent theory of constitutional interpretation, which is based, mainly, on his view of law itself:

> Of course, law is a social phenomenon. But its complexity, function and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena is, **argumentative**. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by within the practice; the practice con-

> sists in large part in deploying and arguing about these propositions (DWORKIN, 1986, p. 17).

In that context, Ronald Dworkin proposes an *interpretive attitude* towards law, because that seems to be the only way to explain the theoretical disagreements that exist in its core. That, briefly described, is the main critic of the american philosopher to Hart's positivist theory that was already mentioned. For the purposes of this paper, it is said that this same attitude can be used towards democracy, once it can also be understood in an argumentative character.

Following Dworkin's thesis, the interpretive attitude has two main assumptions (DWORKIN, 1986, p. 47): (i) the first one, in our case, is that democracy has an objective or a finality, it serves some kind of ultimate purpose and that does not hang on specific descriptions of its rules or working procedures; (ii) besides that, there is the assumption that democracy may not necessarily or exclusively be understood as something that it has always been thought of. On the contrary, it is susceptible to its own purpose. To illustrate this kind of thought, Dworkin uses (DWORKIN, 1986, p. 69) an example formulated by Wittgenstein to show that an institution can remain *essentially* the same along history, although it can be changed or modified in some shallower aspects as well. He asks us to think in a big and thick rope that is made from a bundle of other small wires, in such a way that any of these wires run along the entire rope. In the end, there is an entire and long rope, but there is no wire that is present in it all along. In other words, the value or purpose of the institution remains along history. However, there is no such figure as a one and only peculiar determining characteristic that can be found and described as a fundamental element. The only possible explanation here is a historical one.

In this same scenery, as a tool to interpretation, one can distinguish concepts from conceptions, and, once more, another metaphor can be used to illustrate this distinction. The debates around democracy usually run in a tree structure (DWORKIN, 1986, p. 70), namely, participants in general agree with the most generic and abstract propositions about democracy and that is the tree's trunk. However, people usually also disagree on the more concrete refinements of these abstract propositions, videlicet, the tree's branches. That interpretive structure is exactly the distinction between concepts and conceptions, according to Dworkin (1986, p. 71), and to expose this structure is to make an argument better. Thereby it follows that the contrast between these two ideas

(concepts and conceptions) is not only the level of abstraction, but also the level of normal disagreement towards what is to be interpreted.

Once that this has been said, it becomes easier to build a concept of democracy, or, in other words, abstract propositions about it, which are not usually controversial. Etymology can be useful in this point. Democracy comes from the words *demos* and *kratos*. People and power to decide, respectively. In the word itself, then, we can find a very abstract idea of what democracy is, and this idea, that the people must have the power to decide, seems not controversial at all. Perhaps we can go further and say that democracy is a government in which the sovereignty is held by the people. Having defined this concept with abstract propositions, the next step is to turn it more concrete, namely, to establish a conception of democracy, a task that is much more complicated.

II. Conceptions of democracy.

In order to take this next step we will introduce two different conceptions of democracy which were developed by two authors that have led a debate between judicial review of legislation and a Legislative's final decision.

The first conception belongs to Dworkin itself, who happened to be a defender of the judicia review. If we tried to summarize his entire decision theory in a word (act that would be very ungracious, but, at the same time strategic to an introduction to his theory) it would be *integrity*. Integrity is a principle, just as equity and justice that, on the other hand, have the assumption to condemn incoherence of principles among the acts of a personified State (DWORKIN, 1986, ps. 183/184). In that sense, it turns out that integrity is accepted in a community as a political ideal, because it is part of our political morality to demand from authorities a behavior that is coherent with principles, avoiding, for example, conciliatory solutions in cases where there are matters of principles, giving both parties a mediocre and shallow decision that satisfies partially them both, so the authority agent can excuse himself from facing the problem in its fundaments. In addition to that, this demand, in most of the western legal systems, is also a constitutional demand (DWORKIN, 1986, ps. 184/185), since the constitution itself holds norms that guarantee the equal protection of citizens when they are standing in front of an official waiting for a decision.

In the last paragraph we've used the term *community* and that

deserves a deeper explanation, because that same term, in the language Dworkin uses, has a specific and elemental meaning. In *Law's Empire*, the American philosopher describes three types of communities (DWORKIN, 1986, p. 208). These models offer, in common, a straight view of general attitudes of the political community members towards each other. Nevertheless, they all show very big differences when compared one to another.

The first one assumes that the members of a determined community treat their associations only as a matter of fact, historically and geographically speaking. This model, however, does not represent a true political community, because there are no effective and embracing enough reasons for a political authority to see its responsibilities towards the people as a moral issue. It is called the model of facts. The second, called the rule's model, assumes that the members of the community accept a general commitment of obeying established rules in a way that is exclusive to this community. It works like a kind of game, in which the players are honest enough to follow the rules, but, at the same time, they are selfish and have their own individual interests. In this case, these players see the commitment to the set of rules just as a simple convention that is limited only to the content of those same rules. There are no subjacent principles which would represent a more abstract and general source of obligation. Finally, the third model is the principle's one. In this case, people agree that, in the same way as in the second model, a shared understanding is needed, but it ought to be wider and more generous than the previous one. The people believe that they are governed by common principles, and not only by rules originated from a political agreement. In other words, it is said that the political rights and duties depend not only in particular decisions taken by political institutions, but also on a scheme of principles that these same decisions ought to assume and consider.

Having this said, Dworkin concludes that only the third model is capable of being a true political community, where responsibilities are taken as personal responsibilities. And that demands that no one shall be excluded or scarified in the name of others. In the same pace, it follows that an individual can be *fairly* considered responsible for acts of the group. Those propositions can be concentrated in the idea of moral membership in a political community.

This conception of political community is the foundation of Dworkin's constitutional theory and also of his theory of democracy. Starting from the former, that includes the moral reading of the con-

stitution as an interpretation theory, he gives us his conception of democracy, since the constitutional argument is "a debate not about how far democracy should yield to other values, but about what democracy, accurately understood, really is." (DWORKIN, 2005, p. 15). And to understand that, is not to discuss methods of representation, but to understand a philosophical argument about the value or aim of democracy. In this context, Dworkin assumes the argument of the *majoritarian premisse*, which is a thesis, in his view, about *outcomes* (and that idea is fundamentally important to our debate):

> (…) it insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection. (DWORKIN, 2005, p. 16)

Against that premise, the American author argues that a majoritarian process is not a definition of democracy and not even a necessary aim of it. In his constitutional conception of democracy, the only reason to defend the majoritarian premise would be a commitment of the people to equality, because that is the foundation of democracy: the attitude from a political institution to dedicate to each of the individuals the same consideration and respect. Therefore, a majoritarian process of decision is not a *conditio sine qua non* to a democratic regime.

In order to establish this conception of democracy we have already said that the moral membership in the political community is the only way to make it possible, but how are we to conquer this kind of membership? Logically, there are also some conditions to it and they can be separated in three groups (DWORKN, *2005,* p. 24).

The first one is a structural set of conditions. This set describes the character of the community in general, and that is why it has an essential historical root that carries sociological traces that the entire community shares, such as a stable territory, a common language and values and so forth. However, this set of conditions it's not as important to us as the others that follow. The second ones are called relation conditions, and they state how must an individual be treated to he or she be considered a moral participant of a determined community, and that is mostly a matter of participation. Everyone must have a voice in the public debate on a decision of the community. Although that is the condition that insists on universal suffrage, Dworkin says (DWORKN, 2005, p. 24)

that it does not mean that elections are the only way possible to satisfy this condition, which, above all, shall preserve the freedom of speech. At last, the third set is made of moral independence conditions. In other words, each individual must have the possibility to regard his or hers own choice in a group venture, even when that opinion is not going to change the outcomes at all.

It is then demonstrated that democracy does not require necessarily a majoritarian premise. On the other hand, it is a matter of constitutional arrangement, participation, and specially, equality. Or, as Dworkin, himself, states:

> If the legitimacy of a political arrangement can be improved by constitutional arrangements that create some in equality of impact but carry no taint or danger of indignity, then it would be perverse to rule these measures ou.t That is the fatal weakness of the majoritarian conception. It rightly emphasizes the value of equal impact, but it misunderstands the nature and hence the limits of that value; it compromises the true value at stake, which is positive liberty, by turning equality of impact into a dangerous fetish. (DWORKIN, 2011 p. 392)

The second conception of democracy we want to present here is the one Jeremy Waldron defends, especially in his book *Law and Disagreement.* Just like Dworkin, Waldron thinks that democracy is compatible with the idea of individual rights, in the sense that there is no trade-off between them. Also following the American philosopher, Waldron uses an interpretive methodology when analyzing law, democracy or any other concept, denying a merely descriptive approach of jurisprudence in the way Hart proposed (WALDRON, 2008, p. 10).

Therefore, one can conclude that Waldron rejects positivism just like Dworkin, but that is not entirely true. Connecting the ideas of jurisprudence and democracy, Waldron goes back to the roots of legal positivism when it was entirely associated with democratic values. As an example, he gives us the work of Jeremy Bentham. That proposition was actually made by Dworkin himself, who, however, observed that the connection between this two ideas has been lost, partially because he thinks in a democracy associated with a right's jurisprudence enforced by judges, but also partially because he thinks that positivists have turned against any sort of political connection with law (WALDRON, 2005, p. 12). Waldron, on the contrary, uses positivism as a starting point

for his theory of a democratic jurisprudence, therefore, not denying it entirely.

Apart from that, now focusing in the conception of democracy, Waldron believes that democracy needs very robust fundaments and, because of that, it would be insufficient to say that democracy is just a government of the people in which the people itself can choose their representatives through a majoritarian process. More than that, it also would not be enough to say that democracy should treat anyone as an individual who has fundamental rights which are represented by constitutional principles. Those two premises, in Waldron's believe, it is important to mention, are based on moral grounds, because to take someone as a right-bearer, is to have confidence in that person's moral capacity – his capacity to be responsible when there is a moral relation between his interests and another's.

Completing these two propositions, Waldron adds that there cannot be a democracy unless each individual bare and regularly exercise the *right to participate*, or, as he calls it, the right of rights (WALDRON, 1999, p. 282). He explains that:

> For me, democracy includes the idea that rulers are chosen by the people whom they rule, the people determine the basis under which they are governed, and the people choose the goals of public policy, the principles of their association, and the broad content of their laws. The people do all this by acting, voting, and deliberating as equals, through elections and through their relations with representatives (WALDRON, 2008, p. 8).

On that basis, Waldron establish a new conception of what Dworkin called a constitutional democracy. Instead of thinking only in a theory oriented especially to the results of a decision, he designs also a theory of democratic *means* or procedures. Obviously, in the end, what matters most is a democratic result, but, in Waldron's view, the way that result is reached is also included in the idea of democracy. According to him, Dworkin puts his argument in defense of his constitutional democracy theory as a "elision between a decision *about democracy* and a decision *made by democratic means*" (WALDRON, 2004, p. 292). And assuming this distinction, Waldron argues that the point he wants to make is that "concerns about the democratic or non-democratic character of a political procedure do not evaporate when the procedure in question is being used to address an issue about the nature of democracy" (WAL-

DRON, 2004, p. 293).

At this point, we are able to affirm that Waldron's conception is more focused in a procedural character. But why is that? The answer is what he calls the *circumstances of politics* (WALDRON, 1999, p. 102). It is an argument based on the same structure of the *circumstances of justice,* developed by John Rawls, which he describes as "the normal conditions under which human cooperation is both possible and necessary" (RAWLS, 1999, p. 109). The circumstances of politics, however, according to Waldron, means that we all live in disagreements. And by that, he means that people disagree in good faith, that is, for example, we all want to achieve a solution to a problem, but may of us disagree on how are we going to conquer this aim, or even on what that solution exactly is. In other words, we all want to end the disagreement, but as free individuals who have the right of self conviction, we may still disagree. Some may think that an answer to that problem is a kind of deliberative democracy, in which a valid consensus is the key. That consensus must be rational and motivated, that is, it must take place in a public arena (a legislature, for example) where the individuals bare freedom of speech, and so the best argument will naturally prevail. But, as Waldron says that "in the real world, even after deliberation, people will continue to disagree in good faith about the common good, and about the issues of policy, principle, justice, and rights which we expect a legislature to deliberate upon (WALDRON, 2004, p. 93)

Because of that, we can conclude that deliberation will always be embedded in disagreement. And that leads us to the central idea of the circumstances of politics: how can we, individuals, act in a common way in disagreement? Or, how can a course of action be possible in the face of disagreement? Those questions emerge from the bilateral character of the circumstances of politics: firstly, according to Waldron, disagreement would not matter, if there was no urgency for a course of action; and, secondly, this urgency would not give rise to politics as it is known if there was not the potential for disagreement related to this concerted course of action ought to be. Our society, in that way, is a non-well-ordered one.

At this point, Waldron, who has been greatly influenced by Rawls political liberalism, just like Dworkin, takes a step against the ideas of the author of *A Theory of Justice.* In rawsian's terms, Waldron puts it, "To think – as *we* have to – about the politics of a society whose members differ radically an in principle about what justice is (…) is to move from ideal (or strict compliance) theory, to non-ideal (partial compliance) the-

ory.". If that is correct, he continues, Rawls's argument is very problematic, because it can not be applied in a society like ours, in which people do not accept the same principles of justice (WALDRON, 1999, p. 158). Our society is deeply emerged in disagreement, including disagreement about principles. Therefore, we must engage in procedural principles.

So, in Waldron's conception, democracy is not only about reaching the best decisions, but also about how do we reach those decisions. The democratic outcomes do not invalidate the democratic importance of the means these outcomes are conquered. And, most important, this conclusion do not come from a normative need of democracy, it comes from the fact that the level of disagreement among citizens is so high, that it reaches the consensus of what is the best decision. There is no consensus.

III. Outcome related reasons and process related reasons.

The arguments that have been until now exposed constitute a solid background for the analysis of the problem stated in this paper. Taking both conceptions of democracy described until now, the main difference between them can be pointed by two types of reasons, outcome-related and process related. Both, Dworkin and Waldron, recognize the existence of those reasons, but their approach to them and, therefore, the role they play in a democratic decision procedure, is different.

As we have seen, Dworkin rejects the majoritarian premise, since it is not fundamental for democracy. In this sense, judicial review of a specific statue enacted by the Parliament, through a majoritarian premise, that declares it unconstitutional, is not anti-democratic at all, as long as this declaration promotes rights and do not interfere in the participation of people (in the sense he defends) in the discourse. However, this conclusion is limited, because it does not provide a positive defense for judicial review. In addition to that, Dworkin (2005, p. 33) argues that democracy is incomplete, because it does not prescribe procedures for testing whether the conditions it demands for this procedures are being attended.

According to him, his moral reading method does not prescribe necessarily, who should take decisions. It remains silent to that question. What to do then? The only way to answer that is by taking results, or outcomes as criteria, whether than procedures or processes (DWORKIN, 2005, p.33). The best one to take those decisions is the one who

reaches the best answers.

But in this case, Dworkin's argument is not satisfactory. He admits, in the end, that there is disagreement when deciding who can reach the best answers, and that this is exactly the incomplete character of democracy: it can not provide a procedure do decide that! (DWORKIN, 2005, p. 34). He now takes Waldron premise, and that seems illogical for him to do, once he defends the existence of a right answer and the possibility to reach it in regard of the procedure there is to be chosen. Dworkin ends by taking an already established Constitution (the United States Constitution) that already prescribes an institutional desing, to say, only, that there is no reason to oppose to judicial review of legislation (DWORKIN, 2005, ps. 34/35). This attitude to talk about law, and to talk about *the* law, without making this contrast, in Dworkin's discourse, has been much criticized, and it can be considered a flaw in his argument (KRAMER, 1999, p. 129).

However, there are at least two arguments that offer a positive defense for judicial review. One is presented at the end of this section, the other is stated on the next one. Before presenting them, nevertheless, it is necessary to present Waldron's view.

In the face of disagreement, Waldron claims that in certain situations a course of action is unavoidable. There is a need for settlement when we disagree about rights. It follows then that a decision-procedure ought to be set up. But how is that possible? He explains that "even though the members of the society we are imagining disagree about rights, they need to share a theory of legitimacy for the decision-procedure that is to settle their disagreement". (WALDRON, 2006. 1371). This, however, must be independent of the disagreement it is suppose to settle, it can not reignite it, otherwise, it would not be good. Having this said, Waldron argues that, although relevant, outcome-related reasons are inconclusive, while process-related reasons truly stand against judicial review (WALDRON, 2006, p. 1375).

The core of the case, when relating to these process-related reasons goes back to legitimacy. It is a fact that we disagree in good faith, but, since we have to take decisions, we must have a process to do it, and what assures that the decision taken must be followed eve by those who do not agree with it, it is the legitimacy of the process. We have already established that in Waldron's conception of democracy, the right of rights, or the right to participate, is fundamental. Therefore, it must be on the basis of the decision-procedure to be followed. Once everyone has participated in this procedure, it *is* legitimate. But how to do that?

We have already in mind, two models: judicial review or the legislature final decision. It is then a question whether which of them promotes the participation of everyone interested in the decision.

To test both models, Waldron, adopting the point of view of a citizen, asks:

> Why should this bunch of roughly five hundred men and women (members of the legislature) be privileged to decide a question of rights affecting me and a quarter billion others?; (ii) even if I accept the privilege of this five hundred, why wasn't greater weight given to the views of those legislators who agreed with me? (WALDRON, 2006, p. 1387)

The same questions are addressed to Justices. Waldron begins answering that the answer to the first question is the fair election of members of the legislature, which, in most countries, do not take place when Justices are chosen. In his account, fair elections treat each individual equally, respecting the right of rights. To the second question, the answer is the majoritarian premise, because, in order to take each individual's opinion equally, each legislator's opinion must be treated in the same way as the other.

However, that does not bring any advantage to the legislature's final decision. It can be said that judges are chosen or indicated by those who were elected, having, in this way, the same "democratic credentials" as members of the legislature. Waldron know this argument (WALDRON, 2006, p. 1391), but he fails to respond to it. He says that election of members of the parliament is democratically superior to Justice's indirect election, because the formers are usually accountable to their constituents, something that does not happen to judges.

Nevertheless, this argument only *presumes* that legislators do so. One can not infer that, once a legislator is elected he will vote or participate in law-making by always being accountable to his constituents! There is a logical flaw in this argument: the conclusion of the premise is not obligatory. There are no clear reasons for us to believe that legislators are always faithful or loyal to the ones who voted on them. The correct conclusion is that elections *might* serve as a legitimate credential to democracy and that opposes nothing to judicial review. Since legislators may or may not be loyal to its constituents, so do judges. In fact, most of the times, it is said that even if a judge or Justice is chosen by a political representative of the people, he must not be always loyal to this repre-

sentative. On the contrary, the judge must be free, politically speaking, in order to reach decisions that are not always desired by the ones who hold political powers, and that can be taken as a positive argument in favor of judicial review.

In relation to the second answer, the one about the majoritarian premise, if we take the statement made in relation to the first one, it is easy to see that it makes no harm to judicial review as well. If elections do not provide a positive definite and obligatory democratic consequence, both judges and legislators have the same legitimacy. And, if the majoritarian premise is important to democracy (to Dworkin we have already seen, that it is not), there is no difference whether the decision is taken in courts or legislatures, because, both of them vote by following a majoritarian process. In both cases, the proposal which have the most votes is the one to be taken as the final decision.

As follows, what Waldron has argued as being the core of the case against judicial review is, in the end, an argument that favors neither one, nor the other. What lefts, then, is the outcome-related reasons. Nonetheless, these reasons are actually just a part of a broader argument, which we consider to be the key to the question, the argument on moral reasoning as a method of interpretation. Since, in this case, what matters to democracy is the final result, it does have some connection to the method of interpretation of law, which is a determined type of reasoning.

IV - Moral reasoning.

The main problem faced in this paper, so far, has been answered by philosophers in two different ways: one that is based on the *who* question and the other on the *how* question. In other words, who should be the one making decisions and how that should be done. The first question, in a narrower view, is our main problem itself, while the second one, although may be part of the problem, takes our horizon a bit further, but for good reasons, because it forces us to go deeper in this research.

In order to answer those questions, they won't be taken as two completely separated subjects, but as parts of a one and only matter and there is no such time or space, in this opportunity, to demonstrate the answer to the *how* question as a whole, but only where it comes in contact with the *who question,* which is exactly the part that we want

to focus on. We think it is already clear that regarding to law, the interpretive perspective can not be avoided and, because of that, all decisions in all the aspects of law should be taken through an interpretive method. And when we look at all the existent interpretive methods, we reach another giant controversial area in law, which I won't explore right now. Thus, based on the arguments showed in the first parts of this paper, the moral reasoning (understood as an interpretive method), can be taken as one of the best methods to take decisions in law, specially when the criteria is democracy. In fact, this method is taken in account by both main authors discussed in this paper (DWORKIN, 1986, and WALDRON, 2009).

But how does moral reasoning (one of the answer to the *how question*) connects to the *who question?* The answer is another question: who can be a moral reasoner?

Waldron says that most of the times it is said that courts are better at moral reasoning than legislatures (WALDRON, 2009, p. 2). In other words, it is said that judges take moral issues more seriously than legislators, who have to face a chaotic majoritarian-procedure. Against that, Jeremy Waldron argues that if the most important issues concerning individual and minority rights have to be addressed directly as moral issues, just like he and Dworkin advise, we might well think that courts aren't the best institutional forums where the final decision ought to be taken, because, although judicial reasoning about rights is indispensable, it may not be the right answer when a moral phase is considered (WALDRON, 2009, p. 14). He thinks that those issues may be better conducted through settings where they will not be compromised by "doctrines, precedents, texts, and interpretation" (WALDRON, 2009, p. 14), characteristics that are intrinsic to legal reasoning, which may, however, compromise moral reasoning. Waldron even gets to use the expression "contaminated moral reasoning" (WALDRON, 2009, p. 15) to describe judicial reasoning.

On the other hand, he says that an ideal legislative type of reasoning does not have to face such obstacles, because it is a way of reasoning in the name of the whole society that is not constrained *prima facie*:

> (It) is different from a court's obligation to reconcile its decision with previous decisions on the same and similar issues. Mostly, legislators are in a position to reason about moral issues directly, on the merits. Members of the legislature speak directly to the issues involved, in a way that is mostly undistracted by legal doc-

> trine or precedents. (WALDRON, 2009, p. 19)

In brief, this latter type of legal reasoning can be described as made by representatives of the whole society, elected on a basis that treats all individuals as equals (one fundamental aspect of a democracy), who also vote and reason in a direct way as equals. This argument can easily be addressed to common law systems, where there is no written constitution, specially regarding to the precedents which, in this sense, are supposed to work as a filter to an effective type of moral reasoning. But Waldron believes that the same argument can be used in systems where a written constitution is present, because, in this case, the type of moral reasoning used by courts members will not be based on a fresh look at the issues (WALDRON, 2009, p. 21). It will only be moral in the sense to reconcile what is thought as moral with what has been already thought as moral by the society and, therefore, established in the constitution's text. Thus, it wouldn't be an authentic kind of moral reasoning like the one we are searching for.

Finally, Waldron concludes that questions about rights, which are subjected to the controversy regarding judicial review, are not, in most of the times, issues of interpretation (WALDRON, 2009, p. 22). In his view, they only present themselves as such. In fact, these questions should better be treated as practical and political matters than actual interpretive issues.

Although Waldron's argument might sound very convincing and well elaborated, it does have some weak points that, in our view, compromise the defense of legislatures when the subject is fundamental decisions about rights. We will start with the types of reasonings that can be extracted from his argument. In his work, he says that decisions involving fundamental rights should be taken as moral issues, therefore, moral reasoning should be the method through which the problems ought to be interpreted.

However, moral reasoning is inserted in a more generic type of reasoning: legal reasoning. Inside this genre, besides moral reasoning, there is a type of reasoning that states the abilities to find and to apply law (WALDRON, 2009, p. 14). This division in legal reasoning has been historically carried out by positivists in very different ways, but Waldron, in this case, just like Dworkin, holds a post-positivist position. He believes that the best view on legal reasoning is the one that considers that finding, applying and (morally) interpreting law are many parts of a hole and that they can not be well isolated or distinguished

one from another. It is practically impossible to say when a jurist is finding, applying or interpreting, even morally, the law, and when he is not, or when is doing only one of these tasks. Thus, we reach the conclusion that moral reasoning *is* legal reasoning.

Nonetheless, when attacking judicial review, Waldron seems to forget this fact. He thinks judges, because they have to face doctrine, precedents, texts and even *interpretation*, might not morally reason in a good or authentic way. Well, facing doctrine, precedents and texts is a very important facet of legal reasoning, because all of these are aspects of the language and, more importantly, aspects (or sources, in a more traditional vocabulary) of the legal discourse. And interpreting these and all other aspects of the discourse may be considered the main facet of legal reasoning! Furthermore, interpretation itself can not be considered an obstacle to moral reasoning, in fact, it can not even be considered an *aspect* of the legal discourse, it is, instead, the *base* or *foundation* for any kind of discourse, it is the process through which discourse itself is created.

The idea of discourse takes us to the next argument presented by Waldron: that judges, specially in systems where there are written constitutions, never have the possibility to face moral issues with a *fresh look*. But what is a *fresh look?* And how this idea is related to the idea of discourse? Waldron does not give us a philosophical answer, he says that a fresh look is the one free from commitments, that in our view, as already stated, can be considered legal commitments, because they are related to aspects of the legal discourse. In that sense, a fresh look towards a moral issue would be the one that holds no commitments to these aspects. Again, Waldron seems to run away from an interpretive perspective which he, in earlier moments, claim to adopt. There is no fresh look. The discourse in general, as well as the legal discourse, never starts from nowhere. There is always a commitment or influence of some historical kind. One can not be considered someone free from these linguistic commitments or influences. A discourse does not start from a "fresh" environment. There is always a linguistic and historical background. In addition to that, as long as we are considering moral reasoning as our interpretive method, we must pay attention that moral reasoning itself demands a kind of historical commitment to the community where the decision is to be taken and that does not mean precedents or historical propositions can not change, it means that they must, at least, be considered and, therefore, interpreted during the decision process.

At last, in relation to the point that issues regarding judicial review should be treated as political or practical ones, instead of interpretive issues, despite of Waldron's sayings, our conclusion can not be different: issues that are related to decision taking processes, especially when fundamental rights are at sake, must not be treated as merely political, because of the inherent interpretive character of law.

There is, then, no reason to believe that judges are bad at moral reasoning, because legal reasoning itself includes the former. Legislatures, on the other hand, have obstacles to face when using moral reasoning. Waldron tried to expose obstacles faced by judges, that, in the end, were proved to be linguistic commitments intrinsic to legal discourse, and therefore, to legal reasoning and to moral reasoning, while the truth is that legislators are the ones who have to face real obstacles. The commitments taken by legislators with the ones who have elected them and with other officials in order to participate in the political processes are not commitments based on aspects of legal reasoning or in the legal discourse. They are, in fact, external commitments, which do not have any kind of relation to moral reasoning. However, these same commitments have influence on the result of the decision process, because they reflect in the choice of arguments used by legislators. And, unfortunately, the practical procedures used in parliaments, most of the times, do not prevent those influenced arguments to take place.

IV. Conclusion.

We have seen that just like law, democracy must be analyzed through an interpretive attitude and, within that, moral reasoning has been pointed (including by both authors in here discussed) as one of the best methods when the issues are related to fundamental rights. In the same pace, we have established the concept of democracy and a conception of democracy that contains the propositions that all individuals, understood as participants, shall be treated as equals, who integrate a system of rights formed by rules and by constitutional principles. Moral reasoning, therefore, must be used in order to reach the best decisions, considering all individuals as equals.

In addition, we have also demonstrated that, despite the importance of the results, procedures shall also be considered, but only to guarantee those results, since process-related reasons do not give us any motives to choose courts or legislatures as the best forums for decision-

making.

Thus, confronting Waldron's arguments on attacking judicial review, we have argued that the interpretive character can never be left aside and that legislators have to face obstacles that come from outside the legal discourse, and, hence, outside legal reasoning, which is something that should be avoided in the decision-processes. To the question in relation to who must take decision on fundamental rights, the conclusion, then, can be no other than that judges are the ones, because they are more settled on the legal discourse, since they have stronger commitments to its aspects.

References.

DWORKIN, Ronald. Freedom's Law: the moral reading of the american constitution. Oxford University Press, 2005.

DWORKIN, Ronald. Justice for Hedgehogs. Oxford University Press, 2011.

DWORKIN, Ronald. Law's Empire. Harvard Unuversity Press, 1986.

HART, Herbert Lionel Adolphus. The Concept of Law. Oxford University Press, 1994.

KRAMER, Matthew H. In Defense of Legal Positivism: law without trimmings. Oxford University Press, 1999.

RAWLS, John. A Theory of Justice. Harvard University Press, 1999.

WALDRON, Jeremy. Can There Be a Democratic Jurisprudence?. Public Law and Legal Theory Research Papers Series, Working Paper no. 08-35, 2008.

WALDRON, Jeremy. Judges as Moral Reasoners. Oxford University Press, 2009.

WALDRON, Jeremy. Law and Disagreement. Oxford University Press, 1999.

Transitional justice and Brazilian amnesty law:
A study on their democratic legitimacy

Ronaldo Louzada Bernardo Segundo[1]
Adriano Sant'Ana Pedra[2]

Abstract: This study aims to discuss the democratic legitimacy of a legal instrument on the political transition that took place after the last dictatorship period in Brazil, between the years 1964 and 1985. It approaches from the theoretical framework established by Friedrich Müller, in "Who are the people?" in order to evaluate the validity of the Brazilian Amnesty Law. Based on the analysis of the essential concepts to understanding the subject, such as amnesty, transitional justice and political crimes, the study discusses the different historical experiences lived on different countries to demonstrate the diversity of solutions to address the questions posed by the need for political transition societies different from its historical, cultural and political and, thereby, demonstrate that the solution found by the Brazilian society is the result of its peculiarities, not deserving reproach from the comparison with other solutions found by other societies.

Keywords: Amnesty; democracy; transitional justice.

1. Introduction

The last three decades of the 20th century served as backdrop for deep political changes around the world; as one of the most important results, democracy took over authoritarian political model in many countries.

[1] Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Lawyer. E-mail: ronaldosegundo@hotmail.com. Curriculum Vitae: http://lattes.cnpq.br/0109049271076413.

[2] PhD in Constitutional Law (Pontifícia Universidade Católica de São Paulo – PUC/SP). Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Professor of Constitutional Law at Faculdade de Direito de Vitória – FDV (bachelor, master and doctoral program). E-mail: adrianopedra@fdv.br. Curriculum Vitae: http://lattes.cnpq.br/0637600349096702.

It is no exaggeration to affirm that each society had chosen its own unique path to allow the political transition to occur, however it is also possible to point out similarities in their processes.

Among these similarities, one is the object of this work: finding the answer to the question of how to accommodate the newly created democratic structure components of antagonistic political groups basically divided on those who support the former authoritarian regime and their opponents, a question whose relevance becomes greater when one considers the fact that in these countries have routinely occurred disrespects of human rights.

The analysis of the proposed theme demands the comprehension of at least three essential concepts, without which is not possible to understand the thesis defended: amnesty, transitional justice and political crimes.

2. Amnesty

There is almost no controversy about the nature of amnesty as an instrument to promote the oblivion of legal offenses committed, inclusive when derived by etymological analysis of the world.

If there are relevant controversies, they are focused on the possibility of granting amnesty to common crimes as history reveals that the institute emerged from the need to resolve mainly political issues, which is not sufficient by itself to rule out its use in case of crimes of another nature – including common crimes.[3] [4] [5]

By the other hand, amnesty presupposes the existence of a crime expressly typified and manifests itself through a sovereign political choice to promote forgiveness despite the fact committed, as it had never occurred, still being a legal institute able to make its way in the political field, therefore it is a decision of the holder of political power to choose the facts to be amnestied.

---

[3] PRADO, Luiz Regis. *Curso de direito penal brasileiro: parte geral.* São Paulo: Revista dos Tribunais, 2006. p. 722.

[4] VIEIRA, Vanderson Roberto. *Anistia no direito penal.* Disponível em: <http://www.faimi.edu.br/v8/RevistaJuridica/Edicao6/ANISTIA%20-%20vanderson.pdf>. Acesso em: 31 mar. 2011.

[5] PERRONE-MOISÉS, Claudia. *Leis de anistia em face do direito internacional: desaparecimentos e direito à verdade.* In: PIOVESAN, Flávia (Coord.). Direitos humanos, globalização econômica e integração regional. São Paulo: Max Limonad, 2002. p. 285-305.

3. Transitional Justice

It is possible to conceptualize transitional justice as a field of research destined to examine how different societies face issues related to "[...] legacy of human rights abuses, mass atrocities or other forms of severe social trauma, which includes genocide and civil war, intending to build a more peaceful and democratic future".[6]

Activity that aims to investigate the past, assign responsibilities and also find ways to punish the guilty of disrespecting human rights, its main purposes are to provide the victims of violent or arbitrary actions of the state or of others human rights violators, to pacify society by eliminating tensions among opposite political groups and to provide the establishment of political instruments to prevent the recurrence of past events.[7]

Each of these purposes is directly related to different standards of legal responses to the history of disrespects of human rights: punishment, pacification and the search for truth, graduating from the elements highlighted and the inexistence of finding the right pure solutions, a set of triangular solution models for the question.[8]

The finding of the absence of the aforementioned "pure solutions" is essential in that it reinforces the belief there are numerous paths to be traversed by different societies that face the challenges of transitional justice, each endowed with such a high number of variables that seems impossible affirm the possibility of replication or the superiority of one model over the other.

---

[6] MEZAROBBA, Glenda. O que é justiça de transição: uma análise do conceito a partir do caso brasileiro. In SOARES, Inês Virgínia Prado; KISHI, Sandra Akemi Shimada (Coord.). *Memória e verdade: a justiça de transição no Estado Democrático brasileiro.* Belo Horizonte: Fórum, 2009. p. 37-53.

[7] MEZAROBBA, Glenda. O que é justiça de transição: uma análise do conceito a partir do caso brasileiro. In SOARES, Inês Virgínia Prado; KISHI, Sandra Akemi Shimada (Coord.). *Memória e verdade: a justiça de transição no Estado Democrático brasileiro.* Belo Horizonte: Fórum, 2009. p. 37-53.

[8] DIMOULIS, Dimitri. Justiça de transição e função anistiante no Brasil: hipostasiações indevidas e caminhos de responsabilização. In: DIMOULIS, Dimitri; MARTINS, Antonio; SWENSSON JUNIOR; Lauro Joppert (Coord.). Justiça de transição no Brasil: direito, responsabilização e verdade. São Paulo: Saraiva, 2010. p. 91-127.

4. Political Crimes

The main difference between common and political crimes consists in the fact that the political, unlike the common, are not theoretically practiced for selfish reasons, but rather to influence decisions concerning the exercise of power characterized as a radical modality of political participation in situations where the ordinary paths to take part in political decisions are blocked to opponents and dissidents.[9]

Political crimes can be analyzed from at least two criteria: objective and subjective. In the first, the definition is based on the legal object effectively threatened or injured, restricting the recognition of such nature of acts against the political body; in the second, the focus is the goal pursued by the agent, which if it has a political character, his acts will assume this quality no matter the characteristics of the goods threatened or harmed.[10]

Arguments that deny political acts committed by state agents fail to consider the existence of doctrinal elements able to justify the assignment of such nature to the aforementioned acts.

5. Brazilian Amnesty

During the process of redemocratization that followed the last dictatorship period, the amnesty issue has became more important than ever in the long history of Brazilians amnesties and it echoed deeply into society.

Surrounded by controversy – specially because of granting amnesty to public agents involved in the repression of regime opponents – the Amnesty Law allowed the return home of many expats living overseas for years and, despite the criticism it suffered, it was reaffirmed by the Constitutional Amendment that convened the National Constituent Assembly, responsible for drafting a new constitution.

Since then the discussion concerning the validity of the Amnesty Law has been increasing and reaching unprecedented significance in recent years. On one hand, it had lined up proponents of the thesis that amnesty law was wrested by the military dictatorship, causing its il-

[9] SILVA, Carlos A. Canedo Gonçalves. *Crimes políticos.* Belo Horizonte: Del Rey, 1993. p. 55.

[10] SILVA, Carlos A. Canedo Gonçalves. *Crimes políticos.* Belo Horizonte: Del Rey, 1993. p. 55.

legitimacy by lack of democratic representation, enhanced by the existence of amnesty law established for public officials involved in torture, despite the violation of the obligations assumed by Brazil to combat this kind of practice; on the other hand, it lined up those who advocate amnesty as an instrument to promote social peace and understand it to be essential to allow democracy transition and the consolidation of new political institutions.

In order to understand the process of political transition, which one of the main points was the granting of amnesty, is necessary to remember that throughout the period of military rule always existed disputes among different political-military groups, fueled by differences over the conduct of the "revolutionary process".[11]

Such groups were not easily identifiable and neither were made up of factions clearly separated; trying to set in black and white the political arrangement may seem inglorious task, although it is possible to affirm the existence of two extremes between which revolved all that in any way had a voice in policy decisions of the military government.

This dynamic was present form the beginning to the end fo military rule and the result os clashes between different groups was always a point to be considered when it was necessary to take important decisions by generals-presidents who occupied the head of the Executive Branch in the period.

6. Wrested Amnesty

The claims about the amnesty established by Law n. 6.683/79 having been wrested by military dictatorship[12] [13] [14] [15] do not consider

[11] MARTINS FILHO, João Roberto. 40 anos depois. In: REIS, Daniel Aarão; RIDENTI, Marcelo; SÁ MOTTA, Rodrigo Patto (Coord.). *O golpe e a ditadura militar:* 40 anos depois (1964-2004). Bauru: Edusc, 2004. p. 125-140

[12] GAGNEBIN, Jeanne Marie. O preço de uma reconciliação extorquida. In: TELES, Edson; SAFATLE, Vladimir (Coord.). *O que resta da ditadura.* São Paulo: Boitempo Editorial, 2010. p. 177-186.

[13] NOHARA, Irene Patrícia. Direito à memória e reparação: da inclusão jurídica das pessoas perseguidas e torturadas na ditadura militar brasileira. *Revista de Direito Constitucional,* São Paulo, n. 67, p. 125-159, abr./jun. 2009.

[14] BICUDO, Hélio. Anistia desvirtuada. *Revista brasileira de Ciências Criminais,* São Paulo, n. 53, p. 88-97, mar./abr. 2005.

[15] ALVES, Márcio Moreira. **Teotônio, guerreiro da paz**. São Paulo: Vozes, 1983. p. 169.

essential elements for understanding the dynamics of the process that resulted on its approval.

Similarly, statements about the lack of legitimacy of Congress to vote and approve the measure, which according to critics it responded to the interests of the state agents who failed to account for their illegal actions during exception.[16] [17]

Similarly, complaints regarding the lack of legitimacy that could be called "popular" – as opposed to the one that would be called "politics".

First of all, there are good reasons for credit to several popular groups the initiative of claim by amnesty – with special emphasis to the student movement – since the mid-1970s.

The claim of having been amnesty wrested fails to consider the previously mentioned bitter struggle for the leadership of conduction of the military regime, in which were involved supporters of institutional nomalization (which amnesty was an essential element) and the other different groups interested in maintaining government dictatorial (which were radically opposed to any amnesty proposal).

To understand the issue and try to find a satisfactory answer to the question concerning the validity of the Amnesty Law, it is important to verify if its approval answers the wishes of a significant portion of the population, even within the limits imposed by the historical context then lived.

At this point, it is necessary to discuss the theoretical framework formulated by Friedrich Muller in his book "Who are the people?", going beyond what is written in the Constitution, once the author's goal is to establish the criteria to identify the different roles played by the members of this great community called people, and that can be applied to any situation. Such analysis is necessary to try to demonstrate if the model of transitional justice adopted in Brazil is endowed with "popular" legitimacy.

---

[16] ARAÚJO, Maria Paula Nascimento. *A luta democrática contra o regime militar na década de 1970*. In: REIS, Daniel Aarão; RIDENTI, Marcelo; SÁ MOTTA, Rodrigo Patto (Coord.). O golpe e a ditadura militar: 40 anos depois (1964-2004). Bauru: Edusc, 2004. p. 161-175.

[17] LEMOS, Renato. Anistia e crise política no Brasil pós-1964. *Topoi*, Rio de Janeiro, p. 287-313, dez. 2002.

6.1. Who are the people?

In order to answer the question objectively and scientifically grounded, Friedrich Muller outlined four distinct concepts that can be attributed to the word "people", demonstrating how each of them fits a certain reality, providing subsidies for the understanding of the topic.

6.1.1 Active people

The success of the French revolutionary process of 1789 brought the need to justify the exercise of power by the victorious. It was grounded in theories related to the divine until it faces a process of change which displaces the Crown – and God – as the bases of sovereignty to base it on an element which had not yet played such prominent role in political science: people.

Once identified with the electorate, the active people is the starting point for validity of all the state legal system. Although the association with democracies is more common, the fact is that even dictatorships make use of such association in order to legitimize the exercise of power.

The idea of active people respond to the need to establish a starting point for individual compliance to social rules, avoiding opened debate on the subject to comply with the determinations of any authority, solving two problems at once: the question of legitimacy of power combined with abandonment of any kind of metaphysical justification for submission to it.

6.1.2 The people as a global instance of legitimation

Here the term people takes a new meaning due to the interruption of the cycle of legitimation, no longer acting directly but represented by public officials.

This idea is therefore a necessity in modern states in which the exercise of power occurs indirectly through representatives an in which decisions can only be exercised through extensive professional and specialized paperwork, holder of portions of state power.

6.1.3 The people recipient of civilizing benefits of state

Alongside the role of "active" and "legitimizing" the people still plays another, which Muller calls "civilizational recipient of benefits".

Absent the people, it would not be possible to speak of the state – at least not according to the theoretical basis that has being adopted for this concept since the Peace of Westphalia – following from this fact the need, on the other hand, to ensure the people effectiveness of fundamental rights.

6.1.4 The icon people

The people appointed as an icon is to justify the attitudes of those in power, however that actually does not legitimize anything, being a mere instrument of justification of the measures taken, serving only as a symbol just as the religious icons (pictures, flags, banners etc.) used to be carried by the ancient armies: nothing more than an attempt to show the approval of the deity to the designs of individual rulers.

In the name of this new divinity, policies are made and actions are performed, however the divinity is never consulted. Most often it is not even informed of the decisions that are taken and it becomes aware of them only when it gets affected by the results.

Elections, popular consultations, as well as public and "spontaneous" demonstrations on the part of the population are instruments who use notorious detractors of democracy to demonstrate that represent the "people", which does not cease to be true, if consider the people mentioned here the "people" icon, resulting from the work of "creating" the people, including, when necessary, through violent practices, such as [...], resettlement, expulsion, settlement and more recently also by 'ethnic cleaning', a barbarian neologism to denote the old barbaric practice."[18]

In other situations, the iconization do not occur ostensibly, but covertly; existing distinct and opposing groups in a given political reality, each trying to accuse those who hold the opposite position this negative designation. In such situations it is possible to make a parody with the author and to redo the question that baptizes his work in the following terms: who are the people icon?

---

[18] MÜLLER, Friederich. *Quem é o povo?* A questão fundamental da democracia. São Paulo: Max Limonad, 1998. p. 67-68.

6.1.5 The icon is always the other one

The accurate analysis of F. Muller shows that it is possible to understand "the people" by different concepts, each occupying a different dimension, showing that the desire of any person or group has or aspires to exercise political power is present to itself as a representative of "the people" in its positive aspects.

On the other hand, it does not seem to be credible that any person or group who has or aspires to exercise state power want to see their power connected to the idea of people icon concept that should always be reserved for those who do not share their political beliefs in order to, first, take away from this group – this 'other' that is different – any possibility of legitimacy and, second, to ensure this legitimacy only to himself.

It can be concluded that there is an irresistible temptation to those who somehow struggle for power – and even stronger when the power is exercised from convictions strongly ideologized – to confer themselves the role of active people, as the opponents keep the function of mere icon.

During the last military government the two warring sides repeatedly tried to assign the nature of icon to that portion of the population that demonstrated to be contrary to their ideals, keeping to themselves the exclusive role of representative of the popular will.

Today, those who try to invalidate the Amnesty Law always deny the existence of popular support for its approval, as well as deny historical facts that point out to a root eminently popular of the movement that leads to the Amnesty Law and reject to assign to those engaged in the fight the title of active people.

The aforementioned origin is enough popular to recognize those who struggle and have risked in favor of amnesty project the role of active people. To do so, it would be sufficient to adapt Muller's ideas about this dimension of the people to a reality that is not exactly the one imagined by him when developing his theory.

Muller refers to the role of active people within a democratic environment, even though this was not the situation in Brazil at the time. Instead of serving as an obstacle to the recognition of the role of active people who took part in the campaigns in favor of amnesty, the political environment should be recognized as a factor to increase the value of

their actions; in dictatorships, political participation is discouraged or severely repressed and take position against the permitted by those who wield power demand greater deal of courage and commitment.

Despite all the risks involved, it was just within society that amnesty project started and grew. Later on, it was taken over by the government as an instrument to make easier the political transition, representing a situation that is not enough to delegitimize the validity, as it will be shown bellow.

6.2. The Struggle For Amnesty

Long before the adoption of the amnesty law, voices were heard calling for the granting of an amnesty to allow the return to Brazil for a large number of exiled and banished, as well as to release those who had been imprisoned for their political activities.

These first signs emerged from the family of the political prisoners and they had a great impact as government promoted a slow increase in political freedom known as *Abertura*, which allowed claims once forgotten by the media to be broadcast, as well as gave opposition politicians the necessary enthusiasm to hold the thesis of amnesty.

Although the country was far from experiencing a democracy, it was due to popular action, with special emphasis on those organizations whose names referred to targets proposed to achieve with their activities – among others, the Movement for Amnesty and Female Brazilian Amnesty Committees – the process that resulted in the adoption of the amnesty law began.

Despite the peculiarities of that time, it is clear that because of the actions of ordinary people – apart from the possibility of attributing those who supported the campaign in favor of amnesty one purely iconic nature – the possibility of political action was reintroduced in national life.

References

ALEXY, Robert. Derecho injusto, retroactividad y principio de legalidad penal: la doctrina del Tribunal Constitucional Federal Alemán sobre los homicidios cometidos por los centinelas del Muro de Berlin.

Disponível em: <http://biblioteca.universia.net/html_bura/ficha/params/title/derecho-injusto-retroactividad-principio-legalidad-penal-doctrina-tribunal-

constitucional-federal/id/42167421.html>. Acesso em: 3 out. 2011.

ALVES, Márcio Moreira. Teotônio, guerreiro da paz. São Paulo: Vozes, 1983.

ARAÚJO, Maria Paula Nascimento. A luta democrática contra o regime militar na década de 1970. In: REIS, Daniel Aarão; RIDENTI, Marcelo; SÁ MOTTA, Rodrigo Patto (Coord.). O golpe e a ditadura militar: 40 anos depois (1964-2004). Bauru: Edusc, 2004.

BICUDO, Hélio. Anistia desvirtuada. Revista brasileira de Ciências Criminais, São Paulo, n. 53, p. 88-97, mar./abr. 2005.

DIMOULIS, Dimitri. Justiça de transição e função anistiante no Brasil: hipostasiações indevidas e caminhos de responsabilização. In: DIMOULIS, Dimitri; MARTINS, Antonio; SWENSSON JUNIOR; Lauro Joppert (Coord.). Justiça de transição no Brasil: direito, responsabilização e verdade. São Paulo: Saraiva, 2010.

GAGNEBIN, Jeanne Marie. O preço de uma reconciliação extorquida. In: TELES, Edson; SAFATLE, Vladimir (Coord.). O que resta da ditadura. São Paulo: Boitempo Editorial, 2010.

LEMOS, Renato. Anistia e crise política no Brasil pós-1964. Topoi, Rio de Janeiro, p. 287-313, dez. 2002.

MARTINS FILHO, João Roberto. 40 anos depois. In: REIS, Daniel Aarão; RIDENTI, Marcelo; SÁ MOTTA, Rodrigo Patto (Coord.). O golpe e a ditadura militar: 40 anos depois (1964-2004). Bauru: Edusc, 2004.

MEZAROBBA, Glenda. O que é justiça de transição: uma análise do conceito a partir do caso brasileiro. In SOARES, Inês Virgínia Prado; KISHI, Sandra Akemi Shimada (Coord.). Memória e verdade: a justiça de transição no Estado Democrático brasileiro. Belo Horizonte: Fórum, 2009.

MÜLLER, Friederich. Quem é o povo? A questão fundamental da democracia. São Paulo: Max Limonad, 1998.

NOHARA, Irene Patrícia. Direito à memória e reparação: da inclusão jurídica das pessoas perseguidas e torturadas na ditadura militar brasileira. Revista de Direito Constitucional, São Paulo, n. 67, p. 125-159, abr./jun. 2009.

PERRONE-MOISÉS, Claudia. Leis de anistia em face do direito internacional: desaparecimentos e direito à verdade. In: PIOVESAN, Flávia (Coord.). Direitos humanos, globalização econômica e integração regional. São Paulo: Max Limonad, 2002.

PRADO, Luiz Regis. Curso de direito penal brasileiro: parte geral. São Paulo: Revista dos Tribunais, 2006.

SILVA, Carlos A. Canedo Gonçalves. Crimes políticos. Belo Horizonte: Del Rey, 1993.

TELES, Edson. Entre justiça e violência: estado de exceção nas democracias do Brasil e da África do Sul. In: TELES, Edson; SAFATLE, Vladimir (Coord.). O que resta da ditadura. São Paulo: Boitempo Editorial, 2010.

TELES. Edson Luis de Almeida. Brasil e África do Sul: os paradoxos da democracia: memória política em democracias com herança autoritária. p. 103. Disponível em: < www.teses.usp.br/.../8/.../TESE_EDSON _L_ALMEIDA_TELES.pdf>. Acesso em: 3 out. 2011.

VIEIRA, Vanderson Roberto. Anistia no direito penal. Disponível em: <http://www.faimi.edu.br/v8/RevistaJuridica/Edicao6/ANISTIA%20-%20vanderson.pdf>. Acesso em: 31 mar. 2011.

ZILLI, Marcos. O último tango? In: SOARES, Inês Virgínia Prado; KISHI, Sandra Akemi Shimada (Coord.). Memória e verdade: a justiça de transição no Estado Democrático brasileiro. Belo Horizonte: Fórum, 2009.

State power legitimacy in Brazilian democracy

Luciana Cristina de Souza[1]

Abstract: This article debates about resilience principle, imported for us from Physics with the intention to use this concept to equalize the relationship between State and Civil Society inside de Rule of Law, but not cloistered for it. Under our point of view, Law borns in the middle of the political and official branches, but also it comes from Society too, composing its dual aspect. We do not use classical bibliography about State power for this essay because in this new approach concerning democracy we want to understand the cooperative interaction between official branches and Citizens mediated by Law like a boundary issue, which is marked by the conceptions of "essentiality" and "resilience" of social and political structures. The resilience principle is, for us, a condition to establish a parameter for evaluating the quality of democracy in Brazil nowadays, once it is a way to measure State power legitimacy, which one is measure, in its turn, by the quality of Citizenship. If the Citizens do not have democratic access, if they can not be cooperative with the State in the public discussions, they are not true Citizens, because the boundary between State and Society is stiffened. Resilience is the opposite of that, it represents flexibility with stability in the relationship between State and Society (Citizens), since this principle aims to maintain a balance between the essential elements of Rule of Law and the growing demand by inclusive democracy in Brazil today. In fact, without inclusion of all Citizens, they will become "Sub-citizens", speechless and the State will not be legitimate. This balance between this two subjects, State and Civil Society (Citizens), are imperative to actual Brazilian democracy.

Keywords: Brazil; Citizenship; Democracy; Legitimacy; Resilience

[1] Doctorate Degree in Law at Catholic University of Minas Gerais (2012); Master Degree in Sociology at Federal University of Minas Gerais (2005); Professor of Sociology of Law at Milton Campos Law School, Nova Lima (Minas Gerais); Professor at IBS, certified by Fundação Getúlio Vargas, Belo Horizonte (Minas Gerais); Researcher of National Council of Research (CNPq), in Brazil; Associeted to the National Council of Research about Law (CONPEDI), in Brazil, and to the International Sociological Association (ISA); Lawyer. E-mail: dralucianacsouza@gmail.com

1 Brazilian democracy today - A brief profile

Nowadays, in Brazil, democracy is been redefined. Despite its greek inspiration and the Enlightenment principles, today our meanings for categories as "individual", "State", "popular participation", "responsivity" and "rationality" are very different than traditional studies showed, they are more deliberative and it demands new capacities from official branches before the Citizen needs of effective participation in public decisions. The individual is a new category because he represents itself and, at the same time, a fragmented group created by social networks like Facebook and Twitter that influences his behavior (HALPERN, 2013; PARENTE, 2007), which are very important in Brazilian political and social context due to their amplitude and cost. Our country has serious problems of education and information access – according 2012 International Seminar "Regulation of Public Communication" speakers, hosted in Brazil, few families, about only six, behest 70% of our media – and tools like those could open to Citizens different ways to interact, to show their opinions and to organize actions with other people to improve their Citizenship and solve social issues.

This new reality it is very different than previous notions of social movements in Brazil. How explain William César Castilho Pereira (2001) and José de Souza Martins (2000), because they was supported by strong identity of groups – students, unions, associations, etc. – that guaranteed their way of fight for recognition in a very particular manner, they use to defended mostly private and particular interests longed for their group, because their interaction depended on their similar identity one to another. The traditional social movements are much institutionalized too, and some of them, like unions and non-governmental organizations, have internal struggles by power and receive financial support from public funds, which causes interference of the State in many of its decisions (for example, art. 149, Constitution of Federative Republic of Brazil, 1988, and art. 9º, Federal Rule n. 9.790, 1999).

Nowadays, plurality is emphasized and there are social nets that exchange information and resources together solving some financial problems caused by State dependency of social movements which imposed obligations in the past. The net organization of Citizens in Brazil empowers day by day the individual and social movements providing them with real time information and funds for actions. The plural and diverse *net condition* also enables transversal interests, like environmen-

tal and public services quality. Many people do not go to civil organizations anymore, however answers immediately to invitations posted in social networks to participate in public protests. Today, the social media has a lot of potential to give more overture to public debates, access to information and to amplify democratic deliberation (HALPERN, 2013). There is a new subjectivity of Brazilian Citizens that began with internet interaction (PARENTE, 2007).

This new organization permits empower group efforts, get more resources for the social conflicts with State and also the quickly exchange of important informations, like we said. But, if the individual it is no more a ordinary figure distinct of the group like traditional studies emphasized, mainly after the researches about human agency in the XX century promoted specially by Anthony Giddens (1979), he is no more a particular universe how used to be in Liberalism. He is one subject in a net and his kind of interaction it is shared, global, has multiple faces and is instable in a certain way, what is one of the main causes that currently difficult the performance of governments and his Law. Because of this, we need define new boundaries between State power and Citizen participation, boundaries that conserve the "essentiality" of the Rule of Law that assure fundamental rights against particular interests and, also, that could be "resilient" before the real and actual demand by cooperative public decisions, what means, inclusive democracy.

How to do that?

1.1 Connect people

Zygmunt Bauman (2007) call this moment of history the "liquid time", because the human relations assume a great importance, but a constant and fast process of transformation of institutions to attend the new social demands causes instability. We feel that phenomenon when we observe the struggle situation between State and Civil Society in Brazil and in others countries in order to provide these demands. Today individuals all over the world are connected and this new relationship using the virtual space and the facilities of communication offers conditions to individuals sustain their particular existence at the same moment they shared the experiences inside a plural and virtual environment. An individual connected behavior is so unlike a individual modern behavior – the word "modern" is used here to indicate the period of rationality in the first centuries after the Enlightenment process

– that we need other categories to study this new condition in social life. And the redefinition of State, democracy and Law is essential, in this new context of virtual condition, to understand better what happens in human relations and what one define like "legitimacy" nowadays. Notedly State legitimacy in front of this new individual that constitutes our Civil Society.

In Brazilian democracy currently there is a fundamental concern on State power legitimacy because popular participation had a meaning improvement in the last decades, especially with internet growth in the country since information is really necessary to exercise Citizenship and, in the last years, have become widely available whereby, for example, transparency portals through which Citizens can monitor government activities (SOUZA, 2008). The Brazilian Civil Society assumed central role after 90's, which was a political struggle period for the democratization due to the end of the military dictatorship that had lasted thirty years, the return of freedom of speech, free elections, the promulgation of a new constitution and the creation of several boards with the State in which popular participation could be practiced (PEREIRA, 2001).

This is the phase of social movements mutation from traditional model to social nets; democracy and technology grow together – but not at the same measure – in Brazil during the first years of present Constitution, changing relations between State and Citizens dramatically. From the 90s to the present day, internet increases, because many investments were made by Brazilian government and private companies. This historical period of Brazilian Society has redefined the ways of popular participation because four principle reasons:

a) Brazilian population got more access to political information with the web expansion in our territory, which facilitated access to governmental acts, as well as allowed programs and other means of disseminating news beyond the traditional media, with a more critical and less controlled perspective (SOUZA, 2008);

b) a new sense of Citizenship born in 1988 with the new Constitution, which is called the Citizen-Constitution and that brings a extensive list of fundamental rights, due to the democratization process whereby the Civil Society had passed in 1980s, which put an end to thirty years of dictatorship in the country (PEREIRA, 2001), and this access movement lobbied the Government in different ways, achieving some significant advances for democracy and Citizenship, as well as postulating more political space by the empowerment of population (AVRITZER, 2002).;

c) Brazilian federalism includes municipal administration (dif-

ferent than EUA, for example, where just exists federal and States federative entities), the municipalization process amplified popular participation, although many problems still persist, because it created the Municipal Boards of important social demands like childhood, the environment, education, urban planning, social inclusion and others (GUIMARÃES, 2008).

Therefore, people still demand the inclusion of fundamental rights not recognized yet – our redemocratization process still go on – and through which individuals represented by social groups could be included with more quality in the roll of Citizens. In fact, this is a very essential reflection for brazilian today: what is the quality level of our Citizenship?

1.2 Inclusive democracy

To evaluate democracy inclusion in our country it is fundamental talk about the concept "Sub-citizen", from Jessé Freire de Souza (2003). If we intend to include people not respected yet like real Citizens we have to balance the "essentiality" of our social and political structures that define the Brazilian Rule of Law with the "resilience" of boundaries whereby this state structure can be changed by Society (Citizens) to improve Citizenship and become it effective for those "Sub-citizens". The "Sub-citizenship" problem highlights the difficulty of accessing fundamental rights like housing, health, safety, and other aspects that make our Human Development Index inappropriate and makes us question whether the Rule of Law and the Constitutions written inside it would be really emancipatory for Citizens or in fact, perhaps merely declaratory of rights whose effectiveness seldom citizen can get in their daily lives (nowadays, current HDI Brazil provided by United Nations Development Programme is better than some years ago, but in some states, the highest and the lowest cities are neighbors and the difference between them is like a African and a European countries).

For change this, it is necessary beyond the digital access, modify cultural inheritance, why Brazil many times justify "Sub-citizenship". It is essential to consider our slavery heritage that exclude part of Brazilian people from qualify public services and drove them to the slums, the colonial tradition of male political and family control, the strong influence of religion in official branches that have Christian symbols in all the state buildings, the extremely low index of Brazilians with university

access (according Brazilian Institute of Geography and Statistics, 11% of Brazilians, mostly white people in a population of about 200 million in accordance with last census, in which more than half are black or brunet) and further, like explain Roberto Loeb (2001), a unequal economical stratification.

To promoted inclusive democracy resilience is fundamental. Different groups fight for public services in this disagreeable social context, as occurs in the affirmative actions that intend to include Afro-Brazilians at universities. When Citizens make social nets the interaction revels clearly this unfair reality, because they express their thoughts and demands by this way, and the State necessity of talk with Citizens about solutions, maybe changing the operating state apparatus if required. But, even local governments still have difficult to hear, specially the "Sub-citizens", because the political instruments that allow a individual or group public speech are insufficient and controlled by few people.

The only way is empower Citizens and Sub-citizens by the human rights assure in Law. Since to be considered a effective Rule of Law, the State have to develop social functions – guarantee the moral fundament of Society, its important values, and also the individual rights (DURKHEIM *apud* OLIVEIRA, 2010) – democracy becomes a central subject. First, due to the redefinition of Brazilian moral fundament after the Constitution of 1988, called Citizen-Constitution, which has listed many unprecedented fundamental rights, for example *Habeas Data* constitutional action that allow Citizen access to his personal information in government database. Second, because this function of keep the balance between State and Citizens and between different individuals or groups is part of the "essentiality" of the Rule of Law, soon, State have to act in the sense of "resilience" exactly to fulfill its social function, as explain Émile Durkheim in his political sociology. Individual liberties depends on State capacity to be resilient before new demands and social pluralism; even depends on State authority to conserve the moral fundament from community sense which sustain the "essentiality" of social and political structure when we want a inclusive democracy in the Rule of Law.

2. The Resilience Principle

In order to promote this discussion and the inclusion of excluded individuals, we believe the State is able to absorb, democratically, the transformations conducted by Civil Society, without implying renun-

ciation of his legal and political authority to govern and we also believe that this attitude from State is fundamental to be recognized like a legitimate authority by people. State legitimacy depends on democracy and, nowadays, it´s unthinkable waits for democracy and legitimacy without a regular and complete popular participation in State decisions through an effective Law. In this cases, Law would be the mainly instrument for democracy and Citizenship effectiveness through developing and applying what I call "resilience like a principle in the political and Law fields", which brought to us for the legal area a better analysis of Brazilian democracy.

"Resilience" it is a scientific term came from Physics and, in the last years it had been used in Psychology. Resilience is the ability to be passing through a shock or profound changes in its structure **without** losing its fundamental characteristics. A resilient body it is capable to adapt to the new, **while** retain that is substantial in your essence. Why State and Law must be resilient? To be democratic. Why Civil Society must be resilient in their internal groups? To be democratic. The resilient State seeks to understand and define the institutions, rules and values that are fundamental to it constitutes, what it calls its "*essentiality*", while also listening to the voices of the other subjects with which it interacts, arising out Civil Society, its reason for being.

The State exists for and with Civil Society, not without her or tutoring her mandatorily. Civil Society should also assume a resilient approach to safeguard the right to difference in democracy and to avoid the imposition of stronger groups, since in many cases of dispute the popular collective understanding is not possible. This means you can combine evenly the need for adaptation and the need for support, based on its essential elements that remain during the event. Read these examples:

a) In the Physics field, a simple one is the pole vault at the Olympic games. The stick must be sufficiently flexible to allow the scale needed to drive the athlete while ensuring safety and sustainability of the heel part to conserve intact its internal structure. Therefore, it is not destroyed, it becomes another object of a different pole jumps, but is modified face of external force exerted on it in order to enable a satisfactory result, in the case, the successful jump;

b) In the Environmental field, a example is the recuperative powers that has an ecosystem after being beaten by some form of external impact, so is the ability of the living elements of that ecosystem have to resume their interrelationships biological and revive the environment by

adapting to changes and also overcoming the possible damage caused by the offender, as a deforested area which, if protected, can recover;

c) In the Psychology field, this term is apply to people who have overcome traumatic situations and after these events, they were able to pick up their lives with quality, although they have had to adapt to what the obstacle may have become unrecoverable, such as loss of one body member in a traffic accident or grieving;

d) In the Technological field, it represents the ability to interact under new media instruments to socialize information, culture, economic interests, transnational policies, and other issues in the digital Society, without harming the *essentiality* of their local cultures, which aim to be preserved in this interactive global environment where they exchange experiences;

e) In the Sociological field, this term could be used to explain dialogue in the possible struggle between State and Society groups which ask for more protection for their rights, like minorities, because in this situations, State sometimes have to offer some conditions there are expected by these organized individuals that are not previously announced in the public policies, making it necessary to establish the equilibrium point between the functions defined by the State for its social and those required by the new situation submitted by social groups.

Therefore, "resilience" is totally different from "resistance", because in this one the actors are opponents and in these cases one will find a power struggle – like he only answer to democratic understanding problem, as the more extremists legal pluralists did; the principle of resilience, how we call in our doctoral thesis, represents a value very essential to actual Brazilian democracy, since this application by Law in State-Society conflicts could equalize "State power", which must be legitimate, and "popular participation", whose interventions in political context sometimes aims just particular demands, compromising important public interests or minority rights.

The resistance was necessary sometimes (RIBEIRO, 2004). In many moments in Brazilian history – the slavery abolition (1888), the constitutionalist revolt (1932), the end of the 1964-1985 dictatorship, and others examples – and, until now, could be, perhaps, a way to fight to recognition . But for a uninterrupted process of democracy, that involves routine decisions about social life, the resilience could be a way to practiced tolerance, recognition of the other and to learn about our own borders in pursuit of a joint project of a shared democratic State, mostly

since we live in the internet times. As any kind of democratic principle, the resilience demands its application in the middle of the Rule of Law.

And it is important to define the kind of "Law" we will consider for this application, because we can interpret "Law" at a legislative way, a judicial one, or like a social construction. This is the meaning here used, because Brazil is a plural country and this undeniable multiplicity necessarily reflects on the routine of legislators and professionals in various legal areas – judges, Lawyers, etc.. Considering this, one cannot discuss this study on resilience without considering Brazilian pluralism, which is an important differential in our reality at the moment to create legal rules to the Citizens. But what is the reason that in recent years this social multiplicity became so frequent? Does the recent demonstrations in the streets of Brazil are actually interrelated with the yearning to narrow the debate about what is "Law" with the State? Had an objective structurally transforming of its relationship with society, which feel "forgotten", a subject of "second class"?

This occurred especially because of the high degree of disparity that still exists in Brazil between Citizens - economic and cultural inequalities, problems of access to education and habitation, etc. -, as observed in the Brazilian democratic context because in our country there is still a significant amount of people who are called Sub-citizens, which marked our democratic model with heterogeneity and constant struggles for recognition (FREIRE DE SOUZA, 2000, p. 133). As part the process to establish a democratic dialogue between the State and Civil Society allowing both subjects be considered equitable, that relationship that defines socially "Law" for all of us must applies the principle of resilience, requiring the State realizes that openness to dialogue with the Sub-citizens, a attitude that does not compromise its essential elements of authority.

Hence the resilience, as a principle governing relations between subjects treated in a democracy, fulfills the important role of maintaining equilibrium in continuous play of forces between State and Civil Society, the result of a continuous process of delimitation of boundaries between State sovereignty (Clause 1, Constitution of the Federative Republic of Brazil, promulgated on October 5, 1988 - CR/88), which aims to ensure the permanence of their authority over Citizens, and popular sovereignty (Clauses 14 and 61, §2º, CR/88), whose main purpose is to expand in order to achieve more political space where up their demands. And, concomitantly, balances the play of forces within Civil Society itself, formed by different social groups, with interests not always

harmonized, thus avoiding the continuing prevalence, for example, the most influential politically or economically more powerful, the that could lead to the particularization of public policies.

In this way, the principle of resilience is a social mechanism for releasing the Sub-citizens, however, without the intention to deconstitute the existing legal-political model, but focused on their rehabilitation to the current needs of individuals, enabling social inclusion. This does not mean that the confrontations are always avoided, because they are part of everyday dialectic constant delimitation of space and autonomy. However, we perceive the resilience principle like a way to preserve ethics in relations between State and Civil Society.

Urge remind that in a resilience process we do not have to agree all time with the other, or accept State rules without objections, or always sustain a resistance attitude if we do not agree. Any individual and the State have to know that are some *essentiality* that we have to preserve, and discuss about what each side could waive. The importance of resilience is too in the ability to discuss. These actors need to recognize themselves as subjects able to dialogue – not to a complete agreement. If State power it is only a strength demonstration of political superiority, or if people claim only particular interests, democracy can't be real.

A good example in Brazil, nowadays, it is the defense of "family" made by religious groups against homosexual rights. Despite Brazilian Constitution (CR/88) guarantee human dignity like an important principle (article 1, III), there is a huge discussion about the limits between State and religion principles, because some rights have been hindered for a non-laic government attitude, especially for political representatives. The overture text in the Constitution begs for God bless to State and their Citizens and churches have no taxies duties. Because of this religious intervention in political decisions, some minority rights are offended. In this scenery, it is urgent to reflect on State commitment with the freedom of faith. How to get a equilibrium between State, religious groups and homosexuals in order to conserve democratic principles inside a so pluralistic Society?

Emphasizing our own reality and thinking about sub-Citizen category of Citizenship, we have to concern on the essential elements of a democratic Rule of Law and have these elements as a guide, in the resilience principle, to propose a dialogue between these subjects. We know how hard would be and, even, that the subjects could never agree one with another, but is indispensable create a parameter, linked in this essential structure of authority, to limit the groups in struggle and, so on,

guarantee portions of both rights claimed – fundamental principles in the present Constitution are effectual like parameters. According Émile Durkheim (1982), there is a duality in moral facts, and Law is part of this facts. This duality consists in a double face of Law, mostly, that is called duty-right relation; there is no total freedom for anyone that wishes to live in Society and, at the same time, Society has to respect individuals.

We'll have, ergo, determine what is essential in our Rule of Law in terms of *dignity constitutional fundaments* to both groups, which will have a portion of his use of freedom if they respect themselves, first of all, because "dignity" is part of the *essentiality* of our democratic system, it is a fundamental element (BARCELLOS, 2002). Preserve dignity is guaranteeing both interests insofar the necessary equilibrium between State and Society, and between Society different groups. How explains Michel Rosenfeld, the Constitution has to be a interplay between identity – individual or collective – and diversity: "Equality is itself necessarily linked to the interplay between identity and difference... There has been a general tendency to associate equality with identity and inequality or inferiority with difference." (ROSENFELD, 1994, p. 9). If the better situation happens, equality linked to possibility of diversity, for us, it is resilience because has a deliberative and fundamental aspect to democracy quality.

In this article, we use to explain this reality a benchmark of what would be the democracy quality, resorting to the following concept of deliberative democracy: the legal-political organization founded on the people's participation with a view to their inclusion in decision-making policies and in the drafting of legal rules will apply. His plea supports the analysis of Argentine jurists Carlos Santiago Nino (2003) and Roberto Gargarella (2007), beyond research Robert Dahl (1971) about polyarchy, called by the author of effective democracy. And if the Democratic State intends to encourage this effective democracy, or polyarchy, resilience it becomes so fundamental as principle as federalism or separation of powers, *e.g.*, as well as you need to ensure a equilibrium between these legal relations, is also of paramount importance to ensure the balance, by Law, between State and Civil Society, not only giving negative rights, but also rights of proactivity with the dynamics of everyday life controlled by State agencies.

Thus, resilience is understood also by the ability of political institutions to assimilate the intervention of new subjects - Citizens proactive - in its internal structure in order to interact with them aiming their continuous improvement. Refers directly to the theory of human agency,

which in this article will be addressed by the perspective of Anthony Giddens (1979). The structuring Giddens model allows better understand how the principle of resilience is applied within the social system, *in casu*, considering the Democratic State. Giddens is undoubtedly one of the contemporary authors that better recognizes the individual's action called *human agency*. For this reason, chooses not to accept the rigidity of the term structure, and instead it adopts the concept of *structuring*, giving the notion of dynamics to his theory.

The use of this term is intended to represent the conditions under which agents choose to act in a context in order to continue the *status quo*, or, otherwise, to transform it. The differential analysis of Giddens assignment lies in its greater capacity of the agency to the individuals that comprise the structure (Stare, political institutions, etc.). According to Giddens, the agency is the power of social agents to transform the structure in which they live. Although the structure, or social setting, delimit a field of choices , many individuals usually arranged in groups, create strategies that allow them to overcome such limitations, acting in order to adapt it to a new reality and also legitimize it (GIDDENS, 1979) .

For example, social movements reproduce standards of conduct prescribed by Law (create associations registered in the registry office, subscribe to get tax breaks, etc.), but also produce new behaviors (particular mechanisms of conflict resolution, informal labor, and others) they wish to (re) known to the State to be valid in the social system organized by this "Law". Individuals from such groups depend on the institutional recognition to integrate the official system of social relations. When they do not get, then, rises a conflict between what the agency capacity of individuals of these groups can do, considering their particular network of relationships, and State institutions.

According to Giddens human agency theory, while the actual political and legal systems retain their fundamental features, changes in other aspects are also negotiated to allow the inclusion of new categories of Citizens, or simply to update the dynamics of democracy today. This mainly occurs in the contexts of deliberative democracy, as they assert Gargarella and Nino. The ability to absorb and live with such changes is resilience, not misrepresent these social systems, but transforms them. And, most importantly, this transformation comes as much from within because the State promotes the application of the principles, as out of a thread until a few decades ago was not adequately address the subject while emancipated and able to debate political and legal Civil Society.

Based on this conceptual repertoire, Giddens (1979) lists some

characteristics of Societies with recognition of citizen-subjects and their human agency:

a) there is no fixed locations (hence use the naming *structuring*);

b) the normative elements serve to ensure claims of legitimacy on a social location (position), which can, of course, be of many types and be challenged to a greater or lesser degree;

c) the Society shall not be confused with the territorial limits of a State, but referred to a *network* of relationships formed by individuals, which can be varied according to the plurality of possible joints socially.

And this recognition of Citizens as subjects in their plurality, made possible by the resilience, is critical to improving the level of quality of democracy that we intend to adopt in Brazil today. We can then say that the hallmark of contemporary Citizenship is its deliberative character, even though sometimes seeming a promise yet to be realized, because there is confidence in the Constitution. Its confidence is part of the *essentiality* of the Democratic State structure, as said Rosenfeld:

> Constitution making also raises the question of maintaining the essential identity of the newly created constitutional self over time in order to secure a sufficient link between the generation of constitution makers and numerous succeeding generations. Carving a constitutional identity over time is crucial to the legitimation of imposing the constitutional scheme devised by the constitution makers upon subsequent generations. (ROSENFELD, 1994, p. 15).

Thus, resilience principle is part of a valid constitutional scheme created, in Brazilian case, for de 1986-1988 popular assembly that formulated a *democratic essential identity*, which one we hope be respected and enforced for Citizens benefits. According to Brazilian jurist Humberto Ávila (2007), a principle should become an ideal in an achievable objective and to do this is necessary to define the legal right which aims to protect and further the necessary behaviors for their protection. Considering the principle of resilience, its **achievable objective** is to enforce the Citizenship through equilibrium between State and Civil Society, showed in the routine life by the *equitable use of democratic instruments* – it is the way to measure equilibrium – mainly, nowadays, by the equitable use of internet media.

The **legal rights** under resilience principle protection are *democracy, popular sovereignty and Citizenship*, all under the actual Constitution (CR/88) protection too. And, the **necessary behaviors for their protec-**

tion, which are indicated by the principle of resilience in the political and legal areas, are: recognition of Brazilian plural identity, which justifies the adoption of measures for discussion in public able to allow for diversity, on this account even conflicting groups ever intend to agree with each other they have to defended the *essentiality* of Democratic State (difference right); non-criminalization of social movements human agency, thus ensuring that Civil Society can manifest without political persecution; transparency in public acts to not prevent Citizens from obtaining necessary information for free exercise of their Citizenship; the maintenance of public digital spaces for wide Citizens interaction, avoiding any type of exclusion in this field, so relevant presently.

3. Digital democracy in Brazil - How to include

Considering what was said and by observing the current Brazilian reality we can say that one of the main forms of Citizens activity or agency has been the articulation of efforts through social media especially Facebook - although groups like the Free Pass Movement have ceased to publish their agendas mailing preferably in social networks on the allegation of increased State control over what was said by the people in these virtual spaces, a situation that would prejudge this group conditioning them to a peripheral Citizenship, typifying Sub-citizenship. With the propose of guarantee this equilibrium among State and Civil Society, and between different Society groups too, nowadays Brazil needs discuss: State legitimacy to exercise authority over its Citizens; the problem of Sub-citizenship; and the functions of State e Civil Society in digital democracy, because the level of participation is amplified by social networks and other digital medias which can overcome the huge geographical distances of our country and also give informational accessibility.

Likewise, we must learn to know about the behavior of the individual networked and also about this new rationality that was born with the digital media, what I call in my article *mediatic rationality*. Without that comprehension, we will not be able to accomplish democracy in these days, which has so many peculiarities and in which one have to develop new categories to shed light on current challenges. Being resilient in this context means: one have disposition to change if it is better for democracy; at the same time, sustain what is essential in the Rule of Law. It is a "pulse" movement, that could keep democracy (and Law)

more reasonable and inclusive.

Aside the metaphors, we have to think of the close relationship that exists among State, Society and Law in Brazilian democracy today. The current political institutions that make the link between Citizens and the State, as well as the legal rules governing them and the latter, have presented a performance below social needs to adapt to a new era in Brazilian democracy. As a result, State has failed to sustainability (stability) to act and solve by conventional means new issues presented to him. His performance deficit is due to bureaucratic model used, little or nothing dialogical, which imposes a vertical system of authority in which the Citizen is still treated passively.

Because the bureaucratic model is extremely attached to fixed formulas and patterns, it becomes difficult the recognition of new subjects, and also the plurality of subjects, after all, the increased number of participants in the dialogue does not mean they are all from the same social subgroups, cannot be a shared agenda between all who are demanding greater attention and dedication of public power. And as the traditional political institutions are not eligible for this type of flexible interaction, too often confuse public demonstrations with "disorder" and the criticism coming from segments of the civilian population as "unjustified" and from persons "without legitimacy / authority to do it".

From the point of view expressed in this article seems a nonsense the same State that says its right to political participation is formally guaranteed to their Citizens, determine this right have to be subject to the prior approval of the State authority (not we are talking about commitments to use public spaces such as streets for demonstrations, but the right to manifest itself).

Thus, Brazil is now facing the following challenges:

I - How best to define what are *essential elements* such as the *dignity of the human person* under the Constitution in force (BARCELLOS, 2002), in order to differentiate the concessions that may or may not be made during the upgrade process with the objective to maintain balanced adaptation needs and support of political institutions;

II - How to extend the process of Citizens emancipation, both for access to public discussion forums, such as the recognition and protection of minorities that do not have full freedom of speech but, in fact, they are submitted under the prevalence of a univocal power.

These issues are paramount and difficult to answer, because it depends on the degree of resolution possible in the Brazilian democratic model, which means that they are linked to existing tools that can facili-

tate public debate and access to culture and information, public hearings, access to digital government pages, free communication media, etc. (SOUZA, 2007a and 2008). The definition of what are these *essential elements* must be the result of a political-social process constructive and resilient so that one can have a great definition without an ideological particular pressures, although such interference will always exist. Therefore, more important than define them, is to establish the democratic process within which they are set. Thus they will have more legitimacy and public trust, but also provide an internal and stable structure for political institutions, which should keep the deliberative process continuously to preserve open needs constant adjustment.

It is a new routine for social life. Replaces up the rigid institutional trust in perpetuity, coming from the liberal bourgeois culture of the XIX century and its bureaucratic model to establish the relationship between the State and Civil Society, and one puts in its place a new parameter of dynamic and interactive nature. In the digital age, as well as operating systems (iOS, Android, Java, etc.) maintain a base of programming that is *fundamental architecture of the software* on it and make constant updates, we must now put the model shared and resilient democracy rather than rational thought pattern of industrial motivation. The cell operation and activities network replaced the traditional way of thinking, repetitive, standardized and methodical inspired the production line of factories. It is up to the political institutions and the right, who once considered themselves "modern" by following this inspiration, now have to follow another model that is more suited to the challenges of our own time.

But it is no easy for our authorities or, even, for jurists. Liberal modern rationality still remains in many books, seminars, legislations. To adapt our institutions to a new parameter of rationality, marked by the effect of social medias on the internet, you'll need a huge resilience effort to overcome the inertia caused by the desire to remain in the past, to use the ordinary control instruments – as we saw in the recently conflicts among popular and police during the public manifestations in the streets. We have a futuristic Constitution, because it provides many fundamental rights that our political (and security) institutions aren't ready to execute. Nowadays, Brazilian legislators are discussing about a "regulatory mark" to internet, and the question is: It is a way to establish greater State control over the web or to contribute to the regulation of an important public space?

Brazil has two fundamental challenges to win to qualify better democracy and Citizenship, respect internet as a public space and create

instruments to include peripheral Citizens in this further communication channel. This inclusion would be made materially, because Citizens need appropriate hardware and software to interact, and rationally, once a new mindset was born with this social transformation and one has to know more deeply this *mediatic rationality*. According Neal Thomas (2011), social computing it is a reality of our days and it is responsible too to rationalize information, conceived as a shared token of meaning, despite inside the chaotic hyperlinking structure of the web. The computing rationality is a collective construction, made by a community which wants to optimize its actions rationally. One of the instruments used by people and, mostly, by organizations to rationalize information is building data bases full of individual behavior characteristics.

Of course, it is a kind of "god's-eye view" (THOMAS, 2011) on the private life practices by State, companies and other organizations and we have to debate on the ethic in these power relationships among State and Civil Society inside the web. Social media it would be the mainly channel for that, since social computing, due its specific rationality, provides an interactive environment favorable to multiple human agency (THOMAS, 2011). Any agent could interfere in the others agent's actions, changing the result and returning a new object on which these others agents will work. Social computing functions as a rational steering medium in network societies. It is a continuum and interactive process with the propose of rationalize information and share it. As asserts André Parente (2007) space, events, information and people are each day more influenced by telecommunications and cyberspace in a pantropic way, because technology occupy every place nowadays.

Our way of life is shifting, gradually and inexorably, for virtual environments: reduction of geographical distances, reduction of language difficulties, content management arranged in huge shared databases, video conferences, agreements and other documents with digital certification and legal effect admitted in many countries, social networks that expand exponentially institutional and personal networking, news and weather data in real time, fast articulation and global Civil Society movement (flash mobs).

These and many more are the prospects that the internet and new technology of virtual interaction through computers and mobile phones enabled humanity. The interaction can define our space, as well as the limits that we must obey. However, the freedom of action available to us in the digital society – multiple human agency – does not always ensured the wellbeing expected in the face of easier access to

information and communication, since this new social structure has the characteristics to be of a (TRIVINHO, 2005): virtual nature (much of the interaction is done without real human contact, often being hidden by avatars or fake profiles), dromocratic (based on speed and immediacy with which the relationships occur, which has changed the language we use, inclusive) and fragmented (ties and affinities are constructed and deconstructed all the time, making it difficult maintaining the cohesion between people).

Virtualization of human relationships brings as challenges the legal regulation of acts performed in digital media and the protection of users of this new communication system. The defense of privacy is another important flag raised in the present day due to the intense ethical aspect that involves. The dromocratic aspect of the digital society is bound to virtualization. As the word "Autodrome" the greek term "dromo" means "speed" (VIRILLO *apud* TRIVINHO, 2005). A dromocratic Society therefore, is one that has technological resources that enable their human relationships (personal, commercial artistic governmental etc.) to be developed and disseminated quickly, almost at the same time the events occur.

The fragmentation, in turn, makes it difficult to maintain social ties more solid and stable as a warning Polish sociologist Zygmunt Bauman (2007). Just "click" the mouse to join, leave, "like" a social group who organize virtually. For example, although thousands of people have heeded the call made on social networks and attended the demonstrations on the streets in Brazil this year for most there is no real commitment to any organized movement that will keep the agenda of discussions on long-term is easy to simply "unplug".

So take care of these challenges mentioned becomes very important to ensure that not create a contingent of digitally excluded Brazilians who do not appropriate their rights because ignore them; should also seek to strengthen the bonds created virtually by other live means, even to make more durable guarantees conquered. Finally, it is very important to rethink our relationship with technology itself, so it does not become "servants" when the correct should be the opposite. And it is crucial that the significance of Law in a society whose meaning is constructed in the midst of political and social discourse in digital media does not serve the massification of social relations at the risk of reducing the paths to democratic dialogue.

Considering topics outlined, Brazil needs qualify its digital democracy to qualify democracy itself as predict in the Constitution

(CR/88). Many Brazilians do not have an appropriate access to these new media, or have difficult to understand this *mediatic rationality* – even intellectuals and authorities. As Trivinho says (2005), technology brought a diverse type of "death", because the Citizen that can't interact using internet has less democratic access to State services, information and, also, compromises his social networking, indispensable nowadays to public participation. And, as *participation* is a *fundamental* of our Democratic State, part of it *essentiality*, State has to supply Citizens with means to digital interaction and to get comprehension about this *mediatic rationality*.

Technology can't be used to manipulate Citizens or submitted them under State control. Have to be a way to qualify democracy and improve Citizenship. A State that sustain a political regime not respectful with its Citizens, it has not the necessary legitimacy to be accepted for people. The principle of resilience has to be apply here to avoid abusive decisions from State using technology against Citizens freedom.

Therefore one must think to be equal in the XXI century as a process of broad inclusion of Civil Society in policy making through a fair interaction between different groups or so one will see only the revalidation of the old liberal "ideological core" now with hi-tech aspect of the information age. The creation of new spaces for deliberation through communication media available today do not reflected yet in the increase of democracy especially in Latin America where access to computers and the web is not widespread if we consider the numbers needed for effective public access.

The Brazilian campaigns for free education of new technologies demonstrate the distance that remains between the different types of Sub-citizens and Citizens that our society still has (FREIRE DE SOUZA, 2003), what offends the principle of human dignity protect by CR/88 (BARCELLOS, 2002). In countries where democracy is still under construction, as Brazil, more than computerize administrative offices will be necessary to integrate differences within the sphere of political power, basic condition to State legitimacy, even if it means not always we'll have the "quiet" expected when one mention the ordinary concept of social peace.

So, digital democracy is required to guarantee equilibrium of power among Citizens and the State – resilience. When there is overlap of the will of the latter upon the former, this means that some control mechanism is used to reduce the political role such as ideology, which is one of those devices employed by the State authority to cover the im-

balance of relations. Ideology can hide inequality between Citizens and Sub-citizens behind the discourse of the "connected world - free for all and informative."

Ensure technological access notably to mass media must be central to any discourse these days if we want get a more egalitarian democracy. Will not help the Citizens mere refinement of the forms of domination, if the quantum of decision power who can effectively engage in their relations with the State does not change. Obtain a certificate via online reduces the volume of calls in locus allowing the government to reduce staffs. But it is so much different than to open the system for inserts providing them with interactivity policy decisions. Internet could contributes to the equilibrium between State and Civil Society, because public decisions broadcast in this media reach a greater number of people, as in distance education using the web via satellite, since the intricate system of rivers, creeks and streams of the Amazon region, for example, hinders other types of informational access.

Contributes either to the equilibrium between Society groups since one do not have to be economic powerful to broadcasting in internet, it is possible publish a blog about the group or community - it will still be possible if the internet regulatory mark, that is being voted on today in Brazil, does not create obstacles to free traffic information today this media offers, what would mean yielding to lobbying by big businessmen who control radio and TV in Brazil.

4. Conclusion

In conclusion we can say that State legitimacy is deeply dependent on the level of popular participation in political decision making, which requires the Brazilian government – at all levels of federalism: federal, regional and local – appropriate preparation to achieve a viable equilibrium between the private interests and between them and collective interest; also between State and Civil Society. And, this kind of Citizens participation is increasingly becomes each day more dependent on digital forms of democracy. We have the challenge now: to make policies that include Sub-citizens, to negotiate new public spaces to political interaction, to redefine "Law" considering Brazilian diversity. These three aspects are crucial to qualify Brazilian democracy today.

Our dictatorial past will be overcome when Citizens can really practice political and legal interaction with authorities in an equality

base as a respected subject in this relationship. And to make it happens State has to stop defending its outdated elements, like the excessive vertical use of power, the authoritarianism, the bureaucratic communication, the low educational level of the people (not just alphabetization, but mostly, the preparation to interact in a *mediatic rationality*), the few electoral connection among political representatives and their voters, the elitism, etc.. With this outdated elements interfering in social and political relations, resilience isn't viable, what means that democracy with quality isn't possible yet.

References

AVILA, Humberto. Theory of legal principles. New York: Springer-Verlag, 2007. Law and Philosophy Library, v. 81.

AVRITZER, Leonardo. Democracy and the public space in Latin America. New Jersey: Princeton University Press, 2002.

AVRITZER, Leonardo. Um paradigma para os movimentos sociais no Brasil. Revista Brasileira de Ciências Sociais, São Paulo, v. 12, n. 35, 1997.

AVRITZER, Leonardo; SANTOS, Boaventura de Sousa. Introdução: para ampliar o cânone democrático. In: Reinvenção da Emancipação Social. Disponível em www.ces.fe.uc.pt. Acesso em 01º de novembro de 2004.

BARCELLOS, Ana Paula. A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana. Rio de Janeiro: Renovar, 2002.

BAUMAN, Zygmunt. Liquid Times: Living in an Age of Uncertainty. Cambridge: Polity Press, 2007.

BLEIKER, Roland. Political boundaries, poetic transgressions. In: Popular dissent, human agency and global politics. Inglaterra: Cambridge University Press, 2000.

BRASIL. Constituição da Republica Federativa do Brasil, promulgada em 5 de outubro de 1988. **Presidência da República, Casa Civil, Subchefia para Assuntos Jurídicos**. Disponível em: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Acesso em 22 de julho de 2013.

BRASIL. Lei 9.709, de 23 de março de 1999, Dispõe sobre a qualificação de pessoas jurídicas de direito privado, sem fins lucrativos, como Organizações da Sociedade Civil de Interesse Público, institui e disciplina o Termo de Parceria, e dá outras providências. **Presidência da República, Casa Civil, Subchefia para Assuntos Jurídicos**. Disponível em: < http://www.planalto.gov.br/ccivil_03/

leis/l9790.htm>. Acesso em 22 de julho de 2013.

BREUS, Thiago Lima. Políticas públicas no estado constitucional: problemática da concretização dos direitos fundamentais pela Administração Pública brasileira contemporânea. Belo Horizonte: Editora Fórum, 2007.

CARVALHO, José Murilo de. Cidadania no Brasil: o longo caminho. 11ed. Rio de Janeiro: Civilização Brasileira, 2008.

DAHL, Robert Alan. Polyarchy. : Yale University Press, 1971.

FREIRE DE SOUZA, Jessé José. A construção social da subcidadania: para uma Sociologia Política da modernidade periférica. Belo Horizonte: UFMG, 2003.

FRÚGOLI JR., Heitor et al. . As cidades e seus agentes: práticas e representações. São Paulo: EDUSP, 2006.

GARGARELLA, Roberto. La Nación. Caderno de Cultura. 14 de outubro de 2009. Interview in Spanish. Availabel in: <http://www.lanacion.com.ar/1186007-como-ciudadanos-perdimos-el-control-sobre-la-politica>. Access in July 19, 2010.

GARGARELLA, Roberto. El derecho a la protesta: el primer derecho. Buenos Aires: Editorial Ad-Hoc, 2007.

GIDDENS, Anthony. Central problems in social theory: action, structure and contradiction on social analysis. Berkeley: University of California Press, 1979.

GUIMARÃES, Aline Amorim Melgaço. **Democracia possível**: espaços institucionais, participação social e cultura política. Campinas: Alínea, 2008.

HALPERN, Daniel; GIBBS, Jennifer. Social media as a catalyst for online deliberation? Exploring the affordances of Facebook and YouTube for political expression. Computers in Human Behavior, v. 29, Issue 3, May 2013, p. 1159–1168.

KROUSE, Richard W. Polyarchy & Participation: The Changing Democratic Theory of Robert Dahl. Polity, v. 14, n. 3, Spring, 1982, p. 441-463.

LOEB, Roberto. Aspectos do planejamento territorial urbano no Brasil. In: LAFER, Betty Mindl. Planejamento no Brasil. 5ed. São Paulo: Perspectiva, 2001. p. 139-160.

MARTINS, José de Souza. As mudanças nas relações entre a sociedade e o Estado e a tendência à anomia nos movimentos sociais e nas organizações populares. Revista Estudos Avançados, v. 14, n. 38, p. 268-278, 2000.

NINO, Carlos Santiago. La constitución de la democracia deliberativa. Barcelona: Gedisa, 2003.

OLIVEIRA, Márcio de. O Estado em Durkheim: elementos para um debate so-

bre sua sociologia política. Revista Sociologia Política, Curitiba, v. 18, n. 37, p. 125-135, outubro de 2010.

PARENTE, André. Rede e subjetividade na filosofia francesa contemporânea. Revista Eletrônica de Comunicação, Informação e Inovação em Saúde. Rio de Janeiro, v.1, n.1, p.101-105, jan.-jun., 2007.

PEREIRA, William César Castilho. As trilhas do trabalho comunitário e social: teoria, método e prática. Petrópolis: Vozes, 2001.

RIBEIRO, Fernando Armando. Conflitos no Estado constitucional democrático: por uma compreensão jurídica da desobediência civil. Belo Horizonte: Mandamentos, 2004.

ROSENFELD, Michel. The rule of law and the legitimacy of constitucional democracy. Cardozo Law School - Jacob Burns Institute for Advanced Legal Studies, n. 36, p. 1-70, mar. 2001. Availabel in: <http://papers.ssrn.com/paper.taf?abstract_id=262350>. Access in March 24, 2009.

ROSENFELD, Michel (Ed.). Constitucionalism, identity, difference and legitimacy: theoretical perspectives. Londom: Duke University Press, 1994.

SORJ, Bernardo. Brasil@digitaldivide.com - Confronting inequality in the information Society. Brasília: UNESCO, 2003.

SOUZA, Luciana Cristina de. Igualdade e Democracia: velhas promessas na Era Tecnológica. Revista Brasileira de Estudos Jurídicos, v. 3, p. 41-53, 2008.

SOUZA, Luciana C. Refundação do estado democrático de direito pela sociedade civil. Anais... XIII Congresso Brasileiro de Sociologia, Recife-PE: Dom Bosco, maio/junho de 2007a.

SOUZA, Luciana C. Conseqüências das mudanças jurídicas dos últimos séculos na relação entre estado e sociedade. Anais... XVI Congresso Nacional do CONPEDI, Belo Horizonte-MG, novembro de 2007b.

TRIVINHO, Eugênio. Introdução à dromocracia cibercultural: contextualização sociodromológicada violência invisível da técnica e da civilização mediática avançada. Revista FAMECOS, Porto Alegre, n. 28, p. 63-78, dezembro 2005. Disponível em: <http://revistaseletronicas.pucrs.br/ojs/index.php/revistafamecos/article/viewFile/3338/2595> Acesso em 09/02/2013.

Technique, Dehumanization and Human Rights

Eduardo C. B. Bittar[1]

Abstract: "The modern technique promotes economic development. But also modern technique produces social dehumanization. This creates a challenge for the culture of human rights. This article aims to study the effects of dehumanization from the social thought of Jürgen Habermas.

Key-Words: Technique - Dehumanization – Human Rights.

1. Methodological fundamentation and field study assessment

Studies on the importance of technique in contemporary social life are relevant in terms of research on the human condition and, especially since, if technical resources have the virtue of representing a solution to practical and operational problems in life, they also have the potential to stifle action and the understanding of world perspectives. Technical advances, in this sense, are neither a curse nor simply a sign of pure progress. Based on this, one may measure human advances; however, modern history warns against how deceitful a direct association between these two phenomena may be. Therefore, the state of technology, as we can assess, has positive and negative effects on human condition, and a current diagnosis faces the challenge of verifying both harm and benefits resulting from technological advances, based on what can be submitted to critical considerations and, thus, and establishing humanly responsible guidelines concerning the apparatus. In fact, warnings had already been clearly expressed in the text of José Ortega y Gasset, *Meditación de la técnica,* 1939, where he states: "One of the themes that will

[1] Post-Doctor and Doctor in Philosophy and General Theory of Law from the School of Law. Associate Professor at the Faculty of Law – University of São Paulo. 2o. Vice-President of ABRAFI (IVR/ Brazil).

be discussed with more intensity is the significance, the rewards and drawbacks of technology".[2]

Technology, as an issue of our times, beckons a series of interconnected considerations, prompting us to ponder whether technology has provoked alienation or liberation and, also, if it has served a function of humanization or dehumanization.[3] Sociology of knowledge and critical philosophy both intersect at this exact point where, in assessing net gains and losses of technological advances, one must consider the effects of celebrating production and economic ideology as integral factors in the appearance of modernity and the historical definition of a capitalistic production mode, along with the ramifications created in its darkest moments. Technical sociology, as a branch of the sociology of knowledge,[4] has expressed the dysfunctional effects caused by pervasive technical reason;[5] in addition, critical philosophy has obtained results from this process, based on a enlightenment[6] dialectics.

Marx and Engels may be considered the theoretical framework for both perspectives, that is, sociology[7] of knowledge and critical philosophy itself. Theirs is the observation: "It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness."[8]

A critique of a hyper-inflated economy is not only criticism of an economic system, but a critique of its effects on human condition itself. And, if the observed effects have been unfavorable, one must not think that the logic of materialist productivism is capable of producing better conditions of life when, in actuality, it causes the progressive deterioration of human existence. This concern becomes clear when, in *German Ideology*, Marx and Engels state: "In general, it has obliterated all possible natural elements on the workplace, and has succeeded in dissolving all natural relations, transforming them into monetary relations. In place of cities born naturally, large modern industrial cities were created, popping up like mushrooms. Wherever it reached, it destroyed crafts and, in

---

[2]Orttasset, *Meditación de la técnica y otros ensayos sobre ciencia y filosofía*, 2004, p. 21.

[3] Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? *in Socialist Humanism* (Fromm, org.), 1976, p. 348.

[4]Mannheim, *Sociology*, 1982, p. 97.

[5]Bunge, *Sociology and Science*, 1998, p. 19.

[6]Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? *in Socialist Humanism* (Fromm, org.), 1976, p. 353.

[7]Bunge, *Sociology and Science*, 1998, p. 20.

[8]Marx, Engels, *German Ideology,* 2001, p. 20.

general, all pre-industrial circumstances. It defined the victory of commercial urban centers over the field. Its first condition is automation."[9]

2. Techné, from art and technique to instrumentation and technique, and praxis, from art and interaction to labor and production;

The etymological origin of the term 'technique' is Greek, but this does not mean that the Greek are aware of the extent to which *techné* is still a semantic component in this word, as it is used in modernity. *Techné* among the Greek, indicates a knowledge-based meaning of competence that differs from instinctive capacity (*phýsis*) or mere chance (*tyche*). Heidegger observes in his text, *The Question Concerning Technology* (*Die Frage der Technik*), that the meaning of the term, among the Greek, encompasses the arts, from architecture to painting and sculpture, not forgetting the carpentry skills in building a ship or those of a farmer tilling the land.[10] The Greek also distinguished clearly between (*techné*) and action (*práxis*), considering that *techné* leads to production (*poietiké*) and *práxis* represents a deliberate exercise in virtue (*phrónesis*).[11] Human excellence, however, does not reside in technique, but in virtue, and the mastering of virtue is equivalent to the mastering of active reasoning and not to the mastering of production. In Nicomachean Ethics 1140 a, 15, Aristotle makes a very clear distinction: "In reality, while production has an end beyond itself, this is not the case of action, since a good deed is an end in itself".[12]

The Greek had also come to realize that the question of freedom (*eleutería*) was linked to the way in which work relations were administered. Also, theoretically, technique carries a liberating potential in terms of labor. Even slavery is justified, and this is clearly stated in Aristotle, based on the premise that instruments do not carry out their functions on their own; if they were capable of obeying orders or could even anticipate them, as the statues of Daedalus or the Hephaestian tripods, if the looms themselves wove autonomously, then the masters would not need slaves (*oudén àn édei oúte toîs architéktosin yperetwn oúte toîs*

[9]Marx, Engels, *German ideology,*, 1998, p. 71.
[10]Heidegger, *The Question Concerning Technology and Other Essays,* p. 13.
[11]Aristóteles, *Nichomachean Ethics*, 1140 a, 20, p. 144.
[12]Aristóteles, *Nichomachean Ethics*, 1140 b, 5 – 10, p. 144.

despóstais doúlwn).[13] Aristotle's argument reveals that technique conveys a liberating dimension of labor and that, consequently, domination loses its grounds when technique is placed at the service of human liberation.

While the Greek were familiar with the term *techné* and, more than that, were able to appreciate excellence (*arethé*) of technique in the splendor of Fidian esthetics, in the harmony of the cithara, or in the enchantment of *kartarsis* produced in theater,[14] on the other hand, they could not fathom the astounding technological development that, nowadays, places humans in the spotlight of history. We could even say, according to Walter Benjamin, that the Greek "… were obliged, due to the state of their technical mastery, to produce eternal values." Taken this way, beauty also becomes a product of *techné* and, therefore, *techné* was capable of translating harmony, proportion, and balance.[15] So, how come, if the Greek had recognized the liberating force in technique, did it become an instrument of domination? Let's remember that Western history is marked by fissures, and realize that the term 'technique' has taken on new connotations with the arrival of modernity.

Changes are brought on through history. While *techné* is not worthy of much further ado on the part of the Greek, it is not in this manner that moderns view it. If the ancient Greek viewed *techné* as an accessory to *phýsis*, in other words, a sum total of human experience expressed through knowledge and materialized through artifacts in the real world, yet distinct from knowledge itself, between *episteme* and *sophia*, they chose to glorify the latter. One can, therefore, observe continuity and discontinuity in transition from old to modern technique, even considering that the latter derives from the former. The former had a more solid nature, while the latter is no longer dependent on man, except as its instrument. *Techné* becomes the reason behind new times, such as modernity. In modernity, conditions were destroyed to convert *techné* into the *sophia* of our times. The abandonment of autonomy on the part of *sophia* and its subjugation to *techné* builds a history stripped of its capacity to offer autonomy to every person. It is in this sense that Heidegger refers to technique, not merely as an instrument for action but, fundamentally, as a perspective on the world: "What *is* today becomes subjected to the essence of modern technique, a domination that has become prevalent on all spheres of life, through multiple indicative signs

[13] Aristóteles, *Politics*, 1253 b,/ 1254 a, 1.

[14] Heidegger, *The Question Concerning Technology and Other Essays*, p. 34.

[15] Heidegger, *The Question Concerning Technology and Other Essays*, p. 34.

that can be named: function, perfection, automation, bureaucratization, information."[16]

3. Technique and modernity: the technical empire

Lost in time is the notion that technique, inevitably, would free man and pave the way to human emancipation. After overwhelming evidence to the contrary, we may discard the optimistic views of Bacon: "In fact, the benefits of inventions may reach humanity as a whole, with civil measures reaching but a few communities and being short lived, while these may last forever. In other words, State reforms rarely take place without violence and upheaval, but inventions prompt activity and their benefits do not cause harm or bitterness."[17] This is due to the fact that technique, which operates above communicative reason, becomes the prevailing instrument in the organization of life and, with the advent of modernity, leeches the emancipatory potential in instrumentation processes affecting man and nature.[18]

Modern technique has proven to be a form of social rationalization. However, rationalization is here assessed in a Weberian sense, in other words, in a perspective that recognizes that, if there are gains, there are losses.[19] Technique becomes the main driving force of emergent capitalism.[20] The technocratic conscience that appears with modernity does not only mean a new ideological force shaping the world, sterilizing politics and alienating the masses, it also represents a reduction in practical reason (ethics, justice, politics) due to technique.[21] The immediate consequence is the transformation of action awareness to production awareness, with *homo actives* reduced to *homo faber*. Thus, we can sense the nullifying effects on existence and interaction setting in. Work emerges as a sovereign element, smothering all others.

In modernity, technique takes on the status of *–logy*, when it becomes 'techno-*logy*,' and culture becomes 'technologism,' with effects reaching deeper than the mere addition of a suffix to the term *techné*; this

[16]Heidegger, Conferences, p. 193, apud Rüdiger, *Martin Heidegger and the Question Concerning Technology: Prospects of the Furure of Man*, 2006, p. 34.
[17]Bacon, *Novum Organum*, livro CXXIX, 1999, p. 96.
[18] Araújo, *Religion and Modernity in Habermas*, 1996, p. 33.
[19] Araújo, *Religion and Modernity in Habermas*, 1996, p. 39.
[20] Araújo, *Religion and Modernity in Habermas,* 1996, p. 38.
[21] Araújo, *Religion and Modernity in Habermas*, 1996, p. 38.

change causes a shift that also affects the meanings of these terms themselves. The anthropological and instrumental definition of technology,[22] more accessible to common sense, is debunked by a more powerful player. Technology not only reaches its own independence as a branch of study but also as a fundamentation of itself. Its force and status are also instrumental in fueling the process of its autonomy. Once one realizes that technical expertise can represent power through the control of both nature and human populations, then technique becomes rebellious to man, since, "…technique, in itself, is anything that man does not dominate," according to Heidegger in *Political Ontology*.[23] From a mere instrument of anthropological intentions, technique becomes the master of human existence itself.

This Copernican turnaround in the sense of *techné* takes place in the passage into modernity. Modern science, an instrumental view of nature, the rise of science and an ideology based on technique are all elements that preceded the industrial revolution itself. In observing this passage into modernity and natural science, Heidegger identifies, especially, in the physics of the end of the 17th century, an open road towards the creation of a technological empire, starting in the 18th century.[24] The 18th century is characterized by the establishment of terms, such as, investigation (*indagine*) and experiment (*cimento*). The 18th century represents the first time in history in which utilitarian expertise becomes, in effect, respectable, in midst a strong progressive ideology of technical advances and a rush towards new inventions. Utilitarian exploration is regarded as a social conquest, imparting notoriety and driving industrial production capacity to new limits. Thus, the economical system is open to scientific endeavors, appropriating modern discoveries. Hence, quantity and efficiency "…become the new moral virtues, *technological morality,*" as Mathilde Niel[25] would put it in *Technology and Science as Ideology*), 1968, dedicated to 70-year-old Herbert Marcuse. Habermas, in line with a Marcusean thesis, notes: "With the grand-style industrial investigation, science, technology and the revaluation of capital flow into a single system."[26]

---

[22]Heidegger, *The Question Concerning Technology and Other Essays*, p. 05.

[23]Heidegger, Political Ontology, p. 193, apud Rüdiger, Martin Heidegger and the Question Concerning Technology: Prospects of the Furure of Man, 2006, p. 34.

[24] Heidegger, *The Question Concerning Technology and Other Essays,* p.22

[25]Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? *in Socialist Humanism* (Fromm, org.), 1976, p. 353.

[26]Habermas, *Technnology and Science as Ideology*, 2001, p. 72

The troublesome question of modernity proves to be not exactly related to technological reason in itself, considering human history has always been linked to technological history, but to the fact that technological reason has become an end in itself and, especially, a form of existence of an era, prevailing over all other essential categories.[27] The passage from a theo-centered to a techno-centered perspective, establishes a predominant ideological path that does not lead to human emancipation. In fact, technical knowledge was not just incrementally perfected, it was raised onto a sacred pedestal.[28] Modern man places technique on a throne, and human armies worship it. From its inert nature springs life, though not the lives of millions offering their own to sustain the inert. Inert matter shifts from body accessory to body replacement.

The Aristotelian idea of liberation from the realm of needs through technology which, supposedly, would take the place of slavery, goes awry precisely where technology inverts the human-machine polarity, to machine-human. From the passage of technique to technology, the promise of liberty ends churning up more oppression, and the emancipatory perspectives of technique are paradoxically achieved through human enslavement. In line with Mathilde Niel, technology "…has, today, become the new support system for the old absolutist and emotional mentality. Thus, instead of featuring as a form of liberation, which is conceivable, technology has become a means of enslavement."[29] When a tool that would enhance natural dimensions takes on a life of its own, we will concur with Ortega y Gasset, that: "It is no longer the utensil that aids man, but the contrary: man is reduced assisting machinery."[30] Therefore, the more one advances in a world that depends on technical resources, promoting the self-circulation and self-nourishment of the technical organism, the more the idea of freedom goes up in smoke and becomes an unrealized objective."[31]

Thus, in the wake of the impoverishment of the Greek term *techné*, culture weakens and human autonomy is undermined in its capacity

---

[27] Araújo, *Religion and Modernity in Habermas*, 1996, p. 39.

[28]Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? *in Socialist Humanism* (Fromm, org.), 1976, p. 353.

[29]Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? *in Socialist Humanism* (Fromm, org.), 1976, p. 361

[30]Ortega y Gasset, *Meditación de la Técnica y Otros Ensayos sobre Ciencia y Filosofía*, 2004, p. 87.

[31]Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? *in Socialist Humanism* (Fromm, org.), 1976, p. 358.

to stand against a technological empire. These concerns are magnificently voiced by Walter Benjamin in *The Work of Art in the Age of Mechanical Reproduction*, 1935: "A new form of misery has emerged with this monstrous technical development, dominating man."[32] This is because technical resources convey no deeper spiritual component[33] other than the draining of spirituality itself. Things that lose their meaning, actually, become fungible and, therefore, lose their aura. "The concept of aura allows us to summarize these characteristics: what is atrophied in an age of technical reproducibility of the work of art is the aura. This process is symptomatic, generating shock waves far beyond the domain of art. *Generalizing, we can say that reproducibility removes the copied object itself from the domains of tradition.* As it spawns new copies, it replaces the one-of-a-kind existence of a work of art for a serial existence."[34] Technique advances, leaving trails of corroded identity and fungibility on its way towards its ultimate goal: man, stripping him of his aura, therefore, leaving him vulnerable to becoming an object and, consequently, exposing his bony structure, deprived of its very flesh. World view itself is then conditioned to the empire of reproducibility: "Here, unity and resilience are as intimately bound as are, in terms of reproduction, transience and repetitiveness. The r*emoval of the object from its casing and the destruction of its aura are characteristics of a form of perception whose capacity to capture "the similar in the world" is so strong that, thanks to reproduction, it can capture it in a single event."*[35]

Technical resources, without a doubt, enable interaction with nature, allowing for humans to adapt to their environment and safeguard the survival of the species through cumulative experience and knowledge.[36] Life depends on technique for conservation and reproduction. To a large degree, natural challenges prompt responses that propel technical evolution. Thus, Ortega y Gasset notes: "Man, technique and

---

[32]Benjamin, *Magic and Technology, Art and Politics:* an Essay on Literature and the History of Culture, 7.ed., 1994, p. 115.

[33] Rüdiger, *Martin Heidegger and the Question Concerning Technology:* Prospects of the Furure of Man, 2006, p. 25.

[34]Benjamin, *Magic and Technology, Art and Politics:* an Essay on Literature and the History of Culture, 7.ed., 1994, p 168.

[35]Benjamin, *Magic and Technology, Art and Politics: an Essay on Literature and the History of Culture*, 7.ed., 1994, p. 170

[36] Ortega y Gasset, *Meditación de la técnica y otros ensayos sobre ciencia y filosofía*, 2004, p. 28

well-being are, ultimately, synonymous."[37] Modernity permits, through material advances, a series of unlikely modifications in the field of material development that result in a greater capacity to enjoy well-being and overcome previous existential limitations. It is Engels who notes that this is the first time in history that conditions are right to acknowledge a greater possibility, through material possessions, of providing improved human conditions for all.[38]

Moreover, it is Marx that realizes with stupefaction that science has brought the dominance of technology, allowing for a series of material advances which, also, provide a greater comfort and well-being, albeit no greater justice, inclusion or socially distributed welfare. Even though this may be a reality for some countries, by no means does it constitute a global reality.

For modernity has associated technology to its functions in an enlightenment dialectic fashion and, therefore, promotes progress, carrying out reification, promising freedom and delivering oppression. In the warning words of Ortega y Gasset,[39] technology does not imply in an adaptation of the person to the environment, but in an adaptation of the environment to the person, and it is this that inverts the meaning in this relationship, also expressing the possibility that, in the relation between *ego* and *alter*, the other himself becomes a part of the environment and, thus, becomes both instrument and means of technique. The instrumentalization of objects evolves to the instrumentalization of man. Therefore, if technique takes on a new significance, it is so that it may drift towards the degeneration of both man and environment as it defines the identity of modernity; 'modern' is here synonymous with denaturing nature and dehumanizing humans. What emerges from this is the *homo fabricatus*, to which Habermas refers.[40]

Primarily, modern man is responsible for disenchanting and dehumanizing. First, he disenchants nature, turning it into an object, *res extensa*, then he dehumanizes, because the domination exerted on things is also exerted on humans. Aura and soul are extracted from everything. Therefore, as expressed in the *Dialectics of Enlightenment* "To disenchant

---

[37]Ortega y Gasset, *Meditación de la técnica y otros ensayos sobre ciencia y filosofía*, 2004, p. 35

[38] Borges, *Critique and CrisisTheories*,1994, p. 89

[39] Ortega y Gasset, *Meditación de la técnica y otros ensayos sobre ciencia y filosofía*, 2004, p. 31.

[40] Habermas, *Technnology and Science as Ideology*, 2001, p.75.

the world is to destroy animism."[41] The civilization vessel is launched on a mission to purge the world of its mystery and obliterate enchantment. Pretenses disguised as explorative are, in fact, dominating, for their interests do not seek the acquisition of knowledge, but domination. "Technical reason, today, is the rationality of domination itself. It represents the compulsive character of a society that is alienated from itself."[42]

Thus, the advances of modernity derive from independent technical advances which often supersede man himself. From mechanisms imagined to aid in overcoming human needs, technical resources have come to engender new human needs, driving the wheels of irreversible dependency relentlessly into the future. "On the contrary, technological man lives in a state of extreme technological stress."[43] The desire to control in a panoptic society, to which Foucault makes reference, is aggravated through an increased loss of control as a consequence of technical dependency itself. The unbridled search for more, the competition to acquire the latest knowledge, the unlimited and insatiable desire to control and possess nature are the founding blocks of an order that overwhelms human capacity in order to exercise control. Total control implies in total lack of control. Therefore, for Adorno and Horkheimer, "The myth is clarified and nature is objectified. The price paid for greater power is the alienation of that over which power is exerted."[44]

Modern pipedreams envisioning technique as a channel for freedom have become a fetish. Hence, its central role in increasing productivity has also become a factor of economic growth and permanent revolution in modern history. However, the same modern history with its recent conquests and advances forebodes a cyclical relationship involving technology, State and ideology which, to a considerable measure, fuse modern history with the history of desires and power.[45] The potentiation of power through technology also carries with it the great paradoxes experienced throughout modernity. Hence, the translation of modern human history into this ambiguous and paradoxical condition: technical resources that liberate also serve to oppress, opening venues for the objectivation of life. This provides the very evidence that

[41]Horkheimer, Adorno, *Dialectic of Enlightenment*, 1985, p. 20.

[42]Horkheimer, Adorno, *Dialectic of Enlightenment*, 1985, p. 114.

[43]Niel, Mathilde, *The Phenomenon of Technology:* Liberation or Alienation of Man? (Fromm, org.), 1976, p. 356.

[44]Horkheimer, Adorno, *Dialectic of Enlightenment*, 1985, p. 24.

[45]Niel, Mathilde, Niel, Mathilde, T*he Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism* (Fromm, org.), 1976, p. 354.

enlightenment dialectics operates within modernity as a secret driving force, turning subliminal gears which, between evolution and involution, progression and regression, has allowed for events such as Auschwitz, Gulag and Guantanamo to take place, as observed by Adorno and Horkheimer. At the base of this dialectical analysis, Western society exposes us to ever-increasing paradoxes that devour the most auratic elements of existence. Enlightenment dialectics continues to operate its contradictory machinations, where discolored humans herald the dawn of technology, and vice-versa.

A world that, contrary to human interests, has long relinquished its anthropocentric nature, as announced by the dawn of modern renaissance, has embraced technocentricity; the further technology advances, throughout modern history, the more grandiose and showy it becomes, causing man to feel belittled and impotent in face of powerful machines. Man's potency is surrendered in confrontation with powerful machines, and debilitated work efforts affect his capacity to engage in the spirit of enlightenment which, in other words, represent the passage out of the self-inflicted condition as a minor referred to by Kant, and here quoted by Adorno and Horkheimer: "In Kants words, enlightenment is the solution for man in his under-aged condition, for which he himself is responsible. As a minor, he is incapable of acting on his perceptions without the intervention of another. 'Understanding without the direction of another' is the understanding directed by reason."[46] Human impotence in face of machines now becomes an autonomous force instigating tools and equipment.

Conditions in this technological era enable technically skilled individuals to experience through technology a new form of legitimizing domination, as notes Habermas: "For now, the first productive force, technological-scientific progress in limited to a few, has become a new form of legitimation. This new form of legitimation has, no doubt, lost the old form of *ideology*."[47] It is true that a new form of ideology strengthens production, domination and control, making human emancipation impossible. It is through the need to adapt to technical conditions and through the desires fueled by negotiating life as merchandise that technocratic consciousness spawns and replicates unchecked; after all, it operates as a disguised weapon within the economic system itself. Who would deny the importance of technology or science? Therefore, its in-

[46]Horkheimer, Adorno, *Dialectic of Enlightenment*, 1985, p. 81.
[47]Habermas, T*echnnology and Science as Ideology,* 2001, p. 80.

herent repression is profoundly infiltrated in social consciousness and actions, garnering "…the loyalty of the masses" through "…compensations directed to the satisfaction of privatized needs."[48] Consequently, present-day perceptions find incongruence in modernity and, therefore, produce anxiety-ridden perspectives of either succumbing to technology or overcoming its historically accrued effects, from Auschwitz to Hiroshima-Nagasaki, and from Guantanamo to Iraq.

It is not a question of abominating technology or associating it with any end-of-the-world omen, but a question of realizing that technology distances man from himself and, therefore, builds walls between a stupefied comprehension of gnosis and the simple pressing of a button. Technology desensitizes individuals in terms of their responsibilities, establishing a gap between acts and their repercussions. The technological era brings out the beast in men for, with the same nonchalance with which a hand moves the mouse of a computer, systems are activated to destroy entire cities. Technology releases barbarity and challenges civilization, while emancipation rests abandoned on a heap of things to do. Technocratic consciousness is, in a sense, less ideological than all previous ideologies; since it does not have the opaque power to blind which, at least, would falsely suggest satisfaction. On the other hand, the somewhat vitreous prevailing background ideology that makes of science a spell, is more irresistible and more far-reaching than ideologies of yesteryear, considering that the disguising of issues not only justifies the partial domination interests of one class, suppressing the partial emancipatory need of another, but it also affects emancipatory interest, as such, of the entire human race."[49] The issues, therefore, concerning the effects of these processes in the dimensions of life would call for a more detailed analysis.

4. Technique, the world of life and dehumanization

Modern society, an era dominated by enframing (*Gestell*), in a Heideggerian sense,[50] has converted the emancipatory potential of tech-

[48]Niel, Mathilde, *The Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism* (Fromm, org.), 1976, p. 355.

[49]Habermas, *Technnology and Science as Ideology,* 2001, p. 80.

[50] Rüdiger, M*artin Heidegger and the Question Concerning Technology: Prospects of the Future of Man*, 2006, p. 34.

nology into a formula of oppression by the bourgeoisie, and this transformation has changed its effects from liberating to castrating. Modernity, therefore, takes on the meaning of a historical era in which experience is drained through work channels and market interests, and from where the dimension of technology, as a product of work, will co-determine all other areas of existence. The resulting historical change allows for the reduction of existence to labor and the rejection of the more encompassing concept of *techné* as entertained by ancient Hellenics. Modern capitalist and productivist society privileges the "mode of possessing" over the "mode of being," driving the carriage of destiny in determining historical events. The issue does not reside in the use of technical resources to either lessen human expenditures or to put an end to physical suffering or duress, but in its quintessential role in history –machine gears driving the gears of history. Man is to be measured by the yardstick of technology. For our time, therefore, technology is the measure of all things, contrary to Protagorean claims.

What is ultimately a product of human artifice, paradoxically, excludes humans. Technology's distinguishing feature is its very capacity to command the space of what is natural and what is human. It is not in dichotomic terms that the relationship between technology and humanity is seen, through simple and reciprocal exclusion, but in dialectic terms, where one dominates the other, fueling tense and contradictory conditions, inextricable from the confines of contemporary productivist and consumerist society. Technology discriminates when directed to discriminate; technology emancipates when it is allowed to emancipate. Technology may not be viewed apart from social considerations as a whole, which involve the historical relationship between production and productive forces at work, as stated in Marxist tradition. Technology presupposes historical and social conditions that endow it with any particular meaning. And the current meaning is exhausted in its ideological in maintaining the capitalist production system. Therefore, the problem is not in the technological advances and in the furthering of scientific knowledge; it lies in the enslavement of science to serve prevailing interests in using technology as a means of domination.

Furthermore, this critique seeks to focus on the gap between material progress achieved as a result of technology and the level at which elementary human dignity is catered to. Despite existing contraptions, these are not meant for all and are much less accessible to all. The problem is not in technology as a complement to human existence; it resides in its appropriation over man, in the conversion of human thought into

technology-centered thought and in the prevalence and autonomy of technology over the natural world and over humanity. Technology proclaims its independence from man and stands above both man and nature.

In the age of cyberculture, the problems with absolute technological values can be traced to procedures ultimately established to control life, dislodging man from his own self-concept. Only a shared experience, constructed through symbols can define the human condition; however, when reduced to a purely labor condition, in a society run by bureaucratic powers and by economic interests, life itself dwindles to make way to the domination interests of immediatism. In information society, vulnerability towards technology is maximized, on a path with no return. The more technology is used, the more it becomes necessary. Technology is, thus, an inextricable part of our daily lives and, thus integrated, connects all life-cycle elements that depend on it, creating interdependency on a scale never seen before. It follows that technology has become the core of existence.

The nullification of existence is aggravated with each new advance in our technocratic era. Therefore, by no means can we claim that it is liberating, *tout cort*, we can claim that technology has liberated some men; however, there are hordes of people denied access, kept within their silent isolation from the lifeline of provision and means of developing communications, which represent, especially in an information society, limited productive communicative dialog and social mobilization on the public sphere, as points out Habermas.

Thus, the complex and rich experience of the world of life becomes void through external, systemic and determining factors of bureaucratic and economic powers that dominate production spaces, ultimately, through symbolically represented exchanges of experiences. Instrumental reason violates the space of communicative interaction. Therefore, when Habermas alludes to efficiency considerations of this technical ideology and modern science, he discusses his capacity to "… disassociate the self-concept of society to form the reference system of communicative action and from the symbolically mediated concepts of interaction, to replace them with a scientific model. Equally, the culturally determined self-concept of a social world of life is replaced by the self-objectivation of men, under the categories of guided rational action and adaptive behavior."[51] Instrumental imperatives substitute categori-

[51]Habermas, *Technnology and Science as Ideology*, 2001, p. 74.

cal imperatives and, consequently, trash the potential alternative of a constellation of emancipatory values on dimensions of communicative reason, as noted by Habermas: "However, this unfolding process of productive forces can only constitute a liberating potential if it does not replace rationalization on another level."[52]

Rationalization and technification grow conceptually apart, for rationality, while communicative, promotes emancipation, founded on logic and dialog and on the recovery of active interventions of man in history, while technology serves value-added interests and nullifies all interactive human potential. Therefore, the simplification of the world of life must be the standard and yardstick of the devastation provoked by society's modernization movements. The technical-operative mode of today's society makes behavioral conditioning the rule, invading and dissolving spontaneous, creative and integrating experiences of communication in line with the requirements of the *world of life* (*Lebenswelt*). What we notice in the world of life, therefore, in what affects society, an increased social disintegration, affecting culture, the loss of symbolic potential and, for the individual, the loss of autonomy.

5. Humanization: ethical responsibility of the human rights culture;

"To be radical is to take things by the root. However, for man, the root is man himself."[53] This phrase, by a young Marx, reveals his concerns for human dimensions that lie behind critical thought. The subtle question of ethics in Marx suggests that the path of resistance against reification may only be reached through humanization, in the sense that the instrumentalization of everything in modernity has become the new law.[54] "In the Marxist view, socialism is humanism as it organizes the social division of work, the realm of needs, the manner in which to allow that men fulfill their social and individual needs in the absence of exploitation and with a minimum of difficulties and hardship."[55]

In this sense, it is clear that there is strong evidence of humanism with latent concerns, especially in the work of the young Marx, a form

[52]Habermas, T*echnnology and Science as Ideology*, 2001, p.88.

[53]Marx, *Crítique of Hegel's Philosopy of Right – introduction*, 2005, p. 151.

[54] Heidegger, *Letter on Humanism to Jean Beaufret,* 1973, p. 351.

[55]Marcuse, Herbert, *Socialist Humanism* (Fromm, org.), 1976, p. 113. and: Sviták, Ivan, *The Sources of Socialist Humanism*, *in Socialist Humanism* (Fromm, org.), 1976, p. 37.

of humanism, in fact, that is shared by a number of other theoretical currents for, actually, as a philosophical current, humanism itself (*humanismo; humanisme; humanismus; umanesimo*), in spite of having been thus baptized during the Renaissance, maintains its name long after the Renaissance.[56] There is, in this sense, an invisible line that connects the Socratic *gnouth autos* to the idea of the Vitruvian man of Leonardo Da Vinci, and to the socialism of Marx, in its critical views on capitalist society; an invisible line that expresses the concern for humanity and its condition. *Humanitas* is this invisible thread woven through history that connects a diversity of ideas around the same objective, from the Greek *paidéia* to the *humanitas* of Cicerus and Varronis, through to the *trivium* and *quadrivium* of Medievals, the *umanesimo* of Renaissance Italians, and the culture of *hommes de lettres* of French Enlightenment. Therefore, if Marx did not found Western humanism, he did, however, give it a very particular aspect different from bourgeois individualism, thus, taking his place as an important asset of critical philosophy.

The confrontation involving critical thought versus existential technification and the world of labor is a clear reactive component of the modern process of exalting progress and capitalistic fetishizing of the labor world.[57] Noteworthy in Marxist critical tradition is attempt to overcome the idea that ties life to work, enslaving man in a new form of domination that becomes the tool, the master over man himself and the instrument of class domination. In this sense, if technology were directed towards fostering equality and justice, technology would foster social balance rather than domination.[58] Consequently, work itself, originally a source of creation and protection of human life, as it stands, is the cause of the reification of life itself and of social oppression,[59] leading to domination.[60]

If man occupies center stage throughout Western Renaissance, at a later stage, technology takes his place as the driving force in defining conditions. Therefore, it is in the course of modernity that one observes the rise of man as a source of philosophical humanism, in other words,

---

[56] González, *El Ethos, Destino del Hombre,* 1996, p. 28.

[57]González, *El Ethos, Destino del Hombre*, 1996, p. 30.

[58]Niel, Mathilde, *The Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism* (Fromm, org.), 1976, p. 351.

[59]Goldman, Lucien, *Socialism and Humanism, in Socialist Humanism*(Fromm, org.), 1976, p. 69-70.

[60] Suchodolski, Bogdan, *Renaissance Humanism and Marxian Humanism,* in Socialist Humanism (Fromm, org.), 1976, p. 59.

the idea that man is the measure of all things, as well as historical humanism, starting in the 14th century, encompassing a number of diverse ideals focused on cultivating *humanitas*.[61] The long years that separate us from the first declarations of the 18th century have clearly observed a more significant advance in the fields of technology than in the realization of ideals involving freedom, equality and fraternity. Therefore, having been born to exalt man, modernity has come to be responsible for the reduction of all things to possessions and to instruments of domination of nature, exhausting existence, turning colors to grey, fusing all dimensions into one and, ultimately, discoloring man, for "…accompanying the victory of the technological age comes the fading of the human aura," as notes Horkheimer in 1966.[62]

Modernity impoverishes the meaning of *techné*, when depriving it from its sense of technique and art, as known by the Greek, and when reducing it to an instrument of nature to produce a historical condition in which *praxis* in work becomes the only significant social life.[63] Technique has become the end, and the means have been legitimized, due to inconsequential teleologism. "What is, in fact, false in the realm of *praxis*, in today's perspective, manifests itself in the prevalence of tactics above all else. Means have become absolutely independent; while thoughtlessly serving their ends, they alienate themselves from these."[64] If one has sought to dominate nature through instruments, now the instruments dominate the consciousness of a time. In the 1965 text, *Technical Progress and the Social Life-World*, originally published in *praxis*, Zagreb, n 112, 1966, and later, integrated into *Technology and Science as Ideology*, in 1968, Habermas is emphatic in saying: "Technical power provided by science to affect nature has also, today, directly affected society…"[65] Ethics of ends prevails over ethics of means and becomes the driving force behind the functioning of technical logic. Man does not stand above nature; he

[61]This extensive historical movemen would produce echoes in different parts of Europe, as we can observe from the number of names involved: among the Italians: Giovanni Pico della Mirandola; Francesco Petrarca (1304-74); Coluccio Salutati (1331-1406); Leonardo Bruni (1374-1444); Lorenzo Valla (1407-57); Giannozzo Manetti (1396-1459); among the French: Charles de Bouelles (1475-1553); Michel E. de Montaigne (1533-92); among the Spaniards: Ludovico Vives (1492-1540); among the German: Rodolfo Agrícola (1442-1485)

[62]Horkheimer, *The Future of Marriage*, 2005, p. 106.

[63]González, *El Ethos, Destino del Hombre,* 1996, p. 38.

[64]Adorno, *Marginal Notes on Theory and Practice, in Words and Signs: Critical Models, 2*, 1995, p. 216.

[65]Habermas, *Technnology and Science as Ideology*, 2001, p. 100.

is not beyond nature, and he cannot do without nature; man is a part of nature, and his unresolved relationship carries grave consequences with it, for it represents his conflict with his very matrix.[66]

Following this logical process, science is neglectful of its responsibilities towards existential emancipation, serving as an instrument of power itself, with its emancipatory forces harboring the oppressive agents of domination.[67] Science and technology, devoid of ethics, suppress fundamentally important factors of human conditions and become, precisely for this reason, forces which, instead of protecting, threaten the place of humans in the world.[68] Its corruption corresponds to the spirit of a period. There are science and technology ethics limiting their practice, and these ethical boundaries are set by a secularized culture of human rights, impervious to any metaphysical fundamentation, depending exclusively on the capacity of social coordination of human behavior to bring on the emancipation of the life-world.

If the advantages garnered from this process of blown up technology are evident and undeniable,[69] so are the effects of technical developments on nature and human coexistence.[70] Everything indicates that freedom will not be the crop harvested at the end of the day, but more oppression, following the modern configuration logic of the capitalist society.[71] Plucked by the dialectics of enlightenment, man marches forward, allowing technology to work towards his ultimate annihilation. Therefore, we can echo Sophocles: "The most marvelous and terrible in the world is man… from his art and creative genius result good and evil" (Sophocles, *Antigona*, 335). The reason being, is that where *homo faber* prevails, his fate is the reification of things. In the words of Hannah Arendt: "Fabrication, which is the work of *homo faber*, consists in reification."[72] Therefore, absorbed by the world of labor, banned from the political arena, *homo faber* tends to determine the conditions of social power. Hannah Arendt, commenting on Marx, notes with propriety: "In

---

[66]González, *El Ethos, Destino del Hombre,* 1996, p. 24.

[67] Bunge, *Ética, ciencia y técnica*, 1996. p. 47.

[68] Bunge, *Ética, ciencia y técnica,* 1996. p. 51.

[69]Niel, Mathilde, *The Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism* (Fromm, org.), 1976, p. 350.

[70]Markovic, Mihailo, Humanism and Dialectic *in Socialist Humanism*(Fromm, org.), 1976, p. 108.

[71]Niel, Mathilde, *The Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism* (Fromm, org.), 1976, p. 347.

[72]Arendt, *The Human Condition*, 10. ed., 2000, p. 168.

one of the passages that reveals his eminent historical sense, Marx once commented on Benjamin Franklin's definition of man as an instrument maker as a product of typical "yankeeness," in other words, typical of the modern era, analogous to the definition of man as a political being, in antiquity. This observation rests on modern era premises intent on excluding the political man from the public arena, in other words, man who speaks and acts as in antiquity, *homo faber*, was sought to be excluded."[73]

Social repression annihilates all that is human in man. It is Erich Fromm who states that "…repression, whether conditioned individually or socially, deforms fragments and robs man of all his humanity."[74] Therefore, it is worth asking whether humanism has run its course, if humanism has become unable to come up with any proposals, if humanism, nowadays, is devoid of any purpose. To answer these questions with Herbert Marcuse it is necessary to say that humanism "…must remain an ideology as long as society depends on continued poverty, arrested automation, mass media, prevented birth control, and on the creation and re-creation of masses, on noise and pollution, on planned obsolescence and waste, and on mental and physical rearmament."[75] The same concerns occupy the mind of Erich Fromm: "The revival of Humanism today is a new reaction to this latter threat in a more intensified form—the fear that man may become the slave of things, the prisoner of circumstances he himself has created—and the wholly new threat to mankind's physical existence posed by nuclear weapons."[76]

In the sense here invoked, today's culture of humanism would be assuming a new role if it proposes to stand watch against technology, in the sense that Heidegger describes the problem.[77] Therefore, he states: "What else, in turn, does that betoken but that man (*homo*) become human (*humanus*)? Thus, *humanitas* does remain the concern of such thinking. For this is humanism: meditating and caring, that man be human and not inhumane, "inhuman," that is, outside his essence."[78] Despite

---

[73]Arendt, *The Human Condition,* 10. ed., 2000, p. 172.

[74]Fromm, Erich, *The Application of Humanist Psychoanalysis to Marx's Theory, in Socialist Humanism* (Fromm, org.), 1976, p. 252.

[75]Marcuse, Herbert, Socialist *Humanism?, in Socialist Humanism*(Fromm, org.), 1976, p. 119.

[76]Fromm, Introduction, in Socialist Humanism (Fromm, org.), 1976, p. 08.

[77]Rüdiger, Martin Heidegger and the Question Concerning Technology: Prospects of the Future of Man, 2006, p. 211.

[78]Heidegger, Letter on Humanism to Jean Beaufret, 1973, p. 350.

Heidegger's attempts, in his *Letter on Humanism*, to find fault in other humanists' concepts and, in turn, in Sartre's *Existentialism is a Humanism*, he does not neglect to warn against the excessive humanism of the moderns,[79] he does not fail to consider that the empire of technology is the present-day threat to human existence itself, in essence, because it leads humanism itself into a crisis. Therefore, Juliana González states: The alternative for today's ethics is, in our judgment, to deny humanism and its distortions and re-find it, in its original and radical meaning, with the new essential features that it has acquired in modern and contemporary times."[80]

If the human being represents its material and historical existence, and the cultural world bears the symbols of its existence, then reification may well provoke the gradual disappearance of human traits, replaced, as before, by technical reproduction.[81] Consequently, our current times may offer man "…the danger of annihilating his essence," as states Heidegger in Nietsche IV.[82] And, Hannah Arendt, in line with Heidegger, in her text *On Violence*, 1969, a reflection written during the Cold War and the Vietnam War, in respect to thermonuclear weapons that are added to cybernetic terrorist threats, also echoes this idea, saying that the use of technology itself in war has enabled the confrontation between opponents to take on apocalyptic dimensions. "Thus, war – from times immemorial, the ultimate and ruthless arbitrator over international disputes – has lost much of its efficiency and almost all of its fascination. The apocalyptic chess game of superpowers, in other words, between those who operate the highest levels of our civilization, is played under the premise that, if there is a winner, both shall perish; it is a game that does not show any resemblance with any of its predecessors."[83]

If the relationship of man and nature expresses the passage from the objective to the subjective world through language, and if the passage from the subjective to the social world occurs through language, then existing or coexisting outside the realm of language is not an option. It follows that human preservation occurs through the preservation of language. In a process that defines the *ego-alter* relationship in

[79]Sartre, Existentialism is a Humanism, 1996, p. 76.

[80]González, El Ethos, Destino del Hombre, 1996, p. 35.

[81]Rüdiger, Martin Heidegger and the Question Concerning Technology: Prospects of the Future of Man, 2006, p. 148.

[82]Heidegger, Nietzsche IV, apud Rüdiger, Martin Heidegger and the Question Concerning Technology: Prospects of the Furure of Man, 2006, p. 246.

[83]Arendt, On Violence, 1994, p. 13.

terms of marketability, and annihilates the richness of symbolic exchanges, man's self-remission depends on his approximation to his own anthropo-linguistic and communicative nature, as a viable form of reason for our times. Humanism does not exist outside the preservation of human symbols. What clearly identifies and distinguishes man is his symbolic dimension, as language allows man a passageway to his calling, with communicative interaction describing his social-human coexistence. Habermas' observations regarding technological introjections into the life-world causing the impoverishment of symbolic interchange, explains his reaction, through discourse theory, against the loss of meaning in experience and against forms of degradation of human conditions. "This intention is to be found not only among technocrats of capitalism but also among those of bureaucratic socialism. It so happens that technocratic consciousness obscures the fact that institutional frameworks, while mediated through common language, can only dissolve themselves following rational action schemes, else running the risk of being excluded from essential dimensions, which ultimately offer access to humanization."[84] There, one wishfully envisions the creation of a new form of humanism.[85] Therefore, he states: "The liberating force of reflection cannot be replaced by the spread of technologically applicable knowledge."[86]

In the words of Weber, potential and safeguards of *humanitas*, which legitimate justice seeks to protect, are crushed under the effects of staunch dominance. In the absence of these elements, the result is, clearly, dehumanization.[87] How to react to a state of being in which interaction is smothered by work, the world of life is sapped dry by dominating systems, wilting away the sense of experience? How does the humanization of justice respond to its existential circumstances in the process of modernizing the paradoxical role from creator to annihilator?[88] And this, considering that modernity opens itself at a time in history in which it is necessary to name *human* rights, distinguishing them from mere technical knowledge. Modernity celebrates the rise of technique and sinks the ethics vessel as, dialectically, it invents the imposition of human rights, as a restriction in terms of the advancement of technology

[84]Habermas, Technology and Science as Ideology, 2001, p. 86.
[85]Araújo, *Religion and Modernity in Habermas*, 1996, p. 104.
[86]Habermas, Technology and Science as Ideology, 2001, p. 106.
[87]González, *El Ethos, Destino del Hombre,* 1996, p. 33.
[88]Araújo, *Religion and Modernity in Habermas*, 1996, ps. 87-88.

(*Technik*) that leverages power (*Macht*). Where the life-world is determined by the value of money (*Geld*) and of power (*Macht*), the defeat of ethics represents the victory or barbarity. Therefore, in the admonitions of Max Weber, within the logical framework of modern rationalization, ethical issues become irrational when faced with a world beleaguered by target-related logic: "From an end-driven rational stand point, however, rationality which refers to values will always be depicted as irrational, increasingly so as the bar is raised to absolute standards; for, the more one focuses on the actual value of action (pure moral attitude, beauty, absolute kindness, total fulfillment of duties) the less the consequences of these actions will be reflected".[89]

Therefore, ethical concerns inherent to a social and cultural critique of human rights do not merely involve operative knowledge of technical-legal issues, but a knowledge that is focused on self-comprehension based on *humanitas* itself. A legal culture whose main concern contemplates complementary elements within a number of human rights dimensions, is a judicial culture committed towards emancipatory goals in harmony with the mission to humanize a society, reified by the lack of consciousness regarding its own *ethos*. In times when the art of practicing law is squandered through the aseptic tools of market needs, legal science itself becomes an instrument of action and, thus, loses its meaning, especially as an instrument of domination, increasingly forfeiting its more noble functions – safeguarding human dignity and combating unbridled challenges to the principle of reality. One cannot form people for a democratic, pluralistic and tolerant culture outside the framework of human rights, which becomes the driving force in establishing ethical boundaries within contemporary legal premises. If the law, as a category, belongs to the life-world (*Lebenswelt*), then the current legal system will have to avoid becoming a victim of technology, resisting colonization and reification; furthermore, jurists will face the challenge of engaging in humanistic resistance ethics[90] countering the emergence of the latest forms of terror which threaten the survival of the *Dasein* itself.

If 'humanism' infers 'humanity' (*humanitas; humanity; humanité; humanität; umanità*), what then is humanity? Well, humanity is the common, inalienable destiny to which every person who lives in this world is attached, a fact that, in and of itself, demands the necessary worldly

[89]Weber, Economy and Society, 1999, p. 16.
[90]Bunge, *Ethics, Science and Technology,* 1996. p. 137.

administration within the sphere of the same common *oikós*. This reciprocal co-existential dependency is heralding a new logic of sharing that will pave the way towards every action, gathering momentum to make it all feasible, in other words, the subjective world subject to a strict dependency on the objective world, structured within the political framework of social life. In this sense, Cicerus' maxim comes into evidence: "Great is the force of humanity" (*Magna est vis humanitatis*). *Humanitas* is not a formal attribute of human beings, but a characteristic of its identity, of its own turf and, therefore, of historical, social and political relevance. The understanding that man is the author of his own existence is a part of this path towards human emancipation itself. At his famous Paris conference, October 29th, 1945, congruent with his existential perspective, Sartre notes: "If man, as the existentialist sees him, is not definable, it is because, to begin with, he is nothing. He will not be anything until later, and then, he will be what he makes of himself."[91] A product of his own actions, man is capable of conditioning his own existence and, therefore, he becomes the author of one's own history, and not the instrument of technological history within emancipatory struggles in the framework of a technological society.

Humanism is, in essence, a form of ethical engagement. Ethics is merely the framework depicting responsibilities that affect us, connecting everything and everybody. If ethics is, etymologically, the habitat of man, then man's own destiny, as noted by Heraclitus ("Character is Destiny" – *Ethos antrhwpw daímwn* - Heraclitus, *Fragments*, 119), engaging in ethics is to renounce one's own destiny. The culture of humanism takes place through forms of engagement that seek to establish *homo humanus'* predominance over *homo bestialis*, considering that man only reaches his self-identity when his human aspect fulfils his *daimon*, his destiny, and cares for his habitat (*ethos*).[92] It is not the distancing from what is human, but the approximation towards what is human that can provide us with solutions for the feelings of depletion of our times. Man who does not take ethical ownership of questions affecting himself and dwell on the identity of humans, can join in with Roman comic playwright, Aristophanes, of the 2nd century b.C.:"*Homo sum; humani nihil a me alienum puto*" – "I am a man: nothing human do I consider alien to me" (Terrence, *The man who punishes himself*, 77). It is only the raging fury of unbridled advances that breaks the pact with *ethos*. The result of this

[91]Sartre, Existentialism is a Humanism, 1996, p. 29.
[92]González, *El Ethos, Destino del Hombre,* 1996, p. 19.

fury is a dislodgement of the being from within itself for, actually, *ethos* as a house, represents a return to self-identity and self-knowledge. Ethics is the responsibility of man in what affects man and his environment, in the sense that man may not be viewed as foreign to his responsibilities in terms of engagement and social action.[93]

The formation (*paidéia*) of man's towards virtue is integral to a society in which concerns for the human being are above concerns for technology and the material world.[94] Following Erich Fromm's critical thought, the core concept in developing a human rights culture may lie in the engagement in emancipatory struggles and resistance ethics, pitted against man becoming a one-dimensional being, reclaiming human elements lost in history and overwhelmed by technological civilization. The holism of critical and formative consciousness tackles the complexity of what is human to echo Democritus in: "Man is a miniature version of the universe" – "*Anthrwpos mikros kósmos*" (Democritus, *Fragments,* B 24 Diels), representing the first step in staying the spread of ideologies distancing man from himself and, therefore, from his own habitat (*ethos*).[95] Thus, "humanism and ethics constitute, clearly, an essentially inseparable unit. Humanism is, in essence, an ethical concept."[96]

Humanitas does not take place through an isolated individual, nor does it take place through an individual for his private interests; *humanitas* inhabits social latitudes of life. Therefore, individualistic humanism is the opposite of socialist humanism, out of which a framework of legitimate human rights culture emerges as a *praxis* of social solidarity, reconciling man with the other and with nature. Social humanism distinguishes itself, therefore, from all other trends within Western humanism.[97] Social humanism is critical of market logic, of fetishized merchandise and of the reification of the life-world. A contemporary, social and post-metaphysical humanist is critical of alienation, of reification, of ontologism and finds, in the dialectics of history, his support for the comprehension of man and his human condition. Even if post-metaphysical humanism renounces the classic attempts to define man based on his essence, it continues to link solidarity and ethics as intrinsic to a form of engagement that prioritizes *humanitas*. It is not through deplet-

[93]González, *El Ethos, Destino del Hombre,* 1996, p. 10.
[94] (González, *El Ethos, Destino del Hombre,* 1996, p. 27.
[95]González, *El Ethos, Destino del Hombre,* 1996, p. 23.
[96]González, El Ethos, Destino del Hombre, 1996, p. 17.
[97]Bunge, *Ética, ciencia y técnica,* 1996. p. 131.

ing the *ethos* that this reactionary process against technology will take place – the technological foe that voids all things and dissolves the web of human solidarity.[98]

The ethical responsibility backing human rights today seeks to debunk technical mystification, indicating alternative routes for humanizing life in spite of technology. Therein resides a humanization task to be advanced by the culture of human rights. However, at the same time, as emancipatory forces are active within the field of critical humanism, science and technology itself cannot be excluded from the equation.[99] Within humanistic parameters, technology itself elicits new meanings. The use of technology that is not associated with human liberation becomes illegitimate and dominating while social applications of technology take on relevant human and political connotations.[100] Serving emancipatory needs, technology faces a wide range of challenges regarding the fulfillment of human vocations.[101] Thus, notes Marcuse: In terms of the established industrial societies, nothing is more sensible than the fear of that stage where technical progress would turn into human progress: self-determination of life in developing the needs and faculties which may attenuate the struggle for existence—human beings as ends in themselves."[102] There are so many goals and objectives in terms of the establishment of human rights that it is hard to know where to begin; were technology to serve humanization, its task in serving this cause would take some time to complete. At the core of ideas relating to a human rights culture is the concern with the development of human potentials that have been obliterated by a society of possessions, individualism, competition and the logic of amassing wealth.

So, one can glimpse in social humanism a consistent and systematic form of reclaiming what has been buried by technology with a thought agenda that necessarily involves a commitment towards safeguarding human rights in its different latitudes, when the law is there to carry out its role in protecting human dignity (*Menschenswürde*).[103] The

[98]González, *El Ethos, Destino del Hombre,* 1996, p. 23.

[99]Bunge, *Ética, ciencia y técnica,* 1996. p. 138.

[100]Niel, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism (Fromm, org.), 1976, p. 360.

[101] Marcuse, Herbert, Socialist Humanism?, in Socialist Humanism (Fromm, org.), 1976, p. 120.

[102]Marcuse, Herbert, Socialist Humanism? in Socialist Humanism (Fromm, org.), 1976, p. 115. And Habermas, Technology and Science as Ideology, 2001, p. 104.

[103]Habermas, The Future of Human Nature, 2004, p. 30.

social humanism program ends up as a remedy and a refuge against the tribulations of these unusual times. Therefore, critical humanism resorts to the legal framework as an important shield to preserve the order of, possibly, the most essential elements of existence and co-existence and, consequently, it must preserve, within its core, a consistent reflection regarding humanism as a form of strengthening its resistance against its own inclination towards self-alienation.[104] The empire of technical resources reflects in a number of facets the loss of both autonomy and the capacity of utilizing the potential contained in emancipatory reason and, on a practical level, it involves ethical, legal and political frameworks. Therefore, in light of early Marxian teachings, it is possible to optimistically develop a set of active resistance ethics within modernity. There is no need to abandon the ship of modernity, bearing in mind the longevity of the humanist critique initiated by the young Marx in *Critique to Hegel's Philosophy of Right*, and shared by the critical thought of Benjamin through to Adorno, of Horkheimer to Habermas and of Erich Fromm, in view of the sights projected over mankind in its diverse activity venues.[105]

References

ARAÚJO, Luiz Bernardo Leite. *Religion and Modernity in Habermas.* São Paulo: Loyola, 1996.

ARENDT, Hannah. *The Human Condition*. Translation by Roberto Raposo. 10. ed. Rio de Janeiro: Forense Universitária, 2000.

ARENDT, Hannah. *On Violence.* Translation by André Duarte. Rio de Janeiro: Relume Dumará, 1994.

BACON, Francis. *Novum organum.* Translation by José Aluysio Reis de Andrade, São Paulo, Nova Cultural, 1999.

BENJAMIN, Walter. *Magic and Technology, Art and Politics: Essays on Literature, History and Culture.* Translation by Sérgio Paulo Rouanet. 7. ed. São Paulo: Brasiliense, 1994.

BENJAMIN, Walter. *Charles Baudelaire, A Lyric Poet in the Era of High Capitalism. Verso Classics,* vol. III. Translation by José Martins Barbosa e Hemerson Alves

[104]González, El Ethos, Destino del Hombre, 1996, p. 31.

[105]Senghor, Leopold, *Socialism is a Humanism*, *in Socialist Humanism* (Fromm, org.), 1976, p. 88. And: Markovic, Mihailo, *Humanism and Dialectic*, *in Socialist Humanism* (Fromm, org.), 1976, p. 95.

Baptista. São Paulo: Brasiliense, 1989.

BUNGE, Mario. *Sociology of Science.* Translation by Hernán Rodríguez Campoamor. Buenos Aires: Sudamericana, 1998.

BUNGE, Mario. *Ethics, Science and Technology.* Buenos Aires: Sudamericana, 1996.

FROMM, Erich, *The Application of Humanist Psychoanalysis to Marx's Theory, in socialist Humansim* (Fromm, org.), 1976, p.

FROMM, Erich, Introduction, *in Humanist Socialism* (Fromm, org.), 1976.

FROMM, Erich. *Marx´s concept of man.* New York: Continuum, 2004.

FROMM, Erich. To Have or to Be? 4. ed. Translation by Nathanael C. Caixeiro. Rio de Janeiro: LTC, 1987.

GOLDMAN, Lucien, Socialism and Humanism, in Socialist Humanism (Fromm, org.), 1976.

GONZÁLEZ, Juliana. El ethos, destino del hombre. México: Fondo de Cultura Económica, 1996.

LUHMANN, Niklas. The Reality of the Mass Media. Translation by Ciro Marcondes Filho. São Paulo: Paulus, 2005.

HABERMAS, Jürgen. Technology and Science as Ideology. Translation by Artur Morão. Lisboa: Edições 70, 2001.

HABERMAS, Jürgen. The Future of Human Nature. Translation by Karina Jannini. São Paulo: Martins Fontes, 2004.

HEIDEGGER, Martin. Letter on Humanism to Jean Beaufret (Conferences and philosophical ontology), in The Thinkers, vol. XLV, São Paulo: Abril, 1973.

HEIDEGGER, Martin. The question concerning technology and other essays. Translated by William Lovitt. Cambridge: Harper, s.d.

HORKHEIMER, Max. Society, Reason and Freedom. Translation by Jacobo Muñoz Veiga. Madrid: Trotta, 2005.

MANNHEIM, Karl. Sociology. Translation by Emilio Willems, Silvio Uliana and Cláudio Marcondes. São Paulo: Ática, 1982.

MARCUSE, Herbert, Socialist Humanism?, in Socialist Humanism (Fromm, org.), 1976.

MARKOVIC, Mihailo, Humanism and Dialectic, in Socialist Humanism (Fromm, org.), 1976.

MARX, Karl. Critique of Hegel's Philosophy of Right. Translation by Rubens Enderle and Leonardo de Deus. São Paulo: Boitempo, 2005.

MARX, Karl; ENGELS, Friedrich. German Ideology. Translation by Luis Cláudio de Castro e Souza. São Paulo: Martins Fontes, 2001.

MARX, Karl; ENGELS, Friedrich. Communist Manifesto, in Selected Works (v. I). Rio de Janeiro: Vitória, 1956.

MERQUIOR, José Guilherme. Art and Society in Marcuse, Adorno and Benjamin. Rio de Janeiro: Tempo Brasileiro, 1968.

NIEL, Mathilde, The Phenomenon of Technology: Liberation or Alienation of Man? in Socialist Humanism (Fromm, org.), 1976.

RÜDIGER, Francisco. Martin Heidegger and the Question Concerning Technology: Prospects on the Future of Man. Porto Alegre, Sulina, 2006.

SARTRE, Jean-Paul. Existentialism is a Humanism. Paris: Gallimard, 1996.

SENGHOR, Leopold, Socialism is a Humanism, in Socialist Humanism (Fromm, org.), 1976.

SUCHODOLSKI, Bogdan, Renaissance Humanism and Marxian Humanism, in Socialist Humanism (Fromm, org.), 1976.

SVITÁK, Ivan, The Sources of Socialist Humanism, in Socialist Humanism (Fromm, org.), 1976.

WEBER, Max. Economy and Society. Translation by Regis Barbosa and Karen Elsabe Barbosa. São Paulo: Official Press; Universidade de Brasília, 1999.

WOLKMER, Antonio Carlos. Fundamentos do humanismo jurídico no Ocidente. Barueri: Manole; UFSC: Fundação Boiteux, 2005.

Human dignity in the moral discourse of social justice for people with severe or extreme mental disabilities

Ana Paula Barbosa-Fohrmann[1]

Abstract: As a departing point for this paper, three different positions were identified: a liberal one, which defends autonomy and independence, a second one, which is grounded on dependence and vulnerability and a third one, which lays emphasis on human capabilities. None of them, however, includes people with mental disabilities. In this paper, we will therefore analyse whether Kant's moral philosophy represents – in opposition to these three positions – an inclusive theory. According to the Grundlegung der Metaphysik der Sitten autonomy is the capacity to accept freely and with self-determination moral laws and to obey them. By providing himself with laws based on reason, man is endowed with absolute value, and this is what constitutes his dignity. Therefore, autonomy is the basis for the dignity of human being and of every rational human nature. Furthermore, human dignity grounded on the absolute value of man presupposes that he is an end in himself. As an absolute end in himself every rational being shall therefore admit that everyone else equally is. Thus, reason, autonomy, equality and dignity form a relation based on motives. This paper will discuss if this discourse on human dignity also includes people with severe or extreme mental disabilities, i.e., if it regards them not only as men, but also as moral persons. Based on the assertion that human dignity is inherent to a rational human nature this paper will demonstrate that every man with no exception has human dignity. Therefore, all people with severe or extreme mental disabilities can be considered "men" in Kantian sense, and to that extent, they are endowed with dignity. However, this paper will tackle another intricate question: if the human dignity of people with severe or extreme mental impairments enables them to be regarded as "men" in Kantian sense, can they also be included in the Kantian conception of moral person?

Keywords: Autonomy. Dignity. People with Severe or Extreme Mental Disabilities.

[1]Universidade Federal do Rio de Janeiro.. E-mail: ap_cbarbosa@yahoo.de.

I. Introduction

According to several philosophers, the conception of "person" is until today one of the most difficult issues in the modern moral philosophy (e.g. QUANTE and SCHWEIKARD, 2012, p. 90-104; WOOD, 1998, p. 172). Taking the confusion that dominates the research literature concerning the conceptions of "moral person" and "human being" as a starting point, we will examine these two conceptions grounded on Kant's Grundlegung der Metaphysik der Sitten. For this, we will use the group of people with mental disabilities, in particular those with severe or extreme mental impairments as case study. If they can be understood to be embraced by the Kantian moral conception of person, they consequently have self-legislative capacity to respect the moral law and to act having it as a sole sufficient motive of their will. They are hence provided with autonomy and subsequently with dignity. In order to establish the differentiations between "human being" and "moral person" and also to respond to the question whether people with severe or extreme mental disabilities are endowed with autonomy and dignity we propose as a departing point in this paper 1) to analyse three different theoretical positions on social justice for people disabilities and 2) to present some criticism on those theories. Subsequently, we introduce 3) some conceptual interpretations of Kantian autonomy as well as 4) an alternative interpretation of dignity based on (3). As a final point 5) we propose the application of (3) and (4) to some cases of people with severe or extreme mental disabilities.

II. The Current State of the Issue

1. Procedural Justice

1.1. John Rawls

The starting point of the discussion on social justice for people with mental impairments is the thesis developed by Rawls, which aims to found a universal and inclusive theory of justice (RAWLS, 1971, 1993, p. 5-6). In Rawls all individuals with no exception are initially under a so-called "veil of ignorance or unawareness" (KOLLER, 1996, p. 371), in which the contracting parties stripped of individualizing characteristics choose the foundational principles of justice for the political society.

However, under the veil of ignorance individuals are already endowed with a certain or a basic sense of justice although they do not know their origin, basic skills, natural abilities and social status:

> "First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of this rational plan of life, or even the special features of his psychology such as his aversion of risk or liability to optimism or pessimism." (RAWLS, 1971, p. 137)

Still, as referred, individuals already have a sense of justice when they choose the principles of justice. This is an attribute that characterizes the person as moral, a concept introduced later on by the author in his seminal work (Ibid., p. 505). Another attribute of the person is the capacity for a conception of the good that is concretized in rights, freedom, opportunities, income, welfare and the social basis for self-respect (Ibid., p. 92). Therefore, in Rawls's theory, a basic sense of justice and a conception of the good constitute the so-called "two moral powers" of the person (Ibid.).

The distribution of the mentioned goods takes place according to the major principle of justice, which is divided into the principle of liberty, equality of opportunity and difference (RAWLS, 1993, p. 5-6). Such principles obey a serial or lexical order: when the list of the rights relating the first principle is set, it is sequentially followed by the list of the second principle composed by equality and difference. There is thus a progressive realization of the principles and corresponding rights. One of these principles, the one relating difference, which affirms that economic and social inequalities are fair if "they are to the greatest benefit of the least advantaged members of society" (Ibid., p. 6-7) draws our attention. Rawls's theory does not advocate a strict and equitable distribution of equality, but rather the reduction of existing social inequalities. This is a type of compensatory equality. Therefore, although apparently not all individuals with disabilities, particularly those with serious mental disabilities, can be included in the Rawlsian concept of moral person, the difference principle can be interpreted as rectifying, by means of compensatory equality, the non-inclusion of a great number of people with disabilities.

Still, it is to be asked whether Rawls's thesis need such a cor-

rection. Inclusion is perhaps embedded in his concept of moral person. This is so because all individuals can have a certain or minimal sense of justice. Sophia Wong, for instance, in a lecture given in 2008 in New York during the international conference on cognitive disabilities interpreted the concept of moral person in Rawls by referring to the idea of potentiality of all human beings. In her opinion, everyone has the potential to become a moral person in the original position under the veil of ignorance (WONG, 2012). But can this interpretation of Rawlsian theory based on potentiality be truly applied to the specific case of people with severe or extreme mental disabilities?

Another issue calls our attention: In *Political Liberalism* Rawls replaces the discourse of the moral person by the discourse of the citizen. As a member of the society the citizen cooperates limitlessly and throughout his life with it. Rawls asserts:

> "Beginning with the ancient world, the concept of the person has been understood, in both philosophy and law, as the concept of someone who can take part in, or who can play a role in, social life, and hence exercise and respect its various rights and duties. Thus, we say that a person is someone who can be a citizen, that is, a normally and fully cooperating member of society over a complete life." (RAWLS, 1993, p. 18).

In this discourse of full cooperation exercised by every citizen in the society, acknowledgment can be inserted. The acknowledgment, which is intersubjective, would thus be connected on the one hand to the fact that a citizen must respect the rights of others and fulfil his duties towards them. On the other hand, he is entitled to have his rights respected by others as well as to demand that these others comply with their duties towards him. Acknowledgment construed this way can, nevertheless, exclude people with mental impairments, since they are in most cases dependent throughout their lives of high levels of care and support.

However, by assuming that all individuals can potentially become moral persons because they have a basic sense of justice – but can people that suffer from a severe or extreme form of mental disability have a basic sense of justice? – , it could also be assumed that all persons in society can become citizens by means of an interpretation of the meaning of *full social cooperation*. The interpretation of full social cooperation is grounded on how the difference principle gains social concreteness,

i.e. how it is enforced. The provision and granting of social fundamental rights, which are at the heart of the so-called *social minimum* (Ibid., p. 228-230), give the difference principle social concreteness. The social condition of people with disabilities in general, and those with severe or extreme mental impairments in particular, gains social acknowledgment – although there remain some doubts about the potentiality of people with severe or extreme mental disabilities to be regarded as moral persons according to Rawlsian theory – by accepting that they need care and support throughout their lives, in sum, that they are entitled to social minimum.

2. *Dependency and Vulnerability*

2.1. Michael Walzer

Communitarians emerged in the eighties as a movement of reaction to the liberal view proposed by Rawls. The communitarian model is grounded on the core idea that the individual belongs to a historical political *community* and because of that individuals are bound to each other by community values.

In line with this view the inclusion of all people with disabilities is defended by a discourse founded on the dependence of the vulnerable individual on the community and the community's obligation of generosity towards him.

In *Spheres of Justice* (1983) Michael Walzer distinguishes – in accordance with the idea of 'belonging' to a human community – between those who are members, who are bound to the community and therefore dependent on it, and those who are strangers, foreigners, and who therefore show vulnerability and defenselessness. In the latter case the community only has the obligation to offer hospitality and relief as well as to express good will towards them. This characterizes according to Walzer the so-called "principle of mutual assistance". However, a philosophical basis for this principle is, in author's view, difficult to specify (WALZER, 1983, p. 31-35). In our interpretation of Walzer's theory such principle would not be applied to people with disabilities who have been born into a particular political community. This is justified because they hold since their birth the *status* of members. These individuals are – this is clear – dependent on the community due to those ties established with it when they were born. For instance, if the political community,

where the disabled person was born, did not have care as one of its values or could not afford with it, he would not possibly obtain it from the community. But within a smaller community, such as family or charity associations or those with religious nature he could possibly have access to this kind of provision.

2.2. Alasdair MacIntyre

Another view that is worth mentioning in this context is that of Alasdair MacIntyre. Vulnerability and dependence are virtues that underlie the author's discourse on social justice for people with disabilities. At different stages of life, in childhood, sickness, disability and old age, MacIntyre states, we are dependent on others or develop vulnerability and dependence on them.

According to him, the aid provided by one individual in a community does not imply necessarily a direct counter-provision of the individual that received attention, support or affection, but perhaps a debt that will be fulfilled in a future relationship established with other individuals. This makes the community, in which we are found, a complex network of mutual debts, by means of which we become attached to and dependant of each other. In the words of MacIntyre:

> "[we] become independent practical reasoners through participation in a set of relationships to certain particular others who are able to give us what we need. When we have become independent practical reasoners, we will often, although not perhaps always, also have acquired what we need, if we are to be able to give to those others who are now in need of what formerly we needed." (MACINTYRE, 1999, p. 99; see also GRAUMANN, 2011, p. 148)

According to MacIntyre a culture of giving and receiving based on the so-called "virtues of acknowledged dependence" (MACINTYRE, 1999, p. 119-128) should be built in today's society. Such virtues are synthesized in fair generosity. They are "the virtue of charity, or friendship towards God and human beings, (…) the virtue of taking pity, *misericordia*, and (…) the virtue of doing good, *beneficentia*" (Ibid., p. 121). These virtues are not dependent on our pure act of will or any legal norms, but only on our willingness to cultivate, develop and transmit them in community. All people with disabilities then have moral right to that fair generosity. The author is, however, completely reticent on the specific

issue of codification of virtues and moral rights as legal rights. He asserts, in an excerpt of an earlier work from 1981, entitled *After Virtue*: "… the truth is plain: There are no such things as rights, and belief in them is one with belief in witches and in unicorns." And further on: "The best reason for asserting so bluntly that there are no such rights is …. Every attempt to give good reasons for believing that there *are* such rights has failed." (MACINTYRE, 1981, p. 69)

3. Human Capabilities

3.1. Martha Nussbaum

Lastly, Martha Nussbaum founds her discourse on social justice on "human capabilities", which since 1993 have been employed by the Human Development Reports of the United Nations Program for Development (UNDP) (NUSSBAUM, 1997, p. 275). The idea of capability refers to a concern for equality, specifically an equality that provides certain people with an improved quality of life. Nussbaum clarifies: "This focus on capabilities, unlike the focus on GNP, or on aggregate utility, looks at people one by one, insisting on locating empowerment in *this* life and in *that* life, rather than in the nation as a whole." (Ibid. p. 285)

On that basis the author proposes a list of capabilities and corresponding rights, which aims to collaborate in practical terms for the planning of public policies. The list presented by Nussbaum corresponds to the role of primary good in Rawlsian theory. The list of primary goods in Rawls embraces basic rights and liberties, freedom of movement and free choice of occupation against a background of diverse opportunities, powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure, income and wealth and the social bases of self-respect (RAWLS, 1993, p. 181). This list thus supports powers of human reason and practical choice and has consequently a special importance for making any choice of a life plan possible (NUSSBAUM, 1997, p. 286). The capabilities and corresponding rights proposed by Nussbaum are:

> "1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living. 2. Bodily Health. Being able to have good

health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction. 4. Senses, Imagination, and Thought. Being able to use the senses; being able to imagine, to think, and to reason – and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing expressive works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain. 5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. Supporting this capability means supporting forms of human association that can be shown to be crucial in their development. 6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. This entails protection for the liberty of conscience and religious observance. 7. Affiliation A. Friendship. Being able to live for and to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedoms of assembly and political speech.

B. Respect. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, ethnicity, caste, religion, and national origin. 8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature. 9. Play. Being

> able to laugh, to play, and to enjoy recreational activities. 10. Control over One's Environment. A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protection of free speech and association. B. Material. Being able to hold property (both land and movable goods); having the right to employment; having freedom from unwarranted search and seizure." (Ibid., p. 287-288).

This list of capabilities and rights also applies to people with disabilities. In *Frontiers of Justice* (2006) Nussbaum criticizes Rawls's theory in particular because according to her Rawls does not include this group of people not only in his conception of moral person, but also in his conception of a citizen able to cooperate socially: "I shall argue that Rawls's treatment of the problem of disability is inadequate, and yet not easy to rectify. The full inclusion of citizens with mental and physical impairments raises questions that go to the heart the classical contractarian account of justice and social cooperation." (NUSSBAUM, 2006, p. 18)

Martha Nussbaum's view is thus exactly in midfield between John Rawls's and Michael Walzer's and Alasdair MacIntyre's theories. On the one hand, she is as liberal as Rawls in view of many roles played by liberty in her theory (NUSSBAUM, 1997, p. 277). On the other hand, she emphasizes dependence, communitarian attachment and individual vulnerability like Walzer and MacIntyre do. On her list, liberty plays, for instance, a central role in those capacities related to life, bodily integrity, senses, imagination and thought, practical reason and affiliation where it refers to self-respect and political and material control of individuals over their environment. Dependency and vulnerability take the form (or are acknowledged) of capacities to express emotions through attachments among individuals, and affiliation where it relates to friendship, concern and compassion for others.

III. Some Objections to the Arguments Examined

In sum, three different positions can be identified: a liberal one, which defends autonomy and independence, a second one, which is grounded on dependence and vulnerability and third one, which lays emphasis on human capabilities (ELLIS, 2004).

The liberal conception reveals that rights are connected to the fulfilment of responsibilities, and personality is understood under the perspective of autonomy and independence. In terms of implementa-

tion of public policies the liberal model stresses, for instance, productivity, paid employment and other income generating activities. Those who cannot fulfil the conditions of this model often remain in the periphery of the society. Invalidity, aging and dependence, for instance, are on the opposite side to a dichotomy that shows that individuals are measured according to their skills to produce revenue.

On its turn, the second, communitarian conception is characterized by assistentialism (or welfarism), since it stresses the vulnerability and dependence of people with disabilities. According to this model, care is recognized as relevant. People are regarded as independent social entities, who give and receive support and assistance during their lives. The acknowledgment of the conditions of dependence as well as the support to social relations and interconnections are, according to this view, part of human existence. In this sense, dependence is not a condition detached from being, but a very common condition of life, sometimes temporary, sometimes permanent. Furthermore, some other aspects of humanity can be revealed through it, such as connection among people, and the acknowledgment that care is need in different life stages.

In the third model, the capabilities approach can serve to build a structure of rights that empowers people with disabilities to reaffirm their own capabilities by means of social provisions, assistance and care. However, this is not an inclusive theory because it does not embrace grave, profound and extreme forms of mental disabilities, such as the extreme cases of people with advanced dementia, patients in permanent coma and children with anencephaly. Under these conditions, the individual's rational capacity, his capacity of emotional expression and his capacity of establishing social attachments is progressively reduced (e.g. patients with advanced dementia) or intensively reduced to a minimum stage of consciousness (e.g. a great number of patients in permanent vegetative state), i.e., he only has the capacity to perceive minimally – or not at all – his environment and to be attached to it (NUSSBAUM, 2006, p. 181). The universal inclusion claimed by this conception is therefore just as little inclusive as the liberal model criticized by Nussbaum. In this sense, Sigrid Graumann remarks:

> "This… means that *the capabilities approach* does not include all people with disabilities as Nussbaum herself claims. Indeed, anencephaly and permanent vegetative state can be considered extreme forms of damages. The determination of the limits of possibility of implementing basic skills, below which one can speak of a

> human being, is, however, entirely a matter of interpretation, and it should not be understood as narrowly as Nussbaum proposes in *Frontiers of Justice*." (In the original: "Das … bedeutet, dass der *Capabilities Approach* nicht alle behinderten Menschen einschließt, wie Nussbaum selbst behauptet. Sicherlich müssen Anencephalie und dauerhaftes Wachkoma als Extremformen von Beeinträchtigungen angesehen werden. Die Bestimmung der Grenze der Verwirklichungsmöglichkeit von Basisfähigkeiten, unterhalb derer nicht mehr von einem menschlichen Wesen gesprochen werden könne, ist allerdings durchaus interpretationsfähig und muss auch keineswegs so eng gezogen werden, wie das Nussbaum in *Frontiers of Justice* tut.") (GRAUMANN, 2011, p. 168; translation by Barbosa-Fohrmann)

IV. Interpreting the Kantian Conception of Autonomy through the Conceptions of Existent Autonomy and Potential Autonomy

In our view none of three models is appropriate to respond to the main question whether people with severe or extreme forms of mental disabilities can be considered moral persons. (BARBOSA-FOHRMANN, 2013). We argue, instead, that it is possible to find a foundation in the theory developed by Immanuel Kant on human dignity.

Autonomy, in Kant, is the attribute to accept freely and with self-determination moral laws and to obey them (SCHÖNECKER and WOOD, 2004, p. 143). All values and principles that determine human actions should only be drawn by man himself. By providing himself with laws based on reason (MAURER, 2005, p. 75; EISLER, 1961, p. 82-83), man is then endowed with absolute value, and this is what constitutes his dignity (KANT, 1786, Ak: 434; SCHÖNECKER and WOOD, 2004, p. 142). Therefore, according to Kant, in *Grundlegung zur Metaphysik der Sitten*, "Autonomie [ist] (…) der Grund der Würde der menschlichen und jeder vernünftigen Natur" (KANT, 1786, Ak: 436). Furthermore, human dignity grounded on the absolute value of man presupposes that he is an end in himself. In their comment on *Grundlegung* D. Schönecker and A. Wood state: "Es ist diese [Autonomie] und keine andere Eigenschaft, die den Menschen zum Zweck an sich macht und damit zu einem Wesen, das Würde besitzt…" (SCHÖNECKER and WOOD, 2004, p. 143). In Kant's own words: "Der Mensch, und überhaupt jedes vernünftige Wesen, existiert als Zweck an sich selbst, nicht bloß als Mittel zum belie-

bigen Gebrauche für diesen oder jenen Willen" (KANT, 1786, Ak: 428; see also BRUGGER, 1991, p. 895). As an absolute end in himself every rational being shall therefore admit that everyone else equally is (SCHÖNECKER and WOOD, 2004, p. 147).

Accordingly, reason, autonomy and dignity form a relation based on motives in Kantian theory. In this respect, we can ask if this discourse on human dignity also encompasses people with disabilities in general, i.e., if it regards them as men and moral persons.

Such considerations can, however, entail further questions. If we admit that people with disabilities – and in particular also those with severe or extreme mental impairments – are with no exception included in the Kantian conception of *moral person*, this affirmation leads to the acknowledgment that all those individuals are provided with enough reason to make their own choices autonomously and thus obey the moral laws.

Here, it seems that we should interpret the conception of autonomy that grounds human dignity in Kant's theory on two levels. On the first level, autonomy should refer not to the act of effectively using reason or intellect, but rather to an existent autonomy that every man or human being has. Furthermore, it refers to the *potentiality* that almost every man or human being has to develop it or not. In our view this existent autonomy together with potentiality make a man a moral person. In our understanding, such an existent characteristic provides every man or human being with existent autonomy as well as potentially provides every person with *potential autonomy*.

On the second level, existent autonomy originates the so-called "internal autonomy". Likewise, potential autonomy gives rise to "external autonomy". On the one hand, internal autonomy is grounded on the existence of human being. This existence by itself differentiates each human being from any other non-rational and non-human beings. Internal autonomy is therefore directly connected with our identity as a unique being, in short, with the fact of being born as a man. It also refers to the humanity in ourselves, which means, to our wide intrinsic distinctive trait of being able to establish ends in general, to orientate our lives according to those ends and not to make differences between us and other members of own species (WOOD, 1998, p. 172). Here internal autonomy is identified with an existent rational attribute that enables us to be qualified as men.

On the other hand, external autonomy is an attribute of every human being in their action with the environment. It is characterized

by its visibility and by turning concrete what is particularly human. It presupposes what is human in us and the special condition of using or not our rational attribute to respect the moral law. In other words, it presupposes the special condition of acting according to the duty imposed by moral law or even of making use or not of autonomy as the sole and sufficient motive of our will to respect the same moral law (Ibid. on the specific meaning of personality). Here, external autonomy is identified with the use or not of our rational attribute that enables us to be qualified as a moral person.

V. Human Dignity in Kantian Theory founded on the Distinction between Existent and Potential Autonomy

As asserted previously, human dignity is grounded on Kant's conception of autonomy. Furthermore, it is also understood as a prerogative of a person that is his own or self-legislator. For that reason, this person has motives to accomplish with his own duties resulting from moral law (Ibid.). To quote Kant:

> "… imgleichen, daß dieses seine Würde (Prärogativ) vor allen bloßen Naturwesen es mit sich bringe, seine Maximen jederzeit aus dem Gesichtspunkte seiner selbst, zugleich aber auch jedes andern vernünftigen als gesetzgebenden Wesens (die darum auch Personen heißen), nehmen müssen. Nun ist auf solche Weise eine Welt vernünftiger Wesen (*mundus intelligibilis*) als ein Reich der Zwecke möglich und zwar durch die eigene Gesetzgebung aller Personen als Glieder". (KANT, 1786, Ak: 438)

And further:

> "… wir uns … eine gewisse Erhabenheit und Würde an derjenigen Person vorstellen, die alle ihre Pflichten erfüllt. Denn sofern ist zwar keine Erhabenheit an ihr, als sie dem moralischen Gesetzte unterworfen ist, wohl aber, sofern sie in Ansehung ebendesselben zugleich gesetzgebend und nur darum ihm untergeordnet ist". (KANT, 1786, Ak: 440)

Three different interpretations of these quotations can be inferred. A first wide one resides in the presumption that human dignity is inherent to every rational nature. In this sense, every *man* with no

exception would have this status. Kant does not refer only and strictly to a being that thinks or effectively uses his reasoning, but rather to *a rational animal nature, human being that differs from a non-rational animal nature, non-human being*. A second strict interpretation presupposes that only rational beings that can self-legislate are endowed with dignity, and this attribute of self-legislation can be understood as a predicate only of rational beings that can use their intellect to elaborate the moral law and consequently to respect and obey it. A third alternative interpretation consists of admitting that every human being with no differentiation has dignity. But the reason for this assumption is not the same underlying the first wide interpretation. According to my conception of existent autonomy, every human being is born with an internal not exercisable autonomy. Assuming that every man with no exception has internal autonomy, everyone has as a consequence human dignity. Human dignity gains, however, concretion only in the field of potential external autonomy, when every man receives the more specific status of the person. Being qualified as a person he then can actively self-legislate and pay obedience to the moral law. Here, dignity means the dignity of the person. Accordingly, from both conceptions of internal and external autonomy we can deduce that not every man that is born with human dignity has necessarily the dignity based on the status of the person.

VI. Applying the Conceptions of Existing and Potential Autonomy and Human Dignity to People with Severe or Extreme Mental Disabilities

To illustrate the topic above we go further in our argumentation by applying the conception of existent autonomy and its equivalent 'human dignity' as well as the one of potential autonomy and its equivalent 'dignity of the person' to three different groups of people with severe or extreme mental disabilities. We discuss whether patients in permanent vegetative state, with advanced dementia and children with anencephaly can be regarded as endowed with autonomy and dignity according to our interpretation of Kantian moral theory.

1. Patients in Permanent Vegetative State or with Advanced Dementia

Here, we will sustain the position that these two groups of dis-

abled people have existent internal autonomy and are born with human dignity. Thereafter, we will sustain that they have potential external autonomy and are therefore endowed with the dignity of the person.

The starting point of this construction is to ask whether we cease to be who we are in essence, in other words, whether we can loose our identity as a consequence of a severe medical condition or illness. A possible answer can be delivered based on our interpretation of Kantian moral philosophy. We understand identity as a unity with two facets: a static and a dynamic one. The static one we are born with and we do not loose it in the course of life. It distinguishes us as a human being from what we are not, a non-human being. The dynamic one depends on the static one and can influence it but cannot annihilate it. In other words it cannot make a human being a non-human being. The dynamic identity refers to our interaction with the environment.

There is, of course an immense literature on personal identity in the field of the philosophy of the mind, but we shall here only refer briefly to two contributions, namely those of D. Parfit (1984) and C. Belshaw (2000). Parfit establishes a psychological difference between the so-called "numerical and qualitative identities", an idea followed by Belshaw. According to Parfit, numerical identity is, on the one hand, based on the fact that each person is intrinsically unique and for that reason he is not identical to another one, even if this other one is his twin. On the other hand, qualitative identity consists of an identity resulting from the fact of having the same appearance as another person. In this sense, two twins are identical. Belshaw shares this position by asserting that the persistence of a determined psychology is necessary and sufficient to the continuous existence of a certain individual (BELSHAW, 2000, p. 266; see also HOLLAND, 2008, p. 163). Applying this categorization to the two specific cases examined here we can deduce from Parfit and Belshaw that the person who is in permanent vegetative state or has advanced dementia is, in terms of qualitative identity, the same he/she was ten years ago before he/she became ill, but, according to their views, who he/she was in the past does not correspond to the person he/she is now in the present.

We would, however, like to stress that Parfit and Belshaw's contributions are in fact psychological views of the identity founded on the person. However, if we – following Kant – admit a necessary conceptual philosophical distinction between, on the one hand, what human being is and, on the other, what moral person means we are able to make modifications to their position. We understand patients in permanent

vegetative state or with advanced dementia to be constituted with a unique sole static identity that does not differentiate each of them from every other human being. The fact that they are unique human beings that exist for the sole reason of being humans and their existence is motivated by the same human end make them an absolute in themselves (reason and end). This understanding that we are at the same time reason and end in ourselves, which implies that we cannot be transformed into something else, a non-human being, configures our identity in every phase of our lives. Here, the constitution of identity is not founded on the person, but rather on the human being. At this point, we think what both authors call the numerical identity of a person can be conceptually corrected by using the designation of 'the internal identity of a human being'. In this sense, both patients in permanent vegetative state and with advanced dementia have internal identity as a result of their human status. They do not loose their identity or are not transformed into another non-human being because of their illness. Furthermore, the internal identity based on human status provides us with a single inner 'code' that makes us original. It does not permit our internal identity to be changed later in life due to illness or disability. After all, by asserting that a person who is in an advanced stage of dementia or who lies in a hospital bed for years in a permanent vegetative state is someone else different from who he was in the past does not take into consideration the identity understood as his single, unique and original code that was born with him and that made him who he is, reason, end and absolute in himself in different phases of his life. Being born as he is he has not only an internal identity but also existent autonomy and consequently human dignity.

We agree, however, partly with Parfit and Belshaw when they say that changes in appearance can happen throughout our lives and this can generate effect on our qualitative identities. We also agree that qualitative identity relates to the meaning of the person, however, not grounded on the same reasons proposed by both authors but on the fact that identity can have a dynamic, concrete facet that depends on our interaction with the environment, is based on the potential external autonomy and constitutes personhood and the dignity of each person. We argue, therefore, that people with advanced dementia or in permanent vegetative state also have external identity. We prefer the designation "external identity" to "qualitative identity", since the first one depends for its understanding on the conceptual moral construction of "potential external autonomy" and personhood, and the latter, according to

its defenders, refers only to apparent traits of a person. In our view, those two groups of disabled do not either lose their external identity in reason of the illness or accident that led to their disability. Here, it is possible to consider that in these cases the interpretation of potential external autonomy can be extended to the *memory* of such persons. Let us explain: The preservation of the memory of patients with advanced dementia or in permanent vegetative state could be exercised autonomously, not properly by them, but with the assistance of other individuals, with whom they were connected before losing their memory. Stories told by such patients in the past or writings left by them can contribute to preserve their memory in the present. They can by such means affirm their own external identity and reveal their before-the-accident-values or illness that caused the coma or the advancement of dementia. The potential autonomy of these people can be here extended to the circle of people that were or are still close to them. Such understanding can lead to the exercise of their *autonomy through others*. This is what I call *extended autonomy*. The exercise of such autonomy does not imply the replacement of the will of the patient, but the acknowledgment that his will was known by his family, friends and/or acquaintances in the past. The past of the person can therefore serve to ground his external identity, his potential external autonomy and his dignity as a person in the present.

2. Children with Anencephaly

The external identity and the potential external autonomy of children with anencephaly are, however, much more limited or even unknown than the one of patients in permanent vegetative state or with advanced dementia, since the will of those children is and will not be known. It seems impossible to assess any will with potential external autonomy in such a case. Therefore, the autonomy of children with anencephaly will be fully transferred to their parents or tutors that according to "the interest of those children" will exercise it in society. Strictly speaking, children with anencephaly cannot be included in the conception of Kant's moral person, although from a broader perspective they could have potential external autonomy, which would be exercised by their parents. Just in this second sense they might be regarded as moral persons. But this interpretation would imply such a wide enlargement of the Kantian conception of moral person that the core meaning of the Kantian conception of a person, i.e. the capacity for self-legislation, to

respect moral law and to act due to this sole sufficient motive, would have no more meaning. Opposed to the first two groups of severe mental impaired people, here, the past – and even the present – cannot serve to ground their external identity, their potential external autonomy and consequently their dignity as moral persons.

However, we can still reflect upon existent autonomy or the existence of *autonomy in itself* and internal identity in the case of children with anencephaly. Here, the conceptualization of existent autonomy and internal identity applies to these children motivated by the fact that they are born from a man and as men, and, therefore, they are different from a non-man or a non-human being. According to our interpretation of Kant, as human beings they are self-constitutive, since they are an absolute (reason and end) in themselves. And it is exactly what is human in them that constitutes their unique internal identity and justifies in the last instance their human dignity.

This construction of the internal identity and existent autonomy of children with anencephaly can also be further developed by drawing upon a number of propositions formulated by Johann Gottlieb Fichte. It is known that he deepened and sophisticated some of the Kantian conceptions, such as those upon which we elaborate in this paper. In his *Wissenschaftslehre* he proposes, for instance, that the "I that posits itself absolutely" is not a static fact (*Tatsache*) with fixed properties, but rather it is a self-processing fact-act (*Tathandlung*) (FICHTE, 1997, p. 16).

If the "I that posits itself" is a being that produces itself, so just for that reason it should be autonomous, since it owes its existence to nothing but to itself. Therefore, we can conclude that the "I that posits itself absolutely" only exists, since it has an intuitive immediate perception of itself, i.e., it acknowledges itself not as an object, but rather, according to J. Lèbre's commentary on this assertion of Fichte, as a subject that "redirects its identity to a unity: an I that posits literally itself as an absolute principle" (LÈBRE, 2011, p. 350; STÖRIG, 2002, p. 504-510). For Fichte autonomy seems therefore to be connected with a subjective attribute of self-acknowledgment, self-identification, which can – in our view – be translated into an intuitive (DÖRFLINGER, 2012, p. 213-234) self-perception of our own existence, which all of us with no exception are endowed with.

VII. Conclusion

In this paper we proposed an interpretation of the Kantian moral conception of autonomy on two levels: the first one relates to the difference between existent autonomy and potential autonomy, and the second one, which is founded on the first one and is dependent on it, establishes a difference between existent internal autonomy and potential external autonomy.

We also proposed an alternative interpretation of Kantian moral dignity grounded on those conceptual reconstructions of autonomy: human dignity justified by the conception of existent internal autonomy and the dignity of the person based on the conception of potential external autonomy.

Such conceptualizations were then applied to people with severe and extreme mental impairments, particularly those in permanent vegetative state, with advanced dementia and children with anencephaly. Concerning the two first groups of people we conclude that they have not only existent internal autonomy and human dignity, but also potential external autonomy and dignity derived from their status of moral persons. Concerning the last group, the one constituted by children with anencephaly, we conclude that they have existent internal autonomy and human dignity.

References

BARBOSA-FOHRMANN, A. P., Algumas Reflexões sobre os Fundamentos dos Discursos de Direitos Humanos e de Justiça Social para Pessoas com Deficiência Mental ou Cognitiva Severa ou Extrema. In: **Revista Direitos Fundamentais e Justiça** n. 22, p. 80-97, Jan.-Mar. 2013.

BELSHAW, C. Belshaw Identity and Disability. In: **Journal of Applied Philosophy** n. 17, p. 263-276, 2000.

BRUGGER, W. Grundlinien der Kantischen Rechtsphilosophie. In: **Juristen Zeitung** n. 19 893-900, 1991.

DÖRFLINGER, B. A Ideia de Kant de um Entendimento Intuitivo no Contexto de sua Teoria do Organismo (Trans. C. A. Martins). In: MARQUES, U. Rancan de Azevedo (ed.). **Kant e a Biologia**. São Paulo: Barcarolla, 2012, p. 213-234.

EISLER, R. **Kant-Lexikon. Nachschlagewerk zu Kants sämtlichen Schriften, Briefen und handschriftlichem Nachlass**. Hildesheim: Georg Olms, 1961.

ELLIS, K. Dependency, Justice and the Ethic of Care. In: HARTLEY, D. (ed.). **The Ethics of Welfare**. Bristol: The Policy Press, 2004, p. 29-46.

FICHTE, J. G. **Grundlage der gesamten Wissenschaftslehre**. Hamburg: Meiner, 1997.

GRAUMANN, S. **Assistierte Freiheit. Von einer Behindertenpolitik der Wohltätigkeit zu einer Politik der Menschenrechte**. Frankfurt, New York: Campus, 2011.

HOLLAND, S. **Bioética. Enfoque Filosófico** (Trans. L. Pudenzi). São Paulo: Loyola, 2008.

KANT, I. **Grundlegung zur Metaphysik der Sitten**. 2nd ed. Riga: 1786.

KOLLER, P. Moderne Vertragstheorie und Grundgesetz. In: BRUGGER, W. (ed.). **Legitimation des Grundgesetzes aus Sicht von Rechtsphilosophie und Gesellschaftstheorie**. Baden-Baden: Nomos, 1996, p. 361-393.

LÈBRE, J. Pós-Kantismo e Romantismo. In: PRADEAU, J.-F. (ed.). **História da Filosofia** (Trans. J. Bastos Arêas N. Correia de Melo Sobrinho). Rio de Janeiro: PUC-Rio, 2011, p. 348-355.

MACINTYRE, A. **After Virtue**. Notre Dame: University of Notre Dame, 1981.

___. **Dependent Rational Animals: Why Human Beings Need the Virtues?** Chicago: Carus Publishing Company, 1999.

MAURER, B. Notas sobre o Respeito da Dignidade Humana… ou Pequena Fuga Incompleta em torno de um Tema Central (Trans. R. Dostal Zanini). In: SARLET, I. W. (ed.). **Dimensões da Dignidade: Ensaios de Filosofia do Direito e Direito Constitucional**. Porto Alegre: Livraria do Advogado, 2005, p. 61-87.

NUSSBAUM, M. C. Capabilities and Human Rights, **Fordham Law Review**, vol. 66, n. 273, 1997. Available at: http://ir.lawnet.fordham.edu/flr/vol66/iss2/2. Access on January, 17th 2014.

___. **Frontiers of Justice: Disability, Nationality, Species Membership**. *Cambridge, Mass.: Harvard University Press, 2006.*

PARFIT, D. **Reasons and Persons**. Oxford: Oxford University Press, 1984.

QUANTE, M.; SCHWEIKARD, D. P. Person. In: MOSER, V.; HORSTER, D. (ed.). **Ethik der Behindertenpädagogik. Menschenrechte, Menschenwürde, Behinderung. Eine Grundlegung**. Stuttgart: W. Kohlhammer, 2012, p. 90-104.

RAWLS, J. **A Theory of Justice**. Cambridge, Massachusetts: Harvard University Press, 1971.

___. **Political Liberalism**. New York: Columbia University Press, 1993.

SCHÖNECKER, D.; WOOD, A. W. **Kants "Grundlegung zur Metaphysik der Sitten". Ein einführender Kommentar** 2nd ed. Paderborn: Ferdinand Schöningh, 2004.

STÖRIG, H. J. **Kleine Weltgeschichte der Philosophie**. Frankfurt am Main: Fischer, 2002.

WALZER, M. **Spheres of Justice. A Defense of Pluralism and Equality**. New York: Basic Books, 1983.

WONG, S. Duties of Justice to Citizens with Cognitive Disabilities, lecture given during the international conference on **Cognitive Disability: A Challenge to Moral Philosophy**, New York, September, 18th to 20th 2008. Available at: http://www.stonybrook.edu/sb/cdconference/. Access on January, 8th 2014.

WOOD, A. Humanity as End in Itself. In: GUYER, P. (ed.). **Kant's Groundwork of the Metaphysics of Morals. Critical Essays**. Oxford: Rowman & Littlefield, 1998, p. 165-187.

Human Rights: Pragmatic Utility, Theoretical Approach and Complex Societies

Giovanni Bombelli

Abstract: Globalization is a typical process of the complex societies and it has enabled the wide diffusion of the notion of 'human rights' related to different issues (multiculturalism, economic-social differences, gender issues and so on). Nevertheless this notion is very discussed and in this paper I will focus on two aspects: the pragmatic level and the theoretical perspective. Human rights have a pragmatic utility since they put in evidence 'subjective positions' and give them a legal protection through different tools (national law, international declarations, constitutions, non-governmental organizations). On a theoretical level the question concerning the foundation of human rights is problematic, with relation to their philosophical origins and historical application. So, on the one side human rights are really a new legal language but, on the other side, they call for the recourse to the legal positivist instruments (especially international Courts). We should shift from the traditional notion of 'human rights' to the protection of 'anthropological (universal) dimensions' as they emerge into complex societies. Hence the necessity to rethink the modern paradigm of human rights (based on the equivalence 'individual rights'-'human rights') and the contemporary one, which took shape during the last century and extended the 'list' of human rights to fields as education, labour and individual dignity. Complex societies require a more sophisticated paradigm and a new 'list' of human rights, grounded on new 'goods' to be protected concerning economics, the new labour sphere, environmental protection, genetic revolution and communication (i. e. the access to new technologies). This 'evolution' has to face the process by which the new pair 'soft law-hard law' progressively destroys the traditional vision of law as a 'complex' dimension raising, in this direction, the question about its western nature.

Keywords: Utility - Theory - Complexity

1. A Premise

As it is universally recognized, globalization represents a typical process within the contemporary and complex societies. It has allowed, maybe a little bit paradoxically (and vs. some perspectives[1]), the wide diffusion of the 'notion' of 'human rights', certainly more widely if we compare the current debate to the discussion held during the last century.[2]

Nevertheless, from a theoretical point of view the concept of 'human right' still seems very generic because of its association with many and different questions or claims. So, this notion is *pragmatically* referred either to multiculturalism[3], or to economic/social or religious difference[4] and to gender/sexual issues[5] and so on. For this reason it has proved difficult to conceptualize, *on a theoretical level*, the notion of 'human right',

[1] Zygmunt Bauman, *Globalization: the Human Consequences* (Cambridge: Polity Press, 1998).

[2] About this point see the essays presented in Social Research. An International Quarterly, 79, no. 4 (2012). See also: Daniel E. Lee and Elizabeth J. Lee, Human Rights and the Ethics of Globalization (New York: Cambridge University Press, 2010); Joseph Stiglitz, "Human Rights and Globalization: The Responsibility of States and of Private Actors", in Catholic Social Doctrine And Human Rights (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), ed. Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti (Vatican City: Libreria Editrice Vaticana, 2010): 341-346; Hans Tietmeyer, "Globalization and the Present Crisis", in Catholic Social Doctrine And Human Rights (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), ed. Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti (Vatican City: Libreria Editrice Vaticana, 2010): 591-596; David Kinely, Civilizing Globalization: Human Rights and the Global Economy (Cambridge: Cambridge University Press, 2009); Global Governance and the Quest for Justice, ed. Roger Brownsword (Oxford-Portland, Or.: Hart, 2004), vol. IV.

[3] Jürgen Habermas and Charles Taylor, Multiculturalismo: lotte per il riconoscimento (Milano: Feltrinelli, 1998); Will Kymlicka, Multicultural Citizenship: a Liberal Theory for Minority Rights (Oxford: Clarendon Press, 1995); Will Kymlicka, Liberalism, Community and Culture (Oxford: Clarendon Press, 1989).

[4] For instance Dominic McGoldrick, Human Rights and Religion: the Islamic headscarf Debate in Europe (Oxford- Portland, Or.: Hart, 2006).

[5] Patricia Londono, Human Rights and Violence against Women (Oxford: Oxford University Press, 2012); Human Rights, Minority Rights, Women's Rights (Proceedings of the 19th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), New York, June 24-30, 1999), ed. Alexander Bröstl and Marijan Pavcnik (Stuttgart: Verlag 2001).

starting from the sixteenth century (and, then, from the origins of modernity represented by the Grotian *De jure belli ac pacis* (1625)[6] and, in some way, starting from Peace of Westphalia 1648).

This paper will proceed in three steps.

First, I will try to put in evidence, from a philosophical-theoretical point of view, the double profile of human rights: their pragmatic 'utility', on the one hand, and some classical and new questions related to their difficult theoretical foundation and legitimateness on the other hand.

Secondly, I would like to discuss a sort of paradox underlying the current debate about human rights and to outline a possible new conceptual perspective starting from an anthropological point of view and based on the concept of 'duty'.

Thirdly, in the light of this twofold dimension (i.e. pragmatic and theoretical) and also by drawing a brief historical perspective, I will refer more strictly to contemporary sociological contexts in order to put in evidence both the transition from a classical (*melius* modern) model of human rights to contemporary perspective and, most importantly, the necessity to elaborate a new and wider paradigm or spectrum of human rights, in some way more suited and adequate to complex societies and with reference to their philosophical and political-legal sceneries.

2. Pragmatic 'utility' and theoretical dimension

From a philosophical and legal point of view, my opinion can be summed up in two points (strictly related with two aspects of human rights): a *pragmatic level* and a *theoretical dimension*.

The first point concerns the *pragmatic utility* of human rights.

In other words, what we traditionally name 'human rights' have an important *pragmatic* or, better, *performative utility* (efficacy) in order to give, and to guarantee, a *legal protection* to many 'subjective (individual) positions'. Nevertheless, this point (and always on a pragmatic level) presents some problems, particularly with regard to the difficulty for their extension to some peculiar subjects, namely the so called 'collective' or 'general' subjects. So think, for instance, of the political and social relevance achieved by many minority groups referring to different cultural, religious or political perspectives (and so on: this is a problem,

[6] Hugo Grotius, De jure belli ac pacis (Tübingen: J. C. B. Mohr-Paul Siebeck, 1990).

I think, also in Taylor's perspective previously mentioned[7]).

More precisely, the point is the following one.

Human rights, pragmatically and generally, put in evidence 'positions', 'situations' and questions concerning the *individual* sphere which, normally, can be protected by legal and institutional instruments. From this point of view we can sometimes observe a superimposition of many levels and degrees, which frequently are not distributed according to a hierarchical order[8]: national law, national Constitutions, international Declarations, non-governmental organizations (NGO[9]) and so on (this phenomenon originates many contradictions[10]).

Obviously the claims of human rights can be rhetoric and politically abused, but they certainly offer a sociological-cultural enlightenment and endorsement to many different situations: sexual/genders discriminations, cultural or religious subordinations or, also, claims of the relevance of historical heritages.

These brief remarks show how difficult is to define, also on a pragmatic level, the 'content' of the notion of 'human right' and, consequently, to provide a legal protection. In other words, the pragmatic dimension raises the necessity to consider and to re-examine the conceptual profile of the question, starting from the problematic foundation of human rights on a *theoretical level*.

---

[7] Kirsten Shoraka, Human Rights and Minority Rights in the European Union (London-New York: Routledge, 2010).

[8] Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions, ed. Ryan Goodman and Thomas Pegram (New York: Cambridge University Press, 2012); Ian Loveland, Constitutional Law, Administrative Law, and Human Rights: a Critical Introduction (Oxford et al.: Oxford University Press, 2009).

[9] For this aspect Christian Strohal, "The Quest for Protection: The Role of International Organizations and NGOs in Surveying Human Rights Compliance", in Catholic Social Doctrine And Human Rights (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), ed. Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti (Vatican City: Libreria Editrice Vaticana, 2010): 541-558; Hans Thoolen and Bert Verstappen, Human Rights Missions: a Study of the Fact-Finding Practice of Non-Governmental Organizations (Dordrecht: Martinus Nijhoff Publishers, 1986).

[10] See, for instance, Kymlicka, Multicultural Citizenship: a Liberal Theory for Minority Rights and Kymlicka, Liberalism, Community and Culture; Pierpaolo Donati, "I diritti umani come latenza di tutti gli altri diritti", in Catholic Social Doctrine And Human Rights (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), ed. Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti (Vatican City: Libreria Editrice Vaticana, 2010): 171-187.

In fact, and in spite of their pragmatic utility, from a conceptual point of view human rights are a very discussed matter (and, in some way, they *must be discussed*): from the earliest Declarations of the XVIIIth century human rights have been continually elaborated and defined. In very few words, the points in question are: *what* is *a* 'human right'? What do we *really* mean by the words 'human' and 'right'? Furthermore: even though the western origin of the concept of 'right' is generally referred to *an* 'individual subject', nowadays can we talk about a sort of 'humankind right' nowadays? From this point of view, the analytical perspective can certainly offer interesting reference points perspectives but, in some way, it seems unable to gather the current debate about human rights.

Hence, within this conceptual framework, I would like to put forward some considerations about classical-theoretical (but at the same time, at least partially, operative) questions which, nevertheless, are more and more discussed.

More precisely, I will focus on the following points: a) the philosophical origins of human rights, b) the anthropological model underlying the classical-modern notion of 'human right' and c) the historical (or pragmatic) articulation of the model of human rights.

a) The first question concerns the philosophical origins, or the conceptual foundations, of 'human rights'. As is well known, this point represents a classical question, since the Classical age to the modernity.

The problem was frequently understood trough the pair 'natural law-positive law' or similarly 'natural reason (*phusis*)-political (violence) power'. Within these conceptual pairs the notion of 'human right' was referred to the first level, that is to say to the 'natural reason (law)', as notoriously we can see in Antygone (tough along a very questionable interpretation dating from the Hegelian tradition) and also, along different lines, in Stoicism and Christian tradition.

But this question received a more precise definition starting from the modern period.

This passage represented a crucial transition since the new political scenery, dominated by the role of the State as a creator of law, encouraged a new and rich reflection about the nature and the legitimateness of human rights. More precisely, the necessity to (re)discuss, in the light of new paradigms, why and how we can talk about 'human rights' emerged: in other words, the necessity to deepen the conceptual bases of human rights. Hence the rethinking of some classical schemas and, consequently, the proposal of new models.

Very rhapsodically, within the modern debate we can observe at least four models: the natural justification of human rights, only partially understood along the line of the classical tradition and, more explicitly, referred to the rational paradigm based on the concept of reason as a 'natural dimension' (Grotius); the historical model (*lato sensu* according to the Hegelian perspective), whose pivotal idea was the notion of 'human right' as a result of the historical movement; the utilitarian perspective, in some way underlying to the pragmatic perspective previously mentioned, and inspired by British tradition (especially from Bentham) and, finally, a vision of human rights as a theoretical framework legitimated by a widespread and socially shared public opinion[11].

The point is that all these paradigms appear unable to interpret the contemporary sceneries. This for two reasons. The first one concerns the crisis of their conceptual bases, that is to say respectively the categories of 'reason', 'history', 'utility' and 'shared opinion'. Furthermore, we have to consider the 'multicultural question': in other words, the relevant presence in western societies of many cultural models, and very differently from the western tradition, in some way implies a radical rediscussion of the entire western heritage concerning human rights.

b) A second aspect, strictly related to the previous one, concerns the model of human being underlying the doctrine of human rights. In fact, from a strict legal and philosophical point of view, the previous remarks highlight, in particular, the 'anthropology' implied by human rights.

In other words, the (modern) model of 'human right', if we accept the French Revolution as its recent historical origin, is grounded on a very peculiar notion of 'human being', which is still fundamentally based (in the state of nature) on an atomist or individual model. This point clearly emerges even before the French Revolution in The Second Treatise of Government by John Locke:

> "To understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of

[11] *Burton M. Leiser* and *Tom D. Campbell*, Human Rights in Philosophy and Practice (Aldershot Burlington: Ashgate, 2001); Francesco Viola, I diritti umani sono naturali? (Milano: Vita e Pensiero, 2009); Francesco Viola, Diritti umani e globalizzazione del diritto (Napoli: ESI, 2009); Francesco Viola, Diritti umani, diritto naturale, etica contemporanea (Torino: Giappichelli, 1989).

> Nature, without asking leave, or depending upon the Will of any other Man. A *State* also *of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creature of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection[...]"[12]

In substance, the main anthropological model implied by the doctrine of human rights was shaped within a western image of 'human being', which is historically and culturally determined (we will see this point in depth hereinafter). Once again, this question emerges particularly within the contemporary multicultural social contexts: in fact, the mentioned presence of many and different cultural models implies the diffusion of as many anthropologies (i.e., for a legal case, the widely debated 'excision question' and their criminal consequences[13]).

Beyond the debate about the notions of interculturalism and multiculturalism, which is sometimes politically oriented, the doctrine of human rights will have to face anthropological models, as well as notions of 'human right', that are very different compared to our cultural tradition.

c) From an historical point of view, the previous contradictions and aporias, related both to the pragmatic and theoretical level of human rights, become more evident. In particular, we should briefly consider some historical cases of the twentieth century and, in particular, the condemnation of Nazism and the critic to Communism.

In both cases there is no doubt about the *pragmatic* violation of human rights but, on a philosophical-legal level, the question involves the *theoretical* justification of the condemnation.

As is known, in the first case during the Nuremberg War Crimes Trials the legal basis for the condemnation of many Nazis was represented by the discussed notion of 'crimes against humanity' (which presupposed the concept of human dignity)[14]. But this latter notion was a

---

[12]John Locke, Two Treatises of Government (Cambridge: Cambridge University Press, 1988): 269 (emphases in original).

[13] Chantal J. Zabus, Between Rites and Rights: Excision in Women's experiential Texts and Human contexts (Stanford: Stanford University Press, 2007); Cristina De Maglie, I reati culturalmente motivati: ideologia e modelli penali (Pisa: ETS, 2010).

[14]About this point we have to remember the Resolution 95/I (1946) of the United Nations General Assembly and the so-called Nuremberg Code (or Nuremberg Principles):

very problematic one: both from a legal point of view (because it was a formal violation of a principle of criminal law based on the axiom *nullum crimen sine lege*), and from an historical point of view (Nazis were sentenced by the winner countries).

The question about Communism or, better, Stalinism was treated in a similar way. Obviously, no doubt about the *pragmatic* violation of human rights perpetrated during the Stalinist period but, once again, the question involves the *legal (and philosophical) reason* of this violation. So, starting from the famous denounce of the Stalinism by Khrushchev (the so-called Khrushchev's Report: 1956), the condemnation of Stalinism became a political condemnation, whereby the legal reference to the concept of human rights turned into a political condemnation of the socialist movement as a whole all to the (supposed) 'political good' embodied by Liberalism.

In other words: once again both cases show the *pragmatic utility* of the notion of human right, especially in order to provide a legal protection for 'weak subjects', but, at the same time and from a theoretical point of view, they reveal the difficult foundation of the doctrine of human rights. Somehow the evocation of human rights frequently becomes contradictory: born to be a theoretical tool to protect 'weak subjects', human rights might end up turning into a strong tool for political powers or ideological movements.

The point does not involve only some tragic historical transitions, but concerns also the crucial relation between human rights and democratic systems. This is a much less developed question. More clearly: are we sure that democracy is *always* a sort of 'bulwark' (or the appropriate defence) of human rights[15]?

Notice that this relation should not be confused or mixed with the relation between democracy and capitalism: discussing democracy does not imply discussing capitalism and vice versa. In other words, from a historical and theoretical point of view there is no necessary equation

---

"UN General Assembly Resolutions 95/I (1946)", Crime of aggression, 2013, accessed February 14, 2014, http://crimeofaggression.info/2013/01/un-general-assembly-resolution-95-i-1946/; "Nuremberg Principles", Wikipedia 2014, accessed February 14, 2014, http://en.wikipedia.org/wiki/Nuremberg_principles.

[15] For instance Ben Emmerson, Andrew Asworth and Alison MacDonald, Human Rights and Criminal Justice (London: Sweet & Maxwell, 2007); Salvatore Zappalà, Human Rights in International Criminal Proceedings (Oxford: Oxford University Press, 2003); Andrew Ashworth, Human Rights, Serious Crimes and Criminal Procedure (London: Sweet & Maxwell, 2002).

between the former and the latter: as a matter of fact, there are democratic systems substantially lacking of capitalist development (i.e. some western countries) and, on the contrary, totalitarian assets wherein a form of capitalist structures has flourished (generally a State-capitalism) with a clear violation of human rights (for instance, and paradigmatically, China).

3. A paradox and a proposal

The previous remarks not only reveal the difficulty of conceptualizing appropriately the notion of 'human right' but, maybe, produce a little paradox.

On the one hand, 'human rights' really represent a *new (international-transnational) legal language*[16]. In some way, they try to go *beyond* (along the lesson of the 'Radbruch formula'[17]) the positivist model of 'rule of law' based on the role of the State and, hence, beyond its limits: in other words, the doctrine of 'human rights' aims to be a step for a more just society. In other words, human rights aim towards a 'new global order' and, hence, new forms of sovereignty[18]: in fact, how could we protect human rights without radically new (and non-state) institutions? The goal of this process, I guess, is a cosmopolitan scenery[19] and maybe, ultimately, a sort of kantian legal–philosophical order[20].

But, on the other hand, human rights necessarily imply and evoke (at least: *at the moment* and in many cases) the recourse to the legal 'positivist' tools: that is to say, the protection of human rights is still essentially based on the central role played by international Courts, which are sometimes (or, better, almost always) a mere 'emanation' of politics and power of national States[21].

---

[16] Human Rights, Language and Law (Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 2009), ed. Thomas Bustamante and Oche Onazi (Stuttgart: Verlag, 2012), vol. II.

[17] Gustav Radbruch, Rechtsphilosophie (Leipzig: Quelle & Meyer, 1932).

[18] Kurt Mills, Human Rights in the Emerging Global Order: a New Sovereignty? (London-New York: MacMillan Press - St. Martins' Press, 1998).

[19] Costas Douzinas, Human Rights and Empire: the Political Philosophy of Cosmopolitanism (Abingdon-New York: Routledge-Cavendish, 2007): especially the second Part.

[20]See Frieden durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung, her. von Matthias Lutz-Bachmann and James Bohman (Stuttgart: Suhrkamp, 1996).

[21] Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (New York:

Just this paradox, and the pragmatic and theoretical dimensions of human rights, push to deepen the question and to sharpen the solutions. In fact, this perspective maybe makes room for a theoretical proposal based fundamentally on an anthropological rethinking of human rights and on the idea of 'duty'.

From a philosophical point of view, we may need a new interpretation of human rights. In other words, we should discuss the 'traditional' perspective: this implies a transition from the usual notion of 'human rights', in some way frequently grounded on a 'classical (i.e. western and modern) list' of clearly recognized/legalized 'subjective positions', to another and wider perspective. It should aim to the protection of what we could name 'anthropological dimensions' (i.e. identity, freedom of worship, and so on[22]), which, unlike the traditional *legal* notion of human rights, present an unquestionable, universal, recognizable and intercultural nature.

In a few words and more precisely: *what we should protect are not legal positions (rights) but, first of all, human (universal) dimensions*. Obviously, they can have many different historical and legal articulations: hence the possibility to conceive 'new' human rights (see better below). This transition could be described as follows: we should move from the concept of 'human right', frequently and positively codified, to the notion of 'right to the respect of (human and universal) dimensions'. Moreover, we have to place this perspective into a wider, general and progressive cultural transition (equally sociological and legal): the transition from the prevalence of the 'objectivity' of law, grounded on an ontological or rational legitimateness, to the centrality of a sort of 'subjective perception' of law as a 'personal or individual' dimension.

Hence the role of duties, that is to say the other side of rights. Within contemporary complex societies, maybe we should start thinking about the centrality of duties: so we should focus primarily on the

---

Oxford University Press, 2005): especially 107 ff.

[22] Vittorio Possenti, "Antropologia cristiana e diritti umani. Diritti e doveri", in Catholic Social Doctrine And Human Rights (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), ed. Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti (Vatican City: Libreria Editrice Vaticana, 2010): 107-127; José T. Raga, "Christian Anthropology and the Effectiveness of Human Rights of an Economic Content", in Catholic Social Doctrine And Human Rights (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), ed. Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti (Vatican City: Libreria Editrice Vaticana, 2010): 128-170.

idea of 'human duties'. In other words, 'risk societies'[23] reintroduce the crucial and traditional nexus 'right-duty' and, then, the necessity of its global rethinking (where the stress should be put, now, also on the second element: the 'duty'). Furthermore the notion of 'human right' logically implies, more and more, the notion of 'human duty' or, more widely, the dimension represented by 'inter-subjective (social, collective) responsibility': only in this way we can elaborate a doctrine of human rights really consistent with our social contexts. This is an absolutely decisive point within a scenery dominated by complex societies.

4. Complex societies and paradigms of human rights

The conceptual framework hitherto suggested, including its historical background and its many conceptual contradictions, might be a useful conceptual model in order to discuss the evolution of the contemporary western countries or, by a common expression, complex societies. In fact, within these societies the conceptual and operative difficulties implied by the strict interlacing between theoretical and pragmatic dimension of human rights clearly emerge.

Unlike the 'traditional' social models, the contemporary and globalized complex societies[24] present a close superimposition between many social spheres (or ambits). In other words, there is a sort of recombination among the distinct levels. In fact, complex societies are characterized by the progressive development of a circle including politics, economics, law, and (last but not least) the just mentioned difficult coexistence of many cultural models (multiculturalism). These are the main reasons to rethink the traditional 'paradigms' about 'human rights'[25].

In this direction, and in order to better understand the new complex sceneries, maybe we can try to trace (by a very brief historical glance) a short typology of the *recent* (i.e. modern) conceptual and operative models or paradigms underlying the theory of human rights. So, in a very schematic manner and from a philosophical-legal point of view, the conceptualization of the notion of 'human right' is grounded

[23] Ulrich Beck, Risk Society: Towards a New Modernity (London: Sage, 1992).

[24] For this notion see for instance: Malcom Waters, Globalization (London-New York: Routledge, 2001): especially chapters 5, 6, 7; but see also the classical Niklas Luhmann, Rechtssoziologie (Hamburg: Rowohlt, 1972).

[25] Human Rights: an Agenda for the Next Century, ed. Louis Henkin and John Lawrence Hargrove (Washington D. C.: The American Society of International Law, 1994).

at least on two paradigms: a) the 'traditional' (or classical-modern) one and b) the contemporary perspective.

a) What we could define the 'classical paradigm' was a typical product of the 'traditional' contexts. It developed, in particular, within modern societies and, above all, within *western* social models, *grosso modo* starting from the beginning of the twentieth century but with their philosophical premises dating back to the seventeenth century.

In fact, in these contexts it was relatively easy to 'recognize', on a sociological level, the fundamental subjective rights and, *hence*, 'human' rights. On a conceptual level, this identification of human rights based on an anthropological equation between 'subject/legal subject' and 'human being', in some way chiefly according to the just mentioned Locke's lesson (but, in some way, similarly to Kant) which was notoriously based on the crucial role played by the protection of three original individual spheres: 'life', 'property', 'freedom'[26].

In this paradigm you can notice a sort of *perfect equivalence* between 'individual (subjective) rights' and 'human rights': that is to say, and more precisely, a close relation between 'citizen (citizen of a State)' and 'human being' (but for this point see also the universal Declarations of the eighteenth century and many other Charters of the nineteenth century).

b) The contemporary model of human rights, which somehow *has* characterized the western societies during the last century, *extended* the 'list' of human rights created during the first generation of theorization in this field and, then, the *apparatus* of their legal instruments.

More precisely, during the twentieth century, because of the crucial role played by the so called *Welfare State* (for this point see, for instance, the entire work developed at the *Centre of Rights Development* of the University of Denver), the debate focused on *new* 'human rights': in other words, on a new typology of human rights. The western societies of the last century were characterized by a great attention to the crucial relevance of some dimensions: education, labour sphere (principally understood in terms of *right* to have a job: about this aspect let me also refer to the Italian Constitution, art. 1) and individual dignity, particularly for disabled persons[27].

---

[26] Locke, Two Treatises of Government.

[27] Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments, ed. Theresia Degener and Yolan Koster-Dreese (Dordrecht et al.: Martinus Nijhoff Publishers, 1995); Clarence Wilfried Jenks, Human Rights and International Labour Stan-

This cultural turn, from the classical-modern paradigm to the contemporary model, presents at least two corollaries.

From an anthropological point of view a different model of 'human being' emerges. In some way, and differently from the classical-modern framework, the *new* human rights focus on a more 'dynamic' and complex concept of 'human being', which is to be understood in the light of all its historical articulations and social differences.

At the same time, we can also highlight a legal-philosophical corollary. This new perspective concerning human rights produced, symmetrically, a great increasing (in number and relevance) of new legal instruments (Charters, Declarations, Constitutions et cetera) and, finally, the more and more decisive role played by international Courts in order to identify and protect human rights[28].

5. Towards a New Paradigm?

Nevertheless complex societies, that is to say our (and, especially, future) societies, may postulate another and yet more sophisticated paradigm of human rights: in other words, a (possible) future model.

By a pragmatic approach, this paradigm should focus on new human subjects, spheres and dimensions, which are very different if compared to the previous western models based on recognizable social contexts and on a typical figure of 'human being'. Hence, only for instance, we can understand not only the future relevance, with reference to the doctrine of human rights, of 'new' subjects as migrants and, more generally, people coming from the poor areas of the world[29], but we can also

dards (London-New York: Stevens & Sons-Praeger, 1960).

[28] For instance Joseph Wronka, Human rights and Social Policy in the 21st Century: a History of the Idea of Human Rights and comparison of the United Nations Universal Declaration of human rights with United States Federal and state constitutions (Lanham et al.: University Press of America, 1992).

[29] Are Human Rights for Migrants? Critical Reflexions on the Status of Irregular Migrants in Europe and the United States, ed. Marie Benedicte Dembour and Tobias Kelly (New York: Routledge, 2011); William Paul Simmons, Human Rights Law and the Marginalized Other (New York et al.: Cambridge University Press, 2011); William H., Meyer, Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression (Westport, Conn.-London: Praeger, 1998); Alan G. Smith, Human Rights and Choice in Poverty: Food Insecurity, Dependency, and Human Rights-based development aid for the Third World Rural Poor (Westport, Conn.-London: Praeger, 1997).

appreciate, on a theoretical level, the crucial role played by some new concepts of 'solidarity' or 'mutual subsidiarity'[30].

Then, along this direction, we need a new radically different 'list' of human rights and a new paradigm of human rights. It symmetrically presents new and unedited 'legal goods' to be protected, with the great problem connected to their proliferation[31]. So, this new list should include, only as a proposal and drawing a sort of open list,the following levels or issues closely related to each other: a) economics, c) labour sphere, c) technology, d) environment and some new horizons. This list, understood as an ideal guide, could represent a political agenda in order to elaborate more updated public policies.

a) *Economics and human rights*. Economics is a decisive field for human rights. In fact, the recent and deep development of the economic dynamics calls into question the traditional schema of human rights. More precisely, from an economic point of view the recourse to human rights should be articulated at least in two directions.

On the one hand, human rights should provide a legal protection for 'weak subjects' involved in business transactions: that is to say, not only for the so called 'stakeholders' but also, and generally, for common people in some way affected by the actions of business as a whole. In other words, the global and disarticulated dynamics of the modern financial economics may imply the introduction of the notion of 'economic human right', above all in order to guarantee protection from finance speculations.

But, on the other hand, this point naturally implies a radical questioning about the legal responsibility of national or transnational corporations, also by rethinking the dogma of criminal law based on individual responsibility. More clearly: the extension of the philosophical notion of human rights to economic processes postulates, at the same time and from a strict legal perspective, a deep rediscussion about the nature of corporate liability[32].

---

[30] Carlos Eduardo Maldonado, Human Rights, Solidarity and Subsidiarity: Essays Toward a Social Ontology (Washington D.C.: The Council for Research in Values and Philosophy, 1997).

[31] Human Rights: their Limitations and Proliferation, ed. Peter Wahlgren (Stockholm: Institute for Scandinavian Law, 2010).

[32] Human Rights, Corporate Complicity and Disinvestment, ed. Gro Nystuen, Andreas Follesdal and Ola Mestad (Cambridge-New York: Cambridge University Press, 2011); Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann, Human Rights in International Investment Law and Arbitration (New York: Oxford University Press,

b) *Labour sphere and human rights*. Labour sphere represents another and relevant field related to human rights. Once again, we can evaluate this aspect from two points of view.

First of all, within a 'market economy' (i.e. the current prevalent economic model of western societies) the doctrine of human rights can provide, chiefly through the concept of 'human dignity', a minimum protection to many workers. In fact, as is well known, the contemporary processes of delocalization and fragmentation of economics involve a radical and progressive disarticulation of the traditional organization of the labour market as well as of its legislation. Hence the crucial role of human rights which, in parallel with national laws, play a double role: both in order to promote a more just new legislation and 'to control' the new legislation as a guarantee for a basic or minimum protection.

But this point is also intertwined with some recent and new processes like, for instance, the so called 'land-grabbing', that is the practice based on buying or leasing (by transnational companies or governments) large pieces of land in developing countries. In similar cases, human rights have a double role. They can be pragmatically a sort of guardianship of the dignity of populations involved in these new phenomena, with particular reference to the labour conditions. But, at the same time, processes as 'landgrabbing' are concerned with the possible access to natural resources *as a human right* and, in this way, the protection of the historical and cultural heritage of many populations.

c) *Technology and human rights*. The recent development of technology represents another and very important dimension for a future and mature doctrine of human rights. More precisely, we can distinguish at least two different levels strictly connected to each other.

The first one is concerned with the fundamental question of the conditions of access to new technologies. In other words, the wide but different diffusion of technologies and, at the same time, the persistent 'digital divide' between western countries and the rest of the world, demonstrate the key relevance of the problem of the access to new technologies. This not only in view of the usage of technologies but also, and above all, in prospect of the sharing of scientific knowledge (or, more precisely, the technological know-how). This obviously represents a cru-

---

2009); Human Rights and Capitalism: a Multidisciplinary Perspective on Globalization, ed. Janet Dine and Andrew Fagan (Northampton-Cheltenham: Edward Elgar Publishing, 2006); Human Rights and International Trade, ed. Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (New York: Oxford University Press, 2005).

cial precondition for an updated doctrine of human rights and, hence, to articulate a 'technological human right'.

The second level generally concerns the economic and legal repercussions related to technological development. So, let's think for instance about the question related to the legal notion of 'intellectual property', that is what elicits both providing legal tools to protect the scientific research results (i.e. the question of the patent right concerning some fields, as pharmaceutical industry[33]) and a serious comparison among different legal systems.

d) *Environment and human rights*. As is well known technological evolution involves the 'environmental question', which represents another and relevant horizon for a future doctrine of human rights. Apart from some old positions (as the distinction between *Welt* and *Umwelt* traced some years ago by Nicolai Hartmann), from a philosophical-legal point of view the conceptualization of the notion of 'environment' is very recent because it developed within the post-industrialization processes.

In particular, the awareness of the crucial role of 'environment' recently spread out as a result of the crisis and failure of some relevant international documents (i.e. the famous *Rio Declaration on Environment and Development* (1992)[34]and the subsequent international documents), which implies the configuration of new models of social responsibility.

Hence the possibility to think about a 'human right' to the protection of environment which is rooted, at least, on two reasons related to each other. The first one, in some way in a utilitarian perspective, is grounded on the necessity to preserve natural resources (water, air and so on) in order to guarantee the future economic development (see also the mentioned question about the 'landgrabbing').

But, beyond this 'utilitarian' reason, the relevance of the concept of environment within a doctrine of 'human rights' implies also a new model of individual and social responsibility. In other words, from a philosophical-legal point of view we should pass from a synchronic (and substantially traditional) model of responsibility to a diachronic perspective, focused on the central role played by the new generations

[33] Lawrence R. Helfer and Graeme W. Austin, Human Rights and Intellectual Property: Mapping the Global Interface (New York: Cambridge University Press, 2011).

[34] Especially the Principles number 4, 7, 16 and 17. See "Rio Declaration on Environment and Development", United Nations, 1992, accessed February 13, 2014, http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

(in some way according to the philosophical perspective grounded on *das Prinzip Verantwortung* proposed by Hans Jonas[35]).

e) *New frontiers and new'human rights'?* The next doctrine of human rights will have to face new frontiers and fields, in addition to the just mentioned general relevance of new technologies and the problem concerning the access to technological knowledge[36]. More specifically, we can briefly outline the relevance of other and future dimensions for a theory of human rights such as biology and, for instance, robotics.

The ongoing genetic/biological revolution (i.e. particularly genomics) puts into question some theoretical presuppositions of the 'traditional' doctrine of human rights[37]. Thus, this scientific evolution, as well as the increasing relevance of neurosciences, can compromise some conceptual premises of the traditional perspective concerning human rights, usually based on the idea of personal and unchangeable 'identity'. In other words, the future question will be: is there a 'human right' to the genetic (that is to say: personal) identity?

Similarly, some particular technological developments directly involve human rights. For instance, we will have to take increasingly into account the developments of robotics[38] and the consequent problem concerning a comparison between 'human being' and 'machine'. Hence we will have to face some unedited questions as: is there a human right

[35] Hans Jonas, The Imperative of Responsibility: in Search of an Ethics for the Technological Age (Chicago-London: The University of Chicago Press, 1984) but, for this aspects, also: Stephen Humphreys, Human Rights and Climate Change (Cambridge-New York: Cambridge University Press, 2010); Human Rights and Sustinable Development, ed. Mariarosaria Cutillo (Milano: ISU, 2007); Elli Louka, Biodiversity & Human Rights: the International Rules for the Protection of Biodiversity (New York: Ardsley Transnational Publishers, 2002); Gavin Parker, Citizenship, Contingency and the Countryside: Rights, Culture, Land and the Environment (London-New York: Routledge, 2002); Human Rights Approaches to Environmental Protection, ed. Alan E. Boyle and Michael R. Anderson (New York: Oxford University Press, 1998); W. Paul Gormley, Human Rights and Environment: the Need for International Cooperation (Leyden: Sijthoff, 1976).

[36] Human Rights and the Internet, ed. Steven Hick, Edward F. Halpin and Eric Hoskins (London-New York: MacMillan Press -St. Martin's Press, 2000).

[37] Carla Faralli and Sandra Tugnoli Pattaro, "Frontiers of Genetics Human Rights and the Right to Health", in Human Rights, Language and Law (Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing 2009), ed. Thomas Bustamante and Oche Onazi (Stuttgart: Verlag, 2012): vol. II, 35-44.

[38] Ugo Pagallo, The Law of Robots. Crimes, Contracts and Torts (Dordrecht: Springer, 2013).

not to be technologically reproduced? Or also, and in a deeper sense: can we think about a doctrine of human rights (i.e. ethics) adequate to robots?

6. Some Future Legal-Political Questions

In conclusion, from a philosophical and legal point of view all the previous considerations show how the past (and, above all, the next) 'evolution' of the doctrine of human rights is articulated along radically new dimensions[39].

This implies the widening of the theoretical perspective as well as the operative ambits of human rights. Thus, starting always *from a pragmatic perspective* and overlooking the fundamental theoretical dimension, I would like to suggest some brief final remarks concerning two closely related legal-political questions regarding the doctrine of human rights understood as a 'global challenge'[40].

a) The first point concerns the 'concept of law' (by lexicon deriving from H. L. A. Hart[41]). The new sociological and political sceneries imply not only a rethinking of human rights but also, and above all, of the nature and the role of law, with particular attention to the new pair 'soft law-hard law' and, more generally, to the western nature of law.

In other words, the new conceptual pair 'soft law-hard law' (including its theoretical contradictions: what really means 'soft'?) not only progressively destroys the traditional vision of law as a 'complex' (hard, conceptual)' dimension but, *along these lines*, it raises the crucial question about the *western* nature of law[42], including the western doctrine of human rights. Hence, more clearly, the problem can be reformulated as follows: human rights are to be considered merely soft law or, in some

[39] Human Rights: new Dimensions and Challenges, ed. Janusz Symonides (Aldershot: Dartmouth, 1998).

[40] Human Rights in the Twenty-First Century: a Global Challenge, ed. Kathleen E. Mahoney and Paul Mahoney (Dordrecht et al.: Martinus Nijhoff Publishers, 1993).

[41] Herbert Lionel Adolphus Hart, The Concept of Law (Oxford: Clarendon Press, 1981).

[42] Luke MacNamara, Human Rights Controversies: the Impact of Legal Form (Abingdon: Routledge-Cavendish, 2007); Shama Arvind, Are Human Rights Western?: a Contribution to the Dialogue of Civilizations (New Delhi: Oxford University Press, 2006).

way, they can be understood as 'hard law'? And what is their relation with other cultural models? In a wider perspective: what's the new relation between law and ethics?

From this latter point of view, if we look closer, the *nature* of law to come is at stake: or, better, *which law* are we talking about? Then, on a theoretical level, we can better appreciate the limits of some philosophical perspectives as, for instance, the classical rationalist paradigm elaborated by Jürgen Habermas[43] or, more recently, by Robert Alexy[44].

Of course, *on a pragmatic level* all these questions present some precise consequences in view of the elaboration of a doctrine of human rights (and well highlighted by philosophy of law): for instance, let's think about the vagueness of legal language, the difficult 'practicality' of human rights and, finally, the relaunch of their questionable nature. From this point of view, as partially just observed, the role of national (and especially international) Courts has become crucial, because they not only interpret law: they *create* law. With particular regard to human rights, Courts have elaborated the central, and at the same time problematic, concept of 'human dignity', whereby the theoretical question concerning the philosophical foundation of human rights emerges again.

b) The second point concerns the role played by this undetermined law in future social sceneries and, in particular, the nexus 'human rights-legal prevention': in other words, the new forms and sceneries of the relation between human rights (also in the light of the suggested new paradigm) and legal prevention/protection.

In fact, if we live within 'risk societies' (according to Beck's perspective), within a global horizon[45] the classical relation 'security (law)-violence' dating back to Hobbes has come to light as a crucial matter *also in the context of western countries* (at least starting from 9/11/2001). In this perspective, it should be reformulated not only in relation to the nexus 'human rights-terrorism'[46]but, more generally, paying attention to the

[43]Jürgen Habermas, *Theorie des kommunikativen Handelns* (Frankfurt Am Main: Suhrkamp, 1981).

[44] Robert Alexy, Theorie der juristischen Argumentation: die Theorie des rationalen Diskurses als Theorie der juristischen Begrundung (Frankfurt Am Main: Suhrkamp, 1978). See also Robert Alexy, Theorie der Grundrechte (Baden-Baden: Nomos Verlagsgesellschaft, 1985).

[45] Tim Dunne and Nicholas J. Wheeler, Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999).

[46] Allen Buchanan, Human Rights, Legitimacy, and the Use of Force (New York: Oxford

problems aroused by humanitarian interventions and the involved political powers: once again, the pair 'political (legal) power-human rights'.

So, the final question is: whose human rights?

References

Alexy, Robert. *Theorie der Grundrechte*. Baden-Baden: Nomos Verlagsgesellschaft, 1985.

Alexy, Robert. *Theorie der juristischen Argumentation: die Theorie des rationalen Diskurses als Theorie der juristischen Begrundung*. Frankfurt Am Main: Suhrkamp, 1978.

Arvind, Shama. *Are Human Rights Western?: a Contribution to the Dialogue of Civilizations*. New Delhi: Oxford University Press, 2006.

Ashworth, Andrew. *Human Rights, Serious Crimes and Criminal Procedure*. London: Sweet & Maxwell, 2002.

Bauman, Zygmunt. *Globalization: the Human* Consequences. Cambridge: Polity Press 1998.

Beck, Ulrich. *Risk Society: Towards a New Modernity*. London: Sage, 1992.

Boyle, Alan E. and Michael R. Anderson. (eds.) *Human Rights Approaches to Environmental Protection*. New York: Oxford University Press, 1998.

Bröstl, Alexander and Marijan Pavcnik. (eds.) *Human Rights, Minority Rights, Women's Rights* (Proceedings of the 19th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), New York, June 24-30, 1999). Stuttgart: Verlag 2001.

Brownsword, Roger. (ed.) *Global Governance and the Quest for Justice*. Oxford-Portland (Or.): Hart, 2004, vol. IV.

Buchanan, Allen. *Human Rights, Legitimacy, and the Use of Force*. Oxford: Oxford University Press, 2010.

Bustamante, Thomas and Oche Onazi. (eds.) *Human Rights, Language and Law* (Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing 2009) vol. II. Stuttgart: Verlag, 2012.

University Press, 2010); Terror, Culture, Politics: Rethinking 9/11, ed. Daniel J. Sherman and Terry Nardin (Bloomington-Indianapolis: Indiana University Press, 2006); Rosemary Foot, Human Rights and counter-terrorism in America's Asia policy (New York: Oxford University Press, 2004).

Cottier, Thomas, Joost Pauwelyn and Elisabeth Bürgi Bonanomi. (eds.) *Human Rights and International Trade*. New York: Oxford University Press, 2005.

Crime of aggression. "UN General Assembly Resolutions 95/I (1946)". Crime of aggression. 2013. Accessed February 14, 2014. http://crimeofaggression.info/2013/01/un-general-assembly-resolution-95-i-1946/.

Cutillo, Mariarosaria. (ed.) *Human Rights and Sustinable Development*. Milano: ISU, 2007.

Degener, Theresia and Yolan Koster-Dreese. (eds.) *Human Rights and Disabled Persons: essays and relevant human rights instruments*. Dordrecht et al.: Martinus Nijhoff Publishers, 1995.

De Maglie, Cristina. *I reati clturalmente motivati: ideologia e modelli penali*.Pisa: ETS, 2010.

Dembour, Marie Benedicte and Tobias Kelly. (eds.) *Are Human Rights for Migrants? Critical Reflexions on the Status of Irregular Migrants in Europe and the United States*. New York: Routledge, 2011.

Dine, Janet and Andrew Fagan. (eds.) *Human Rights and Capitalism: a Multidisciplinary Perspective on Globalization*. Northampton, Cheltenhan: Edward Elgar Publishing, 2006.

Donati, Pierpaolo. "I diritti umani come latenza di tutti gli altri diritti". In *Catholic Social Doctrine And Human Rights* (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), edited by Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti, 171-187. Vatican City: Libreria Editrice Vaticana, 2010.

Douzinas, Costas. *Human Rights and Empire: the Political Philosophy of Cosmopolitanism.* London-NewYork: Routledge-Cavendish, 2007.

Dunne, Tim and Nicholas J. Wheeler. *Human Rights in Global Politics*. Cambridge: Cambridge University Press, 1999.

Dupuy, Pierre-Marie, Francesco Francioni and Ernst-Ulrich Petersmann. *Human Rights in International Investment Law and Arbitration*. New York: Oxford University Press, 2009.

Emmerson, Ben, Andrew Asworth and Alison MacDonald. *Human Rights and Criminal Justice*. London: Sweet & Maxwell, 2007.

Faralli, Carla and Sandra Tugnoli Pattaro. "Frontiers of Genetics Human Rights and the Right to Health". In *Human Rights, Language and Law* (Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing 2009), edited by Thomas Bustamante and Oche

Onazi, vol. II, 35-44. Stuttgart: Verlag, 2012.

Foot, Rosemary. *Human Rights and counter-terrorism in America's Asia policy*. New York: Oxford University Press, 2004.

Goldsmith, Jack L. and Eric A. Posner. *The Limits of International Law*. New York: Oxford University Press, 2005.

Goodman, Ryan and Thomas Pegram. (eds.) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*. New York: Cambridge University Press, 2012.

Gormley, W. Paul. *Human Rights and Environment: the Need for International Cooperation*. Leyden: Sijthoff,1976.

Grotius, Hugo. *De jure belli ac pacis*. Tübingen: J. C. B. Mohr-Paul Siebeck, 1990.

Habermas, Jürgen. *Theorie des kommunikativen Handelns*. Frankfurt Am Main: Suhrkamp, 1981.

Habermas, Jürgen and Charles Taylor. *Multiculturalismo:lotte per il riconoscimento*. Milano: Feltrinelli, 1998.

Hart, Herbert Lionel Adolphus. *The Concept of Law*. Oxford: Clarendon Press, 1981.

Helfer, Lawrence R. and Graeme W. Austin. *Human Rights and Intellectual Property: Mapping the Global Interface*. New York: Cambridge University Press, 2011.

Henkin, Louis and John Lawrence Hargrove. (eds.) *Human Rights: an Agenda for the Next Century*.Washington D. C.: The American Society of International Law, 1994.

Hick, Steven, Edward F. Halpin and Eric Hoskins. (eds.) *Human Rights and the Internet*. London-New York: MacMillan Press - St. Martin's Press, 2000.

Humphreys, Stephen. *Human Rights and Climate Change*.Cambridge-New York: Cambridge University Press, 2010.

Jenks, Clarence Wilfried. *Human Rights and International Labour Standards*. London-New York: Stevens & Sons-Praeger, 1960.

Jonas, Hans. *The Imperative of Responsibility: in search of an Ethics for the Technological Age*. Chicago-London: The University of Chicago Press, 1984.

Kymlicka, Will. *Liberalism, Community and Culture*. Oxford: Clarendon Press, 1989.

Kymlicka, Will. *Multicultural Citizenship: a Liberal Theory for Minority Rights*. Oxford: Clarendon Press, 1995.

Kinely, David, *Civilizing Globalization: Human Rights and the Global Economy*. Cambridge: Cambridge University Press, 2009.

Lee, Daniel E. and Elizabeth J. Lee. *Human Rights and the Ethics of Globalization*. New York: Cambridge University Press, 2010.

Leiser, Burton M. and Tom D. Campbell. *Human Rights in Philosophy and Practice*. Aldershot Burlington: Ashgate, 2001.

Locke, John. *Two Treatises of Government*. Cambridge: Cambridge University Press, 1988.

Londono, Patricia. *Human Rights and Violence against Women*. Oxford: Oxford University Press, 2012.

Louka, Elli. *Biodiversity & Human Rights: the International Rules for the Protection of Biodiversity*. New York: Ardsley Transnational Publishers, 2002.

Loveland, Ian. *Constitutional Law, Administrative Law, and Human Rights: a Critical Introduction*. Oxford et al.: Oxford University Press, 2009.

Luhmann, Niklas. *Rechtssoziologie*. Hamburg: Rowohlt, 1972.

Lutz-Bachmann, Mathias and James Bohman. (herausgegeben von) *Frieden durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung*. Stuttgart: Suhrkamp 1996.

MacNamara, Luke. *Human Rights Controversies: the Impact of Legal Form*. Abingdon: Routledge-Cavendish, 2007.

Mahoney, Kathleen E. and Paul Mahoney. (eds.) *Human Rights in the Twenty-First Century: a Global Challenge*. Dordrecht et al.: Martinus Nijhoff Publishers, 1993.

Maldonado, Carlos Eduardo. *Human Rights, Solidarity and Subsidiarity: Essays Toward a Social Ontology*. Washington D. C.: The Council for Research in Values and Philosophy, 1997.

McGoldrick, Dominic. *Human Rights and Religion: the Islamic headscarf Debate in Europe*. Oxford-Portland (Or.): Hart, 2006.

Meyer, William H. *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression*. Westport (Conn.)-London: Praeger, 1998.

Mills, Kurt. *Human Rights in the Emerging Global Order: a New Sovereignty?* London-New York: MacMillan Press-St. Martins' Press,1998.

Nystuen Gro, Andreas Follesdal and Ola Mestad. (eds.) *Human Rights, Corporate Complicity and Disinvestment*. Cambridge-New York: Cambridge University

Press, 2011.

Pagallo, Ugo. *The Law of Robots*. *Crimes, Contracts and Torts*. Dordrecht: Springer, 2013.

Parker, Gavin. *Citizenship, Contingency and the Countryside: Rights, Culture, Land and the Environment*. London-New York: Routledge, 2002.

Possenti, Vittorio. "Antropologia cristiana e diritti umani. Diritti e doveri". In *Catholic Social Doctrine And Human Rights* (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), edited by Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti, 107-127. Vatican City: Libreria Editrice Vaticana, 2010.

Radbruch, Gustav. *Rechtsphilosophie*. Leipzig: Quelle & Meyer, 1932.

Raga, J. T. "Christian Anthropology and the Effectiveness of Human Rights of an Economic Content", in *Catholic Social Doctrine And Human Rights*, (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), edited by Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti, 128-170. Vatican City: Libreria Editrice Vaticana, 2010.

Sherman, Daniel J. and Terry Nardin. (eds.) *Terror, Culture, Politics: Rethinking 9/11*. Bloomington-Indianapolis: Indiana University Press, 2006.

Shoraka, Kirsten. *Human Rights and Minority Rights in the European Union*. London-New York: Routledge, 2010.

Simmons, William Paul. *Human Rights Law and the Marginalized Other*. New York et al.: Cambridge University Press, 2011.

Smith, Alan G. *Human Rights and Choice in Poverty: Food Insecurity, Dependency, and Human Rights-based development aid for the Third World Rural Poor*. Westport (Conn.)-London: Praeger, 1997.

Stiglitz, Joseph. "Human Rights and Globalization: The Responsibility of States and of Private Actors", in *Catholic Social Doctrine And Human Rights*, (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), edited by Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti, 341-346. Vatican City: Libreria Editrice Vaticana, 2010.

Strohal, Christian. "The Quest for Protection: The Role of International Organizations and NGOS in Surveying Human Rights Compliance", in *Catholic Social Doctrine And Human Rights*, (Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences), edited by Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti, 541-558. Vatican City: Libreria Editrice Vaticana 2010.

Symonides, Janusz. (ed.) *Human Rights: new Dimensions and Challenges*. Aldershot: Dartmouth 1998.

Thoolen, Hans and Bert Verstappen. *Human Rights Missions: a Study of the Fact-Finding Practice of Non-Governmental Organizations*. Dordrecht: Martinus Nijhoff Publishers,1986.

Tietmeyer, Hans. "Globalization and the Present Crisis", in *Catholic Social Doctrine And Human Rights*. Proceedings of the 15th Plenary Session 1-5 May 2009 of the Pontifical Academy of Social Sciences, edited by Roland Minnerath, Ombretta Fumagalli Carulli and Vittorio Possenti, 591-596. Vatican City: Libreria Editrice Vaticana, 2010.

United Nations. "Rio Declaration on Environment and Development." United Nations. 1992. Accessed February 13, 2014. http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

Viola, Francesco. *Diritti umani, diritto naturale, etica contemporanea*. Torino: Giappichelli, 1989.

Viola, Francesco. *Diritti umani e globalizzazione del diritto*. Napoli: ESI, 2009.

Viola, Francesco. *I diritti umani sono naturali?* Milano: Vita e Pensiero, 2009.

Wahlgren, Peter. (ed.) *Human Rights: their Limitations and Proliferation*. Stockholm: Institute for Scandinavian Law, 2010.

Waters, Malcom. *Globalization*. London-New York: Routledge, 2001.

Wikipedia."Nuremberg Principles". Wikipedia. 2014. Accessed February 14, 2014. http://en.wikipedia.org/wiki/Nuremberg_principles.

Wronka, Joseph. *Human rights and Social Policy in the 21st Century: a History of the Idea of Human Rights and comparison of the United Nations Universal Declaration of Human Rights with United States Federal and State Constitutions*. Lanham et al.: University Press of America, 1992.

Zabus, Chantal J. *Between Rites and Rights: Excision in Women's experiential Texts and Human contexts*. Stanford: Stanford University Press, 2007.

Zappalà, Salvatore. *Human Rights in International Criminal Proceedings*. Oxford: Oxford University Press, 2003.

Human rights: has the present economic crisis proven Bentham was right?

Maria Clara da Cunha Calheiros de Carvalho

I. The present economic crisis and ideology. Notes from the Portuguese experience

The present economic crisis has set a scenario, especially in the southern countries of Europe, for the unfolding of a social tragedy that seems far from ending.

The financial troubles and the intervention of European institutions along with the IMF in countries such as Greece, Ireland, Portugal or, more recently, Cyprus has led to the implementation of austerity measures designed to allegedly stabilize the economy and public budgets, thus regaining the credibility lost with international creditors.

One of the common features of the intervention programs has been the adoption of legislative initiatives towards the reduction of the welfare state.

Hence, it comes with no surprise that Courts have been asked to judge if such regulations/rules are in conformity with the constitutional laws of each country. Frequently the issues at stake concern the violation of individual rights once regarded as the result of previously accomplished social and human development. For the purpose of this paper it is particularly relevant that we start by analyzing the arguments that have been used by partisans and detractors of austerity measures. For brevity's sake, we will only focus on the Portuguese debate that arose from the late Constitutional Court decision declaring that a set of regulations adopted by the Portuguese government violated the constitution.

First, let us briefly summarize the content of such regulations. At the end of 2012, the Portuguese government attained the parliamentary approval of the 2013 budget law containing several articles whose conformity to the Portuguese constitution seemed dubious. In fact, the

President of the Republic himself, as well as several deputies of the opposition, submitted a request for the Constitutional Court to rule on the matter.

Following the issue of the court´s decision, the international press quoted some Brussels officials, allegedly disappointed with the outcome of the procedure, to the point that they "could barely disguise their contempt for the black-robed judges" who had just decided "that cutting the 14th month's pay for public sector workers and pensioners constituted unfair discrimination"[1]. One Eurocrat was even quoted to have said that the Portuguese constitution was the last socialist constitution of Europe[2].

The Portuguese government, having been asked to apply budget cuts worth 5.3. Billion euros, in order to keep the bail-out programme on track, had planned to do so by reducing public-sector salaries, pensions and benefits. The Constitutional court struck down four out of nine budget cuts before it. The elimination of one extra bonus month paid in the summer was found to flout the equitable treatment of public and private sector workers, the latter maintaining the right to the extra bonus payment. Additionally, the court also rejected the cuts in sickness and unemployment benefits on grounds that minimum payments established by law cannot be lowered.

In the aftermath of the Portuguese constitutional court decision, public opinion was divided between those supporting the government's point of view, and those applauding the reinstatement of the citizens' constitutional rights under threat.

This debate has moved rapidly towards the ideological field. On one side we have seen the use of arguments defending the revision of the Constitution in order to downsize the welfare state. Cuts on public employment, especially in educational and health areas are in order. On the other side, we find criticisms to what has been already defined as an ideological attack on social rights in disguise.

On matters of political philosophy, the debate that arises from the definition of the State's social role comes with no surprise. In fact, one should acknowledge that "since the eighteenth century [the distinctive political issue] has been whether government should do more or

[1] Euro wobbles, in "The Economist", 13th April 2013. Available on http://www.economist.com/news/europe/21576129-portugals-constitutional-court-creates-new-problems-euro-euro-wobbles. Last access 16 July 2013.

[2] Idem, ibidem.

less."[3]

If we could consider to be true that in modern politics the debate between more or less government is being replaced by the discussion about what sort of activity politics is[4], we should admit that the former has now regained relevance. This debate has generated prodigious amounts of academic discourse that cannot be dealt with here. Nonetheless, for the purpose of this paper we are particularly interested in ascertaining what implications the reduction of the welfare state will have on people's rights and especially how it will reflect on the theory of rights.

At this point it is necessary to turn our attention towards the history of modern human rights as some of the arguments used in the above mentioned discussion that currently takes place in Europe seem oddly familiar to us, in spite of the fact that today's politicians are apparently unaware of the pedigree of the ideas they are overseeing.

II. Bentham's assault on natural rights

The well known "Declaration of the Rights of Man and Citizen" stands as a landmark for the building of the modern concept of human rights. It was the product of France's national endeavours to summarize, in a single text, the rights of all persons. However, its revolutionary proclamation of the existence of a set of inalienable rights that every man or woman ought to be acknowledged by did not cause a general and immediate applause.

In fact, it generated a choir of criticism instead; one can better understand why when we recall the tragic events that took place in France during the historical Terror period.

Among the critics, Jeremy Bentham stands as one of the fiercest. Although we can find Bentham's ideas on natural rights throughout his works, his main assault on the topic is contained in a posthumous work published first in French, and later in English, under the title of Anarchical Fallacies[5]. In this text, the author condemns not only the very idea of

[3] LETWIN, Shirley Robin, The pursuit of certainty, Cambridge: Cambridge University Press, 1965, p. 1.

[4] LETWIN, *Shirley Robin,* op.cit., p. 1.

[5] The full title being "Non sense upon stilts or Pandora's box opened or the French Declaration of Rights prefixed to the Constitution of 1791 laid open and exposed – with a comparative sketch of what has been done on the same subject in the Constitution of 1795 and a sample of citizen Sieyès.

the existence of natural and imprescriptible rights, but also the listing of liberty, property, security and resistance to oppression as such. It is here that Bentham writes his famous contention towards the concept of natural rights saying it consists of "nonsense upon stilts".

Jeremy Bentham's scepticism about natural rights is rooted in his particular vision of the world and the law. We agree with Hart's view on the matter when he argues that Bentham's opinion on human rights has to be understood in articulation with his formulation of the principles of Utilitarianism. In his work A Fragment on Government, he expressed his theory justifying the limits of government by resorting to the goal of achieving the "greatest happiness of the greatest number" rather than by means of acknowledging individual rights.[6] This work appeared only a few months after the issuing of the American Declaration of Independence and Bentham reiterated his rejection of the very concept of human rights later in another paper published under the title of Answer to the Declaration of the American Congress.[7]

Despite being critical of philosophical conceptions that underlie the American and French Declarations, BENTHAM sympathizes with the republican and democratic revolutionary spirit that animates the Americans and the French. In fact, his ideas have exerted considerable influence in these parts, and particularly in France, where he translated his works. Moreover, BENTHAM receives the title of citizen of France, in the year 1792[8].

We will therefore briefly review here the various arguments that align Jeremy Bentham in his attack on the French Declaration of Human Rights. We will base our main object of analysis on the BENTHAM works titled Anarchical Fallacies, with the occasional mention of ideas and positions contained in other works. The thesis we seek to sustain is that Bentham's text currently continues up-to-date, since it is an excellent showcase of a set of objections to human rights that are still brandished by their detractors. Opinions are divided on whether the same criticism would remain valid today, given the subsequent Declarations of Human Rights which have arisen, notably the Universal Declaration[9].

[6] HART, H., The Shell Foundation Lectures, 1978-1979. Utilitarianism and Natural Rights, "Tulane Law Review", 53, ap. 1979, passim.

[7] HART, ibidem, p. 664.

[8] Cf. GETTEL, Raymond, História das Ideias Políticas, trans. Port., Lisboa: Ed. Inquérito, 1936, pp. 395-397.

[9] Here I take into account the now classic analyses carried out by TWINING and DALGARNO. Cf. The contemporary significance of Bentham's Anarchical Fallacies, in "Jer-

We shall not deal with analysing this question, but rather seek to demonstrate that, in theory, many of the criticisms that have continued to be addressed today to the natural rights or human rights follow, to some extent, the line of thought of BENTHAM and many of the human rights theories themselves move within the legalistic pattern he used to analyse and criticize natural rights. It is clear that many of the current critics of human rights have the benefit of being able to take into account the actual practice of human rights, with special emphasis on that which has marked international relations. For that reason alone, there would always be room for disagreement. The focus will be the Anglo-Saxon tradition of criticism of the Bills of Rights, in particular, with noticeable influence of utilitarian philosophy. Later, we will briefly comment on these criticisms.

In the interests of greater clarity of the exposition of ideas, we prefer to bring together the main arguments used by the British author under three distinct sections, which were given the following designations: logical objections, political objections, and legal objections. This is our arrangement and does not reflect any division the British author included in his original text.

1. BENTHAM's arguments against the Declaration of Human Rights

a) Logical objections

In the text of the Anarchical Fallacies, as in many other works, the British author clearly expresses the intellectual contempt he feels for the "doctrine" of natural rights. This is, in his opinion, the result of a series of errors of reasoning that he analytically looks to deconstruct. These errors in reasoning are enhanced by the poor quality of the drafting of the text, aspect which we focus here as well, given that it is difficult to maintain a line between the purely procedural and substantive aspects involved in the critical exercise of the British author.[10]

Bentham divides his analysis of the Declaration on two occa-

emy BENTHAM. Critical Assessments", London/New York: Routledge, vol. III, 1993; DALGARNO, M. T., The contemporary significance of Bentham's Anarchical Fallacies: a reply to William Twining, ibidem.

[10] An aspect with which we agree with TWINING, op. cit. P. 713.

sions: he starts with the analysis of the text itself, and then comments the adverse consequences that he envisions can derive from it. So he begins by identifying several flaws of the Declaration of Rights, from a logical point of view. One aspect relates to the use, criticized in the text, of propositions with a high degree of abstraction. In his opinion, the more abstract a proposition is, the higher the degree of probability of containing a sophism[11]. This is a flaw in the logical plan that, on the contrary, the English House of Commons would be free, thanks to the known British aversion to adopt provisions of an abstract nature[12].

The wording of the text in itself is the subject of particularly virulent criticism. The author considers that particularly bad, accusing it of being vague, imprecise, inaccurate and full of truisms. He even claims that it is a perpetual stream of absurdities deriving from a perpetual abuse of words.[13]. Indeed, the ambiguity would start with the very status of the Declaration as it appeared separated from the Constitution, but preceding it. BENTHAM, as we know, considered that the appropriate place to establish mechanisms for executive control of the legislature

[11] "But the more ample the extent given to any proposition or sorting of propositions, the more difficult it is to keep the import of it confined without deviation, within the boundaries of truth and reason. […] The more abstract – that is, the more extensive the proposition is, the more liable is it to involve a fallacy." BENTHAM, The works of Jeremy Bentham, John Bowring ed., 1843, p. 496.

[12] BINOCHE e CLÉRO, op. cit., p. 24, 21. BENTHAM says: "In the British Houses of Parliament, more especially in the most efficient house for business, there prevails a well-known jealousy of, and a repugnance to, the voting of abstract propositions." BENTHAM, The works of Jeremy Bentham, op. cit., p. 497.

[13] The British author considers particularly important the careful choice of words used in legislation, otherwise the result could be civil war. However, the expressions that the Declaration employs, seem particularly unsuitable and objectionable to him: "The logic of it is of a piece with its [the incendiary of the Efesian Temple] morality: - a perpetual abuse of words, - words having a variety of meanings, where words with single meanings were equally at hand – the same words used in a variety of meanings in the same page, - words used in meanings not their own, where proper words were equally at hand, - words and propositions of the most unbounded signification turned loose without any of those exceptions or modifications which are so necessary on every occasion to reduce their import within the compass, not only of right reason, but even of the design in hand, of whatever nature it may be." BENTHAM, The works of Jeremy BENTHAM, op. cit., p. 497. The great inspirer of utilitarian philosophy had, moreover, particular care with terminology issues and even created neologisms in English from Greek matrices. Some later became integral part of this language: vg. international, utilitarian, codification, minimize. GETTEL, op. cit., p. 398.

was the *Constitutional Code*[14].

The author points out in particular the blatant contradiction towards a tendency to affirm the existence of absolute rights and then make exceptions and limitations to those with an indefinite nature.[15] That is instantly evident to him in the analysis he performs of Article 1 of the Declaration: "All men are born and remain free and equal in rights. Social distinctions may be based only on common utility." BENTHAM criticizes the falsity of the statements contained in the first sentence and the ambiguity of the second one.

The first sentence is analytically unfolded by the author in four propositions: that all men are born free, that all men remain free, that all men are equal in rights, and that all men remain equal in rights. The author invokes the multiple subjections, as well as the family, social and legal ties that all are subject to in society[16], as well as the differences in wealth and hierarchy existing in society (between master and apprentice, for example) to support this accusation of falsehood[17].

He then proceeds to review the alleged ambiguity in this phrase "social distinctions can only be based on common utility," stating that a contradiction exists with the previous statement of equal rights for all. In fact, says he, one does not even understand what these social distinc-

[14] TWINING, op. cit., p. 705, 706, whose opinion we follow closely here.

[15] Cf. QUAH, The continuing Relevance of Anarchical Fallacies to Modern Rights Discourse, in "UCL Jurisprudence Review", 2002., p. 218.

[16] BENTHAM says: "All men are born free? All men remain free? No, not a single man: not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection – the subjection of a helpless child to the parents on whom he depends every moment for his existence. In this subjection every man is born – in this subjection he continues for years – for a great number of years – and the existence of the individual and of the species depends on so doing." The works of Jeremy Bentham, op. cit., p. 498.

[17] Cf. BENTHAM, The works of Jeremy Bentham, op. cit., p. 498. Among the many differences that the British author lists are those that are created by the differences of fortune, hereditary privileges, gender and hierarchical relationships in nature, as are the sovereign and subject, master and apprentice, doctor and nurse, among others. In the particular case of the relations between husband and wife, BENTHAM leaves no doubt as to his thinking about the recognition in this field of equal rights: "Amongst the other abuses which the oracle was meant to put an end to, may, for aught I can pretend to say, have been the institution of marriage. For what is the subjection of a small and limited number of years, in comparison of the subjection of a whole life? Yet without subjection and inequality, no such institution can by any possibility take place; for of two contradictory wills, both cannot take effect at the same time." Ibidem, p. 499.

tions are, or how to make them compatible with the previously proclaimed equality. In his view, if they are distinctions that affect equality, they override it; if they are in compliance with equality, one cannot see how they can exist as such[18].

On the other hand, the British author criticizes the list of natural and imprescriptible rights recognized - liberty, property, security and resistance to oppression - and that their establishment, without limits, makes them incompatible. Thus, pointing out, for example, that private property can only be established and be conceived as a limit or restriction on the freedom of others. [19].

All in all, however, it is not these more formal criticisms that constitute the fundamental objection to the theory of natural rights. As we will see, thenceforth, from a political point of view, those articulate with the deeply damaging consequences that this entails, according to the leader of the utilitarians.

b) Political objections

One of the fundamental reasons for the opposition that BENTHAM offers to the idea of the imprescriptibility of natural rights is political in nature. In his eyes, there is a manifest inconsistency in establishing natural rights conceived as negative limits for government action and, at the same time admitting that that same government is allowed to establish exceptions and limitations to those.[20] That is to say that its role (natural rights) as a desired brake to the arbitrariness of those in power was far short of what would necessarily be the intention of those who conceived the doctrines of natural rights.

However, if this is still an objection logical-political in nature, the truth is that criticism of BENTHAM does not end here. It is no coincidence that the text from which we have carried out our analysis has been rightly titled "*Anarchical Fallacies*". So the question is where the fallacies contained in the Declaration of Human Rights (or more correctly, the theory of natural rights that underlies it and that is truly the target of BENTHAM's attack) are likely to lead to anarchy. Or, put differently - borrowing the exact words of the author - are a threat to the entire gov-

[18] BENTHAM, The works of Jeremy Bentham, op. cit. p. 499.
[19] BENTHAM, The works of Jeremy Bentham, op. cit., p. 503.
[20] Cf. QUAH, op. cit., p. 218.

ernment and the stability of society itself[21].

It seems to us that there are two main reasons why BENTHAM saw therein the existence of a threat. Firstly, the author considered that the Declaration was a standing invitation to insurrection as it made it almost a duty that the people should resent any violation of their natural rights[22]. Let us remember that one of the rights established was the resistance to oppression, which BENTHAM interpreted in the broader and most radical of terms. It is true that, even though they make no reference to the terrible events that characterized the era in France, they would not be oblivious to this interpretation made of the Declaration. As well remember some of the critics of BENTHAM's thinking, he lived a troubled moment of history, in which the fear of the "mob" was a constant concern of the upper classes of England[23]. Hence perhaps some exaggeration in the very radical interpretation which carries out the intentions behind the Declaration and its effects.

Otherwise we could not understand, for example, the analogy used by the English author to illustrate the harmful effect of the Declaration: this could resemble the legendary law that the murder of the prince on his throne gave the killer the right to succeed him[24]. All in all, it is to argue with the thesis that either "you always comply or never (comply) at all," accusing the revolutionaries of irreparably weakening the authorities of the present and future, to justify the destruction of order and previously existing authorities.

Obviously, Bentham was fully aware that the laws are not always good and that there would, therefore be cases in which disobedience would seem justified[25].

---

[21] Also in this sense, HART, H. op. cit., p. 79.

[22] That is clear in this passage: "People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your duties." Such is the constant language, for such is the professed object of this source and model of all laws – this self-consecrated oracle of all nations." BENTHAM, The works of Jeremy BENTHAM, John Bowring ed., 1843, p. 496.

[23] Cf. BEDAU, Hugo Adam, Anarchical Fallacies: BENTHAM's attack on Human Rights, in "Human Rights Quarterly", 22, 2000, p. 268 HART also stresses the influence of these events in France and the fears they inspired in regards to the spread of social unrest, as a result of "contagion," to England itself, as a justification for the particularly vehement tone of criticism.

[24] BINOCHE and CLÉRO, op. cit., p. 20, 21.

[25] BENTHAM makes a distinction in this respect, between the "rational" or "anarchic" attitude that could be taken against an unjust law: "The rational censor, acknowledging

But what disgusted him was the idea that any law could be disobeyed, for no reason, without adequately addressing the consequences of this disobedience, also harmful to the peace and public order. Hence it is critical to emphasize the word "*cannot*" that limits the action of the legislature, in view of the protection of natural rights[26].

The second reason that the introducer of utilitarianism would have to identify an "anarchic" threat in the Declaration, has precisely to do with the recognition of the inalienable character of natural rights and therefore absolutely binding of the government. In his view, the entire government would forever be severely shackled in its ability for action.

BENTHAM's objection in this regard is better understood by reading another of his subsequent works[27], the *Book of Fallacies* that aims to carry out the analysis of the fallacies to which political discourse was particularly exposed. Now while we do not find any reference to *anarchical fallacies* there, there is an explicit statement of the fallacy consisting in the recognition of irrevocable laws. BENTHAM vehemently rejects the possibility of defence and consecration of these, stating, in a very eloquent and meaningful way that this would be worse than the despotism of Caligula and Nero.[28] However, the fallacy behind the French Declaration was precisely as stated, the one that induced anarchy:

"What then was their object in declaring the existence of impre-

---

the existence of the law he disapproves, proposes the repeal of it: the anarchist, setting up his will and fancy for a law before which all mankind are called upon to bow down at the first word – the anarchist, trampling on truth and decency, denies the validity of the law in question, - denies the existence of it in the character of a law, and calls upon all mankind to rise up in a mass, and resist the execution of it." BENTHAM, The works of Jeremy BENTHAM, op. cit., p. 498.

[26] In this sense, HART, op. cit., p.p. 81, 82. Says BENTHAM: "For such is the venom that lurks under such words as can and cannot, when set up as a check upon the law". The works of Jeremy BENTHAM, op. cit., p. 499.

[27] Subsequent in writing, not in the publication, of course.

[28] BENTHAM states: "Suppose this irrevocable law, whether good or bad at the moment of its enactment, is found at some succeeding time to be productive of mischief – uncompensated mischief – to any amount. Now of this mischief, what possibility has the country of being rid? A despotism, though it were that of a Caligula or a Nero, would be less intolerable than any such immutable law. By benevolence (for even a tyrant has his moments of benevolence), by prudence, in a word, by caprice, the living tyrant might be induced to revoke his law, and release the country from its consequences. But the dead tyrant! Who shall make him feel? Who shall make him hear?" BENTHAM, BENTHAM's Handbook of Political Fallacies, Harold Atkins Larrabee, ed rev., 1952, p. 56.

> scriptible rights, and without specifying a single one by any such mark as it could be known by? This and no other – to excite and keep up a spirit of resistance to all laws – a spirit of insurrection against all governments – against the governments of all other nations instantly, - against the government of their own nation - against the government they themselves were pretending to establish – even that, as soon as their own reign should be at an end."29

It should not be forgotten that BENTHAM, with the publication of his *Fragment on Government*, introduces the utilitarian philosophy that refuses to recognize the existence of natural rights, replacing them with a utilitarian principle of the *greatest happiness of the greatest number*. Thus, although he did not exactly enunciate a theory of rights, one can consider that the concept of collective utility[30] will act as a filter for the individual rights to be maintained and created. This is summarized in the following passage:

> What is the language of reason and plain sense upon this same subject? That in proportion as it is right or proper, i.e. advantageous to the society in question, that this or that right – a right to this or that effect – should be established and maintained, in that same proportion it is wrong that it should be abrogated […] there is no right, which ought not to be maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished."31

That is to say that our rights should or should not be recognized in accordance with the benefit arising therefrom, in the light of government for the social whole, or rather, for the majority[32]. In fact, we must remember that BENTHAM has a pragmatically pessimistic view of human nature, considering that there are two enemies of public peace: the hostile passions and selfish passions. In this context, the role of government should be to achieve the necessary sacrifices to social cohesion and ensure safety[33]. However, from his point of view, the French Declaration

---

[29] BENTHAM, The works of Jeremy BENTHAM, op. cit. p. 501.

[30] Cf. BINOCHE and CLÉRO, BENTHAM contre les droits de l'Homme, Paris: PUF; 2007, p. 2, 3.

[31] BENTHAM, The works of Jeremy BENTHAM, op. cit. p. 501.

[32] Also in this sense, BEDAU, op. cit., p. 272.

[33] Also in this sense, TWINING, op. cit., p. 703.

emphasized both passions thus threatening social peace[34].

Furthermore, the British author does not believe that any existing government- past, present or future - ever has the ability to perform such duties and expectations. There is therefore also a problem here of effectiveness that emphasizes the need for its rejection[35].

c) Legal objections

For Jeremy Bentham no rights exist other than those that positive law provides citizens with, at all times. It must be said that to understand the concept of rights for BENTHAM one must keep in mind his Theory of Fictions[36].

According to this, the "right" and "obligation" are two fictitious entities, the first of which is a consequence of the second. That is, I can only claim to have the right X, when the law imposes a corresponding obligation Y. This means that the subject be forced to suffer a penalty imposed by law, should he not adopt the behaviour that such imposes and demands. The underlying reasoning is this: all rights derive from the Law, the Law results from the government, so there are no rights beyond the positive rights.[37]

The same is to say, in his opinion, "*there are no rights without law- no rights contrary to law – no rights anterior to law*."[38] The British author

[34] Cf. BINOCHE e CLÉRO, op. cit., p. 22.

[35] "A government which should fulfil the expectations here held out, would be a government of absolute perfection. The instance of a government fulfilling these expectations, never has taken place, nor till men are angels ever can take place." BENTHAM, The works of Jeremy BENTHAM, op. cit., p. 506.

[36] BENTHAM maintains that the word "law" is a fictitious entity that is used for purposes of discourse and is indispensable for it. He also states that the law depends on the idea of obligation for its understanding, since the efficient causes of the individual rights are two: first, the absence of an obligation imposed upon the holder of the right and opposite to the latter (i.e. each has the right to do what he is not obliged to do), and secondly, the presence of a correlative obligation on the other person (s) to refrain from disrupting the exercise of law.BENTHAM, Teoría de las Ficciones, Spanish trans. Madrid/Barcelona: Marcial Pons, 2005, pp. 165 e ss.

[37] In this sense, the analysis and opinion we follow here, offered by TWINING, W., op. cit., p. 703.

[38] Also in this identical sense, states BENTHAM: "there are no such things as natural rights – no such things as rights anterior to the establishment of government – no such things as natural rights opposed to, in contradistinction to, legal: that the expression is

conceived the Law merely as positive law, namely as a command of a particular sovereign. In this sense, and borrowing from another of his expressions, the subjective right is the *son of the law*[39]. Although Hobbes's philosophy was not alien to his thinking, BENTHAM rejects the idea that the existence of a natural law of self-preservation in the "state of nature" could be conceived (Hobbes, however, admitted to such). There are two reasons for this: first, such a right to exist, would lead to the war of all against all (*what is every man's right is no man's right*[40]); and, secondly, there not being fulfilled an essential requirement, in his view, to all rights, which was the nexus of correspondence with the corresponding obligation. Who was the obliged of this right? BENTHAM denied that the corresponding obligation could be identified there and its unequivocal holder[41].

Indeed, in his theory of rights, the connection between rights and coercively enforceable obligations, due to the threat of a penalty, therefore plays a central role[42]. This is an aspect that is also associated with his concern about the effectiveness of rights. To BENTHAM, recognition of any system of rules cannot take place without the conditions of its existence being met.

Now the natural and imprescriptible rights which the Declaration spoke of did not seem at all to meet such requirements. In fact, the declared rights were so, regardless of acceptance or compliance, thus it

---

merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to the sort of error that leads to mischief – to the extremity of mischief." BENTHAM, The works of Jeremy BENTHAM, op. cit. p. 500.

[39] "Right, the substantial right is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, "gorgons and chimaeras dire". BENTHAM, The works of Jeremy BENTHAM, op. cit. p. 523.

[40] BENTHAM does not have a contractual view of the origin of government (considering that the strength of contracts comes from the government and not otherwise) and does not endorse a vision of a state of nature in which everyone would be entitled to all: "Nature, say some of the interpreters of the pretended law of nature – nature gave to each man a right to everything; which is, in effect, but another way of saying – nature has given no such right to anybody; for in regard to most rights, it is as true that what is every man's right is no man's right." BENTHAM, The works of Jeremy BENTHAM, op. cit. p. 502.

[41] Here we follow closely the observations of BEDAU, op. cit., p. 271.

[42] HART, Essays on Bentham. Jurisprudence and Political Theory, Oxford: Clarendon Press, 1982, p. 86.

was impossible to equate them to "real rights", whose normative force came from the mandate of the law, and ensure the forcible compliance of the corresponding obligations that their effectiveness depended on. Which authority did the rights of man come from? The only justification led to theories that the British author rejects: those of natural law[43].

In the opinion of HART, which we closely follow, his rejection of the "doctrine" of natural law is based on what he calls "*the criterionless character of alleged natural rights*". This lack of criterion was an expression of the assumed separation of rights (subjective) and law (objective) and would have the terrible consequence of permitting that any political whim be confused with a right[44].

To some extent, BENTHAM is not insensitive to the idea that all men should have some and certain rights, but he believes that the defence discourse of the innate natural rights, as a way to claim those rights for all (of universal character therefore), is misleading. The author says: *"But reasons for wishing there were such things as rights are not rights: a reason for wishing that a certain right were established is not that right – want is not supply, hunger is not bread".*[45] One realizes why he employs the term "fallacy" to classify the propositions contained in the Declaration, as BENTHAM would precisely define this concept in his other work, as an argument employed with the intent to deceive (which is moreover, a questionable definition)[46].

The alternative, that Bentham gives us some insight to, is a theory of rights built on the principle of utility, which can be understood to be alluded to in the passage of the text referred above[47].

---

[43] Vd. QUAH, op. cit., p. 216.

[44] Cf. HART, Essays…, p. 82.

[45] Cf. HART, Essays, pp. 88, 89.

[46] Vd. BEDAU, op. cit., p. 265. A fallacy can be something that a speech suffers involuntarily.

[47] HART rejects that Bentham has somehow stated, a theory of utilitarian not legal rights that utilizes the principle of utility as a criterion for establishing and identifying the rights that man should have in addition to the positive. According to his view, the British author merely identifies two types of positive rights: the rights of freedom and rights to services. The reasons for this choice are, in his view, double in order: first, the principle of utility would also not be immune to social variations and nuances, not providing a more stable anchor point for the reasons for a rights theory than of the criticized "human nature" and, secondly, because such a theory of not positive rights would contend with his characterization of positive rights, in particular with its necessary correspondence to obligations that could be required to be satisfied by fear of suffering a

The interpretation that HART makes of the British author's thinking, the acceptance of the existence of moral rights (alongside real rights – the positive ones) was compatible with his utilitarian philosophy. Moral rights would emerge from positive morale created by each society and therefore from human conduct. Thus, continuing to pursue this train of thought, what BENTHAM denied was not that there were not only positive rights, but rather that there could be rights universally held by all, in a threefold sense: them not being the product of man or God, their existence not depending on social convention or recognition; nor constituting the reflex of certain features of human nature[48].

III. The Anarchical Fallacies and the crisis "discourse"

Let us look go back to our analysis of today's economic crisis.

The arguments now presented by those who are defending the downsizing of the welfare state are, in my point of view, very similar to the ones used by Jeremy BENTHAM in his works, and in particular in the "Anarchical Fallacies" even if, as I have said before, they do not seem at all aware of this similarity. Of course, not all the justifications given to us by Jeremy Bentham to offer a rejection of the concept of human rights are in place, nor has anyone ever been bold enough to publicly defend that human rights are just "nonsense upon stilts".

However, the fact remains that the suppression or reduction of the welfare rights are being defended as necessary sacrifices that government must inflict on part of the population for the benefit of a greater good. Ultimately, we are being told that what must guide government is nothing but "the greatest happiness of the greatest number". Moreover, the very existence of imprescriptible and unalienable rights is being questioned in a "Benthamian" sort of way as something which is incompatible with the free exercise of the powers of government.

As one should expect, the same supporters of the welfare state's downsizing are fearful of the ordinary functioning of democratic mechanisms, especially the expected outcome of general elections taking place. And again this recalls Bentham's first negative views on democracy.[49]

---

penalty. Essays…, op. cit., p. 85.

[48] Cf. HART, op. cit., pp. 83, 84, 85.

[49] He later on changed his opinion and expressed his compatibility with Utilitarianist principles, as Hart notices. However, at first he was not convinced by democracy supporters and indeed he seemed very critical of French revolution. Hart sustains this was

He changed his opinion later on, but there is a logical connection between the scepticism on human rights and the advantages of democracy.

To some extent the present economic crisis has put to a test Bentham's assertion that *"reasons for wishing there were such things as rights are not rights: a reason for wishing that a certain right were established is not that right – want is not supply, hunger is not bread"*. Indeed, the lack of sufficient economic resources has made the public aware of the frailty of individual rights. Furthermore, there was continuous public pressure on the Portuguese constitutional court in order to convey with the restriction of rights. The reiterated statement that the people were living in a way "they had no means to afford" conveyed the idea that having rights costs money.

In consequence, the public disbelieve in the protection offered by any system of rights has increased. This is particularly so in what concerns economic and social rights. The question now is no longer to understand how to work towards expanding those rigths, but rather acknowledging that no progress ever made seems to be granted.

---

the result of fear of anarchy and excess inspired by news on the Terror period events. HART, ibidem, p. 666.

Fundamental social rights and *existenzminimum*[1]

Cláudia Toledo[2]

Abstract: While fundamental individual rights are unquestionably taken as subjective rights, the same does not happen with fundamental social rights. If they are subjective rights, they are justiciable. The main argument in favor of this understanding is based on liberty. The main argument against is the so called formal argument. In this article, fundamental social rights are stated as prima facie subjective rights. Nevertheless, one of them is an a priori definitive subjective right: the right to Existenzminimum (existential minimum). Its content is not settled yet. According to Robert Alexy, they are the rights to simple housing, fundamental education and minimum level of medical assistance. Existenzminimum is then related to the minimum necessary for factual liberty. Against the justiciability of fundamental social rights, there are also arguments related to the juridification of politics, the administrative discretion and the possible reserve clause. The counter-arguments refer to the original and exceptional competence; the necessary objective proof of state's economical incapability; the prohibition of State's will; the principles of legality and of the non-obviation of Judiciary jurisdiction; the Existenzminimun untouchable guarantee.

Keywords: Prima facie subjective rights; Justiciability; Human dignity.

I. Fundamental social rights and human dignity

Fundamental rights are the *positivation* of *human rights* (which have a moral character) in the national Law. Such *juridicization* is the result of secular *political struggles*. According to Robert Alexy[3], the moral constructions and claims from which the positivation of human rights result go back to the Classical Antiquity with, for example, Seneca texts, stoic

[1] This article presents the results of the post-doctorate research developed from September 2011 to December 2012 with Prof. Robert Alexy in the Juristisches Seminar of Christian-Albrechts Universität zu Kiel, Germany.

[2] Universidade Federal de Juiz de Fora.

[3] ALEXY, Robert. *Staatsrecht II*, *Vorlesung*, Christian-Albrechts Universität zu Kiel, April 5th 2012.

who preached the *cosmopolitism*—everyone is the manifestation of a *universal* spirit. In turn, the ideas of *dignity* and *equality* were developed by *Christian theology* (Genesis, New Testament and especially Paul), until the 18th Century *Enlightenment*, when finally it has got to its peak with the *Declaration of the Rights of Man and Citizen*.

While *fundamental individual and political rights* were consensually understood as *subjective rights* since the first moment of their positivation, the same did not happen with *fundamental social rights*, which appeared after those ones, only in 19th century. Until today, it is still polemical if fundamental social rights may be identified as real *subjective rights* or mere *objective* norms. As subjective rights, they are *judicially demandable*, that means they are *justiciable*[4]. As objective norms, they are an orientation directed to *Legislative and Executive Powers* for the elaboration and implementation of *State's goals* or its *political programs*.

According to Alexy, fundamental social rights are "rights of the individual before the State, to something that the individual, if had enough means and if there were sufficient offer in market, could also have from particulars"[5]: right to health, education, work and housing—all of them substantially guided by the idea of *human dignity*.

Dignity is a *semantically open* concept, i.e., a concept whose definition does not present a high accuracy level, but only joins a non-exhaustive group of related characteristics. Alexy states that the concept of dignity goes beyond the generic formula according to which the human being can not be transformed into an object. There are a lot of subjective rights related to it: *life, liberty, equality, physical integrity, privacy* rights and many others[6]. Because of this, Alexy synthesizes the wealth of

---

[4] Language is recognized as a *cultural manifestation* of the society, reflecting its *ethos*. This ethos is in constant formation and modification. So, the language is necessarily flexible, adaptable and passive of enrichment according to the growth of the complexity of the society's intersubjective relations. The creation and posterior demanding of concretization of fundamental social rights are examples of this social transformation. The development of language vocabulary makes the social transformation clear. The arising of the terms "justiciability," "justiciable" and "juridicization" is an illustration of this process.

[5] ALEXY, Robert. *Theorie der Grundrechte*. Baden-Baden: Suhrkamp, 1994, p. 454. See ALEXY. Grundrechte. *Enzyklopädie Philosophie* – hg. V.H.J. Sandkühler. Hamburg: Felix Meiner Verlag, Bd. 1, 1999, p. 525-529. ALEXY. *A theory of constitutional rights postscript*. Oxford: Oxford University Press, 2010.

[6] These rights are mostly fundamental *individual* rights. This makes clear the close relation among all fundamental rights, what demands the vision of their *indivisibility*.

adjectives and nouns related to the concept of dignity which, although exuberant, do not formulate a definition, due to the randomness of their choice, saying that dignity can be expressed by a *joint of concrete conditions*, which must be present for its assurance. It is certain that the content of this joint is not unanimous, but it is not completely *different* either. There is convergence of many aspects, so that many times the differences are related only to the *weight* given to some conditions of the same joint[7].

II. Fundamental social rights: *prima facie* subjective rights and human dignity

There are arguments *in favor* and *against* the consideration of fundamental social rights as *subjective rights*. The main *pro* argument is based on *liberty*. The main argument *against* this understanding is the so called *formal argument*, even though there is also the *substantial* one[8].

Liberty can be either *juridical* (right to do or not something) or *factual* (the concrete possibility of choosing among the allowed alternatives). According to this argument, *juridical* liberty does not have any value without *factual* liberty. The German Constitutional Court (*Bundesverfassungsgericht*) states that "the right of liberty would have no value without the factual preconditions for its exercise"[9]. Material and intellectual goods are then preconditions for selfdetermination. Though, factual liberty is not a matter of *everything-or-nothing*, but a matter of *degree*.

The *formal* argument against the definition of fundamental social rights as subjective rights is that they dislocate the *competence* of the establishment of social policies from *Legislative Power* to the *Judiciary one*. This would cause a judicial determination of the budget plans, which is incompatible with Constitution.

The *substantial* argument against this understanding refers to the *material* principles: *juridical liberty of the third party*[10], the *other's social*

[7] ALEXY. *Theorie der Grundrechte*, ref. 3, p. 322.

[8] *Ibid*, p. 458-465.

[9] BVerfGE 33, 303.

[10] Fundamental social rights would *collide* with *liberty* rights, because they are highly expensive, so the State can only accomplish them with a huge *taxation* on those who are not demanding them, that is, the *property owners*.

rights[11] and the *collective interests*[12].

Nevertheless, according to Alexy, fundamental social rights are *subjective rights* indeed and this is today pacific understanding of the *Bundesverfassungsgericht*. The author develops his thought based on his *theory of principles*, considering fundamental social rights as *prima facie subjective rights*. These are rights established by norms that have a *surplus content* or an *ideal* one. A fundamental social right only becomes a *definitive* one when the *factual liberty principle* has a *heavier weight* than the *colliding principles* in the concrete case.

III. Fundamental social rights: positive rights under principle structure

Fundamental rights are presented under the *principle* structure[13]. Their *mandatory* characteristic is stipulated by the *biding clause* in the German Constitution (art. 1, paragraph 3) which denies their *programmatic* character, stating that they are *immediately in force*.[14]

According to a detailed and rigorous conceptual specification, Alexy classifies fundamental social rights as *rights to something*, as *positive rights*. Their *positive action* can be either *factual* or *normative*. On one hand, they are *absolute* rights, because they oblige the *generality* of the society members. On the other hand, they are *general*, because they do not need *acquisitive deed*. They are *universal* from the *holder's* point of view, because they are *rights before everybody*. From the *logical* point of view, they are *abstract* rights, i.e., rights that are determined only in the *concrete situation*.

Fundamental social rights have a *wide range*, once they are fre-

[11] *Everyone* demanding the *equal* exercise (in the same degree) of fundamental social rights turns unfeasible the rights themselves, because the State cannot bear the costs of the requirement of the exercise of fundamental social rights by everybody in the same measures, as high as possible, that is, with the highest patterns of education, health, housing and work.

[12] There would be a preponderance of the *individual's* subjective rights—especially if many individuals demand the exercise of fundamental social rights—to the detriment of the whole society's interests, of the collective good.

[13] BOROWISK, Martin. *Grundrechte als Prinzipien*. Baden-Baden: Nomos, 2. Auflage, 2007.

[14] "The following rights [fundamental rights] bind Legislative, Executive and Judiciary Powers as immediately applicable right". See ALEXY, Robert. *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie*. Frankfurt am Main: Suhrkamp, 1995, pp. 264-267.

quently identified through the interpretation of juridical norms *conjunctions*, in which they are *explicitly* or *implicitly* presented. The understanding that there is a fundamental right only if there is a *correspondent normative provision* about it is an extreme *positivist* vision of Law, that promotes the *literal* or *genetic* interpretation rather than the *systematic* one, which is broader and more complex. In German legal theory and case law, the *integral* and *wide* comprehension of the constitutional text is dominant.[15] This is the kind of interpretation required by the high *semantic openness* that not only fundamental social rights, but *all* fundamental rights have, due to their high *value density* (they rule the values socially taken as *essential*).

Many times, the recognition of fundamental social rights happens through a *counterfactual argumentation*: if the *non-recognition* of a juridical position leads to an *irreconcilable consequence* with the *constitutional order*, such juridical position must be *recognized*. Thereby, the *criterion* for the *correction* of the *justification* of a fundamental social right *adscription* to another *positive* right is the demonstration that the *denial* of this adscription is wrong, because it contradicts the juridical system as a whole[16]. This is possible through a *correct constitutional justification*.

Alexy's *theory of legal argumentation* aims precisely the *correction* in the justification of the value judgments that integrate juridical norms and the juridical discourse. So it delineates *forms* and *rules* to be complied, which act as *objective criteria, procedures* to achieve the *maximum rationalization* of the *juridical discourse*.[17]

IV. *Existenzminimum* as definitive subjective right

There is a *core* of rights, which appear *a priori* as *definitive*. It stems from the *totality* of fundamental social rights. The set of these rights form exactly the *Existenzminimum*. As a definitive right, the *Existenzminimum* is *justiciable*, i.e., its *immediate compliance* is demanded from *Public Pow-*

[15] The *classic-liberal* interpretation of fundamental rights identifies them only with *liberty*, i.e., *negative rights*, from which results a marked limitation of their content.

[16] ARANGO, Rodolfo. *Der Begriff der sozialen Grundrechte*. Baden-Baden: Nomos Verlagsgesellschaft, 2000, p. 45-46.

[17] ALEXY, Robert. *Theorie der juristichen Argumentation*. Frankfurt am Main: Suhrkamp, 7. Auflage, 2012.

ALEXY. *Teoría del discurso y derechos constitucionales*. México: Distribuciones Fontamara, 2005.

er.[18]

If its content is not pacific even in Germany yet, which was one of the first countries to create this concept, it is for sure controversial in Brazil. Alexy understands that it is compounded by the right to *simple housing*, *fundamental education* and a minimum level of *medical assistance*[19]. It is certain that the *content* of the *Existenzminimum* varies according to the cultural, local, economical and historical context—the richer the country is, the broader is the *Existenzminimum*.[20]

It is a concept oriented by the idea of *factual equality*. *Juridical liberty* is empirically enabled based on it. Nevertheless, it is difficult to define precisely in relation to which *aspects* this factual equality must exist. The recourse to *historical comparisons* and also comparisons with the reality of *other countries* is necessary. Its content is always related to the *present* conditions, guided by the *effectively existing life level*, once the equality principle appears as *means* to assure human dignity.

Indeed, everything turns to be a matter of *pondering*, indispensable in cases that involve fundamental rights.[21]

The German Constitutional Court (*Bundesverfassungsgericht*) relates the *Existenzminimum* to the principles of *human dignity*, *free development of personality*, *equality*, *Social State* and right to *life* and to *physical integrity*. Although sparse references to the *Existenzminimum* had already been done in the 90's, its precise determination was done by the decision BVerfGE (125, 175, on February 9th 2010), which specified the amount of money that corresponds to that *minimum* and must be paid by the State to the individual, according to each specific factual situation.

In Brazil, the first reference to it was done by the Constitutional Court (*Supremo Tribunal Federal*) in 2004 (ADPF 45/DF, 2004).[22] From then on, the use of *Existenzminimum* notion in Brazilian constitutional case law is increasingly present. Only between 2004 and 2008, there was

---

[18] This is the understanding of both German and Brazilian legal theory and case law.

[19] ALEXY. *Theorie der Grundrechte*, ref. 3, p. 466. In Brazilian legal theory, see, among others, TORRES, Ricardo Lobo. *Direito ao mínimo existencial*. Rio de Janeiro: Renovar, 2012.

[20] For example, "fundamental education", considered by Alexy as one of the rights that compound the Existenzminimum, includes high school and technical education, what clearly does not correspond to Brazilian reality.

[21] Among others, see ALEXY, Robert. *Derechos sociales y ponderación*. Madri: Fundación Coloquio Jurídico Europeo, 2007.

[22] Minister Celso de Mello was the rapporteur.

a growth of more than 300% in relation to its assertion and protection.[23]

This first decision related to *Existenzminimum* in stated the necessity of its preservation "in favor of individual's integrity and intangibility." The new Brazilian constitutional hermeneutics began to assure *immediate effectiveness* to *all* fundamental rights. They are considered "full effectiveness norms".

Brazilian Constitutional Court (*Supremo Tribunal Federal*) considers that there must be protection against "situations that threaten the *Existenzminimum*," because without it, *human dignity* is "mere utopia" (AI 583594/SC, 2009).

The insurance of "human dignity conditions", which is presented as a "central constitutional goal" (AI 583594/SC, 2009), means not only to assure the protection of fundamental individual rights, but also the "minimum material conditions of existence" (ADPF 45/DF, 2004). Thus, *Existenzminimum* appears as the "joint of fundamental rights without which human dignity is confiscated" (AI 684829/SP, 2008).

State's omission in complying with fundamental social rights which are part of the *Existenzminimum* constitutes an "illicit conduct," whose consequence is the judicial establishment of deadlines for the State's provision through "imposition of daily fines".[24]

V. Fundamental Social Rights: justiciability and *existenzminimum*

V.I . Arguments against

Here comes the polemic questioning about the judicial decisions which order State's compliance with fundamental rights—especially the social ones. The argument is that these decisions would be *improper* due to these main reasons:

(1) This situation would configure a *politics' juridicization*, since *Judiciary Power* would be determining the acts of the *other powers*, what would assail the *principle of separation of powers*;

(2) The *principle of democracy* would be affected too, because the political decisions' *legitimacy* belongs to *Legislative* and *Executive Powers*, compounded by *popular representatives*;

(3) *Public power* has *administrative discretion*, which would be tak-

[23] Until last year, there were more than 80 decisions directly referred to Existenzminimum.

[24] According to art. 644 and 645/CPC, Brazilian Code of Civil Procedure.

en away by Judiciary Power acts;

(4) The recourse to the *possible reserve clause* is suitable, when the effectiveness of fundamental social rights is *financially unviable* for the State, due to their high costs.

V.II . German Constitutional Court case law and Alexy's Thought

Both German and Brazilian Constitutional Courts consider and answer these arguments *in the same way*. Once the *concept* and the *demand* of *Existenzminimum* are older in Germany, the position of German Judiciary Power is more consolidated in this respect.

These are some of the German Constitutional Court positions:

(1) Indeed, *Legislative Power* has the *original* competence to decide about the *limits* of social assistance, *how* it can and must be done, according to the existing *means* of the State and its *other* equally important *obligations*;

(2) Nevertheless, when the question is about the assurance of the *minimal conditions* for a *dignified existence*, *Judiciary Power* is competent, because this is duty of the "*public community*" of which it takes part.

Alexy analyzes the arguments *in favor* and *against* the *justiciability* of fundamental social rights and its implications. He states that:

(1) Fundamental social rights are so important that their *assurance* cannot be left to the decision of a *simple parliamentary majority*;

(2) There is no *previous* determination of which fundamental social rights are *definitive*;

(3) This determination is a matter of *pondering* among principles—on one hand, there is the *principle of factual liberty*, on the other hand, the *formal principles of democracy* and *separation of powers*, besides the *material principles* of *third party's juridical liberty,* of *other's fundamental social rights* and of *collective interests*.

V.III . Brazilian Constitutional Court case law

Brazilian Constitutional Court has stated that:

(1) Fundamental social rights are *justiciable*. Since the decision of 2004, *Judiciary Power* is asserted as competent to decide claims related to the non-compliance with fundamental social rights;

(2) These rights are not only a matter of *social politics* derived from programmatic and non-imperative norms, subordinated to *Execu-*

tive Power. They have *immediate effectiveness*;

(3) They are *subjective rights* really, not mere objective norms, which oblige the State only *objectively*, that means, they justify *duties*, but do not grant *rights*;

(4) They represent an *inalienable constitutional prerogative*, which is not subordinated, during its concretization process, to reasons of pure governmental pragmatism;

(5) Even though the prerogative to *formulate* and *execute public policies* is *primarily* of *Legislative* and *Executive Powers*, if the public bodies primarily competent do not comply with the *political-juridical charges* mandatorily imposed to them, coming to compromise, with their *omission*, the *effectiveness* of fundamental social rights, *Judiciary Power* is *exceptionally* competent to determine the implementation of public policies especially if they are defined by *Constitution* itself;[25]

(6) The simple allegation of the *State financial incapacity* followed by the recourse to the *possible reserve clause* is not enough for the non-compliance with fundamental social rights. The referred material limitation must be *objectively demonstrated*. Otherwise, the behavior of Public Power is *illicit*. After all, taking the *rights* seriously means taking the *shortage* seriously. State's shortage must be articulated with the "allocation choices" of public spending. However, the *demanded pretension* mentioned as content of the *Existenzminimum* by the individual must be reasonable, i.e., *reasonability* is the judgement criterion for the analysis of the requested right;

(7) *Judiciary Power* is competent to determine the compliance with fundamental social rights:

(7.1) In case of State's *abusive behavior*, such as *State's inertia*, *unreasonable procedure* or procedure with clear intention to *neutralize the effectiveness* of fundamental social rights;

(7.2) In case of *State's arbitrariness* towards the compliance with fundamental social rights, extrapolating the legal *discretion power*;

(7.3) On the basis of the fact that the *conformation liberty* of *Legislative* and *Executive Powers* is not *absolute*, but have a *relative* character;

(8) There is the necessity of harmony of the *public administration*

[25] The identification of *omissions* or *State actions* that violate fundamental social rights corresponds to the determination of what is *legally due* and what is only *legally acceptable*. The *border* between both hypothesis is markedly *fluid*, depending on the *conditions* and *circumstances* of the concrete case, as all the situations that involve fundamental rights.

acts with the *principles of legality* and *of non-obviation of judicial control*. Public Power is subordinated to a *legally biding* constitutional mandate, which represents a factor of political-administrative *discretion limitation*;

(9) *Judiciary Power interference* in *public administration* does not necessarily implies offense to the *principle of separation of powers*, because the *Legal State* is subjected to *jurisdiction*. Due to the *high biding degree* of Public Power to the satisfaction of fundamental social rights by virtue of its *essential* character, it is possible that *Judiciary Power*, if State is in default, determine it to implement *public policies constitutionally provided*. After all, *public spending* with *public policies* is subordinated to the administrator's *convenience judgment and opportunity*, but not to his *arbitrariness*;

(10) The conception of *Existenzminimum* prevails over the *possible reserve clause* one (ADPF 45/DF, 2004; AI 658491/GO, 2011; RE 667745/SC, 2012);

(11) The necessity of satisfaction of the *minimal conditions* for a *dignified existence*, i.e., of the *Existenzminimum* is untouchable. Thus, the establishment of *priority aims* is due. The discussion about which other projects might receive investment must be related only to the *remaining resources*.

In virtue of all these positions, Brazilian Constitutional Court considers that there is really a *political dimension* (ADPF 45/DF, 2004) in *constitutional jurisdiction*, which ultimately controls the subordination of all State acts to the Constitution. Constitution is precisely the materialization of the encounter between *Politics* and *Law*. The observing and compliance with fundamental rights are exactly the result of the Public Power subordination to constitutional norms.[26]

VI. Concluding Remark

In short, two conclusions are clear in relation to fundamental so-

[26] Nowadays in Germany, the *Existenzminimum* concept transcends the *juridical sphere* and it is an idea that guides the *Executive Power* measure called *Hartz IV*, a program created in 2005, whose aim is the support to the *unemployed*. However, its sense goes beyond, once it seeks the stipulation of the due *values* to each specific concrete case, in order to ensure the *minimal material conditions* necessary to the assurance of *human dignity*. That is, the pecuniary amount corresponds to the *Existenzminimum*. The amount of 391€ is monthly due to the *individual*, added to the financial cover for *proper housing* and *health care*. In Brazil, there is a similar government program called "Bolsa-Família" since 2004. It is also guided by the idea of *human dignity* and ensures the minimum benefit of R$ 70,00 (about US$ 30) to the individual.

cial rights:

(1) All fundamental rights are *subjective rights*. So they are *justiciable*. They are *prima facie* rights that become *definitive* in the concrete case. Alexy emphasizes this understanding by stating that "*non-justiciable* fundamental rights are a *lie*"[27]. He adds that the justification specifically of fundamental social rights is to promote to those who were not *lucky* to be born in a family with a reasonable economic situation, the *access* to similar opportunities and material goods;

(2) The *effectiveness* of fundamental social rights depends on the way the *individual* is seen by the society to which he belongs: if as a *legal subject* or as a juridical order *object*.[28] Increasingly, the countries, in the search of *democracy* – which always develops as a *process* and therefore it is built by forward and backward –, consider the individual as a *holder of subjective rights* and progressively no longer as an *object of public interest* to be treated by State's *social assistance service*, in such a way that *public security* and *social order* are ensured. In other words, individuals always seen as *disturbing objects*. Individuals not endowed with a *value on their own*, but a *social problem* to be solved. Briefly, to respect individual's fundamental rights means to *take the individual seriously*.

References

ALEXY, Robert. *Theorie der Grundrechte*. Baden-Baden: Suhrkamp, 1994.

---. *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie*. Frankfurt am Main: Suhrkamp, 1995.

---. Grundrechte. *Enzyklopädie Philosophie* – hg. V.H.J. Sandkühler. Hamburg: Felix Meiner Verlag, Bd. 1, 1999, p. 525-529.

---. *Teoría del discurso y derechos constitucionales*. México: Distribuciones Fontamara, 2005

---. *Derechos sociales y ponderación*. Madri: Fundación Coloquio Jurídico Europeo, 2007.

---. *A theory of constitutional rights postscript*. Oxford: Oxford University Press, 2010.

[27] ALEXY, Robert. *Staatsrecht II*, *Vorlesung*, Christian-Albrechts Universität zu Kiel, April 5th 2012.

[28] ARANGO, Rodolfo. *Der Begriff der sozialen Grundrechte*. Baden-Baden: Nomos Verlagsgesellschaft, 2000, p. 29-30; 50-55. See ARANGO. Basic Social Rights, Constitutional Justice and Democracy. *Ratio Juris*, vol. 16, 2003, p. 141-154.

---. *Theorie der juristichen Argumentation*. Frankfurt am Main: Suhrkamp, 7. Auflage, 2012.

ARANGO, Rodolfo. *Der Begriff der sozialen Grundrechte*. Baden-Baden: Nomos Verlagsgesellschaft, 2000.

---. Basic Social Rights, Constitutional Justice and Democracy. *Ratio Juris*, vol. 16, 2003, p. 141-154.

BOROWISK, Martin. *Grundrechte als Prinzipien*. Baden-Baden: Nomos, 2. Auflage, 2007.

TORRES, Ricardo Lobo. *Direito ao mínimo existencial*. Rio de Janeiro: Renovar, 2012.

Brazilian Federal Constitution, 1988.

GERMANY. Bundesverfassungsgericht. BVerfGE 33, 303, July 07th, 1972.

GERMANY. Bundesverfassungsgericht. BVerfGE 125, 175, February 09th, 2010.

BRAZIL. Supremo Tribunal Federal. ADPF 45/DF, May 04th, 2004.

BRAZIL. Supremo Tribunal Federal. AI 583594/SC, December 03rd, 2009.

BRAZIL. Supremo Tribunal Federal. AI 684829/SP, October 14th, 2008.

BRAZIL. Supremo Tribunal Federal. AI 658491/GO, September 02nd, 2011.

BRAZIL. Supremo Tribunal Federal. RE 667745/SC, March 05th, 2012.

BRAZIL. Code of Civil Procedure, 1973.

The rhetoric of resignification:
The hidden face of spiritualist scientism in Pontes de Miranda and the effect of opacity

André Lucas Fernandes[1]

Abstract: The construction of a historical-rhetorical research, along the lines placed by Adeodato, follows a series of reconstructed categories from Aristotle, Ballweg etc. So are analyzed within specific methodology: pathos, ethos and logos in the Pontes de Miranda's works. In addition, the triadic structure (material, strategic and analytical rhetoric) is designed for a more suitable reconstruction of the history of ideas of the Brazilian jurist. In addition, a metaphor of "play of lenses" is designed to facilitate the presentation of the conclusions. The "metaphors operator" is a cultural figure that appears in today's complex society, a flagrant reaction to the high degree of fluidity of their social environment and fragmentation that characterize our time. Thus the subject-observer postmodern lives in an environment of constant provocations and proposals. In this way, values such as subversion will be of great value to this paper. Metaphor here is the human capacity to move of its axes preestablished meanings in cultural constructions earlier. The metaphor then is, itself, a constant innovation. What was dynamic energy dies, being fixed on winning story through symbols which together form, in the first instance, the phenomenon of tradition. This paper aims to demonstrate the gap between what "was said" about Pontes de Miranda and what was actually "written" in his works. Starting with the philosophical classification of the Brazilian jurist, consolidated as "logical positivist" and later "critical nominalist". Despite of being an heir of thought coming of the Vienna Circle, Pontes de Miranda exceeded expectations and ways of thinking about the world that the philosophical group used. The ontology in Pontes de Miranda is a "provisory ontology" that attentive to the limits of science. "Ontology" with quotes differs fundamentally of Ontology, without quotes, ie the classical ontology. Going forward I intend to launch reflections on the work of the jurist and his transition from a "faith in science model" to an operationalization of law based on science.

Keywords: Rethoric. Metaphor. Scientism.

[1] Is a graduate student at the Faculty of Law of the Recife - Federal University of Pernambuco. With research scholarship by PIBIC FACEPE / CNPq. Studies the life and work of Francisco Cavalcanti Pontes de Miranda. Founder of the study group in General Theory and Philosophy of Law, Law in Focus.

So I need to introduce specific terms used in my research: as metaphor, metaphor operators and others.

The "metaphor's operator", or observer, is a cultural figure that appears in today's complex society, since it is a reaction to the flagrant high degree of fluidity, of the dilution of social environment and fragmentation that characterize our time. Thus the postmodern subject-observer lives in an environment of constant proposals and provocations. So, values such as subversion will be of great value to the lecture placed here.

The notion of the operator is also a metaphor. But what is a metaphor? Metaphor here is the human ability to displace the axes of predetermined meanings in earlier cultural constructions. The metaphor then is, itself, a constant innovation. The meanings established are merely metaphorical constructions that were plastered. What was dynamic energy dies, being fixed on a winning story through symbols which together form, in the first instance, the **phenomenon of tradition**.

The metaphors' operator is also a skilled handler of lenses. It is the qualification of the lens (opaque, crystalline, concave, convex) that modifies the mode of social action of the subject, all this from a metaphorical perspective rebuilding the world from the schemes of images.

By the arrangement of lenses is possible for man to build various combinations to observe society with unlimited possibilities, because the lenses are also modifiable. We have then the social actor. Acts as a unit operating within an organizational whole, independently but within the margins of a preterit script whose guidelines were demarcated by the cultural construction of the previous generation - the generation that designed its symbolic framework about the world in which operates the current generation.

On what gnoseological premises this essay intends to build its conclusions? Determinism and combination possibilities or subject-object conjugation? The vision of the metaphor might imply that the subject, who operates his lens, performs an action without limits. That is not the sense proposed here. There are limits on the duplicitous gnoseological relationship: on one hand, it requires the object, on the other, empece the subject.

Has endorsed opinion, decades ago, the very Pontes de Miranda, Brazilian heir of logical positivism of the Vienna Circle, whose work is exemplary case of this lecture, showing the form of combination of lenses and one of his most perverse rhetorical effects which is the **opacity**.

Opacity is the adjective of the noun "lens" here as a metaphori-

cal instrument that shows how the subjects construct their questions by looking at the history of ideas. The phenomenon of opacity can specialize in five different formats that take into account the interference of the subject in examination of the object. Quintuple subdivision is also artificial, so we have: **mythmaking**, **depreciation**, **subordination**, **decontextualization** and **juggling**. By analyzing "the symbol Pontes de Miranda" in National Legal History of Ideas, I will concentrate on showing: mythmaking and the juggle.

The mythmaking makes reference to the effect of opacity that builds around the object observed a laudatory story, mystifying and at the same time making inaccessible the thinker ideas. The metaphor of lenses here comprises an opaque lens in its periphery that directs a huge amount of light concentrated. The mythmaking is a burning opacity.

"The juggle" is the specialization with the most nefarious effect. This is in any observation of world. Presupposes the mere use of opaque lenses and unguarded with appropriated light. This specialization removes of the "medium culture" the particular author's ideas in a historical period without causing weirdness. Psychological component here functions as the cloak of the magician who makes them disappear without giving an explanation to the auditorium. Without a step by step reconstruction – opposing a scientific attitude.

Every specialization can be combined with another. The case presented here illustrates the point. So is that, like physical lenses, observer's cultural lenses can be "added" to each other creating new effects and increasing the crystallizer potential of a specific observation.

There is a real gap between what "was said," and what is effectively "written" in Pontes de Miranda's Work. Starting by the classification of the jurist, in the history of philosophical ideas, consolidated as "logical positivist" and later a "nominalist", in a "critical way". Though, being an heir of the Vienna Circle ideas, Pontes de Miranda exceeded expectations and ways of thinking about the world of that philosophical group.

The theory of knowledge that Miranda discusses in his essay **O problema fundamental do conhecimento -** Fundamental Problem of Knowledge (1999) cannot be understood as adherence to nominalism, yet critical. There is confusion, especially involving the "jective equation" (equação jetiva, a neologism used by him), and the scientific model, that is explanatory, logistical in a way that Pontes de Miranda proposes. The model is used to "track" the knowledge and the idea that universals are simply names, unmatched in the real world.

Nominalism[2] denies the existence of the universal in the world of experience, or thought - it is mere *flatus vocis*. Miranda thinks ject, not universal - and the use of a new name is a rhetorical strategy of the jurist - is extracted from an operation that relates the two aspects: it is not realistic, is not conceptualist. The operation of the extraction, the mental operation, necessarily passes through the two poles: the object and the subject. Not present one of the poles increases the inaccuracy of the knowledge process.

Books and books on the history of philosophical and legal ideas share a common pattern that resembles a kind of "zeitgeist" restricted to a few decades of the twentieth century in Brazil and can be detached historically as a unit - so the twenties until the seventies. The proposed suggestion is to think a new category called **spiritualist scientism**, which meets pragmatic conclusions, rhetorically self-referential, in a rhetorical methodology.

By spiritualist scientism I mean nothing beyond the **commitment with scientific methods**, especially the induction, the **relativity of scientific knowledge**, the **positive view of the world** and **complex relationship with the subject**. Spiritualist scientism proposes a political action having the science knowledge as a background to manage the society. Its biggest function is to generate models that translates the real and make us able to operate logistically the society to achieve the greatest degree of happiness possible. The theory of Pontes de Miranda is systemic.

So, I would like reiterating that Miranda does not commit "intellectual imposture" in the sense proposed by Alan Sokal in his book. He is not inserted into the epistemological dimension of postmodernism, which Sokal analyzes. He remained loyal to his thought, whose adaptations always made reference to the same "theoretical paradigm" preceding the fifties. Pontes de Miranda understands, from the Cartesian premise that human knowledge is one and the division in **scienceS** is a didactic "play", however, make sure to point out that the conceptual transposition between the sciences is an "artifice" to better express ideas and understand the phenomena of the world.

---

[2]The doctrine that universals or general ideas are mere names without any corresponding reality, and that only particular objects exist; properties, numbers, and sets are thought of as merely features of the way of considering the things that exist. Important in medieval scholastic thought, nominalism is associated particularly with William of Occam.(OXFORD DICTIONARIES, 2012).

The ontology in the work of Miranda is an "temporary ontology" aware of the limits of science. "Ontology" with quotes differs fundamentally of Ontology, without quotes. Conceptually different, the first is attached to the principle of relativity, attached to the idea of science: science as a "posture" to know and that is very close to the position of Adeodato, and the analytical Rhetoric. The question that led to the conclusion in the research: we must also use the term ontology taking into account an entire historical collection it carries?

The "jects' theory" serves as an explanatory scheme to methodological explanation of science and the world itself. It is worth taking into consideration that "the fundamental problem" is an essay on science, but would not be inside a scientific practice. It is like the theoretical basis or a starting point.

I think Pontes de Miranda is situated in a "diffuse" middle term of the dichotomy between: rhetoric (being cognitively poor) versus ontology (being cognitively rich). Scientific knowledge for Pontes de Miranda is an attempt of knowing in a probable and rectifiable way. Is not "the correct" or "the just" but only "tendencies" of correctness and fairness.

So, the **opacity** functions as a differential in the observation when we talk about the history of ideas. Pontes de Miranda was always known by the project to construct a Brazilian science, specifically a science of law in Brazil. This "tag", the scientific tag, attributed, rightly, to the jurist concluded the phenomenon treated in the exhibition of these ideas. As in sociology, opacity operates an effect of the inclusion by exclusion, in a cyclical relationship: the work of Miranda receives the filter of opacity that qualifies as "scientific", and ontological.

It is precisely through the mythmaking (and here would be adjectives like "genius" or "brilliant"), that the opacity was formed and crystallized, excluding the real and objective appreciation of what he wrote. The consequences are, and were the most damaging. By the opacity, several misunderstandings about his thinking took place, blocking a balanced view that recognizes the limitations and contextual true thought of the jurist.

Combining mythmaker effect, the lens of juggling reached maximum crystallization effect extracting and stabilizing senses with low "scientificit degree" or "scientific prudence." In other work I intended to demonstrate how the thought of Pontes de Miranda was more complex and avant-garde than the narratives about his work make it seem. This conclusion does not work from the "genius", but from the objectivity

with which the work of Miranda is analyzed.

The **Juggle** also overshadowed the political, educational and prescriptive dimension of Miranda's work. He that all the time insists on the possibility of, with the adoption of those ideas, builds a better future for the man. Opaque lenses are a fine strategy of observation, but cannot escape a common denominator: always act with greater efficiency when greater is the lack of knowledge about some work, on which focus its affects. Every strategic observation by opaque lenses and their specializations generates a refractive effect which apex is the maximum crystallization.

In this direction, the metaphorical effort "dies" to give rise to a catachresis - figure of speech that represents the end or sharp decline in metaphorical power and consolidation of a sense for a particular expression. The catachresis no more moves spaces of socially constructed meaning; it is a hard space, immobilized by the acceptance of the use. The comparison here is made with a catalyst that boosts certain reaction, but crumbles when make this work: the metaphor of the observer who operates with lenses is a "catalyst" that performs a rhetorical optimization in the observation - though not objective - of history of ideas.

The high intensity of the refractive effect feeds on ignorance, as I have said, and stimulates it. Producing a certain "story", the observation incorporates the narrative as a code, re-producing a sequence of imprisoning reports in a process programmed to stop and die in a historical catachresis.

How break the winner report/winner story/winner narrative and their crystallization? My suggestion pursuit an effort to think about the question of historical revisionism, after the "dive", analyzing the work in his context, with scientific prudence. It should be noted, finally, that the work of Miranda is huge. If ignorance prevails, also reins unavailability – of books and readers. The "system" is spread all over dogmatic writes, but, and that's fundamental, in philosophical and literary works in which establishes an "aphoristic", influenced by Nietzsche.

Lourival Vilanova noticed a partial disruption between the "system of positive science of law" and "private law treaty", key works of Pontes de Miranda. But recognizes the guideline of what he called "jurist scientist" - in the sense of "attitude / posture" mentioned earlier. Such discontinuity, in my view, comes with old age and his distance from attitude of "jurist scientist" to prestigious "lawyer referee" committed to dogmatic solutions.

So now i bring synthetic conclusions from the use of the catego-

ries of a rhetorical methodology:

At the level of **material rhetoric**: Pontes de Miranda was inserted in the vicinity of the Old Republic, in an environment of early national science foundation. At the **strategic level of rhetoric**: is fundamentally the use of broad categories and in his attitude to influence the world with their theories. Theories always focused on the clash between the attitude of spiritual scientism and an attitude of creating models committed to democracy, with a liberal moral and also with a specific scientific socialism. Pontes de Miranda has not entered into open clashes of opinion. At the level of **analytic rhetoric**: the conclusions lead to the foundation of a new classification category in a national legal history of ideas, spiritualist scientism.

Regarding the **ethos** is possible to refer to the financial power of his rich family in Alagoas, especially in the context of the Old Republic. The very embodiment of sarcasm and irony in the texts. Besides the call to humble and incessant labor.

As for **pathos** we have the flagrant high level of scholarship, the aphoristic and scientism. All mixed into a common language, seeking to persuade and educate a population to a science project. Thus, fit using metaphors and allegories.

For logos: the use of alethic logic generating the apparent break with the modeling logic treated in System of Positive Science. But in the end the theory of juridical fact of Miranda that guides and architect his general theory of law is ordered by a alethic logic? With a necessarily break that Vilanova teachs? It is not possible to give a conclusive answer yet, but it seems to me that the answer would be negative. No category functions well in front of Pontes de Miranda eclecticism: perhaps the category that is designed for its own name "ponteano"/pontesian? Ideas with intertexts and associations, but extremely critical and unique. The theory of juridical fact of the Private Law Treaty, is a "dogmatic issue" - belongs to a dimension of law as practice. The science of law which is in System of Positive Science is a metalanguage, or perhaps, for greater accuracy, is a dynamic background that crosses and guides all thought of the author. For sure, it is a controversial historical figure.

References

ADEODATO, João Maurício Leitão. **A retórica constitucional: sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo**. São Paulo: Saraiva, 2009. 195 p. ISBN 978850277461. BURKE, Peter. **O que é história cultural?**. 2 ed., rev. e ampl. Rio de Janeiro: J. Zahar, 2008. 215 p. ISBN 9788571108387.

MIRANDA, Pontes de. **O problema fundamental do conhecimento** / Pontes de Miranda. – Campinas: Bookseller, 1999. 329 p. ISBN 8574680044.

_____. **Sistema de Ciência Positiva do Direito** / Pontes de Miranda. – Campinas: Bookseller, 2005. 1600p. ISBN 8574683507.

NIETZSCHE, Friedrich Wilhelm. **Obras incompletas.** São Paulo: Nova Cultural, c1999. ISBN 85-13-00857-5.

FERREIRA, Luis Pinto. **Historia da Faculdade de Direito do Recife**. Recife: Ed. Universitária da UFPE, 1980. v. ISBN

REALE, Miguel. **Figuras da inteligência brasileira** / Miguel Reale; - 2ª ed. refund. e aum. – São Paulo: Siciliano, 1994. 8526706810.

SKIDMORE, Thomas E. Uma história do Brasil. São Paulo: Paz e Terra, 1998. 356p ISBN 8521903138.

VITA, Luis Washington. **Panorama da Filosofia no Brasil.** Porto Alegre: Globo, 1969. ISBN.

Preserved sophistic rhetoric as part of Aristotle legacy to the history of legal persuasion

Lourenço Torres[1]

Abstract: This paper presents a study on the concept of legal persuasion and, in particular, the possible transition that this practice suffered over a considerable period of time, specifically, during the Sophistic period to the Aristotelian one. It studies the concept of legal persuasion over the time. Presents Plato's ambiguous relationship to Rhetoric and asks if the concept and practice of persuasion have suffered the same disbelief that received the Sophists in that lapse of transition. Also studies Aristotle's compilation phase in his book Rhetoric and his rhetorical persuasive emphasis. It concludes that Aristotle preserved the main Sophistic arguments on persuasion.

Keywords: History of Philosophy. Legal Persuasion. Rhetoric.

1 Introduction: The concept and importance of persuasion.

The matter of the persuasion is something argued long time ago and, with certainty, it is not restricts to the sudden interest that have been given to this subject in the recent years, with the attempt of understand or to analyze it in an instrumental way as abilities directed to reach speech success or the decision success. This interest had made possible the institutionalization of its study in such a way that it is possible to find specialized courses in important universities that are only

[1] José Lourenço Torres Neto is a lawyer and Law teacher in Faculdade Joaquim Nabuco - Recife/PE/Brazil. Has Master degree in Theory, Sociology and Philosophy of Law by UFPE (Brazil); is Bachelor in Law and Procedural Law specialist by UNINASSAU campus Recife/PE (Brazil); is also a researcher member of the Rhetorics in History of Brazilian Legal Ideas UFPE (Brazil) researching group coordinated by Prof. Dr. João Maurício Adeodato. Email: lourenconeto@yahoo.com. CV Lattes at: <http://lattes.cnpq.br/7901606887149048>.

dedicated to its reflection.

Persuasion is mixed with decision according to some definitive conceptions, both been used some times as synonymous. Therefore, persuasion is relevant in the legal sphere which is flooded with decisions of many kinds. This is because the persuasion that does not have for target the decision, is empty, and all decision are drift from an internal personal persuasion or from an external influence; this deliberative capacity of choosing judgments. Moreover, persuasion also is intrinsically related with argumentation and rhetoric. Its entire argumentative load is a permanent social phenomenon and, historically, it was always there in all epochs and in all great cultures. Its variation level is what awakens greater or minor interest. To study it is important because, even so the forms and the degrees of intensity of its application could varies, always it will be non-separable from communication and language, important factors in the world of Law.

Therefore, the object of this study is **persuasion** and my purpose here is to present in short a study on the development of the concept of **legal persuasion** and, in particular, the possible transition that this practice suffered over a considerable period of time, specifically, during the Sophistic period to the Aristotelian one. So, this work aims to study the concept of legal persuasion over the time. Having in mind Plato's ambiguous relationship to Rhetoric, I question if the concept and practice of persuasion have suffered the same disbelief that received the Sophists in that changeover lapse. It goes by and through the ideals and the practice of relativism of the Sophistic movement, until Aristotle compilation phase on restrictive persuasion in his book *Rhetoric*. That generated a concern about an (unfounded) prejudice against the Sophists and the large volume of Aristotle's work which preserved only the persuasive rhetoric from the Sophists. To accomplish this objective I go through the considerations of authors such as Werner Jaeger, Romeyer-Dherbey, and Guthrie, in addition to Aristotle himself.

I find, on one hand, that the rhetorical Sophists preferred to leave any objectivity and certainty to open an unlimited space for communication, language and freedom of thought; their most powerful weapon to persuade in their speeches. And I concluded that Aristotle, on the other hand, despite the influence he receive from his teacher Plato against the Sophists, do not ignored the importance of aesthetics nor the strategic relevance of persuasion in their rhetoric speeches. Thus he preserved the main Sophistic arguments, describing and developing them, objectively, as technical means, for legal discourses.

2 The Sophists

The concept and practice of persuasion was already developed in the Antiquity and its study invaded the day-by-day use of the citizens living in the Greek *polis*, who were familiar to the Sophists and its rhetoricians' political, legal and exhibitive speeches. However, although such analyzes were so old, until today a preconception persists with respect to the Rhetoric and the Sophistic, also resulting in an absurd ill-confusion.

Guthrie gives to us a view out of the Greek definition for persuasion by some of their teachers, the Sophists:

> *Peitho*, Persuasion, was for them [the Greek ones] a powerful goddess; 'the charmer to whom nothing is denied', Aeschylus called her (*Suppl*. 1039f), and Isocrates a century later reminded his Athenian audience that it was their custom to offer her an annual sacrifice (*Antid*. 249). Gorgias in his *Encomium of Helen* – a school exercise in rhetoric, sophistic in every sense – names speech and persuasion as the two irresistible forces[2].

In the Athena of the 5th century B.C. there were an educational system that allowed any citizen to assure that its children studied with great scholars, so that, when they were free men (adults), they could fulfill adequately their rights and duties as citizens. Before the Sophists, the educators of Greece were the poets[3]. Notice that formal education were an exclusiveness to castes and social privileged ones, but the State tried to surpass the system of privileges of the old education that believed that *arete* should be accessible only to those who had divine blood. Moreover, it was the State who organized periodically open matches to the citizens where they also practiced singing, poetry and athletics as complementary forms of education[4].

In sprouting (emerging, rising) the democratic State was concomitant the practice of public assemblies and freedom of word or expression. This became indispensable the oratory endows and it was converted into an "authentic helm at the hands of the man of State". In the Classic age and for some centuries that had followed the legal or the politician orator was called rhetorician, *rhetor* (ῥήτωϱ), and that word

[2] GUTHRIE, W. K. C. The Sophists. Cambridge, 2005, p. 50.

[3] ROMEYER-DHERBEY, Gilbert. Les Sophistes. Paris: Puf, 2002, p. 5.

[4] JAGER, Werner Wilhelm. Paideia: The Ideals of Greek Culture. 2nd. ed. New York: Oxford University Press, 1944, p. 336-337.

did not have the formal meaning that it acquired later. The political education of the heads was based on eloquence which was necessary for the orator's formation. It had in the *logos* a higher mingling of formal and material. That's how it is understood the emerging of a class of educators who offered publicly, for money, the teaching of "virtue", as previously described[5].

It was a period of prestige of knowing. Only after the critics of Plato and Xenophon is that the term "sophist" would start to be synonymous of "possessor of a false knowledge", and that knowledge searched only for those who wanted to deceive, making for this considerable use of the paralogism[6]. The "sophist" term would not only be discredited, but its master teses also had been tarnished by the platonic refutations since many were displayed in distorted way to make that the sophists appeared of beforehand as perpetual loosers[7]. But, traditionally, Sophistic always were consisted as an organic member of philosophical development[8]. There also enclosed its practices of persuasive rhetoric.

3 The Sophistic's offer in relation to persuasion

Pursuing the previous thought, one sees that this controversy is not based on the *modus operandi* of the sophists, but in its fundamental epistemology inserted in each of its speeches. Greek Sophistic had another offer with sights to persuasion. The Sophists considered that: on each subject there could be always some proposals, and not only one. In these proposals contrary thesis could be found coexisting side by side. This position can be seen in Protagoras, that together with Gorgias, express the best intellectual power of those earlier times when said: "the man is the measure of all the things, of that they are that they are, of whom they are not that they are not [*Teeteto*, 152a]"[9]. Certainly, this was somewhat inconceivable and unacceptable for those who desired to keep a certain criterion of objectivity, as Plato. The rhetorician preferred

[5] JAGER, Werner Wilhelm. Paideia: The Ideals of Greek Culture. 2nd. ed. New York: Oxford University Press, 1944, p. 340.

[6] ARISTOTLE. On Sophistical Refutations. VI. Organon. trasl. by W. A. Pickard. 2013, p. 533, 539 et passim.

[7] ROMEYER-DHERBEY, Gilbert. Les Sophistes. Paris: Puf, 2002, p. 9.

[8] JAGER, Werner Wilhelm. Paideia: The Ideals of Greek Culture. 2nd. ed. New York: Oxford University Press, 1944, p. 340-341.

[9] PLATO. **Teeteto** (on Knowledge). Tradução, textos complementares e notas Edson Bini. Bauru, SP: EDIPRO, 2007, p. 57.

do not make use of this objectivity. The subjects could be considered by two or more sides, and, would be capable to follow two opposing directions simultaneously. That paradigm followed to Rhetoric bid too. Either in its positive definition or in its negative definition, Rhetoric offers itself as a multiple possibility; becoming a vehicle for many kinds of persuasion in vary genres and contexts[10]. And, therefore, could have good or bad use.

Gorgias himself in his famous proposition from the *On Non-Existent (or On Nature) Treaty* affirmed that: "Nothing exists. Even if existence exists, it is inapprehensible to humans. Even if existence is apprehensible, nevertheless it is certainly not able to be communicated or interpreted for one's neighbors" (*Frag. B_3*. 979b20 – 980a1)[11]. Text interpreted, since early times by the Greek philosopher Sextus Empiricus as being the expression of the impossibility of making use of truth by means of one only criterion, refuting "the standard of truth" (*to tes aletheias kriterion*). He eliminates a constant standard of judgment, of criterion. According his interpretation, the speech is composed for perceptions, as that in which is not the speech or language that communicates the perceptions, but are the perceptions that create the speech or the language[12]. Thus, it is clear that for the sophist Gorgias, the argumentative speech does not depend on an objective reality, impossible to be apprehended. And, as other sophists, he broke the coherent and uniform texture of the ontologic optic, uttering a declaration favorable to diversity, not totally divorced from ethics and not less worried with justice, although Rhetoric was wide used inside the limits of legal persuasion procedure[13].

4. Aristotle and the discursive means of persuasion.

On the other hand, Aristotle comes to demonstrate the discursive means of persuasion, initially, to some applied technician aspects referent to speech. He used for these technician aspects the terms *ethos*,

[10] MALATO BORRALHO, Maria Luísa; CUNHA, Paulo ferreira da. Manual de retórica e direito. Lisboa: Quid Juris, 2007, p. 31.

[11] McCOMISKEY, Bruce. Gorgias, On Non-Existence: Sextus Empiricus, Against the Logicians 1.65-87, Translated from the Greek Text in Hermann Diels's Die Fragmente der Vorsokratiker. In: Philosophy and Rhetoric, vol. 30. n. 1. Pennsylvania: Penn State University Press, 1997, p. 45.

[12] LLANOS, Alfredo. Los presocráticos y sus fragmentos. Buenos Aires: Juáres, 1968, p. 274.

[13] PLATO, **Dialogos**. v. IV. Trans.: Carlos Alberto Nunes. Belém: UFPA, 1980, p. 123.

pathos and *logos.* The term *ethos* indicates the personal character of the orator, its presentation, its experience. That, derived out of the orator himself, which gives weight to his words. The orator's power to set his personal character in evidence. The *pathos* is what causes in the audience some type of emotion, a reaction and a state of spirit. No doubt, this is one of the objectives of the orator: to control the reaction of the audience; to control the *pathos*, but not any *pathos*, only that one that the orator desires. It is also the awakening power of emotions. Further, there is the *logos*, which is the proof, or the apparent proof, the speech's content properly said, the objective rational argument[14], the power to prove a truth, or an apparent truth through persuasive arguments. Aristotle describes them as "species" of "persuasion supplied by the verbal speech"[15]. It is here when Aristotle took the sophistic technique of persuasion. That is, the not objective technique for objective arguments.

When Aristotle enumerated the discursive means of Rhetoric, he also used the same systematic used in his *Topics* to distinguish the dialectic syllogisms from the apodictic ones, dividing them in inductive and deductive. But with the difference that in Rhetoric they take for base verisimilitude. The inductive way is called *paradigm*, the example, known as rhetorical induction. The deductive way is *entimema,* known as rhetorical syllogism, and distinct from erisma or eristic syllogism[16].

Hence, when we speak about "syllogism" it demands specification. The term syllogism is a generic term. The deriving premises from entimemas are constituted of probabilities and signs. And as Aristotle said, catching the So: "this is the more effective way of persuasion", because "the man who makes good conjectures concerning the truth assimilates himself in making good conjectures concerning probabilities (*Ret*. 1355a)"[17]. Paradigmatic entimema gains all its persuasive content from the examples, being predominantly demonstrative, whereas the rhetorical syllogism or entimema has its persuasion based on signals

[14] ADEODATO, João Maurício. Ética **e** r**etórica**: para uma teoria da dogmática jurídica. 4. ed. São Paulo: Saraiva, 2009, p. 339.

[15] ARISTOTLE. Rhetoric. I, 2, 1356a. The works of Aristotle, trad. W. Rhys Roberts, Col. Great Books of the Western World. Chicago: Encyclopaedia Britannica, 1990, vol. 8, p. 596 – 597.

[16] ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. 4. ed. São Paulo: Saraiva, 2009, p. 339..

[17] ARISTOTLE. Rhetoric. I, 1, 1355b. The works of Aristotle, trad. W. Rhys Roberts, Col. Great Books of the Western World. Chicago: Encyclopaedia Britannica, 1990, vol. 8, p. 594.

or indications (indicium). Entimema is formally defined as a syllogistic structure which lacks one of the three formal elements, possessing "occult modal unfoldings"[18] and Quintilian called it: *epiquerema*[19].

5. Conclusion.

Thus, Rhetoric consisted too in one *techne* (τέχνη), a technic to speak well, to enchant and to seduce an audience. Among others meanings: an instrument that becomes possible the persuasion. Therefore it is why much is said that Rhetoric is the *art* to persuade. Although this is not out of place, it is necessary to have in mind that to confer a bigger precision to the term, the meaning of art for the Greeks also assigned one technique, that is, a capacity that appears as the product of the application of one to know, and not that one of gift or inexplicable talent, as usually the word "art" is understood.

Hence, Rhetoric is similar, on one hand, to dialectic, on the other hand, to sophistic arguments. In other words, Rhetoric do not occupy itself only on what is persuasive, but also of what seems to be, that is, "the truth and the approached truth" [Rhetoric, 1355a17][20]. What means that, for Aristotle, Rhetoric is more a faculty to consider theoretically the possible means to **persuade** or to attribute verisimilitude to any theme or subject that comes to be deal with.

So, the core here is to perceive that the object of Rhetoric are not the truths, but the pronounced words and speeches, the practical domain of certain techniques to obtain a persuasive language so prevailing in the forensic sphere. Therefore, it was through Rhetoric that Aristotle preserved the Sophistic technique of persuasion, although, some lack of objectivity and certainty would give space to freedom of thought.

---

[18] ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. 4. ed. São Paulo: Saraiva, 2009, p. 342.

[19] FERRAZ JUNIOR. Tercio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. 6. ed. São Paulo: Atlas, 2008, p. 318.

[20] ARISTOTLE. Rhetoric. I, 1, 1355a. The works of Aristotle, trad. W. Rhys Roberts, Col. Great Books of the Western World. Chicago: Encyclopaedia Britannica, 1990, vol. 8, p. 585

Universal International Law?
A challenge and a contribution from the peoples in the South

Henrique Weil Afonso[1]

Abstract: This article explores the role of the Third World in international legal affairs vis-à-vis post-colonial readings of the history of the discipline. It sets of by examining the liberal legacy in present International Law to propose a critical survey of the methodological aspects of historical approaches to the field, namely historicism. It develops an argument according to which the Third World represents a valid, yet thoroughly diverse and complex, category of resistance committed to the interrogation of present-day projections of colonial relations and imperial agendas. After engaging with Indian Subaltern incursions in history along with Latin American post-colonial thought, the article concludes by arguing for a sustained appreciation of the methodology of history and the viability of emancipation discourses it forecloses.

Key-words: TWAIL; post-colonialism; International Law.

1. Introduction

One prominent consensus within mainstream international legal scholarship became evident in the immediate aftermath of the Cold War. The old Bipolar struggle, facts reviewed, had at last come to an end to the benefit of capitalist world economy, driven by developed countries who found in the USA the adequate leader to set the road ahead. Whatever meaning the Cold War period had to the Third World, the debacle of the URSS along with its global agenda could have had but one interpretation: all States, regardless of evident peculiarities, could – and *would* – take advantage of the capitalist market driven economy in order to bring about that very elusive quest: development and prosperity. Hardly a surprise, international law was profoundly influenced by these events, though not necessarily prone to the interests of less economically

[1] Ph.D. candidate, Pontifical Catholic University of Minas Gerais. Contact: henriqueweil@hotmail.com

developed States.

This study intends to examine the intricate relationship, on the one hand, between the ways international law perceives its history and, on the other one, the construction of its universal design. There is reason to suppose that recent perceptions of traditional international legal scholarship rest firmly on a particular understanding of the historical phenomena that posits present-day developmental schemes at the top of international community's agenda. Turning one's eye to the past, it is suggested, has the effect of understanding current discourses about how the world is and how the world should be, and the very method adopted in this exercise should unfold international law's proneness towards universality.

A brief survey of early theorists, namely 16th Century Spanish theologian Francisco de Vitoria and 19th Century liberals such as John Westlake, should add to the understanding of this intricate and complex relationship. It should be argued that international law's history is thoroughly based on particular perceptions of the international, and non-European peoples only marginally figure in this narrative. In response, it is by reviving the relevance of the Third World in international affairs that counter-hegemonic alternatives to established modern thinking may gain voice. The Third World today materializes the outcomes of colonial and imperial practices upon which the discipline is so intrinsically connected. Confronting the ways these conditions have reached the 21st Century acquires resonance within academic movements engaged with new designs of the international plane that are more inclusive when it comes to diversity and more receptive of plural forms of the legal and the historical narratives.

2. Universalism and International Law: historical views in debate

The new "age" in international affairs launched in the beginning of the 1990's is presented by doctrinal elaborations regarding both norms in practice and the justification for revisiting certain legal institutes. The idea and praxis of liberal democracy symbolizes the grindstone for a large number of accounts of this new moment[2], as an examination of the

[2] On this particular issue, the bibliography is quite vast. See, generally, SLAUGHTER, Anne-Marie. International Law in a World of Liberal States. In: European Journal of International Law, vol. 6, no. 2, p. 503-538, 1995; SLAUGHTER, Anne-Marie. A Liberal

writings of theorists like Thomas M. Franck and Fernando Tesón should disclose. Professor Franck sustains a defense of liberal democratic values as the ideal form of political participation in State level, to be transplanted to the international plane: the latter is powerfully connected to the former, and the more democratic States become, the more democratic the transnational sphere would be. Accordingly, Franck speaks of an "emerging 'law'" that corroborates domestic governance and reflects in the cannons of international law. "This newly emerging 'law'", the author explains, "– which requires democracy to validate governance – is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations."[3]

Argentinean professor Fernando Tesón is in line with Franck's insights regarding the nature of this supposedly new international law. In his work *A Philosophy of International Law*, Tesón elaborates a comprehensively liberal theory of international law based on Kant's essays *Towards Perpetual Peace* and *The Idea of a Universal History From a Cosmopolitan Point of View*. The merits generally accredited to democratic forms of government appear to be based, initially, on the assumption that "[…] the very point of democratic institutions is to keep political power (with all its corrupting potential) under check"[4], coupled with Kantian universal imperatives that deposits certain duties to be carried out by States: "the categorical imperative is universal and holds for every civil society regardless of history and culture. Liberal democracies, ranging from laissez-faire states to welfare states, are the only ones that secure individual freedom, thereby allowing human beings to develop their potential fully".[5] In short, liberal democracies, according to these

---

Theory of International Law. In: American Society of International Law Proceedings, vol. 94, p. 240-250; DOYLE, Michael. Kant, Liberal Legacies, and Foreign Affairs. In: Philosophy and Public Affairs, vol. 12, no. 3, 1983, p. 205-235; DOYLE, Michael. Kant, Liberal Legacies, and Foreign Affairs II. In: Philosophy and Public Affairs, vol. 12, no. 4, 1983, p. 323-353; TESÓN, Fernando. A Philosophy of International Law. Boulder: Westview Press, 1998.

[3] FRANCK, Thomas M. The Emerging Right to Democratic Governance. In: American Journal of International Law, vol. 86, no. 1, 1992, p. 47.

[4] TESÓN, Fernando. A Philosophy of International Law. Boulder: Westview Press, 1998, p. 19.

[5] TESÓN, Fernando. A Philosophy of International Law. Boulder: Westview Press, 1998,

views, embodies the definitive characteristics to foment dignity to human existence and prosperity to all peoples.

With the end of the Cold War, some would claim, so did the Third World come to its term and, consequently, the category no longer deserves historical significance while regarded as an entity in itself. According to specialist Mark Berger, who writes in the 1990's, a central point to be considered is that the mentioned group of States is not suitable to fit its purposes in a globalized world. In face of the trump of globalized market economy, all less economically developed countries have been put in the developmental route. Taking the Asian Tigers as a role model to be followed by other nations, Berger emphasizes the timely need to set aside this old-fashioned, Cold War response-type classification – a group of States struggling for existence outside US-Soviet dichotomy –, in order to foster economic growth and political stability via consolidation of democratic practices and processes. As Berger states, "'Third World' now serves primarily to generate both a dubious homogeneity within its shifting boundaries and an analytically irrelevant distinction between the 'Third World' (developing) on the one hand and the 'First World' (developed) on the other hand".[6] Additionally, the author suggests replacing the category for an all-inclusive treatment brought about by liberal world views that may have better results or, in other words, "an emerging approach to 'development' which privileges historical particularity, but also adopts a global perspective".[7]

Adopting a similar argumentative strategy, though enriched by universalist ideals, it is worth taking note of the influence that standard *end-of-the-world*, Fukuyaman-based ideologies, have taken concerning decisive steps towards the consolidation of certain practices and norms, either by means of legal reform – today's legal responses to terrorism, such as military intervention to end terrorist threats[8] – or reinterpretation – in the case of *ius ad bellum*, the debate on preemptive and preven-

---

p. 15.

[6] BERGER, Mark. The End of the Third World? In: Third World Quarterly, vol. 15, no. 2, 1994, p. 258. On the craft of writing history from a power-politics perspective, thoroughly neglecting a world with valid history outside Europe or North America, see KENNEDY, Paul. The Rise and Fall of the Great Powers. New York: Vintage Books, 1987.

[7] BERGER, Mark. The End of the Third World? In: Third World Quarterly, vol. 15, no. 2, 1994, p. 260.

[8] For a debate over the reformulating of international law to suit the imperial power, see CHIMNI, B. S. International Institutions Today: An Imperial Global State in the Making. In: European Journal of International Law, vol. 15, no. 1, 2004, p. 1-37.

tive self-defense.[9] It follows that the scope of participation of the Third World in international legal affairs is downplayed by an apparently natural surpass of capitalism and liberal democracy.

In other words, the end of the Cold War fomented a new universal beginning to international law, and it achieved this point by retrieving the spirit of world community that illuminates the doctrine of human rights and transnational solidarity. Third World claims, while up to a certain extent representative of interests located outside US-Soviet disputes, are labeled to be outdated when confronted to this new paradigm. In this sense, so reads the passage from *Akehurst's Modern Introduction to International Law*:

> Nevertheless, major changes in international law have occurred since 1945. Western states were anxious not to drive Third World states into the arms of communist states, and have therefore agreed to many of the alterations sought by the non-aligned countries. Most of the rules which developing countries used to regard as contrary to their interests have changed, or are in the process of being changed. Similarly, when the interests of Western states change, such states are often just as ready as other states to abandon the old rules and to replace them with new rules which are more in keeping with their own interests. Modern international law is not static, but has a dynamic nature and is in a continuous process of change. The accusation that international law is biased against the interests of Third World states is, on the whole, no longer true.[10]

These remarks on the status of the Third World are woven into a specific view on history and its mode of production. It is often acknowledged that the study of the history of international law represents a relevant aspect of the study of the discipline itself. Nevertheless, some specialists tend to approach history through rather limited lenses, embracing certain views on history as self-evident statements, or, though not without difficulties, as a natural fact that dismisses proper methodological scrutiny. Within these premises, the act of turning one's attention to the past could be initially associated with a narrative focused on

[9] An attempt to add legal and moral justifications to USA's foreign invasions in the 1980's is D'AMATO, Anthony. The Invasion of Panama was a Lawful Response to Tyranny. In: American Journal of International Law, vol. 84, no. 2, 1990, p. 516-524.

[10] MALANCZUK, Peter. Akehurst's Modern Introduction to International Law. 7a ed. London and New York: Routledge, 1997, p. 30.

the progress of the discipline, a narrative that elucidates key moments, setting aside the ones that are of less relevance, in order to finally reach the present times in a triumphant style.

Internationalist Lassa Oppenheim insists on the importance of surveying the history of the discipline, for an adequate knowledge of its history provides the international lawyer with the tools to cope with current legal or institutional challenges. International law makes its own history side by side with the evolution of the international society: together, they compose a promising portrait of the narrative of international law's institutions and norms in an ever changing world where conflicts are inevitable. In any case, there remains one steady, uncompromising fact: to speak of the history of international law means precisely to speak of the successful narrative of the discipline towards progress and universality, or, to put it differently, the triumph of international law over international anarchy. In this sense, Oppenheim asserts that "the master-historian […] will in especial have to bring to light the part certain states have played in the victorious development of certain rules and what were the economic, political, humanitarian, religious, and other interests which have helped to establish the present rules of international law."[11]

The method outlined by Oppenheim has been measured in detail by David Kennedy, to whom such an approach to history plays a central role in conventional scholarship, which is "[…] to reinforce the fantasy that some thing called 'international law' has had a continuous presence across differences in time and place."[12] Telling history according to these parameters, Kennedy points out, reflects in the act of investigating the precedence of a given rule or institution. In the same way, such a task can also be understood as an inquiry over history in a very peculiar sense: the rule or institution reaches out present day international relations through an evolutionary road that departs from the sphere of politics and, by a series of events, intentional practices, advances and drawbacks, is finally inserted in the domains of the legal world.

Professor Kennedy stresses the functional nature of the act of ad-

[11] OPPENHEIM, Lassa. The Science of International Law: Its Task and Method. In: American Journal of International Law, vol. 2, no. 2, p. 1908, p. 317. A similar line of critique has been presented by KOSKENNIEMI

[12] KENNEDY, David. The Disciplines of International Law and Policy. In: Leiden Journal of International Law, vol. 12, no. 1, 1999, p. 90. A similar line of critique has been presented recentely by KOSKENNIEMI, Martti. Histories of International Law: Dealing with Eurocentrism. In: Rechtsgeschichte, vol. 19, p. 152-176.

dressing the history of the discipline in this way. Paradoxically, though, this implies a process of writing history by selecting certain events that meet the requirement of having what it takes to leave the historical and political spheres to join the prestigious hall of legalized practices and institutions – for instance, 1648 Treaties of Westphalia –, or, in Kennedy's terms, "an argument about a rule or principle, or institutional technique in international law is almost always an argument about history – that the particular norm proffered has a provenance as law rather than politics, has become general rather than specific, has come through history to stand outside history."[13]

Writing history within the boundaries pointed out by Kennedy evidences the influence of positivistic philosophy – *historicism* – over international law's historians. Assumed to be a fact, the distinction between the historical world and what we say about it works as the framework for the much preferred scientific understanding of history *vis-à-vis* the broader complex and contradictory worldly processes. According to Kennedy, "the conventional tale of international legal history is a progress narrative, a fable about how the discipline grew and who its enemies are – above all, this history teaches, turn your back on politics and ideology, and then also on philosophy, theory and form."[14]

Historians seek to provide epistemological foundations to the discipline, and, as Michel-Rolph Trouillot highlights, "the more distant the sociohistorical process is from its knowledge, the easier the claim to a 'scientific' professionalism."[15] Once the craft of writing – and *producing* – history, as positivist tradition reveals, is determined by scientific assumptions, some preliminary conclusions should be considered regarding the positivist methodology. First, the qualification of a set of events that are likely to compose the historical narrative is a task to be performed with scientific criteria. It follows that, even though some claim to produce their own history – for instance, the Third World, social movements, minorities, etc –, it is not up to them to decide whether their tales should join 'official History'. As post-colonial Indian historian Dipesh Chakrabarty points out, "[historicism] tell us that in order to understand anything in this world we must see it as an historically devel-

[13] KENNEDY, David. The Disciplines of International Law and Policy. In: Leiden Journal of International Law, vol. 12, no. 1, 1999, p. 88.

[14] KENNEDY, David. The Disciplines of International Law and Policy. In: Leiden Journal of International Law, vol. 12, no. 1, 1999, p. 92.

[15] TROUILLOT, Michel-Rolph. Silencing the Past. Power and the Production of History. Boston: Beacon Press, 1995, p. 5.

oping entity, that is, first, as an individual and unique whole – as some kind of unity at least in potential – and, second, as something that develops over time."[16] Secondly, and as a consequence of the former statement, the very act of writing history embodies a precise, yet disguised by language, *act of power and violence*.[17] Here comes necessary the question posed by Trouillot: "what makes some narratives rather than others powerful enough to pass as accepted history if not historicity itself?"[18]

Taking Trouillot's insightful remarks, one should ask his question to contemporary international lawyers. At a first glance, one should reckon it to be a highly demanding task, though, to draft a comprehensive critique of the historical biases, the occluding processes or oppressive institutions and norms. Yet, any critical understanding of international law must come to terms with the urgent commitment to tackle history. The entrepreneurship would require diverse mechanisms that are capable of, but not only, exposing the flaws, continuities, discontinuities, and an understanding of the language that narrates history, and confront it with a vocabulary that escapes conventional scholarship. It is argued that such a vocabulary may be available in alternative readings of modernity, in social movements that permeate the peripheries of modern rationale, even perhaps in local democratic and political practices that defy the single-minded developmental model.

3. The Third World: stories of resistance and emancipation in XXI Century international law

The search for alternative readings of international law's foundations, history and subjects, conventionally taken for granted by mainstream research, has encouraged promising investigative legal approaches.[19] Present-day world relations are unquestionably complex,

[16] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000, p. 22.

[17] See the discussion of subjective and objective violence in ŽIŽEK, Slavoj. Violência. Seis notas à margem. Lisboa: Relógio D'Água Editores, 2008 (English version: Violence. Six Sideways Reflections. New York: Picador Paperbacks, 2008).

[18] TROUILLOT, Michel-Rolph. Silencing the Past. Power and the Production of History. Boston: Beacon Press, 1995, p. 6. In this remarkable and highly provocative monograph, Trouillot dedicates the third chapter to discuss the mechanisms by which the 1790 Haitian Revolution has come to be labeled by historians of its time as a non-event that was not apt to enter history.

[19] Among these approaches, one could cite the feminist, international relations theory,

broad-ranging and conflictive, which places international law in the intricate yet unavoidable position of providing normative regulation for innumerous competing perceptions of the international phenomena. Among these, the Third World Approaches to International Law (hence, TWAIL) movement has recently attracted considerable attention from international lawyers who display concern with the situation of developing countries in the global landscape.

TWAIL scholars are engaged in a number of projects ranging from the complex relations between colonialism and imperialism to contemporary surveys aimed at deeper transformations of the international plane. The movement embraces a very distinctive departing point: rather than assuming international law to be a thorough and finished project based on a conjugation of universal ideals claims and State behavior patterns, TWAIL perceives international law to be a culturally and historically constructed scholarship.[20] Conceiving classical international law as the normative product of an international order drafted by the European powers over the last five centuries, TWAIL aims at exploring the mechanisms by which colonialism, imperialism and economic dependency have framed the international order in detriment of developing and Third World countries, social movements, minorities, and other innumerable forms of communal life. International theorist Obiora C. Okafor provides a sound description of the movement:

> TWAIL scholars (or "TWAILers") are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order […] a commitment to centre the rest rather then merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.[21]

---

international legal process, law and economics, positivism and human rights approaches. For an overview of these methods, cf. SLAUGHTER, Anne-Marie; RATNER, Steven. Appraising the Methods of International Law: a Prospectus for Readers. In: American Journal of International Law, vol. 93, no. 2, p. 291-302, 1999.

[20] See GATHII, James Thou. International Law and Eurocentricity. In: European Journal of International Law, vol.9, no. 1, p. 184-211, 1998.

[21] OKAFOR, Obiora Chinedu. Newness, Imperialism, and International Legal Reform in Our Time: a TWAIL Perspective. In: Osgoode Hall Law Journal, vol. 43, no. 1 & 2, 2005, p. 176-177.

Telling the "untold stories" of international law, as Pooja Parmar asserts, materializes one the main imaginative purposes of TWAIL researchers. The widely perceived notion that modern international law was born out of the European order conceived by the 1648 Peace of Westphalia has driven the discipline into a particular set of postulates and legal theories revolving issues such as sovereignty, recognition of States, regulation of war and appeasement of conflicts. Keeping the international realm in order has attracted international law's attention for over four centuries, whereas the claims for international justice, emancipation of Third World nations and protest against economic dependency have been largely neglected. A change in the manner international problems are traditionally conceived, so as to include alternative solutions based on alternative epistemologies – non-European modes of thought, values, institutions, practices – is at the heart of TWAIL's inquiries.[22]

Whereas coming to grips with the formation of international law in its structural, ideological and normative aspects compose the mosaic in which TWAIL scholars focus their research, a further proposal in the movement aims at providing alternative solutions to contemporary socio-legal problems – underdevelopment, hunger, domestic conflicts, dependency, AIDS, to name but a few. In order to accomplish this dual objective, it adopts "[…] distinctive ways of thinking about what international law is and should be; they involve the formulation of a particular set of concerns and the analytic tools with which to explore them."[23] Taking history seriously and critically is one of these "tools".

3.1. Who is the Third World in International Law?

The 1970's symbolizes a turn of the tide on the surveys of the role of the Third World in international legal knowledge. The aftermath of decolonization and the immediate debates that emerged concerning newly independent States that were joining the international arena and being granted international legal recognition provided the scenario

[22] PARMAR, Pooja. TWAIL: an Epistemological Inquiry. In: International Community Law Review, vol. 10, p. 363-370, 2008. See also GATHII, James Thou. International Law and Eurocentricity; OKAFOR, Obiora Chinedu. Newness, Imperialism, and International Legal Reform in Our Time: a TWAIL Perspective.

[23] ANGHIE, Anthony; CHIMINI, B. S. Third World Approaches to International Law and Individual Responsibility in Internal Conflicts. In: Chinese Journal of International Law, vol. 2, no. 1, 2003, p. 77.

for political contestation and cooperative initiatives. Taking a standard account as a starting point, it could be argued that the main concern addressed by Third World internationalists was the proposition of fair rules of commerce and perspectives of economic development that could meet these countries long-awaited expectations. Nevertheless, theorists would soon come to grips with the more profound structures and processes disrupting Third World nations' expectations.

In this large picture, Indian internationalist R. P. Anand, among others, has sounded a note in favor of the interests of Third World countries. Prof. Anand points out the perpetuation of colonial and imperial relations despite the promises of political decolonization. International economic institutions, such as the IMF and World Bank, on the one hand, and international legal forum, such as the WTO and even the UN to a certain extent, on the other hand, were drafted upon a world consensus that acted in favor of inequality, exploitation and control over the populations in the South. Despite well-known cooperative efforts, namely the Non-Aligned Movement (G-77) and its drafting of a New International Economic Order as an alternative developmental path independent of the Cold War ideological settings, colonial relations have taken new forms of influence and control over the Third World, as well as the articulation of the imperial reason has been reshaped so as to fit economic interests of rich nations. These remarks notwithstanding, Anand insists both on reforming world institutions in order to address developing nations interests and developing countries' balancing positions to confront anti-reformist discourses: "The only way the poor countries can better their lot is by increasing production and by industrialization. It is now generally recognized that the only way to have a stable and peaceful world is to help the poor countries in their development."[24]

Anand's ideal international system would embrace everyone's interests. In this sense, important documents such as the 1974 Declaration on the Establishment of a New Economic Order[25] emphasized the need to cope with injustices and the ever-widening gap between developing and developed countries. Similarly, the Preamble to the Charter of Economic Rights and Duties of States[26], also approved in 1974, stated "it is a fundamental purpose of the present Charter to promote the es-

[24] ANAND, R. P. Confrontation or Cooperation? International Law and the Developing Countries. 2a ed. Gurgaon: Hope India Publications, 2011, p. 161.
[25] GENERAL ASSEMBLY. Res. A/3201 (S-VI).
[26] GENERAL ASSEMBLY. Res. A/3281 (XXIX).

tablishment of the new international economic order, based on equality, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems". In light of these developments, international theorist Mohamed Bedjaoui argues for an international law of participation "[…] genuinely all-embracing and founded on solidarity and cooperation [which] must give great prominence to the principle of equity (which corrects injustices) rather than the principle of equality".[27] Both Anand and Bedjaoui acknowledged the dangers that arise from treating international norms – e.g, sovereignty and sovereign equality – uncritically, being it for international law remains deeply structured and influenced by imperial and colonial relations.

This seminal treatment of the Third World in international legal affairs is well deserving of its dues. This recognition notwithstanding, recent TWAIL scholarship have been focusing its efforts, on the one hand, in the direction of a deeper understanding of the specificities of this heterogeneous assembly of States that shapes varying legal arrangements, and, on the other hand, TWAILers have been drawing upon what Karin Mickelson labels "interconnectedness". As for the former, research is being carried out in major areas, namely (i) the articulation of different legal orders – and varying cultural traditions – to fashion a less Eurocentric oriented international law[28] and (ii) the accommodation of cultural diversity both within present legal institutions and around new designs of the national/international legal frameworks, especially in form of epistemic resistance[29]. Mickelson, in her turn, argues in favor of authentically interdisciplinary approaches aimed at composing a distinctive Third World approach. "Interconnectedness", in light of interdisciplinarity, cannot mean anything but an engagement between

[27] BEDJAOUI apud MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. In: Wisconsin International Law Journal, vol. 16, no. 2, 1998, p. 371.

[28] Among this rich and stimulating branch of surveys, it is worth citing, among others: ANGHIE, Antony. Imperialism, Sovereignty and the making of International Law. Cambridge: Cambridge University Press, 2004; KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001; GROVOGUI, Siba N'Zatioula. Sovereigns, Quasi Sovereigns, and Africans. Minneapolis: University of Minnesota Press, 1996.

[29] A mandatory study is RAJAGOPAL, Balakrishnan. International Law from Below: Development, Social Moviments and Third World Resistance. Cambridge: Cambridge University Press, 2003.

international legal institutions and norms, on the one hand, and a threefold analysis of justice, morality and history.[30]

Following Mickelson's analysis, the resurgence of historical studies in international law is highly noticeable. Over the last two decades, an increasing interest in the history of the discipline has given rise to academic courses and disciplines dedicated to several aspects of such a broad-reaching interconnectedness.[31] Once historical studies were back in the scene, theorists have been committed to understanding the foundations of the discipline, its disputable relations with specific historical contexts and processes and, last but not least, the formation of the nation-State along with its worldwide spread. Finally, the treatment of colonialism and imperialism, often coupled with historical approaches, emphasizes the critical twist that some contemporary internationalists imprint in their works.

3.2. Colonialism, imperialism and International Law

TWAIL benefits extensively from these propositions. For instance, the examination of colonial relations, the formation of specific historical biases – *one-sided* official Histories – and its repercussions to present-day global institutions and norms consist in one of the ways in which international law is seen through critical lenses. Consequently, there is reason to question the role played by early thinkers towards the consolidation of its universal vocation: the dynamics of colonial and imperial relations from the 16th to 19th Centuries, and up to our times, are generally left untouched by conventional scholarship.[32] Since the latter usually employs universalist arguments in their description of in-

[30] MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. In: Wisconsin International Law Journal, vol. 16, no. 2, p. 353-419, 1998.

[31] For an overview of the spread of the history of international law, see LESAFFER, Randall. International Law and Its History: Story of an Unrequired Love. In: CRAVEN, Matthew; FITZMAURICE, Malgosia; VOGIATZI, Maria (Eds). Time, History and International Law. Leiden: Martinus Nijhoff Publishers, p. 27-41, 2007; also, MACALISTER-SMITH, Peter; SCHWIETZKE, Joachim. Literature and Documentary Sources relating to the History of Public International Law: An Annotated Bibliographical Survey. In: Journal of the History of International Law, v. 1, n.1, p. 136–212 , 1999.

[32] For instance, in Wilhelm Grewe's celebrated work The Epochs of International Law, debates around colonialism, imperialism and violence are occluded by a celebrative oriented characterization of evolutionary periods, namely the Spanish, French and English Ages. GREWE, Wilhelm. The Epochs of International Law. New York: De Gruyter, 2000.

ternational law – in Koskenniemi's words, their "sensibilities"[33] –, and since a certain view on history seems to spring from such an approach, the study of history within critical parameters becomes a much needed undertaking. The production of history, or the processes by which the discipline has come to be around a certain selection of events, often conceals, or even discredits, the o*ther* non-European, his/her values and world views.[34]

Taking account of the very first questions posed by theorists such as Francisco de Vitoria – and other early "founding fathers", such as Suarez and Grotius – in his quest of providing both moral and legal justifications to the *just title* of Spanish colonial actions in 16th Century Americas, as well as the solutions advanced by him, encapsulate an effort to apply TWAIL's postulates to an early legal scholar within the dictates of the historical domain. Humanistic interpretations of Vitoria's *ius gentium*, despite being postulated by eminent internationalists[35], have nevertheless had contending aspects of their studies questioned and deconstructed. The purpose of these investigations must not be a complete deconstruction of these authors' opinions, placing them – entirely out of context, it should be said[36] – as co-responsible actors of colonial and imperial practices. Instead, this process discloses *Eurocentric* minded assumptions, particular modes of thought that are granted global access, and a highly enthralled, yet at times disguised in universalist fashion[37],

[33] Koskenniemi's works reflect a turn towards the history of the discipline that is coupled with surveys of controversial aspects of this relation. See, generally, KOSKENNIEMI, Martti. Histories of International Law: Dealing with Eurocentrism. In: Rechtsgeschichte, vol. 19, p. 152-176, 2011. Another important survey of these issues, that demonstrates a certain trend within the return of history inside the discipline, is GATHII, James Thuo. International Law and Eurocentricity. In: European Journal of International Law, vol. 9, no. 1, p. 184-211, 1998.

[34] Concerning the issue of the production of history and the processes of disavowing particular cultures from the pages of history, see, generally, TROUILLOT, Michel-Rolph. Silencing the Past. Power and the Production of History. Boston: Beacon Press, 1995.

[35] An authoritative study on this axis is SCOTT, James Brown. El Origen Español del Derecho Internacional Moderno. Valladolid: Talleres Tipográficos, 1928.

[36] On the pitfalls of examining the history of ideas out of their historical, epistemic and language context, see SKINNER, Quentin. Meaning and Understanding in the History of Ideas. In: History and Theory, vol. 8, no. 1, 1969, p. 3-53.

[37] Both the Indians – term that represents the innumerous groups of native Americans – and the Spanish, representatives of thoroughly contrasting cultural manifestations, were immerse in differing standards of values. The peculiar mode each culture relates to the circling environment, the specificities in the relations towards the divine and the percep-

imperial discourse in the making that represents the standard *attitude* or *inclination* of the discipline, an attitude that it avoids facing directly.[38]

The duty to bring civilization to the peoples of the New World, in different ways present in the writings of these authors, is rooted upon a belief of the superiority of European institutions, economy, religion, values and ways of life. An occluding attitude towards the *Other* – the Indian, the Oriental[39], the inferior –, as pointed out by Latin American philosopher Enrique Dussel[40], is a key component of modern reasoning, which unfolds the myth of modernity coupled with its underside, relentless subjective and, perhaps more troubling owing to its deceptive nature, objective violence, to use Žižek's terms[41]. This comprises a

---

tion of the other are some of the elements that allocates the Indians and the Spanish. In this sense, when in 1492 Columbus sent to Spain his primary descriptions of the New World, it should not come as a surprise the fact that these accounts were immersed in the Christian tradition. The reality the explorer encountered was perceived, understood and interpreted through a method named by Tzveran Todorov as finalist hermeneutic, in which the most significant argument is the one derived from authority, rather than the one based on personal experience: "[Columbus] sabe de antemano lo que a encontrar; la experiencia concreta está ahí para ilustrar una verdad que se posee, no para ser interrogada, según las regras preestablecidas, con vistas a una búsqueda de la verdad." TODOROV, Tzvetan. La Conquista de America. El problema del otro. Mexico: Siglo Veintiuno Editores, 2003, p. 26. In Vitoria's works, such a set of values is unquestionably the values of the Spanish society. Whenever the theologian was confronted with the question whether the Indians could be considered civilized, he would not hesitate to compare the colonized peoples' institutions and practices with the correspondent element within his own cultural patterns, which forged "a standard based on the capacity of socio-political organization and self-government whereby the Spaniard's system of governing is the natural benchmark." BOWDEN, Brett. The Colonial Origins of International Law. European Expansion and the classical Standard of Civilization. In: Journal of the History of International Law, vol. 7, no. 1, 2005, p. 11.

[38] KENNEDY, David. Primitive Legal Scholarship. In: Harvard International Law Journal, vol. 27, no. 3, 1986, p. 5-6. A TWAIL interpretation of the doctrine of Francisco de Vitoria can be found in ANGHIE, Anthony. Imperialism, Sovereignty and the Making of International Law. Cambridge: Cambridge University Press, 2004.

[39] A distinctive work that approaches European attitudes towards other cultures, often imprinted in occidental vs oriental mentality, is SAID, Edward. Orientalismo. O Oriente como invenção do Ocidente. São Paulo: Cia. das Letras, 2007 (english version: Orientalism. New York: Random House, 1978).

[40] DUSSEL, Enrique. 1492. *El encobrimiento del Otro. Hacia el origen del mito de la Modernidad*. Conferencias de Frankfurt. La Paz: Plural Editores, 1994.

[41] Slovenian philosopher Slavoj Žižek differentiates two types of violence. Subjective violence derives from day-to-day relations concerning the physical or regular conflict be-

distinctive feature of international law *vis-à-vis* its colonial and imperial roots, as internationalist Brett Bowden asserts:

> The very essence of the function of a standard of civilization. If in the eyes of the Spanish, the Indians are unable to measure up to European social and cultural practices, and more importantly, systems of political organization and government that are assumed to be the universal norm, then they are deemed as 'barbarous', 'uncivilized', or 'infantile' – in any event, inferior.[42]

The *standard of civilization* was the legal mechanism that admitted or excluded peoples and nations into the international society, "the cultural values and practices of Christian societies are taken for granted and are the infallible yardstick."[43]A particular focus at this stage is laid on

---

tween individuals or societies, e.g. crime and terror. This kind of violence is self-evident and can be noted by the nude eye. Conversely, objective violence operates inside symbolic signs – namely, language, racism, hate-speech – or structural elements – economic, political, legal relations. Žižek's point is to explore the ways we perceive and misperceive violence. See ŽIŽEK, Slavoj. Violência. Seis notas à margem. Lisboa: Relógio D'Água Editores, 2008 (English version: Violence. Six Sideways Reflections. New York: Picador Paperbacks, 2008).

[42] BOWDEN, Brett. The Colonial Origins of International Law. European Expansion and the classical Standard of Civilization. In: Journal of the History of International Law, vol. 7, no. 1, 2005, p. 12. The author took the matter to a greater and deeper scrutiny in a recent work. See: BOWDEN, Brett. The Empire of Civilization: the evolution of an Imperial idea. Chicago and London: the University of Chicago Press, 2009.

[43] CAVALLAR, Georg. Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans? In: Journal of the History of International Law, vol. 10, no. 2, 2008, p. 192. For a similar interpretation of Vitoria's doctrine, see KEAL, Paul. 'Just Backward Children': International Law and the Conquest of Non-European Peoples. In: Australian Journal of International Affairs, vol. 49, no. 2, p. 191-206, 1995. The mechanism is described in detail by Todorov, in his compelling survey of the "discovery of the Americas". Todorov tackles Spanish attitudes regarding the native peoples, which, as he points out, are based on a previous and definitive conception of the role the colonizer plays vis-à-vis the backwardness of the colonized populations, which may depart from a viewpoint of the similarities between the two peoples or the its differences. In either case, there exists an excluding and eclipsing approach towards the other. Columbus' writings and actions are representative of these interpretations: "La actitud de Colón respecto a los indios descansa en la manera que tiene de percibirlos. Se podrían distinguir em ella dos componentes, que se vuelven a encontrar en el siglo seguiente y, prácticamente, hasta nuestros días en la relación de todo colonizador con el colonizado; ya habíamos observado el gérmen de estas actitudes

historical studies dedicated to 19th Century internationalists. The ideas of progress, civilization and economic freedom are generally regarded as distinctively present in international lawyers of that period. Rising nationalism contrasted with mounting awareness of world affairs, as the European continent experienced relatively peaceful times.

One should note, however, how theorists confronted questions of international society and universal values in quite troubling terms. As Martti Koskenniemi explains, internationalists engaged in fierce debates over the characterization of international society often advanced proposals about what should international law become. Despite obvious theoretical divergences, e.g. among people like Von Martens – who confined his reflections around positivist-minded assumptions – or John Westlake – who advanced an organic understanding of international law –, Koskenniemi highlights a common belief in them: European society and civilization materialized the cornerstone of any project of the international arena, which echoed in European attitudes towards peoples outside Europe, or, in other words, "even as international lawyers had no doubt about the superiority of European civilization over 'Orientals', they did stress that the civilizing mission needed to be carried out in an orderly fashion, by providing good examples, and not through an unregulated scramble".[44]

Non-European peoples were granted access to international life provided certain conditions were met. In these accounts, Europe occupies the vertex of an allegedly natural – a fact of nature – evolutionary pyramid encompassing all the peoples in the world. In his 1894 *Chapters of the Principles of International Law*, John Westlake puts forward the nec-

---

en la relación de Colón con la lengua del otro. O bien piensa en los indios (aunque no utilice estos términos) como seres humanos completos, que tienen los mimos derechos que él, pero entonces no sólo los vê iguales, sino también idênticos, y esta conducta desemboca en el asimilacionismo, en la proyección de los propios valores en los demás. O bien parte de la diferencia, pero ésta se traduce inmediatamente en términos de superioridad e inferioridad (en su caso, evidentemente, los inferiores son los indios): se niega la existencia de una sustancia humana realmente otra, que puede no ser un simple estado imperfecto de uno mismo. Estas dos figuras elementales de la existencia de la alteridad descansan ambas en el egocentrismo, en la identificación de los propios valores con los valores en general, del propio yo con el universo; en la convicción de que el mundo es uno." TODOROV, Tzvetan. La Conquista de America. El problema del outro. Mexico: Siglo Veintiuno Editores, 2003, p. 50.

[44] KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001, p. 71.

essary attributes by which a certain people is considered a State – thus admitted to the society of States. Westlake calls these attributes the *test of civilization*. To him, the peoples in the world are expected to take European civilization as a mirror, should they look ahead to acceptance and active participation in international affairs. Accordingly, the differences between the civilized and the uncivilized cannot be bridged unless the latter is capable of being approved in the *test of civilization*. The test involves a given people's capacity to manage reasonably working institutions, such as law, administration and commerce, and inspire confidence that they can perform well without foreign "assistance". Westlake writes: "Can the native furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it."[45]

In Westlakes's view, international law should mediate the treatment of non-civilized peoples so as to expand the *standard of civilization* throughout the world. The sort of legal discourse performed by early internationalists such as Vitoria, works through 19th Century international affairs, though in more elaborate and contemporary arguments, usually concerning sovereignty, sovereign equality and basic principles of government and Constitutional achievements. In this aspect, if one considers the legal relevance of sovereignty, a cornerstone of legal subject hood for European countries, it could be argued that it is framed upon universalist assumptions: on the one hand, the peoples who are not granted with such a gift[46], because stuck in inferior scales of human progress, do not deserve recognition by the society of States; on the other hand, progress and civilization are to be brought by European interventionism, an inevitable step towards the maturing of less-developed peoples:

> Accordingly, international law has to treat such natives as uncivilized. It regulates for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded, rather than sanction their interest being made an excuse for more war between civilized claimants, devastating the region and the cause of suffering to the natives

[45] WESTLAKE, John. Chapters of the Principles of International Law. Cambridge: Cambridge University Press, 1894, p. 141.

[46] This is the term used by KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001, p. 71.

themselves.[47]

This seems to display the standard, or the legitimate fashion, for the violence that has been committed towards native populations in America, Africa and Asia since early 16th century and continued onwards, reaching the 21st century through varying mechanisms and structural imbalances. In Anghie and Chimni's remarks, "violence has been displaced in part from the first to the Third World by a number of international practices that have resulted in the South's subjugation to a range of unsustainable economic and social practices policed by international institutions and trade institutions that enrich and favor the North."[48]

4. The international and the post-colonial: dissident voices and the vocabulary of *decoloniality*

If Anghie and Chimni make a strong a point, that is to say, if colonialism and imperialism, rather than a feature of a distant past, but a component of legal Western tradition, then by what mechanisms do these aspects endure in contemporary international law? An attempt to answer this elusive question could stand upon the contributions, first, of post-colonial Indian historian Dipesh Chakrabarty[49] surveys along within the Subaltern Studies movement members on the alternatives to confront historicism with a commitment to *provincialize Europe* give life to the subaltern voices, and second, Latin American philosophers like Aníbal Quijano[50] and Walter Mignolo[51] and their critique of Western modernity through epistemic mechanisms known as *coloniality of knowledge*.

---

[47] WESTLAKE, John. Chapters of the Principles of International Law. Cambridge: Cambridge University Press, 1894, p. 143.

[48] ANGHIE, Anthony; CHIMINI, B. S. Third World Approaches to International Law and Individual Responsibility in Internal Conflict. In: Chinese Journal of International Law, vol. 2, no. 1, 2003, p. 89.

[49] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000.

[50] QUIJANO, Aníbal. Coloniality and Modernity/Rationality. In: Cultural Studies, vol. 21, nos. 2-3, p. 168-178, 2007.

[51] MIGNOLO, Walter. Local Histories/Global designs. Coloniality, Subaltern Knowledges, and Border Thinking. Princeton: Princeton University Press, 2000; MIGNOLO, Walter. Delinking – the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality. In: Cultural Studies, vol. 21, nos. 2-3, p. 449-514, 2007.

The conceptual framework that forges modernity, Chakrabarty outlines, "[…] entail an unavoidable – and in a sense indispensable – universal and secular vision of the human", that meaning a totalizing narrative that makes a particular reality *the only reality*. Departing from it, "the European colonizer of the nineteenth century both preached this Enlightenment humanism at the colonized and at the same time denied it in practice"[52], which reveals a hierarchy of values and the geographical site of the production of historical events. The logical conclusion, the *cunning of reason* tell us, is that all should converge to a desired point in history despite evident historical particularities.

Historicism is a product of modernity and functions by presenting certain evolutionary stages that, once achieved, should grant the necessary credentials to join *official* history. This reasoning is perhaps somewhat present in legal institutions like the recognition of States, the principle of self-determination and the idea of the nation-State itself. In order to tackle these assumptions, Chakrabarty suggests *provincializing Europe*, that is, examining the hidden ideological-historical-legal-political-cultural mechanisms responsible for projecting, to the globe, a determined local sensitivity, while downplaying other conceptions of diversity: "to 'provincialize' Europe was precisely to find out how and in what sense European ideas that were universal were also, at one and the same time, drawn from very particular intellectual and historical traditions that could not claim any universal validity".[53]

Anibal Quijano's reflections on modernity, too, display a permanent concern with making sense of the byproducts – violence, poverty, dependency – of the historical process. Western modernity presents itself linked with its totalizing counterpart, a specific mode of production of knowledge labeled *coloniality*. The relations between the colonial mode of thinking and reasoning – *coloniality* – and modern social-legal dynamics are reflective of a permanent exercise of power and violence directed at plural visions of knowledge that escapades or defies modern/colonial parameters. These forms of subjugation and occlusion of diversity inevitably colonize knowledge, in the precise sense that valid knowledge must abide by a set of standards should it be willing to be accepted globally. Modernity/coloniality, together, comprise a structure

[52] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000, p. 4.
[53] CHAKRABARTY, Dipesh. Provincializing Europe. Postcolonial Thought and Historical Difference. Princeton: Princeton University Press, 2000, p. xiii.

of power that is virtually inescapable because it creates a hierarchy of knowledge and dictates the parameters of recognition within the realm of *valid* knowledge:

> That specific colonial structure of power produced the specific social discriminations which later were codified as 'racial', 'ethnic', 'anthropological' or 'national', according to the times, agents, and populations involved. These intersubjective constructions, product of Eurocentered colonial domination were even assumed to be 'objective', 'scientific', categories, then of a historical significance. That is, as natural phenomena, not referring to the history of power. This power structure was, and still is, the framework within which operate the other social relations of classes or estates.[54]

Large scale political decolonization that took place in the 1960's and 1970's did not represent, based on Quijano's insights, the end of epistemic and systemic colonization. Colonial logics sustains action through the imposition of political, economic, social, cultural and epistemic patterns, on the one hand, and the empowerment of a matrix of power55 that is permanently categorizing knowledge and life, and it does so by the unilateral implementation of values with universal appeal. Coloniality disguises itself in universal/cosmopolitan clothing, forging a "mystified image of their own patterns of producing knowledge and meaning."56 The universal categories put forth by Western modernity through colonization and informal imperialism produce universalism by claiming the exclusivity of its epistemic position despite the contingency of the historical and cultural and social biases.57

---

[54] QUIJANO, Aníbal. Coloniality and Modernity/Rationality. In: Cultural Studies, vol. 21, nos. 2-3, p. 168-178, 2007, p. 168.

[55] The concept is developed further in MIGNOLO, Walter. Local Histories/Global designs. Coloniality, Subaltern Knowledges, and Border Thinking. Princeton: Princeton University Press, 2000.

[56] QUIJANO, Aníbal. Coloniality and Modernity/Rationality. In: Cultural Studies, vol. 21, nos. 2-3, p. 168-178, 2007, p. 169.

[57] The working of the parameters of universality in 16th century legal thinking was examined by Peter Fitzpatrick. The author defends the thesis that Spanish Scholastics, like Francisco de Vitoria, have developed a vocabulary that placed political-theological concepts within the rationale of modern imperialism. It follows that legal practices and norms become secular features of modernity whereas the theological remains active as it absorbs and reenacts the religious continually. FITZPATRICK, Peter. Raíces Latinas: teología secular y formación imperial occidental. In: Tabula Rasa, no. 11, p. 33-52, 2009.

Working in similar argumentative structures, Walter Mignolo develops further the concept of coloniality so that it could give rise to decolonial strategies capable of unraveling, deconstructing and reconstructing those tales, experiences, forms of life and knowledge that have been silenced for the past five centuries. Decolonial strategies, in Mignolo's words, set the road to new modes of thinking, "a delinking that leads to de-colonial epistemic shift and brings to the foreground other epistemologies, other principles of knowledge and understanding and, consequently, other economy, other politics, other ethics."58

4. Conclusion

So as not to drift into unnecessary excavations that may lead this study astray, two main conclusions should be made up to this stage. Firstly, international law's foundations face severe criticism by the craft of theorists who display a commitment to disenthralling given assumptions, biases and differentiations upon which legal doctrine takes root. The reasons for revisiting key thinkers such as Vitoria or 19th Century liberals are unfolding before us: these studies tackle both the history of the discipline and the broader social context in order to come to terms with the so often elusive, at times misleading, quests for decolonization and promotion of diversity in global reach. Secondly, once history has become a prominent element in TWAIL's methodology, internationalists ought to come to terms with the difficulties, limitations and perspectives woven in the task of taking the history of the discipline seriously. In other words, the Third World searches for its own voice inside international law and, while they seek to write history from distinctive perspectives, such histories may be located outside the discipline's classical accounts.

It is the extent to which violence, be it subjective or objective to use Žižek's terminology, becomes institutionalized within present practices and norms, that raises notes about the urgency of revisiting the history of the discipline and the unfolding of acts of power, occlusion or exclusion that grants a particular culture – Europe – its universal status. International law, as the discussions above may reveal, often projects particular modes of life, culture and politics to the detriment of multiple modes of life, culture and politics that are strange to its language and appeal. In this sense, the accounts that dismiss the relevance of the

[58] MIGNOLO, Walter. Delinking – the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality. In: Cultural Studies, vol. 21, nos. 2-3, 2007, p. 453.

Third World in post-1990's international affairs work in tandem with all-encompassing historical views that flattens pluralism and diversity, yet spreading a belief on current norms' proneness to address the interests of all peoples in a liberal-fashioned community of States.

The road to development becomes evident in the horizon of *official History* as the alleged fragmentation of the Third World gains prominence. In face of this, TWAIL advances vocabularies, practices and pluralism aimed at a double movement of, first, confronting established scholarship in their own foundations and, second, of bringing to the fore epistemic alternatives, the excluded voices of the *Others*, the subalterns, in international level. By embracing this critical methodology, the movement takes seriously the need to expose the limits of mainstream thinking, its promises of emancipation and development, in order to give room to academic approaches firmly grounded on social movements, alternative thinking and a commitment to act otherwise.

Critical theories, such as TWAIL, reject linear perceptions of time and history, and allow for epistemic strategies capable of recognizing counter-hegemonic conceptions of society, culture and diversity. International law, in light of TWAIL's remarks, insists on a hegemonic discourse firmly rooted on historicism. Therefore, by interpreting colonial relations both beyond temporal limits and alongside the dimension of *coloniality*, as proposed by Latin American and Indian post-colonial thinkers, international lawyers are able to perceive their discipline in more diverse ways. Silenced stories, oppressed subjects and diverse manifestations of legal pluralism will find room for a broader democratic debate that outdoes the boundaries of historicism and its embedded postulations.

Sovereignty in a world of tangled legal orders

Mirlir Cunha[1]

Abstract: Unlike the traditional view amongst legal theorists about the international order, this paper argues that we do not live in a world with global institutions able to enforce their standards to our social practice. This observation is based on the fact that the international relations are developing at the same rate as the sovereignty of the state is being reinforced. This is happening because global governance requires the state's infrastructure to make the international directives obligatory and respected by ordinary people.

This new situation can be described as a division of labour where every global instance of rule-making recognizes the others as important and limited. Nevertheless, the power to constrain is exclusive of the state's legal system, especially when human rights cases are under consideration, as some authors such as Marcelo Neves, Thomas Nagel, Amartya Sen, Joseph Raz, and Jurgen Habermas have argued.

Yet in the contemporary legal order there is no consensus about how this account of sovereignty is able to provide certainty and predictability. While Neves, for example, treats the "shared or divided sovereignty" as a set of constitutional interactions of tangled legal orders, where different cultures reflect about themselves and other analogous cultures with a view to learn something from the analysis of the other people's experience, Habermas focus on the level of democracy and how far politics becomes from citizens in this new context, and tries to identify the means to develop the idea of a dual citizenship, in which one can be at the same time a citizen of the country and of the international community.

However it may be, the solution to these problems must start from the acceptance that with a fragile international authority, state sovereignty is necessary to enforce the international standards, while, at the same time, cannot

[1]Police officer in the Policia Militar of Minas Gerais, promoted to the rank of First Lieutenant in 2006. Bachelor of Law from the UFMG Law School (2007), with a specialization in Process by Continuing Education Institute - IEC PUCMG (2012), and has been a student of the MSc Program in Law at the UFMG Law School since 2012. (Currículo lattes: http://lattes.cnpq.br/6600002614769287; email: mirlircunh@gmail.com)

be seen as an excuse to disrespect that authority. Hence, the international community should move beyond the current strategy of reducing international aids for countries where international regulations are disobeyed. It should put theses countries under pressure until their governments and their society revise their policies to respect the authority of the international community and the argument of human rights.

In the context of this interesting debate about the authorities of the international community and the state, this essay attempts to develop a jurisprudential theory of justice in a global world and to realize its effects on traditional concepts which figure in legal theory and in theories about the state.

Keywords: Global Justice, Sovereignty. Legal Theory.

1. The facts.

With the progress of international trade, interaction between people from all over the planet, global communication through the world wide web, and an increase in non-state institutions' regulatory activities, with different levels of entanglement between communities, it is possible to identify an interesting phenomenon—one that, until recently, had been making itself present in a rather shy manner. Around the discussions on globalization and its effects orbits the questioning of the realization of justice and promotion of human rights on a global scale. Furthermore, one must recognize its reflections on traditional conceptions of law that are the results of the theory of law and constitutional law, such as sovereignty, authority, and political self-determination of a people in its territory. Therefore, this is the important issue that guides the development of the present work.

When reflecting on the realization of human rights on a global scale, major contemporary philosophers and jurists, such as Jurgen Habermas, Amartya Sen, Anthony Appiah, Thomas Nagel, Joseph Raz, and Jeremy Waldron, made significant advances towards new interpretations that associate the aforementioned concepts regarding the protection of human dignity, the establishment of forms of political control that prohibits degrading treatment of human beings, and the institutionalization of the existing order beyond State borders. The recurrence with which the said concern is raised and the reasonableness of the analyses presented by these authors highlight the importance of this debate for

understanding the legal practices adopted by our society.

Due to the importance and topicality of this issue, one can observe that the present discussion has been raising the interest of broad groups from the international community as the integrative effects of globalization policies are felt in a rather impactful manner, both inside the residences and over foreign policy-making. As can be seen in section two, this new approach significantly changes how the theory of law deals with international law and promotes the upgrading of traditional legal institutions based on concern for human dignity and human rights.

In section three, the author continues to delineate reasoning through the reflection on current solutions of control and the use of force in the international arena, in the face of the actual inefficiency of political and legal systems with regard to the current legal and political globalized practices. These developments are perceived as common constitutional problems that serve as foundations for serious issues that affect the globalized States, especially the democratic ones. Such issues are deemed too dangerous for the social stability of countries and will progress rapidly if political reforms are not effectively applied to various regulatory bodies whose decisions interfere in the relationships between individuals, organizations, and institutions.

As will be outlined in section four, mainly due to the economic crisis of 2008—which was the first major challenge to be addressed by the international community—and its consequences, the inequalities of the current practices of globalization denounced by intellectuals, not only in economic terms but also in social, humanitarian, and environmental, have become even more evident and have generated diverse reactions from the public policies of the community of states. This hard reality has set out a new form of organization of the National States, exposing a new concept of sovereignty. Contrary to predictions of great legal theorists of the first half of the twentieth century, there were no valid hypotheses intensifying national borders, nor letting them go altogether in favor of a central institution endowed with coercive power and control over political, legal, economic, and social issues. There was no central hypothesis in favor of a central institution that was skilled enough to develop core standards of recognition, change, and standards of judgment upon all States.

What happened, as discussed in section 5, was the realization that the solution to the current problems affecting political States and communities will not be arrived at unilaterally. There is a strong trend towards collective proposals, which require some loosening of the no-

tion of sovereignty focuses on dialogue, cooperation, and negotiation with other States and peoples and is strengthened by enhancing its role as the guarantor of legal institutions within each nation. As a result, these collective proposals are able to protect the human dignity of the citizens of political States and promote human rights. This new direction shows that without the proper functioning of State institutions and official statements, as well as spaces for debate and discussion, any notion of global justice is an illusion too utopian to become a reality.

Therefore, the main thesis defended in this paper focuses on the issue of the reinterpretation of the notion of sovereignty under the influence of the phenomenon of transconstitutionalism, understood as the entanglement of constitutional orders and their impact on the design of a theory of justice in the international arena.

2. Law, coercion, and morals in international law.

Unlike the theoretical constructions about legal systems and the traditional theories of justice, which are well developed because they are linked to political and legal orders of States, the discussion on the functioning of the international order is surrounded by doubts and uncertainties. These doubts and uncertainties arise because any claim towards a theory of decision or a proposed theory for justice on a global level presents an obstacle. The obstacle is the idea that this field of human social relations is still in the early stages of development (NAGEL, 2005, p. 113), and therefore, suffers from a lack of basic constructions, such as the notion of authority and legitimacy of decisions.

For Bentham, the founder of the term international law (HART, 2009, p. 305), the idea of an order that regulates the actions between States should be devised in a manner analogous to the operation of the existing law in them. By transposing the notions regarding the rights of delimited space and groups, Bentham was faced with a number of incongruities that was inadmissible under the traditional General Theory of Law, such as the absence of coercion and institutions with authority to impose sanctions on transgressors whose behavior is regarded as deviant. In addition, there was no easy way to reconcile the notions of sovereignty with the imperative nature of a foreign legal system. These and other issues were the reasons that motivated the understanding that international standards should be taken as the rule of law only through their common use or convention, and therefore not constituting a proper

legal system. The objections to this proposal, as Amartya Sen noted, led to an opposite understanding of what Bentham advocated. The said objections placed international law under an ethical perspective, the perspective of human rights that follows in the opposite direction, instead of understanding them as requirements and legal claims (SEN, 2011, p. 398).

The first contact with the debate on the ethics of international law in the General Theory of Law is a bit rough and generates a series of questions about legislation, legality, and coercion in international law. There are many doubts about the existence of a political community and international institutions that are able to coordinate the interaction between States and peoples. The more traditional texts, with a positivist view, do not address the issue with due importance. These texts are restricted to discussions either regarding the preparation of legislation in each State concerning the protection of individuals, or about the development of mechanisms for peaceful coexistence between States and peoples. Even sophisticated readings that critically address these standards, such as Hart's paper on International Law, start the analysis with the comparison between the former and internal law. In these papers, international law is compared to a simple system of primary rules of obligations. International law is then at a far less developed stage than domestic laws of national states, in which we see political and legal structures that are more organized and "sophisticated," and are regarded as a "luxury" (HART, 2009, p. 303). These domestic laws are the result of the hierarchical political organization of national states—something that is not perceived internationally.

Considering the long time lapse between the historical moment in which positivist conceptions were developed and the social realities of today, we see that historical facts overtook the assumptions of this theory on international law. Currently, they are an inadequate basis for contemporary reflection of the study of law, since international law can no longer be understood as "a set of standards accepted by States as binding norms" (HART, 2009, p. 304). Due to the failure of positivism in offering an appropriate proposal for the study of international law, some important jurisprudence philosophers became interested in the subject, and presented their contributions on it. Among these jurisprudence philosophers, we highlight the contributions of John Rawls.

Like Hart, Rawls also brings the elements of his theory to the international level. With this initiative, he goes on to defend the assumptions of political liberalism in the international order and the moral char-

acter of "International Law," which he called the "Law of Peoples." According to its design, the first step in the development of the Law of Peoples is the elaboration of principles of justice for a national society, according to which government, as a political organization of the people, is not the author of all its powers. That is because in reshaping the powers of sovereignty in the light of a reasonable Law of Peoples, the State would abdicate traditional rights to war and unrestricted internal autonomy (RAWLS, 2001, p. 34–5) when it comes to the protection of human rights.

Rawls' argument overcomes former positivists views according to which international law would be a simple set of rules of a factual character, denying an essential point for discussion about international law: the importance of moral character[2] contained in the notions of *ius cogens* and human rights. From then on, they are abandoned or reformulated, rendering space to the theoretical constructs compatible with the issues of justice and transconstitutionalism conflicts involving human rights.

This observation leads to the understanding of international law, today, not as a series of treaties and intergovernmental agreements (NEVES, 2009, p. 133), but as social and legal practices whose intentions express concerns mainly on issues relating to the defense of human rights. At the heart of the debate about constitutional aspirations, increasingly influenced by events and reflections developed around the world, is the concern for the protection and promotion of rights that tend to be seen as universal achievements. This fact leads to the recognition of a transconstitutional web established through the exchange of

[2] In the view of Amartya Sen, Hart is one of the major proponents of the idea and the usefulness of human rights as a source of inspiration for legislation, according to positions presented by the jurist in the article "Are there any natural rights?" (SEN, 2011, p. 398–9). In this paper, there are no agreements with this interpretation of Hart's work. The proposal developed herein identifies the author as someone very concerned about the rights and fundamental guarantees of equality and freedom under the formalism of moral critique of law that may be held by official institutions, hence a coherent stance with the text of the known work. "The concept of law" (HART, 1955, p. 189). Regarding international law, our shared interpretation is that Hart argues (1) the thesis of separability between law and morality, since although the contents of international law resemble that of the primary standards (standards of conduct that establish obligations), it is improper to insist that all standards not supported by threat are a form of "moral" (Hart, 2009, p. 292); (2) the law critically accepted as a standard; and (3) the denial of the law as only a set of coercive orders.

information and critical legal content.[3]

Renowned jurists in the last thirty years, such as John Rawls, Jurgen Habermas, and, Amartya Sen, pointed out in their work on the notion of international law under the conception of human rights, which is taken as the basis of international law and therefore, as a connecting element between morality and law. In this way, human rights, when understood as coercive subjective rights that assure individuals a space for freedom and self-determination, would present two faces, much like Janus: one faces morality while the other faces the right itself (HABERMAS, 2012, p. 18).

Nowadays, support for the moral character of international law stems from the perception that one should care for the idea of justice in the context of international law, not only the differences involving conflicts between States, but also those that involve the State and its citizens in interdependent common cases that are often recognized in different legal systems. This interpretation makes the positioning of Rawls described above, although innovative, the target of much criticism, one of which came from Habermas. For the German philosopher, the theory presented by Rawls in his work "The Law of Peoples" is limited to the relations between people in the context of war, resulting in a subsidiary and insufficient protection of human rights in everyday relationships within States. It fosters a mild deflation of human rights into a new minimalism that ends up loosening the strength of human rights, by separating them from their essential moral impulse represented by the protection of the equal dignity of each. "This minimalism forgets that the continuous tense relationship, internal for the State, between universal human rights and the rights of private citizens is the legislative basis for the international dynamics" concerning human rights (HABERMAS, 2012, p. 35).

By developing a theory of justice in international law that strengths the relations between Peoples represented by States, Rawls underestimated the importance of the political participation of individuals that incorporates them into a collective will. The peoples conceive political participation and derive said participation from a binding con-

[3] "From the point of view of the international order, it means the incorporation of constitutional issues within the competence of the courts, which are to raise the claim to decide immediately to character-binding agents and citizens of the States" (NEVES, 2009, p. 133).

tract. The advantage of the liberal democratic peoples is treated as inherent in this culture of political participation, leaving the analysis of the reason of success of these or the inhibiting factors of the development of other peoples, classified as "decent," "developing," or "outlaws." Rawls' rating system, besides being airtight and somewhat idealized when it comes to the nobility and morality of liberal peoples, presents a descriptive reason. This descriptive reason builds an international order lacking both mobility and the participation of individuals, through their critical positions, on the events happening around them.

Another important criticism of the proposal formulated by Rawls came from the acclaimed positivist Joseph Raz whose text, "Human Rights without foundations," posits that state autonomy was mistakenly appreciated by Rawls. Because state autonomy was mistakenly appreciated by Rawls, Joseph Raz insists that Rawls' doctrine of basic justice (structured on the State) cannot simply be extended to the international arena. The principles of justice that govern domestic relations cannot be extended to international relations. The criticism of Raz concludes that moral principles that determine the limits of sovereignty should not only reflect the limits of State authority, but also, relatively, set (establish) limitations on the possibility of justifying intervention by international organizations and other States in what concerns the offended State (RAZ, 2005, p. 16).

Notwithstanding the undeniable contribution made by Rawls' view about the law in the international arena, and through the criticism of his theory, it is possible to think of a theory of justice at the international level that does not depend only on the State. It is possible to identify the social and institutional practices that work in an inductive manner from the events and reflections from various locations around the world, which allow us to identify the occurrence of cross-pollination between constitutional challenges. Thus, on a case-by-case basis, it is possible to evaluate the aggregate result of this succession of episodes that affect the construction of moral concepts discussed by all spheres of the international community in a legal-constitutional political debate that is fostered within each State. From this point on, we must not only discuss the emancipation of the peoples, but also of individuals through citizenship, political, and democratic actions. Current theories are committed to the pursuit of interpretations that balance the ideas of shared sovereignty, public reasoning in the international community, institutions and control of transnational economic practices, and social policies that benefit the development of the dignity of individuals.

3. The concentration of force.

Instead of promoting a federalist hierarchy among nations that concentrates on, and is organized around, a center of power endowed with supranational authority, the discussion about the organization of the States of the international community has made good progress towards the defense of transconstitutional hierarchical cooperation between the international, national, and supranational structures that are in place today. This progress, however, has not yet allowed for a proper understanding of the social, political, and legal scenarios currently developing in the international community due to the exchange of practices stimulated by globalization.

As an achievement of the last fifty years, one can point to the deflation of the concern regarding the issue of the understanding of international law or human rights as law, as constructs that did not fit in the model of law as commands constrained by threats. The debate was overcome after the State concentrated coercive functions, concerning issues of human rights, in structures set up by the State. This means that, according to the history, as long as there is the absorption of the ideals shared universally by constitutions and the strengthening of transnational regulatory bodies, one can verify the importance of state institutions in the process of the achievement and creation of acceptable legal behavior by the international community.

In a multilateral legal and political cooperation, it is possible to observe that the external decisions of States are evaluated and interpreted for them through the institutions of such cooperation. The States only then later incorporate the external decisions in the laws of the inner plane. After performing an evaluative step, the reason constructed in the external arena is critically introduced within the internal orders by state institutions, which are able to welcome and legitimate demand, through the imposition of sanctions. The compliance with legal practices results from interpretations contained in external decisions, especially when these decisions relate to human rights (HABERMAS, 2012, p. 62).

Thus, the theme of human rights, which was viewed with some suspicion,[4] finds protection in the constitutional powers that mention re-

[4]Habermas, mentioning Neves, warned that "regardless of the strength merely symbolic of fundamental rights in many of the façade democracies of South America and other places, the politics of the United Nations' Human Rights reveal the contradiction between the expansion of rights rhetoric humans, on the one hand, and its misuse as a

spect for fundamental rights. At the same time, in order for the violations of these guarantees not to be hidden and therefore become invisible because of the sovereignty of each State, the defense of human rights must be shared with agencies and supranational entities or interstate bodies. From the point of view of the intertwining between legal systems, these agencies, entities, or bodies monitor and control the episodes of offense and divulge them through their agencies and media. Therefore, they are able to pressurize States, entities, or individual transgressors.

Due to the problems of efficiency and legitimacy faced by organizations and international institutions that have the duty to oblige various States to respect and promote human rights, the international community has been structured in such a way that there was no concentration of political and legal debate about human rights in various forums. In spite of this lack of concentration and political debate, the implementation of coercive and corrective measures necessary for the realization of human rights, remained tied to the local forces and legal structures of each State (NEVES, 2009, p. 165).

As pointed out by Anne-Marie Slaughter (NAGEL, 2005, p. 139), one can verify that the recognition of the new order in the consolidation process involves the understanding that international governance must be conducted in accordance with the capacity and responsibility of the various actors belonging to the communities that make up the international community. In this scenario of constant negotiation and communication among stakeholders, a chain of "shared labor" is instituted by the articulation between external and local authorities. This exchange takes place within the sovereignty of the States. This type of network process connects disintegrated parts in transterritorial structures that share common responsibilities and powers beyond the boundaries of individual States.

In this sense, it is possible to agree with the understanding that there is a strategic gain by stimulating the defense and realization of human rights as a national project, built by the critical legal debate about the interpretation of these rights, according to the cultural perspectives and political community whose practice is under evaluation (NEVES, 2009, p. 153). It is believed that this attitude allows greater legitimacy of the decision making process, given that the interpretation of human rights is promoted through an adjustment of the claims inherent in

---

means of legitimation for political power usual, another" (HABERMAS, 2012, p. 135).

the content of these regional expectations.[5] Concerning this point, the aforementioned author establishes that even with the diversity of the doctrinal and jurisprudential repertoire, Constitutional Courts of the countries or supranational communities seek legitimacy for their decisions through a process of questioning institutional practices that are contrary to the protection of the freedoms and rights of individuals. It can be observed that Constitutional Courts are becoming increasingly self-referential in the solution of common constitutional cases, in a typical case of migration of constitutional ideas. More than a phenomenon of reciprocal influence between legal states, or a case of transjudicialism where courts promote reciprocal referrals, transconstitutionalism between legal systems implies that, in typically constitutional cases, the decisions of Constitutional Courts invoke the decisions of other states, cited not only as *obiter dicta*, but also as elements of the *rationes decidendi*. This phenomenon implies a reinterpretation of foundations not only of the starter line, but also of the finishing line (NEVES, 2009, p. 166–167).

In the examples presented by Neves, it is interesting to note that even the more closed courts, such as the United States, have some concern with the debate being conducted in foreign jurisprudence (NEVES, 2009, p. 168). This demonstrates that Americans are not so oblivious to world events and hermetically focused on their propositions. They also accept the persuasive force of the arguments advanced by other peoples, although they are more reluctant to accept political reflections undertaken by other communities. Contrary to this American position, Courts in South Africa, Canada, India, Zimbabwe, Israel, New Zealand, Ireland, Switzerland, England, and Brazil, among others, did not adopt the stance of the immediate deployment of foreign law. Instead, they adopted a reception of foreign law through internal processes of critical self-validation (NEVES, 2009, p. 171). Thus, they turned the reception into a dialogue capable of representing the development of reflective self-consistency while maintaining itself constitutionally open to learning from the experiences of others Courts, in judicial practice or presentation of models based on the study of comparative law.

Based on the study carried out by Slaughter (cited NEVES, 2009, p. 184), we find that there is a form of rejection verified in less efficient

[5] Neves writes about the search for a model to "reconcile the dissension" between constitutional orders involved in the conflict and how to allow that there is a minimum balance between legal consistency (internal) and legal adequacy (external) in a transcontitutional "conversation" (NEVES, 2009, p. 165).

Courts in the transconstitutional process that are characterized by the absence of a minimum standard with respect to fairness. This situation, however, is not so simple, since whenever a country does not accept transconstitutionalism, due to not adopting constitutional institutions in their modern sense, but radically rejects it, there is an almost an insuperable difficulty for the transconstitutional conversation that will change the status quo. And so proposes Marcelo Neves, following the trails of Slaughter, is the overcoming of this event and the search for interaction with these courts averse to constitutionalism, even though passive agents initially, through face-to-face meetings between judges. The success of this proposal is due to the assumption that the transconstitutionalism model imposes respect for the differences between constitutional orders and their particularities with regard to the normative content as well as procedures.

The realization of constitutional dialogue between legal State depends on the emergence of a "*judicial comitas*" and on judicial trading through which one might establish the following chain of events—while the former can provide the structure and rules for a global dialogue between judges in the context of specific cases, the latter is more limited and reflects the overall bankruptcy of cases that go beyond borders. This transconstitutionalism should not be confused with an overarching global order (NEVES, 2009, p. 186), but should be recognized as the provision of legal entities engaged in resolving disputes, interpreting, and applying the law in the best manner possible. The starting point of transconstitutionalism is not a denial, but the opening of State constitutionalism to other jurisdictions, either similar or from a different species.

Thus, one will deem a decision adequate, perennial and stable, and thus legitimate, when it was guided by dialogue and accessible arguments able to represent the desire of local people for pursuing the protection of individuals. Considering the peculiar aspects of the history of the regional community inside in a global context of the protection achievements by the international community, the achievements guide the ongoing debate, with the occurrence of internally influenced episodes that allow the change in parties' conceptions (NEVES, 2009, p. 228).

With the author of "Transconstitutionalism," it is manifested interest in this essay, but also demonstrates the concern about what he calls the development of a right "no punctual" (*contrapontual* in Portuguese) (NEVES, 2009, p. 154). A nice overview of this phenomenon is the realization that, at first, it promotes the adjustment of the tension

between internal and external perspectives held by a constitutional entanglement founded in the conversation needed for reciprocal learning for the actors of an interpretive community, which is very positive. Although, at a different time, it authorizes the relativization of the normativity of human rights under the same matter between the States on the grounds of *"direito contrapontual"* (in Portuguese), a promoter of the autonomy of national melodies and shares with misaligned institutional practices that are being promoted by the community.

The harmful behavior, builder of fear, perpetuates cynical interpretations that deny rights and restrict the efficiency of the design rules provided by the history of these achievements. On this issue, Habermas also does not fail to expose the problematic side of the attempt to establish a world order made up of fragmentary institutions, because these, can be unsuccessful, can cause ambiguity of human rights, which makes its own standards suspect (HABERMAS, 2012, p. 32).

4. The new conception of sovereignty.

Regardless of the risks, the scenario that is set for States and international organizations and transnationals is that they are closely related in their actions and attitudes through a legal code, not just a moral code, in that this scenario is open to the experiences and social practices, political and economic facts, and interpretations, which are derived from its constitution. From start to finish, we verify that the various contemporary legal systems share a common identity since all of them share the same binary code of the common legal system, legal/illegal, and the problems they face (NEVES, 2009, p. 115).

However, what is legal or illegal and how the legal systems of a modern world society within a plurality of orders work, each with their different legal requirements and programs, in a theory of law, remains an empty question, as it is no simple task to correlate the basis of various legal barriers for cooperation. Thus, the relationship between systems must be done first before the possibilities of building a cross rationality through reciprocal learning and creative exchange can be optimized. In this way, the internalization and externalization of information arising from social spheres play various roles in the efficient realization of the binary code, legal/illegal. The internalization and externalization of information is reciprocal in a multitude of orders. The fact that there is a multiplicity of orders does not mean they should be isolated. Since

always, even in classical international law, input/output relations and the interpretation of legal orders have been observed through treaties, the international legal order of representatives, and practical and legal perspectives.

As set forth by Marcelo Neves, Jurgen Habermas and Amartya Sen, the point of convergence between these multiple orders is the ability of people to question and act in a critical manner. The action should have political reflections when considering "problems" of their community and the achievements of other communities. The dynamics mentioned are moved by a sense of reciprocity that grounds the idea of equality between individuals and makes them act in pursuit of treatment and conditions similar to others.

For their potential in fostering a political-legal regime in which people are viewed equally, self-determination, political liberalism, and the democratic rule of law are seen as social constructions that contribute to the consolidation of the notion of human dignity, the central point of the fight for human rights claims today. This positive perception of these social constructions stems from the fact that these 1) highlight tolerance to individual choices regarding religion, sexual choice, 2) and are endowed with institutions that seek to suppress possible offenses based on gender, race, background, or financial ability, allow social advances, through the inclusion and participation of people in the design of community projects. It does not hold here that the aforementioned social constructions are not prone to institutional errors, but, if there are distortions, these have the environment conducive for corrections.[6]

In this respect, in his work "On the European Constitution," Habermas[7] defends a cosmopolitan attitude in which human rights, col-

[6] Nicolas Berggruen and Nathan Gardels, however, present a position somewhat skeptical about the ability of liberal democracies and participatory self-regulation. In their work, Intelligent Governance for the 21st Century, the authors point out flaws in the self-regulatory process of liberal democracies, which often fall prey to a "consumption citizenship" that presents populist policies unable to promote policies and structural unpleasant reforms to the population that are necessary for fundamentals of good governance in the long term. They question whether, like the market, a liberal democracy is able to regulate itself to preserve its system from malfunctioning (BERGGRUEN; GARDELS, 2013, p. 69).

[7] In the aforementioned work, as highlighted by Alessandro Pinzani in presenting the Brazilian edition of Habermas' book (2012: p. XIV), unlike earlier works, the German philosopher adopts a decidedly normative position on the concept of human dignity, one that theories of justice have always avoided. This attitude can be illustrated by the

lectively constructed through institutional achievements[8] has always found in its core the notion of human dignity. He regarded human dignity as "the conceptual hinge that connects the morale of equal respect for each with the positive law and the democratic legislation so that, in their cooperation under favorable historical circumstances, can emerge a political order based on human rights " (HABERMAS, 2012, p. 17–18).

Compatible with the thought presented by Habermas, Kwame Anthony Appiah highlights that the commitment to human dignity, built by local political movements with outpouring of support from the international community, is the attitude that avoids disrespectful actions towards others and allows the evolution of a legal system toward the preservation of individuals (APPIAH, 2012, p. 140). On the notion of human dignity, Jeremy Waldron argues that the spread of the concept of dignity offers one promising idea to envision to all people the right to the same noble treatment, previously restricted to the high caste. That means, he continues, building concepts that give everyone the same respect and equal rights, ideas worthy of egalitarian liberalism (WALDRON, 2009:28).

For a sense of reciprocity, it is necessary that before an identity geared towards guaranteeing the right to respect is established for the democratization of criticism, it is important to make the criticism a popular and common practice, thereby spreading reflexive thoughts. Thus, the concern is with respect to what makes the connection between the good life, built by the individuals' participation in government, and the place they occupy in the world. The universal dignity, which Habermas also attributes to all persons, supports the connotation of self-respect in social recognition, an attitude referred to by Appiah as one of honor. According to the philosopher,

> (...) The honor is not a vestige of a decadent pre-modern order, for us, it is what it always was: a mechanism driven by dialogue between our self-conceptions and consideration of others, which can propel us to fade seriously our responsibilities in a world we share. A person with integrity will care to live according to their ideals. If you can, we should respect it. But worry about doing the

passage according to which human dignity, for the author, is one and the same everywhere and for each, based on the indivisibility of human rights (HABERMAS, 2012, p. 16).

[8] According to the author, "Human Rights resulted from violent historical struggles for recognition and sometimes revolutionary" (HABERMAS, 2012, p. 28).

> right thing is not to worry about being worthy of respect. It is the concern with the respect that makes the connection between living well and our place in the social world. The honor makes the integrity public. (APPIAH, 2012, p. 184)

In the same sense, Waldron also talks about honor, distinction, and position when dealing with the legal notion of dignity as it is conceived today. However, for him, unlike the majority of philosophers who believe in the loss of certain habits distinctive of value as the gain for the construction of the notion of dignity, there was a unification of the social classes. They share the same habits of nobility and equal respect as universal rights, and reject special privileges or honor as corresponding rights (WALDRON, 2009, p. 27).

Since human dignity is a concept about equal respect, it is grounded in a sense of belonging to a community that is organized geographically and temporally under the banner of a civil status. Hence, the concept of human dignity is promoted by combining the moral contents, with equal respect for each other and an order of citizens who are subjects and are endowed with rights that are recognized as equal and claimable (HABERMAS, 2012, p. 24).

Thus, the philosopher predicts that the validity of positive human rights is only perceivable when situated in a particular community, primarily within a state, in the form of fundamental rights. However, for Habermas, they are endowed with a claim to universal validity that transcends national boundaries and towards a "cosmopolitan inclusive community" based in a "democratically constituted world society," which does not need to develop the same characteristics and structures of the State itself (HABERMAS, 2012, p. 24). Right now, what we observe is an idea of "shared or split sovereignty."Throughout the debate on the topic, especially based on the experience of community law of the European Union, the notion of sovereignty was reinterpreted through the concept of "shared or split sovereignty" between legal systems that intertwine in what can be referred to as the "transnationalization of popular sovereignty" (HABERMAS, 2012, p. 50), or the "transconstitutionalism between supranational law and state law" (NEVES, 2009, p. 152). The new paradigm means the transfer of a part of "competence of competence" for a more comprehensive legal domain present in a relationship of complementarity that is located in a "network of constitutional elements" in the view of the citizen (NEVES, 2009, p. 153–154). This phenomenon points to a constitutional conversation focused on

mutual learning, rather than a monolithic hierarchical way, whose process consists of three components. These are: (1) the democratic communitarisation of the idea that the subjects of Law are free and equal, (2) the organization of collective action capabilities, and (3) the means to integrate a civil solidarity among strangers (HABERMAS, 2012, p. 50).

The similarities between Neves and Habermas concerning the matter in question go only as far as its identification, as they differ on the understanding of what it represents. Neves values the intertwining of orders through the process of reciprocal learning between the legal orders established in multilateral discussion forums, mostly officers, about certain shared constitutional matters. Habermas' argument about constitutional change focuses on dual citizenship accumulated by citizens of European nations in a unique process in which it is possible to follow the formation of a new form of sovereignty where the individual is at the same time a citizen of the nation and a citizen of the Union.[9]

Thus, Habermas supports the idea of transnationalization of popular sovereignty as a democratic alliance between nation states so that, on the one hand, nation states accept to undergo rights established at a supra-national level, and on the other, give citizens the constituent power of the union with a limited number of "constituent States," receiving a mandate from their people to be consistent for the foundation of a supranational community (HABERMAS, 2012, p. 49).

Thinking in terms of Habermas, according to whom honor and value the political capacity of each individual as a conductor of his own life project, raising it to the merit of the writer and interpreter of legal and constitutional history to be inherited by their peers, is to also report that the process of global governance performed by intertwining institutions and governmental entities, and non-governmental, lacks a deficit of democratic legitimacy. This deficit results in the gap between those endowed with power to decide and will be influenced by the consequences of political decisions. The reflection of this political abyss generates a series of distortions increasingly complicated and impractical to overcome with only localized measures (HABERMAS, 2012, p. 85).

This same observation is made by Berggruen and Gardels (2013:48), when they analyzed the changes in globalization, from the 1990s to the present day. According to them, the "economic power" experienced pre-2008 crisis resulted in a cultural and political assertive-

[9]According to Habermas "(...) the division of sovereignty between two subjects constituents, citizens and peoples of the States" (HABERMAS, 2012, p. 90).

ness that led to a "pluralism normal" in the history of humanity. However, the complexity of a greater global integration in trade, investment, production, consumption, information flows, has pressed authorities to demand greater involvement of governments at the technical and policy levels, mega urban regional, national, and supranational level in order to manage systemic linkages of interdependence that exist today. In conclusion, everyone will lose if it all falls apart.

Thus, according to the authors, "the political awakening that is noticeable in many places requires the dignity of meaningful participation. The failure to find an institutional response to this challenge will result in a crisis of legitimacy for any government system, for the inability to function enabling inclusive growth and employment, or it is because a 'democratic deficit' that silent many voices of the population will harm an effective consent" (BERGGRUEN; GARDELS, 2013, p. 49).

The expressions above represent the current responses to writings, such as that of Thomas Nagel, in which institutions are sustained in a stage of pre-organization of world politics which, despite the abovementioned democratic deficit and in spite of being deemed "unfair" for not having passed democratic process, have the capacity to implement measures of common interest among States imposed by bargaining power between them, thus being able to minimize the problem of global justice in a system that may be centralized and then critically questioned (NAGEL, 2005, p. 146).

5. Politics in the contexts of life.

The pessimistic scenario described by Habermas (2012:85), derived from the unfolding of the global crisis of 2008, is about a society in which the political elite is far from the population, which in its turn, ignores the real intentions of those who made these policies that are followed by Nations; who change the rules unilaterally, focusing on efficiency, and deconstructing, in the wake of their advance, the guarantees and rights of individuals. About this Habermasian concern, Amartya Sen affirms (2011:377) that democracy, through the representation that it causes between citizens and government, allowed the development of measures that guaranteed freedoms and reduced social inequalities, which can stimulate the healthy growth of the individual. Without the controlling instruments of existing decisions in a democratic context, global governance would possibly become nothing more than a gov-

ernment of bureaucratic political elite, insensitive to the needs of particular communities and involved only with its power and institutional arrangements.

Discussing democracy, Sen (2011:359), citing Habermas, describes the need for a public arena where arguments can be defended freely during the process of decision making. This is recognized not only in solemn moments of the procedures of democratic decision-making, but also in the day-to-day speech and actions of the people of a political community that reinterpret social practices, allowing for reflection and improvement of these through transit of information and demands between stakeholders and those with power to decide (SEN, 2011, p. 438).

Because they are bound to the community they represent, the holders of political power should be aware of the fact that when the gap between what is said and what is perceived increases; when the difference between truth and propaganda is so great, people eventually simply cease to believe in the system—a system that will take only as much as a push to fall (BERGGRUEN; GARDELS, 2013, p. 81). Therefore, at any level of State action, authorities should cherish acting in accordance with the desires and expectations of their populations, favoring space for debate and accountability as a means to avoid being targeted or criticized by the public. Thus, the public sphere of debate is the environment wherein one will find the possibility of good governance that allows for an environment where plans capable of producing patterns of conduct and standards, and with the ability to ensure the promotion of human dignity and citizenship are discussed (SEN, 2011, p. 383–384).

To perform in the arena where public reason can be conducted, certain institutions are needed. As Nagel points out, the individual and political action of the people only makes sense in a manner capable of changing consolidated social practices when they are contextualized in a mechanism endowed with structures in motion, with the potential to be targets of the insurgency. Anarchy does not allow for progress as it seeks to restrict the ability of individuals to move toward a definite proposal for the long term. However, contrary to what the American philosopher supports, one should not be compelled to accept illegitimate and unjust institutions as a necessary evil to achieve global justice (SEN, 2011, p. 362).

As the capacity for action and communication is not limited to national borders, the preservation of the media and free press represents the maintenance of important arenas for the promotion of public argumentation and protection of human rights in transnational forums

(HABERMAS, 2012, p. 84). After all, among the achievements of democracy and its inclusive process of participation is the ability to "make people interested, through public discussion, in the difficulties of others and have a better understanding of their lives" (SEN, 2011, p. 378). Defending the standpoint of Appiah, based on Habermas' communication and discourse theory, Sen (2011:427) explores the importance of pressure from the world media and human rights organizations in the protection of fundamental rights in the local communities, where hierarchical exclusionary practices disrespects the constitutional freedoms of weaker individuals by reason of their condition, subordination, or minority.

Thus, one can conclude that legal orders based on subjective rights, protected by the freedom of expression and the ability of political action of individuals, are indeed endowed with sovereign institutions, which can be deemed legitimate, as they are constantly subject to correction by their population. Although regarded as the most efficient ones to date, even these institutions face major challenges over the economic and political entanglement in the international arena, which despite being touted as a stage for decisions with serious effects on national constitutional spheres, are characterized by the absence of any form of coordinating or legitimately established power that hinders the development of responses to shared problems.

There is no denying that all sovereignty nowadays is open to transnational learning, even though some are more than others are. It is observed that such opening has as its foundation the quest for efficiency that reflects the quality of life of society and its political maturity, economic and social. Such is the new format of State sovereignty that needs to be articulated at various levels—national, international, and transnational, which can develop individuals and make a system thrive. Due to the tangling of very similar and interconnected dilemmas, in all corners of the planet, States must share the idea of the realization of the protection and promotion of human rights as a type of justice in the international arena, endowed with reflexivity, impartiality, and transparency.

6. Conclusion

The discussions on global justice have progressed towards the ability of societies to associate the regional interests of their population in broader perspectives that affect all others. From the moment one verifies the existence of connected practices through a network that surpass-

es the code of sovereignty with relative ease and familiarity, one might notice the consolidation of other decision-making arenas in different environments which, with or without mature Institutions, will require a new attitude from the traditionally practiced policies in the current constitutional States of nowadays. This evidence left behind the limitations and doubts posed by legal positivism of the first half of the twenty-first century as to the existence of international law and the sharing of common ideals such as human rights.

That which affects the populations of the world today the most is directly linked to their ability to generate welfare societies, or efficiency societies, and to promote a sense of dignity. Socioeconomically stable societies tend to persevere in their territories without serious conflicts and promote the strengthening of institutions endowed with legitimacy and credibility. Their development is so great that it renders them able to generate patterns capable of influencing other societies, to the extent to which they are presented as viable after an incorporation process through procedures and local interpretations.

As pointed out by Marcelo Neves, who innovatively verified the strengthening of what he called "cross-pollination" between constitutional systems of the world, pointing out the decisions reached by major courts of the world that were in full dialogue, we now realize that there is more than dialogue in this new social formation that affects the interdependent global society as a whole. There are legitimate demands for representation, in different spheres of power, that use of the media as grounds for action and political pressure.

It is unsettling to acknowledge that there is a mismatch in the international arena between the economy and law, on one the hand, and politics on the other, the latter being practiced in an unsatisfying manner—or none whatsoever, depending on the subject. Flowing from the thought of Habermas, it is seen that this gap has caused political instability in many countries, even liberal democracies, whose systems, by themselves, are not capable of generating responses to the welfare demands of the population.

The actions outlined until now by political leaders have been insufficient or hopeless since their early stages, due to the lack of ability from the structures to articulate internationally concrete policies that combine efficiency and legitimacy. Although limited and with little success, in Europe, as pointed out by Habermas (2012:62), there are already global forums such as the G20 in which, according to appointment by Nicolas Berggruen and Nathan Gardel (2013:53), one can point to an

outline of international coordination skilled to control organizations and practices that erode the national structures, thereby causing serious imbalances and constitutional problems.

We can refer to this phenomenon as politics being required to expand its borders beyond sovereignty boundaries in a process of "political globalization," arising from economic and cultural globalization. This historical moment is characterized by diffuse uncertainty due to the lack of market transparency, to government omission, as well as to the convenience of various governments regarding risky and ambitious economic practices. Faced with the current disarray of institutions in the face of adversity, the actual stage demands a concern with stable and sustainable growth. Therefore, the capability of survivability of States and their institutions depends directly on the willingness of their societies to self-correcting in an articulated and critique-wise way, mixing regional, supranational, and international actions that both seek results and focus on the development of people and strengthening of human rights.

This means that if at first national policies stimulated economic globalization, resulting in an opening of markets and cultures, which established a certain easing of sovereignty, now the same policy sees the need to share this sovereignty and to render accounts to external parties, or risk having to forfeit the credibility and trust of the international community, risk-averse, and eager for growth.

As a new chapter in the history of mankind begins, we perceive that the current form of organization and production will tend to stabilize this cycle when the sense of belonging to a broader community becomes more encouraged in a way that the highest standards of human development goals are taken seriously by any government. When the expansion of rights and the rule of law occur in a sustainable manner, public demonstrations and popular political demands shall be taken seriously by governments and institutions, as they will be supported as sources of information about the system malfunctions that may contain the key to improving governance and the development of the peoples.

References

APPIAH, Kwame Anthony. *Código de honra: como ocorrem as revoluções morais*. Translated by Denise BOTTMANN. São Paulo: Companhia das Letras, 2012.

BERGGRUEN, Nicolas and GARDELS, Nathan. *Governança inteligente para o século XXI: uma via intermediária entre o ocidente e o oriente*. Translated by Martin CARDOSO. Rio de Janeiro: Objetiva, 2013.

HABERMAS, Jurgen. *Sobre a constituição da Europa: um ensaio*. Translated by Denilson Luiz WERLE, Luiz REPA, and Rúrion MELO. São Paulo: Ed. Unesp, 2012.

HART, Herbert Lionel Adolphus. Are there any natural rights? *The Philosophical Review*. 1955, 64(2), 175–191.

NAGEL, Thomas. The problem of global justice. *Philosophy & public affairs*, 2005, 33(2), 113–147.

NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009.

RAWLS, John. *O direito dos povos*. Translated by Luiz Carlos BORGES. São Paulo: Martins Fontes, 2001.

RAZ, Joseph. Human Rights Without Foundations (March 2007). Oxford Legal Studies Research Paper No. 14/2007. Viewed June 6, 2013. Available at SSRN: http://ssrn.com/abstract=999874 or http://dx.doi.org/10.2139/ssrn.999874.

SEN, Amartya. *A ideia de justiça.* Translated by Denise BOTTMANN. São Paulo: Companhia das Letras, 2011.

WALDRON, Jeremy. Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley (September 1, 2009). NYU School of Law, Public Law Research Paper No. 09-50. Viewed March 10, 2013. Available at SSRN: http://ssrn.com/abstract=1461220 or http://dx.doi.org/10.2139/ssrn.1461220.

Subjectivity and judicial decision:
A philosophical approach

André Martins Brandão[1]

Abstract:This paper seeks to clarify the relationship between subjectivity and judicial decision making. It can be said the majority of judicial decisions have something in common, a simple sentence: "I decide." The investigation of this phrase brings up two essential questions to be answered in order to justify an entire conjecture of interpretation and application of law: who is this "I" who decides? And how that "I" ought to decide? This work has for hypothesis that the way of deciding depends on the manner the person understands oneself. From the first question - who is this "I" who decides? - It is perceived, especially since philosophy's linguistic turn, that the subject is no longer seen as the creator and epistemological starting point for knowledge of the world, as the moderns Cartesian cogito and Kantian transcendental proposed, and came to be understood as a historical subject, being-in-the-world, participating in a world of intersubjective meaning, heavily influenced by history and tradition, according to contemporary continental authors such as Heidegger, Gadamer and Foucault. From the second question - how that "I" must decide? - It was noticed that in a positivist view, by authors like Kelsen and Hart, the judicial decision making process, that defines interpretation of law as an act of will and uses discretion as a way to fill the "gaps" of the legal system, is closely related to the modern perspective of understanding subjectivity, because the judge is elected as an epistemological starting point for knowledge of the world, therefore creator of law, who can say what the law is based on his individual conscience. Likewise, Alexy's attempt to overcome positivism ends up falling into a similar problem, because it permits the judge to use discretion in choosing the most relevant principle for decision, through the proportionality method. Finally Dworkin, with his vision of law as integrity, offers an alternative for interpretation and application of law consistent with subjectivity´s contemporary notion, given that the judge's main task is to order coherently and responsibly a system that pre-existed him, guaranteeing previously existing rights. From these findings, it is seen that the way of understanding one's place in the world

[1] Doctoral student in Philosophy of Law at the Pontifícia Universidade Católica de São Paulo – PUC/SP; Master in Public Law at the Universidade da Amazônia; Lawyer and Professor. E-mail: andrembrandao@gmail.com.

is a prerequisite for making judicial decisions, based on the link between the transcendental subject, the cogito and the positivist interpretation and discretion, and the proximity between the historical subject and contemporary theses of interpretation and application of law, such as law as integrity.

Keywords: subjectivity; judicial decision; interpretation and application of law.

1. Introduction

Judicial decisions are ways to put an end to legal disputes, whoever are their participants. They are largely responsible for the concretization of law in the world of life. From a linguistic perspective, it is possible to assume that at least the majority of judicial decisions have something in common, a simple prayer, consisting of a subject and a verb: I decide.

Generally judges rely on such a statement at the final moment of their decisions. When, based on the normative system and circumstances of the case, through interpretation, decide the application of the law to the case, thus settling the dispute at hand.

The investigation of such a phrase brings at least two key questions to be answered in order to justify a whole conjecture of interpretation and application of law: who is this "I" who decides? And how that "I" ought to decide?

The first question has descriptive claims: subject´s meaning in the world must be ascertain in order to answer who is the "I" who decides in legal judgments; the second, in its time, normative claims, after all, to better enable law´s concretization it must be sought a form of decision that allows a method of interpretation and application of the law at the same time minimally safe and that claims correction.

This work has for hypothesis that the way of deciding (in any normative system, including law) depends on the way the human being understands himself, i.e., the manner that humans see the world directly influences their way of deciding.

From this possible statement, the answer to the two questions above complete each other, and are necessary for a better method of interpretation and application of the law, because the "I" who decides is the way that the human being sees the world, and how this "I" ought to decide shows us the path he must tread to reach the decision.

Thus, it is proposed to seek the answer to both questions from a philosophical point of view, in order to clarify the relationship between the human being and the way to decide within a normative system of law.

2. The First Question - Who is the subject in decision making?

The first question - who is this "I" who decides? – will be answered through the clash between the classical notion of kantian transcendental subject, strongly influenced by the cartesian subject or cogito ergo sum, and a contemporary way to understand the subject as a historical entity, within the structure, mainly based in continental authors such as Martin Heidegger, Hans-Georg Gadamer and Michel Foucault.

From the study of the kantian transcendental subject (KANT, 2001, 2002, 2003) or the cartesian cogito (DESCARTES, 2001) in a context of modernity it was found that subjectivity was elected as the birthplace of all knowledge. All the world's meanings comes from men (I think, therefore I am), which has the supposed ability to draw from their own history and factuality system for better research of mundane objects. In that way, it was established a subject-object relationship, where man is the subject, birthplace of all knowledge, key point of knowing the world; and the object is the target of that knowledge. Establishing a relationship in which the object is known, and the subject is the knower; the object is manipulated, and the subject manipulates. The notion that the subject is able to extract an object from its environment to know it, understand it, interpret it, manipulate it better permeates this way of thinking.

From a contemporary point of view, based on the ontological-linguistic turn on philosophy, Heidegger (2005, 2008, 2009) demonstrates the ability to see the human being through an existential being - Dasein, as being-in-the-world, which reverses the cogito. "I think therefore I am" is replaced with "I am in the world, therefore I think." (NUNES, 2004) Heideggerian Dasein is the human presence, is being (Sein) there (Da). For Heidegger the human being is not something general, abstract, but something concrete, that takes place in the world. The essence of Dasein is in existence, in the concreteness of experience, where he creates bonds with being, with entification man. Dasein, for Heidegger, explains existence as an existential situation. It is only to be until stop being. When death comes to be is no more. Time governs being, that is finite in its essence. Making a language game with the title of Heidegger's seminal

book, it can be said that being is time (HEIDEGGER, 2005).

From this new sense of self, Heidegger tried to end with the cartesian myth of being encapsulated in itself and in the present tense. Kant and Descartes believed that the best way to understand the object was to extract it from its midst, removing it from its environment in order to know it really by itself, without interference from the environment. But Heidegger says that Dasein is always being in the world, in the world of projects, in the world of concerns. He is being in it´s midst, questioning the very being of the other. Dasein essentially exists in the world, raising questions about being and open in possibilities. The subject is not something isolated, pure, but immersed in an existential situation. All cultural, historical, local, situational factors are immersed in being. Thus, one passes, through the Dasein, from the singular subjectivity offered by theoretic models presented to an intersubjective existence.

Dasein is always being in the world. The world is it´s there. He is always situated, having no cartesian metaphysical capacity to be an abstract entity, he is not extractable from the world. He is also temporal, is projected in the future possibilities, but thrown into a world that was already there before him. Heidegger's philosophy has the characteristic of being historical, always expressing itself in a temporal form. The time, in turn, is not just a metric system, but a necessary data for the understanding of existence. Dasein is the temporal presence of existence.

Hans-Georg Gadamer (2008, 2009), in turn, remembers the Aristotelian philosophy, in which the expression for subject was Hypokeimenon, which means "that which persists throughout all change". It is not the human being responsible for the existence and designation of the world; he is a being in the world, a being-thrown, a being-there, in Heidegger's fundamental ontology. In that way, all the truths and interpretations produced by the subject are, in one way or another, a product of the time in which he lives, a product of history and tradition.

Michel Foucault (2000, 2002, 2007, 2009) is also a big opponent of Descartes and his man extractable from the world, which dominates all knowledge and reality. No wonder that the French philosopher declared in one of his first works, called '*Le mots et le choses*', that man is dead (FOUCAULT, 2000). It is dead the cartesian centralized man, cogito ergo sum, to make room for the subject within the structure, to open space to the temporal subject. In this way, as well as Heidegger, Foucault sought to flee from the subject as the epistemological starting point, and became concerned with the structure, placing the subject within that structure.

In this sense, from the clash of perceptions of subjectivity offered

by the contrast between the cartesian cogito and the kantian transcendental in one side, and the heideggerian Dasein, the gadamerian historic and the foucaultian structural in another; it is realized, especially from the linguistic-ontological turn on philosophy, that the subject is no longer seen as the creator and epistemological starting point of knowledge of the world, as in modernity, and came to be understood as being in the world, participating in a world of intersubjective meaning, strongly influenced by history and tradition.

3. The Second Question - How the subject decides?

The second question - how that "I" ought to decide? - will be answered based on philosophy of law, especially taking into account methods of interpretation and application of law, and the issue of discretion. It will be investigated the legal positivist notion of judicial decision and interpretation, by authors such as Hans Kelsen and Herbert Hart, in order to contrast it with contemporary forms of understanding them, based on authors such as Ronald Dworkin and Robert Alexy.

From the kelsenian normativist notion (KELSEN, 2000, 2006), legal positivism elected subsumption as the main form of application of law. It would be up to the judge to make the case fit the pre-existing rule, so to resolve it. However, it identified the problem of semantic closure in the system of law, i.e., the existence of cases that could not be solved by the positive rules. Thus, it relegated the issue of interpretation and application of the law to a minor problem, aiming primarily on logic-deontic conditions of validity of norms (rules). This fact can be seen by the kelsenian construction of the normative pyramid that defines the validity and concretization of law, and his hypothetical basic norm as a condition of closing the system (KELSEN, 2006). Hart (2007) also noted such a construction, as the system of primary and secondary rules, which has as support a rule of recognition, based on the social acceptance of the presented system.

According to this vision, legal positivism admits the discretion of the interpreter as a way of solving the problems of factual insufficiency of law to respond to all cases. Kelsen (2006) poses the problem of interpretation of the law as an act of will of the judge, who in front of the frame of the legal rules, decide according to their conscience. Thus, if there is no clear rule to a situation - a "gap" situation for the positivists - the judges would be the ones responsible, through their own discretion-

ary judgments, from their own individual consciousness, for integrating the system, creating law from their subjectivity, legislating retroactively.

The positivist view of interpretation and application of law combines, in an essencial form, to the meaning of subjectivity of the Kantian transcendental or Cartesian cogito, as it invests in human consciousness, as creator of the world, to solve problems of practical application of law, making use of discretion as the system´s closure valve. In this sense, the individual consciousness has the power to integrate law from their own judgments, without connecting to intersubjective practices - law is what the interpreter, from his interpretation as an act of will (and why not power), says it is.

Contemporary authors like Robert Alexy and Ronald Dworkin, each from their own theoretical frameworks, noted the problems of positivism, particularly regarding the insufficiency about the method of interpretation and application of law, and discretion as an "inevitable" way to give responses to cases not covered by the system.

Firstly it is verified that Alexy's (ALEXY, 2008) legal argument thesis is insufficient to try to go beyond positivism, because with his way of solving hard cases - those cases of "gap" in positivism - through legal principles seen as optimization commands, which uses the maximum, principle or rule of proportionality for achieving a balance of values, ends up falling back into the abyss of discretion, considering that it is the duty of the subject, from their individual conscience, to choose the most relevant principle for the case, which will be used as the decision main criterion. Thus, Alexy´s method does not leave the basic structures of positivism - discretion - choosing the subject as an epistemological starting point of knowledge, just as the transcendental kantian or cartesian cogito.

Ronald Dworkin (2005, 2008, 2011), mostly from his mature critique of positivism (or law as a matter of fact, the nomenclature used in the book "Law´s Empire"), weaves his way of seeing the practice of law as integrity. For the author, legal judgments are interpretative judgments which must face the past and the future in order to continue the system, while creating something new. In this sense, the doctrine of judicial decisions closely resembles a chain novel, where several authors write the same work - rests with the new author the obligation to continue what has already been written and add new things. Thus, the task of the interpreter of law is to try to balance the past and the future, trying to give moral coherence to the legal system.

In the American philosopher´s view, from the perspective of law

as integrity, discretion of judges would not fit as a way to address the shortcomings of the legal system (GUEST, 2010). The task of a judge is not to legislate retroactively, so this would be a political irresponsibility. The judge has the duty to solve cases always within the legal system, using other legal patterns, like principles, when there are no rules for deciding a case. However, this does not mean a freedom to decide from his own conscience, in isolation – it means to decide the case according to the system of law, mediating past and future, trying to give coherence to legal practices responsibly. For this reason that Dworkin (2008) refers to integrity as the internal morality of law - because it's up to integrity to guide the work of judges, that is to build the system. Thus, the judge can never create law in the task of interpretation and application, but merely guarantee preexisting rights.

It is noticed that the dworkinian formula of seeing legal practice is coherent with the notion of contemporary intersubjectivity, since the judge's conscience is no longer the epistemological starting point to solve the insufficiency problems of the legal system. From the teachings of Dworkin, the judge can be seen as being in the world of meanings - a person who is responsible for giving coherence to the previously existing system. The subject is no longer creator of the world, as the cogito or transcendental, but a subject within history, tradition, and previously existing structures, which has the duty to interpret them as best as possible (coherently), in order to solve the practical problems of interpretation and application of law.

4. Conclusion

In this study it was observed that at least the majority of judicial decisions have a common bond - the phrase "I decide". This work started from the hypothesis that the human being´s form of perceiving the world directly influences the way they decide. Thus, it was elected two questions as a manner to demonstrate the influence of the way of perceiving subjectivity in the decision: who is this "I" who decides? And how that "I" ought to decide?)

It was seen that in modernity the subject was perceived as epistemological starting point for knowledge of the world (or creator of the world), from the notion of kantian transcendental and cartesian cogito; while in contemporaneity the subject is seen as being in the world, someone who participates in a world of intersubjective meanings.

In this sense, within the system of law, it was realized that the positivist notion (in its normative bias) of judicial decision, and mainly discretion as a way to address gaps in the legal system, are strongly related to the modern way of seeing subjectivity, because the judge is elected as epistemological starting point for knowledge of the world, therefore creator of law.

Similarly, Robert Alexy´s attempt to overcome positivism falls into a similar problem, because it opens doors for the subject to use discretion in choosing the most relevant principle to the decision of the case, using the method of proportionality.

Finally, Dworkin offers an alternative for interpretation and application of law consistent with the contemporary notion of subjectivity, given that the subject is no longer responsible for the world´s designation (like the kantian transcendental), therefore for the creation of the law in the concrete case, but his main task is to order coherently and responsibly a system that pre-existed him, ensuring existing rights.

From these findings, it is seen that the way perceiving oneself in the world is an indispensable condition for decision making, based on the link between the kantian transcendental subject, the cartesian cogito and the creative force of law living in the positivist discretion; and linking between the historic-structural subject and contemporary constructions of interpretation and application of the law, such as the law as integrity formula.

Finally, it must be stressed out that this paper is not based on a theory of truth as correspondence, thus it does not claim to be the correct mirror of nature. This is an incitement to debate and to democratic dialogue. In that way, the positions taken here cannot be, nor intend to be, the natural truth. Within a society one should, at least, listen to the other, open up for discourse, and not get locked in the tower of blind absolutism. As said by Levinas, in his work Totality and Infinity - between our totality, and the infinity of the other, the most ethical way to behave is to hear what the other has to say until the end, and not assume what he should have said from what one believes.

References

ALEXY, Robert. *Teoria dos Direitos Fundamentais.* Malheiros, São Paulo, 2008.

_____, *Conceito e validade do direito.* São Paulo: Martins Fontes, 2009

DWORKIN, Ronald. *Uma questão de princípio.* 2ª ed. São Paulo: Martins Fontes, 2005

_____, *Levando os Direitos à Sério.* São Paulo: Martins Fontes, 2007.

_____, *O império do Direito.* São Paulo: Martins Fontes, 2008.

_____, *Justice for hedgehogs*. Cambridge: Harvard University Press, 2011.

DELEUZE, Gilles. *A filosofia crítica de kant.* Lisboa: Edições 70, 2009.

DESCARTES, Rene. *Discours de la méthode.* Paris: Mozambook, 2001.

FOUCAULT, Michel. *As palavras e as coisas.* 8 ed. São Paulo: Martins Fontes, 2000

_____, *A verdade e as formas jurídicas.* 3 ed. Rio de Janeiro: Nau, 2002,

_____, *Vigiar e Punir.* 33 ed. Petrópolis: Vozes, 2007

_____, *Microfísica do Poder*. São Paulo: Graal, 2009

GRONDIN, Jean. *Introducción a La hermenêutica filosófica.* Barcelona: Herder, 1999.

GUEST, Stephen. *Ronald Dworkin.* Rio de janeiro: Elsevier, 2010.

HART, Herbert L. A. *O conceito de Direito.* 5 ed. Lisboa: Calouste Gulbekian, 2007.

HEIDEGGER, Martin. *Ser e tempo.* Parte I. 15 ed. Petrópolis: Vozes, 2005

_____,. *A caminho da linguagem.* 4 ed. Petrópolis: Vozes: 2008.

_____, *Introdução à filosofia.* 2 ed. São Paulo: Martins Fontes, 2009.

HODGE, Joanna. *Heidegger and ethics.* London and New York: Routledge, 1995.

GADAMER, Hans-Georg. *Verdade e método: traços fundamentais de uma hermenêutica filosófica.* 10 ed, Petrópolis: Vozes, 2008.

_____, *Hermenêutica em Retrospectiva.* Petrópolis: Vozes, 2009

KANT, I. Crítica da razão pura. 5. ed. Coimbra: Calouste Gulbenkian, 2001

_____, *Crítica da faculdade do juízo.* 2. Ed. Rio de Janeiro: Forense universitária, 2002.

_____, *Critica de la razón practica.* Buenos Aires: Losada, 2003.

KELSEN, Hans. *Teoria Geral do Direito e do Estado.* 3 ed. São Paulo: Martins Fontes, 2000.

_____, *Teoria Pura do Direito.* 7 ed. São Paulo:Martins Fontes, 2006.

LEVINAS, Emmanuel. *Totalidade e infinito.* Lisboa: Edições 70, 2000.

NUNES, Benedito. *Heidegger & Ser e tempo.* 2 ed. Rio de Janeiro: Zahar, 2004.

PUGLIESI, Márcio. Teoria do Direito. 2. ed. São Paulo: Saraiva, 2009.

RICOUER, Paul. *Hermenêutica e ideologias.* Petrópolis: Vozes, 2008.

RORTY, Richard; GHIRALDELLI JR. Paulo. *Ensaios pragmatistas sobre subjetividade e verdade.* Rio de Janeiro: DP&A, 2006.

RABINOW, Paul; DREYFUS, Hubert. *Michel Foucault: Uma trajetória filosófica.* Rio de Janeiro: Forense, 1995

SILVA, Luís Virgílio Afonso. *Princípios e Regras: Mitos e equívocos acerca de uma distinção.* In: Revista Latino-Americana de Estudos Constitucionais 1, 2003, p. 607-630.

The role of procedural dialogue in the democratic system and the risks of judgment standardization in Brazilian Law

Flávia Almeira Pita[1]

Abstract: In the last decades, the Brazilian Judiciary has faced a large increase in its demand, and has shown its inability to live up to the expectations of its service users, revealing the inadequacy and failure of its administrative structure to timely process and adjudge suits. Given this context, proposals have been presented to accelerate proceedings, proposals that have in common the emphasis on ways to standardize judgments. One of the relevant examples is the assignment of binding effects to Brazilian Superior Courts decisions. Such proposals demonstrate a trend to depreciate the dialogue procedure established in the case, considering the parties objective e subjective peculiarities and real circumstances, prioritizing instead standardized solutions usually given by the higher courts of Judiciary, whose application prioritizes general over specific. Based on this evidence, this paper discusses the role of the judicial process in a Democratic State governed by the Rule of Law. The democratic ideal is politically represented, as a system of government, by the popular choice of rulers and legislators, responsible for translating, through the laws, socio-political-economic choices made by society. The "complete" construction of the rule of law, however, to the extent that it can be imposed specifically to individuals, prescribing them behaviors, limits or penalties coercively, depends on a second order of value choices, which will happen in court proceedings, lead by the judicial authority that conducts a process of information gathering and interpretation of facts and legal texts. For this, any lawsuit must obey principles such as the adversary system, the legal defense, the right to equal protection of the parties, justification for judicial decisions and the system of appeal, which aim to ensure the conscious participation of the parties in the construction of the concrete rule of law to which they will be submitted. Considering the absence in Brazil of democratic regimentation and control mechanisms to which judges are submitted, the democratic nature of the concrete rule of law lies in the procedural dialogue of the parties in the lawsuit, and in the expectation that

[1] Assistant Professor - Universidade Estadual de Feira de Santana. Masters Degree in Public Law (Universidade Federal de Pernambuco). Bahia State Attorney.

it can influence the hermeneutic process of judgment. To what extent, then, does this observation conflict with the mechanisms of judgments standardization introduced in Brazilian judicial system in recent years? It is assumed, as a hypothesis, that they, in the way they are being conducted, weaken even more Brazilian Democracy. As a starting point for discussion the paper will examine the thinking of Calmon de Passos, Brazilian jurist.

Keywords: Democracy. Judicial Procedure. Judgments Standardization.

1 Introduction

In the last decades, the Brazilian Judiciary has faced a large increase in its demand, and has shown its inability to live up to the expectations of its service users, revealing the inadequacy and failure of its administrative structure to timely process and adjudge suits.

Given this context, proposals have been presented to accelerate proceedings, proposals that have in common the emphasis on ways to standardize judgments. One of the relevant examples is the assignment of binding effects to Brazilian Superior Courts decisions. Such proposals demonstrate a trend to depreciate the dialogue procedure established in the case, considering the parties objective e subjective peculiarities and real circumstances, prioritizing instead standardized solutions usually given by the higher courts of Judiciary, whose application prioritizes general over specific.

Based on this evidence, this paper discusses the role of the judicial process in a Democratic State governed by the Rule of Law. The democratic ideal is politically represented, as a system of government, by the popular choice of rulers and legislators, responsible for translating, through the legal rules, socio-political-economic choices made by society. The "complete" construction of the rule of law, however, to the extent that it can be imposed specifically to individuals, coercively prescribing them behaviors, limits or penalties, depends on a second order of value choices, which will happen in court proceedings, lead by the judicial authority that conducts a process of information gathering and interpretation of facts and legal texts. For this, any lawsuit must obey principles such as the adversary system, the legal defense, the right to equal protection of the parties, justification for judicial decisions and the system of appeal, which aim to ensure the conscious participation of the

parties in the construction of the concrete rule of law to which they will be submitted.

Considering the absence in Brazil of democratic regimentation and control mechanisms to which judges are submitted, the democratic nature of the concrete rule of law lies in the procedural dialogue of the parties in the lawsuit, and in the expectation that it can influence the hermeneutic process of judgment.

The primary objective of this work, then, is to propose the following question: to what extent, then, does this observation conflict with the mechanisms of judgments standardization introduced in Brazilian judicial system in recent years?

The discussion proposed particularly makes use of the thinking of José Joaquim Calmon de Passos (Salvador, Bahia, Brazil, 1920-2008), jurist that, although more remembered for his production in the context of Civil Procedural Law, he also won admiration for the criticality and strength of his philosophical and political thought, as well as by its sweeping rhetoric, that " ...used to make huge audiences change over from laughter to tears, in the rhythm of emotion that he used to transmit with his images, sometimes comical, sometimes dramatic, but always extremely personal", always with the objective of "[...]reveal the weakness of institutional arrangements, lacking support in effective conditions of political society and economy, indicating citizenship as a decisive factor for effective change". (MURICY, 2012, p. 27)[2].

Because it is understood that the importance and opportunity of the thinking of Prof. Calmon de Passos – especially when he is concerned to alert to the peculiar problems of Brazilian political organization – deserves due attention and reflection, this work has explicitly also the sense of homage.

Therefore, based on the reflections of Prof. Calmon de Passos, this paper wants to state that the exacerbated adoption of standardization mechanisms weaken even more Brazilian Democracy. The emphasis of the work, however, doesn't lie in the defense of an answer, but in the relevance and opportunity of the question which is made.

2 Judicial Power And Democracy: A Reflection From The Tripartite System

[2] Translation provided by the author.

2.1 Democracy

Democracy is one of those words that can suscitate a certain feeling in the interlocutor, but that is not easily translated into words, or at least in few words. Such difficulty probably derives from the fact that its concept depends on the allusion to several elements, "although loyalty to etymology (*demos, Kracia*) and the knowledge of the realities do situate the notion of *people* as its essential note" (SALDANHA, 1987, p . 66)[3].

In the reflections proposed in this work, the emphasis is, initially, the traditional sense of Democracy as a form of government in which there is the participation of the people in the choice of those who exercise political power [4] (which justifies its current relationship with the ideas of *universal suffrage*, *political equality* and *representation* and, on the other hand, its antagonism with the idea of *dictatorship* and *autocracy*).

However, another idea can be extracted from that, with a more general character, which is the idea of *participation*, directly linked to the values of *equality* and *freedom*. The element of isonomy is resumed, in the sense of civil and political equality of all before the law, one of the three principles that comprised the basis of Athenian democracy, beside the *isocratia* (allocation of sovereignty and power to the *demos*) and the *isagoria* (freedom of opinion and equal rights) (GUERRA FILHO, 1997, p . 16)

We need to highlight two other senses to the word Democracy, because they are especially important to the conclusions to which we want to reach. The first one concerns the meaning of Democracy as a peculiar form of political organization that assumes that the power is *controllable*. Democracy, therefore, to the extent that "the contemporary political structures are not understandable without reference to legal frameworks (also because of the so-called State-of-the-Law)" (SALDANHA, 1987, p. 70)[5], also presupposes the constitutional legal system organization based on the separation of powers (coming close to the concept of Republic), and the prediction of mechanisms for participation and democratic control in decision-making processes of all powers. In his definition of Democracy, Norberto Bobbio proposes, on the same line:

---

[3] Translation provided by the author

[4] Corresponding to the formula "all power emanates from the people, and it is exercised through his elected representatives or directly", present in the single paragraph of art. 1st of Brazilian Federal Constitution.

[5] Translation provided by the autor.

> I preliminarily say that the only way to reach an agreement when we speak of democracy, understood as something opposed to all forms of autocratic government, is to consider it characterized by a set of primary or fundamental rules that establish *who* is authorized to take collective decisions and with which *procedures*. Every social group is obliged to take binding decisions for all its members with the objective of providing their own survival, both internally and externally. But even the decisions for the group are taken by individuals (the group as such does not decide). For this reason, so that a decision taken by individuals (one, few, many, all) might be accepted as a collective decision, it must be based on rules (no matter whether written or customary ones) that establish who are the individuals authorized to take binding decisions directed toward all members of the group, and through which procedures. (2002, p. 30-31)[6]

Finally, it is possible to extract from the idea of control the sense of *accountability*. This is the last consequence of the possibility of control, its form of concrete realization. The representation provided by democratic mechanisms of political agents choice only can be legitimated, ultimately, if the mechanisms of accountability of these same agents are effective. In this regard, says Jose Joaquim Calmon de Passos:

> The civilizing gain that comes from the Democratic Rule of Law imposes that the production of the Law process is planned in line with its principles. Being its basic premise the equality of all men, so that no one can exercise power over another man that is justified by divine will, personal qualities or social condition of the dominator, only in terms of service is acceptable the exercise of political power in a democracy. So, the political power must be used within the limits of competence defined for this and in accordance with the rules imposed by the holders of single and true sovereignty - the members of the politically organized social group. (1999, p. 44. 70-71)

2.2 The Enlargement of the Judiciary Power

It can be noticed, since the 20th century, a process of political power concentration in the hands of the Judiciary, which has been in-

[6] Translation provided by the author.

spiring reflections on its role, not only in Brazil, but in the whole world.

Starting from what we comprehend as the bourgeois liberal State – whose characteristics explain the Brazilian State itself – it is possible to recognize, in its origins, in contrast to previous experiments, a transition of the core of political power from the Executive Branch in the direction to the Legislative Power. The continental European historical circumstances, which marked the end of feudalism and the inauguration of what is usually called modernity, seem to have required the concentration of power in the hands of monarchs, that come to be, in certain moments, "the only source of creation and implementation of Law, as far as Louis XIV is always remembered for his famous phrase: L'Etat c'est moi" (TOMAZ, 2008, p . 98)[7].

We can see, then, a change in the balance of powers previously established, and, from the second half of the 18th century, it is the Legislative Power that assumes the centrality of political power. It embodies the "third state", that is praised by abbot Sieyes in his manifesto *Qu'est ce qu'est le tiers État*?, echoing a set of values and liberal ideals, related to thinkers like Rousseau, Locke, Voltaire and Montesquieu. The core of power migrates toward the Legislative, which submits other powers to the primacy of the written legal rule, that would represent rationality and people's will. Well known are, in this sense, the words of Montesquieu, for whom "*les juges de la nation ne sont que la bouche qui prononce les paroles de la loi; des inanimes qui n'en peuvent moderer ni la force ni la rigueur."*(*on line*).

The construction of the Modern State can be recognized as one of the various consequences of profound changes in man's way of thinking and living in continental Europe, which took place from the 15th century, with the end of the middle ages. Especially the development of renaissance humanism in the 15th century, the Protestant Reformation in the 16th century and the Scientific Revolution in the 17th century, have meant a turning point in structural pillars of western societies and prepared the man for a new form of political, economic and cultural organization, very well represented by the Enlightenment of the second half of the 18th century. The highlighting of the human will, the secularization of social relations, the appreciation of free initiative and individual freedom, the replacement of medieval mysticism and contemplative attitude by experimental method and by the rational systematization of knowledge: these are all traces of modern man that shaped its actions on

[7] Translation provided by the author.

multiple aspects of life in society, especially in Law.

At that time the *rationalism* will occupy the central position in the way of man understand his world. Security[8] is now the primordial value of Law, justifying the overvaluation of the legal rule, which needs to be understood as a closed system, complete, ubiquitous and rationally understood and applied, in order to be accept under the new set of values of modern man. This scenario will reach its climax in the 19th century, when the scientific positivism boosts, in Law, a widespread tendency to scientific systematization of legal rules.

It is in the 20th century that begins, then, another turnaround, that has been unfolding since then up to the present moment. If the core of power has first migrated from the Executive Power to the Legislative Power, now it walks toward the Judiciary, for reasons that have been identified and discussed in the last few decades, and whose consequences wait yet to be properly understood and scaled.

This time, it is the so-called *linguistic turn* of Philosophy that represents changes in the way the man philosophically understands his reality. Wittgenstein, Frege, Russell, the logical neopositivists of Vienna Circle, Karl Popper and Gadamer are names that can be mentioned among those who shed light on the constructive role of language in the formulation of the world.

Since then, it is increasingly relevant the role of the work carried out by the Judges in the definition of the rules of law, as a result of the recognition of the creative character that assumes the hermeneutic task undertaken by the magistrate. It is recognized that there is subjectivism in the act of judging, and that the judge is responsible for the construction of a new rule, result of a peculiar reading of the legal text, of a

[8] "If we investigate the ideological roots that sustain our paradigm, we see that the modern law, from 17th century Philosophy, it prioritized the value 'security', as the fundamental requirement for the construction of the modern 'Industrial State'. As a remarkable English writer said [Jon Elster, Juicios salomónicos – Las limitaciones de la racionalidade como principio de decisión, translation 1985, Cambridge, Barcelona: Gedisa Editorial, 1989, p. 40 et seq.], the modern Legal Science instituted, as fundamental task, 'taming the gambling', gettting Law results as accurate as it can the solution of an algebraic problem. Before Savigny geometricizes Law, creating a 'Law world', far from the "no imaginables diversidades" of the concrete case and, therefore, of the social reality, Leibniz had said that not only Law, but also Moral, would be so demonstrable as math [Ensaio acerca do entendimento humano, Brazilian translation, 1973, Chapter III, n. 18]" (SILVA, 2002, p . 40) (Translation provided by the author)

peculiar understanding of facts and also a result of the participation of parties in the procedural dialog that precedes the judicial decision. The judge is no more the "mere mouth of the law" (that only "say" the Law), extracting a right and unique answer from the fact under trial. Even assuming the necessary existence of limits to the hermeneutic subjectivism of magistrate (and one of them is the legal text itself), this change of perspective opens to the Judiciary a creative space that requires a fresh look at the correlation between the powers of the State.

Alongside this new understanding of the judicial judgment itself, authors indicate other reasons for the growing recognition of the creative character of the work of judges. Mauro Cappelletti (1993) points out aspects such as massification, complexity and unpredictability of post-industrial revolution social relations, demanding more fluid and vague norms, drawn up with the aid of open and indeterminate concepts. This kind of rules depends on a more integrative actuation of the Judiciary in the solution of the case. On the other hand, the enlargement of the Welfare State9, with the growth of demands for actuation of the Executive and the Legislative, requires the Judiciary "raises itself to the level of other powers, becoming the third giant, capable of controlling the behemoth legislator and the leviathan administrator" (CAPPELLETTI, 1993, p. 47)10. The judicial review (the power of courts of law to review the actions of the executive and legislative branches considering the provisions in the Constitution), function recognized in continental Europe only from the mid 20th century, is an example of consequence of what has just been said.

Also Boaventura de Souza Santos, having under analysis the enlargement of power of Brazilian Judiciary in particular, speculates about the peripheral countries reality, in which the recognition of rights by legal orders, deriving from a wave of redemocratization at the end of the 20th century, has generated an expectation of rights, provided for

[9] "The first steps have been taken in social policy area, through relevant legislation about the right to work, right to health and social security; but gradually the interventions spread to the economic sphere, through antitrust acts, to the concurrence, transport and agriculture; and, finally, we come to the present situation, with the extension of the public sector, the widespread exercise of state control over the economy, the assumption of responsibility of the state in matters of employment, social assistance planning and the financing of non-profit activities, such as, for example, arts, public works and renewal of decadent urban centers". (KOOPMANS apud CAPPELLETTI, 1993, p . 35.)(Translation provided by the author.)

[10] Translation provided by the author.

the positive Law, but not answered by the State, whose implementation is being required, then, through the Judiciary Power:

> In the transition from authoritarian regimes to democratic regimes, the peripheral societies and semi-peripheral passed by what I call short-circuit history, i.e. by recognition of rights at a single constitutional act, while, in central countries, they were conquered in a long historical process (hence, we talk about several generations of rights). It is true that the constitutionalisation of a so extensive set of rights, without the backing of consolidated public and social policies, makes its effectiveness difficult, but it is no less true that this broad catalog of rights opens space for a larger judicial intervention from the constitutionality control of ordinary law (2007, p . 20)[11]

The enlargement of the responsibilities of the Judiciary has been the cause of several problems (such as, for example, the multiplication of the demands and the consequent inability of the Judiciary to timely respond to them with quality) and requires deep reflections, aiming at understanding the role that assumes this Power in the context of Democratic States, the limits to its performance and the solution of its shortcomings. In the same way, once more, Boaventura de Souza Santos:

> For these reasons – different from country to country, but converging in the general sense – we have even come to watch, in some countries, a displacement of the legitimacy of the State: from the executive and legislative power to the judiciary. This transfer of legitimacy is a gradual process, faster in some States than in others. This movement creates increasing expectations over the judicial system, which is expected as the one that solves the problems that the political system is unable to resolve. It happens that the creation of exaggerated expectations about the possibilities of the judiciary is itself a source of problems. When we analyze the comparative experience, we see that, in large measure, the judicial system does not match the expectation (2007, p . 21)[12].

[11] Translation provided by the author.
[12] Translation provided by the author.

3. The role of the due process of law in democratic control of judicial activity

Weighing Up, on one hand, the recognition of the creative character of judicial activity and, on the other, and as a consequence of this first statement, the growth of Judiciary political power, leads to the observation that is needed, today, a review of the bases on which the Modern State was signed and, especially, a broad discussion on the ability of the Judiciary to meet the requirements of Democracy.

Thus, recognizing that the Judiciary is an instance of normative production – in other words, accepting the political nature of its activity, as far as it implies *choices* between the different values – makes imperative, also, to identify to what extent the necessary elements of democratic exercise of power are present in the performance of its duties.

The theme is, today, one of the most fruitful of Political Science and Philosophy, not only in Brazil, as all over the world, since those characteristics cited above, indicative of a greater expectation of society in relation to the product of judicial work, are not exclusive to this country.

Although the recognition of political power exercised by the Judges may seem obvious to the eyes of those who live under common law legal systems [13], in Roman-Germanic tradition countries, such as Brazil, the understanding of the judge as a "technician", who should only "apply" the law to the actual case, still seems to be predominant. Judges are appointed after highly technical examinations, in which they should choose "right answers" in multiple-choice questions. The candidates are trained with the help of manuals that reproduce the legal text, without emphasising on the actual case, on the ability of argumentation and understanding of values, tensions and political implications behind the facts. It is stimulated, still today, the social isolation of the magistrates, to the advantage of a supposed immunity before values, interests, social pressures. As remarked by Ovidio Baptista da Silva, seek the magistrates "[...] distance even from the lawyers of the trial [...] ", ending by strengthening, in another hand "[...] the sharp corporatism of the institution [...]" and encouraging "[...] the bureaucratic spirit, so markedly present in our Judiciary, to the extent that the judge, by virtue of that social isolation, keeps an 'element of the organization', of which

[13] In the Anglo-Saxon tradition, the written legal rules assume a merely subsidiary function before the case law.

becomes dependent, through a suffocating administrative and recursal control system." (2006, p . 45)[14].

If this does not happen in the midst of the academic discussions, it is certain that the professional practices, the university teaching of Law and even the expectations of society before the judges work, reproduce a vision of judicial activity still clinging to positivist rationalism:

> As long as we think the Law as a matter of logic, capable of being solved as any math problem; while we do not lose the illusion that the legal rule - fruit, as the system presupposes, of a illuminated legislator – has an unambiguousness sense, the University education will remain immutable in its legal methodology, providing the system quotas of servers, suitable for the task of discovering the ineffable "desire of the law", to which Chiovenda used to refer, and that, for our time, entwined with the "desire of power".
> [...]
> Although everyone can see that the Law, in a democratic society, is established by the judicial courts; in spite of the disposal of the ideological and politicians presuppositions who provoked the distrust in magistrates, nourished by the ideals of the French Revolution, the harsh reality - no more the speech - is that the University remains servile to the methodology recommended by the jurists and philosophers of the 17th and 18th centuries. (SILVA, 2006, p. 53)[15]

Nevertheless, it is a fact that it has been more and more required of Brazilian magistrates, no matter in which instances, choices that have strong political implications, either with regard to the set of values in private relationships (such as decisions about limits of the use of the property, about freedom of expression and manifestation, about recognition of same-sex couples rights) or with respect to the relationship between Judiciary and other powers (such as judicial review decisions and decisions that enforce Executive Power the fulfillment of constitutional duties, e.g. supply of health services and medicines, construction of public facilities, provision of essential services etc.).

Considering the implications of such tasks, to what extent does the activity of the Judiciary fulfill the required characteristics for the democratic exercise of political power?

If what you have in mind is the sense of Democracy that favors

[14] Translation provided by the author.

[15] Translation provided by the author.

the popular participation in the choice of political agents, it would be recognizable only in the context of Brazilian Higher Courts, even if indirectly, in so far as Executive and Legislative Powers[16] (whose members are in their turn submitted to popular choice) take part in the choice of its judges.

These courts, however, usually do not decide about facts, being their responsibility, in almost all cases, only the abstract interpretation of the written law. On the other hand, it is a task of the initial instances judges to deal with what it is considered the more representative part of the judicial function work: direct contact with parties and with the facts that are the origin of the claims, evidence production and, finally, the creation of the concrete rule that will discipline the human relations that were the cause of the judicial claim.

To what extent, then, such judges do legitimize the exercise of their power as political agents of a State that claims to be democratic?

The reflections around this question are particularly inspired by, as already announced, the thinking of the jurist Jose Joaquim Calmon de Passos. Emeritus Professor of the School of Law of Federal University of Bahia, and after his retirement, teacher of many generations at the post-graduate programme he used to coordinate in Bahia:

> [...] Calmon de Passos is remembered more for his personality and charisma rather than by its epistemological contribution interdisciplinary connected to philosophy. In fact, his rhetoric was so remarkable, that here we chose transcribing an interview available on video over the Internet, instead of his books. In his words: "I've never been able to be exclusively dogmatic. My pragmatics made me dogmatic; but my philosophical side compelled me to overcome my dogmatic training [...] I am this contradictory person and I'll die contradictory".

With this, the author demonstrates that, despite being a man fac-

[16] In this sense, the Brazilian Federal Constitution, in the single paragraph of art. 102, determines, as regards the composition of the Federal Supreme Court, that "the Ministers of the Federal Supreme Court shall be appointed by the President of the Republic, after being approved by the absolute majority of the Federal Senate". Similar logic, with some variation in each case, presides over the composition of the Superior Court of Justice ("Superior Tribunal de Justiça") (art. 104), the Superior Court of Work ("Superior Tribunal do Trabalho") (art. 111-A), the Superior Electoral Court ("Superior Tribunal Eleitoral") (art. 119) and the Superior Military Court ("Superior Tribunal Militar") (Art. 123).

> ing the practice, he was not satisfied with the answers offered by dominant legal culture. To overcome this limitation, he sought aid in philosophy in order to understand the procedural problems in addition to their own limitations.
> [...]
> This proposal led him to develop a thought that goes beyond the Law and explores connections with Philosophy and also with Economy and Political Science" (COSTA. COSTA, 2011, p . 424)[17].

We specially emphasized, in the work of Calmon de Passos, for its eminently philosophical character, the book *Direito, poder justiça e processo: julgando os que nos julgam* (1999)[18], about what he himself clarifies:

> The Law has everything to do with power [...]. My line of research was always to try to demystify this neutrality of Law, this scientificity of Law, this neutrality of the magistrate and try to understand the Law in its indissolubly political dimension. The Law is the discourse of power. My entire professional life was dedicated to deepen this research. And in a certain way a book – that does not satisfy me so much that I'm preparing another[19] – which I consider my testament, translates this concern: Law, power, justice and process. (apud Costa; Costa, p. 424)[20]

Many and subsequent "reducing complexity procedures" of human coexistence – referring to the Luhmann's expression (1999, p. 85) – are identified by Calmon de Passos in the process of production of Law. They occur in so far as the democratically institutionalized political powers choose the general standards, substantial ones (Substantive Law) and procedural ones (Procedural Law), as well as the ones that determinate the administrative organization and the competence of the agents that will recognize and interpret these same standards before the

[17] Translation provided by the author.

[18] "Law, Power, Justice and Process: judging those who judge us", without translation in English.

[19] In fact, it was not completed. In 2012, however, it was posthumously published "Revisitando o Direito, o Poder, a Justiça e o Processo: reflexões de um jurist que trafega na contramão" (Revisiting the Law, the Power, the Justice and the Process: reflections of a jurist who worked in the opposite direction (Salvador, JusPodivm), with unpublished texts, organized by Mrs. Eridan Steps, Calmon de Passos daughter, from digital files found in his personal computer.

[20] Translation provided by the author.

conflicts arising out of social relations (organization standards). Such procedures, however, result in texts that, faced with the obstacle-situations to human coexistence, require a final procedure for reducing complexity, which happens, after all, inside the Judiciary.

In his playful way of say that the "Law is not solid, neither liquid nor gaseous, it does not have atomic or molecular structure" (1999), Prof. Calmon de Passos bring us an essential warning:

> The Law is not given to us as they are given the realities of the physical world (organic and inorganic). It is man-made, but it can not be reified – become a product – , it only exists while produced. It is always the result of the communicative action of men, a sectorial part of global communicative action that is the society, never reifying, never becoming a being, it can not be decoupled from its production process because it can never be separated from the human will, both to be spelled out as to be applied (1999, p . 22)[21].

Then, from this observation, Calmon de Passos points out the fundamental importance of *process* for the Law, cultural phenomenon par excellence, product of the dialog between the values inside the messages exchanged between the procedural subjects. Thus, he concludes:

> The relationship between the production process of the Law and the Law that is produced, whether as legal texts or as decisions (say the Law and apply the Law) does not have an instrumental nature, means-end nature, but a substantial, integrative nature. The Law is the result of its production process. This warns us that it is never something given, ready, pre-set or pre-produced, whose implementation is possible, through simple use of certain techniques and instruments, with secure prediction of its consequences. The Law, in fact, is produced in every act of its production, it becomes concrete with its application and it *is* only while it is being produced or applied. (1999, p. 44. 68)[22]

It can be seen, therefore, although the judges do not have the democratic legitimacy of the ballot box or are submitted to external bodies of popular control, the process of judicial production of rules, on the other hand, is democratically valued in so far as it is the result of direct participation of recipients of the judicial decision. The judicial decision

[21] Translation provided by the author.

[22] Translation provided by the author.

text is a consequence, in other words, of the messages produced in the proceedings: those through which postulate the parties, those that integrate the evidence produced, the dialogs that take place at the hearings, even the dialogs that informally occur between the subjects, by means of written or spoken texts, but also by means of facial expressions, gestures, posture. Each judgment or sentence, after all, must be the fruit of this peculiar meeting of minds and reflects not only the values already chosen by the legislator in legal text, but also, to some extent, reflects the circumstances of time, place and the values of the human beings that participates in the procedural dialog.

It is not any process, however, which provides the necessary democratic qualification to the standard produced by the judge. Certain characteristics must be present in the judicial process, grouped under the term that is commonly called *due process of law*, and that is explained by Calmon de Passos like this:

> Constitutional due process of law [...] is not synonymous with formalism, or excessive attention to rite, but a complex of minimum guarantees against subjectivism and the arbitrariness of who has power to decide. It is required, without exception, the prior competence definition of those who have the power to decide the case (principle of the court with jurisdiction under the law), the respect to the adversary system (no one can suffer restriction in its heritage or in its freedom without previously being heard and have the right to offer their reasons), the respect to the divulgation principle (elimination of any secret procedure and accessibility to the interested public of all the acts carried out in the process), the reasoning of decisions (allowing the objective evaluation and criticism of the decision maker actions) and the control of this decision (making always possible the correction of illegality practiced by decision makers and accountability by their inexcusable errors). (1999, p. 69)[23]

Thus, it was not inadvertently that we related the concept of Democracy, at the beginning of this exposure, to the ideas of *participation*, *equality*, *freedom*, *control* and *accountability*. This has been done precisely because, at this point, we want to demonstrate the reproduction of such values in which we consider a democratically qualified judicial process: either by isonomic participation of parties (principle of equality

[23] Translation provided by the author.

of the parties), that must have the right to free and timely manifestation (principles of the legal defense and adversary system); or by the transparency provided by the prior definition of the judicial body, by the publicity and reasoning of procedural acts and decisions (principle of the court with jurisdiction under the law natural, principle of publicity and principle of reasoning), making possible that the ones that must obey the decision also keep under control the judicial power, including the possibility of accountability by magistrates deviations (principle of expediency, system of appeal and mechanisms of external control of Judiciary Power).

Between the presence of such principles at the Brazilian Constitucion – what is a fact[24] –, and its effective fulfillment, it is true that there is often a yawning gap. Obstacles ranging from the lack of administrative structure of judicial bodies (insufficient number of judges and other public servants, questionable regimentation methods of these servers, lack of administrative control of their activities, inadequate facilities), to the difficult access to Justice for considerable part of the population, by virtue of their economic deprivation and information, make useless, most of the time, the constitutional guarantees.

However, the alleged submission of the judicial process to such ideals by itself, ensuring that, at least, "the participation in the decision-making process, in all its presuppositions and phases, it is a constitutive element of the democratic dimension of the rule of Law, a guarantee for the citizen and a real space of freedom and self-determination, indispensable for the real citizenship" (CALMON DE PASSOS, 1999, p. 44. 71-72)[25].

4 Democracy and the emphasis on judicial decisions standardization in Brazilian law

Considering this particular understanding of the judicial process, which alerts to the importance of submission of Judiciary to the democracy requirements, we reach the central question of this work.

The Brazilian legal system, heir of continental European Law, as seen previously, keep some characteristics born in the historic, political and socio-economic atmosphere that resulted in the juridical positivism.

[24] Article 5th, subparagraphs XXXV, XXXVI, LIII, LIV, LV, LVII, LX, LXXIV, LXXV, LXXVIII of Brazilian Federal Constitution.

[25] Translation provided by the author.

Greatly influenced by France and as it would be possible to assume, by Portugal, Brazilian Law is among the systems that Rene David has enlisted within the Roman Germanic family (1993).

Among the main notes that distinguish the systems of *civil law* of ones of *common law* is the idea, present in the first ones, of unrestricted supremacy of written legal rule. The principle of the supremacy of the legal rule was always present in Brazilian constitutional history. The formula "no citizen can be forced to do, or not to do, something, except by virtue of legal rule", appearing in the art. 179, I of the Imperial Constitution, was repeated, without major changes, in §1º of art. 72 of 1981's Federal Constitution, in 2nd Subparagraph of art. 113 of 1934's Federal Constitution, in §2 nd of art. 141 of 1946's Federal Constitution, §2 nd of art. 150 of 1967's Federal Constitution, §2 nd of art. 153 of the First Amendment to 1969's Constitution, and finally, in Subparagraph II of Art. 5th of the current Brazilian Constitution (1988). Only the Federal Constitution of 1937 did not deal with this matter.

A more careful research in Brazilian legislative history, as well as in its current legal system, however, does not seem to lead exactly the conclusion set out in paragraph above. It is possible to identify, over the course of time, rules which assign to judicial decisions a role much more determinant than we suppose at first sight. It is observed, however, that this is a trend that has been strengthened in recent decades and has been the object of fruitful doctrinaire discussion, especially from Constitutional Amendment Proposal No 96/1992, which, after more than a decade of negotiation, resulted in Constitutional Amendment no. 45 of December 30th, 2004 and, more precisely, in the art 103-A of the Brazilian Federal Constitution, that provided *erga omnes* binding effect for some Federal Supreme Court (STF) decisions (*stare decisis*).

The so-called "*súmula vinculante*" (binding precedent) of the Brazilian Federal Supreme Court, borrowing a model inspired by the *stare decisis* of Anglo-Saxon Law, stimulated, between us, a large doctrinaire production, that shows how the theme of the role of judicial decision in Brazilian Law has been subject of particular concern and many debates in this country.

It should be emphasized, however, that the concern with judgments standardization methods was always present, even in *civil law* systems, which indicates that the principle of the supremacy of legal rule is not incompatible with the search for "tame" mechanisms to the natural multiplicity of meanings available to the judicial interpreter, establishing more continuous judicial lines in solution of the issues of

Law. If before it was believed that the desirable uniformity would come simply from the fact that the judge would withdraw of the legal text a (single) interpretation true, a better understanding of the hermeneutic mechanisms and the advances in semiotics studies showed the inevitable equivocalness of language.

Thus, legal systems have been adopting standardization techniques (such as the assignment of binding effects to certain judicial decisions) with a view to maintaining its coherence and functionality. This is particularly true if we think about Case Law arising from judicial review of constitutionality.

By its tradition, the judicial review courts do not examine and decide about fact issues – they should not review the version of facts that judges of lower courts have recognized through the evidence present in the records. Its function is not dealing with the actual peculiarities of each case, but interpret the abstract legal sense present in legal text and, through its decision, give to this interpretation the more univocal sense as desired for a greater harmony of legal system.

In theory, therefore, the existence of a binding effect for repeated decisions of courts which have this profile – i.e., the constitutional courts, as our Federal Supreme Court (STF), Superior Court of Justice (STJ) and other Superior Courts, all competent to judge appeals with obvious standardization function – does not seem to hurt the consistency of systems based on the principle of the supremacy of the legal rule, operating, on the contrary, even as a mechanism for maintaining its congruence.

It is believed, also, that such techniques of standardization - emphasizing especially the *stare decisis* technique within superior courts - would not, in theory, threaten the lower court judges autonomy, if it takes into account the singular characteristics of judicial hermeneutics, as it had been already highlighted above. The judge is not the "*mere mouth of the legal text*", as much as he could not be the "*mere mouth*" of higher courts decisions. The binding precedent, as far as the legal text, will be interpreted and adapted to the facts and to the specific question that the judges have before them. This operation, no matter what say the legislator, will result in a new juridical standard, which may repeat faithfully the contents of the precedent, or, as long as rigorously reasoned, may innovate its content, promoting the natural and inevitable mutability of Law.

This is what also concluded Prof. Calmon de Passos:

> Thus, it is unacceptable to withhold the judge freedom to interpret the general standard of the binding precedent that he must apply to the specific case. Therefore it is admissible its inapplicability to concrete case since that the magistrate justifies his position, as occurs when he interprets the legal text. Everything will be a problem of clarity and pertinence of the offered reasoning. This parity between the legal rule (general rule) and the binding precedent (general interpretative standard) is indispensable and seems to me, as I have said before, a consequence of the system (1997, p. 650).

However, we must emphasize, on the other hand, that the increasing and strengthening of binding precedent mechanisms in Brazilian Law were erupted because of the concern with the worsening of the Judiciary Power crisis, with special focus on the slowness of its services. In nearly all cases this kind of technique was introduced in the legal system in order to speed up judicial proceedings.

We can notice a series of amendments in Brazilian procedural legal system, which began systematically from the 1990s, especially in the context of Civil Procedural Law, both in constitutional text (Constitutional Amendment No 45/2004 is a good example), as in legislation.

More than a decade ago, Calmon de Passos had already predicted:

> Distortion not less serious, however, was to have placed as the single goal to achieve with the reforms a solution, whatever, for the "stress" of Judiciary Power, given the inadequate, undemocratic and bureaucratic constitutional model of its institutionalization. The question that must be made - what are the real causes of this crisis? - has never been formulated. The only question made was: what do we should do to get rid of the plethora of suits and appeals in which we drown? And the answer was given by the magic word 'instrumentality', married to other magical words – 'quickly', 'effectiveness', 'deformalization" etc. And thus, magic word by magic word, we join a Law production process that risks becoming mere conjuring tricks. We should not forget, however, that every magic show has limited duration and a time of disenchantment. (2001, p. 66/67)

In addition to the already-mentioned binding precedent of the Supreme Federal Court, several other legal rules adhere to the same log-

ical and objective, of which examples are:

(A) Added to the text of the Brazilian Civil Procedural Code (CPC), respectively in 1998, 2001 and 2010, by Federal Act No. 9756 (December 12th, 1998), Federal Act No. 10352, (December 25th, 2001) and Federal Act No. 12322 (September 09th, 2010), the articles 557, § 1[26] (generically applicable to "proceedings in the courts"), 527, I[27] (disciplining the "agravo de instrumento", a kind of bill of review) and art. 544, §4, II, «b» and «c»[28] (which deals with the "agravo de instrumento" against the decision that do not grant the review – "recurso extraordinário" e "recurso especial"), make possible for rapporteur decides the merits of the appeal when it contradicts a precedent or the prevailing case-law.

(B) The art. 285-A , added to the CPC by Federal Act No. 11277 (February 7th, 2006), makes possible the trial, without prior citation of the accused, when it is "solely matter of law and there is a prior dismissal judgment in identical cases".

(C) In 2001, Provisional Act No. 2180-35 (August 24th, 2001) added a paragraph to art. 741 of CPC, making unenforceable judicial sentence "founded in legal rule or normative act that has been declared unconstitutional [even that subsequently] by the Supreme Federal Court or in application or interpretation recognized as incompatible with the Federal Constitution". The same rule was subsequently confirmed by ordinary legislator and today it is written in the single paragraph of art. 475-L of the CPC[29], added by Federal Act No. 11232 (December, 22th,

[26] "Art. 557. O relator negará seguimento a recurso manifestamente inadmissível, improcedente, prejudicado ou em confronto com súmula ou com jurisprudência dominante do respectivo tribunal, do Supremo Tribunal Federal, ou de Tribunal Superior". §1o – A Se a decisão recorrida estiver em manifesto confronto com súmula ou com jurisprudência dominante do Supremo Tribunal Federal, ou de Tribunal Superior, o relator poderá dar provimento ao recurso."

[27] "Art. 527. Recebido o agravo de instrumento no tribunal, e distribuído incontinenti, o relator: I – negar-lhe-á seguimento, liminarmente, nos casos do art. 557."

[28] "Art. 544. Não admitido o recurso extraordinário ou o recurso especial, caberá agravo nos próprios autos, no prazo de 10 (dez) dias.[...] § 4o No Supremo Tribunal Federal e no Superior Tribunal de Justiça, o julgamento do agravo obedecerá ao disposto no respectivo regimento interno, podendo o relator: [...] II - conhecer do agravo para: [...] b) negar seguimeto ao recurso manifestamente inadmissível, prejudicado ou em confronto com súmula ou jurisprudência dominante no tribunal; c) dar provimento ao recurso, se o acórdão recorrido estiver em confronto com súmula ou jurisprudência dominante no tribunal."

[29] "Art. 475-L. A impugnação somente poderá versar sobre: [...] II – inexigibilidade do título; [...] § 1o Para efeito do disposto no inciso II do caput deste artigo, considera-

2005).

(D) Finally, the Federal Act No. 11672 (May 08th, 2008) added the art. 543-C to the CPC[30], disciplining what will be called "Recurso Especial Repetitivo", within the Superior Court of Justice (STJ). In this case, the decisions took under this specific proceeding will be an obstacle to appeals that do not confirm the understanding of STJ. In other words, it will be automatically rejected appeals ("Recursos Especiais", in fact) against decisions of lower courts that suit the understanding of STJ.

In common, the rules listed above attribute to previous decisions,

---

se também inexigível o título judicial fundado em lei ou ato normativo declarados inconstitucionais pelo Supremo Tribunal Federal, ou fundado em aplicação ou interpretação da lei ou ato normativo tidas pelo Supremo Tribunal Federal como incompatíveis com a Constituição Federal."

[30] "Art. 543-C. Quando houver multiplicidade de recursos com fundamento em idêntica questão de direito, o recurso especial será processado nos termos deste artigo.

§ 1o Caberá ao presidente do tribunal de origem admitir um ou mais recursos representativos da controvérsia, os quais serão encaminhados ao Superior Tribunal de Justiça, ficando suspensos os demais recursos especiais até o pronunciamento definitivo do Superior Tribunal de Justiça.

§ 2o Não adotada a providência descrita no § 1o deste artigo, o relator no Superior Tribunal de Justiça, ao identificar que sobre a controvérsia já existe jurisprudência dominante ou que a matéria já está afeta ao colegiado, poderá determinar a suspensão, nos tribunais de segunda instância, dos recursos nos quais a controvérsia esteja estabelecida.

§ 3o O relator poderá solicitar informações, a serem prestadas no prazo de quinze dias, aos tribunais federais ou estaduais a respeito da controvérsia.

§ 4o O relator, conforme dispuser o regimento interno do Superior Tribunal de Justiça e considerando a relevância da matéria, poderá admitir manifestação de pessoas, órgãos ou entidades com interesse na controvérsia.

§ 5o Recebidas as informações e, se for o caso, após cumprido o disposto no § 4 deste artigo, terá vista o Ministério Público pelo prazo de quinze dias.

§ 6o Transcorrido o prazo para o Ministério Público e remetida cópia do relatório aos demais Ministros, o processo será incluído em pauta na seção ou na Corte Especial, devendo ser julgado com preferência sobre os demais feitos, ressalvados os que envolvam réu preso e os pedidos de habeas corpus.

§ 7o Publicado o acórdão do Superior Tribunal de Justiça, os recursos especiais sobrestados na origem:

I - terão seguimento denegado na hipótese de o acórdão recorrido coincidir com a orientação do Superior Tribunal de Justiça; ou

II - serão novamente examinados pelo tribunal de origem na hipótese de o acórdão recorrido divergir da orientação do Superior Tribunal de Justiça.

§ 8o Na hipótese prevista no inciso II do § 7o deste artigo, mantida a decisão divergente pelo tribunal de origem, far-se-á o exame de admissibilidade do recurso especial. [...]"

precedents or prevailing case-law (without there being, it is quite true, a more objective parameter to determine to what extent a certain judicial understanding become "prevailing" in Brazilian Law) effects that go beyond those ordinarily expected in a judicial decision, and that bind on not only the parties who participated in the procedural dialog.

For that we can scale the potential of such rules, it is important to note, for example, that, since Art. 543-C of the CPC came into force, in August 2008, were submitted to the procedure of "recurso repetitivo", according to the data available on the website of the STJ, 851 "recursos repetitivos". This means that, for each one working day and half a new theme was submitted to the STJ in recent 5 years.

Although , strictly speaking, the judgment resulting from the "recurso repetitivo" does not bind the magistrate of lower courts, the decisions that do not adhere to the understanding of STJ, it is known in advance, may not be submitted to the STJ by unsatisfied part.

The same logic takes place, moreover, as indicated above, and in a even more comprehensive way, in the trial of appeals by second instance courts. In them, the rapporteurs themselves (that is, the single judge responsible for reporting the antecedents of the cause and uttering the first vote at the collegiate trial), without it being necessary the participation of the others members of the court, will uphold the action brought by the appeal, if the decision of first instance does not follow the understanding previously signed by Superior Courts.

The Brazilian procedural system, thus, seems to be closing down the space for interpretation by the first instance courts, "forcing them", under penalty of ineffectiveness of their decisions (given that their effects only will be confirmed if the decision does not confront the case law established by the second instance courts), to join the interpretation built outside the process that is under trial.

This observation gains particular importance if combined with the difficult working conditions of Brazilians judges. It must be assumed that, in the face of courts crowded with proceedings, lack of administrative structure, personal pressure resulting from the urgency of ever more complex issues, the agreement to a "done" argument, many times synthesized in an abridgment, is the *possible* solution, even if not necessarily the more reflected and democratic one.

Thus, even if we consider the advantages that seem to arise from mechanisms of judgments standardization – synthesized by ideas such as speed, security, systematic coherence – , it is required that they are contrasted with its undesirable effects and, especially, with the degree

of essentialness of values that they relativise.

The first of them, which is even the core of the idea presented in this paper, demand to come back to the role that the process takes on the democratization of the judicial function. The adoption, as a general rule, of hermeneutic solutions built on superior instances of Judicial Power, minimizes, dangerously, the role that dialog developed from the specific case must have in the construction of concrete rule of law. The hermeneutic process loses, this way, the contingency which, although enemy to a certain extent of security or certainty, is inherent and essential to human life. This contingency is an inevitable result of space, time, values, whose multiplicity is even more pronounced in a huge and culturally diverse country as Brazil.

This greater and greater possibility of imposition, top to bottom, of judicial standards, ends up to take the legitimacy away from judicial decision in face of its recipients, rooting out from it, gradually, the remains of life between the judicial records, and the remains of democracy where its values already cost to be recognized.

Yet another reflection, however, shows negative effects of such mechanisms.

The history of the Brazilian Judiciary Power, being itself a consequence of "a culture marked by political individualism and by legalistic formalism" (WOLKMER, 1999, p. 44. 98) and also a consequence of a professional training that favors the "legality dissociated from the concrete society and from the grassroots" (WOLKMER, 1999, p. 44. 101)[31], reflects the liberal "bachelorism"[32] that has characterized, since the beginning, the first Brazilian Law Schools, and that explains, until today, the predominant conservatism of judicial staffs.

The Judiciary neither seems to distinguish itself by compromising with the democratic ideals. There is not record, for example, of an institutional positioning of the Brazilian Judiciary against military coups[33], nor a statement in opposition to the decline of democratic institutions (especially of the Legislative Power) in these dark periods of Brazilian history. Quite the contrary, it seems indeed that the states of exception of Brazilian political history sponsored an enlargement of power in the

[31] Translation provided by the author.

[32] See, about this, Antônio Carlos Wolkmer's "História do Direito no Brasil" (1999).

[33] Except, of course, certain individual and isolated positions of just a few magistrates, which, because of that, were victims of persecution and suppression of rights by military governments.

hands of the Judiciary. Example of that is the Constitutional Amendment no. 07/77 to the text of the Constitutional Amendment of 1969, which gave to Federal Supreme Court jurisdiction power to prosecute and judge "representation of Attorney-General of the Republic due to unconstitutionality or to misinterpretation of federal or state normative acts". The decision took in this kind of proceeding use to have a binding effect. Constitutional Amendment no. 07/77 still introduced in Brazilian Law the "avocatória" (a type of *mandate*): STF could avocate, after a request of the Attorney-General of the Republic, the proceeding and the trial of claims where there would be "immediate danger of serious injury to public order, health, safety or finances", suspending the effects of any decision rendered by another court.

We can add to all these findings the absence of a democratic external control on Brazilian Judiciary, the timidity of the internal controls and accountability of judges, the close submission relationship and proselytism among the Judiciary and Executive Power, especially due to the lack of transparency of nominating and appointing the members of the Courts.

The concentration of power in higher instances of the Judiciary and the corresponding weakening of the single judges, seem, finally, to stimulate its tendency to inertia and impermeability to counter-hegemonic values.

This happens because it is in the lower instances of judicial system where there is a greater likelihood of decisions that break the logic imposed by economic power and by the ideology that sustains the maintenance of social inequalities. After all, due to its proximity and dialog with the reality of the facts, and even due to the natural personal diversity of thousands of judges scattered throughout the country, the chances of interpretations that are more sensitive to the interests of the working classes or minorities are naturally less rare.

5 Conclusion

Imposing on first instance courts, to an increasing extent, the adoption of the higher courts standards of interpretation will ultimately reduce the already small space for diversity, for minorities, and for the economic disadvantaged majority. It ensures, in this way, that the reduction of complexity arising from the judicial decision probably will point towards *conservation*, instead of opening to new values and new

forms of power correlation in society. At this point, then, we should recognize that favoring *status quo* means, ultimately, disrespect for Democracy, especially if we think about how unequal Brazilian society is.

The essentiality of such reflections is even more evident if we remember, with Calmon de Passos, that:

> […] any normativity, while prescription, has any validity, if divorced from the process of human communication, therefore of its protagonists. The most relevant thing is the reading of the communication, and when the communication results in a decision, the most important thing is the process that it came from, markedly dependent on its protagonists." (2012, f. 296)[34]

The essence of Democracy is not the certainty about the content of legal rules. Even predictability and security – that are valued, without doubt, by mechanisms of judgments standardization – are values dear to social life, they do not share the nuclear region of the concept of Democracy. There is Democracy, otherwise, when "all forces must fight continuously by satisfaction of their interests. Nobody finds refuge in his political positions. Nobody can wait for the results to modify them after; everybody must subordinate their interests to competition and uncertainty" (CALMON DE PASSOS, 2012, p . 155).

Certainty must be find, in truth, in the inevitability of the effects of decisions and in the possibility and quality of political participation – that, in the judicial process, is a consequence of the respect for the *due process of law*. In this regard, Calmon de Passos says:

> This transfer of power over the results is exactly what constitutes the decisive step toward democracy; the power is transferred from one group of people to a set of rules, of which derives that in a democracy - and this is one of its essential characteristic – nobody has the effective capacity to avoid political consequences that are contrary to his interests, no matter if this someone is a person (the leader) an organization (the armed forces, trade unions etc.), the police, the party, the bureaucracy or even something less easily identifiable, such as to be part of a "clique", of a selected group. (2012, p . 155)[35]

[34] Translation provided by the author.

[35] Translation provided by the author.

Such characteristics distinguish democratic regimes not only from frankly authoritarian ones, but, in which interests us more precisely, also from falsely democratic ones – "formally called democratic, but substantially organized in a authoritarian way" (CALMON DE PASSOS, 2012, p . 155). It is this last hypothesis that seems to meet with the circumstances experienced in our country, where it is believed that, in view of our political experience history, "[...] the mechanisms of power are able to prevent certain political results, through the exercise of control over the society, not only *ex ante*, but also *ex post*, exerting, in addition to the procedural control, also the substantive control over the decisions [...]" (CALMON DE PASSOS, 2012, p . 156) [36].

This seems to explain why, even though Brazilian statutory law ensures the elements of democratic ideal, we are very far from achieving what Calmon de Passos considers the point of transition between Democracy and the lack of it: "the passage of the threshold beyond which no one can intervene to reverse the results of the formal political process" (2012, p . 156)[37].

The abuse of techniques of standardization of Brazilian Case Law, in face of what we saw, does not contribute to the solution of such problems. Much to the contrary, it is one more element to bring the promises of constitutional legislator out of the actual experience of Brazilian society, by dangerously relativising the role of procedural dialog – subordinated to the principle of due process of law – , in ensuring democratic legitimacy to judicial decision. This way, even though the legal system is theoretically open to free and fair clash of different interests that are opposed in society, one of the sides has always guaranteed, beforehand, the victory at the end of the game.

References

BOBBIO, Norberto. *O futuro da democracia*. São Paulo: Paz e Terra, 2002.

BRASIL. *Constituição Politica do Imperio do Brazil*, 25 Mar. 1824. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/Ccivil_03/Constituicao/Constituicao24.htm.

_____. *Constituição da República dos Estados Unidos do Brasil*, 24 Feb. 1981. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/Constituicao91.htm.

[36] Translation provided by the author.

[37] Translation provided by the author.

_____. *Constituição da República dos Estados Unidos do Brasil*, 16 Jul. 1934. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm.

_____. *Constituição dos Estados Unidos do Brasil*, 18 Sept. 1946. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/Constituicao46.htm

_____. *Constituição da República Federativa do Brasil de 1967*, 24 Jan. 1967. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm

_____. *Emenda Constitucional No. 1*, 17 Oct 1969. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc_anterior1988/emc01-69.htm.

_____. *Lei Federal No. 5.869*, 11 Jan. 1973. Institui o Código de Processo Civil. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/leis/l5869.htm.

_____. *Emenda Constitucional No. 7 à Constituição Federal de 1967*, 13 Apr. 1977. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc_anterior1988/emc07-77.htm.

_____. *Constituição da República Federativa do Brasil de 1988*, 7 Oct. 1988. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

_____. *Lei Federal No. 9.576*, 12 Dec. 1998. Dispõe sobre o processamento de recursos no âmbito dos tribunais. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/leis/L9756.htm

_____. *Medida Provisória Federal No. 2.180-35*, 24 Aug. 2001. Acresce e altera dispositivos das Leis nos 8.437, de 30 de junho de 1992, 9.028, de 12 de abril de 1995, 9.494, de 10 de setembro de 1997, 7.347, de 24 de julho de 1985, 8.429, de 2 de junho de 1992, 9.704, de 17 de novembro de 1998, do Decreto-Lei no 5.452, de 1o de maio de 1943, das Leis nos 5.869, de 11 de janeiro de 1973, e 4.348, de 26 de junho de 1964, e dá outras providências. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/mpv/2180-35.htm

_____. *Lei Federal No. 10.352*, 25 Dec. 2001. Altera dispositivos da Lei no 5.869, de 11 de janeiro de 1973 – Código de Processo Civil, referentes a recursos e ao reexame necessário. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10352.htm

_____. *Emenda Constitucional No. 45*, 30 Dec. 2004. Altera dispositivos dos arts. 5º, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 e 168 da Constituição Federal, e acrescenta os arts.

103-A, 103B, 111-A e 130-A, e dá outras providências. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc45.htm

_____. *Lei Federal No. 11.232*, 22 Dec. 2005. Altera a Lei no 5.869, de 11 de janeiro de 1973 – Código de Processo Civil, para estabelecer a fase de cumprimento das sentenças no processo de conhecimento e revogar dispositivos relativos à execução fundada em título judicial, e dá outras providências. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11232.htm.

_____. *Lei Federal No. 11.277*, 7 Feb. 2006. Acresce o art. 285-A à Lei no 5.869, de 11 de janeiro de 1973, que institui o Código de Processo Civil. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/L11277.htm

_____. *Lei Federal No. 11.672*, 8 May 2008. Acresce o art. 543-C à Lei no 5.869, de 11 de janeiro de 1973 - Código de Processo Civil, estabelecendo o procedimento para o julgamento de recursos repetitivos no âmbito do Superior Tribunal de Justiça. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Lei/L11672.htm.

_____. *Lei Federal No. 12.322*, 9 Sept. 2010. Transforma o agravo de instrumento interposto contra decisão que não admite recurso extraordinário ou especial em agravo nos próprios autos, alterando dispositivos da Lei no 5.869, de 11 de janeiro de 1973 - Código de Processo Civil. [viewed 10 January 2013]. Available from: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Lei/L12322.htm

CAPPELLETTI, Mauro. *Juízes Legisladores?* Porto Alegre: Fabris, 1993.

COSTA. Henrique Araújo. COSTA, Alexandre Araújo. Os testamentos ignorados de Ovídio Baptista e Calmon de Passos. *Revista de Processo*. 2011, **192**, 419-437. ISSN 0100-1981.

DAVID, René. *Os Grandes Sistemas do Direito Contemporâneo*. São Paulo: Martins Fontes, 1993.

DIREITO DO ESTADO. *Depoimentos Magistrais*: Calmon de Passos. [online] [no date] [viewed 12 December 2012] Available from: http://bit.ly/a0HlwD.

GUERRA FILHO, Willis Santiago. *Elementos de uma Teoria Geral da Política*. Brasília: Instituto Teotônio Vilela, 1997.

MACCORMICK, D. Neil, Estado de derecho y rule of law. In: THESING, Josef (comp.). *Estado de Derecho y Democracia*. Buenos Aires: CIEDLA, 1997, pp. 101-117.

MONTESQUIEU, *L'Esprit de La Lois*. Paris: Éditions Garnier Frères, 1949.

MURICY, Marilia. Depoimento. In: PASSOS, J. J. Calmon de. *Revisitando o Direito Poder, Justiça e Processo*: reflexões de um jurista que trafega na contramão. Rio de Janeiro: Forense, 1999, pp. 15-30.

PASSOS, Calmon. Súmula Vinculante. PASSOS, J. J. Calmon. Súmula vinculante. *Gênesis*:

Revista de Direito Processual Civil. 1997, **6**, 630-654, ISSN. 1676-8736

_____. *Direito Poder, Justiça e Processo*: julgando os que nos julgam. Rio de Janeiro: Forense, 1999.

_____. Instrumentalidade do Processo e Devido Processo Legal. Revista de Processo. 2001, **102**, 55-67, ISSN 0100-1981.

_____. *A Jurisdição* [notes for the Curso de Pós-Graduação Lato Sensu em Direito Processual]. Salvador, Bahia: Unifacs, 2003 [typed manuscript].

_____. *Revisitando o Direito Poder, Justiça e Processo*: reflexões de um jurista que trafega na contramão. Salvador: JusPodivm, 2012.

SALDANHA, Nelson. *Pequeno Dicionário da Teoria do Direito e Filosofia Política*. Porto Alegre: Fabris, 1987.

SANTOS. Boaventura de Sousa. *Para uma revolução democrática da justiça*. São Paulo: Cortez, 2007.

SILVA, Ovídio Baptista da. *Processo e Ideologia*: o paradigma racionalista. 2nd ed. Rio de Janeiro: Forense, 2006.

SOARES, Guido Fernando Silva. *Common Law*: introdução ao direito dos EUA. São Paulo: RT, 1999.

STRECK, Lenio Luiz. *Súmulas no direito brasileiro*: eficácia, poder e função. Porto Alegre: Livraria do Advogado, 1995.

SUPERIOR TRIBUNAL DE JUSTIÇA: o tribunal da cidadania. [viewed 10 January 2013]. Available from: http://www.stj.jus.br

TOMAZ, Carlos Alberto Simões de. Juridicização da Política. *Revista de Informação Legislativa*. 2008, **45**, 95-112, ISSN 0034-835x.

WOLKMER, Antônio Carlos. *História do Direito no Brasil*. 2nd ed. Rio de Janeiro: Forense, 1999.

The judicial activism as an evidence of the fragility of fundamental rights towards the Weberian political-administrative system

Sérgio Luiz Barbosa Neves[1]

Abstract: The constitutionalization of rights and their recognition as fundamental rights led to the questioning of legislative omissions and policies by the Judiciary Power, which is being accused of activism and exacerbation of its duties while making decisions to correct policies and to supply those omissions, i.e., the Judiciary Power would be invading the competence sphere from the Legislative and the Executive. Considering this Judiciary activism as an unusual function of this Power and realizing the civil society's need to avail itself of that Power for the purpose of achieving its fundamental rights, the objective of this work is to verify if such rights are strong or weak, not for the fact they took chair in the Republic Constitution text, but in reason and under the perspective of the democratic state of law that continues to adopt a political-administrative weberian model unable to ensure fundamental rights, which would be further hampered by a system of functional division among the three spheres of power, constantly driven by political and electoral conveniences, that contributes for the lack of performance of these functions and delays the attainment of fundamental rights by citizens, who are forced to resign themselves to lengthy court proceedings. This is not intended to analyze whether or not the Judiciary is usurping powers of other branches, but taking that role as a symptom that representative democracy and separation of powers are suffering irresistible pressure of other factors such as market and information, which impose a reevaluation of these dogmas about the state ideal structure. In this scope, this paper will: (i) analyze the origins and adoption of separation of powers, (ii) ascertain the reasons for the transmutation of direct democracy to representative, (iii) question the way in which he conformed to the State separation of powers; (iv) propose a new perspective based on democratic control, more preoccupied with meeting the burdens and obligations arising from ownership of power than its distribution and arbitrary exercise, and (v) pursue a restructuring proposal to the Legislative and to the Executive to strengthen the fundamental rights which, without subtracting functions from the Judiciary, make the performance of this Power

[1] E-mail: sergiolbn@bol.com.br

conformed and restricted to law enforcement, without having to create it by supplying legislative omissions or by setting public policy.

Keywords: Democratic State of law – fundamental rights – judicial activism.

1. Introduction

The Prussian army and its reorganization by Frederick The Great was the inspirational source for Max Weber works about organizations and the bureaucracy required for their success. The bureau would be the foundation of his theory and responsible for many administrative functions in the industry. Precision, speed, clarity, regularity, reliability, and efficiency were to be expected from the actors who wanted to achieve the best results. The organization would have to follow Weber's recipe: a fixed division of tasks, hierarchical supervision, and detailed rules and regulations. This leads us to the principle of legal certainty, which is internationally recognized as a central requirement for the rule of law.

As we can see, legal certainty and the rule of law are valuable principles up till now, hence they have grounded societies all around the world, creating a fertile soil for the market and economic liberal ideals, for whom predictability and a State limited by national and international law were fundamental to their objectives. The Organization for Economic Cooperation and Development (OECD) defines the rule of law as the principle that "first and foremost seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability".

Bureaucracy consists in a rational mode of organization, based on law and regulations that, in Weber's time, nailed down arbitrary decisions and the world of work. This model applied to the public administration legitimate the public authority, sheltered by the belief in the inviolable nature of administrative routine and certainty of predictable reactions of all elements of the public apparatus. This way, Weber pursuits absolute objectivity in decision-making, giving total independence for the political power organization and fixed, at the same time, a disciplinary framework. His rational bureaucracy was founded on four principles: (i) the division of labor in order to increase productivity; (ii) the hierarchical structure of any organization, establishing different levels of authority in it, the way information takes and how, when and for whom

it would be released, and, at least, the role exercised by each member of the organization; (iii) vertical communication as the way to disseminate information respecting the hierarchy from top to bottom; and, (iv) written information disciplined – like internal rules, procedures and memos – in order to avoid misinterpretation.

The bureaucratical organization is not a privilege of the public administration or a success scheme for corporations. Bureaucracy became a characteristic of the occidental societies, rationalizing their procedures, despite their economic, political, administrative, social or cultural nature, in aim to be more efficient. For Weber, the ideal kind of public servant is the rational oriented to the accomplishment of pre-established objectivities.

Oriented like that, the occidental states and their administrative machine were predictable enough to work with and for capitalists. The connection between Weber's theory and capitalism is conspicuously clear. However, his theory has been adopted by the Public Administration since then. That outputs a question related to the notion of the post-modern State: more pluralist, more complex, less centralized than the bureaucratic modern state, whose institutions should be able to ensure its citizens the so-called fundamental rights and beyond all that, with a loss of sovereignty and unable to fulfill its citizens' expectations from the social contract, what, in thesis, States were made for. The question is: Is the Prussian army a reliable source to ensure citizens their fundamental rights? And so, has the weberian political-administrative system the right tools to endorse the fundamental rights or something is missing?

Constitutionalization of fundamental rights is a recent phenomenon that impacts the weberian political administrative state, while these rights were put into constitutional law without been regulated by Executive and Legislative branches, which were accustomed to label then as programmatic norms. Notwithstanding, the impact of these constitutionalized rights was perceived when Courts issued decisions granting such rights, yet they were not regulated or diversely established by the law and by public policies. Predictability, law certainty and the rule of law were gaining a new perspective and even the separation of powers and its structure proposed centuries ago were shaken. It seems also important to underline that many of these fundamental rights came to life by the hands of principles and values. It's the kind of norm avoided by the weberian system, which standards are explicit rights and positivism. While these kind of rights do not admit a wide range of interpretation, on the other hand, principles and values give a white paper to be draw

and colored by the interpretation from someone, unelected, from the Judiciary branch.

Decision-making by the Judiciary Power took a different road and, since then, this branch has been accused of being activist and of exacerbation of its duties while making decisions to correct public policies and to supply those omissions, i.e., the Judiciary Power would be invading the competence sphere from the Legislative and the Executive.

Considering this judiciary activism as an unusual function of this Power and realizing the fact that the civil society's need to avail itself of that Power for the purpose of achieving its fundamental rights, we must question if the problem really lies on the Judiciary and its decision-making procedure has changed or if the roots of that "people's need" to rely on the Judiciary to get their fundamental rights in concrete are embedded somewhere else. It's easy to stare at a tree and describe their leaves and branches, therefore anyone can see then, but to study and tell people where and how their roots are underneath the soil demands the removal of many obstacles. In the same way, it's easy to exam the Judiciary decisions and, as we figure out some kind of elevation over the decisions of the Executive or Legislative Powers or as we view a judicial rule supplying these Power's omissions, but it is difficult to disclosure what unleashed that kind of judicial decisions. We would never find the actual reasons of that judicial behavior unless we go further, beyond the process, looking back and try to discover what situations caused such a twist of functions, considered legitimate by almost all the doctrine.

Understanding what is happening requires a long journey from the Prussian army in the nineteenth century, walking by Weber's theory and the constitutionalization of fundamental rights, taking a detour to analyze the separation of Powers, representative democracy and elections, till we finally reach our goal: the judgments of the Judiciary reputed as activists.

2. A little gaze at separation of powers.

Tyranny was the great villain who leaded man to think about a separation of functions and to avoid its accumulation in the hands of one to exercise power. The executive, legislative and judiciary functions should be shared among different persons distributed in specific branches, which would be properly created in this meaning. As James Madison Jr. – the fourth President of the United Sates – have said about

the theme, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny".2 That means, if there is a system where all these powers are attributed to one human-being or even to only one institutional body, that system would be a tyrannical one. Therefore, that also links separation of powers with democracy.

Nevertheless, separation of powers and the check and balance system were not unanimous principles. For parliamentarists, the accumulation of functions in the cabinet does not turn the power exercise from democratic to tyrannical, while, for presidentialists, the check and balance system was a great mistake, since it was not necessary, contrary to democracy and a way of turning government ineffective.

The origin of the idea of shared governmental power and even constitutionalism dates back to medieval writings, where concepts of governmental functions and theories of mix and balanced government were evolved. The idea embodied in seventeenth century (1642-1660) during the English Civil War period, when it turned to be a "response to the need for a new constitutional theory, when a system of government based upon a 'mixture' of King, Lords, and Commons seemed no longer relevant"[3]. In fact, power and its exercise were in the center of the debate and contributing to evolve this theory. As Vile says, a set of values conform our political society, such as justice, liberty, equality, and the sanctity of property, which favored the separation of powers. At the end of his book, Vile added to his original list the conversion of these principles into justice, democracy, and efficiency, but the foremost value of twentieth century would be social justice.[4]

To establish a concept the boundaries of the theory of the separation of powers, Vile says:

> "A 'pure doctrine' of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corre-

[2] Alexander Hamilton, John Jay, James Madison, The Federalist, ed. Mead Earle (New York: The Modern Library, Random House [1937]), 47, p. 313.

[3] VILE, M J. C.. Constitutionalism and the separation of powers. (2nd ed.) (Indianapolis, Liberty Fund (1998), p. 7.

[4] Op. cit., p. 6.

> sponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State."[5]

Each branch would have its own procedure in which would be embedded a set of that values and in the representation of an array of interests. Talking about men behavior as political representatives, shall we take their administrative or legislative acts on people's behalf? After all, these branches can marshal their legal power, administrative decisions and law making process to their advantage. What kind of values and interests will prevail and frame their acts? Can a judge analyze this frame to evaluate values such as legitimacy and social justice aiming to quash the effects and the proper act? Or would be this judge accused of being overly activist?

It's beyond the scope of this essay to go further in the study of the separation of powers, finding answers to those questions. Nonetheless that theory was the first to organize the state as we comprehend it in our days. For sure it was built over the basis of the set of values mentioned above, which are also the fundamental values from capitalism. Nevertheless, representation, democracy and social justice were lifted by the principle of separation of powers and must be investigated by us targeting to verify if citizens reached and reach the social justice, enshrined by Vile as last century's main value. Insofar we consider fundamental rights as a necessary way to achieve social justice, we have to argue if separation of powers and representative democracy enables small and incremental steps towards that achievement or, on the contrary, if they obstacle it. Another question to be responded refers to the so-called judicial activism and if it can be considered as a usual function of the Judiciary or if this branch is usurping share of power from the other two.

3. Representative democracy: does it actually represent people?

Originally, democracy consisted in citizen's direct participation

[5] Op. cit., p. 14

in the political life of their community. Representation was never considered as democracy. At this time, it was easier to find communities with (i) citizen's harmonious interests in the aim of general wealth; (ii) religious, economic, language, educational level, ethnical and cultural homogeneity; (iii) small number of citizens, facilitating their direct participation in a public decision making process, in politics and in the legislative process; and, (iv) autonomy regarding to other cities. This autonomy was fundamental to a good life for the citizens, ie, dependence from other communities and cities would diminish that high pattern of life. To avoid a strong dependence from the external trading due to ensure "dignity" – as we would say in present days – to their citizens, economic life should be frugal.6

In conclusion, the virtue of frugality was intrinsically linked to democracy, which could be fatally wounded by an intense economic life embodied in consumerism. Today's view of democracy is the opposite. Political science tries to conciliate representation with democracy and a consumerism society with the dignity of all citizens. Direct participation and frugality seemed to disappear a long time ago. Do we have actual democratic governments in the twentieth-one century? Is democracy possible in a neoliberal government?

4. Unelected bodies reshaping the role of the traditional branches and the separation of powers.

As elections cost a huge amount of money, some accuses governments of handing over power to the market and to bow to corporate interests, that may translate their ideologies and interests into laws and governmental acts without regard for any interest of the society. Beyond this issue, we live in an informational society, where expertise and capacity to get, process and absorb information, taking decisions in a second are a "must do" for any kind of enterprise and administration. The political bureaucratic system proposed by Weber is not capable to respond to those new instances, condemning the public administration to be anachronistic, slow and ineffective, remaining several steps behind the private economic actors.

Representative democracy may be the given process, yet it is not anymore an effective solution for the citizens who claim the achieve-

[6] DAHL, R. A.. *A democracia e seus críticos [Democracy and its critcs]*. São Paulo: WMF Martins Fontes, 2012, p. 26.

ment of their social interests and fundamental rights. Corporations and laws concerned to economic, financial adjustments of the State, tax, and in the aim of free market have undeniably more clout than any other constitutional principle or law from any State. Representative democracy is being questioned all around the globe, and there are an increasing number of unelected bodies arising in the horizon, like Central Banks, Quangos in England and Agencies in the USA and Brazil, for instance. Vibert[7] view the unelected bodies as a new kind of separation of powers, which would be integrally responsible for the public policy, while they have expertise, are well informed and know how to take effective and rapid decisions without political bias. Assuming that theory as better than the traditional one, there must be sought to constrain and reshape the role of the Executive and Legislative Powers.

In Brazil, despite the fact that members of the Judiciary Power are not elected, people were hopeful and expected the President of the Supreme Court to be the President of the country. What kind of phenomenon takes place in such country and leads to a paradoxical political trend like that?

Presidential polls surveys 2014 indicated the President of the Supreme Court from Brazil, Minister Joaquim Barbosa, as the number one in people's choice. This is the first time in the history of the country that a member of the Supreme Court leads a political poll survey or even has been spontaneously nominated. The vote has shifted from traditional political groups to someone whose biography does not show any kind of political involvement and wasn't even candidate. This phenomenon can't be analyzed by itself, it must be considered among many social, economic and historical factors. Juridical instance however cannot be dismissed. Since 1988 Brazilian Republican Constitution expresses that in any kind of question the last word competes to the Judiciary Power, what made it stronger and able to take decisions about legislative omissions and public policies, using principles, a set of values and the constitutionalization of fundamental rights, despite the fact these rights are still written as programmatic rules.[8]

For sure, the credibility of the Legislative and the Executive de-

[7] VIBERT, F. The rise of the unelected: democracy and the new separation of Power. New York: Cambridge University Press, 2007.

[8] Article 5º - XXXV – the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power. http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf

creases whereas grows the credibility of the Judiciary. We can also exam the issue by the perspective of the relationship among State Powers. In fact, Legislative and Executive did not hand over power to the Judiciary. Independence and harmony of State Powers continue to be a fundamental principle in Brazilian Constitution [Article 2. The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union].[9] For this principle, it would be a wrong perception if someone tries to demonstrate the Judiciary Power as the one with more clout than the others. Many countries around the globe have done constitutional reforms that amplified the role of Judiciary, since enabling to go further in the interpretation of law by using principles and a set of values to ground judicial decisions. Nevertheless, it was not a global reviewing of the system of checks and balances and the separation of powers, and did not take the fundamental rights from the paper to real life automatically. That role continues to fit among the functions from the Legislative and the Executive, but omissions characterized by not turning fundamental rights into concrete ones nor into public policies figure out as common place. The constitutionalization of rights and acknowledgement of judicial review are widely accepted and considered as a new path for society to thrive, but, in fact, there is a long and wide road to be traveled, therefore fundamental rights are normally programmatic while economic rules are well defined. In a pejorative way, trying to constrain the role of the Judiciary, some accuses the Judiciary as activist, whereas "the characterization of a decision as activist depends on the politics of the person doing the characterizing, "judicial activism" is merely meaningless pejorative".[10]

Within their structure, based on the weberian political-administrative theory, States are unable to ensure fundamental rights, which would be further hampered by a system of functional division among the three spheres of power, constantly driven by political and electoral conveniences, that contributes for the lack of performance of these functions and delays the attainment of fundamental rights by citizens, who are forced to resign themselves to lengthy court proceedings. This essay is not intended to analyze whether or not the Judiciary is usurping pow-

[9] http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

[10] SHERRY, Suzanna, Why We Need More Judicial Activism (February 6, 2013). Constitutionalism, Executive Power, and Popular Enlightenment, 2014 Forthcoming; Vanderbilt Public Law Research Paper No. 13-3. Available at SSRN: http://ssrn.com/abstract=2213372, p.2.

ers from other branches, but taking that role as a symptom that representative democracy and separation of powers are suffering irresistible pressure of other factors such as market and information, which impose a reevaluation of these dogmas about the state ideal structure, as, for example, the presence of other actors such as autonomous unelected bodies.

5. Judicial activism.

The term "judicial activist" first appeared in an article released in 1947 in Fortune by Arthur Schlesinger Jr. about Justices on the Supreme Court and initially forged to label liberal judges. Judicial activism is not an expected role from the Judiciary and nor its foremost function. Yet it became quite common to be found in judicial decisions that were criticized as 'activists'. If people do not obtain their fundamental rights straight from the state, there would be no other way than fighting for then in the Judiciary Power. In the tenor of judicial debates ensued in Brazil such as (i) abortion of anencephalic fetus, (ii) use of stem cells in scientifically research trying to heal the handicapped citizens, (iv) homo affective marriage, (v) claims about bed-vacancies in hospitals, (vi) vacancies at the public educational system, and (viii) free of charge medical procedures, and medicines that are too expensive in private systems, the omissions of the Brazilian government in such matters explain the crescent phenomenon of judicial activism in this country and people's expectation for a judge to become president.

Judicial activism is seen most clearly when judges elevate their own judgment over that of other constitutionally significant actors, in circumstances where a formal model of law would predict otherwise.[11] Definitions of judicial activism and judicial review are so many as the number of authors who have written about the theme. Sherry gives us a concept involving both of them:

> Judicial activism occurs any time the judiciary strikes down an action of the popular branches, whether state of federal, legislative or executive. Judicial review, in other words, produces one of two

[11] YUNG, Corey Rayburn, Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts (January 14, 2010). Northwestern University Law Review, Vol. 105, No. 1, 2011; 5th Annual Conference on Empirical Legal Studies Paper. Available at SSRN: http://ssrn.com/abstract=1434742, p.47.

> possible results: If the court invalidates the government action it is reviewing, then it is being activist; if it upholds the action, it is not.[12]

In other hand, worldwide, judicial activism has been studied as a postmodern phenomenon and law philosophers has been given huge importance to its study. This is not different in Brazil, where we can add to this consideration the fact that, only recently, fundamental rights have been raised to constitutional rights. Brazilian jurists are somehow tempted to consider this foreign and global influence and the juridical novelty of those rights as the reason that leads Judiciary to interfere in instances which, in the recent past, this Power would consider itself unable to decide about political issues and affected to the sphere of convenience and opportunity of the Executive.

Ran Hirschl challenges this conventional wisdom. Hirschl makes a comparative inquiry into the political origins and legal consequences of the recent constitutional revolutions in Canada, Israel, New Zealand, and South Africa. Politicians are not committed with that trend toward constitutionalization of rights. Despite their speech before elections, politicians rarely act in the aim of democracy, social justice, or universal rights. As observed by Hirschl, the elected members of the legislative and executive branches produce law and public policies more commonly as a "product of a strategic interplay among hegemonic yet threatened political elites, influential economic stakeholders, and judicial leaders".[13] The political discourse has already incorporated fundamental rights and social justice, but we still have to look forward longing to witness laws and policymaking actually in behalf of social justice without traces of political and economic elites' interests.

Judicial activism has a democratic foundational ground, as far it has a counter-majoritarian role. So it's easy to figure out the reasons for the attacks Judiciary branches are suffering from majority elites and their representative members in the legislative branch, whose discourse enacts a motto aiming to take the Constitution away from the courts and to give it back to the people or their democratic representatives. In fact, they struggle unduly for a pure democracy that do not care about minorities and do not recognize pluralist society. On the contrary, Seidman

---

[12] SHERRY, Suzanna. Op. cit., p. 4.

[13] HIRSCHL, Ran. Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. Harvard University Press: 2007.

contest this electoral opportunistic statement, contending that an "'unsettling' constitution helps to build a community founded on consent by enticing losers into a continuing conversation".[14]

This essay aims neither to argue in favor of the judicial activism nor against it, but to answer its foundational question, i.e., if that activism is necessary to citizens in order to obtain their fundamental rights. As we notice that the Judiciary Power acts in a counter-majoritarian way to ensure constitutional democracy that leads us to a favorable conclusion about the judicial activism and its importance. However it continues to be an anomalous function and should be avoided by a simple change in the behavior of the Legislative and the Executive Powers. After all, the word "activism" can be associated to its opposite "passivism", what indicates that while Judiciary is being activist, Legislative or Executive are being passives.

6. Conclusion.

While studying about judicial activism it's hard or even impossible to find a decision involving economic goals, which were not yet regulated by the other branches. Judicial activism is useful to ensure fundamental rights, which would be forever forgotten over a dusty shelf of undesired laws.

The current political administrative system is the same proposed by Weber more than a hundred years ago. That authoritarian and hierarchical system, allied with a defective democracy based on a false representation that ignores pluralism, does not enable our society to achieve their legitimate aspirations on exercising fundamental rights. It's the kind of problem a stockholder does not have, once it is easy for that caste of citizen to exercise his rights and even privileges, which are well protected by predictability and law certainty.

It would be a turning point in the bureaucratic system suggested by Weber if the Public Administration becomes permeable to a set of principles and values, which would turn certainty into doubt. The members of this system are familiarized with a range of predetermined outputs, which they use as an answer to the inputs trying to obey to a centralized source of power. As Saint-Pierre says the weberian sys-

[14] SEIDMAN, Louis Michael. Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review. Yale University Press (December 11, 2001).

tem, it's the kind of "sterilized knowledge by its blindness to values"[15]. Therefore, aiming that change in administrative decision making process, we have to transform that "sterilized knowledge" into a fertile soil that enables the system to make the new set of constitutional principles and values useful.

The fragility of fundamental rights is evident and judicial activism is the only way citizens have to take their rights from paper to real life. It's unfair to accuse Judiciary of usurping functions from the other branches and of being overly activist. Judicial activism is a guarantee of constitutional democracy protecting minorities against the majority tyranny and protecting people against politically and electorially informed branches, whose objectives are not always confessable. The excess of judicial activism is not an arbitrary exacerbation of power, but a symptom of the fragility of fundamental rights. As it is not the cure of that kind of disease caused by an anachronic administrative system in which time seems to have stood still.

In comparison with the rights of a stockholder, fundamental rights are fragile and cannot be exercised with the help of the Judiciary, which activism denotes this fragility towards the weberian political-administrative system. Democracy, separation of powers and the administrative structure must be rethought, giving enough and adequate tools to the achievement of fundamental rights by citizens without the necessity to avail themselves of the Judiciary Power. It would be a decisive and gigantic step from the ranks of the Prussian army in the nineteenth century to the information society of the twentieth first century. In other words, while economic rights are updated and live in the information society, fundamental rights are still living in the industrial society.

[15] SAINT-PIERRE, Héctor luis. Max Weber entre a paixão e a razão. Campinas: UNICAMP Ed., 2004, p. 120.

For a judicial decision theory between ontological hermeneutic and epistemological hermeneutic

João Víctor Nascimento Martins

Abstract: In this article, we intend to open a space for debate about the foundations for a theory of judicial decision. To this end, the paper discusses two different fronts, seeking to highlight their contradictions, but also the possibility of their coexistence and eventual complementarity: the first fomented by Robert Alexy in his Theory of fundamental rights, founded on a analytic philosophy and epistemological hermeneutics; and the second conducted by Ronald Dworkin in Law´s Empire, based on the ontological hermeneutics of Gadamer.

Keywords: Theory of judicial decision; ontological hermeneutics; epistemological hermeneutics.

1. Introduction

Robert Alexy proposes a theory of judicial decision in his work A *theory of constitutional rights.* His work, markedly founded on analytic philosophy, aims, in fact, for a systematization of the different conceptions and modes of application of constitutional rights. However, for the completion of such task, Alexy makes use of a necessary conceptual differentiation between the two varieties of legal norms: the rules and the principles (ALEXY, 2008, p. 90). In order to make clear the distinction between these kinds of norms, Alexy shows, then, how they should be differently applied to the decisions handed down by judges. Therefore, the author makes use of his theory of judicial decision.

In a brief summary, it is possible to say that Robert Alexy's theory aims for the systematization of judicial methods. Its central focus is on a search for a greater rationality in court decisions, considering the whole apparatus formed in his theory of legal argumentation. Thus, through standardization and systematization techniques, Alexy seeks to

attribute the greatest rationality to a court decision, always taking its legality into account, as well as its effectiveness and its correction. Alexy therefore seeks the institutionalization of reason, i.e. the foundation and application of Law through discursive rationality (ALEXY, 2011, p. 19).

It happens that the Alexyan theory, despite being widely adopted in judgments of various Western legal systems, has been criticized by several authors. The criticism is based on several arguments over his works, but this paper intends to analyze only one point raised by critics. This point is based, according to critics, on Ronald Dworkin's decision theory.

Dworkin's theory, mainly presented in his work *Law´s Empire*, is especially anchored in Gadamer's philosophical hermeneutics (DWORKIN, 2010a, p. 62-63). According to Gadamer, the sciences of the spirit (or the humanities) are interpretive sciences and, therefore, are the result of the interpreter's normative construction. Dworkin, glimpsing Gadamer's work, seeks to apply it to Law. Thus, Dworkin constructs a decision theory based on an ontological hermeneutics, according to which the judge, as an interpreter, would be necessarily influenced by their pre-understandings and by the historical context in which they stand. Thus, all methods created by the legal positivism that sought to ensure legal certainty through an objectivity would be bankrupt, considering that they are inevitably vitiated by the interpreter's pre- understandings.

Within the above context, questioning about whether the criticism (imposed by Dworkin) to the philosophical positivism, and especially to the legal positivism – through Gadamer's philosophical hermeneutics – also affects Alexy's post-positivist theory is inevitable. And if it does, would it cause the methods created by legal argumentation and post-positivist theories of Law to be all inapplicable or irrelevant?

Thus, this work intends to make a brief presentation on Alexy's and Dworkin's decision theories, raising the debate about their foundations found in different hermeneutical perspectives – the ontological and the epistemological – also seeking to discuss the possibility of their coexistence and complementarity.

2. The Robert Alexy theory and its grounds: of analytical philosophy to epistemological hermeneutic

Professor Robert Alexy's proposal in writing his *Theory of constitutional rights* was to construct a general legal theory of constitutional

rights of the German Constitution. By saying that his intention was to construct a legal theory, Alexy speaks about the formulation of a dogmatic theory, i.e. a legal science that has what is practiced as Law and what should be practiced as Law as an object of study (ALEXY, 2008, p. 32). With this object of study, the theory presents three different dimensions: analytical, empirical and normative.

The Alexyan theory, therefore, is based primarily on analytic philosophy[1], through which Alexy tries to construct a conception of constitutional rights through the analysis of legal concepts, i.e. to construct a structural theory of Law, *a priori*. On the other hand, Alexy is also concerned about the practical character of the science of Law (ALEXY, 2008, p. 34), for which he also focuses on the empirical and normative perspectives of Law. Given that the science of Law is constructed from the judge's perspective as an interpreter, Alexy also based on a theory of legal argumentation to construct his decision theory. This theory of legal argumentation is strongly based on epistemological hermeneutics and its interpretation methods. It is the search for a greater rationalization of interpretation methods.

Thus, outlined the intention of the German author when formulating his theory of constitutional rights, it is important to initially understand that Alexy proposes a necessary differentiation between rules and principles. This distinction is a basis for the theory of constitutional rights. Without this differentiation, there would be no possibility of discussion about the collisions between principles. According to Alexy, principles and rules are norms, considering that both say what should be (i.e. they are formulated by means of basic deontic expressions of duty, permission and prohibition). The distinction between rules and principles is, therefore, a distinction between varieties of norms (ALEXY, 2008, p. 88).

In general, the criterion of generality is used to make the distinction between rules and principles. The determinability of cases of application of the norms is also considered, as well as the form of its appearance, the form of creation or development, the axiological content, among others. These criteria, while important, are not alone sufficient to draw a meaningful distinction between rules and principles. Then, three possible theses about the classification of the norms arise: *a)* that all classification is doomed to failure, given that differentiation could not meet

[1] This line stands out above all the influences of Wittgenstein, Perelman, Apel and Austin.

all the differences and similarities between the norms; *b)* there is only a difference of degree between rules and principles; and *c)* it is possible to highlight a qualitative difference between rules and principles. According to Alexy, this thesis is correct and he tries to show it.

The main feature of differentiation of norms is:

> principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible, but also on what is legally possible (ALEXY, 2008, p. 90).[2]

Rules, in turn, are norms that have determinations within what is legally and factually possible, i.e. norms determine that one must do exactly what they prescribe. Therefore, they can be met or not. The difference between rules and principles is therefore qualitative. This distinction is quite similar to that proposed by Dworkin in his book *Taking Rights Seriously*, but differs in the characterization of principles as optimization requirements.

One way to better explain the differentiation occurs through the cases in which there is conflict between rules and collisions between principles. At this moment, Robert Alexy's decision theory enters the discussion. When two rules conflict, either one of them is held invalid or an exception clause that eliminates the conflict is introduced. This is because the concept of legal validity is not gradable. A legal norm is either valid or invalid, "it is not possible that two concrete judgments of a contradictory is-ought are invalid between each other" (ALEXY, 2008, p. 92) [3].

The collision between principles occurs differently. When two principles collide, the decision about the application of one or the other is not given within the discussion of its validity, but the precedence of

[2] Our translation of the original in Portuguese: "princípios são normas que ordenam que algo seja realizado na maior medida possível dentro das possibilidades jurídicas e fáticas existentes. Princípios são, por conseguinte, mandamentos de otimização, que são caracterizados por poderem ser satisfeitos em graus variados e pelo fato de que a medida devida de sua satisfação não depende somente das possibilidades fáticas, mas também das possibilidades jurídicas" (ALEXY, 2008, p. 90).

[3] Our translation of the original in Portuguese: "não é possível que dois juízos concretos de dever-ser contraditórios entre si sejam inválidos" (ALEXY, 2008, p. 92).

one principle over the other will be established in specific factual and legal conditions. "Conflicts between rules occur in the dimension of validity, while collisions between principles – since only valid principles can collide – occur beyond this dimension, in the dimension of weight" (ALEXY, 2008, p. 94) [4]. Dworkin works well with the "dimension of weight" in *Taking Rights Seriously*.

The collision between principles therefore generates a need for balance, according to the law of collision. For Alexy, it generates a conception of the result of balance as assigned norms of constitutional right. The solution to the collision consists in establishing a conditional relation of precedence between the conflicting principles, given the circumstances of the concrete case. Considering the concrete case, the establishment of conditional relations of precedence consists in setting conditions under which a principle has precedence over the other. The central question, therefore, is to determine under what conditions which principle should prevail over the other.

Alexy seeks, with the law of collision, to systematize the technique used by the Federal Constitutional Court to judge cases in which there is a discussion about the weights of principles. The problem is that principles do not have "weights" assigned; so, this weight must be constructed in the analysis of the case. Thus, the law of collision can be presented in the following formulation: "the conditions under which a principle takes precedence over another constitute the factual support of a rule that expresses the legal consequence of the principle that takes precedence" (ALEXY, 2008 , p. 99) [5]. The law of collision is one of the foundations of the Alexyan theory of principles. It reflects, above all, the nature of the principles as optimization requirements (norms that do not have absolute relations of precedence over one another).

The law of collision, therefore, handles the case where two norms lead, if considered alone, to results contradictory to each other. None of them is invalid, and none of them takes absolute precedence over the other. Precedence will be decided in the concrete case. The result of this balance is what Alexy will name as assigned norms of constitutional

[4] Our translation of the original in Portuguese: "Conflitos entre regras ocorrem na dimensão da validade, enquanto as colisões entre princípios – visto que só princípios válidos podem colidir – ocorrem, para além dessa dimensão, na dimensão do peso" (ALEXY, 2008, p. 94).

[5] Our translation of the original in Portuguese: "as condições sob as quais um princípio tem precedência em face de outro constituem o suporte fático de uma regra que expressa a consequência jurídica do princípio que tem precedência" (ALEXY, 2008, p. 99).

right, which has the structure of a rule, since it determines, in a concrete case, what should be done. Thus, it is possible to see that the norms of constitutional rights are not necessarily only principles.

For Alexy, therefore, norms of constitutional rights are both principles and rules. Like Dworkin, Alexy defends that those rules and principles have different *prima facie* characters. The final rules contain ultimate requirements, i.e. they determine that one must do exactly what they prescribe. The principles, in turn, are optimization requirements that determine that something is done to the greatest extent possible, given the legal and factual possibilities. Rules are therefore definitive reasons, while principles are *prima facie* reasons.

> Decisions on constitutional rights presuppose the identification of definitive rights. The path that goes through principle, that is, the prima facie right, until the definitive right, undergoes the definition of a relation of preference. But the definition of a relation of preference is, according to the law of collision, the definition of a rule. In this context, one can say that whenever a principle is ultimately a decisive reason for a concrete judgment of is-ought, then this principle is the foundation of a rule, which is a definite reason for this concrete case (ALEXY, 2008, p. 108). [6]

Principles are, therefore, usually more generic than rules, since they are not related to factual and legal possibilities.

> While reasons for the rules of nature are often quite technical, the axiological content of principles is more easily identifiable than the content of rules; as decisive reasons to numerous rules, principles have a substantial importance for the juridical order; its relation to the idea of Law results from a model of foundation that advances from the broader towards the more special; and the contrast of principles as norms 'developed', to the norms 'created' is due to *the fact that it is unnecessary that principles be set explicitly, which may*

[6] Our translation of the original in Portuguese: "Decisões sobre os direitos fundamentais pressupõem a identificação de direitos definitivos. O caminho que vai do princípio, isto é, do direito prima facie, até o direito definitivo passa pela definição de uma relação de preferência. Mas a definição de uma relação de preferência é, segundo a lei de colisão, a definição de uma regra. Nesse sentido, é possível afirmar que sempre que um princípio for, em última análise, uma razão decisiva para um juízo concreto de dever-ser, então, esse princípio é o fundamento de uma regra, que representa uma razão definitiva para esse caso concreto" (ALEXY, 2008, p. 108).

> *come from a tradition of detailed positivation and judicial decisions that, in general, express widespread conceptions about what Law should be* (ALEXY, 2008, p.109, italics added). [7]

Alexy later addresses the relationship between the principles and the so-called maxim (or principle) of proportionality. According to him, the nature of the principles implies the maxim of proportionality and the later implies the former.

> Stating that the nature of principles implies the maxim of proportionality means that proportionality, with its three partial maxims of adequacy, necessity (least restrictive means requirement) and proportionality *stricto sensu* (balance requirement itself), logically results from the nature of the principles, i.e. proportionality is deducible from this nature (ALEXY, 2008, p. 116-117). [8]

The maxim of proportionality is the form used to perform the analysis of the case where a State measure that intends to promote a particular principle comes into collision with another principle, namely, two principles collide and are balanced according to the law of collision. The principles require that something be done to the greatest extent possible, given the legal and factual possibilities of the case. The proportionality test provides exactly the ascertainment of the factual and legal conditions of the case.

In the examination of adequacy, it is important to observe if the

---

[7] Our translation of the original in Portuguese: "Enquanto razões para regras de natureza muitas vezes bastante técnica, o conteúdo axiológico dos princípios é mais facilmente identificável que o das regras; como razões decisivas para inúmeras regras, os princípios têm uma importância substancial fundamental para o ordenamento jurídico; sua relação à ideia de direito decorre de um modelo de fundamentação que avança do mais geral na direção do sempre mais especial; e a contraposição dos princípios, enquanto normas 'desenvolvidas', às normas 'criadas' deve-se à desnecessidade de que os princípios sejam estabelecidos de forma explícita, podendo decorrer de uma tradição de positivação detalhada e de decisões judiciais que, em geral, expressam concepções difundidas sobre o que deve ser o direito" (ALEXY, 2008, p.109, grifos acrescidos).

[8] Our translation of the original in Portuguese: "Afirmar que a natureza dos princípios implica a máxima da proporcionalidade significa que a proporcionalidade, com sua três máximas parciais da adequação, da necessidade (mandamento do meio menos gravoso) e da proporcionalidade em sentido estrito (mandamento do sopesamento propriamente dito), decorre logicamente da natureza dos princípios, ou seja, que a proporcionalidade é deduzível dessa natureza" (ALEXY, 2008, p. 116-117).

measure that is being proposed to conduct or promote a principle can do it, i.e. it is an analysis of the capacity of the measure to promote the desired principle. In a second step, the examination of the necessity of that measure is performed, i.e. the adopted measure is observed in order to see if it is able to promote a particular principle with the same efficiency as another measure, presenting a smaller impact on the colliding principle. The examinations of adequacy and necessity are analyses of factual possibilities for the application of a principle.

The examination of proportionality *stricto sensu*, in turn, is an analysis of the legal possibilities for the application of a principle in a particular case. In this phase, a balance itself is carried out. "When a norm of constitutional Law with a character of principle collides with an antagonistic principle, the legal possibility for the realization of this norm depends on the antagonistic principle. In order to reach a decision, a balance under the law of collision is required" (ALEXY, 2008, p. 117). [9]

This whole process of decision formulated by Alexy is endorsed in his theory of legal argumentation. The analyses of necessity, appropriateness and proportionality *stricto sensu* are only met if the rules imposed by the theory of legal argumentation are complied. This is because the search for the rationalization of legal practice requires the application of interpretative methods, in order to limit, as much as possible, the possibility of arbitrariness on the part of judges.

The theory of legal argumentation, in turn, is also founded, as previously mentioned, on the tradition of epistemological hermeneutics, as its objective is the scientific construction of methods and criteria for interpretation. Epistemological hermeneutics came right at the initial moment of hermeneutic science. Despite its origins in ancient times, hermeneutics acquired its scientific character, mainly through Schleiemacher's and Dilthey's studies. This science had the study of interpretation as a motto and was initially carried out in the fields of Philology, Theology and Arts. Hermeneutics, at that time, had a scientific character, by demonstrating itself as a methodological enterprise, i.e. by making a study of interpretation methods in human sciences.

The epistemological hermeneutics aimed, then, the creation of

[9] Our translation of the original in Portuguese: "Quando uma norma de direito fundamental com caráter de princípio colide com um princípio antagônico, a possibilidade jurídica para a realização dessa norma depende do princípio antagônico. Para se chegar a uma decisão é necessário um sopesamento nos termos da lei de colisão" (ALEXY, 2008, p. 117).

an interpretive methodology for human sciences, since their followers repudiated the possibility of importing the methods of the natural sciences to the humanities. For Schleiemacher and Dilthey, the philosophical positivism proposed inevitably failed, considering that the center of the humanistic study is in the comprehension of the author's individuality, i.e. not only in a grammatical interpretation, but in a psychological interpretation. The methods of the natural sciences mainly aimed generality and standardization which, according to the epistemological hermeneutics, are inapplicable to the humanities. The humanities depart from the point of view of an individual, be it author or interpreter (RICOEUR, 1988).

For Dilthey, knowledge takes different forms in the fields of natural sciences and the humanities. For the former, knowledge is externally, objectively given, through the observation and comparison of phenomena. In the humanities, on the other hand, knowledge is given through the search for the comprehension of the individual. This comprehension becomes more difficult, since it is comprised of the individual's choices, their history and social context. Thus, according to Dilthey, the different branches of the humanities are necessarily interdependent and all their study is linked to the influences of the socio-historical context (DILTHEY, 2010).

Such hermeneutics of an epistemological bias developed by Dilthey had a great repercussion, since it steadied the bases for the methodological separation between the studies of natural and human sciences, establishing its own interpretative methodology of the human sciences. This methodology influenced several authors, such as Robert Alexy and his theory of legal argumentation debated here.

The epistemological bias of hermeneutics, however, lost ground to the study of the ontological-oriented hermeneutics, subsequently developed by Gadamer from Heidegger's studies. Although Gadamer uses many of the concepts created by Dilthey and his studies to construct *Truth and Method*, his criticism of Dilthey's search for objectivity is compelling.

3. The Ronald Dworkin theory and the ontological hermeneutic of Gadamer

The ontological hermeneutics initially gained expression through Heidegger's works. From this new perspective, hermeneutics ends the

search for methods and tools of interpretation, abandons its scientific pretension and supports its roots in Philosophy. The interest of the ontological hermeneutics focuses on the being who interprets.

> "Hermeneutics becomes a fundamental ontology, and its function is 'to bring up the structure that arises in a methodological plan', designated by Heidegger as a structure of 'pre-understanding'" (Ruedell *apud* Ricoeur, 2008, p. 81). [10]

Comprehension, from the perspective of ontological hermeneutics, however, takes on a new meaning. Comprehending now means the constant unveiling of possibilities to be constructed by a being, and no more the discovery of an inherent meaning to a text. Thus, comprehension ceases to be focused both on a relationship between two beings (author and interpreter), and in the relationship between subject and object (interpreter and work), but on the being as a living being in the world, which Heidegger nicknames *Dasein*.

The ontological hermeneutics thus brings out the study of comprehension as a phenomenon and not as the result of a procedure achieved by force or by the use of methods. The study focuses, therefore, on the comprehension of the being and on the need of the perception that comprehension is not a process that can be described through rationalized processes, but rather a phenomenon that occurs with a being, aiming their full potential generated by their experience in the world (RICOEUR, 1988).

Gadamer greatly incorporates Heidegger's ontological hermeneutics to give life to his *Truth and method* (which can be better read as *truth against the method*). Gadamer's objective is to demonstrate that the truth (as the phenomenon of the unveiling of possibilities, as introduced by Heidegger) could not be discovered through a set of methods, since the experience of the being and their pre-understandings overlap the intention of rationalization.

Gadamer supports that the impossibility of knowledge of a particular object and its description are not connected to the interpreter's pre-understandings. "Every comprehension is interpretation, and every interpretation is developed through a language that intends to let talk

[10] Our translation of the original in Portuguese: "A hermenêutica torna-se ontologia fundamental, e sua função é 'fazer aparecer a estrutura que aflora no plano metodológico', designada por Heidegger como estrutura de 'pré-compreensão'" (Ruedell apud Ricoeur, 2008, p. 81).

with the object and is, at the same time, a proper language of its interpreter" (GADAMER, 1999, p. 467, our translation)[11]. An interpreter makes use, although unintentionally, of their pre-understandings to interpret a text, and such text will influence their comprehensions of future objects of study. A continuous spiral motion is inevitably formed, and influences the interpreter, as well as determines they exert influence.

> The reference to the text cannot be compared according to this fixed, motionless and obstinate point of view, which only emerged for the one who tries to understand the unique question of how the other person could get to such an absurd opinion. In this context, comprehension certainly is not a historical understanding that reconstructs the genesis of the text. What one understands is what really is comprehended in the text. But this means that, in the resurrection of the meaning of the text, the interpreter's own ideas are always impied. Their horizon results, thus, always decisive, but cannot be understood, in turn, as an individual point of view which maintains or imposes itself, but rather as an opinion and a possibility that is at stake and that will truly help appropriate of what the text says. We described it above as a fusion of horizons. Now we can recognize the achievement of conversation in them, in which a subject consents to their expression, not in the quality of their own things or author, but as something common for both (GADAMER, 1999, p. 466-467, our translation). [12]

[11] Our translation of the original in Spanish: "Todo comprender es interpretar, y toda interpretación se desarrolla en el medio de un lenguaje que pretende dejar hablar al objeto y es al mismo tiempo el lenguaje proprio de su intérprete." (GADAMER, 1999, p. 467).

[12] Our translation of the original in Spanish: "La referencia del texto no se puede comparar según esto con un punto de vista fijo, inamovible y obstinado, que solo planteara al que intenta comprenderlo la cuestión única de cómo ha podido el otro llegar a una opinión tan absurda. En este sentido la comprensión no es seguramente una comprensión histórica que reconstruya la génesis del texto. Lo que uno entiende es que está comprendiendo el texto mismo. Pero esto quiere decir que en la resurrección del sentido del texto se encuentran ya siempre implicadas las ideas propias del intérprete. El horizonte de éste resulta de este modo siempre determinante, pero tampoco él puede entenderse a su vez como un punto de vista proprio que se mantiene o impone, sino más bien como una opinión y posibilidad que uno pone en juego y que ayudará a apropiarse de verdad lo que dice el texto. Más arriba hemos descrito esto como fusión de horizontes. Ahora podemos reconocer en ello la forma de realización de la conversación, en la que un tema accede a su expresión no en calidad de cosa mía o de mi autor sino de la cosa común a ambos." (GADAMER, 1999, p. 466-467).

As Fernandes (2008, p. 192) highlights, Gadamer emphasizes the need to take the historicity of the being into account. It would not be possible to remove an interpreter's knowability of their set of pre-understandings. "Each person is faced with a horizon, mainly a *historical horizon*, that acts not as a limiting element, but as a 'condition of possibility' of our comprehension" (FERNANDES, 2008, p. 192). [13]

Hence the relevance of the "consciousness of historic being", as proposed by Gadamer. The interpretation of an event can only occur through the action of a being that is inevitably historical and, therefore, influenced by the environment that shaped their comprehensions. According to Gadamer:

> (...) the authentic intention of comprehension is the following: when we read a text, we want to understand it; our expectation is always that the text will *inform* about something. A conscience formed by an authentic hermeneutic attitude is always receptive to the origins and characteristics which are totally strange to everything that comes from outside. In any case, such receptivity is not acquired through an objectivist "neutrality": it is neither possible, nor necessary, nor desirable to put ourselves in parentheses. The hermeneutic attitude supposes a consciousness taking regarding our opinions and prejudices which, when qualified as such, removes their extreme character. When we accomplish this attitude, we give the text the possibility of appearing in its difference and expressing its own truth in contrast with preconceived ideas that we imposed on it in advance (GADAMER, 2003, p. 63/64). [14]

[13] Our translation of the original in Portuguese: "(...) a compreensão se faz a partir de uma imersão em determinada tradição, operando de maneira circular, condicionada à revisão sempre constante das pré-compreensões do indivíduo" (FERNANDES, 2008, p. 193/194).

[14] Our translation of the original in Portuguese: "(...) a intenção autêntica da compreensão é a seguinte: ao lermos um texto, queremos compreende-lo; nossa expectativa é sempre que o texto informe sobre alguma coisa. Um consciência formada pela autêntica atitude hermenêutica é sempre receptiva às origens e características totalmente estranhas de tudo aquilo que lhe vem de fora. Em todo caso, tal receptividade não se adquire por meio de uma "neutralidade" objetivista: não é nem possível nem necessário nem desejável que nos coloquemos entre parênteses. A atitude hermenêutica supõe uma tomada de consciência com relação às nossas opiniões e preconceitos que, ao qualifica-los como tais, retira-lhes o caráter extremado. É ao realizarmos tal atitude que damos ao texto a possibilidade de aparecer em sua diferença e de manifestar a sua verdade própria em contraste com as ideias preconcebidas que lhe impúnhamos antecipadamente" (GADAMER, 2003, p. 63/64).

In this perspective, comprehension occurs, therefore, by the conception that the subject confers on the object of study within their historical horizon - formed by their pre-understandings. "Wherever we comprehend something, we do it from the horizon of a tradition of sense, which marks us and precisely makes this comprehension possible" (OLIVEIRA, 2001, p. 228)

As Oliveira recalls:

> Hence the circular nature of all comprehension: it is always accomplished from a pre-understanding, which comes from our own world of experience and comprehension, but this pre-understanding can be enriched by the collection of new content. Precisely, the roots of comprehension in the field of the object is the expression of this inevitable circle in which any comprehension takes place. For this reason, the hermeneutical reflection is essentially a reflection of the influence of history, i.e. a reflection that has the task of thematizing the reality of "history acting" on any comprehension. In a word, hermeneutics unveils the historical mediation of both the object of comprehension and the situationality of what it comprises (OLIVEIRA, 2001, p. 230). [15]

From there, it is possible to observe the harsh criticism made by Gadamer to the philosophical positivism: the search for scientific objectivity through an alleged position of the interpreter's alienating detachment is factually impossible, given that the interpreter is a living being and, therefore, when interpreting, they will be influenced by their pre-understandings and conditioned by their historical horizon of meaning – always changing. Thus, Gadamer complains about the import of methods of the natural sciences by the spiritual sciences, since interpretation does not have the power to get the objectivity required by the philosophical positivism. Interpretation can not start from an interpreter's desired

[15] Our translation of the original in Portuguese: "Daí o caráter circular de toda compreensão: ela sempre se realiza a partir de uma pré-compreensão, que é procedente de nosso próprio mundo de experiência e de compreensão, mas essa pré-compreensão pode enriquecer-se por meio da captação de conteúdos novos. Precisamente o enraizamento da compreensão no campo do objeto é a expressão desse círculo inevitável em que se dá qualquer compreensão. Por essa razão, a reflexão hermenêutica é essencialmente uma reflexão sobre a influência da história, ou seja, uma reflexão que tem como tarefa tematizar a realidade da "história agindo" em qualquer compreensão. Numa palavra, a hermenêutica desvela a mediação histórica tanto do objeto da compreensão como da própria situcionalidade do que compreende" (OLIVEIRA, 2001, p. 230).

zero value, because there is no such ideal condition.

Dworkin, in his work *Law's Empire*, imports Gadamer's ontological hermeneutics to Law, trying to formulate a theory of decision from the perspective outlined. From Gadamer, Dworkin notes that Law is the result of a tangle of theoretical divergences, which are constantly debated, defended and criticized by legal theorists, judges and other participants. These differences allow interpreters to formulate different conceptions about the foundations of the social practice known as Law.

> The interpretation of the works of art and social practice, as I will show, is, in fact, concerned mainly about the purpose, not about the cause. But the purposes that are at stake are not (primarily) those of any author, but the interpreter's. In general, the constructive interpretation is a matter of imposing a purpose to an object or practice, in order to make it the best possible example of the form or genre to which one thinks they belong. It does not follow, even after this brief explanation, that an interpreter can make whatever they would like from a practice or a work of art; that a member of a hypothetical community, fascinated by equality, for example, can in good faith assert that, in fact, courtesy demands that riches be shared. For history either forms it from a practice, or the object exerts coercion on the available interpretations of the latter, although, as we will see, the nature of this coercion must be carefully examined. From the constructivist point of view, the creative interpretation is a case of interaction between purpose and object (DWORKIN, 2010a, p. 63-64).[16]

[16] Our translation of the original in Portuguese: "A interpretação das obras de arte e das práticas sociais, como demonstrarei, na verdade, se preocupa essencialmente com o propósito, não com a causa. Mas os propósitos que estão em jogo não são (fundamentalmente) os de algum autor, mas os do intérprete. Em linhas gerais, a interpretação construtiva é uma questão de impor um propósito a um objeto ou prática, a fim de torná-lo o melhor exemplo possível da forma ou do gênero aos quais se imagina que pertençam. Daí não se segue, mesmo depois dessa breve exposição, que um intérprete possa fazer de uma prática ou de uma obra de arte qualquer coisa que desejaria que fossem; que um membro da comunidade hipotética fascinado pela igualdade, por exemplo, possa de boa-fé afirmar que, na verdade, a cortesia exige que as riquezas sejam compartilhadas. Pois a história ou a forma de uma prática ou objeto exerce uma coerção sobre as interpretações disponíveis destes últimos, ainda que, como veremos, a natureza dessa coerção deva ser examinada com cuidado. Do ponto de vista construtivo, a interpretação criativa é um caso de interação entre propósito e objeto". (DWORKIN, 2010a, p. 63-64).

Thus, according to Dworkin, Law is the result of a constant constructive interpretation, in the sense that the interpreter of the law worries about its purposes, about the idea that they have about the normative order. But this idea, this conception or this point of view, derives from the fact that "(...) the story or the form of a practice or object exerts coercion on the available interpretations of the latter (...)" (2010a, p.64)

> In the following pages, I evaluate the assumption that the creative interpretation must be a conversational interpretation, especially when discussing an idea familiar to literary theorists: that interpreting a literary work means to recapture the intentions of its author. But this assumption has a more general basis on the philosophical literature of interpretation. Wilhelm Dilthey, a German philosopher who was especially influential in shaping the debate about objectivity in the social sciences, used the word *verstehen* to describe specifically the kind of understanding we acquire when we know what the other person means with what they say (we could say this is a sense of comprehension in which understanding someone implies in reaching an agreement with such person), instead of describing all possible ways or methods to understand their behavior or their mental life. (...) Gadamer thinks that Dilthey's solution presupposes the Hegelian apparatus Dilthey longed to exorcise (See H. G. Gadamer, *Truth and Method,* in particular PP. 192-214 (…)). He believes that the Archimedean historical consciousness that Dilthey thought possible, free from what Gadamer calls, in the special sense he gives the term, prejudices, it is impossible that the most we can hope to achieve is an "effective historical consciousness" that intends to see history not from any particular point of view, but understanding how our own point of view is influenced by the world we wish to interpret (DWORKIN, 2010a, p. 62-63).[17]

[17] Our translation of the original in Portuguese: "Nas páginas seguintes avalio o pressuposto de que a interpretação criativa deve ser interpretação conversacional, sobretudo ao discutir uma ideia familiar aos teóricos da literatura: de que interpretar uma obra literária significa recapturar as intenções de seu autor. Mas esse pressuposto tem uma base mais geral na literatura filosófica da interpretação. Wilhelm Dilthey, um filósofo alemão que foi especialmente influente em dar forma ao debate sobre a objetividade nas ciências sociais, usou a palavra verstehen para descrever especificamente o tipo de entendimento que adquirimos ao saber o que outra pessoa quer dizer com aquilo que diz (poderíamos dizer que esse é um sentido da compreensão no qual entender alguém implica chegar a um entendimento com tal pessoa), em vez de descrever todas as possíveis maneiras ou modalidades de entender seu comportamento ou sua vida mental. (...) Ga-

Thus, aware of the influence exerted by the interpreter's historical context (in this case, the judge) over decision making, Dworkin proposes a theory of decision founded on integrity, i.e. on the importance of legal propositions "that provide the best constructive interpretation of legal practice in the community" (DWORKIN, 2010a, p. 272)

> Law as integrity asks judges to admit, as far as possible, that Law is structured by a coherent set of principles about justice, equity and adjective due process, and asks judges to apply them in new cases that are submitted to them, so that each person's situation be fair and equitable, according to the same norms (DWORKIN, 2010a, p. 291). [18]

The theory of integrity in Law, as a theory of decision, postulates, therefore, that the court decision is the representation of a fusion of horizons. The central idea of interpretation is, according to Gadamer, the fusion of horizons: an interpreter who seeks to comprehend a text is vitiated by their own pre-understandings and conditioned by their historical horizon of meaning. But the work and its author also feature a historical horizon of meaning – inside their context and seen from the interpreter's context – which, fused to the interpreter's historical horizon of meaning, will allow their interpretation.

Similarly, Dworkin postulates the court interpretation. The judge must take into account, within a particular community of principles, not only the institutional history (i.e. the foundation consolidated in court for the consideration of similar cases), but also the constitutional morality (which is the interpretation of the Constitution in accordance with

---

damer acha que a solução de Dilthey pressupõe o aparato hegeliano que Dilthey ansiava por exorcisar. (Ver H. G. Gadamer, Truth and Method, em particular PP. 192-214 (…)). Acredita que a consciência histórica arquimediana que Dilthey imaginou possível, livre daquilo que Gadamer chama, no sentido especial que dá ao termo, de preconceitos, é impossível, que o máximo que podemos esperar alcançar é uma "consciência histórica efetiva" que pretende ver a história não a partir de nenhum ponto de vista específico, mas sim compreender como nosso próprio ponto de vista é influenciado pelo mundo que desejamos interpretar". (DWORKIN, 2010a, p. 62-63).

[18] Our translation of the original in Portuguese: "O direito como integridade pede que os juízes admitam, na medida do possível, que o direito é estruturado por um conjunto coerente de princípios sobre a justiça, a equidade e o devido processo legal adjetivo, e pede-lhes que os apliquem nos novos casos que se lhes apresentem, de tal modo que a situação de cada pessoa seja justa e equitativa segundo as mesmas normas" (DWORKIN, 2010a, p. 291).

the wishes and traditions of the community in the current historical context). In a court decision, then, the judge, when interpreting, would be performing the fusion of horizons of the institutional history with constitutional morality, always mediated by their own historical horizon of meaning.

4. For a pos positivist theory of judicial decision

The richness of two important theories of decision was demonstrated in previous chapters: Robert Alexy's and Ronald Dworkin's theories. It was also shown that the first theory has its philosophical roots in analytic philosophy and in epistemological hermeneutics, and the second theory in ontological hermeneutics. Finally, the criticism developed by the ontological hermeneutics to the epistemological hermeneutics and to the philosophical positivism were presented.

Given all this, the questions raised in the introductory chapter of this study must be resumed: are the different hermeneutical schools mutually exclusive? Does the criticism imposed by the ontological hermeneutics to the philosophical positivism reach the epistemological hermeneutics? Due to their philosophical foundations, are the contributions of Alexy's and Dworkin's theories of decision mutually exclusive, or may they be complementary?

As we tried to demonstrate in the course of this study, hermeneutical school are not mutually exclusive, but complementary. The development from different perspectives makes the hermeneutical school complementary, and not mutually exclusive. This happens for two reasons: firstly, because the criticism imposed by the ontological hermeneutics to the philosophical positivism does not apply to the epistemological hermeneutics; and secondly, because the criticism imposed to the epistemological school of hermeneutics can be absorbed and amortized.

As previously explained, the hermeneutics developed by Dilthey was based primarily on the defense of the independence of the humanities studies in relation to the studies of the natural sciences. Dilthey's speech was based on the sense of overcoming the philosophical positivism, i.e. overcoming the import of methods of the natural sciences to the humanities. Thus, treating the theories constructed under the canopy of the epistemological hermeneutics as if they were attached to the philosophical positivism is a big misconception. The construction of the epistemological hermeneutics by Dilthey occurred precisely because

the author did not find any possibility that the import of techniques of the natural sciences by the humanities would succeed, considering, especially, that these are necessarily interpretive sciences. Thus, the construction of the epistemological hermeneutics occurred exactly in response to the philosophical positivism. Therefore, the criticism imposed by the ontological hermeneutics to the philosophical positivism does not have the power to undermine the theories founded on a hermeneutic-epistemological-oriented hermeneutics.

On the other hand, one must agree on the acceptance of the criticism imposed by Gadamer to the relentless pursuit of objectivity in Dilthey's work and, exactly at this point, the greatest Gadamer's contribution to a theory of decision is found. If one postulates an epistemological hermeneutics which absorbs the Gadamerian criticism, it is possible to distinguish an epistemology concerned with the study of methods that fit the search for the best rational interpretation, since there is the awareness that the rationality of the interpretation will be still vitiated by the interpreter's pre- understandings.

The proposal formulated here aims that interpretation, the way proposed by the epistemological hermeneutics, constitutes a step "ahead" of comprehension – which is a phenomenon, as proposed by the ontological hermeneutics. When the phenomenon of comprehension occurs, it is up to the judge, as an interpreter, to submit their comprehension to a constant and tireless interpretation through the methods proposed by the epistemological hermeneutics, in order to seek to assign it the highest possible rationality. Still, it is impossible to claim that this "second moment" is not vitiated by the judge's historical horizon of meaning, but the methods of legal argumentation themselves will also contribute to a reconstruction of this historical horizon, giving it new perspectives.

Thus, it is possible to see an overlap between the contributions made by the theories of decision founded on the ontological and epistemological hermeneutics. What is proposed is the observance of Dworkin's important complaint: court decisions will never get the certainty sought by epistemology, even if they build a monumental apparatus of argumentation methods, because the decision is inevitably the result of the comprehension of a being that is conditioned by their historical horizon of meaning. But it is also proposed that this comprehension must be relentlessly reviewed by the judge. Within a hermeneutic circularity, a review of comprehension through interpretation results in increasingly consistent new clarifications with what is intended as Law.

The methods proposed by the theory of legal argumentation themselves influence the interpreter. The question proposed by Gadamer seems to mean that one must not abandon the methods of application of Law and of systematization of the foundations in court decisions, but rather emphasize the importance of consciousness taking regarding decision, which will inevitably not be made based only on methods that seek to give it the greatest possible certainty, but, above all, based on the interpreter's pre-understandings, which will shape their comprehension. A greatly important fact brought by Gadamer is that comprehending is prior to interpreting, because we only interpret what we understand within our historical horizon of meaning.

Therefore, the import of the Gadamerian proposal to the theory of decision under the perspective here postulated, can not give occasion to the elimination of methods and tools that are intended to provide a greater security to the court decision. The greatest relevance of the importation of the Gadamerian theory is based on its complaint; i.e. adopting Gadamer's ontological hermeneutics means to realize that, despite the use of all methods of legal argumentation, the decision will always be vitiated by the judge's pre-understandings. Thus, may the judge decide by deliberating among weight-abstract principles or may the judge decide seeking integrity in Law through a constitutional morality and an institutional history, their interpretation of what the weight given to a principle must be or their interpretation of what, at that moment, is the constitutional morality that will be necessarily vitiated by their pre-understandings and therefore conditioned by their historical horizon of meaning.

Thus, it is clear that both theories – Alexy's and Dworkin's – have important contributions to Law, but are not complete, but complementary. The overlap between the theories allows the judicial decision taking, from comprehension and interpretation. If Dworkin's complaint is accepted, one is inevitably aware that the court decision is initially constructed by the judge's comprehension which, by making a fusion of horizons between institutional history and constitutional morality, find themselves inevitably influenced by their own historical horizon of meaning. But the court decision can not be limited to this initial comprehension. So, the judge must undergo an interpretative review process of their comprehension, so as to make it as rational as possible, through the methods of legal argumentation. At this time, the contributions of the Alexyan theory can assist the construction of the decision.

The possibility of debate allows Law enrichment. The debate

presented here sought to present two very respected legal perspectives, not as they are commonly presented, as opposing theories, but as complementary theories.

In the manner of the important criticism imposed by some legal theorists, Professor Robert Alexy's theory has extreme scientific rigor and concern with a discursive rationality, which certainly does not rule out the influence of the judge's pre-comprehensions, seeks to assign to the court decision the highest argumentative rigor within a conception of a fair Law, effective and linked to the legal process.

In the same step, Dworkin's theory presents a relevant contribution to the formulation of a theory of decision, emphasizing the importance of the awareness about the historicity of the being. But the need to allow the greatest possible rationalization of the interpretation process leads us to require something more: the application of the methods produced from the epistemological hermeneutics as interpretive means to review the comprehension obtained in a "first step" of the court decision.

Thus, the discussion presented here did not intend to give birth to a new theory of judicial decision, or even formulate a mixed theory of judicial decision (half ontological, half epistemological). It rather intended to demonstrate that both the hermeneutical perspective and hence the theories of decision influenced by them, granted important contributions to Law. These contributions may provide the initial apparatus for the construction of a theory unrelated to the semantic demarcations imposed by theorists and philosophers of Law.

References

ALEXY, Robert. Epílogo a la Teoría de los derechos fundamentales (trad. C. B. Pullido). **Revista Española de Derecho Constitucional (Centro de Estudios Constitucionales y Políticos)**. Madrid, año 22, n. 66, 2002.

ALEXY, Robert. **Teoria dos Direitos Fundamentais**. Trad. Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

ALEXY, Robert. **Constitucionalismo Discursivo**. Trad. Luis Afonso Heck. Porto Alegre: Livraria do Advogado, 2008.

ATIENZA, Manuel. **As razões do direito. Teorias da argumentação jurídica**. Trad. Maria Cristina Guimarães Cupertino. São Paulo: Landy, 2000.

BUSTAMANTE, Thomas da Rosa de. **Teoria do Direito e Decisão Racional.**

Temas de Teoria da Argumentação Jurídica. Rio de Janeiro: Renovar, 2008.

DILTHEY, Wilhelm. **A construção do mundo histórico nas ciências humanas.** Trad. Marco Casanova. São Paulo: Editora UNESP, 2010.

DWORKIN, Ronald. **O império do direito.** Trad. Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2010a.

DWORKIN, Ronal. **A justiça de toga.** Trad. Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2010b.

FERNANDES, Bernardo Gonçalves; PEDRON, Flávio Quinaud. **O Poder Judiciário e(m) crise.** Rio de Janeiro: Lumen Juris, 2008.

GADAMER, Hans-Georg. **Verdad y Método: Fundamentos de una hermenéutica filosófica.** Trad. Ana Agud Aparício e Rafael de Agapito. Salamanca: Sigueme, 1999.

GADAMER, Hans-Georg. **O problema da consciencia histórica.** Trad. Paulo Cesar Duque Estrada. Rio de Janeiro: Editora FGV, 2003.

HEIDEGGER. M. **Ser e tempo**. Trad. Marcia de Sá Cavalcante. Petrópolis: Vozes, 2002.

NINO, Carlos Santiago. **Introdução à análise do direito.** Trad. Elza Maria Gasparotto, São Paulo: WMF Martins Fontes, 2010.

OLIVEIRA, Manfredo Araújo. **Reviravolta linguístico-pragmática na filosofia contemporânea.** São Paulo: Loyola, 2001.

RICOEUR, Paul. **O conflito das interpretações: ensaios de hermenêutica.** Trad. M. F. Sá Correia. Porto: Rés, 1988.

RUEDELL, Aloísio. Epistemologia e ontologia. Uma leitura da hermenêutica de Paul Ricoeur. **Humanidades em revista.** Ano 5, n. 6. Ijuí: Editora Unijuí, 2008.

Law, mental health care and the public health system: achievements and vulnerabilities of the Brazilian model[1]

Márcia Araújo Sabino de Freitas[2]

Abstract:While some developed countries of Europe and North America discuss the creation of a public health system, Brazil handles its implemented integral and universal Unified Health System (Sistema Único de Saúde – SUS), which has constitutionally been provided since 1988. However, SUS is challenged to achieve in practice its ambitious project to its full extent. Moreover, it keeps struggling against distorted conceptual viewings of its actual scope. The role of law in carrying out this project and the ethical obstacles that pervade its effectiveness are discussed in the present paper. Its methodological approach focuses on the mental health care, and more specifically, in the law nº 10.216/01, known as the Psychiatric Reform Law. Mental health care faces all the challenges tackled by SUS, and even more: it has been profoundly reorganized after the new psychiatric paradigm. Research has been made in LILACS database, by collecting references that contrast law nº 10.216/01 with the practice of mental health care after its promulgation. The paper also brings an overview of SUS and the mental health care in Brazil.

Keywords: Law; Mental Health Care; Public Health System; SUS; Brazil.

Introduction

At a time when some developed countries of Europe and North America discuss the creation, or the reformulation, of public health sys-

[1] This paper is an expanded version of the term paper written for the course "Law and development in complex societies", taught by Celso Campilongo and Jean-Paul Rocha in the Master and Ph.D. courses of University of São Paulo Law School.

[2] Ph.D candidate and Master in Law at University of São Paulo - USP (Brazil). Graduated in Law at Federal University of Minas Gerais - UFMG (Brazil). Bioethics and Biolaw Studies and Research Group Assistant Coordinator - University of São Paulo Law School - FD/USP (Brazil). Professor of Bioethics at Health Sciences Faculty of Barretos - FACISB (Brazil). Studied Bioethics at Georgetown University/Washington D.C. (USA).

tems, Brazil reasons on its Unified Health System (*Sistema Único de Saúde – SUS*) within a new context.

SUS is a public health system, with universal access and comprehensive care covering. Its creation was formalized by the 1988 Constitution, the 8th Brazilian Constitution. It represented the largest movement of social inclusion ever seen in the history of the country (Brasil 2007a). The enormous political and administrative architecture that supports it, integrating with agility the three executive bodies – municipal, state and federal – has no counterpart in the world, and not even in other sectors of the Brazilian government (Brasil 2007b).

However, a system responsible for achieving the constitutional wording that health is a State duty and a right for everyone, certainly faces difficult challenges, especially in an extremely unequal country with complex political structure. Young, SUS is still under construction; and, as a project in progress, it is also under healthy constant discussion.

Making the project real within the social reality is the great challenge of SUS.

In this context, the question to be made refers to the role of legislation in turning effective its own rights content. In other words, in which extent law is able to contribute to social development.

The methodological approach will focus on the mental health care model embraced by SUS. Dealing with this issue, the aforementioned question seems even more delicate, for in addition to its inclusion in SUS, the mental health care has been reformulated in several countries all over the world, including Brazil, after the psychiatric reform movements started in the 70s (Desviat 1999; Amarante 1995). Due to its peculiarities, the mental health care revealed itself as a good study niche for this particular work purpose. It suffers the same difficulties that affect SUS as a whole, and exposes the law to a more subtle effectiveness test, namely, how to integrate legislation in the social setting in order to extract social gain, in this case, improvement of population health.

It is believed that the description of the Brazilian public health system care and management model, as well as its limitations and the role of law in rendering health effective, may bring further data to support the discussion that takes place in other countries regarding the adoption or reformulation of their public health systems.

The Unified Health System and its challenges

SUS can be defined as:

> ... the Brazilian State organizational arrangement that supports the health policy effectiveness in Brazil, and translates into action this policy principles and guidelines (Vasconcelos and Pasche 2006, p. 531)[3].

It is a complex system, responsible for the liaison and coordination of promotional and preventive actions along with the healing and rehabilitation ones (Vasconcelos and Pasche 2006).

It is constitutionally provided, and is legally supported by different norms, among which the following:

i) the law nº 8080 of 1990, that deals with actions and health services in the country, along with the decree nº 7.508/11, which regulates the former;

ii) the law nº 8142 of 1990, which provides the participation of society in SUS management and automatic financial resources transfers for health among the federal spheres[4];

iii) and the recent long-awaited complementary law nº 141 of January 13, 2012, which regulates the constitutional amendment nº 29/00. It determines minimum monetary amounts to be annually allocated by the federal bodies in actions and public health services. It also sets criteria for the Union resources apportionment intended for the states, the federal district and municipalities, aiming to reduce regional disparities.

SUS shares its existence with: i) the Supplementary Health System (*Sistema de Saúde Suplementar*), which basically refers to both private health plans, regulated by the National Health Agency (*Agência Nacional de Saúde – ANS*), and also medical cooperatives; and with ii) the Direct Disbursement System (*Sistema de Desembolso Direto*), by which the user seeks support from the liberal medicine through direct expenditure, and which is poorly regulated and well stimulated by tax exemptions (Brasil 2007b; Ugá and Marques 2005).

---

[3] All the quotations of this article were originally in Portuguese, and these are all free translations made the author, which sought to maintain not only the sense, but even the style, as close as possible to the originals.

[4] These transfers provide great agility to the system, which make it a unique case in the Brazilian public administration and ensure effective partnership between the federal spheres.

The origins of SUS[5] relate to long before its legal formulation by the 1988 Constitution, and go back to the crisis of the privatized healthcare model, since the second half of the twentieth century, when alternatives began to be designed for the model that granted individual medical assistance and in which only remained charity of some philanthropic institutions, such as the *Santas Casas*[6], for the economically excluded (Brasil 2007b).

Afterwards, and previous to the creation of SUS, Brazil has gone through several health policies that can be grouped under the social security health model. During this period, even though there was more inclusion then in the former model, one can say that nonetheless the exclusion only changed the sector, but continued to cover the same separation between the economically included and the deprived ones. In social security health, the economically included, i.e., those who were formal employees, were under the custody of the National Institute for Medical Assistance and Social Security (*Instituto Nacional de Assistência Médica da Previdência Social – Inamps*), while the non included still could only rely on philanthropic hospital care, and some units of simplified medicine in ambulatory care (Brasil 2007b).

SUS aims to break off this historical dichotomy. Also it states itself as a model that seeks to overcome the prevailing view that deems health through disease, with prevalence of the biological and individual dimensions (Vasconcelos and Pasche 2006). Thus, SUS incorporates in its legal basis an expanded concept of health that encompasses economic, cultural and social conditions, access to essential goods and services, and the notions of physical, mental and social well-being (article 3 of law nº 8.080/90).

Despite the undeniable progress and benefits for the Brazilian population, SUS still has to go a long way to materialize itself as designed.

The challenge begins with the conception one figures out of the system itself. Despite having been built on the principle of universality, population forms a segmented idea of it. Most Brazilians consider that SUS, when referring to assistance, is intended for low-income

[5] For further information about SUS history: Zioni, Almeida and Pereira Filho, 2013; Escorel, 1999; Paim et al., 2011; Lima et al. 2005.

[6] The *Santas Casas* are religious philanthropic hospitals that are present in several Brazilian cities. Their installation in Brazil is intertwined with the country's history and, nowadays, they also provide care through SUS.

people, who cannot afford private health plans (Vianna 2005), and for procedures of high complexity, that are not usually provided by private health plans. However, a system considered aimed for the economically excluded segments will never acquire strength because these underprivileged cannot impose themselves firmly in politics (Brasil 2007a).

On the other hand, medical procedures of high complexity, which are also used for the sectors with more economic power, are the most expensive for SUS, while serving a smaller portion of users. It should be noted that a primary care with quality decreases the demand for medium and high complexity procedures. Even from the financial point of view, investing in primary care as a priority is more efficient, as it benefits a much more expressive number of users and avoids spending more with expensive care.

Issues regarding the system financing and its cost efficiency constitute another great problem faced by SUS. It is necessary to increase health spending in Brazil (Paim et al. 2011), and at the same time, improve the quality of spending (Gragnolati, Lindelow and Couttolenc 2013). There are several examples of expenses that might be better managed. Most berths are contracted by SUS in hospitals with few beds, which creates scale diseconomies (Brasil 2007a). At the same time, a large proportion of high-cost equipment is installed in municipalities that do not have size to host them (Gragnolati, Lindelow and Couttolenc 2013). Another example comes from uneven pay adjustment procedures, which ends up favoring the realization of highly complex procedures, to the detriment of medium and low complexity ones, forcing SUS to incur in larger expenditures with the high complexity procedures than with the others (Brasil 2007a). Also, the remuneration system of procedures still ends up inducing the occurrence of more expensive procedures, and hospitals can, for example, achieve unnecessary internments to be better paid for the adopted procedures. Furthermore, as already noted, if the primary care fails, it increases the possibilities of users who would not originally require expensive and complex treatments ending up falling into medium and high complexity care, due to the worsening of not treated symptoms, or either by the failure of the primary care network. All these factors generate inefficient spending for a system that already deals with scarce resources.

Thus, a vicious circle is formed, returning to the first problem: the inefficiency of SUS expenditures appears to reaffirm the segmented view of the system, favoring the smaller economically included part of the population which uses SUS for expensive high-complexity proce-

dures.

As to the need to spend more on SUS, it is important to note that the Direct Disbursement System is the most relevant from the point of view of health expenditures in Brazil. In spite of this fact, it is exactly the less regulated one and hardly taken into account in analysis of the country public policy (Brasil 2007a).

This context allows extracting an initial conclusion: the first step to materialize SUS in all its potential is to overcome the distorted conceptual viewing of its scope, believing in the SUS project, in a commitment towards the universal public health system. This process implies involves a difficult mentality change in society.

The mental health care

Due to the fact that the mental health care in Brazil is inserted into SUS, it faces the same great difficulties of the entire system, and even more: it faces the implementation challenges of the new mental health paradigm arisen after the psychiatric reforms[7].

When dealing with the features of the assistance organization, it is important to remember that it is "... not limited to administrative aspects: the logics to effective SUS depends on the way to conceive and provide care to population" (Minas Gerais 2007, p. 39).

It is important, in order to have the project of SUS accomplished, to have in mind that the institutions design and the model of adopted procedures reveal a world view, which includes a concept of health.

So, after the movements of psychiatric reform, the mental health care in Brazil began to be redesigned according to the essential approach that the individual previously simply labeled as "crazy" is to be viewed as a *person* – who carries his own background and subjective issues –, and must be considered as such.

The mental health care model adopted in Brazil since then seeks to overcome the mental hospital, developing a substitute services network. This is an outpatient clinical care network, which acts in favor of freedom and participation of its users. Psychiatric hospitals would only be destined to the most serious cases, as background support to the outpatient network (Minas Gerais 2007; Guimarães 2010). This is similar to the general model designed by SUS, which proposes to expand a

[7] For further information on Brazilian psychiatric reform, see: Amarante 1995; Desviat 1999; and Oliveira et al 2011.

coordinated network of primary care with basic health units prevalence, avoiding the more complex hospital procedures. Thus, the new mental health approach harmonizes more with the current project health in Brazil.

Briefly, the intended mental health care network is organized as follows:

i) teams specialized in mental health allocated in primary health care units where required;

ii) Psychosocial Care Centers (*Centros de Atenção Psicossocial – CAPS*) dedicated to intensive or semi-intensive specialized treatments;

iii) psychiatric beds in general hospitals and in psychiatric hospitals for the more severe cases.

The CAPS are novelty of the current health care model. They are designed as open therapeutic spaces, focused in the user autonomy and in constant connection with the social environment. They operate mainly through the welcoming and the links established with the users, under the principle of being not places in which the overnight stay becomes a permanent living, but a transient step to an improved well-being (Minas Gerais 2007).

Under the legal framework[8], the law nº 10.216, of April 6, 2001, formalized the redirection of the assistance model, also providing the protection and the rights of people with mental disorders. These rights include: granting access to treatment within the health system, aiming the patient recovery through the inclusion in the family and in community; being treated with humanity and respect; receiving information about their disease, adequate treatment and a possible involuntary hospitalization; being treated by the least intrusive means as possible and preferably in the community mental health services (article 2).

The role of law

Generally speaking, one can say that the function of law is to regulate certain sectors of society in behalf of improvements for people and for their mutual coexistence. Hence, the law is made by people, aiming several improvements for their lives.

It is true that the law *may* play a relevant role in social development, but it is also true that it, *by itself*, is not able to, in most cases, lead

[8] For additional information on Brazilian regulations history concerning mental health, see Guimarães 2010 and Messas 2008.

to development and generate actual improvement in people's lives. Indeed, the social reality complexity calls for a systemic approach of various areas of knowledge, in search of solutions to its problems.

When designing and creating foundation for a health system with a size such as SUS, the law carries out important changes in public administration, with direct effects on social life. Furthermore: as SUS is warranted by the Constitution of Brazil, the essence of the public, universal and comprehensive health system cannot be modified, unless by means of a *coup d'état*. This carries great significance: the fundamental configuration of SUS remains, regardless of the elected government, dominant political party or economical context.

On the other hand, the law, notably one that aims to modify the mental health system, can tackle limits to the possibility of change due to its intrinsic ideological foundations, the underestimation of social-political resistance that would arise, and the unexpected effects of other social forces (Appelbaum 1994). To verify the extent of the proposed change, one should observe how far the ideology behind the psychiatric reform law involves real social change, or if it only embraces modifications that ultimately keep the essence of yesteryear. As to the resistance to change, it may lie, firstly, in the ingrained society prejudices and in the deficient education of a large population portion. And, even as a consequence of the former, the resistance may also occur due to the lack of sufficient political will to implement these legal standards. Such barriers, as Appelbaum (1994) previously warned, cause changes in the law brought by the psychiatric reforms unable to impact the practice as intended, and only an "almost revolution" would be bound to happen.

Within this state of affairs, what is the extent of reach of law regarding health promotion and the consolidation of the new assistance paradigm in Brazil? Specifically addressing the issue that this work intends, how far is the law able to impel society in order to improve mental health care and to overcome the old approach of confinement and dehumanization of the mental disorder users?

Method

Herein, as previously stated, it is proposed to submit this work guiding question to the case analysis of a particular law related to SUS regarding mental health care. Due to its relevance in the area, it was chosen to deal with the law nº 10.216/01, known as the psychiatric re-

form law in Brazil, whose text mirrors the new mental health approach advocated by the psychiatric reforms.

Even before the law publication, several normative acts have already been made within the field of the States legislature and by the executive, to adequate the health policies to the claims of the psychiatric reforms. And so, the law nº 10.216/01 came to endorse, to unify and to strengthen these initiatives (Minas Gerais 2007; Guimarães 2010). Firstly, the enforcement of the guidelines set out in the law meant an actual revolution when dealing with people with mental disorders: diminishing admissions to mental hospitals, summoning family members to the treatment, greater respect for both autonomy and dignity of the individual, and encouragement for their integration into society.

The law has been in force for ten years. Throughout this period, the structures of the mental health service have been remodeled, by the reduction of berths in psychiatric hospitals and the construction of a substitute care network (Minas Gerais 2007). So, the organizational and structural change have already been initiated. But, has the law also contributed to a deeper change, which is the true change in the approach to mental health, fomenting social development?

Taking into account the proposed question, bibliographic search was made in LILACS database. The choice for this database is justified due to the need to use national sources, since the study focuses in the application of a Brazilian law. LILACS is "the most important and comprehensive index of scientific and technical literature in Latin America and Caribbean" (LILACS).

The search strategy used both the keywords "law" and "mental health", by which 93 results were found among all types of references covered by the database, such as articles, theses and monographs. Only the abstracts of the ones published since the year 2001 have been read, for this is the year of the law under review promulgation, remaining 39 occurrences.

Among the latter, only those who had the entire content accessible with thematic relevance to the work issue were chosen for analysis. Selecting the texts which offered for consideration the analyses of Brazilian cases was one of the most common filters adopted in the search – for this study is not intended to review foreign law. Thus, a total of ten texts was obtained for examination, namely, nine papers and one master thesis.

Through the analysis of the research conveyed in these texts, the intention was to check the particular effects the law has created in social

reality, and its consequent ability to assist the social development.

Due to the purpose of this study, it is noteworthy to observe that, among the examined texts, only those who actually brought relevant data concerning the matter under investigation will be mentioned.

Discussion of the outcomes

The paper by Zerwes et al. (2002) investigates the closing process of psychiatric hospitals underway in the country in face of the psychiatric reform. It aims to verify whether the law nº 10.216/01 is being fulfilled with no further damage to the users.

The research brings data about a massive closing of berths in hospitals in the metropolitan area of São Paulo within the range of 1992 and 2001, without, however, a corresponding expansion of the outpatient network of SUS. Between 1998 and 2001 the mentioned network retracted, rather than increasing, as it would be expected before the closing of hospital beds. It also takes into account the significant population increase in that region between 1992 and 2001.

In addition, it points out some difficulties the psychiatric reform faces: the abandonment of the ones with mental disorders by their families, the professionals' fear of losing their power, and the lack of political positioning according to the patient real interests (Zerwes et al 2002). These facts indicate a great need for change in the mentality of the general population, including the professionals, so that the law can be enforced.

The paper concludes that:

> It is not enough to close psychiatric hospitals. ... It is necessary to expand the outside care hospital networks. We must find ways to involve professionals and family members in the fight for the welfare of the patient, and finally, formalize campaigns aimed at ending the general prejudice that involves the designation "mental illness" (Zerwes et al 2002, p. 37).

Indeed, the retraction of the ambulatory network in the period, by itself, would already be unjustified due to the population growth. What aggravates even more the situation is the fact that many hospital beds have been closed, which increases the demand previously in the hospital for outpatient facilities, as mentioned forward.

It seems that the rate of closing hospital beds has not matched

the creation of new therapeutic spaces. In principle, this would leave the psychiatric patients in an extremely delicate situation: a deinstitutionalization with no structural ability of redirecting them to other forms of treatment. This may have led to the lack of adequate treatment for many users – mainly considering the recent process of not keeping them in the hospitals – and even abandoning several of them. The research data do not allow effective conclusions about what really happened and other factors may be linked to these facts. However, the scarcity of data on patient monitoring during this transition is already an important information.

Britto's interesting master thesis (2004) aimed to verify the fulfillment of the law nº 10.216/01 regarding the rights of involuntarily admitted patients. Therefore, she carried out field research with participant observation and interviews in a psychiatric emergency of a Rio de Janeiro municipality. In the interviews, not only the doctors of the service were research subjects, but also the expert psychiatrist of the Public Ministry (*Ministério Público MP*[9]) and the assigned prosecutors (*promotores de justiça*[10]), since the involuntary commitment, according to the law, must be communicated to the MP, which came to be responsible to deal with these demands.

The participant observation report indicates that, again, the mentality of people, largely prejudiced and unprepared to deal with relatives or acquaintances who have mental disorders, affects too much the accomplishment of treatment in accordance with the law and the guidelines of the psychiatric reforms. The report of the following cases is quoted to illustrate such prejudice:

> … [a] physician was taking care of a woman who was accompanied by both her (teenager) son and her brother. The latter said the woman was not well and that he would like to leave her there "for a few days" in order to "clean her apartment" (brother's words). ... The doctor, showing disgust, told the brother it was not for him (brother) to decide an internment, it was the physician's function

[9] The Public Ministry is a public institution belonging to the Brazilian legislature, which has the task "to defend the juridical order, the democratic regime and the inalienable social and individual interests" (article 127 of the Constitution). To duly perform this activity, it should, among other tasks, prosecute criminal actions and civil investigations and the public actions necessary for the protection of the diffuse and collective interests (article 129 of the Constitution).

[10] In Brazil, the prosecutors are public officials that work in the Public Ministry.

> and a set of conditions should be evaluated and that the woman did not actually need to be admitted. (Britto 2004, p. 128)

> They said they had gone out of São Gonçalo to intern their grandmother ... [The doctor] asked why they had not followed an outpatient treatment. The granddaughters complained and said they were unable to stay with their grandmother in such a state. During the confusion and their screaming, the doctor began to speak up and rebuked the granddaughters. They remained silent. The doctor said that the old lady had never been submitted to a treatment because they only used to intern her, that in such a "violence" he would not participate, that "internment is not treatment", and that they should "worry about treating their grandmother". (Britto 2004, p. 132)

The weakening of family ties creates a critical gap which destabilizes the public policy networks, because the family links ties the ends of the basic health network.

Another diagnosed problem is the lack of education of the general population, which affects the performance of the outpatient treatment:

> Many people who received treatment in the emergency care could not read and write, and had no one to appeal for helping them in the medication control. In several visits, the doctors explained the medicines and their schedules by their colors and the meals of the day. However, these people probably ended up getting confused with the administration of medication and having crises. (Britto 2004, pp. 132-133)

> The mother said they had been praying with the parson, but her daughter had not improved. The doctor spoke in a gruffer tone that they should have searched for a doctor before. (Britto 2004, pp. 126-127)

In several parts of the report, it is clear that the hospital internments problems often flee from the field of psychiatry, and, "therefore, some hospitalizations are derived from social problems such as poverty, drugs, unemployment, misery etc." (Britto 2004, p. 125). That is, there are cases in which the hospitalization (not only the one by mental disorder) would not be necessary, and the person could just be under an out-

patient treatment. But the internment is made owing to factors external to mental health, for example: the person, due to extreme poverty, has nowhere to go, or her living conditions are not appropriate, or she has to leave home and "hide" in the hospital to escape from traffickers who threaten to kill her etc.[11]

The mental health policy, and all the legislation that organizes it, get fragile due to complex social problems and the mentality of people, which are beyond reach of these policies. So, it seems that, for the mental health policy to be effective as prescribed by law, many social problems would have to be adequately addressed by other public policies, properly interconnected, and a difficult awareness should be fostered in a population that, rather than imbued with prejudices, is poorly educated. Given this situation, the law, facing unforeseen problems, remains tied up.

Another point worth mentioning concerns the performance of doctors and other health professionals. The researcher stated that, in general, they were considerate with users. Although some negative facts were described, such as their frequent use of cell phones during the medical care, interrupting consultations, sometimes in very delicate moments, to answer their phones (Britto 2004). These occurrences show that a better training to deal with the public is required, especially because people looking for this service usually are in very particular sensitive situations.

In interviews about the activities of the MP, performed both with the service physicians, as with the prosecutors, it appears, on one hand, the convergence of opinions on the theoretical side: the activities of the MP are welcome and closer ties between psychiatry and "justice" (according to the concept that doctors show to have of the MP) are viewed favorably.

Nevertheless, in practice, although it is advocated the positive character of the intervention of the MP, it seems that either prosecutors, as well as physicians, do not see clearly what can be done by the MP. Additionally, both groups report lack of material conditions for more effective interventions in everyday life. According to the doctors:

> "In practice, the service doesn't change anything. But, I think that for the Public Ministry it changes a lot, because they don't have

[11] The conclusions of the 2007 São Paulo Census of the population kept in mental institutions confirm this state of affairs (São Paulo 2008).

> the slightest possibility of accounting for not even 10% of all the papers they receive. ... The hospitalization, it creates a monstrous paperwork. The Public Ministry, surely, has no possibility to check it." (Britto 2004, p. 137)

> "It doesn't change anything. ... It's too many people. The guys over there are already concerned with other things; will they be worrying about patient? No way!" (Britto 2004, p. 137)
> "The fact of communicating to the MP, I have never seen anything practical happen yet." (Britto 2004, p. 137)

> "I think being forced denotes an interest in preserving *individual freedoms*. Great, nice, cool. But I don't know what they do with all this paperwork." (Britto 2004, p. 138)

> "… as I say I don't know what they will do with the papers, in fact I think it's a false guarantee … a guarantee that's only in the paper. ... But I believe that if you have a ... law… you create a possibility of guarantee … I mean, a possibility. ... There is the law just to show, you know, the law that is only in the paper, that doesn't really works, well, those kind of things. Oh, that's the problem. The *law is not enough, this is a beginning*. ... I think that's where really the guarantee happens, *through the mobilization of people who are involved in the process*. By professionals, of course, by users, obviously ... with the government, somehow, if it's through the MP, whatever. I think we have to give these guarantees by law, but we have to practice these guarantees. Everyone has rights" (Britto 2004, p. 139).

In the last transcript statement, the doctor exposes his perception from the reality he lives, considering the ability of law to cause changes in society, to implement the rights it provides. As to the prosecutors, not much unlikely the doctors, they say:

> "The law says that it [the psychiatric internment] will be communicated to the Public Ministry – communicated, but you don't have power to do much. And even worse, if the law said that the Public Ministry will be communicated and that it can completely monitor the internments, we still don't have material conditions to do it." (Britto 2004, p. 144)

> "The Public Ministry received a notification of an involuntary hos-

> pitalization. What is to be done about this admission? Is it up to the Public Ministry to consider whether a doctor acted well, and if he prescribed medicine well? No. This is because the prosecutor doesn't have technical training in this area." (Britto 2004, p. 144)

> "It creates a completely new legal situation with strong implications in the life of a person and we have no past legislation about it. It had no prediction in the Federal Constitution, it had no previous law, it has no legal rule that defines it or gives us, law professionals, a parameter a little stronger, tighter for it. So basically, they are only medical standards and guidelines" (Britto 2004, p. 144)

> "no law ... is able to change the reality of life, change the reality of things. It is a piece of paper. ... I believe that the law, it does have an important role. Of course we can not be utopian to think that the existence of the law will make it all happen, make it change. The law is not a magic wand, but at the same time I believe, even because I work at it, I believe that the law does have a power. It has an educative power, of making people rethink, of calling people to responsibility. So I think this is an important role, to set rights, to establish rights, to catch people's eye that they are the holders of those rights. To educate the society, the family that these people are ... all this is a context, all this has to be changed" (Britto 2004, p. 143)

The discussion of the law function and its ability to interfere with social reality arises with common traits: the law would have an important role, mainly linked to the elucidation and awareness of rights, although being incapable to, by itself, change reality. One realizes the lack of clarity and awareness of the prosecutors regarding the possibilities of their own activities. It is especially due to their understanding of the law being too abstract in relation to their performance parameters, and so they verify their cognition limits due to the involved knowledge. In addition, both doctors and prosecutors realize that it would be unfeasible, at least currently, for the MP to respond to the whole demand.

Although in theory the participation of MP is viewed as important and beneficial, and provided by law, in practice, its performance related to the involuntary admissions is still deemed very small, and may even have been emptied due to the presented factors.

The paper by Luzio and Yasui (2010), very appropriately named "Beyond the ordinances: the mental health policy challenges", also

highlights the necessary mentality change for the accomplishment of the care model construction. Firstly, it says that the change of the assistance model is urgent, with the overcoming of the paradigm illness/healing. Therefore, it goes further and sustains the development of actions along with the society as a whole:

> Such actions should aim to produce changes in the social imaginary about mental illness, madness, abnormality and mental disorder bearer dangerousness, as well as of the mental health services as a mere repository of "insane people" (Luzio and Yasui 2010, p. 25).

Borges and Baptista (2008), also pointing out the necessary change in the care model conception, referring about the important search for the *care*, instead of the *cure*, since "health and disease are not polar opposite phenomena if we comprehend the health as daily production for more health and for better ways of life" (Borges and Baptista 2008, p. 465). The authors defend an interesting posture that assumes not only the change in the health notion, but also shows the idea background that each person would be given *the right to say what health is for herself*[12]."Better ways of life" certainly vary from people with mental disorders to the ones without, just as they can vary naturally from person to person. The prospective content of this thinking lies exactly in its quality of not pre-judging the others, or trying not to stereotype people, whether they bear a mental disorder or not, according to the seemingly "generally accepted" concepts of society. One should not think about *cure*, which presumes as paradigm the "healthy" person, but in *care*. This distinction enables people bearing mental disorders to become better integrated into society carrying on their best forms of life, according to the paradigm created by themselves. Once again, the necessity of mentality change that the previous texts have already pointed out arises.

Both authors discuss the law functions. They state that, even unable to, by itself, achieve the public policy, the law plays an important role in interlocution and as an analysis resource when reflecting in the political agenda:

> It is certain that a policy framework exceeds the boundaries of the rules production, surpasses the formality of a government policy

[12] A similar approach, even more explicit, concerning the right of people to establish what is death to themselves, can be found in Stancioli et al 2011.

> expressed in ordinances, and builds itself in more or less formal interlocutions, more or less permanent, but certainly concurrent with this process. Notwithstanding the rules output works along with the interlocution and in the configuration either of the assistance model as well as in the set of discussions. It also becomes a rich analysis resource, pointing out the necessity of an inflection in the mental health policy agenda. (Borges and Baptista 2008, p. 467)

Barroso and Silva (2011) address the psychiatric reform in Brazil within the framework of the historical-critical historiography. According to them, such reform has not been implemented in the country yet. The reform process continues, with the reduction in the number of berths and the increase of the specialized ambulatory network. Thus, they warn the following:

> The promulgation of laws and ordinances does not guarantee the materialization of its content. … not all the substitutive services have been implemented. The coverage of psychiatric community services and the financial resources invested on the existent services still remain insufficient. There is a lack of qualified professionals for work and there was no adequate preparation for the families and communities living along with people with psychiatric disorders (Barroso and Silva 2011, p. 74).

In addition to the insufficiency of the practical materialization facing the legal text, a scathing critique that the authors present is that, "without the due reflection, the new Brazilian psychiatric model may only change old forms of social control for new ones" (Barroso and Silva 2011, p. 74). Even in the well-intended new communitarian psychiatry, the same relationship pattern between people with mental disorders and health professionals remains the same. This occurs due to the assumption that it is possible to rehabilitate the other, instead of considering that this subject is the only one able to rehabilitate himself (with the health professionals' aid). The power hierarchical structure of the *patient* as a *passive object* prevails. To overcome this traditionally ingrained model, fostering greater gains in social development and also enhance the respect for the patient as *person* is a major challenge.

In the study of Arejano, Padilha and Albuquerque (2003), influenced by the theoretical framework by Michel Foucault, fieldwork was conducted with interviews of employees who work in a mental health care service. The researchers consider that, in the studied area, the im-

pacts of the law nº 10.216/01 in the employees' way of thinking seem to have been more relevant only in the administrative scope. This is owed to the fact they did not demonstrate having sufficient ethical reflection in the relationship between users and professionals, changed by the implemented law. Indeed, that ethical reflection is the essential component to accomplish the psychiatric reform. The authors state two possible kinds of relationships between professional and users: one with a dominant subject and another that favors an ethical solidary action. The equally empowered subjects of the latter kind characterize a relationship between two free subjects (Arejano, Padilha and Albuquerque 2003). It remains clear, from what has been said, that this kind of ethical relationship is the one that would be recommended as ideal by the psychiatric reform.

So, attention is called upon to the necessary change in the mindset, without which the great change brought by the law, would empty itself. In spite of the fact that the research has been made after the promulgation of the law, its findings show that the relationships between professionals and users of mental health services still remain fuzzy in the minds of those professionals.

When reading some testimonies, an effort seems to have been made by some professionals to change their way of viewing mental disorder. When talking about how much that change is difficult, one of them even says that they, professionals, also create prisons in their minds against which they have to struggle:

> "They believe everything is solved, there are no walls, such a strong society and world, but with barriers just as the one of the asylum walls. People, as well as we do, have our own prisons that we also have to face daily." (Arejano, Padilha and Albuquerque 2003, p. 551)

Hence, it can be said that we all are somehow "prisoners" of our minds. While users have mental disorders, the professionals who deal with them, and the whole society, also have "prisons", which in this case, are the prejudices, the limitations when dealing with alterity. Similar to any prison, it is not easy to release yourself, for even if we leave the enclosure of bars, the bars which are within ourselves stick more deeply and require great strength to be surmounted.

Meanwhile, and speaking of bars, the very conception of ambiance of the psychiatric reforms, which is an environment with no walls,

bothers some of the interviewed professionals. Even the outside bars, to those who are familiar with the disciplinary pattern of the previous model, is a confounding factor, because people have not even adapted their mentality to the new architectural structure of the service. They have difficulties dealing with the presence of bars in their minds and their absence in the physical space:

> … facing a no wall environment, people do not know how to relate with one another, the relationship between mental health workers are confused because the discipline requires "closing spaces" to maintain control and body utility. This absence of spatial closures space, according to the researched group, disables people to define themselves by the place they occupy in a ranking, or even by the distance that separates them from the others. (Arejano, Padilha and Albuquerque 2003, p. 551)

This is how the emancipation of people with mental disorders is only going to occur when also the health professional emancipates himself (Arejano, Padilha and Albuquerque 2003).

However, foreseeing that the actual learning and emancipation are experienced processes that require elapsed time, one of the interviewed professionals declared, by using a ludic metaphor, that this change of mentality can be established as time goes by:

> "One of the very remarkable things found out in our meetings is that the Reform is a process and, as a process, it means construction. And currently it became very impressive, through the analogy with coffee, that it is daily built. Nothing is finished. It is up to each and every one, by tasting a dose, some appreciate it stronger and others, lighter, or mixed, as you say referring to a tea-coffee" (Arejano, Padilha and Albuquerque 2003, p. 552)

The content of the psychiatric reforms is not completed in the law. It will be built through everyday assistance to mental health, through the relationship among users and health professionals. And the individuals are still getting to understand their roles in this new ethical relationship. In order to boost this process it is crucial to invest in ongoing training of health professionals, and also in the user and his family participation in the health policies (Arejano, Padilha and Albuquerque 2003).

Concluding remarks

The law nº 10.216/01, with its twelve completed anniversaries, is still too young to accomplish the great revolutions that it carries in its ethical content. In addition to the major structural change in mental health care under implementation, its greatest revolution lies in its ethical content, related to the change of population mentality. And this is a difficult task because that transformation does not occur complying with legal or temporal frameworks. It does not take place all in a sudden. It is gradual and requires small interlinked daily actions and behaviors. So, it is not only of the hospital environment: for this big change to happen, it needs to be spread throughout the whole social environment. The change pattern is processed through the mutual learning between health professionals and patients, through empowered relationships people keep with one another, through the spread of ideas and enlargement of culture.

Law has its role, and the law nº 10.216/01, as a regulatory touchstone, has great importance. Not only did it serve the formalization of the idea of psychiatric reform in Brazilian state apparatus and standardized as well rules that were already being made in the states or at the central executive level. It also performed functions related to communication, dissemination of content and acted as a decoy for discussion topics, including with its mistakes and successes, of discussions about the rethinking of new policy agendas and of strategies for health planning.

However, to effect the content of the law and achieve the desired development in health, it is required a larger financial resources input and the strengthening of the political will to comply the entire physical structure demanded by the new care model. More than this, it is essential to invest more in the training of health professionals and, broadly, in the Brazilian population education, since no major change can actually be achieved without education.

SUS, due to its scope design ambition, similar to the law nº 10.216/01, can also be considered young, and goes through the same fundamental difficulty: to be successfully implemented, it depends not only of a better overall infrastructure of the country, with sanitation, irrigation of the drought and famine areas, quality transportation of goods and people, but also, and mainly, of education. The SUS and the psychiatric reform will only materialize in their fullest potential when Brazilians become more enlightened, educated and less biased, and if, with

full capacity and information, society believes in SUS, in the psychiatric reform, in the patients with mental disorders, and in itself.

The countries that currently discuss their health systems should keep this in mind: for any health system to develop, people need to have education, but also need to share the health project in which they are involved: they need to firmly believe and invest in themselves and in their countries.

References

Amarante, Paulo (Coord.). 1995. *Loucos pela vida: a trajetória da reforma psiquiátrica no Brasil.* 2 ed. Rio de Janeiro: Fiocruz.

Appelbaum, Paul S. 1994. *Almost a revolution: mental health law and the limits of change*. New York: Oxford University Press.

Arejano, Ceres B, Padilha, Maria Itayra C. S. and Albuquerque, Gelson Luiz. Sep./Oct. 2003. Reforma Psiquiátrica: uma analítica das relações de poder nos serviços de atenção à Saúde Mental. *Revista Brasileira de Enfermagem* 56 (5): 549-554.

Barroso, Sabrina M. and Silva, Mônia A. Jun. 2011. Reforma Psiquiátrica Brasileira: o caminho da desinstitucionalização pelo olhar da historiografia. *Revista da Sociedade de Psicoterapias Analíticas Grupais do Estado de São Paulo* 12 (1): 66-78.

Brasil, Conselho Nacional de Secretários de Saúde. 2007a. *Sistema Único de Saúde*. Brasília: CONASS.

Brasil, Conselho Nacional de Secretários de Saúde. 2007b. *Legislação estruturante do SUS*. Brasília: CONASS.

Borges, Camila F. and Baptista, Tatiana. W. F. Feb. 2008. O modelo assistencial em saúde mental no Brasil: a trajetória da construção política de 1990 a 2004. *Cadernos de Saúde Pública* 24 (2): 456-468.

Britto, Renata C. 2004. *A internação psiquiátrica involuntária e a Lei 10.216/01. Reflexões acerca da garantia de proteção aos direitos da pessoa com transtorno mental.* Thesis (Master in Public Health) – Fundação Oswaldo Cruz, Rio de Janeiro.

Desviat, Manuel. 1999. *A reforma psiquiátrica*. Rio de Janeiro: Fiocruz.

Escorel, Sarah. 1999. *Reviravolta na saúde: origem e articulação do movimento sanitário*. Rio de Janeiro: Fiocruz.

Gragnolati, Michele; Lindelow Magnusa and Couttolenc, Bernard. 2013. *Twenty years of health system reform in Brazil: an assessment of the Sistema Único de Saúde*. Washington, DC: World Bank.

Guimarães, Andréa N. et al. Apr./Jun. 2010. O tratamento ao portador de transtorno mental: um diálogo com a legislação federal brasileira (1935-2001). *Texto & Contexto Enfermagem* 19 (2): 274-82.

LILACS database. Available at http://lilacs.bvsalud.org, accessed 17 Dec. 2011.

Lima, Nísia Trindade et al. (Org.). 2005. *Saúde e democracia: história e perspectivas do SUS*. Rio de Janeiro: Fiocruz.

Luzio, Cristina A. and Yasui, Silvio. Jan./Mar. 2010. Além das portarias: desafios da política de saúde mental. *Psicologia em estudo* 15 (1): 17-26.

Messas, Guilherme P. Jan./Mar. 2008. O espírito das leis e as leis do espírito: a evolução do pensamento legislativo brasileiro em saúde mental. *Histórias, Ciências, Saúde* 15 (1): 65-98.

Minas Gerais, Secretaria de Estado de Saúde. 2007. *Atenção à saúde mental*. 2 ed. Belo Horizonte: Secretaria de Estado de Saúde de Minas Gerais.

Oliveira, Walter Ferreira et al. Oct./Dec. 2011. Um breve histórico do movimento pela reforma psiquiátrica no Brasil contextualizando o conceito de desinstitucionalização. *Saúde em Debate* 35 (91): 587-596.

Paim, Jairnilson et al. May 2011. The Brazilian health system: history, advances, and challenges. *Lancet* 377: 1778-179 (Series: Health in Brazil).

São Paulo. Secretaria de Estado de Saúde. 2008. *Desafios para a desinstitucionalização: censo psicossocial dos moradores em hospitais psiquiátricos do Estado de São Paulo*. São Paulo.

Stancioli, Brunello S. et al. Nov. 2010/Feb. 2011. O Sistema Nacional de Transplantes: saúde e autonomia em discussão. *Revista de Direito Sanitário* 11 (3): 123-154.

Ugá, Maria Alicia D. and Marques, Rosa Maria. 2005. O financiamento do SUS: trajetória, contexto e constrangimentos. In *Saúde e democracia: história e perspectivas do SUS*. Lima, Nísia Trindade et al. (Org.). 193-233. Rio de Janeiro: Fiocruz.

Vasconcelos, Cipriano M. and Pasche, Dário F. 2006. O Sistema Único de Saúde. In *Tratado de Saúde Coletiva*, ed. Campos, Gastão Wagner de S. et al, 531-562. São Paulo-Rio de Janeiro: Hucitec-Fiocruz.

Vianna, Solon Magalhães (Coord.). 2005. *Atenção de alta complexidade no SUS: desigualdades no acesso e no financiamento*. Projeto Economia da Saúde. Brasília: Ministério da Saúde/IPEA.

Zioni, Fabíola; Almeida, Eurivaldo Sampaio and Pereira Filho, Floriano Nuno de Barros. 2013. Políticas públicas e sistemas de saúde: a reforma sanitária e o SUS. In *Saúde Pública: bases conceituais*, ed. Rocha, Aristides Almeida; Cesar, Chester Luis Galvão and Ribeiro, Helena. 2nd ed. 115-132. São Paulo: Atheneu.

Zerwes, Maria Helena, T. et al. 2001. Hospital psiquiátrico: um mal necessário? Reflexões acerca da reforma psiquiátrica brasileira. *Arquivos médicos do ABC* 26 (3): 32-38.

Posthumanism and equality

Denis Franco Silva

Abstract: This paper discusses the problem of an enhancement enterprise towards a posthuman stage and its impacts on legal thought concerning the context of society marked by the increasing role of technologies in all dimensions of everyday life. The theories about how a legal system should deal with the idea of human enhancement are still in dispute, but can be grouped in two tendencies: the bioconservatives and the bioenhancement supporters. It must be noticed that procedures and technologies for human enhancement are becoming more and more available, despite the legal grounds for its institutionalization is not completely established and rooted in society and legal circles. Human enhancement procedures can have profound impacts in society, like problems related to the inequality of means that do not grant a universal access to them or the substantial inequality that they can provoke among persons. Enhancements like bionic hands, drugs that increase intellectual performance and, specially, procedures for liberal eugenics are becoming more and more feasible. Thus, they are object of questioning by philosophy and legal theory according to its impacts on traditional concepts such as person and equality. The first tendency mentioned above (Bioconservatives) do not accept any kind of enhancement procedures, based on a naturalist approach in which human nature should be untouched and preserved. Habermas, for instance, and also, Francis Fukuyama, presents a great variety of arguments against enhancement procedures. It is remarkable that these arguments depend upon the idea of a human essence or nature that should not be changed, which means, their arguments are based on a normative essentialism with biological grounds. As mentioned above, there is also a criticism toward processes of human enhancement because they can lead to a situation of unsustainable sociopolitical inequality among persons. On the other hand, the second tendency states that there is a duty to enhance and morals or law should not curb it. This group is represented by scholars like Julian Savulescu, Nick Broston, Alex Buchanan and John Harris, that assumes that morals and law must be disconnected from any biological determinism, denying such a human nature or essence and claiming that inequalities generated by enhancement technologies are not a bigger problem than other substantial

inequalities already existing. This paper suggests a new approach to this debate in an attempt to elucidate if, after all, the idea of human enhancement threats the value of equality.

Key-Words: posthumanism; human enhancement; person; equality.

1. Introduction

One must assume that humans have always tried to enhance themselves by improving their mental, physical and emotional capabilities. The very invention of writing, for instance, was a considerable enhance to our natural cognitive abilities (CLARK, 2003).

Biotechnologies already on the horizon can enable humans to be smarter, to have better memories, to be stronger, to live more and even enjoy richer emotional lives. One can say that, for the fist time, our evolutionary future truly lies on our own hands and several modes for biomedical enhancements can be foreseen, like the administration of drugs, direct brain-computer interface, bionic implants, genetically engineered implants and, of course, genetic engineering of embryos (BUCHANAN, 2009).

It must be noticed that procedures and technologies for human enhancement are becoming more and more available, despite the legal grounds for its institutionalization is not completely established and rooted in society and legal circles.

Thus, how should a legal system deal with the forthcoming possibility of bioenhancements, leading society to a posthuman stage, is still in dispute. The claims can be roughly grouped in two tendencies: the bioconservatives and the bioenhancement supporters.

Of course, human beings can be described as a "marvel of evolved complexity" (BROSTON, SANDBERG, 2007). When manipulating such complex evolved systems, which we poorly understand, our interventions may often fail or backfire, even jeopardize, in the opinion of some scholars, the very idea of being human, and thus, a person. Given how superficial is our knowledge about this peculiar system – the human organism, particularly our brains – how could we have any realistic expectance on enhancing it? For these scholars a dark spectrum of dehumanizing procedures, eugenics and substantial inequalities rises in the horizon when one talks about human enhancement.

Considering such possible outcome, should society allow human enhancement procedures? This question underlies the debate between the so-called bioconservatives and bioenhancement supporters and it is not an easy one.

2. To enhance humans or not?

Bioconservatives can be said not accept any kind of enhancement procedures. They rely on a naturalistic approach in which human nature should be untouched and preserved.

To understand this point of view it is necessary to identify the reasoning underneath bioconservative claims.

As mentioned, the objection to any kind of enhancement procedures seems to be rooted on a naturalistic approach in which human nature should be untouched and preserved, but this assertion presents itself in a variety of forms and arguments. The most frequent is the appeal to the idea of human nature or human essence as a normative claim.

2.1 Appealing to human nature

Appeals to human nature usually play different roles on the enhancement debate.

Some of them seem to be mere supporting roles, like the assumption of human nature as a precondition to moral agency. Practical rationality in Kantian terms would be deeply embedded and, at the same time, regarded as constituent of human nature. Any enhancement attempt would put at risk our capacity to moral agency by endangering the common shared features of human beings that enable practical rationality. The argument is clearly tautological and presumes an empirical assumption that when facing a situation where a so called biomedical enhancement jeopardizes practical rationality it would still be considered an enhancement, not a "backfire", and systematically pursued[1].

Arguments of such kind can be better understood if related to the idea of human nature as a feasibility constraint on morality or of human nature as a constraint on the good for us.

The idea of human nature as a feasibility constraint on moral-

[1] A paradigmatical reference to this argument would be Jürgen Habermas point of view on designing babies. See HABERMAS, Jürgen. The future of Human Nature. Cambridge: Polity, 2003.

ity assumes that a realistic approach to understanding morality must take into account cognitive and motivational limitations of human beings: the biological hard-wiring we happen to have. Buchannan (2011), though criticizing, summarizes this kind of argument in an example:

> If, for example, by virtue of our evolved biological make-up, we have a limited capacity to act altruistically toward strangers, then a plausible account of our moral obligations to others must take this into account. "Ought" implies "can" and what we can do is limited by our evolved biology.

This view is intrinsically connected with the idea of human nature as a constraint on the good for us, an argument based on a plausible interpretation of Aristotle's writings: the idea that a being's nature determines its good by constituting a constraint on what can count as a good life for that particular being. If something is beyond the limits of our nature, it is no good for us[2].

As one can see, the above claims on human nature and practical rationality, morality and good life simply cannot answer the question on whether embracing an enhancement enterprise or not. Precisely, these claims lack a clear definition of "human nature" and, specially, assumes that altering this so called human nature and thus the constraint on what is a good life for us is necessarily a bad thing, but the only conclusion that really follows the argument, if we take it for granted, is that our concept of a good life would be different if we enhance ourselves. Different is not necessarily worst.

The bioconservative speech traduces the idea of human nature or essence as a source of moral rules. It is a version of cognitive morality or normative essentialism grounded on the belief that is possible to derive substantial moral rules from reflection on human nature. More specifically, it would be possible to derive moral rules that include a prohibition on enhancement[3]. Any changes in our biological make-up that does

[2] Authors like Michael Sandel and Erik Parens hold that enhancement is objectionable precisely because it involves the removal of limitations on what can be done by human beings, since there are irreplaceable goods that depend upon our having limitations. See PARENS, Erik. The Godness of Fragility: On the Prospect of Genetic Tecnologies Aimed at the Enhencement of Human Capacities. Kennedy Institute of Ethics Journal 5(2), 1995,141-53, and SANDEL, Michael. The case against perfection. The Atlantic Monthly 293(3) 2005, 50-62.

[3] See, for instance, KASS, Leon. The wisdom of Repugnance. In: MacGee, Glen. The hu-

not occur "by chance" (this expression is frequently used to replace "by nature") or as a side effect of a medical intervention would be morally wrong and, thus, should be prohibited.

Some critics of the bionconservative thinking, like Marchesini (2010) see this "human nature" approach on the debate over the moral and legal grounds of bioenhancement as supportive of a reactive vision of simplistic condemnation and rejection of new body-pervasive technologies. A reaction similar to Luddism, since any reasonable definition of "human nature" is provided by bioconservatives, as also points Buchanan (2011).

The claim of absence of empirical evidence against human enhancement procedures - since all the objections commonly presented assume the loss of the ability for practical reasoning or the loss of meaning of any reasonable conception of morality or "good life" – is also a frequent criticism made by enhancement procedures supporters, like Julian Savulescu (2006), John Harris (2007) and, finaly, Allen Buchanan (2009; 2011).

Though, the analysis of a typical bioconservative argument based on the concept of human nature reveals a much more pungent fear: inequality. In fact, although referring to concepts like "human nature", the bioconservatives underlying reasoning reveals an argument dependent upon the relation between the concepts of person and equality.

The passage below illustrates pretty well a bioconservative claim:

> The political equality enshrined in the Declaration of Independence rests on the empirical fact of natural human equality . . . Underlying this idea of the equality of rights is the belief that we all possess a human essence that dwarfs manifest differences in skin color, beauty, and even intelligence. This essence, and the view that individuals therefore have inherent value, is at the heart of political liberalism. But modifying that essence is the core of the transhumanist project. If we start transforming ourselves into something superior, what rights will these enhanced creatures claim, and what rights will they possess when compared to those left behind? (FUKUYAMA, 2002, p. 09)

Fukuyama's mention to the idea of "human essence", contrary to

---

man Cloning Debate, 2nd ed., Berkeley, CA: Berkeley Hills Books, 2000, p.68-106 and PARENS, Erik. Enhancing human traits: ethical and social implications. Washington DC: Georgetown University Press, 1998.

what seems, is not central in his reasoning, but an instrument through which he sustains the claim that all men are equal, for he commits himself with the following structure of argument, as well pointed by Wilson (2007):

1. There is a human essence.
2. This human essence is responsible for our equal moral status.
3. This human essence would be changed if we were to enhance ourselves in various ways.
4. Therefore if we enhance ourselves in various ways we will no longer all be of equal moral status

A being moral status, however, does not depend upon its biological make-up, or, at least, should not. The idea of an equal moral status, therefore, does not lie on the sameness of such biological make-up. The argument seems, first, to externalize a concern on how do we grant each other the status of person, and thus, on a second moment, a concern on how do we sustain the claim that all persons are equal in a society in which genetic engineering, for example, becomes frequent but not widespread over the hole population or all social classes. Fukuyama is worried about persons and equality and thus, departing from the "natural lottery" argument, tries to link personality, an axiological concept, to such thing as a "human essence", an ontological concept, which implies the so-called "normative essentialism". Altering or enhancing the human, in this view, means to put at risk our moral status and the very idea of political equality among persons.

2.2. Being a person and being equal

The reasoning that links the concept of "human nature" or "human essence" to the concept of person contains a dangerous flaw. It turns an axiological concept – the concept of person, a label that indicates the difference between something and someone (SPAEMANN, 2004) – into an ontology.

Therefore, a coherent criticism to the bioconservative speech must, first, clarify the problem of moral personhood and its independence of a particular psychophysical identity. In a second moment, the problem of generating unsustainable inequality among persons due to the use of bioenhancements must be approached from an adequate theoretical point of view.

As seen above, bioconservatives, when talking about a "human

nature" or "human essence", tend to equal the concept of person to a biological category: the homo sapiens sapiens species.

The recognition of the status of "person" traditionally occurred with particular focus on the belongingness to the human genre. However, as a mere form of rejection of the positivist formalism of law regarding the category of "person" in the nineteenth century and the first half of the twentieth century. Indeed, as a measure of rhetorical reinforcement, aiming to avoid the exclusion of any human being from the universe of persons (which means to avoid the denial of dignity to any human being) but not aiming to necessarily exclude any non-human.

As an axiological concept, a *nomem dignitates*, moral personhood - and also the legal status of person – rely on the presence of some particular features. Traditionally, three distinct crucial co-related features can be identified on the concept of person: the rational self, the psychophysical individuality and the feature of otherness, which means the openness to others or the relational aspect.

These three features put together generate, in time and space, agents able to elect ends or goals and to have interests and desires. They also entail the ability of such agents to reexamine and possibly abandon their goals and desires. The abilities themselves and the person constituted by them are previous to any end, interest or desire. Thus, when one talks about an interest or a desire, a subject of such interest or desire is assumed: a person.

It is also assumed that the identity of a person does not change with his or hers interests or desires. This separation between the person and its ends, interests or desires is what allows her to detach herself from the causal chain of events in which the past, as an empirical phenomenon, is immersed. Therefore, the possibility of electing ends or having desires is not determined by the causal chain of events so that the elected end or interest can be normatively attributed to the person (NINO, 2007) . Ergo, a person is endowed of inherent dignity by the virtue of being able to, in relation with others, constitute for himself or herself an identity and to be able to pursue the ends or goals elected and valuated from this identity.

This is a very traditional and even orthodox description of the concept of person. Though, as one can see, no link can be made between personhood and the possession of something as a human essence or nature, unless one admits that what is defined as human nature is nothing more than the traditional features of the concept of person and, therefore, a useless definition, at least as an objection to enhancement.

It must be noticed that the above description of the concept of person can be translated, for example, to the language of political theory, since they are intrinsic to Rawls's two moral powers, those two properties which between them are certainly sufficient for a creature to count as a moral person (WILSON, 2007). They are, first, a sense of justice: the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation (RAWLS, 2001, p.18). Second is a capacity for a conception of the good: the capacity to have, revise, and rationally to pursue a conception of the good. Such a conception is an ordered family of final ends and aims which specifies a person's conception of what is of value in human life, or, alternatively, of what is regarded as a fully worthwhile life (RAWLS, 2001, p.19).

This is an important remark whereas the major flaw in the "shared human essence" reasoning on how we grant each other the status of persons lies in regarding such properties or the previous above described features of the concept of person not as sufficient or it's presence as a threshold, thus assuming that they vary by degree. Even after a threshold is reached, new variations would imply changes on the legal and moral status of those who present it in a higher or lower level, as if one could be more or less a person depending upon the extension or degree of hers and others moral powers (WILSON, 2007). Further, for bioconservatives, the enhancement enterprise would create differences in our moral status precisely because it would create differences of extension and degree by which we possess those moral powers.

A quite obvious objection to this bioconservative claim is the plain fact that, even without the appliance of biomedical procedures of human enhancement, highly educated people do hold or present more developed moral powers. Though, they clearly count only as a person and no more than a person, even when standing before an illiterate. Their moral, political and legal status regarding equality is absolutely the same.

The assumption that our equal moral status depends upon our shared nature, taken as an obstacle to procedures of human enhancement, is wrong simply because persons cannot be more or less ends in themselves. The concept of person is not gradual. Enhanced humans (*i.e. post humans*) will be no more than persons.

A brief incursion on the theoretical foundations of the concept of person has showed us that the fear of inequality among enhanced humans and those "left behind" is not properly expressed. It is expressed

as a fear of recognition of different moral statuses to different categories or classes of humans that might arise from the use of enhancement procedures. It would be a concern about the possibility of denying a human the moral status of person, thus threatening our equal moral status. The argument assumes that enhancement procedures would drive a political community to a scenario where both Rousseau and Kant considerations on common people moral capacities would be disregarded.

As Wilson ascertains, the wrongness of this objection of political inequality follows logically:

1. Possession of the two moral powers is sufficient to count as a moral person.

2. The unenhanced will retain the two moral powers regardless of whether or not others become enhanced.

3. Therefore the unenhanced will be moral persons regardless of how enhanced or superior others may be.

4. The two moral powers function as *threshold* properties: amounts of them above the threshold amount are not significant for moral status.

5. Therefore even if enhanced persons have the two moral powers to a higher degree than unenhanced persons, this will not increase the moral status of the enhanced.

6. Therefore any amount of these features above the threshold amount does not render a person more than an equal.

7. Therefore all moral persons are moral equals, and Fukuyama is wrong to think that enhancement could threaten the equal moral status of all persons.(WILSON, 2007, p. 423-424)

It is clear that informing Fukuyama's objection on the human enhancement enterprise there is a fear of denial of the moral status of person to those "left behind", therefore threatening our equal moral status, which generated an appeal to the idea of human nature. His aim, at first, is to preserve something as a "detached value" (DWORKIN, 2000), which means that even if empirically those whose status of person was denied were better of in well being it would be morally wrong to do so.

Though, it doesn't seem really plausible that his concern is merely with formal equality, especially if it is considered that any biotechnological intervention on the human body to be considered an enhancement will, at least at first glance, be seen as an advantage or a positional good.

Thus, the real problem that lies under the debate between bioconservatives and enhancement procedures supporters is, in fact, if substantial inequalities derived from an enhancement enterprise should be

accepted or if enhancement procedures itself should be permitted face the risk of such inequalities.

3. Substantial inequalities and human enhancement

Dworkin explains very well what really is at stake when talking about human enhancement:

> Our physical being – the brain and body that furnishes each person's material substrate – has long been the absolute paradigm of what is devastatingly important to us and, in initial condition, beyond our power to alter and therefore beyond the scope of our responsibility, either individual or collective" (DWORKIN, 2000, p.444).

When it is possible to change more and more of what was formerly understood as "given" the boundary between "chance" and "choice" tends to disappear, affecting our notion of shared responsibility for others whose choices – as opposed to chances or luck – differ from our own or differ from the norm. If enhancement procedures and, therefore, the outcome of such procedures, is a matter of choice, what responsibility would enhanced persons hold before those "left behind"?

Unlike the considerations regarding a "human nature" or "human essence" that grants us equal moral status, the idea that enhancement technologies are a threat would be based, in this conception, in the claim that any social cooperation system and the mutual recognition of individuals as persons depends on a so-called "natural lottery" regarding health, intelligence, strength, wealth, social class and skills. The fact that no one is responsible for its winnings or losses in this natural lottery and the indetermination of future results would be what allows the idea that all persons find themselves in a position of equality.

As one can see, this is clearly an attempt to treat derivative values as detached values, which means saying that enhancements are wrong "*per se*", quite apart from any bad consequences it will or may have for any person. However, the supposed strength of the claim is based in the assumption that the position of non-enhanced persons will be worse and, specially, that the distribution of such enunciated talents is, in fact, out of our horizon of choice.

The boundary between chance and choice is no doubt a crucial one when talking about ethics, morality or law. This boundary, howev-

er, presents itself in practical reason as a fact, not a normative judgment. To put it straight: chance is what we cannot control, not what we choose not to control. If we choose not to enhance ourselves, obviously, a choice has been made.

At this point it must be made clear that equality is a value, not a fact (DWORKIN, 2000). This implies that a distinction must be made between equality as a value and a concrete situation of equality among persons.

Equality, as a value, is a detached value and shall not be put at risk as such, and can be defined as an equal concern from a political community for the fate of all its members. This equal concern is understood, here, as Dworkin's version of equality of resources, which implies duties and distributive justice measures aiming a concrete situation of equality.

The present dislocation of the boundaries between chance and choice do not render obsolete equality as a detached value, neither deny its centrality in a moral or legal community. The real problem is that it will possibly create a great amount of substantial inequalities, considering the fact that enhancements are taken to be positional goods and might further increase the advantages of the rich over the poor.

Accordingly, the question to be made is: considering the consequences for the worse off, should we banish enhancement procedures?

One must observe that the problem, therefore, rests redefined as a problem of balancing derivative values and considering the likely impact of any such decision on individual interests.

In a situation like this, equality of resources demands, first, not trying to improve equality by leveling it down. The remedy for injustice is redistribution, not denial of benefits to some with no corresponding gain to others (DWORKIN, 2000).

Follow the above reasoning the conclusion that substantial inequalities generated by the use of enhancement procedures are not a plausible objection to the enhancement enterprise, especially if considered that such inequalities are not qualitatively different from inequalities already existing due to social class, educational level, wealth or access to positional goods in general.

4. Conclusion

After the above considerations, the debate between bioconservatives and bioenhancement supporters seems to be misplaced.

Bioconservatives appear to fell some deeper, less articulate revulsion to the idea of human enhancement and can express it only in heated and logically inappropriate language, like appealing to human nature. This reaction, of course, is due to the fact that the idea of human enhancement dislocates in a radical way the boundaries between chance and choice.

On the other side, bioenhancement supporters seem to "fall into the trap" directing its efforts in denying such think as a normative essentialism reflected from human nature and presenting claims of absence of empirical evidence of the undesirable consequences foreseen by bioconservatives.

The solution to the dilemma on banning or embracing an enhancement enterprise towards a post human future relies in admitting that enhancements put at stake derivative values, not detached ones. These derivative values must be weighted considering the impacts of the decision on particular interests regarding a detached value of equality of resources.

Departing from this reasoning, no reasonable claim stands against the idea of society embracing the enhancement enterprise towards a posthuman stage, which means, according to Buchanan (2011):

a)Allowing considerable freedom to individuals and organizations to develop and use enhancement technologies;

b)Directing resources to research on enhancement;

c)Creating a public debate on risks and benefits of such technologies;

d)Developing effective and morally sensitive policies and institutions for coping with the challenges of enhancement, mainly, risks and substantial inequalities that may arise.

In this hypothetical scenario, equality as a detached value remains preserved, whatever the changes one performs on his/her biological make-up.

References

BUCHANAN, Allen. Human Nature and Enhancement. In: *Bioethics*. V. 23, issue 03, march 2009. Oxford: Blackwell, 2008, p. 141-150..

BROSTON, Nick; SANDBERG, Anders. The Wisdom of Nature: An Evolutionary Heuristic for Human Enhancement. In: SAVULESCU, Julian; Broston, Nick. Enhancing humans. Oxford: Oxford University Press, 2007.

CLARK, Andy. *Natural-Born Cyborgs: minds, technologies and the future of human intelligence*. New York: Oxford University Press, 2003;

DWORKIN, Ronald. Sovereign virtue: the theory and practice of equality. Cambridge/London: Harvard University Press, 2000.

FUKUYAMA, Francis. *Our Posthuman Future: Consequences of the biothecnology revolution*. New York: Farrar Straus Giroux, 2002

HABERMAS, Jürgen. The future of Human Nature. Cambridge: Polity, 2003.

HARRIS, John. *Enhancing Evolution. The Ethical Case for Making Better People.* Princeton and Oxford: Princeton University Press, 2007.

KASS, Leon. The wisdom of Repugnance. In: MacGee, Glen. *The human Cloning Debate*, 2nd ed., Berkeley, CA: Berkeley Hills Books, 2000, p.68-106

MARCHESINI,Roberto. Roberto. Il tramonto dell'uomo: la prospettiva post-umanista. Edizione Dedalo: Bari, 2009.

NINO, Carlos Santiago. *Ética y derechos humanos: un ensayo de fundamentación*. Barcelona: Ariel, 1989.

PARENS, Erik. *The Godness of Fragility: On the Prospect of Genetic Tecnologies Aimed at the Enhencement of Human Capacities.* Kennedy Institute of Ethics Journal 5(2), 1995,141-53

PARENS, Erik. Enhancing human traits: ethical and social implications. Washington DC: Georgetown University Press, 1998.

RAWLS, John. *Justice as Fairness: a Restatement*. London: Harvard University Press, 2001.

SANDELL, Michael. *The case against perfection*. The Atlantic Monthly 293(3) 2005, 50-62.

SAVULESCU, Julian. Genetic Interventions and the Ethics of Enhancement of Human Beings. *In*: STEINBOCK, B. *The Oxford Handbook of Bioethics*. Oxford: Oxford University Press, 2006, p. 516-535.

SPAEMANN, Robert. Persone: sulla differenza tra "qualcosa" e "qualcuno". 2.ed. Laterza: Bologna, 2007.

WILSON, James. Transhumanism and moral equality. In: *Bioethics*. V. 21, n. 8, 2007, Oxford: Blackwell, 2007.

A paradigm for Law

Nuria López[1]

Abstract: Is there a paradigm in Law? A real rupture in the way we know and applied Law in time? This article assumes an interpretation of two notes made by Thomas Kuhn about the absence of paradigms in Law in consequence of the difficult in develop science internal coherence (systemic self-reference) simultaneously with the attendance of social expectations (systemic external-references). Hence, analyze the structure of the references taken for the validity of law in the main thesis of Theory of Law. It is an important relation that grew with after the II World War, as the social claims demanded an observance of the hetero-references, such as human rights and justice, despite of the difficulty in adequate this references to the positivist methodology. But there is a right interpretation to be discovered as an object to be seen? Post-modern science philosophy broke the paradigm of subject, observer/ object relation leading the idea of an object to a construction of subject´s interpretation. It demands a reformulation of Law´s Hermeneutics to handle with this philosophic complexity: the subject as a linguistic composition (with multiple references) that interprets the self-references of Law and the external-references as he can. In other words, the references in Law´s Hermeneutics are inside the subject, and it is such a rupture with the past structures that it is possible to demonstrate a real paradigm-shift in Law.

Keywords: Hermeneutic; Philosophy; Paradigm.

Introduction

In *Structure of scientific revolutions* Thomas Kuhn makes two relevant observations for Law. The first one points out that as social Science maybe Law have not acquired yet a paradigm. The second one, that as Science applied Law has as *raison de être* attending a social demand (Kuhn, 1996, p. 19) and this prevailed over attend the severity of Science.

[1] PhD Student at Pontifical Catholic University of São Paulo (PUC/SP). Master of Philosophy of Law at Pontifical Catholic University of São Paulo (PUC/SP) with a CNPq Scholarship. Email: nuria.lcs@gmail.com

Indeed, many of the thesis that searched for internal severity in Law, borrowing methods and paradigms from other fields in Science, found somewhere the social need Law must attend to (because it only exists to attend it). The main thesis about legal interpretation dealed differently with this issue. Kuhn´s observation have been confirmed in the last fifty years: the concern for a scientific method (self-reference) always stumbles in social needs (hetero-references).This nomenclature (self and hetero references) is ordinary in System Theories since Bertalanffy (2009), but here is used in a more particular meaning: the legal interpretation, as Marcelo Neves has done (2008 and 2013).

On the other way, the critics to the concern with the scientific severity and the validation of legal answer became the central issue in legal controversy in the last fifty years. It was strained to the post-II World War and the need to attend the hetero-references that took old pre-constitutional formulas as the Reason of the People, by Windscheid [1878], the Will of Nation, by Puchta [1854] or the Spirit of the People, by Savigny [1814], recycled as the Will of Constitution [1959], by Hesse (1991), as jusnaturalist concepts, the attending to an specific Justice Theory (Dworkin, 1978), or the normatization of Fundamental Rights (Alexy, 2008).

The urgency of include the hetero-references in legal interpretation, however, did not move away the concern with a scientific method to legal interpretation, even with the difficult implicit in establish a methodology able to verify the validity of references with so wide semantic charge. This difficult forced a revision of what we understood for method in Law (Barroso, 2011), and, many times, in the absence of a method (Ávila, 2009), made believe that there was no methodology in Law, while insisted that could settle with an *anything goes* (Silva, 2007, p.139) in Law, in reference to Feyarabend in *Against the method* (2011).

From the start point of Kuhn, this paper analyzes the structures of the main thesis of legal interpretation, searching for traces of paradigmatic turns. After the definition of *paradigm* in which this paper is based, it analyze the philosophical grounds of self-reference thesis from the viewpoint of the major self-reference thesis – the Kelsenian. In this matter, even Kelsen recognize legal norms as social demands, or in other words, he recognizes the *raison d´être* of Law as attend social demands. This question gets more relevant after the II-World War.

Validity criteria as fundamental rights, will of Constitution, and Justice Theory adopted by the positive law were widely applied in the last decades, while it claimed also for a methodological stringed, an internal systemic coherence. Some works tried to arrange the hetero-ref-

erences in procedures or application formulas. As will be demonstrated, the efforts in this direction at some point had to admit it application for different individuals would lead to different results, what took us to the problem of the *subject*. In other words, the modern effort to systematize (here meaning mechanize) legal interpretation lead to the reevaluation of the subject in Legal Hermeneutics. The adoption of the subject post-linguistic-pragmatic turn, singularized in his own pre-comprehension and so, in his interpretation of legal norms, gave origin to another systemic model – dynamic and complex – in which the subject is in a communicative context, linguistically structured.

The hypothesis of this paper is that Kuhn´s dichotomy could be overcome by the adoption of the subject as draw for the post-linguistic-pragmatic turn, since both self and hetero-references are present in the subject´s composition and could be in some level shared for other subjects. This paper intend to draw the hermeneutics structures in order to demonstrate that the change in the philosophical concept of subject, brought by the linguistic-pragmatic turn, overcame the obstacle to an establishment of a paradigm in Law.

1. The possibility of a paradigm in Law

Kuhn saves the word *paradigm* for the natural sciences. Nevertheless, for many times in Law this word was used in a similar sense, as the example of Boaventura (2008); Morin (2010); Touraine (2006); or the Brazilians Reale (1994), and more recently, Streck (2004).

Although Kuhn gives the word *paradigm* more than one meaning in his *Structure of Scientific Revolutions* (1996), broadly he determines it as a theory that attends better or more precisely the answers given or the lack of answers of the last paradigm. And, despite there is no definition of *paradigm*, it counts with some specific functional characteristics: it exists in a historical context, orient researches, is wide, and shared by scientists (Manochhi, 2006, p. 73).

In this way, it is possible to say that Law does counts with theories that tried to solve open questions or questions treated with poor precision for previous theories, fulfilling the paradigmatic functions described by Kuhn. These theories deal with knowing legal norms and applying them to situations. The elaboration of a scientific paradigm on how we know legal norms and how we should apply them imposed the attending to other sciences´ methodological claims (which paradigms

were borrowed), in order to maintain formal correction, validity in reference to its own methods, and also attend the social needs, so the results obtained for Law could be considered valid.

Ergo, the paradigmatic possibilities in Law are in the propositions concerning self and hetero references in legal interpretation. The history of legal hermeneutic moves between them, until the attempts of conciliation (or overcome).

2. Self-reference

2.1 The philosophical grounds of self-reference in the legal system

The so-called objective theories of legal interpretation, for example the thesis by Binding, Wach and Kohler [1885-1886], defended the exteriorization of the *reason underlying in law*, the *release the empirical isolation of individual legal norms and, by the reconduction to a superior principle or to a general concept, dematerialize them, somehow spiritualizing the positive* (Larenz, 2010, p.53).

Thereby, the legal norm meaning is its objective meaning, independent of the meaning the legislative could have given to it, such as in the Historical School of Savigny. The meaning given to a legal norm has been detached, since Savigny, and then Puchta, whom established a semantic pyramid. In its apex is the legal text which meaning could be taken from deduction, influenced by Christian Wolff´s rationalism (1679- 1754) (Larenz, 2010, p.39).

So, if we could see the references points of legal interpretation as points in a plan and the path from the subject to what he refers to as a vector, we will that the Kelsen´s Pure Theory [1934] reinforced the existent vectors – preannounced to positivist philosophical basis.

From the viewpoint of theories of objective interpretation the legal norm acquires its own rationality, an objective meaning that could not be missed with the ones at the time of its elaboration. Law should then find its objective meaning, the real meaning of legal norm, to apply it to the facts, given in the real world.

In this sense, subject refers to these two points, fact and norm, both given in the world and related between each other by subsumption logic. Furthermore, there is also a third vector, which refers to the formal validity of the legal norm (self-reference), in order to know if the legal norm is valid according to a superior norm, until the last reference point,

that is a logical point, assumed in analogy with Kant´s theory of knowledge (Kelsen, 1998, p.225-226). It is Kelsen´s *Grundnorm*, defined by him as a transcendental logical point. The transcendental logic is defined by him as *"a Science that specifies the origin, the extension and the objective value of these knowledge (...)"* and could be distinguished from general logic for referring exclusive to *a priori* knowledge (Kant, 2007, p. 49).

2.2 The legal norm as social demand: the paradox in Kelsen

On the other hand, Kelsen says that *"a norm (...) to be interpreted as a legal norm has to institute a coactive act or have substantial linking as legal norm"* – is saying, he relates the legal norm to its original sense of demand. This paradox already existed in Kant´s theory of knowledge and was reproduced in Kelsen. The comparison is made by Larenz, for whom is not possible to conceive Kant´s "thing itself" without assume as "something" thinkable in the same way that is not possible to understand Kelsen´s "should be" without assume its ethical, original, sense of demand (Larenz, 2010, p. 97).

This paradox caused the after recognition (in the end of the 2nd edition of Pure Theory) of legal interpretation as a political act, even if such influences are out of Law´s object of research. Ergo, legal norm as a demand, in its coactive sense is recognized and pushed away from Science´s borderline, but remains present as original sense.

2.3 The relevance of Kelsen´s paradox in the Post-II World War: the need to attend the social claim

Despite the legal positivization of some specific liberal fundamental rights in the first half of XX century, as the classic examples of Mexico (1917) and Weimar (1919), just in the post-II WW, in the second half of the century this need became urgent. As legal positivism were unable to deal with the moral questions the authoritarian regimes imposed to their population it brought back questions about subjective rights and the importance of a approximation between Law and Moral (Piovesan, 2002, p.131-132).

According to Mario Losano, the first German jurist to propose this "resumption" was Radbruch, who defended in 1947 a turn back to jus naturalism, in the article *Die Erneuerung des Rechts*, "Die Wandlung". In the years that followed this publication many German jurists sub-

scribed this proposal, even with different grounds, since some of them were from neothomist catholic backgrounds (Losano, 2010, p.240). Still, this resumption was not full. Radbruch still used some categories accepted before and though for concrete systems (Losano, 2010, p.241).

The guarantee of fundamental rights should be incorporated to the legal system without disruption the positivist formal categories. Both of them should be combined in what would be the overcome of jus naturalist and jus positivist thesis.

Thus, some historical demands of both thesis were presents: the approximation with Moral should not depend on metaphysical categories and the recognized possibility of legal interpretation should not be arbitrary (Barroso, 2009, p.54). But these values are hard to fit in a positivist system. And it is even harder to elaborate a methodology able to deal with sensitive issues. These values, came from jusnaturalism had several philosophical grounds (as in Germany, with Radbuch), and could be defined in several different ways, always without a well delimitated contented. The positivist method of subsumption was not able to handle the terminological dimension of the fundamental rights.

3. Hetero-reference

The subject interpret in order to apply the norm with reference in positive law (self-reference), but there is also an hetero-reference, *a claim, a social demand*, that comes out as a stationary point to which the interpretation must be directed. The direction to an hetero-reference varies in the thesis and guarantee that the consequences of decision making (the interpretation of the norm) brings coherence to the system – and this is the common feature of the theories of legal argumentation (Magalhães, 2002, p. 148-149). In general, theories of legal argumentation have been based in three hetero-references, which become relevant for its wide acceptation. There are: the fundamental rights (Alexy, 2008); the will of Constitution (Hesse, 1991); and the Theory of Justice adopted by the positive law (Dworkin, 1978). In the Brazilian National Congress of CONPEDI (2012), Alexy, Hesse and Dworkin were the 8th; 22th and 11th most cited authors of the whole Congress.

3.1 The fundamental rights

Alexy, in his Theory of Fundamental Rights[1986] establishes

a connection between semantic and validity, pointing that *each theory, to tell that something is valid has to have something from this proposition is possible, and, for that, the most adequate is the norm in its semantic meaning* (Alexy, 2008, p.60-62). In other words, the semantic content is criteria of validity for legal interpretation. The semantic content of rules and principles are *reasons* for legal interpretation (Alexy, 2008, p.107).

The application of legal norm claims for axiological arguments and normative arguments. And despite its relevance they are not in Alexy´s concept of legal norm (2008, p.82). He chooses for the maintenance of the positivist concept of norm, opposing to theories such as Friedrich Müller´s (Alexy, 2008, p.76-82), but admit the use of axiological elements in legal interpretation.

This distinction is relevant for Alexy´s whole theory and particularly in the issue that an argument extra-normative could serve as criteria for the norm validity – but could not be mistake by it. Alexy says that *a criteria of something is different then an element of something* (2008, p.84).

So, there is the maintenance of the subject with the Kantian model. There is the maintenance of legal norm with the positivist model. But, there is there cognition of extra-normative elements in legal interpretation. This recognition caused objections about discretion and intuitionism. However, Alexy refused what he called "philosophical objections" saying that we get a less vulnerable valorative theory when we presuppose the possible values (as well as the validity criteria) are not a matter of evidence, but a matter of fundamentation (Alexy, 2008, p.157).

The fundamental rights norms, such as the other ones, could not be mistaken by the reasons that sustained them, but in their application, should be optimized, according to some criteria, that could also point formulas (algorithms) to obtain an answer.

3.2 Will of Constitution

The concept of Constitution normative power *(die Normative Kraft der Verfassung*) is considered today a theoretical reference for the "new constitutional interpretation"(Barroso, 2009, p.57), due to the recognition of Rule of Law and its *tension* with reality (*Faktizität*). Developed by Konrad Hesse [1959], it replaces the role of Constitution from a simple paper, in Works as Lassalle´s and Jellinek´s, to sustain its normative Power in the State´s every-day life (Hesse, 1991, p.12) – and there is power as the constitutional interpretation expresses the will of Consti-

tution contained in the text. Hence, we should interpret according to the will of Constitution in other to give power to the Constitution. There is a tautological reasoning here: the interpretation according to the will of Constitution gives power to the Constitution and the power of Constitution is in the will of Constitution.

Furthermore, the interpretation should be done according to the principle of norm´s optimal concretion (*Gebotoptimaler Verwirklichung der Norm*), in order to relate the constitutional text to the events of life. The interpretation that optimizes the concretion of the norm should prevail (Hesse, 1991, p.23). Hesse proposes a constructive interpretation of the constitutional norm, so it can be optimally concretized into its *finality* (*telos*) (Hesse, 1991, p. 23). Bringing this constructive feature to legal interpretation perhaps had been here the biggest advance, since the concept of will of Constitution was not new at all. It leads us back to similar expressions that took place in the process of Germany´s unification, such as *Reason of the People*, by Windscheid [1878], the *Will of the Nation*, by Puchta [1854] or still the *Spirit of the People*, by Savigny [1814].

Thus, when talking about advances (and retrospectively we could might say this) the construction of legal norm for the interpreter to obtain a social finality (goal) changed the hermeneutic structure. The constitutional normal claims for effectiveness (*Geltungsanspruch*) in social life (Hesse, 1991, p.14-15). This effectiveness will be realized always that its contend point to the same direction that "prevailing tendencies of your time", in such a way that its application will be a need (Hesse, 1991, p.18) as predicted by Kuhn.

Moreover, if the Constitution differs from the "prevailing tendencies of your time" it could still be transformed into *active power*. In other words, the constitutional norm could be realized because are presents not just the will of power (*Wille zur Macht*), but also the Will of Constitution (*Wille zur Verfassung*) (Hesse, 1991, p.19). Structurally, Hesse´s theory is a dynamic system in time, since the prevailing tendencies are in function of its time of application – and this is extremely relevant.

Still about the structure, the will of Constitution is a reference point to legal argumentation, an interpretative vector, as many actually say. But is worth notice that is an empty point, as it does not refer to any specific point and it is able to (equally) justify absolutely different interpretations.

We intend to demonstrate this way that *Will of Constitution* does not select any element to legal interpretation: it is able to include and exclude elements from legal text, amplifying it or defeating it, all rhe-

torically justified by the *Will of Constitution.*

3.3 The Legal Theory adopted by the positive law

Dworkin´s critic is also derived from a liberal tradition, but comes back the "old idea of individual human rights", even that this idea does not presupposes any metaphysical entity (as the collective will or the national spirit). Dworkin´s thesis is derived from utilitarianism philosophy. He comprehends Bentham and Mill as the philosophical basis of his own work. Both of them are philosophical options able to handle the *raison d'être* of Law, determining it under utilitarianism.

Besides, Dworkin keeps subsumption as the adopted methodology for most of the cases, the easier cases, that would not bring any hermeneutic difficulties. And, for deal specifically with the *hard cases* (the ones that could not be solved by the method of subsumption, because they are involved with the old idea of individual human rights to be compatibilized with the positive law) he describes another method. So, there is actually the maintenance – and not a disruption – with positivist hermeneutic structure. Dworkin´s theory refers to the specific question of compatibility of individual human rights with positivist method of subsumption.

His thesis defends an objective amplification of the concept of *norm,* saying an individual has legal rights even if they are not assured by an express rule, express decisions or legal practice. The hypothesis of existence of a legal right despite the absence of a internal positive reference is considered by Dworkin a hard case.

In such cases, Dworkin claim the titularity of the right is in the social need, in the *raison d'êtr*e of Law. These are questions of morality or politics. The case is hard because are absent the methodological references to its solution. Facing this question did not make Dworkin surrender the maintenance of a detail methodological need able to lead to a scientific (right) answer. He supposes, even after recognize the objective amplification of the concept of norm, that there is just one right answer in complex questions about law and political morality (1978, p.279).

So, with his method he intends to be able to determine this right answer (scientifically valid) in the resolution of hard cases. Critics, such as Hart, pointed out that does not exist such thing as a "*right answer*" in questions about politics and morality, but many possible right answers. Other critics went further and said that there are not even *some* right an-

swers, but just answers. Dworkin replies all of them in the 1978 Edition with an example. He supposes that to one of his philosopher critics, who claim that is not a right answer, be suggested to go to Law School and then occupy the place of a judge. They would have to judge cases all day long. Philosophically, said Dworkin, there might not be a right answer, but in the end of the day they still would have to decide for one of them. The need for jurisdiction is a social need that Dworkin recognizes. There is no escape from it. From such recognition, his theory proposes a method that intends to reduce judicial discretion.

The (scientific) validity of Dworkin´s right answer is verified with the reference given by the *theory of law that best justifies settled law*. For him *"a proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law"* (1978, p.283).

Moreover, Dworkin presupposes two different subjects-interprets who knows equally the facts and the legal norms, and are equally reasonable. Still, they could get to different answers in the same hard case. This question implies a Theory of Science puzzle described by Edgar Morin as one of the complexity paradigms. It is the relation between observer (subject) and the object (observed). Embracing complexity is also comprehending the introduction of the subject as a singular, social, cultural and historical placed data in every observation he does (Morin, 2010, p.333). Thereby, both subjects, that are not equal as presupposed by Dworkin, could have different opinions about what might be the Theory of Law adopted by the positive law. In other words, they would disagree about the reference that validates legal interpretation of a specific case.

In summary, in Dworkin´s work we found the enlargement of the objective concept of legal norm, in order to recognize rights that are not expressed in the positive system; the (judicial) answer as a social need; the *right* answer as a claim for methodology able to decrease judicial discretion; the reference for legal interpretation in Philosophy of Law; and the maintenance of the Kantian subject, transcendental, who knows equally the facts and the norms, and is always equally reasonable.

4. The linguistic-pragmatic turn brings another subject

Even with the new questions raised by the enlargement of the concept of legal norm, in order to embrace the social claim for funda-

mental rights did not change the perspective about the subject. For this reason, is possible to see only the change of one element of the structure (the legal norm) and quantitative and qualitative changes of references of validity. But then came the time for the change in the model of subject.

The subject issue had relevant development not only in theories such as Häberle, that recognizes several legitimate interprets of the Constitution (a quantitative change), but also a qualitative change, with the linguistic-pragmatic turn, that comprehend the subject in his own singularity. In this matter, Legal Philosophy started to deal with more and more complex subjects interpreting (also complex) legal cases.

As the so-called linguistic-pragmatic turn in Philosophy reached Philosophy and Theory of Law to change the structure of legal interpretation we could settle here a paradigmatic shift. But we still have to demonstrate *how* this structure was changed. With no intention of limit several possible analysis, this paper will work with Heidegger philosophy as an example of such change.

4.1. The subject as start point and destiny of all references

In Heidegger´s work the subject interpret from his own previous elements of comprehension [Vorhabe] (2012, p. 425; 427), in a way that "the perceive becomes determine" [*Auf dem Bodem dieses Auslegens im weitesten Sinne wird das Vernehmen zum Bestimmen*.] (2012, p. 192-193) and "the perceived and determined could be expressed in propositions and, as so enunciated, retained and preserved" (2012, p. 193). Each moment the interpretation founds itself in a previous have [*Vorhabe*]. This means that "being is not anymore, as it were in the classic ontology, interpreted as pure permanent presence, but as an advent, as coming to an encounter, as interpellation, that is given to men each time differently" (Oliveira, 2006, 219).

Hence, there is the rupture of the modern science´s dichotomy subject-object, since the subject interprets according to his own previous elements of comprehension and the interpretation gives itself, it will be different for each subject and even for the same subject in different moments, as his own elements change in time. Thus, hetero-referent and self-referent are *in the subject*. In this context, legal norm is constructed by the interpret in a given moment (Oliveira, 2006, p.219).

Some of the results of this new structure are the impossibility of a right answer in legal interpretation; the impossibility of divide inter-

pretation in almost algorithm methods (and also think about criteria for apply criteria); withdraw analysis about objective enlargement, as well as the later discussions about limit a semantic content of the norms. It demonstrates, philosophically, that the subject is interpret and that his interpretation is result of a complex of references, more complex than the modern science could admit (Pugliesi, 2009, p.179).

5. The possibilities in the game

In summary, the singularities of the subjects because of their unique constitutions make possible and at the same time limited what they know and what they communicate. Clearly, there are post-Heideggerian models that allow us new analysis and open new fields of research. The one we choose to use integrates concepts of consciousness and language to elaborate a set of semantic content always in change (Pugliesi, 2009).

Considering that the subject could be comprehended as a semantic set by which he *knows* things and decide his actions (including the interpretation of a legal case), Pugliesi establishes that *"the individual acts by the rules of the game and by his own knowledge of the circumstances, he corrects his action and tries to confer its effects on the system (subset of the world, considered as his semantic atmosphere and its pollution) and the environment, the totality of possible meanings for him, and then, as it were, retroactive, that is, re-feed his own repertoire of information and redo, when possible, the decision preliminarily assumed, recomposing his theory."* (Pugliesi, 2009, p. 185-186).

The possibilities of communication in the linguistic game are detailed described (Pugliesi, 2009, p.168-169) in such a way that if there are common elements in the set of elements (pre-interpretative) between two subjects, will be possibility of communication. The possibilities of communication are the ones into the intersection between the semantic sets. These possibilities could be described as *minimal* or *maximal*, both mathematical expressions used in set theory and here matter to refer if there are less or more elements in the intersection. A minimal relation between elements from both sets means that there is no communication between them. A maximal relation between elements of two different sets means there is absolute communication between them. From these categories we are able to say that if there is communication (in any given social relation) it happens in a space between minimal and maximal.

The possibilities of these sets are limited by plenty of meanings socially constructed.

Therefore, what a subject communicate most of the times will be understood partially and differently from what he meant, because it will be understood from the other subject´s semantic set. The things that were communicated will mean something else for who receive the message communicated, after all he had others life´s experience, he apprehend different meanings, he learnt (and that´s a very important point – the learning) different things (Pugliesi, 2009, p.177). And he will *act* based on what he planned, and he planned based on what he could possibly understood from all these. The semantic set we have been working with is a (in)constant system of learning. An ever-changing set, described with absolute detail in Pugliesi (2014).

In summary, we have two (or more) ever-changing (from learning) semantic sets trying to communicate in some level. Communicate is an ordinary and hard thing to do. The sender does as he could (with his semantic set) and the receiver understood as he could (with his semantic set). Communication just as life, as the Brazilian poet Vinicius de Moraes said, is the art of agreement [*encontro*], although there are so many disagreements [*desencontros*] in life. And that is why social relations are potentially conflictive.

6. What comes next?

In this context, Law is a *place* where are established the rule which reduce complex conflicts to structured (known) situations, so they can be understood as similar others and maintained the *status quo* (Pugliesi, 2009, p.173). The legal norms are limits to the subject´s possibilities of actions, in such a way that are maintained the power structure (that establishes the rules) and the set of *optimum* global politics (Pugliesi, 2009, p.217). And every application of a legal norm could be considered as a *move* in a game discursively structured, according to the rule of this game and the previous moves (Schuartz, 2005, p.34).

The change of the subject´s model from the Kantian to the post-linguistic-pragmatic one will lead us to a Hermeneutics centered inside each one of the subjects in a society. Since every subject is different from the other, each one of them have different semantic sets and will comprehend everything (situations, legal norms etc.) differently.

It is also important to say that subjects occupy different *places* in

the game. Some of them are lobbyists, others are Congresists, or judges, or business men, and so on. In other words, some are in a place to *decide* what the interpretation of legal norms is and will confront others with their interpretation. The Constitution (or any other legal norm) is *not* what the Supreme Court say it is, because there is no *ultimate true* about interpretation. A Court´s position is just a position (one of many possible positions) in a game of power, to see which the limits of the structure we mentioned above are. In other words, there are many possible interpretations of a legal norm coming from every citizen - and they may be organized in civil groups; or perhaps they are a part of a community and socially control the effectiveness of law based in their own understanding. Actually, there is brand new research about *Compliance to Law and Effectiveness of the Rule of Law in Brazil* (Cunha, Oliveira and Ramos, 2013), demonstrating statistically the relevance of this social control for Law. The vectors of power are not restricted to the State´s authorities such as the Judiciary, the Legislative, the civil (organized) groups of pressure and so on. The network composed for vectors of power may be more complex as we used to think.

This game of power brings the understanding of our Democratic States as a *game of resilience* in a complex field of power between all the subjects involved. There are also new research about the resilience in this complex system in Brazil, as the excellent example of *Resiliência constitucional: compromisso maximizador, consensualismo politico e desenvolvimento gradual* [Constitutional Resilience: maximizer compromise, political consensualismo and gradual development] (Drimoulis et al, 2013). Just connected with the legal interpretation limits designing the rules of the game for improve democracy in Brazil is *Direito e cooperação nos jogos institucionais* [Law and cooperation in institutional games] (López, 2014). And developed from Jenna Bednar´s design of resilience, there is an application of her research in Brazilian cases in *Conjectura sistêmica na federação resiliente* [Systemic conjecture in the resilient Federation] (Pugliesi, Del Monaco, López, 2014).

None of these complex scenes could be pictured and detailed studied with the maintenance of the modern conception of methodology (always searching for criteria that would lead the interpretation to a "right answer") and the maintenance of the Kantian model of subject (always presupposing a transcendental subject). For what comes next, such as the researches mentioned above, is indispensable a new comprehension of *methodology* and its limits: exactly the singularity of the subject, with his own ever-changing semantic set, will *know* things (and

legal norms) in his own way, with his own possibilities. All the criteria (self and hetero references) are actually inside the subject, are also part of his semantic set; and will be used to plan the subject´s *moves* in the game. It demonstrates a clearly change of structure in legal interpretation – from outside (legal text, society, jusnaturalism etc) to inside the subject. Finally, leading law to the most recent theory of science.

Conclusion

Since the structure of legal interpretation suffered a deep change with post-linguistic-pragmatic turn, it allows us to say that there was a real rupture in the way we know and applied Law in time. All the criteria (self and hetero references) are now *inside* the subject, in his semantic set. And the application of legal norms happens in a discursively structured context, in which communication could be somewhere between *minimal* and *maximal*. Also his actions could be analyzed in time, included by him, that is always learning with them. Therefore, the singularities of subjects are considered, and so, the impossibility of a methodology for applying legal norms. Instead, we have a more complex scene involving the interaction of all subjects, such as in a game, where Law play the role of (trying) to draw limits in this resilient field. This new structure surely overcome Kuhn´s dichotomy and could be considered a real paradigmatic point in Law.

References

Alexy, Robert. 2008. *Teoria dos Direitos Fundamentais.* [trad.] Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

Ávila, Humberto. 2009. *Teoria dos Princípios - da definição à aplicação dos princípios jurídicos.* 10ª. São Paulo : Malheiros, 2009.

Axelrod, Robert. 2010. *A evolução da cooperação.* [trad.] Jusella Santos. São Paulo : Leopardo Editora, 2010.

Barroso, Luís Roberto. 2011. *Curso de Direito Constitucional Contemporâneo.* São Paulo : Saraiva, 2011.

—. 2009. Neoconstitucionalismo e o constitucionalização do Direito - o triunfo tardio do direito constitucional no Brasil . [A. do livro] Regina Quaresma, Maria Lúcia de Paula Oliveira e Farlei Martins Riccio de Oliveira. *Neoconstitucionalismo.* Rio de Janeiro : Forense, 2009, p. 54.

Bednar, Jenna. 2009. *The Robust Federation - principles of design.* Cambridge : Cambridge University Press, 2009.

Bertalanffy, Ludwig von. 2009. *Teoria Geral dos Sistemas - Fundamentos, desenvolvimento e aplicações.* Petrópolis : Editora Vozes, 2009.

Bonavides, Paulo. 2008. Reflexões sobre nação, Estado social e soberania. *Estudos Avançados.* 2008, p. 201.

Brams, Steven J. 2004. *Game Theory and Politics.* Mineola, Nova Iorque : Dover Publications, 2004.

Conjectura Sistêmica na Federação Resiliente. **Pugliesi, Del Monaco, López.** ABRASD, 2014. [*forthcoming*]

Complex dynamical systems and the social sciences. **Abraham, Ralph, Friedman, Dan e Viotti, Paul. 2007.** 2007.

Compliance to Law and Effectiveness of the Rule of Law in Brazil. **Cunha, Luciana Gross and Oliveira, Fabiana Luci and Ramos, Luciana de Oliveira.** (December 2, 2013). Direito GV Research Paper Series n. 78. Available at SSRN: http://ssrn.com/abstract=2362260 or http://dx.doi.org/10.2139/ssrn.2362260

CONPEDI. 2012. Available at: http://150.162.138.7/authors/report?order=documents,entries,name.

Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism. **Tsebelis, George. 1995.** 1995, British Journal of Political Science, pp. 289-325.

Direito e cooperação nos jogos institucionais. **López, Nuria**. Revista Argumentum (UNIMAR), 2014. [*forthcoming*]

Drimoulis, Dimitri [et al.]. 2013. *Resiliência constitucional [livro eletrônico]: compromisso maximizador, consensualismo político e desenvolvimento gradual.* 1. ed. – São Paulo: Direito DV, 2013.– (Série pesquisa direito GV) 2 MB ; PDF.

Dupuy, Jean-Pierre. 2001. *Introdução às Ciências Sociais - Lógica dos Fenómenos Colectivos.* Lisboa : Editora Piaget, 2001.

Dworkin, Ronald. 1978. *Taking rights seriously.* Cambridge, Massachusetts : Harvard University, 1978.

Feyerabend, Paul. 2011. *Contra o método.* São Paulo : UNESP, 2011.

Fonseca, Márcio Alves da. 2011. *Michel Foucault e a Constituição do Sujeito.* São Paulo : EDUC - PUC/SP, 2011.

Free will and the bounds of the self. **Knobe, Joshua e Nichols, Shaun.** Oxford : s.n., Oxford Handbook of free will.

Gilbert, Margaret. 1989. *On Social Facts.* Princeton : Princeton University Press, 1989.

—. 2000. *Sociality and responsibilty: new essays in plural subject theory.* Maryland : Rowman & Littlefield Publishers, 2000.

Heidegger, Martin 2012. *Ser e Tempo.* [trad.] Fausto Castilho. Campinas, SP; Petrópolis, RJ : Editora UNICAMP; Editora Vozes, 2012.

Hesse, Konrad. 1991. *A força normativa da Constituição.* Porto Alegre : Sergio Antônio Fabris Editor, 1991.

Hutchings, Vincent L. 2003. *Public Opinion and Democratic Accountability: How Citizens Learn About Politics.* Princeton : Princeton University Press, 2003.

Kant, Immanuel. 2007. *Crítica da razão pura.* São Paulo : Ícone, 2007.

Kelsen, Hans. 1998. *A Teoria Pura do Direito.* [trad.] João Baptista Machado. 6ª. São Paulo : Martins Fontes, 1998.

Knobe, Joshua e Nichols, Shaun. 2008. *Experimental Philosophy.* 2008.

Kuhn, Thomas S. 1996. *The structure of scientific revolutions.* Chicago/ Londres : University of Chicago, 1996.

Larenz, Karl. 2010. *Metodología de la ciencia del derecho.* Barcelona : Ariel Derecho, 2010.

Losano, Mario G. 2010. *Sistema e estrutura no direito.* [trad.] Luca Lamberti. São Paulo : WMF Martins Fontes, 2010. Vols. 2 - O século XX.

Luhmann, Niklas. 2009. *Introdução à teoria dos sistemas.* Petrópolis, RJ : Vozes, 2009.

Magalhães, Juliana Neuenschwander. 2002. Interpretando o direito como um paradoxo: observações sobre o giro hermenêutico da ciência jurídica. [A. do livro] Carlos E. de Abreu Boucault e José Rodrigo Rodriguez. *Hermenêutica plural .* São Paulo : Martins Fontes, 2002, pp. 127-157.

Manocchi, Liliam Ferreira. 2006. *Paradigmas em Kuhn: contexto, imagem e ação.* São Paulo : Dissertação de Mestrado em Filosofia apresentada à PUC/SP, 2006.

Miller, Seumas. 2001. *Social Action: a Teleological Account.* Nova York : Cambridge University Press, 2001.

Moigne, Jean-Louis Le. 2006. *La Théorie du Système Général - Théorie de la Modélisation.* s.l. : Réseau IC , 2006.

Morin, Edgar. 2010. *Ciência com consciência.* [trad.] Maria D. Alexandre e Maria Alice Sampaio Dória. 13ª. Rio de Janeiro : Bertrand Brasil, 2010.

Nadelhoffer, Thomas. Folk intuitions, slippery slopes, and necessary fictions: an essay on Saul Smilansky´s free will ilusionism. [A. do livro] Peter A. French e Howard K. Wettstein. *Philosophy and the empirical.* s.l. : Blackwell Pub. Inc.

Neves, Marcelo. 2008. *Entre Têmis e Leviatã: uma relação difícil.* São Paulo : Martins Fontes, 2008.

__. 2013. *Entre Hidra e Hércules - Princípios e Regras Constitucionais.* São Paulo: Martins Fontes, 2013.

Oliveira, Manfredo A. de. 2006. *Reviravolta lingüistico pragmática na filosofia contemporânea.* São Paulo : Loyola, 2006.

Piovesan, Flávia. 2002. *Direitos humanos e o direito constitucional internacional.* São Paulo : Max Limonad, 2002.

Pugliesi, Márcio. 2009. *Teoria do direito.* 2ª. São Paulo : Saraiva, 2009.

___. 2014. Filosofia Geral e do Direito. [*forthcoming*].

Reale, Miguel. 1994. *Fontes e modelos do direito: para um novo paradigma hermenêutico.* São Paulo : Saraiva, 1994.

Santos, Boaventura de Sousa. 2008. *Para um novo senso comum: a ciência, o direito e a política na transição paradigmática.* São Paulo : Cortez, 2008.

Schuartz, Luis Fernando. 2005. *Norma, contingência e racionalidade - estudos preparatórios para uma Teoria da Decisão Jurídica.* Rio de Janeiro : Renovar, 2005.

Silva, Luís Virgílio Afonso da. 2007. *Interpretação Constitucional.* São Paulo : Malheiros, 2007.

Streck, Lenio Luiz. 2004. *Jurisdição Constitucional e Hermenêutica* . Rio de Janeiro : Forense, 2004.

Touraine, Alain. 2006. *Un nuevo paradigma: para comprender el mundo de hoy.* [trad.] Agustín López Tobaias. Buenos Aires : Paidos, 2006.

Tuomela, Raimo. 2007. *The Philosophy of Sociality:* The Shared Point of View. Oxford : Oxford University Press, 2007.

On fallacies and fundamentals of legal argumentation

André Ferreira Leite de Paula

Abstract: In this paper I will refer some aspects of contemporary Fallacy Theory which, so far as I can see, weren't object of investigations within the framework of Legal Argumentation Theory until now. My considerations are related not directly to specific fallacies, but to the idea of fallacies at all and to contributions that can be made to the fundaments of Legal Argumentation from the perspective of new approaches on fallacies which were developed within Informal Logic in the last decades.

Keywords: Fallacy, Legal Argumentation, Formal Logic

Legal writings on fallacies proceed usually in the same way as most books on Formal Logic: fallacies are presented, exemplified and classified in formal and informal ones. Behind this standard treatment there is no theory of fallacies at all, but just a resumption of Aristotle's fallacies list with some contemporary additions and a few other classifications. Curiously there is normally in logic books no thematic connection between the fallacy approach – which is normally treated in an independent chapter – and the other chapters of the same book, where profound analysis in Formal Logic are made. Fallacy studies don't seem to have benefited from the developments of formal logic in the last centuries. Instead, they survived through more than two millenniums – since Aristotle's Sophistical Refutations and throughout Whately, Mill, Morgan, Nicole and others – with approximately the same treatment. This has begun to change only in the second half of the twentieth century with Hamblin's book Fallacies (1970), which has inspired many other Logicians to take part on the new debate.[1] After this revival of Fallacy

[1] Hamblin, Fallacies, 1970. Other representative works are: Walton, A Pragmatic Theory of Fallacy, 1995 and Hansen/Pinto, Falalcies, 1995.

Theory, there has been a reception of the debate within Legal Argumentation Theory as well.[2] I would like to make a contribution about the fundamental relation between fallacies in general and Legal Argumentation Theory.

First of all I would like to clarify the reason why studies on Fallacies should be interesting to Jurists at all. Firstly, because Jurists work with arguments. According to the most traditional definition of fallacies, fallacies are arguments that seem to be valid, but are not so.[3] Therewith we have a first sign of relevance, because one of the most important tasks of Legal Argumentation Theories is the development of normative standards of rational argumentation.[4]

Secondly, fallacies are in fact used in legal argumentations as argumentative tactics, either in a subtle way to escape from difficult questions or explicitly as objections against argumentations. Arguments ad hominem, ad absurdum etc. are ubiquitous in legal discussions.[5]

Thirdly, a contemporary comprehension of Logic and fallacies is required to evaluate the justification of judicial decisions. Because of the direct relation between fallacies and Logic, this can be specially relevant in legal systems like the German system, where judgments can be set aside in virtue of violation of reasoning principles (Denkgesetze).[6]

Fourthly – and more important for my purposes – studies on fallacies give rise to think about the fundaments of rational argumentation. Fallacies are complex arguments. In order to evaluate them we need to consider many disciplines, that complete each other, but that are as well partially antithetical. These disciplines are at least: Formal Logic, Rhetoric and Argumentation Theory. There are many relations between these three disciplines. A first approximation could be: Formal Logic

---

[2] See for example contributions from the workshop on Legal Argumentation Theory at the IVR World Congress for Philosophy of Law and Social Philosophy 2011 published in: Dahlman/Feteris, Legal Argumentation Theory: Cross-Disciplinary Perspectives, 2013.

[3] Hamblin, Fallacies, p. 12.

[4] Neumann, Juristische Argumentationslehre, p. 11.

[5] See for example Bustamante, On the argumentum ad absurdum in statutory interpretation: its uses and normative significance and Dahlmann/Reidhav/Wahlberg, Fallacies in ad hominem arguments, both articles in: Dahlman/Feteris, Legal Argumentation Theory: Cross-Disciplinary Perspectives, 2013, pp. 21-43 and pp. 57-70.

[6] Precedent BGHSt 70, 72; German doctrine: Klug, Die Verletzung von Denkgesetzen als Revisionsgrund, p. 363-384. Grave/Mühle, Denkgesetze und Erfahrungssätze als Prüfungsmaßstab im Revisionsverfahren, pp. 274-279.

has to do exclusively with the form of arguments; it evaluates the correctness of argumentations according to the principle of truth transfer (that means, a conclusion is logic correct if and only if it maintains the truth of the premises according to some inference rules). Although each argument has a logical form, or better, many logical forms,[7] we know that the linguistic way how an argument is posed influences its ableness to convince. That's the domain of Rhetoric. Rhetoric concentrates its efforts on the real situation where argumentation occurs, namely between concrete speakers, about a concrete subject and, in Law, within a institutional framework – the judicial process. In one word, Rhetoric is "the practice and theory of persuasiveness in discourses".[8] Theory of Legal Argumentation concerns persuasiveness as well, although a material, objective correctness of argumentations. It is true, that an ideal argumentation does not exist; that every argumentation about practical subjects is a concrete one, with all its "imperfections" (lack of time and of information, stylistic rhetorical figures, emotional appeal, etc.). But it is also true that there is a categorical difference between argumentation approaches on fallacies and rhetorical ones. This difference can be approximately described on the basis of Stuart Mills differentiation between "intellectual sources" (conscious and reflected factors) and "moral sources" (psychological factors) of erroneous opinions.[9] Recently there has been more common to refer to the perspective of the participant or internal perspective – which is the perspective of Legal Argumentation Theories – and to the perspective of the observer or external perspective – which is, as I mean, the perspective of most rhetorical considerations.[10] These differences can be illustrated as follows: let us imagine a situation in which one speaker wants to convince the other one about the accordance of his position to the legal system. From a rhetorical point of view this is a concrete situation where the speaker has to formulate his arguments in a persuasive form in order to get approval of his position. Legal Argumentation Theory regards the same situation from a material point of view and asks materially *what arguments* have to be brought

[7] There is not only one Formal Logic, but a great multiplicity of formal logical systems according to what is considered form and what is considered content of a sentence.

[8] Haft, Juristische Rhetorik, p. 17.

[9] Mill, System of Logic, p. 737.

[10] There are a lot of opposite concepts that, applied to the legal argumentation Theory, designate approximately the same idea: context of discovery vs. context of justification, perspective of the observer vs. perspective of the participant. In the German context: Herstellung vs. Darstellung der Entscheidung, Rechtsfindung vs. Rechtfertigung.

in order to justify a claim. Argumentation Theory has more to do – but not exclusively – with the semantics of the discourse, whereas Rhetoric works especially on a pragmatic level of discourse.

Discussions about some interesting fallacies like petitio principii, ignoratio elenchi and straw man have themselves a value for a critical evaluation of argumentations. Their value goes even beyond the more practical utility of taking fallacy patterns into account just in order to avoid them and to identify them when committed by others. If we leave approaches on specific fallacies for a while and start to ask more general questions about fallacies, we do not do anymore precisely Fallacy Theory, but more generally Argumentation Theory. If we add material components extracted from the legal system and justice considerations, we do Legal Argumentation Theory.

What can studies on fallacies say us about rational argumentation? They provide instruments to analyze syntactic, semantic and pragmatic aspects of the discourse in order to maintain objectivity (that is, in order to maintain an argumentation *ad rem* - German [*Sachlichkeit*]). Which means in Law, an argumentation with orientation to the legal system. For this purpose an honest collision of contradictory arguments is necessary to permit argumentative innovation and progress, which can be achieved through proscription of ad hominem, straw man and petitio principii fallacies.

If it is permitted in legal practical argumentation to use strategies like the straw man fallacy in order not to have to confront strong arguments, then we would fall into a legal discourse, where it is permitted to produce plausibility through mere linguistic strategies. The consequence would be a detachment of the legal discourse from the semantics of positive law. The participants would be permitted to decide a case according to the most persuasive argument, even if it is not sustainable in regard to the positive law. That seems to be the consequence of some rhetorical approaches in the last decades, that defend the use of rhetorical figures to fabricate plausibility and persuasiveness instead of orientation to positive Law. One example of a rhetorical approach in this sense is v. Schlieffen's Legal Rhetoric,[11] that pretends to provide the jurist with a "competence without theory", starting from the premise that the aspiration for justice leads us to another dimension, that could not be achieved with rational means.

[11] Rhetorisches Seismogramm – eine neue Methode in der Rechtswissenschaft, pp. 231-237 and Recht rhetorisch gesehen, pp. 1-7.

So it seems reasonable to require from the participants in legal discourses the avoidance of fallacies, even though this is not without problems in practice. To elucidate this, we can take a look at specific problems of Fallacy Theory. According to the traditional treatment of fallacy – as already stated – a fallacious argument is one that seems to be valid but is not so.[12] Fallacies are normally classified in formal and informal. Formal fallacies are wrong conclusions that violate the rules of Formal Logic. Informal fallacies are the ones, that violate other principles of correct reasoning.[13] So we find in the most logic books traditionally a list of fallacies more of less as the following:

Formal fallacies:

(1) affirming the consequent: conversion of a non convertible consequence: "if Bacon wrote Hamlet, then Bacon was a great writer. Bacon was a great writer. Therefore Bacon wrote Hamlet"[14]

(2) equivocation: syllogism with four terms: "Since he said he would go to Paris if he won a prize in the sweepstakes, I infer that he did win a prize, for he has gone to Paris"[15]

(3) other violations of syllogistic rules[16]

Informal fallacies:

(1) argument ad hominem:

- *abusive ad hominem*: direct personal attack; doubting the expertise, intelligence or good faith of the other party;[17]

- *circumstantial ad hominem*: indirect personal attack; casting suspicion on the other party's moves;[18]

- *tu quoque ad hominem*: pointing out an inconsistency between the other party's ideas and her personal attitude: a sportsman, when accused of barbarity in sacrificing unoffending hares or trout to his amusement replies: "why do you feed on the flesh of animals?"[19]

(2) *ad verecundiam*: appeal to authority

(3) complex question: "have you stopped beating your wife?"

- *petitio principii:* begging the question. "Every effect has a cause, otherwise it wouldn't be an effect"; "this doctrine is an heresy; therefore

[12] Hamblin, Fallacies, p. 12.

[13] Tammelo/Schreiner, Grundzüge und Grundverfahren der Rechtslogik, p. 115.

[14] Hamblin, Fallacies, p. 35.

[15] From Walton, A Pragmatic Theory of Fallacy, p. 70.

[16] See for a more detailed account: Copi, Einführung in die Logik, pp. 110 ff.

[17] Walton, A Pragmatic Theory of Fallacy, p. 217.

[18] Idem.

[19] Example from Whately, Elements of Logic, p. 243.

it has to be abandoned"[20]

(5) straw man: misrepresentation of the opponent's position in order to refute it more easily. Example: Hans is committed to a policy that protects the environment. Mark replies: "the extreme high costs that would be necessary to make of our planet a paradise on Earth would be catastrophic for industrialized countries like the US"[21]

(6) *ignoratio elenchi*: misconception of refutation, irrelevant argumentation.

After this short presentation of the most common fallacies it is clear that every study on fallacies has to take account on a great number of different issues: Fallacies are not just wrong conclusions; they can be also questions (complex question) or just irrelevant arguments (ignoratio elenchi). That issues are far beyond the jurisdiction of Formal Logic and include pragmatic considerations. The fact that most logic treatises on fallacies had not given a specific theoretical account of fallacies and the fact that all this kind of questions are treated under the single title "fallacies" has led Hintikka to refer to this problematic as the "fallacy of fallacies". As he says, „they [fallacies] are not mistaken inferences, not because they are not mistaken, but because they need not be inferences, not even purported ones".[22] The current state of the art in Informal Logic like presents us a mitigation of the traditional concept of fallacy.

That mitigation was a necessary consequence of deeper investigations on fallacies since Hamblins pioneer work, where the pragmatic dimension of fallacies became evident and therewith the insufficiency of Formal Logic. The fact that fallacies are not just violations of the rules of Formal Logic is one of the reasons why most treatises on Logic have not succeeded to make a more accurate connection between profound investigations on Formal Logic and their treatment of fallacies. Especially concerning informal fallacies – but also concerning formal fallacies – it is not correct to say simply that fallacies are always wrong arguments, as if fallacies could be detected by means of the identification of a formal structure. Fallacious arguments have no formal structure whose occurrence could disprove them once and for all. On the other hand, if we see most examples of fallacies given in most logic treatises it would be clear that they are undoubtedly wrong arguments. However, that is an effect of the particular kind of selection of examples: fallacy examples are spe-

[20] Walton/Woods, petitio principii, p. 121.

[21] Modified example from Walton, A Pragmatic Theory of Fallacy, p. 57.

[22] Hintikka, The fallacy of fallacies, p. 211.

cially simple and suitable for didactic purposes. The application of this general fallacy patterns to real contexts can pose significant difficulties. As Hamblin states, "if we try to find better examples we meet another kind of difficulty, in that what is non-trivial may be controversial".[23] Stuart Mill for example regards Rousseau's and Hobbes' social contract doctrines as an hopeless circular argumentations that must be wrong because of their circularity – and already for this reason.[24] Here is not the place to discuss the correctness of the social contract theories – that would require long considerations on philosophy of law and state. My considerations about the fundamental idea of fallacy and correct argumentation could begin at this point with the question: could a so complex and profound theory like the social contract be refuted by simple formal logical considerations like the identification of a petitio principii? Recent discussions on Informal Logic have shown how difficult it is to identify a fallacy unequivocally in real contexts – that is, in contexts beyond the simple examples of Formal Logic books.

The difficulty of making a fallacy objection against an argumentation in a real context is that fallacies cannot be identified a priori, that is, as if they were an evidence (in Kants language I would say that they are not "intellectual intuitions" [*intellektuelle Anschauungen*]). In order to make logical objections like the commitment of a fallacy against a complex argumentation, it is necessary to discuss first how the criticized argumentation has to be formalized. This task cannot be performed without a material argumentation – that is an argumentation that is direct related to the subject in question and not to formal structures in a metalinguistic way –, so that a valid "logical" objection of commitment of a fallacy against an argumentation can only be a *result* of a previous material discussion, which fixes the exact meaning of each sentence of the criticized argumentation and its logical relations with each other. Thus, a logical objection against an argumentation (which means here a objection based on the fallaciousness of the criticized argumentation) cannot replace a material argumentation on the criticized subject. In other words, *fallacy objections against an argumentation are only as strong as the material argumentation that supports them.* In this way, our conception of *fallacy use within discourses* (which means the performance of fallacy objections by discourse participants) receives a nominalistic feature,

[23] Hamblin, Fallacies, p. 15.

[24] Rosen, The Philosophy of Error and Liberty of Thought: J.S. Mill on Logical Fallacies, pp. 121-147.

which makes it close to Johnsons definition: "a fallacy is an argument that violates one of the criteria/standards of good argument and that occurs with sufficient frequency in discourse to warrant being baptized".[25] Which means for our purposes: the use of fallacy objections within a discourse does not make the argumentation stronger than it already materially was; it adds just a *designation* for the committed error, which means from the perspective of the participant: "your argumentation is wrong due to the material reasons X and Y and this mistake has traditionally the name 'fallacy F' ".

Why is this analysis necessary? Because it is common in practical and in legal argumentations in courts to pretend to refute an argumentation or judicial justification by saying about it that it commits a fallacy and letting the material justification for that objection in the background.

An example from a judicial decision could clear this point. The German Court Bundesgerichtshof (BGH) annulled a sentence of a lower court because it contains according to the BGH an argumentative circularity (petitio principii).[26] In that case, the lower tribunal has – also according to BGH – deduced the witness' credibility from the testimony of the same witness. So BGH identified a circulus vitiosus between the witness' credibility and the truth or plausibility of his testimony.

Although I find the BGH decision correct, I would have reservations about the use of the notion of fallacy in it. BGH relies its objection against the lower tribunal's decision on the very abstract logic/pragmatic notion of the petitio principii. However, there is no *logical* principle according to which one could not deduce the plausibility of a testimony from the testimony itself – Logic is related to the form and not to the content of the discourse. The reasons why a court should require more evidences in order to consider a testimony plausible instead of relying exclusively on the content of the same testimony are *material* ones. It would be reasonable to formulate an argumentation standard according to which there is forbidden to deduce the plausibility of a testimony from the content of the same testimony, but that would be a *material legal argumentation standard*, that would have to obey other material rules than Formal Logic principles. It should be formulated based on the legal system and for reasons of justice and adequateness of the concrete case solution. Material legal argumentation standards have priority over

[25] Johnson, The blaze of her Splendors: Suggestions about Revitalizing Fallacy Theory, p. 116.

[26] 2 StR 438/55, 27th January 1956 – Database Jurion, 1956, 10770.

logical principles.[27]

Decisions on material grounds with recourse to formal fallacy patterns tend in my view to a rhetorical use of the notion of fallacies – rhetorical in a bad sense. A speaker in legal discourse achieves with this appeal to logic an efficient rhetorical effect in his favor: Accusing the opponent of committing a fallacy, he uses the persuasive power of Logic to sustain his position and to destroy the opposite one. So he can give his argumentation an appearance of logical necessity. Furthermore, an appeal to logic can be an easy way to escape from complex or inconvenient questions that have to be discussed. Fallacies like straw man or ignoratio elenchi are – among other rhetorical strategies using the power of logical necessity[28] – specially suitable for this purpose.

Because of the possibility of a rhetorical use of fallacies it seems convenient to formulate a standard of rational argumentation that regulates the use of logical categories used as objections against an argumentation. Such a standard could be formulated as the necessity of *material justification of a fallacy objection*. This standard could be understood as a normative rule for the use of arguments based on fallacies in legal contexts. Such a rule would be similar to Alexy's requirement of saturation of arguments (Erfordernis der Sättigung[29]). According to him, the use of traditional legal interpretation methods (e.g. grammatical, systematic, historic, teleological) has to be regulated in order to avoid an arbitrary choice of one method in detriment of others; an arbitrary choice would

[27] Also because there is necessary to make a choice between several logic systems in order to apply them in legal practice. The criterion for this choice have to be done in accordance to the legal system. See Kalinowski, De la specificité de la logique juridique, p. 20: „Il reste néanmoins caractéristique de la pensée juridique ratiocinante qu'elle fait son choix de types et derègles logiques de raisonnement selon les besoins créés par les activités du juriste en tant que tel" and also Neumann, Argumentationslehre, p. 33: „Denn soweit eine Entscheidung zwischen unterschiedlichen Kalkülen erforderlich ist, legen nicht die Regeln des (eines) Kalküls die Standards der Argumentation fest; vielmehr entscheiden diese über die Angemessenheit des logischen Kalküls. Das aber bedeutet: Die Standards der Argumentation sind vorrangig gegenüber den Theoremen eines logischen Kalküls."

[28] See for example the use in legal argumentation of expressions like "logically necessary", "on grounds of logic" (in: Simon, Juristische Logik und die richterliche Tätigkeit), or pseudo-logical arguments like the "logical impossibility" of repatriating of someone, who has never been expatriated, as well as the contestation of an invalid legal transaction ("die Anfechtung eines nichtigen Rechtsgeschäfts" – Neumann, Juristische Logik, p. 311).

[29] Alexy, Theorie der juristischen Argumentation, p. 293.

lead naturally to an arbitrary decision praxis. Similarly, it seems reasonable to require a material saturation of fallacy objections in order to avoid abusive rhetorical effects based on logical appearance.

At this point it is clear that Fallacy Theory can provide us with contributions to the fundaments of legal argumentation. It shows that argumentations exclusively or especially focused on methods – and fallacy patterns can be seen as methods in a broad sense – are easily susceptible to subtle arbitrariness.

To summarize my topics:

In order to decide cases in accordance to the legal system (rule of Law) it is required to maintain a material argumentation, which can be carried out only by avoidance of fallacies. Rhetorical approaches that pretend to achieve plausibility through mere linguistic and/or fallacious methods lead to a detachment of the judicial decision from positive Law.

1) The state of the Art in Fallacy Theory shows that fallacies are just prima facie wrong arguments. Fallacious arguments have no formal structure whose identification could disprove them once and for all. The fallaciousness of an argument can be demonstrated only by means of a material argumentation (that is an argumentation that is direct related to the subject in question and is not metalinguistic or based on abstract methods like formal logical structures). Fallacy objections are – from the point of view of the participant – just nominalistic designations for invalid argumentations whose invalidity was already stated by other means.

2) Logic principles and general argumentation standards have to pass the test of compatibility to the legal system and to be selected in accordance to it – they have to be transformed into *material legal argumentation standards* according to principles of justice and adequateness of a concrete case solution. The direct use of abstract fallacy patterns as an argument in the legal discourse tends to be just apparently logical – also rhetorical in a bed sense.

3) Therefore it seems appropriate to require from legal discourse participants a *material justification of fallacy objections*. This standard could be understood as a normative rule for the use of arguments in legal contexts. Such a rule would be similar to Alexy's requirement of saturation of arguments based on legal interpretation methods.

References

Alexy, Robert: Theorie der Juristischen Argumentation, Frankfurt am Main, 1983.

Aristoteles: Sophistische Widerlegungen, Übersetzung von Eugen Rolfes, 2nd edition, Hamburg, 1922.

Dahlman, Christian/Feteris, Eveline: Legal Argumentation Theory: Cross-Disciplinary Perspectives, Dordrecht, 2013.

Copi, Irving M.: Einführung in die Logik, Übersetzung von Jan P. Beckmann und Thomas Keutner, Munique, 1998.

Grave, Helmut/Mühle, Hans-Jochen: Denkgesetze und Erfahrungssätze als Prüfungsmaßstab im Revisionsverfahren, in: Monatsschrift für deutsches Recht, 1975, pp. 274-279.

Haft, Frtjof: Juristische Rhetorik, Freiburg/München, 2007.

Hamblin, Charles Leonard: Fallacies, London, 1970.

Hansen, Hans V./Pinto, Robert C.: Fallacies. Contemporary Readings, Pennsylvania University Park, 1995.

Hintikka, Jaakko: The fallacy of fallacies, in: Argumentation, vol. 1, Dortrecht, 1987, pp. 211-238.

Johnson, Ralph H.: The blaze of her Splendors: Suggestions about Revitalizing Fallacy Theory, in: Fallacies. Classical and contemporary Readings, edited by Hansen, Hans V. and Pinto, Robert C., University Park (Pennsylvania), 1995, pp. 107-119.

Kalinowski, Georges: De la specificité de la logique juridique, in: Archives de Philosophie du Droit, vol. 11, 1966, pp. 7-23.

Klug, Ulrich: Die Verletzung von Denkgesetzen als Revisionsgrund, in: Festschrift für Philipp Möhring zum 65. Geburtstag, München und Berlin, 1965, pp. 363-384.

Mill, John Stuart: A System of Logic Ratiocinative and Inductive, Toronto, 1974, pp. 733-830.

Neumann, Ulfrid: Juristische Argumentationslehre, Darmstadt, 1986.

Neumann, Ulfrid: Juristische Logik, in: Kaufmann, Arthur/Hassemer, Winfried/Neumann, Ulfrid, Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart, 8th edition, Heidelberg/München/Landsberg/Frechen/Hamburg, 2011.

Neumann, Ulfrid: Theorie der Juristischen Argumentation, in: Brugger, Winfried / Neumann, Ulfrid / Kirste, Stephan, Rechtsphilosophie im 21. Jahrhundert, Frankfurt am Main, 2008.

Perelman, Chaim / L. Olbrechts-Tyteca: Traité de l'Argumentation. La nouvelle rhétorique, 2nd edition, Brussels, 1970.

Rosen, Frederick: The Philosophy of Error and Liberty of Thought: J.S. Mill on Logical Fallacies, in: Informal Logic, Vol. 26, Nr. 2, London, 2006, pp. 121-147.

v. Schlieffen, Katharina Gräfin: Recht rhetorisch gesehen, in: Juristische Arbeitsblätter, 2013, vol. 1, pp. 1-7.

Simon, Dieter: Juristische Logik und die richterliche Tätigkeit, in: Zeitschrift für vergleichende Rechtswissenschaft, vol. 81, Heidelberg, 1982, pp. 63-83.

Sobota, Katharina: Rhetorisches Seismogramm – eine neue Methode in der Rechtswissenschaft, in: Juristenzeitung, 1992, pp. 231-237.

Tammelo, Ilmar / Schreiner/Helmut: Grundzüge und Grundverfahren der Rechtslogik, vol. 2, München, 1977.

Walton; Douglas N.: A Pragmatic Theory of Fallacy, Tuscaloosa/London, 1995.

Walton, Douglas/Woods, John: Petitio Principii, in: Synthese, vol. 31, Dordrecht, 1975, pp. 107-127.

Whately, Richard: Elements of Logic. Comprising the substance of the article in the Encyclopaedia Metropolitana with additions, 6th edition, London, 1836.

Semantic constructions and Law

Lourenço Torres[1]

Abstract: The plan of this study is to debate about the essential "limit" in approaching the legal phenomenon. It is the "limit" of Law "construction" structural techniques from its semantic aspect. More than been affiliated to the belief that Law is conceptually limited, this study inquires the possible extension of legal concepts that could or not be limited by Language. Goes through some linguistic meanings about Semantic science. From Hart's theory it concludes that the linking between the Language and Law has an unremovable indetermination condition in the way that it understands itself as a limitation of human being condition and, therefore, to the legislator's work. Ross dissects the subject of validity and demonstrates that concepts of Law vary according to its contingencies. From Hart's and Ross' compared thesis concludes that Language and Law together are an unexpected category.

Keywords: Law History; Concept of Justice; Semantics.

1. Introduction - Structural possibilities and techniques of construction of Law.

In this study my purpose was to bring for debate one kind of approach of essential the limit to the legal phenomenon. It is the "limit" of the structural possibilities and techniques of construction of Law from its semantic aspect. More than being affiliated to the belief Law is limit-

[1] José Lourenço Torres Neto is a lawyer and a Law teacher at Faculdade Joaquim Nabuco – Recife/PE/Brazil.. Has Master degree in Theory, Sociology and Philosophy of Law by UFPE (Brazil) coached by Prof. Dr. Torquato Castro Júnior; is Bachelor in Law and Procedural Law specialist by UNINASSAU campus Recife/PE (Brazil); is Researcher Member on the Rhetoric of History of Brazilian Legal Ideas researching group of UFPE (Brazil) coordinated by Prof. Dr. João Maurício Adeodato. Email: lourencotorres.advogado@yahoo.com.br. Complete curriculum at: http://lattes.cnpq.br/7901606887149048.

ed conceptually, this study inquires the extension of the possibility that legal concepts could, or not, to be limited for language. It studies in the origins of the philosophy and the concepts, the "liberating paradox of language" and quotes the main theories that had being applied them to the concept of Law.

As one of my theoretical marks, my study initiates for detaching the concept of "being deficient" in the book *The Man, his Nature and his Place in the World*, where Arnold Gehlen (1904 - 1976) considers as an essential quality of man the absence of adaptation to one determined environment. He arrives to such conclusion in face of to the high specialization and instinctive security of other animals, and because man's lack of specialization, immaturity and poverty of instincts he configures him biologically as a "deficient being". According to Gehlen, to survive man had and has to compensate this lack of specialization with a proper action, that he calls as "a cultural world", where appears their higher cultural and spiritual accomplishments.

From this notion of man as being needed and, therefore, one "creature in-risk", Gehlen elaborates an imponent theory of culture as an anthropological concept: that man is "a cultural being by its very nature" because he is "not finished" in his relationship with the environment. Therefore, the necessity of the human being for language. He is incapable to perceive any truths regarding the world independently of a linguistic context, which is his only artificial reality capable to deal. Then, language and everything called "intelligence" can be seen as one *plus* to the man's lack of adaptation to the material world[2].

Thus, language is too valuable to the human being and, as Wittgenstein (1889 - 1951) said, perhaps the language is "one of these things that for being more familiar are the most difficult to understand"[3]. That's why it is so studied as system in Linguistics. Is culture and language's freedom and amplitude what propitiates to the human being concomitantly, unreliability or instability? The linguistics studies are attempts to establish "limits" to the language phenomenon? Are systems, as the legal system, also "closed" in this search for delimiting the "human environment"? Semantic and its constructions "would break" these metalimits one more time?

---

[2] ADEODATO, João Maurício. *Filosofia do Direito*: uma crítica à verdade na ética e na ciência. São Paulo: Saraiva, 1996, p. 198.

[3] WITTGENSTEIN, Ludwig. *Investigações filosóficas*. 6. ed. Petrópolis: Vozes, 2009, §89.

To understand, in this context, the application of Semantic constructions of words, concepts or theories, it's necessary to understand Semantic itself inside Linguistic knowledge and apply it, then, to other areas of the knowledge, as Law. For this, a little of (its) history must help.

2. Law *Validity* as a legal Semantic concept.

It seems that the Semantic theory made its first appearance in Philosophy through Parmenides' monism (475 B.C.) when he stated that "only what was true could be expressed". But Semantic theory itself started to have special importance among the Sophists, who differently from their predecessors' philosophers, the "pre-Socratics", had more interest in man (*anthopos*) than in *cosmos*. This led them to study language. Protagoras (445 B.C.) can be considered the first grammarian between them, and in his syntactic considerations used Semantics.

Today, the term *Semantics* in Bréal's (1832 – 1915) doctrine, finds its etymological justification in the Greek verb *semainen*, and was introduced by Aristotle, to indicate the specific function of the linguistic sign, to "mean" or "assigns" something. In truth, Aristotle is the starting point of two great lines of development of the philosophical quarrel on Language, that is, the relation between language and thought and the communicational function of language. Semantics would be, therefore, and returning to Bréal's meaning, the part of Linguistics, and more especially of Logic, that studies and analyzes the significant function of signs, the nexuses between linguistics signs (words, phrases, etc.) and its significances.

Furthermore, I could not initiate without approaching Frege's (1848 - 1925) theory of formal logic applied to the Philosophy of Language breaking with traditional Logic. His theory of the meaning is: sense, reference and truth. To him, a linguistic statement sense is what it represents of the world, its objects, and the state of things.

Herbert Paul Grice's (1913 - 1988) conversational analysis theory, among others, thinks sense differently from logical ones, and uses the conversational principles: relevance, quantity, quality and modus, to place sense as the subject's intention[4].

Law is constructed on a natural linguistic base that, with greater or minor structural difference, goes on gaining proper connotations to

[4] GRICE, Paul, Studies in the Way of Words. Cambridge, MA: Harvard University Press, 1991.

create a specific legal vocabulary with variations among the existing legal systems. Not obstante the appreciable board of differences that set some distance in legal systems, at least some similarities can be identified in order to approach them, and, perhaps, it could be a universal element capable to establish a common theoretical axle between them.

Herbert Lionel Adolfus Hart (1907 - 1992) demonstrates this semantic complexity in his work *The Concept of Law*, published in 1961. This work transformed the way Law General Theory, commonly presented as Jurisprudence in the English world language and outside there, should be understood and studied. His intention was to deepen the understanding of Law, the coercion and the moral, as distinct social phenomena. However, once related, Law can be considered as an assay on analytical legal theory. His work criticizes the deficiencies of the simple model of legal system, which is constituted according to the lines of Austin's imperative theory, who grounds other XIX century authors, like Sir William Markby

Hart initiates his understanding pointing that all arguments developed by well-known jurists were not capable to answer a central question, which is: what is Law? The most complete and clear attempt in analyzing the concept of Law using the apparently simple elements of commands and habits, made by J. L Austin, do not demonstrate the essential difference between "being obliged to" and "to have an obligation of". Its negation is famous to define Law in a clear way, questioning the possibility and utility of a generic definition.

Another jurist and philosopher who work on the semantic potential for the construction of the concept of Law was Alf Ross (1899 - 1979). He was a representative of the Scandinavian legal realism. His thought diverges sufficiently from traditional currents in science of Law' study. For him, the effective Law does not possess relations that can be explained metaphysically. It must be searched in the experience's plan. It is currently tied to the realistic school. Legal norm, for this author, is constituted by a directive. And by being a directive, it is directed to somebody; that, for Ross, is the judge. The result, therefore, is that the norm effectiveness is measured by the application to that it is directed: that is, it is measured according to the judge's application. Law, to Ross, consists of norms and legal phenomena. Those give substrates to judge's inquires, the questions to tied the facts to social environment existence [5].

Ross' conception of Law system, therefore, is based on *national*

[5] ROSS, A. Direito e justiça. São Paulo: Edipro, 2000, p. 34-36.

law system, that is composed through an integration that determines when the physical force could be and will be used against a person: it aims to operate the use of the State force.

Faced these previous questions for the understanding of his thought, we can deal with the matter of *validity* and its concept. He says that the matter of *validity* has been, until then, argued as an aprioristic concept, endowed with an inherent nature itself. However, it must be analyzed like a legal system's validity.

Validity is a concept that, first, must be understood in accordance with the validity acception above explicated. Validity only exists if a norm is valid law.

> [...] valid law (*valid law*, different from *validity*) is that one that represents the ensemble set of normative ideas that function as a plan of interpretation for the Law phenomena in action, what, in turn, means that these norms effectively are observed, and that thus they are so because they are tried and felt as socially obligatory[6].

Therefore, to Ross,

> […] the test of validity is such that in this hypothesis [...] we could understand the judge actions (the courts decisions) as answers armed with meaning in given conditions and to foresee them, in accordance with certain limits[7].

Human being's unforeseeability, in its legislative intervention is much affected when taking for reference its high pretensions to surround the future. Therefore, it does not foresees all the longed and desirable normative consequences. This has its root in the undetermined and not completely inclusive nature of a complex reality composed for a natural language that the jurist takes for loan together with its limitations to construct norms and legal systems, whose linguistics and semantic adaptations and reconstructions will not be able to eliminate the uncertainty (indetermination) areas or with multiple meanings only determinable in the concrete cases where it will be.

> [...] the human legislators cannot have such knowledge of all the possible combinations of circumstances that the future can bring.

[6] ROSS. Direito e justiça. São Paulo: Edipro, 2000, p. 18.
[7] ROSS. Direito e justiça. São Paulo: Edipro, 2000, p. 35.

> This incapacity to anticipate causes brings with it a relative indetermination of purpose[8].

Such unforeseeability not only characterizes the mark of construction and structures of legal norms as its projection on the moment of norm interpretation, since the "particular situations `in fact' do not wait for us already separate ones to others, and with labels of application cases of the general norm".[9] Here it is not a case of imperfection of the norm simply, because the fact that we cannot attribute to the legislator a capacity that escapes to the human being, which is, the most perfect and precise anticipation of all the facts and that, therefore, is reflected in the normative structure. The norm is, therefore, undetermined because of these reasons, but, any way, determinable to every concrete case. In short, the idea is "that the legislative cannot create uniform norms destined to be applied to each case in an anticipated form without ulterior official directives". In contrast, what the absolute belief in the completeness of the legal system suggests is its unrealizability, because the difficulties, ambiguities or same legal gaps.

3. Conclusion

Relating Frege, Grice, Austin, Searle and Ducrot's theories with the mark established by Gehlen, we can see some differences in its perspectives, but all converge semantically to language indetermination. In searching security in language Frege perceives that the meaning of a sentence can be established through: the analysis of its constituent elements, the sense contribution and the parts' reference to the sentence's entirety. Therefore, sentences also possess sense and reference. But, according to Grice this is constructed, because, any formularization constructs the simulation of a reasoning of the listener from the statement said by the speaker. That it corroborated by Austin when he perceives that the meaning of a sentence must be established by the conditions of use of the sentence that determine its meaning, in a theory of the action. These conditions allows its changeability. Language, according to Ducrot, is a construction that only language makes of the things of the

[8] HART, Herbert L. A. O Conceito de Direito. Lisboa: Fundação Calouste Gulbenkian, 1986, p.141.

[9] HART, Herbert L. A. O Conceito de Direito. Lisboa: Fundação Calouste Gulbenkian, 1986, p. 139.

world, in this search that the human being has for specialization, where a speech is produced as work over other speeches.

In relation to Law, Ross mainly affirms that Law may vary in accordance with its contingencies, mainly with respect to different Countries or States, what makes that the word "law", for example, must be in accordance with the understanding of a specific context, not something universally inclusive. Hart demonstrates the semantic complexity as something marked for its fixed condition of indetermination, which leads to the link between Language and Law.

As observed previously from the displayed theories, a basic theoretical problem seems to serve as a universal junction point of Law norm: the human being's cognitive inaccessibility to the accurate determination of human behavior, which has objective and need to be normatized. The human incapacity to determine language as well as anticipating the future events is what it is on the root of the indetermination concept that marks Law. Yes, "the human being is weak and devoid", as Gehlen had said and therefore he seeks shelter in the system of Law.

Restrictions on fundamental rights:
An interpretation in the light of Friedrich Müller´s structural theory of law

Débora Dossiatti de Lima
Nestor Castilho Gomes

Abstract: This article aims to analyze the possibility of restrictions to fundamental rights. Firstly, it is important to clarify that, from the theoretical viewpoint, the very validity of the idea of restrictions to fundamental rights is controversial, for it depends on a certain conception of legal norm. One theory of the norm founded on the distinction between rules and principles, as the one formulated by Robert Alexy, eventually leads to the acceptance of restrictness of fundamental rights. On the other end, one norm theory that refutes principiology, as the one developed by Friedrich Müller, necessarily implies an effort to define the material extension of fundamental right, and not its restriction.

Keywords: fundamental rights, Friedrich Muller´s structural theory of law.

The restrictness of fundamental rights depends on a conception of norm that sees the fundamental rights as *definite* or *prima facie* positions. It is in the scope of norm theory that stands the controversy around the scope of protection. The definition of scope of protection of fundamental rights has a direct relation with the concept of *restriction* or *determination of the contents* of fundamental rights. These two variations are translated when overlapping *"wide scope of protection* vs. *restricted scope of protection"*. While Alexy supports the wide scope of protection, which relates to that which the norm of fundamental right guarantees *prima facie*, that is, without taking into account the possible restrictions, Müller defends that the interpretation of *norm program* and the definition of *norm scope* would suffice in order to define, at the same time, the *contents* and the *limits* of each fundamental right in each concrete case.

The questions that arise here are not purely theoretical, void of any practical repercussion. The norm theory influences the form of application of fundamental rights: subsumption, *Abwägung*, embodiment,

among others. It does matter, however, to analyze, even if superficially, one of the solution techniques that proposes the overcoming of the mere subsumption: the structuring methodology of right. The enormous influence of the theory of principles and the weighting technique by Robert Alexy in the national bibliography, or even in sentences of the Federal Supreme Court, seems to us as self evident. On the other hand, the exposition of Friedrich Müller´s structuring theory of law serves to demonstrate that the weighting technique is not the only proposal capable of facing the subsumption that characterizes the juridical positivism.

The initial goal of this work is to discuss if Friedrich Müller´s structuring methodology of right can, indeed, be considered an internal theory. Despite the usual identification of a restricted protection scope with the internal theory, such association is not automatic, as pointed out in thesis by Pieroth and Shilink. The goal is to inquire if the structuring method of right will effectively sustain that the fundamental rights have definite essential contents defined *a priori* and of absolute character.

At last, analyze if the adoption of the structuring method of right will lead to a deficit in argument every time something is taken as not being protected by the protection scope of a fundamental right.

I – The structuring methodology and the internal theory: wide protection scope x restricted protection scope

Part of the Brazilian constitutional doctrine associates Friedrich Müller´s *Strukturierende Rechtslehre* to the *Innentheorie*[1].

Those who endorse the internal theory rely on the concept of *limit*. The process of limit definition of each fundamental right would be something internal to it[2]. However, there would be *immanent limits*. Starting out from these presuppositions, it would be on the operator´s behalf, in their task of interpretation/application, to simply *declare* previously existing limits. For beyond this, the internal theory would admit the possibility of *revelation* of the contents of the fundamental rights in an abstract and *a priori* manner.

The internal theory sustains a restricted scope of protection. The fundamental characteristic would be the exclusion *a priori*, the non-

[1] Vide: SILVA, Virgílio Afonso. Direitos fundamentais: conteúdo essencial, restrições e eficácia. São Paulo: Malheiros, 2011.

[2] SILVA, Virgílio Afonso. Direitos fundamentais: conteúdo essencial, restrições e eficácia. São Paulo: Malheiros, 2011. p. 128.

guarantee of certain states, actions and juridical positions in the protection scope of fundamental rights.

If these are the presuppositions of the internal theory, we have it that the structuring theory of right by Friedrich Müller cannot be considered an internal theory.

Firstly, because the *concretization* process, in the scope of the theory and of the structuring method of right, is not summarized into an activity of *declaration* or *revelation* of previously existing limits. This presupposition starts out from the conception of *Rechtsnorm*, typical of juridical positivism. For the structuring theory, *Rechtsnorm* does not have previously given contents, which must be *discovered and declared* by the interpreter. In reality, the structuring theory of right differs *norm* from *norm text*, which already makes it clear that the task of concretization is not limited to a mere *declaration*.

In the lesson from the jurist of Heidelberg, the *Rechtsnorm* does not preexist in the codes or in the laws. What is read in the Federal Constitution, for instance, are simple preliminary forms, norm texts, and not juridical norms[3]. The "constitutional norm" only arises in the concretization process. In a phrase that has become common ground, Müller ensures that "the wording of positive prescription is only the tip of an iceberg"[4]. This because the text – and as shall be seen, as linguistic datum, is considered an element pertinent solely to the formulation of the

[3] Müller makes it clear that the Rechtsnorm does not preexist in the codes and in the constitutions: "What can be read in the codes (and in the constitutions) are only the norm texts – in other words, texts that must yet be transformed, through Reichtsarbeit, into juridical norms". Cf. Müller, Friedrich. O novo paradigma do direito: introdução à teoria e metódica estruturantes do direito. p. 274. About the same topic, Müller assures in other instances: "When the jurists speak and write about "the" constitution, they refer to the constitution text; when they speak "about" the law, they refer to their literal tenor". Cf. Müller, Friedrich. Métodos de trabalho do direito constitucional. p. 53; João Maurício Adeodato also underlines the relation between norm and norm text, general norm and individual norm, beaconing differences between the Strukturierende Rechtslehre and the pure theory of law: "It means, not only is the norm of the concrete case constituted upon the case, but also the apparently generical and abstract norm, that is, the general norm is not previous, only its text is. The general norm does not exist, it is a fiction". Cf. Adeodato, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. p. 239.

[4] Müller, Friedrich. Métodos de trabalho do direito constitucional. p. 53.

Normprogramm. In opposition to the *static* model of juridical positivism, Müller develops a *dynamic* model of the juridical norm genesis; the property of law having been produced by competent authority, according to the procedure foreseen by law, does not allow, *ipso facto*, that such norm text be identified as juridical norm. The norm must be built through the *concretization* process.

If the norm is not confused with the text, but arises solely in the concretization process, if the law operator is key in this process, the inherent temporality to normativity becomes clear. The social-historical reality is a building condition to the norm and its normativity. For beyond this, legal disposition normativity is branded by real data, which hinders one to believe in any solution given by the abstract form and *a priori* (as the internal theory advocates).

The inherent temporality to normativity – which arises at the end of the concretization process – makes the structuring theory and method of right reject the positivist concept of "application of law". The norm cannot be simply applied, because it is not yet ready and neither is it substantially finished. It is about, under a theoretical viewpoint, a logical impossibility. Since the norm is not ready and is not restricted to the text (to the linguistic data/norm program), the concretization is not confused with the interpretation, application or subsumption. The *Rechtnorm* only arises along the concretization process, with the interweaving of the norm program and the scope of the norm. The final step of the concretization process comprises the individualization of the *Rechtnorm* into *Entscheidungsnorm*.

The juridical positivism, by identifying norm and norm text, would present the practical-ruling task as a logical deduction procedure[5]. The judge would decide in a syllogistic manner "subsuming the juridical case to the concepts of a previously given *Rechtsnorm*"[6]. **The**

[5] Müller considers the use of formal logic improbable for the solution of concrete cases. The juridical prescriptions, due to their linguistic character, do not offer, in most cases, any starting point for exact operations of formal logic. In Müller´s words: "the material juridical tenors, by far, are not "contained" in the linguistic elements of the juridical norms, because their nature is necessarily imprecise, so that they could be transformed into moments of logical conclusions". Cf. Müller, Friedrich. Teoria estruturante do direito. p. 47.

[6] Müller, Friedrich. O novo paradigma do direito: introdução à teoria e metódica estruturantes do direito. p. 148. As clarified by Ralph Christensen, in the positivist model, "the jurist´s activity gravitates around the fixed pole of the Rechtsnorm given as previous orientation". Cf. Christensen, Ralph. Teoria estruturante do direito. In: Müller, Friedrich.

norm identification with the text (the norm would be formed by exclusively linguistic data) has enabled the understanding of the ruling activity as merely declaratory. The problem of "interpretation", or "interpretation and application of the law", would consist in a purely hermeneutic problem (in knowing what textually-meaningful is about, *e.g.*, from the law)[7].

The structuring theory and method, on the contrary, considered the ruling activity a practical-normative problem. The non-identification of the norm with the text, and the indispensability of the case (either real of fictitious) – which shall contribute with the insertion of the real data *into* the *Rechtsnorm* -, makes the structuring theory reject an "implacable interpretation" from the normative text. As put by Castanheira Neves, Müller recognizes the methodic priority of the case, the non-obviation of the case for the concretization of the law. The *Rechtsnorm* is not dependent on the case, but refers to it[8]. Both (norm and case) yield the necessary elements for the juridical decision. Müller´s theory is inserted in a context where:

> the problem of juridical interpretation is not hermeneutic, but normative. Hence, the object in matter must be correlative to this nature of the problem, being certain that the interpretive problem will be applied by the normative-practical nature of the case to resolve with the support in the solution of this problem. In other words, the interpreted normative object may not be a merely meaningful object, but an object susceptible to offering normative criteria for the adjudicative solution of the deciding case. And then the goal of the interpretation will not be the text of the juridical norms, as the expression or corpus of a meaning to be understood and analyzed, but the normativity that these norms, as juridical criteria, comprise and can offer[9].

By investigating the juridical normativity structure, the structuring theory of law realizes that the *Rechtsnorm* is also comprised of real data[10]. Thus, the practical-decisory process is not reduced to purely her-

O novo paradigma do direito: introdução à teoria e metódica estruturantes do direito. p. 234.

[7] Castanheira Neves, Antonio. Metodologia jurídica: problemas fundamentais. Coimbra: Coimbra Editora, 1993.p. 83.

[8] Müller, Friedrich. Métodos de trabalho do direito constitucional. p. 61.

[9] Castanheira Neves, Antonio. Metodologia jurídica: problemas fundamentais. p. 143.

[10] João Maurício Adeodato brilliantly emphasizes the reasons that make Müller propose

meneutic work, since the *Rechtsnorm* is not exclusively linguistic data. However, it is not simply about discovering the textual meaning of the words of law, which would give rise to further "applicable interpretation" of the normative text[11].

Having it said, it matters to say that the structuring method does not despise the importance of interpretation. Nevertheless, by distinguishing the "application" from "concretization", Müller conferred a specific function to the "interpretation", restricted. In the structuring method the interpretation of the literal tenor of the norm is solely one of the elements of concretization (certainly one of the most important)[12]. Müller makes it clear that the *Rechtsnorm* is not in the text, and that the mere futurity of the juridical cases make interpretation indispensable:

> One norm is not (only) needy of interpretation because and to the measure that it is not "univocal", "evident", because and to the measure that it is "void of clarity" – but overall because it must be applied to one case (real or fictitious). One norm, in the sense of the traditional method (that is: the wording of the norm) may seem "clear" or even "univocal" on paper, as for the next practical case to which it must be applied, may make it to appear extremely "void of clarity". This always becomes evident solely in the effective attempt of concretization. In it one does not "apply" something ready and done to a group of facts equally understood as concluded. The legal positivism claimed and keeps claiming this. But "the" *Rechtsnorm* is not ready, neither is it "substantially" con-

---

the difference between the traditional "interpretation and application of law" and its "concretization". According to the Author: "The generic procedure through which one seeks to adequate norms and facts and to decide, traditionally known as "interpretation" and application of the Law", Müller denominates "norm concretization" (Normkonkretisierung), seeking to move away from the traditional hermeneutic and to more precisely determine their concepts and procedures. In this task he insists that concretization does not mean syllogism, subsumption, effectivation, application or concrete individualization of the law upwards from the general norm". Cf. Adeodato, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. p. 240; Cf. Castanheira Neves, Antonio. Metodologia jurídica: problemas fundamentais. p. 83; Larenz, Karl. Metodologia da ciência do direito. p. 155.

[11] Neves, Marcelo. A constituição simbólica. p. 77.

[12] This because "(...) it is not solely the injunction of ought-is which contributes to the decision of the case, but also the share of social reality related to the norm, the "norm scope". The norm scope will be approached next. Cf. Müller, Friedrich. Apud Larenz, Karl. Metodologia da ciência do direito. p. 155.

cluded[13].

If the interpretation maintains a specific functional *status* in the structuring theory and method, the same cannot be said about the "application". As has been settled, the *Rechtsnorm* will be constructed by the law operator along the concretization process. It cannot, thus, be applied syllogistically.

So, the concretization of the norm transcends the mere interpretation of the text. Paulo Bonavides offers timely and definite clearing by saying that: "in relation to the interpretation, the concretization has a much wider span, being that the respective method encompasses all means of work through which the norm is concretized and the law is accomplished"[14].

Bonavides´ assertive brings further important datum; the concretization involves a respective "method". The investigation of the structuring method of law will be done in the next section, so as to investigate if its adoption leads to an argumentative deficit, when put in comparison with theories that sustain a wide factual support.

For now, it is important to say that Müller´s *Rechtsnorm* has intrinsic inter-relation with its structuring method[15]. So much so that Robert Alexy, in an inspired metaphor, affirms that the *Rechtsnorm´*s structuring theory and the structuring method are two sides of the same coin[16]. Friedrich Müller himself confirms it, thus: "For this concept (structuring of law) the theory (of the juridical norm) and the juridical methodology are necessary and concretely bound to each other, even before its fundament in the Constitution and its effects in the juridical dogmatic were taken into consideration"[17].

---

[13] Müller, Friedrich. Métodos de trabalho do direito constitucional. p. 61-62.

[14] Bonavides, Paulo. Curso de Direito Constitucional. p. 456; Analogously, Adeodato affirms: "the "interpretation", for Müller a more restricted concept, is built by the possibilities of legal tract, including philological, with the texts, that is, it reduces to an interpretation of normative texts. But, since the Rechtsnorm is more than the text, the concretization goes much beyond the interpretation". Cf. Adeodato, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. p. 240.

[15] In a conventional language, with his "law enforcement" theory.

[16] Alexy, Robert. Teoria dos direitos fundamentais. trad. Virgilio Afonso da Silva. São Paulo: Malheiros, 2008, p. 79.

[17] Müller, Friedrich. Strukturierende Rechtslehre. p. 225 apud Jouanjan, Olivier. De Hans Kelsen a Friedrich Müller - Método jurídico sob o paradigma pós-positivista. In: Müller, Friedrich. O novo paradigma do direito: introdução à teoria e metódica estruturantes do

The structuring theory of the norm and the method are yoked, since the *Rechtsnorm*´s construction process – of decision making – is ruled by the methodic. The *Rechtsnorm* is created under the methodic´s leading thread, which seeks to yield the rationality expected in the Democratic States of Law.

Castanheira Neves expressly affirms that Friedrich Müller´s concretization involves the needed inter-relation between the structuring theory of *Rechtsnorm* and the structuring method of law. The complexity of Friedrich Müller´s theory of the norm (a project that covers both linguistic as well as real data) has as corollary the consideration of the methodological problem as a *concretization* problem of the juridical norms. In the words of the eminent Portuguese jurist:

> Operating with the distinctions between "Normtext" and "norm" (the concrete-material normativity obtained by the structured concretization) (...) F. Müller thinks the concrete juridical *judicium* as the result of a constitutive normative process of concretization, which mobilizes structurally (in a process or "structuring method") an extra set of factors or juridical methodical elements ("concretization elements"), from the normative text or from the hermeneutic elements: dogmatic elements, elements from the respective objective domain, juridical-theoretical elements, technical-juridical, etc. Hence, today the methodological problem would be "*Normkonkretisierung statt Normtextauslegung*" (norm concretization instead of the interpretation of norm texts[18].

II – The structuring method and the argumentative onus of the decision process

Does the adoption of a restricted protection scope eventually lead to a lesser argumentative onus before the decision process? It seems to us that it does not. In the structuring method, e.g., the exclusion of a certain conduct in the protection scope of a fundamental right is not accomplished by a mere act of will. The structuring method of law deals with a series of elements for the concretization of the norm, which evidences a methodical rigor which passes through the argumentative neglect.

Based on the new formulated conception of norm, Müller notes

direito. p. 257.

[18] Castanheira Neves, Antonio. Metodologia jurídica: problemas fundamentais. p. 145.

that the inherited elements of tradition (grammar interpretation, logic, systemic and historic) refer only to the treatment of the norm texts. However, for Müller, the norm is more than its literal tenor. In order to solve this aporia, Müller acts in two fronts: on one end, he seeks to develop and reformulate the treatment elements of the norm text; on the other, he seeks to develop methodical elements capable of using up the material tenor of the normative scopes in a rationally verifiable manner.

Especially with regard to the elements of norm text treatment, Müller reformulates Sivigny´s canons (proposing the replacement of grammar, systemic, historic, generic and teleological elements), apart from incorporating (part) of the modern interpretation principles of the constitution.

In view of the juridical *Normstruktur* developed by the norm theory, the structuring method develops and works with the following concretization elements: (i) "strictiore sensu" methodological elements (grammar, systematic, historical, genetic and teleological interpretation, as well as modern principles of constitution interpretation); (ii) norm scope elements; (iii) dogmatic elements; (iv) theory elements; (v) solution technique elements; and (vi) policy elements of law and constitutional policy. For reasons bound to the imperatives of the Democratic State of Law, the elements directly referred to as norms preponderate in relation to the others in case of conflict.

The structuring methodical concerns with developing controllable means of work of decision and grounds; presenting, therefore, as a decision and imputation technique which demands the submission of the decision norm to the general juridical norm texts. It seeks the formulation and elaboration of rules that enable the imputation of the decision norm to a general *Rechtsnorm* text, which may serve as foundation. The juridical *Normstruktur* redefines the juridical practice; it establishes new tasks and introduces new elements, in order to rationalize the decision work.

III – Conclusion

In conclusion, we can affirm that the theory and the structuring methodology may not be classified as belonging to the internal theory. This is because the possibility of abstract definition of the contents of fundamental right is totally incompatible with the structuring theory of law. Müller´s theory does not admit any aprioristic definition in the

protection scope of the fundamental law, to be revealed by the interpreter. The protection scope is always defined in the concrete case, through the concretization work. In Müller´s words: "*Normbereich* and *Normprogramm* are not means to find, through the manner of natural law, true ontic statements of general validity; neither does it help to ascertain the "true sense" of the normative texts in terms of the defined type and juridically "correct" use of the language in the respective normative context"[19]. In short: the concrete norm of decision is elaborated solely in the particular case and through its connection to it[20].

References

ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. São Paulo: Saraiva, 2002.

ALEXY, Robert. *Teoria dos direitos fundamentais*. trad. Virgilio Afonso da Silva. São Paulo: Malheiros, 2008.

BONAVIDES, Paulo. Curso de direito constitucional. 11ª Ed. São Paulo: Malheiros, 2001.

CASTANHEIRA NEVES, Antonio. *Metodologia jurídica*: problemas fundamentais. Coimbra: Coimbra Editora, 1993.

LARENZ, Karl. *Metodologia da ciência do direto*. trad. José Lamego. 2ª Ed. Lisboa: Fundação Calouste Gulbenkian, 1983.

MÜLLER, Friedrich. *Métodos de trabalho do direito constitucional*. trad. Peter Naumann. 2 ed. São Paulo: Max limonad, 2000.

MÜLLER, Friedrich. *O novo paradigma do direito*: introdução à teoria e metódica estruturantes do direto. Trad. Peter Naumann. São Paulo: Editora Revista dos Tribunais, 2007.

MÜLLER, Friedrich. *Teoria estruturante do direito*. trad. Peter Naumann; Eurides Avance de Souza. São Paulo: Editora Revista dos Tribunais, 2008.

NEVES, Marcelo. *A constitucionalização simbólica*. São Paulo: Editora Acadêmica, 1994.

SILVA, Virgílio Afonso. *Direitos fundamentais*: conteúdo essencial, restrições e eficácia. 2 ed. São Paulo: Malheiros, 2011. p. 128.

[19]Müller, Friedrich. Teoria Estruturante do Direito. p. 245.
[20] Müller, Friedrich. Teoria Estruturante do Direito. p. 263.

Constitutional interpretation in Philosophy of Law beyond interpretivism and non-interpretivism

Bernardo Gonçalves Fernandes[1]

Abstract: The article aims to develop an analysis of the north-American interpretation theories that seek to overcome the interpretivism X non-interpretivism dichotomy traditionally worked in the U.S. legal hermeneutics. For that, we will take a path that goes from the delimitation of the terms under debate to later presentation of contemporary theories that aim to overcome them, considering an open mind to a philosophy of law linked to justice theories that take into account the complexity of the legal phenomenon currently in vogue. Common themes to theorists of law such as proceduralism, minimalism, substantialism, consequentialism, economic pragmatism and integrity in law enforcement are going to be brought up to achieve the main purpose of this essay.

Keywords: Constitutional interpretation. Philosophy of law. Interpretivism and Non-interpretivism.

1. Introduction: the dicotomy, interpretivism x non-interpretivism

When the Constitutional Hermeneutic is brought up inside the north-American juridical debate, the first thing that comes up to mind – even because many of the national works seem not to go beyond it – is the debate between *interpretivism* and *non-interpretivism.*

This debate, that has found and still finds supporters on both sides, is one of those historic and naturalized dichotomies that seem not to abandon us, in other words, they insist to permeate, in a reductionist and limited way, the juridical discussions, as the old question of jusnaturalism *versus* positivism, or public law *versus* private law, and even of *voluntas legis versus voluntas legislatoris*.

However, in this brief excursus, we intend to demonstrate that

[1] http://lattes.cnpq.br/9044160342461871

the north-American debate has reached higher plans in terms of sophistication, incorporating evolutionary achievements from the hermeneutic-pragmatic turn and thereby, pitching for more complex analyses such as the foundation_and the legitimacy of the law and the judicial decisions.

Thus, this article takes as its north the following path: we will start from a reconstruction of the first debate, presenting its basic theses to, then, go to an analysis of theses and authors more complex, that sought to go beyond this dichotomy, enriching the recent theories of justice and of the judicial interpretation.

The current, known today as *interpretivists*, adopts a conservative position – having as its supporters great exponents like Judge Robert Bork and Justice Antonin Scalia – in which they attest that the interpreter, mainly the judges, when interpreting the Constitution, shall be limited to grasp the meaning of the precepts expressed or clearly seen as implicit (semantic texture). Therefore, when interpreting the Constitution, the reader must be limited to the constitutional text that lies ahead of him, setting as his limit of interpretation the intention of the founders. They claim that taking a step to beyond the borders of the text would subvert the principle of the *rule of Law*, turning it into a law made by judges (*law of judges)*. This seems to be imperative at the judicial control of the legislative acts, which should be limited to the constitutional border under the claiming of a violation of the democratic principle (fact of the law or legislative act has to be accepted by the majority of the institution).

The second current, which appears to be booming, despite having a constellation of internal differences, seems to prioritize the attainment of constitutional rights over the formalist interpretation. The principles of justice, liberty and equality would compose the "project" of a constitutional self-respecting democratic society, overcoming the blind subservience to a reductive reading of the democratic principle. This way, while the interpretivists would say that the proper solution, constitutionally, to the dilemmas and conflicts that arise in the legal harvest should be sought (and worked out) in the intention of the Constitution creators, non-interpretivists, in general, will seek responses at the values (and traditions) arising from the society itself.

However, as we argue in this essay, the following constitutional debate doesn't end here. There is still a range of hermeneutic nuances and possibilities that deserve our attention.

Currently, there are numerous north-Americans jurists and phi-

losophers whose theories have a prominent place not only at the American scene, but especially at the international panorama. Their theses that, literally, "took over the world" have been generating, alongside the previous theses of the interpretivism and non-interpretivism, fruitful digressions about the direction of north-American Constitutional Hermeneutics.

2. The proceduralism of John Hart Ely

John Hart Ely has earned celebrity for his work "Democracy and Distrust", in which he argues the theoretical insufficiency (inconsistency) of the classic theses, especially when it comes to the role played by the judges when in a situation of judicial review of laws and normative acts. There is a presumption of the illegitimacy of the magistrate, since they don't have to go through an election and also don't have political responsibility such as the members of the Congress or the Parliament who were elected and, at least in theory, represent the people of a country. Ely then proposes to the Constitutional Courts a better understanding of their role, assuming themselves as "reinforcements of democracy". This proposal is a result of a procedimental conception of democracy (rather than a substantive concept, which would allow judges to make choices that could be based on arguments of moral or ethical origin) that has, as its focus, problems of regulating the procedures in a way fair and equal to all. However, it is worth saying that despite the role of the Courts be the regulation and control of the regularity and the proper participation of the people at the politic process, they would also act proactively at situations or at the event of any misrepresentation of the political process, in which a minority couldn't sustain itself with its own forces (stand on its own feet). (Ely, 1980, p.169)

Therefore, the ex-Harvard and Yale professor says that Courts should play a role similar to referees in a soccer game (they don't say who the winner is, just acting in order to guarantee that the game is played cleanly, fairly and on an equal basis), letting democracy take its course, acting only to unclog blockages that form in the democratic process. This way, the Judiciary does not (and should not!) have authority to change decisions made through a democratic deliberative process (legislative), not being part of its role, the task of a supposed axiological interpretation of the Constitution, that is a guarantor of rights (these rights must be specified at a political instance, not being a responsibil-

ity of a legal instance). But the Courts can yet act for the purpose of defense and preservation of rights related to the communication and the participation that build up the democratic will at the political processes. Therefore, "Ely's positioning presents itself with an apparently contradictory characteristic, since it strengthens and at the same time limits the performance of the constitutional jurisdiction. Through a retraction and a limitation of the procedural aspect, the role of the Courts is restricted and the political process is strengthened, what doesn't implicate a discrimination of minorities, which must have their fundamental rights guaranteed (where the jurisdiction performance is reinforced). [...] It is a model that intends, at the same time, to strengthen and to restrict the constitutional jurisdiction by returning to a reference control of a procedimental nature, in which the political process is intended to be strengthened without incurring in a renouncement of the minorities rights protection". (Ely, 1980, p.88)

3. The minimalism of Cass R. Sunstein

Cass R. Sunstein is another exponent of the American Constitutional Law of nowadays. His proposal (that criticizes the judicial review) falls within a movement called Judicial Minimalism that has as its proposal a resumption of the role that the judiciary should occupy in a state that considers itself democratic.

The minimalists are jurists that don't believe in any theory of the Constitution and Jurisdiction as something savior or even with emancipatory purposes (goals). So they don't conceive any kind of social commitment on the part of the judiciary that should only concentrate on solving the real case they have at hands.

The basic idea of Sunstein is that the judges, at the course of their sentences, must let the question opened, having no hurry to give substantive and conclusive answers – or even brilliant academic theses – to citizens under their jurisdiction. Sunstein recognizes that the U.S. Congress understands the democratic dimension much better than the Supreme Court and, therefore, is the most authorized to give final answers on all legal matters. Therefore, a minimalist decision has the merit of leaving a space for future reflections at national, state and local level. (Sunstein, 1999, p.10)

For that, the magistrates must understand that they have no need - or legitimacy - to decide questions that can't be regarded as essential

for the resolution of the real case, as well as that they should avoid the assessment of complex cases that have not yet reached a maturity level in the course of decisions in society, simply denying *certiorari*.

Sunstein argues that a minimalist decision must have two features: shallowness and narrowness. So he proposes that the Court decides the case at hand, rather than making an attempt to establish rules to be applied at future or similar cases. This way, the decisions have to be "narrow rather than broad" and "shallow rather than deep". According to this, they "have to be narrow whereas the court should decide (as mentioned) only the real case, without anticipating how other similar cases would be solved. And they must be shallow, as they should not try to justify a decision through fundamentals that involves basic constitutional principles. (Sunstein, 1999, p.18-57)

4. The populist Constitutionalism of Mark Tushnet

Mark Tushnet, a professor of Harvard and also one of the forerunners of the Critical Legal Studies, is currently one of the main critics of the U.S. judicial review, supporting in his studies, in a line that could be called more radical, the thesis entitled "popular constitutionalism "or populist constitutional Law. (Tushnet, 1999) (Tushnet, 2006)

According to Tushnet, his theory is populist because it distributes widely the responsibility for the constitutional law. This way, he claims that in a "populist theory of the constitutional law, a constitutional interpretation made by the courts doesn't have any normative weight due to the fact that they are produced by courts". (Tushnet, 2006, p.27)

Thereby, he postulates the removal of the "Constitution of the courts", since they don't have legitimacy to manifest itself in a final way (give the last word) when it comes to constitutional interpretation.

Tushnet criticizes the judicial review not for the "contramajority objection" aspect (traditional questioning of the legitimacy of the Supreme Court magistrates, given their undemocratic origin, to decide complex issues of constitutional laws) but for the "judicial supremacy" thesis (the consideration that the judiciary becomes the power conductor (the supreme power) above all other powers).

Accordingly, Tushnet presents himself as a critic of the Supreme Court regarding its monopoly on saying what the constitutional law is (its content). He believes that this attitude ends up removing the relevance (importance) of the views that are handed down out of the Su-

preme Court. Thus, the definition of what a Constitutional Law is and how we should understand the Constitution is only relevant if issued by the Supreme Court. The defended point, then, goes toward the ampliation of the opinions about the constitutional issues. Therefore, the professor says that "although parliamentarians don't think the same way as judges, they also work towards promoting constitutional values even though they don't follow the formal style of the legal tradition. (Tushnet, 2006, p.46)

It's interesting that the digressions of Tushnet allied to a perspective entitled as "populist constitutional" actually approaches them to a typically conservative bias (under the American traditional point of view). He even proposes a constitutional amendment to abolish the judicial review. (Tushnet, 2006, p.53)

5. The Constitutional choices and the defense of substantialism of Lawrence Tribe

Finally, it's worth mentioning the digressions undertaken by the Harvard jurist, Lawrence Tribe. Tribe, at his famous work "American Constitutional Law", as well as at his collection "Constitutional choices", forcefully criticizes the proceduralist theories. (Tribe, 1988)

At his point of view, these theories that only aim to ensure mechanisms of democratic participation (along the lines advocated, for example, by Ely) are insufficient, as it would require a substantive perspective that recognizes, in most constitutional laws and at their application, its axiological bias. For the author, the Constitution is a conjunction of choices and options developed by a plurality of citizens. This way, the decisions to be taken are closely correlated to our unwavering insertion into a tradition, ie, this tradition would work as a limit or a restriction to our decision capacity. However, the decisions, products of choices, are not and should not lead to an univocity of constitutional positionings. Thus, Tribe claims that the constitutional choices should be principiologic. But what is the basis of such a principiologic conception? And where does its legitimacy come from? (Tribe, 1988, p.188)

Tribe, in his extensive work, doesn't have the will of building an alternative methodology (such as the one currently used in some judged cases of the Supreme Court that has an administrative nature) that could lead us to constitutional choices absolutely correct (and unquestionable), since, for the author, "all constitutional interpretations

have elements of indeterminacy." Therefore, the difficulty would be that "the Constitution requires a series of indeterminable choices, that present themselves to all of us, ie, we are all called to decide what the Constitution is and what it contemplates in its existence: text, intentions (of who?), moral and political assumptions (of what type?)." But even without having a theory of constitutional interpretation entirely feasible in consistency and security, the Harvard professor does not move away from establishing some guidelines that can reduce the actual interpretive deficit (for example, the deficit of the already overcome dichotomy: interpretivist and non-interpretivist or even minimalist and proceduralist authors). In a provocative work, with Michel Dorf co-authored, the author describes the project titled "constitutional conversations" (constitutional dialogues), in which he faces, vehemently, a relevant number of theories, establishing, from the critics, reflexive parameters such as: the dichotomy hard cases and easy cases, or the overcoming of the quest for a constitutional interpretation based on objective or subjective points of view (of the classic hermeneutics). (Tribe, 1988, p.222)

Therefore, the author (although we don't agree with many aspects of his digressions) goes beyond the interpretivism and non-interpretivism, contributing to the criticism of proceduralist conceptions. (Tribe, 1988)

Tribe, despite recognizing a procedimental character in some constitutional devices (laws), doesn't admit a disregard of the substantive character of the Constitutions and its values, especially if the fundamental rights are at the center of the constitutional debate. Accordingly, (though it's a difficult goal) the process and the substance (proceduralism and substantialism) are linked in his theory, even though he later makes an option for the defense of substantialism.

However, unlike Tushnet, Tribe doesn't advocate the end of the judicial review. The author actually claims the need for the maintenance of the Supreme Court and the judiciary role as a defense mechanism of minorities (that can have their rights harmed), as well as the balance between the powers and the constitutional democracy itself.

6. The economic analysis of Law of Richard Posner

The initial point of the economic analysis of the Law is the work "Economic Analysis of Law" launched at the beginning of the 70s of the last century in Chicago by Richard Posner. This work was divided into

seven (7) pieces, involving topics such as the law of firms and financial markets, the distribution of wealth and tax revenues, the American legal process, as well as the nature of the economic legal reasoning. (Posner, 2003, p.26-44)

The center point of this theory is that the law is an instrument to achieve social ends and accordingly its main goal is the economic efficiency. Posner considers that economics is the excellence science of rational choices, stating at his digressions that economics guides the economic analysis of Law and that people are rational maximizers of their satisfactions. Therefore, everybody (except for small children and the mentally retarded) in all activities (except under the influence of psychosis or mental disorders caused by drug use or alcohol abuse) works with choices and should maximize them. (Posner, 2003, p.26-44)

The central thesis of the economic analysis of law could be then synthesized in an utilitarist point view, in which the decision of a judge should be guided by a cost-benefit relation. Thus, the Law is only perspectival when it promotes the maximization of economic relations, and the wealth maximization should guide the actions of the magistrate. (Posner, 2003)

We observe here a subservient basis of the U.S legal pragmatism, of a realistic bias, which sees the Law only through the exogenous (external) consequentialist logic that denatures the binary code of law. (Posner, 1999)

This way, the Law presents itself as a strategic and undetermined instrumental of any internal justification, causing a deficit of legitimacy and judicial correction. Thus, when Posner indicates the criteria of cost-benefit and wealth maximization, he provides a place for the judiciary to guarantee dogmas (for example: private property, contracts) that displace the legitimacy of judicial decisions from the Law to the economic parameters. The juridical decisions lose then their deontological character, guiding themselves by a ratio of costs and economic impacts interconnected by the logic of efficiency. Therefore, we find here a strong strand of consequentialism, which supports that the judicial decisions (judgment) should not be taken looking back to the past (following, for example, a interpretativist bias) but always looking forward to the future (but not as the non-interpretivism), so as to choose among options, the one that brings the greater advantage, that for Posner must always have an economical bias. (Posner, 1999) (Posner, 2003)

Posner, who is a Federal Judge, will be very criticized for many of his positions. One of them even reached the U.S. Supreme Court, as

the foundation of the decision of the Bush x Gore election, where by five votes to four, the original result of the election was maintained, even though it was known that it was biased at the state of Florida. (Dworkin, 2006) According to Posner, decide for the recount of the votes (even if it was legally consistent because of possible fraud) would cause a huge loss to the institutions of the country in addition to an excessive instability caused by the lack of a decision on who would be the next president. We note that for the author, it is more important evaluating the decision's consequences than its legality and normativity. (Dworkin, 2006)

Criticizing this idea, we understand that if the market imperatives begin to guide the judicial conduct, the Law will be colonized by another system with a different logic, profit and loss, and then the Law will tend to disappear, with all the obvious risks to the stabilization of a democratic society.

7. The integrity theory of Ronald Dworkin

We understand that the Dworkin's project is much richer (and wider) than the previous debate, mainly because it relies on an understanding of the Law related to the achievements of the hermeneutic-pragmatic turn and intimately concerned about the quest for a justification of the legitimacy of law and legal decisions.

For the North-American jurist and philosopher Ronald Dworkin law must be read as part of a collective enterprise shared by the whole society. Rights would then be creatures of history and morality, to the extent that they have a historical-institutional construction for sharing within the same society the same set of principles and recognition of equal rights and freedoms to all subjective members (communal principles)[2]. This involves recognizing that all who belong to the same society necessarily share a common set of basic rights and duties, including the right to participate in the construction and attribution of meaning to these rights, whether in the field of the Legislative or the Judiciary Power.

Therefore, magistrates neither would be free to exercise strong discretion while deciding concrete cases brought to the courts, nor could base their decisions in the pursuit of collective goals (which benefit only a portion of society over another branch) if individual rights (embodied

[2] The "Communal principles" becomes the fundamental idea in the Dworkian theory, for it is the condition of possibility for the metaphors of Judge Hercules and the "Chain Novel".

by legal principles) are under question, because – as wildcards in a game of cards – they hold primacy over the first (collective goals), given their universal character – being valid for all members of that given society (Dworkin, 1986).

The realization that the decision making activity of judges is not produced in the vacuum, but rather in a constant dialogue with history, reveals the influence of Gadamer's hermeneutics. However, Dworkin goes further and advocates a constructive interpretation[3] and, therefore, a critical hermeneutic theory in which the decision of a case produces an "increase" in a particular tradition. Moreover, the construction of the decision of a case and, consequently, of its constitutional interpretation, shows itself as something undertaken collectively and open to constant evolution and – why not – review.

Dworkin devises a metaphor (the chain novel) in which each judge is regarded as merely the author of a chapter in a long collective work about the proper interpretation of a legal system. Each judge is, therefore, not only bound to the past, but also is committed to continue the work of her predecessors and to preserve the integrity of the legal practice by constructing the best possible theoretical scheme of the principles recognized by the community in which she is inserted. (Dworkin, 1986)

Summarizing the thesis: The integrity denies that the manifestations of the Law are mere factual reports focused on the past, as it does the conventionalism linked to the positivism; nor instrumental programs focused on the future, as intends the pragmatism tied to the realism. For the Law as integrity, legal affirmations are at the same time, interpretativist positions directed to both the past and the future. In these terms, "Law as integrity, therefore, begins in the present and only turns to the past when its contemporary approach so determines. It doesn't want to bring up, even to the current law, the practical ideals or goals of the politicians who first created it. It (Law as integrity) seeks to justify what these politicians did (…) in a general story worth telling here, a story that brings a complex statement: that the current practice can be organized and justified by principles sufficiently attractive to provide an

[3] A social practice such as law or courtesy is interpreted in a "constructive" way when the interpreter does two things: 1) first, he acknowledges that this practice is not merely a brute social fact, but rather has a purpose or a "point" that makes it valuable to him/her and to those who join the practice. 2) second, he interprets this practice in a constructive way because he regards the practice as "sensitive" to this point and strives to make this practice the best it can be from the point of view of its very point. (Dworkin, 1986)

honored future. The law as integrity deplores the mechanism of the old view of 'law is law', and the cynicism of the new 'relativism'. It considers that these two points of views are rooted in the same false dichotomy of finding and inventing the law. When a judge declares that a certain principle is steeped in the law, his opinion does not reflect a naive statement about the motives of the past statesmen, nor a claim that could be easily refuted by a good cynic, but an interpretative proposal: the principle fits itself into any complex part of the juridical practice and its justifies; it offers an attractive way to see, at the structure of this practice, the principle consistency that integrity requires." (Dworkin, 1986)

A society that accepts integrity as a virtue becomes, according to Dworkin, a special type of community that promotes its moral authority to take and mobilize the monopoly of the coercive force. Therefore, Dworkin's theory (though some Brazilian authors insist to not understand it!), brings at least four (4) points that are worth highlighting, since they are relevant to this debate: (1) the denial of judicial discritionarity (in the strong sense); (2) the denial that the judicial decisions can be based on political guidelines; (3) the relevance of the due process to the dimension of the integrity; and (4) the own notion of integrity, which requires the understanding that each case is a part of a continued story; therefore, a case can't be dismissed without a reason based on a consistency of principles. (Dworkin, 1986) (Dworkin, 2006) (Dworkin, 2011)

8. Conclusion

The scientific turn of the critic rationalism of Karl Popper, as well as the tax law pragmatic-hermeneutic turn of Wittgenstein and Gadamer, ultimately taught us that knowledge paradoxically produces ignorance, because when we get to know something we reduce the complexity, ie, when we launch light on an object of analysis, other objects are darkened. This only characterizes science and scientific knowledge as products of a human condition, which today is known as precarious (against a myopic Enlightenment rationalism) and liable of constantly review and refutation (because it's fallible).

And in these terms, still the old dichotomies insist to haunt our lives, like ghosts that come and go at the course of history. Despite the relative and alleged didacticism of these dichotomies in propaedeutic lessons of the juridical awakening, we believe in a less lazy and more critical point of view, that they hide more than unveil the processes of

law enforcement and the highly complex theories of justice that permeate the theory of the Law and the hermeneutics (critical) behind them.

This text grew out of a question asked to Ronald Dworkin, one of the world's most renowned jurists and already worked in this essay. Asked uncritically, by the umpteenth time in the XXI century, if he was, after all, a jusnaturalist or a positivist, Dworkin answered in an ironic tone: "Well, if there are only these two options and if I have to choose one of them, I'm a jusnaturalist, even though, obviously, I am not, in fact, I am quite the opposite!"

The same would happen if the question was about the preference for the will of the legislature or for the will of the Law (or of public Law versus private Law), or about the theme of this essay (interpretivism and non-interpretivism), or about any other dichotomy incompatible with the complexity of our days.

We believe that the weak proceduralism of Ely, the minimalism of Sunstein, the constitutional populism of Tushnet, the substantialism of Tribe, the economic pragmatism of Posner, as well as the integrity theory and the constructive interpretation of Dworkin are all willing to go beyond, what, undoubtedly, has enriched the north-American debate.

References:

Dworkin, Ronald. 1986. *Law´s Empire*. Cambridge, MA: Belknap

Dworkin, Ronald. 2006. *Justice in Robes*. Cambridge, MA: Belknap.

Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge, MA: Belknap.

ELY, John Hart. *Democracy and distrust: a theory of judicial review*. Cambridge: Harvard University Press, 1980.

KRAMER, Lerry. *The People Themselves: Popular Constitutionalism and Judicial Review.* New York: Oxford University Press, 2004.

Posner, Richard. 1999. *The Problematics of Moral and Legal Theory*. Cambridge, MA. Harvard University Press.

Posner, Richard. *Economic Analysis of Law.* 6. ed. New York: Aspen, 2003.

Sunstein, Cass. 1999. *One Case at a Time – Judicial Minimalism on the Supreme Court*. Cambridge, MA: Harvard University Press.

TRIBE, Lawrence. *Constitutional choices*. Cambridge, Massachusetts: Harvard

University Press, 1985.

_____. *American constitutional law*. 2. ed. Cambridge: Fundation Press, 1988.

TUSHNET, Mark. *Taking the constitution away from the courts***.** Princeton. New Jersey, 1999.

TUSHNET, Mark. *Popular Constitucionalism as Political Law***.** Chicago: Chicago-Kent College of Law, 2006.

WALDRON, Jeremy. *The Core the Case Against Judicial Review***,** In Yale Law Jornal, v. 115, nº 6, 2006.

WEITHMAN, Paul J. Review of Cass R. Sunstein's one case of at a time: judicial minimalism on the supreme court. *Journal of College and University Law*, 1999.

Changes in Constitutional interpretation about fundamental rights:
Conditions And Limits

Adriano Sant'Ana Pedra[1]

Abstract: The objective of this study is to analyze the informal constitutional changes and to further examine the limitations to which they are submitted. According to the concretion theory, constitutional norms result from the connection between the normative program (Normprogram), that is, its literal expression, and the normative ambit (Normbereich), understood by the surrounding reality, which results in a decision norm. Constitutional mutations occur from the existing alterations in the normative ambit and contained by the concretion process. Through deductive process, the obtained results enable us to evaluate the limitations that are imposed to constitutional mutations.

Keywords: constitutional interpretation; fundamental rights; judicial review.

1. Introduction

The interpratation of the Constitution will always occur in a certain context, which must not be disregarded. The constitutional interpretation constitutes a creative process of production of the provision, that is, what is had is an attribution of the normative meaning. Thus, the constructive process is fundamentally volitional, and not merely cognitive, which overcomes the traditional idea of interpretation as a process of discovery or disclosure of a meaning previously existing in the linguistic enunciation.

Considering this necessary overlapping between the factual reality and the normative reality, it is necessary to keep the Constitution from being attacked by manipulators of its construction and, for that

[1] PhD in Constitutional Law (Pontifícia Universidade Católica de São Paulo – PUC/SP). Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Professor of Constitutional Law at Faculdade de Direito de Vitória – FDV (bachelor, master and doctoral program). (http://lattes.cnpq.br/0637600349096702)

purpose, conservation devices are important. If, on the one hand, there are limits expressed in the Constitution for the Parliament to make the constitutional reform, without prejudice to the implicit limits also confirmed, on the other hand, for a constitutional change that is operated by action of the constitutional justice, it is necessary to extract from the Constitution such limits, through a sufficient theoretical development.

This paper has as purpose to identify and analyze the boundary lines that apply to the changes to fundamental rights occurred through the decisions of the constitutional justice. The study was made based on the propositions of Friedrich Müller's structuring methodology, considering the opening of the constitutional system, which permits to approach, with this concretist theory, the demands of the contemporary society, which has as traits the social differentiation and the political pluralism.

2. Changes as a phenomenon inherent to the constitutional provisions

The constitutional change performs a highly relevant function in the constitutional concretization process, as it harmonizes the search for normative meaning and the legal security demanded by the Constitutional State. The phenomenon of the constitutional changes is a constant in the life of the State and the Constitution must be understood within its time.

According to the concretization theory (MÜLLER, 2008), the constitutional provisions result from the connection between the *normative program* (*Normprogram*), that is, its literal expression, and the *normative scope* (*Normbereich*), understood as the surrounding reality (MÜLLER, 2000). As the *normative scope* is subject to changes along time, the results of the concretization of provisions may be changed, in spite of the fact that the normative text – and, thus, essentially, that the *normative program* remains the same (MÜLLER, 2007). Thus, the changes to the constitution occur based on changes occurred within the normative scope and must be assessed in the process of the concretization of the constitutional provisions (PEDRA, 2011).

The constitutional change modifies the content of the Constitution as the result of a change to society's general understanding on a certain subject. That is, the constitutional change corresponds to the har-

mony that must exist between the Constitution in force and the living society.

3. The normative supremacy of the constitution

The limitations to the constitutional changes are imperative. If, on the one hand, the Constitution must conform to the social reality, on the other hand, there must be prudence so as not to permit a state of anomy, even though in the presence of the constitutional wording.

Opposite to what occurs with the constitutional reform, that has its limitations expressly - and implicitly – set forth in the constitutional wording, the constitutional change does not have expressly established in the Constitution its limits and its reach, which will be the result of the supremacy and the normative power of the Constitution.

It is necessary, above all, to preserve the principle of the constitutional supremacy, which indicates that the Constitution is the ultimate provision of the legal system, and that above it no other provision may concretely exist. As Pedro de Vega teaches, in the recognition of the existence of constitutional changes, one cannot challenge the *Lex superior* characteristics of the Constitution (VEGA, 1999, p. 214-215).

The constitutional changes may coexist with the principle of constitutional supremacy, without adversely affecting it. Pedro de Vega (1999, p. 215) highlights that the problem of the limits of constitutional changes arises when the factuality/normativeness tension socially, politically and legally turns into a conflict that puts into risk the very notion of supremacy.

Besides supremacy, one must also observe the normative power of the Constitution. As Konrad Hesse recalls, "the legal Constitution does not mean a simple piece of paper, as characterized by Lassalle" (1991, p.25). Further, according to the teachings of the German author (HESSE, 1998, p. 503), the existence of the Constitution is, firstly, a matter of its normative power. And, further, the more the constitutional order corresponds to the realities of the historical situation, the higher will be the willingness to recognize the contents of the Constitution as mandatory. And, the firmer is the determination to update these contents, the higher is the chance of threatens being avoided.

The Constitution must be both normative and dynamic. While the normative power of the Constitution will be responsible for the confirmation of life in society, the concrete situation will give dynamism to

the constitutional provisions. This is why Pedro de Vega (1999, p. 211) writes that it is not about *fiat jus pereat mundus* prevailing, let alone imposing the factuality, but, finding a formula that without destroying one or the other, permits normativeness and dynamism to coexist.

4. Boundary lines of constitutional changes

The idea of a normative Constitution demands that the constitutional provisions be responsible for conforming the reality. In this regard, it is imperative to approximate the factual world and the normative world so that, there is no mitigation to the supremacy of the Constitution, considering that the factual cannot overcome the normative. Thus, it is necessary that the constitutional change be restricted to the normative limits created by the Constitution itself, which will be seen below.

I) Elasticity of the wording

As a result of the very nature of the constitutional change, as an informal process of change to the Constitution , the constitutional wording arises as its most peculiar limit. Not the wording of the text, but the elasticity that it permits (PEDRA, 2010). The normative text constitutes the starting point of the constructive activity and will also define its limit.

The content of the constitutional provision can only be modified inside the limits drawn by the text (HESSE, 1992, p. 101) and the enunciations constitute "True barriers to construction for the operator of Law" (TAVARES, 2005, p. 219). Thus, if it is true that a text can have more than one meaning, it is also true that it cannot have countless meanings (CALLEJÓN, 1997, p. 108-109). In view of this, it is possible to say that the text performs a *negative function* (CANOTILHO, 2002, p. 1202).

But it must be highlighted that, in certain cases, the elasticity of the normative text permits the extraction of a provision that is far away from the wording of the Constitution without this implying its breaking.

This is what happened, for instance, with the concept of family given by the Constitution of 1967/1969, namely, "family is constituted by the marriage and will be entitled to be protected by the Public Authorities" (article 167 of the constitutional text of 1967 and article 175 of the constitutional text of 1969). Within this concept, there was no idea of

protection to the situation of a man and a woman who happened to live together as spouses without having married. In spite of the literality of the above-mentioned provision, in its process of concretization, the Supreme Federal Court understood, when judging Special Appeal RE No. 60.657/GO that, because of the changes to Brazilian social and cultural conceptions, law should also protect the relationship constituted based on the cohabitation under the same roof of an unmarried couple. We can say that this gap between the constitutional text – which is recent as regards these decisions of the Supreme Federal Court – and the Brazilian reality is mostly due to the fact that such constitutional text has been enacted in a non-democratic manner, and has not been discussed in a constituent assembly formed by legitimate representatives of the people.

As observed by María Luisa Balaguer Callejón (1997, p. 34), it is very difficult to establish to which extent the construction may be taken.

> In the case of a text reconstructed by a new sociopolitical reality that highlighted another meaning from the written word, the problem becomes a matter of limits of change and thus, returns to the general issue of knowing to which extent the text can be taken without resulting in a constructive excess (CALLEJÓN, 1997, p. 34).

For instance, article 55 of the Argentine National Constitution demands, in order for a candidate to become a Senator, that he or she has an annual income of two thousand pesos fortes. This amount, that would correspond today to about two thousand dollars a month (SAGÜÉS, 2006, p. 34), represents an axiologically unacceptable oligarchic demand.

Thus, it is necessary to distinguish the new readings that are kept within the range of acceptable meanings of a legal text, from those other surreptitious creations of new precepts that occur through constructions that exceed the possible literal meaning of the legal enunciations and end up by transforming their interpreters into "illegitimate legislators" (MENDES *et al*, 2008, p. 132).

It must be highlighted that the limit is the elasticity of the constitutional text as a whole, and not of a specific enunciation individually analyzed.

II) Binding decisions of the Constitutional Court

Another limitation which can be found refers to the binding decisions of the Constitutional Court. Such limitation must be seen with temperance, since binding judicial decisions are seen as limits to certain interpreters of the Constitution, except *v.g.* the Constitutional Court itself, which is not bound to its own decisions.

It is possible to notice that the binding decisions of the Constitutional Court adversely affect the capacity of evolution of the construction of the Constitution, as the change of construction must come from this body, which restricts the possibility of occurrence of a constitutional change, as long as the binding decisions inhibit the freedom of construction of lower courts and, thus, the possibility that the changes reach the Supreme Court "from bottom to top".

We are not denying here the legitimacy of the changes to binding decisions, which must occur when they are no longer consistent with the social reality. It is perfectly possible that the Court expresses a change to the case law criteria, even though they are solidly rooted. The Constitutional Court is not bound to its own precedents, and it may decide on a different way (*overrule*).

The foundation of the Constitutional Court must make reference to the prior binding decision and justify the denial of the criteria that led the Court to decide as it did in the previous time. This burden applies because, in this case, the Court is operating a constitutional change. As a new decision modifies the content of the Constitution, a reinforced foundation is demanded to justify the change of understanding by the interpreter.

III) Progressiveness and prohibition of retrocession for the fundamental rights

The constitutional change that involves fundamental rights and guarantees is a one-way path, that is, a path that admits only advances in the informal changes to the Constitution (PEDRA, 2008b, p. 173-205). This is not only a prohibition of retrocession, but also a demand for advances as much as they are possible.

As it is known, many fundamental rights and guarantees need the legislator so that it can be concretized, more even in relation to the constitutional provisions with limited efficacy. Thus, the prohibition

of retrocession will inhibit arbitrary revocations of laws that meet this function, as Jorge Miranda writes:

> Once they are concretized through legal provisions, they cannot purely and simply be revoked, returning to the prior status (although those legal provisions may, and obviously, must be declared unconstitutional when they are not in accordance with the Constitution); the legislator certainly has the faculty (by operation of the pluralist democracy) to change any legal system, what it does not have is the faculty of subtracting in a supervening manner from a constitutional provision, the enforceability that it has, however, acquired (MIRANDA, 2000, p. 254-255).

On this subject, decision nº 39/1984 of the Portuguese Constitutional Court analyzed the revocation of articles 18 to 61, 64 to 65 of Law nº 56/1979, which would correspond to the destruction of the National Health Service, created by this law and set forth in article 64, 2, of the Constitution of the Portuguese Republic. In this judgment, the Court determined that the State cannot step back and breach what it had already complied with.

Ingo Wolfgang Sarlet (2004, p. 255) finds that the prohibition of retrocession "directly results from the principle of maximization of efficacy of (all) provisions of fundamental rights". Besides, the author asserts (SARLET, 2004, p. 254) that, within the scope of the Brazilian constitutional law, the principle of prohibition of retrocession implicitly results from the constitutional system, in particular the following principles and arguments (non-exhaustive list): (*i*) it is a principle of the democratic and social State ruled by Law, (*ii*) the principle of dignity of human person, (*iii*) the principle of the maximum efficacy and effectiveness of the rules that define the fundamental rights (art. 5, § 1, CF), (*iv*) the principle of protection of reliance and, (*v*) self-binding of state entities in relation to their prior acts.

It must be reminded that, in Brazil, the fundamental rights are treated by the Constitution as immutable clauses. It must be highlighted that the enunciation of the provision contained in article 60, § 4, of the Federal Constitution, when using the expression "tending to abolish", wished to preserve in any case, the core of the Constitution, forbidding even the consideration and vote by the National Congress, not only the proposal of constitutional amendments that come to suppress any devices highlighted as immutable clause, but also those which come to hit

them in an equivalent manner, disclosing a tendency to their abolishment, also affecting its essential content. In view of all of that, it is obvious that the original constituent legislator did not as well wished that the essential core of the Constitution were mitigated by a constitutional change and it is possible to assert that the immutable clauses are positioned as a limit both to the formal changes and to the informal changes to the Constitution.

However, there are those who defend that the immutable clauses do not establish an absolute intangibility of the constitutional asset protected by it. In this line of reasoning, although the essential core of the protected constitutional assets remains preserved, that is, "provided that the essence of the principle remains untouched, circumstantial elements connected to the asset turned into an immutable clause could be "modified or suppressed" (MENDES, *et al*, 2008, p. 219).

In line with this understanding as regards immutable clauses in general, it must be highlighted that, as the nature of the prohibition of retrocession for fundamental rights is based on principles, such prohibition must be seen in a relative manner.

However, a retroceding measure, in order not to violate the principle of prohibition of retrocession, must, "besides having a constitutional justification, safeguard – in any case – the essential core of the social rights" (SARLET, 2004, p. 260).

IV) Influence of the international courts and the foreign national courts

In this beginning of 21st century, we walk towards a supranational law that is stimulated by commercial, economic, social and cultural relationships, that end up by limiting the state sovereignty and providing a new face to international law.

In this sense, José Joaquim Gomes Canotilho teaches that an internal legal system, "cannot, nowadays, be *out* of the international community. It is bound to principles of international law (principle of independence, principle of self-determination, principle of compliance with human rights)" (2002, p. 81).

And this international law must have as fundamental principle the international protection of human rights.

A point that must be highlighted here is the world tendency of abolishment of death penalty. Advancing in this regard, many countries

have tried to convince those that still adopt these measures so that they carry out a moratorium on the executions, that they extinguish the capital penalty for underaged people and people with disabilities, and even that it ultimately results in their total abolishment.

In this context, the world community turns to the United States of America, which still resists and keeps death penalty, and it would be possible to reflect about an "internationalization" of the US Supreme Court. Many countries seek to interpret their own constitutional law considering the decisions of the United States Supreme Court. However, the US constitutional justice has demonstrated certain reluctance in searching for support beyond its borders, when it is required to interpret the Constitution of the United States. It is worth highlighting that

> in a recent and controversial decision adopted by the US Supreme Court, in case *Roper vs. Simons* (2005), in which an opinion absolutely prevailing in foreign legislation about death penalty to those under the age of 18 was invoked, to assess the constitutionality of that measure in the USA, Justice Scalia, in a dissenting opinion, observed: "The recognition of the international approval does not have a place in the legal opinion of this Court, unless it is *part of the criteria for decision* of this Court" (TAVARES, 2006, p. 79).

However, in *Atkins vs. Virginia* (2002), the Supreme Court understood, by 6 votes against 3, that the Constitution of the United States prohibits the death penalty for people with mental disorder. Justice Stevens, who was the reporter for the winning vote, expressed the new understanding that the Court gave to Amendment VIII, observing that the world community disapproves the imposition of death penalty for crimes committed by people who suffer of mental retardation. Chief Justice Rehnquist and Justice Scalia reproved the position of the Supreme Court because of its reference to the international understanding on this matter, qualifying the thought of the world community as irrelevant, as their notion of justice not always corresponds to that of US people, but theirs were dissenting opinions.

Notwithstanding, the citizens of most countries have shared aspirations, the same sense of dignity and of value and feeling related to justice. Justice Stephen Breyer, who has been the most prominent member of the Supreme Court to seek guidance outside his country, highlights that the "globalization" of human rights is imperative as long as they must be available to all people and not only to the individuals of

specific States. And this does not subvert the concept of sovereignty in any way.

It is necessary to distinguish between the situations in which the influencing decision comes from a recognized international court (effective law) or when the referenced case law comes from a foreign national court (non-effective law), a case in which it will be just a matter of a persuasion element. Notwithstanding, the reference to foreign legal provisions or to the international public opinion gives the Constitutional Court an additional tool that is potentially useful for the solution of complex subjects involving constitutional law.

V) Prospective effects of the new interpretation

As the Constitution is the base of the entire legal system, any change to its construction has a large repercussion and may generate strong legal insecurity. Therefore, it is necessary to reduce the legal impact caused by such informal changes to the Constitution, preventing retroactive insecurity, so that the new understanding be applied only to cases that occur after it.

As the provision is *construed* by the interpreter during the process of *concretization* of the law, in the constitutional change there is the creation of a new provision, which, because of that situation, will never be able to produce effect for prior events, in compliance with the principle of the legal security. Thus, when a new meaning is given to the constitutional command, it is necessary to save from this new understanding the legal relationships occurred in the past.

> The doctrine of impossibility of retrocession serves the value of legal security: what happened has already happened and must not, at every moment, be legally challenged, under penalty of endless disputes being started. This doctrine, therefore, fulfills a function of permitting the solution of disputes with minimum social disturbance. Its basis is ideological and reports to the liberal conception of law and of the State (FERRAZ JUNIOR, 2001, p. 248).

The legal security must be present in a society, because it represents one's certainty of acting according to the behavior standards in force. People need to know how they must behave in the community where they live, and this is incompatible with the possibility of retrocession of provisions. Ronald Dworkin reminds the objection that "if

a judge creates a new law and applies it retroactively to the case before him/her, the losing party will be punished not for having violated any duty he/she had but for having violated a new duty, created by the judge after the fact" (DWORKIN, 2002, p.132).

The normative change can only produce prospective effects, always forward along the time. Such limit could only have an exception in a criminal matter and to the benefit of the defendant, when then retroactive effects would apply in order to reach in time the conduct thereof. In this sense, article 5, XL, of the Brazilian Constitution ("the penal law shall not retroact, except to benefit the defendant") could be read as "the penal provision shall not retroact, except to benefit the defendant".

5. Final Considerations

The considerations presented in this text showed that the study of the constitutional changes based on the theory of concretization permits to understand its nature and to establish its conditions and its limits.

According to the theory structuring the constitutional provisions, it is possible to take the incorporation of *reality* in the *provision.* This means that the constitutional reality is a complex and including reality, in which facticity and normativeness flow together and appear reciprocally related.

The evolution of the constitutional case law is a constant in the life of the State and occurs because the meaning of Constitution is not given beforehand, but it depends on the context in which it is concretized. The constitutional feeling present in each moment lived starts to permeate the realization of the Constitution and it, as a living organism, permits that we follow up the evolution of the social, political and economical circumstances.

Notwithstanding, in spite of the fact that the circumstances at the normative level integrate the conception of the provision, this does not mean that the Constitution must yield to the forces of the circumstances of reality because such homeostatic process of dynamic balance has positive and negative limits.

The Constitution must be both normative and dynamic, so that the Constitution's normative force regulates life in society and the concrete situation grants dynamism to the constitutional provisions. The changes to the constitutional case law must not generate traumatizing

deformations or subversions to the established order and will only be considered legitimate if they do not exceed the boundary lines resulting from the Constitution's supremacy and normative power.

References

BARROSO, Luís Roberto; BARCELLOS, Ana Paula de. O começo da história. A nova interpretação constitucional e o papel dos princípios no direito brasileiro. *Interesse Público*, Porto Alegre, ano 5, n. 19, p. 51-80, mai./jun. 2003.

CALLEJÓN, María Luisa Balaguer. *Interpretación de la Constitución y ordenamiento jurídico*. Madri: Tecnos, 1997.

CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da constituição*. 5. ed. Coimbra: Almedina, 2002.

CARVALHO NETTO, Menelick de. *Apresentação da obra*. In: ROSENFELD, Michel. *A identidade do sujeito constitucional*. Trad. Menelick de Carvalho Netto. Belo Horizonte: Mandamentos, 2003.

DWORKIN, Ronald. *Levando os direitos a sério*. Trad. Nelson Boeira. São Paulo: Martins Fontes, 2002.

FERRAZ JUNIOR, Tercio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. 3. ed. São Paulo: Atlas, 2001.

HESSE, Konrad. *A força normativa da constituição*. Trad. Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris, 1991.

HESSE, Konrad. *Escritos de derecho constitucional*. 2. ed. Trad. Pedro Cruz Villalon. Madri: Centro de Estudios Constitucionales, 1992.

HESSE, Konrad. *Elementos de direito constitucional da República Federativa da Alemanha*. Trad. Luís Afonso Heck. Porto Alegre: Sergio Antonio Fabris, 1998.

MIRANDA, Jorge. *Manual de direito constitucional*. 4. ed. Coimbra: Coimbra, 2000, t. II.

MÜLLER, Friedrich. *Métodos de trabalho do direito constitucional*. Trad. Peter Naumann. 2. ed. São Paulo: Max Limonad, 2000.

MÜLLER, Friedrich. *O novo paradigma do direito*: introdução à teoria e metódica estruturantes. Trad. Dimitri Dimoulis, Gilberto Bercovici, Peter Naumann, Rodrigo Mioto dos Santos, Rossana Ingrid Jansen dos Santos, Tito Lívio Cruz Romão e Vivianne Geraldes Ferreira. São Paulo: RT, 2007.

MÜLLER, Friedrich. *Teoria estruturante do direito*. Trad. Peter Naumann e Eurides Avance de Souza. São Paulo: RT, 2008.

PEDRA, Adriano Sant'Ana. A justiça constitucional como elemento de aperfeiçoamento da democracia em Cuba. In: TAVARES, André Ramos (Coord.). *Justiça constitucional e Democracia na América Latina*. Belo Horizonte: Fórum,

2008a.

PEDRA, Adriano Sant'Ana. As mutações constitucionais e o limite imposto pelo texto da Constituição: uma análise da experiência latinoamericana. *Revista Brasileira de Estudos Políticos*, Belo Horizonte, n. 101, p. 7-36, jul./dez. 2010.

PEDRA, Adriano Sant'Ana. Evolução de direitos e garantias constitucionais e vedação de retrocesso: uma abordagem da jurisprudência do STF nos vinte anos da Constituição brasileira. *In*: SIQUEIRA, Julio Pinheiro Faro Homem de; TEIXEIRA, Bruno Costa; MIGUEL, Paula Castello. *Uma homenagem aos 20 anos da Constituição brasileira*. Florianópolis: Boiteux, 2008b.

PEDRA, Adriano Sant'Ana. Mutação constitucional e teoria da concretização. *Revista de Direito Constitucional e Internacional*, São Paulo, a. 19, n. 74, p. 15-35, jan./mar. 2011.

PEDRA, Adriano Sant'Ana. Transplantes de órgãos de anencéfalos. *Revista Trimestral de Direito Civil – RTDC*, Rio de Janeiro: Padma, ano 9, v. 36, p. 255-267, out./dez. 2008c.

QUEIROZ, Cristina. *Interpretação constitucional e poder judicial*: sobre a epistemologia da construção constitucional. Coimbra: Coimbra, 2000.

QUEIROZ, Cristina. *O princípio da não reversibilidade dos direitos fundamentais sociais*: princípios dogmáticos e prática jurisprudencial. Coimbra: Coimbra, 2006.

SARLET, Ingo Wolfgang. Direitos fundamentais sociais e proibição de retrocesso: algumas notas sobre o desafio da sobrevivência dos direitos sociais num contexto de crise. Revista Brasileira de Direito Constitucional – RBDC, São Paulo, n. 4, p. 241-271, jul./dez. 2004.

STRECK, Lenio Luiz; OLIVEIRA, Marcelo Andrade Cattoni de; LIMA, Martonio Mont'Alverne Barreto. A nova perspectiva do Supremo Tribunal Federal sobre o controle difuso: mutação constitucional e limites da legitimidade da jurisdição constitucional. In: AGRA, Walber de Moura; CASTRO, Celso Luiz Braga de; TAVARES, André Ramos (Coord.). *Constitucionalismo*: os desafios no terceiro milênio. Belo Horizonte: Fórum, 2008.

TAVARES, André Ramos. *Fronteiras da hermenêutica constitucional*. São Paulo: Método, 2006.

TAVARES, André Ramos. *Teoria da justiça constitucional*. São Paulo: Saraiva, 2005.

THAYER, James Bradley. The origin and scope of the american doctrine of constitutional law. *Harvard Law Review*, Cambridge, v. VII, n. 3, p. 129-156, out. 1893.

VEGA, Pedro de. *La reforma constitucional y la problematica del poder constituyente*. Madri: Tecnos, 1999.

VIGO, Rodolfo Luis. *Interpretación constitucional*. 2. ed. Buenos Aires: Lexis Nexis/Abeledo-Perrot, 2004.

Gadamer‘s dialectics and its basis on Hegel‘s theory

Danilo Ribeiro Peixoto
Nathália Lipovetsky e Silva
Ricardo Henrique Carvalho Salgado

Abstract:Philosophical Hermeneutics' main purpose is the analysis of understanding itself. From this basis, it represents a major rupture from an instrumental perspective of interpretation. Interpretation no longer reports itself to a group of techniques destined to find a hidden or an obscure meaning of a text. Instead, it is a phenomenon that occurs constantly, moment after moment. Hermeneutics is, then, meant for something far greater. It has an ontological basis, in which language occupies the centre. Considering that reality is essentially the product of men's interpretation, men are hermeneutical beings. In accordance to this thought, all things are destitute of an autonomous and essential meaning. Meaning is given by the being which exercises interpretation; a historical being on a specific context, making interpretation a unique and an unrepeatable event. Hence, interpretation embraces all reality and it is not an instrument operated by a subject in regard of a far object. It presupposes a symbiotic interaction between both, which breaks the archaic dichotomy subject-object. Gadamer encountered on Hegel's work one of the great influences for his own theory, especially regarding Hegelian dialectics. Albeit this major influence, Gadamer's dialectics reveals distinct features. It assumes in part the structure of a dialogue, like seen at Socrates' dialogues. As the Hegelian dialectics, though, it aims the totality of reality, although it is the language that occupies an essential matter. Understanding is achieved through a dialectical process that culminates at the fusion of horizons. Both subject and object possess each one a singular horizon that furnishes them with the conditions – and imposes limitations - within which comprehension is possible. The horizon of the subject and the horizon of the object opposes themselves inquiries and answers on a continuous spiral movement which aggregates new content in each rotation. Fusion of horizons conceals a dialectical structure. At the event of interpretation, both horizons merge themselves on a mutual horizon, process which results in a unique product renewable for new interpretation events.

Keywords: Gadamer; Hegel; Dialectics

1. Introduction

Protagonist of *Hermeneutic Turn*, Hans-Georg Gadamer sought to clarify the *understanding* phenomenon, conceiving Hermeneutics from an ontological perspective[1]. Thus, Gadamer's Philosophical Hermeneutics departs from an instrumental perception of interpretation, especially considering that language is treated beside reason as ontological to men.

Gadamer was a disciple of Martin Heidegger and it is possible to identify in his work considerable inheritances from his master's thought. Albeit this major influence, his Philosophical thought could not be seen properly as only Heideggerian derived. It receives the injunction of some very distinct sources, from which could be detached Georg *Wilhelm Friedrich Hegel as one of the most important. Hegel was not just an interlocutor of Gadamer, like many others; actually, his thought seems to receive a great inspiration of Hegel's Philosophy,* especially regarding Hegelian Dialectics. *Gadamer himself recognizes Hegel as one of the three major influences of Modernity to his thought, besides Heidegger and Husserl*[2].

In accordance to Gadamer's theory as exposed in Truth and Method[3]*, his greatest work, understanding could be identified as operating in a dialectical process* This paper seeks, in general aspects and not exhaustively, an analysis of Dialectics in Gadamer's thought, attempting to approach the theme of Hegelian Dialectics in order to understand the influence of Hegel in Gadamer's work. It also aims a short exam of Gadamerian Dialectics' specificities, presenting its similarities and its unique features in comparison to the Hegelian's.

2. Dialectical Logic

In Hegel's philosophy there is no linearity between cause and effect, the movement is circular.

For example, when Parmenides states that "being is being and not-being is not-being", Aristotle sees the principles of formal logic, meaning principle of identity, principle of excluded middle and prin-

[1] PALMER, Richard E. Hermenêutica. Trad. Maria Luísa Ferreira. Lisboa: Edições 70, 1986.

[2] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger. Trad. Marco Antônio Casanova. Petrópolis: Vozes, 2012, p. 7.

[3] GADAMER, Hans-Georg. Verdade e Método I: traços fundamentais de uma hermenêutica filosófica. Trad. Flávio Paulo Meurer. 11 ed. Petrópolis: Vozes, 2011.

ciple of contradiction. To Hegel, stating that "being is being" is enough, since it comprehends a subject and its predicate. The "is being" was added to the "being" and in there lies the not-being. Dialectics constitutes itself of the totality's contradiction movement. The thing in its totality carries in itself its negation.

It is important to emphasize that Hegelian dialectic is not a method, it is not a set of directive rules of thought in search of the truth. Surpassing the being/ thought distinction duality, dialectics consists in the inherent logic of the being becoming, it is its expression.

Contrary to what takes place in the Ancient world, in Hegelian dialectics the negation of negation does not result in the elimination of the negated term. Instead, it results in its surpassing into the moment of synthesis, in the totality.

Dialectical logic has three movements, commonly presented as thesis/antithesis/synthesis. The first of the three is the passing from the *being-in-itself* to the *being-there*, or the passing from abstract universality to particularity; the second is the passing from the *being-there* to the *being-for-itself*, in a subjective movement of negation more extreme than the one before; the third moment is the negation of the *being-there* by the *being-for-itself*, concluding the dialectical movement with the surpassing of the *for-itself*, that returns mediated to its *in-itself*, constituting the moment of the *being-in-itself-for-itself* before Reason.

The most famous and didactic illustration of the dialectical logic is the dialectic of recognition, or the master-slave dialectic, narrated by Hegel in the *Phenomenology of Mind* (or *Phenomenology of Spirit*, there are both translations from the German word *Geist*), which we now briefly broach below.

Dialectic of recognition

It is in the master-slave dialectic that Hegel presents the struggle towards the recognition oscillating between *physis* and *nomos*, between particularity and universality, until finally Reason achieves its self-recognition as the home of universal consensus.[4]

With recognition man knows himself to be unique and the same at once, in a dialectics in which lies the possibility of a society of equal

[4] LIMA VAZ, Henrique Cláudio de. Senhor e Escravo – Uma parábola da filosofia ocidental. In: Síntese Política Econômica Social (SPES) – Nova Fase, v. VIII, n. 21, p. 7-29, jan/abr. 1981, p. 8.

and free beings, individualized.[5]

In the *Phenomenology* is described the observation of the experience that consciousness has through history in the development of the absolute knowledge, which basic elements are history and dialectics. The expression of the absolute knowledge is the Reason, once are resolved the contradictions of the self-consciousness (as equality and inequality) through the work of the Spirit. This knowledge is the outcome of the work of all generations, the work of the Spirit in the process of self-knowledge, which most significant moment lies in the concept of work in the master-slave dialectic. The *Phenomenology* presents two dialectics: the revealed intention of the development of knowledge through the dialectic of certainty of the subject and of truth of the object (the work of consciousness is precisely the one of finding the unity point between certainty and truth) and the dialectic of the development of freedom, in itself and for itself, abstractly and concretely in the relations men brace among themselves in the course of history.[6]

The master-slave dialectics is not restrained to the historical slavery period, but, instead, explains all the relationships of domination between free beings, since it is a deriving risk of freedom itself. It is the explanation of reality revealed in the idea of freedom, reconciling the reality with the concept.[7]

Consciousness is the consciousness of a living being and the consciousness knows what itself is by knowing a living being, in a relation of mere desire and consuming (abstract infinite). To find a permanent object of desire, consciousness needs an object that does not escape from it. It needs the concrete universal, *in-itself* and *for-itself*: other consciousness. Before this universal the consciousness finds itself to be the universal and that it is its own object of desire and that only the consciousness remains as universal and *for-itself*. There no longer exists the relation of desire and consuming, but instead, there is the recognition through which the consciousness knows itself both as subject and object (self-consciousness). It is only in another self-consciousness that the self-consciousness finds satisfaction.[8]

The thinking is the negation of the world presented as a given, to

[5] SALGADO, Joaquim Carlos. A Idéia de Justiça em Hegel. São Paulo: Loyola, 1996, p. 247.
[6] SALGADO. A Idéia de Justiça em Hegel, cit., p. 248-9.
[7] SALGADO. A Idéia de Justiça em Hegel, cit., p. 249.
[8] SALGADO. A Idéia de Justiça em Hegel, cit., p. 251-2.

achieve universality, in a way so action is the negation of the given and, thus, dialectical creation. Action is the rationality itself, that negates its reality as a given without stopping being what it was, putting history into motion.[9]

Reason creates a second nature, the nature of Spirit: the culture, which is the work of a Reason that is of all (the I that is we) and not of one only. The master-slave dialectic shows men's exit from its natural and biological world towards the spiritual and cultural world, where he lives as a free being.[10]

The master-slave dialectic takes place in two dimensions, both aiming the desire of recognition: the action of struggle and the action of work.[11]

In the struggle the self-consciousness try to vindicate its identity as absolute self-consciousness, laying the foundations of the spiritual world (culture). In the life and death struggle between self-consciousness life and freedom are at stake, two essential values to the definition of the self-consciousness. Life is risked in the name of freedom, but it cannot be sacrificed because there cannot be freedom without life. The outcome of this struggle is at one hand the free and independent self-consciousness (the master's) and at the other the dependent self-consciousness (the slave's), that renounced freedom to remain alive and now has both life and freedom as gifts subjected to the master. The master, however, keeps its independence through the recognition given by the self-consciousness of the slave, both in the relations of subsistence and in the assertion of its freedom and independence. The struggle for the recognition of freedom puts life, the supreme value of the living, at risk. From the beginning the dialectical action of the struggle has the purpose of spirituality and what the man seeks with the struggle is not the material survival, but the recognition as a free being (but not a mere living being, an animal). In this double movement the self-consciousness finds in the other not a dependent object destined to the fruition of desire, but other self-consciousness, autonomous. The outcome of the struggle is an abstract negation, as negation of the man's immediate and unilateral life and as the negation of life in its preservation, considering that the fear of death shows to the defeated self-consciousness its truth – life, a gift of a winner. Master and slave are, then, respectively, one independent

[9] SALGADO. A Idéia de Justiça em Hegel, cit., p. 253.
[10] SALGADO. A Idéia de Justiça em Hegel, cit., p. 254-5.
[11] SALGADO. A Idéia de Justiça em Hegel, cit., p. 255.

self-consciousness which essence is being-for-itself, and one dependent self-consciousness which essence is being for the other. [12]

The action of work dialectic is superior to the first one. The inequality brought by the struggle is the preservation of life and freedom, equally essential. The two consciousnesses preserve themselves, even if in inequality, because they know that death would not resolve the contradiction and that life has to be preserved because life is the presence of freedom. The slave's self-consciousness gets its free self-consciousness from fear and work. The master consumes the object with desire while the slave shapes it with work, commanding his desire, shaping himself, overcoming his fear, and the servile consciousness becomes the truth of the independent self-consciousness.[13] Positions change: the master becomes dependent of the slave self-consciousness, which transforms the world and transforms itself in an independent self-consciousness. This freedom, initially, is purely interior, stoic. The slave attempts, then, the recover of his for-itself, no longer through the life and death action (which would take the dialectical relation to a infinite negative process) but through the relation of work and modification of the external world as a mediative element to the lifting of the slave's self-consciousness to the same level as the master's.[14]

The struggle and the risk of death make the negativity surface, which accomplishes itself as work, which, by its turn, transforms the nature. The non-freedom of the master consists in the fruition without previous work. He depends on the slave, his freedom is incomplete because he does not see the other as his equal and there can only be logical liberty between peers. The slave, on the other hand, recognizes the freedom of the master and knows himself to be free too, as with his work he freely transforms nature. Phenomenologically, the slave is in a higher degree.

3. Dialectics in Gadamer's thought

Hegelian Dialectics in Gadamer's view

Following this paper's purpose on examining Hegelian roots of

[12] SALGADO. A Idéia de Justiça em Hegel, cit., p. 255-62.
[13] SALGADO. A Idéia de Justiça em Hegel, cit., p. 262-3.
[14] SALGADO. A Idéia de Justiça em Hegel, cit., p. 263-5.

Gadamer's thought, it would be convenient to shortly remount how Gadamer himself analyses Hegel's work, more specifically Hegelian Dialectics, since his analysis of the understanding process is developed by a dialectical logic.

Identifying a crescent interest at the study of Hegel's philosophy at the 20th Century, Gadamer praises the profound sibylline of his books and the plasticity of his lectures, deriving from them the great influence it exerted at 19th Century[15]. He argues that assuming Hegelian's idea of science would give appropriate conditions to an adequate confrontation of the contemporary philosophical interest in his readings. Then, Hegel's *The Science of Logic* should be put on a central position to this matter.

According to Gadamer, with his logic Hegel sought to consummate Kant's transcendental philosophy – of universalist nature. Like Fichte, Hegel would had identified in Kant's *auto conscience,* which would be capable of spontaneously determine itself – autonomy, the fontal point to every truth of human knowledge. He seeks, however, something more: the self in transcendental sense. Pure self is spirit, and self's truth is pure knowing[16].

In *The Phenomenology of Spirit*'s conclusion appears the idea of philosophical science, which reports itself not anymore to certain figures of the conscience, but to determined concepts[17]. There would be the beginning of logic; the beginning of science is based on results of experiences from the conscience, which is initiated with the sensible certainty and is consummated in *spirit*'s figures that Hegel nominates *absolute knowing:* with art, religion and philosophy. They are absolute because any opinating conscience will go through what is shown on them in full affirmation and here starts science for the first time because anything is thought but thoughts, the pure concept in his pure determination[18]. The expression *pure thought* has Platonic-Pythagoreanorigin and represents the comprehension that thought frees itself from turbidities of the senses[19]. *Absolute knowing* would be result of a purification, emerging as truth of the concept of transcendental self, which is not merely

[15] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger. Trad. Marco Antônio Casanova. Petrópolis: Vozes, 2012.
[16] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., p. 95-96).
[17] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 96.
[18] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 96
[19] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 98.

subject, but reason and spirit, and, this way, everything that is real[20]. Hegel reproduces *absolute knowing* as the truth of Metaphysics, relating his idea of *spirit* to *logos-nous*'s metaphysics of Plato-Aristotelian tradition. Hegel assumes to himself, says Gadamer, the task of fundamenting again Greek *logos* above modern spirit's soil, that knows itself from self-clarification of conscience about itself – inside itself anything that is true can be found without ulterior ontotheological grounding[21].

Hegel saw Greek philosophy as the philosophy of logos, which had the boldness to considerate pure thoughts on their own, being the result of that the unfolding of the universe of idea. Gadamer says that Hegel utilized a new expression in order to do so: das Logische (the logical element), and that he characterizes by it a joint scope of ideas, like Platonic philosophy had developed in its Dialectics. Gadamer said that according to his survey he couldn't find the use of this expression before Hegel. In Plato, this joint scope of ideas had as impulse making account of every thought[22].

Gadamer said that in Hegel's work could be seen both an admiration for the Ancient Greek together with the conscience of superiority of modern life, determined by Christianity and its reformer view, as a peculiar combination[23].The task assumed by Hegel in fundamenting again Greek *logos* would reproduce the Hegelian intent to achieve an authentic *philosophical science.* This scientific pretension has the light of a proper Modernity's Cartesian ideal and that would implicate the assumption of a method. Hegel assumed the method of Dialectics, says Gadamer explicitly[24][25].

It is necessary to highlight that Hegelian Dialectics consisted in a singular model, distinct from Platonic Dialectics and from the use that

[20] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 96

[21] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 96

[22] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 97.

[23] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit. 18.

[24] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., 97

[25] As stated before, the authors of this paper assume that Dialectics could not be seen as a method, considering that Dialectics reports to the structure of reason itself and that the reality itself is full of contradictions, or, better saying, is dialectical. Dialectics would be the inherent logical of self's devir. Then, „all that is rational is real, and all that is real is rational". Althought stating Gadamer that Dialectics would be method, as it will be retaken later, the aim that Gadamer assumes with his own Dialectics is similar to Hegel's. Both seems to aim for the totality of reality, each one by his own way.

Hegel's contemporaries made of the term *Dialectics*[26]. Gadamer states that the "Hegelian Dialectics of Logic" has the pretension of taking clearly account of the property of every thought by means of a systematic unfolding of every thought. The systematic deduction of pure concepts appears in *The Science of Logic,* in which *spirit* had conquered the pure element of its existence, the concept, and determines the system of science as a whole. It presents the thought's whole of possibilities as the necessity with that the determination always determines itself a little more[27].

According to the concept of ancient Dialectics, Dialectics essentializes itself in the sharpening of contradictions, in unfolding mutually opposite hypothesis in its consequences[28]. According to Gadamer, Hegel saw in ancient Dialectics a merely negative task, since it only pretended to realize by the elaboration of contradictions a preparatory work to knowledge[29] criticizing the lack of a positive knowing[30]. Hegel would assume to himself this positive task. He sees in Dialectics the task of achieving by means of sharpening contradictions a step towards a more elevated truth, which unifies contradictions. The power of spirit would be the synthesis as mediation of all contradictions. Reason, provided with universal power of synthesis, remains with the task of mediate oppositions of thought and suspend all oppositions from actual reality, what it demonstrates in history[31].

In Gadamer's view, Hegel identifies three moments that constitute the core of dialectics and he did recognize all of them in ancient Dialectics: first, thought is the thought of something in itself by itself; second, as being that, thought is a necessary thinking together contradictory determinations; third, because he suspends itself in the unity of contradictory determinations, this unity is showed as self itself[32]. Hegelian logic is developed in three levels: self, essence and concept[33].

In Hegel, the dialectical moment that unifies contradictions is *speculative,* which reveals the identity of non-identity, i.e., the identity of difference. Joaquim Carlos Salgado resumes Hegelian Dialectics as

[26] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., p. 13.
[27] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit., p. 97.
[28] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit.,p. 13
[29] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit.,p. 128.
[30] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit.,p. 98.
[31] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit.,p. 128-129.
[32] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit.,p. 30.
[33] GADAMER, Hans-Georg. Hegel-Husserl-Heidegger, cit.,p. 130.

the process by which could be detached the three movements of spirit: position – (something stated, thetic), denial of position and denial of denial of position. This last moment is *speculative.* Dialectics would start itself, then, as the contradiction by which the negative internalizes itself in the positive and vice-versa. Revealing is this movement the totality, speculative moment of duality's overcoming. Contradiction as internal movement and totality characterize this process by which the absolute is shown - Spirit[34].

Professor Salgado identifies three main elements to Dialectics: contradiction, movement and totality. First, if reality is full of contradictions, Dialectics seeks to unify contradictions or the plurality of contradictions the same way that did the quest for science in Greek thought. Second, in the view plurality, by thinking of the fact and of the non-fact, thought must develop a movement from the fact to the non-fact and from the non-fact to the fact; in the view of change, dialectical thought accompanies the process of genesis of reality. Third, dialectical thought does not make the beginning of the process apart from its middle and its end, and identity does not do it either relatively to difference or opposition. To be able to think of something, it would be necessary to think of it as an identity, it wouldn't be possible to think it otherwise as identical to itself. By thinking of it as identical to itself, the thought opposes it to what it is not and by this act includes in it what it is not. This way, it could only be thought as movement of totality, of what is and of what is not, that is, of movement of identity, of difference and unity of these two moments, says Salgado[35].

Gadamerian Dialectics

Dialectics in Hegel's philosophy takes the *concept* as its result, which is related to *absolute* and is constituted by a process of revealing self in its essence. Heidegger opposes a well-known comment to this Hegelian conception stating that finding essence is an impossible task. It would only be possible to recognize *existence*, taking Heidegger's concept of *dasein* to identify man from a "projected Project", a *being-there*

[34] SALGADO, Joaquim Carlos. Princípios hermenêuticos dos direitos fundamentais. In: Direito e legitimidade. MERLE, Jean Christophe, MOREIRA, Luis (org.). São Paulo: Landy, 2003, p. 202.

[35] SALGADO, Joaquim Carlos apud SALGADO, Ricardo Henrique Carvalho. Hermenêutica filosófica e aplicação do Direito. Belo Horizonte: Del Rey, 2006.

in the world, a project which seeks meaning on its own existence, recognizably finite and dated. Language is what makes this search for the meaning possible. Hegelian ontology, as opposite as Heideggerian's, is an ontology of infinite[36]. The same way, Gadamer's also opposes himself to Hegelian's in this perspective.

Gadamer parts from this same presuppose stated by Heidegger and also treats language as ontological, as a constitutive part of *self.* Since language makes possible the individual's understanding of the world, it is important to recognize that language is presented in an intersubjective relation. Where there was before a subject-object relation, now remain a subject-subject interaction mediated by language[37].

Furthermore, Gadamer recognizes in his interlocutions with Heidegger and Husserl the existence of a *horizon,* which could be understood as historical horizon or horizon of meaning, that adheres every subject and every object involved in the interpretative process. In other words, interpreter and interpreted encounter themselves inserted in a determined *tradition*, which figures simultaneously as condition and as limit to the understanding. Condition because interpretation and understanding only make themselves possible by previous understandings, pre-concepts that the subject retains about the world around him; limit, because the fact of being conditioned by tradition makes his possibility of understanding limited in amplitude, once it happens parting from what his historical horizon allows him to comprehend.

Interpretative process as seen by Gadamer results at a *fusion of horizons* between the *horizon* of a subject who interprets with the *horizon* of the interpreted object. The product is a shared *horizon* that contains the meaning and it is only achievable by language. This relation occurs in the form of a dialogue of questions and answers between the interpreter and the interpreted. The interpreter opposes his pre-conceptions as questions to the interpreted text[38], which by its term opposes answers and new questions to the interpreter, in a dynamic interaction that is renewed every single instant at what is called *hermeneutical circle.* Perhaps it would be more didactic to refer to the *hermeneutical circle* as some kind of hermeneutical spiral, since that in each *turn* of this process new contents are aggregated to the understanding.

---

[36] SALGADO, Joaquim Carlos. Princípios hermenêuticos dos direitos fundamentais, cit.
[37] FERNANDES, Bernardo Gonçalves (org). Interpretação constitucional: reflexões sobre (a nova) hermenêutica. Salvador: JusPodivm, 2010, p. 20.
[38] Text could be here understood as any linguistic reasoning.

It is clearly possible to perceive that this hermeneutical process conceals a dialectical structure. However, Dialectics in Gadamer's theory as exposed in Truth and Method is significantly different from Hegelian Dialectics. Reality is interpreted by Gadamer in the plan of finitude, he doesn't see it as showing itself as absolute. A perspective of finitude implicates contingent history, seeming to make Gadamer refuse Hegelian Dialectics - which terminates at the absolute - seeking in Plato's Socratic dialogues a reference model of open dialectics[39]. Gadamer sees Hegelian Dialectics as a monologue, as reason talking to itself only. Also, it comes to an end, it is finalized with the achievement of an absolute concept. Differently, Gadamer grounds his own Dialectics as a dialogical open process that is constantly renewable. By this task he retakes as reference the referred dialogical perspective of Plato's Socratic dialogues.

His extensive studies of Greek philosophy aside, perhaps the singularity of Gadamer's thought derives itself mostly from the junction of his philosophical influences on Hegel and Heidegger. Although opposing himself to some aspects of Hegelian Dialectics and elaborating his own conception of Dialectics, Gadamer seems to have also metaphysical concerns. He seems to aim totality of reality in a different way, by Hermeneutics, the mode of being of Dasein, considering that reality is essentially interpretative and interpretation consummates itself through language. Language is the necessary medium to this achievement, since it universalizes the understanding phenomenon at an intersubjective shared background. Thus, reality only exteriorizes itself to Gadamer in the plan of existence - being, then, historical and finite - and is shaped from the many interpretations of this same plan of existence by means of each interpreter.

Hegelian dialectics proposes a reflection of self, a total self-mediating of reason. His philosophy brings the idea of historical dimension as a whole, identifying the historical path in reason itself. In Gadamer Hermeneutics is related to experience; it is a "spirit" that experiments reality. Therefore, history to Gadamer wouldn't be a path for mankind in search of an absolute spirit, but something that produces effects in man at any moment of his life, especially when he seeks auto-understanding, thus when he seeks to find the meaning of the things. This way, unity in plurality is achieved by the meaning, not the concept, as Hegel propos-

[39] SALGADO, Ricardo Henrique Carvalho. Hermenêutica filosófica e aplicação do Direito. Belo Horizonte: Del Rey, 2006, p. 57.

es[40]. History in Gadamer is seen as effective and, therefore, funded on experience, capable of assume infinite ways. As Gadamer states, experience presents itself to new experiences. A person is not what she is only by her experiences, but also someone that is open to new experiences. Reaching a concluding knowing is not the purpose of Gadamerian Dialectics, then, unlike Hegelian's.

As states Richard Palmer[41], truth is then revealed not by any methodical means, but dialectically. Method proves itself as incapable of obtaining a new truth, but only the truth already implicit in it. The own discovery of method is not achieved methodically, but dialectically. The theme to investigate orientates controls and manipulates method; in dialectics, it is the theme that evokes questions to answer. The answer only could be given if belonging to the theme and situating in itself. Method involves a specific form of questioning that only unveils one aspect of the thing. Dialectics' aim is, before, phenomenological: to make *self* reveal itself. A dialectical Hermeneutics opens itself to a questioning by the self of things in a way that things we can find could reveal themselves in their self. In Gadamer this is possible because of the linguistic character of human understanding and, ultimately, by the own *self*[42]. This way, the title of Gadamer's main work is ironic: method is not the way to the truth; in contrary, truth mocks methodical man[43].

4. Conclusion

In consonance to Gadamer's theory, considering that reality is essentially the product of men's interpretation, men are hermeneutical beings. Thus, all things would be destitute of an autonomous and essential meaning. Meaning is given by the being which exercises interpretation; a historical being on a specific context, making interpretation a unique and an unrepeatable event. Hence, interpretation embraces all reality and it is not an instrument operated by a subject in regard of a far object. It presupposes a symbiotic interaction between both, which breaks the archaic dichotomy subject-object.

---

[40] SALGADO, Ricardo Henrique Carvalho. Hermenêutica filosófica e aplicação do Direito, cit, p. 85-86.

[41] PALMER, Richard E. Hermenêutica. Trad. Maria Luísa Ferreira. Lisboa: Edições 70, 1986.

[42] PALMER, Richard E. Hermenêutica, cit. 170-171.

[43] PALMER, Richard E. Hermenêutica, cit. 168.

Understanding, main object analysis of Philosophical Hermeneutics, is, then, achieved dialectically. Both subject and object possess each one a singular *horizon* that furnishes them with the conditions – and imposes limitations - within which understanding is possible. The horizon of the subject and the horizon of the object opposes themselves inquiries and answers on a continuous spiral movement which aggregates new content in each rotation. At the event of interpretation, both horizons merge themselves on a mutual horizon, process which results in a unique product renewable for new interpretation events.

Gadamer encountered on Hegel's work one of the great influences for his own theory, especially regarding Hegelian dialectics. Albeit this major influence, Gadamer's Dialectics reveals distinct features. It assumes an open structure of a dialogue, like seen at Socrates' dialogues. As Hegelian dialectics, though, it aims the totality of reality, which is possible through language, that furnishes the universal intersubjective background to the understanding phenomenon.

References

FERNANDES, Bernardo Gonçalves (org). *Interpretação constitucional: reflexões sobre (a nova) hermenêutica*. Salvador: JusPodivm, 2010.

GADAMER, Hans-Georg. *Hegel-Husserl-Heidegger*. Trad. Marco Antônio Casanova. Petrópolis: Vozes, 2012.

GADAMER, Hans-Georg. *O problema da consciência histórica*. Trad. Paulo César Duque Estrada. 3 ed. Rio de Janeiro: FGV, 2006.

GADAMER, Hans-Georg. *Verdade e Método I: traços fundamentais de uma hermenêutica filosófica*. Trad. Flávio Paulo Meurer. 11 ed. Petrópolis: Vozes, 2011.

GADAMER, Hans-Georg. *Verdade e Método II: complementos e índice*. Trad. Maria Sá Cavalcante-Schuback. 6 ed. Petrópolis: Vozes, 2011.

HEGEL, G. W. F. *La phénomenologie de l'esprit*. Trad. Jean Hyppolite. Tome 1. Paris: Aubier, 1941.

JARCZYK, Gwendoline; LABARRIÈRE, Pierre-Jean. *Les premiers combats de La reconnaissance* – maîtrise et servitude dans la Phénomenologie de l'Esprit de Hegel. Paris: Aubier, 1987.

KOJÈVE, Alexandre. *Introduction à la lecture de Hegel*. Paris : Galimard, 2008.

LIMA VAZ, Henrique Cláudio de. Senhor e Escravo – Uma parábola da filosofia ocidental. *In*: *Síntese Política Econômica Social (SPES)* – Nova Fase, v. VIII, n. 21,

p. 7-29, jan/abr. 1981.

PALMER, Richard E. *Hermenêutica*. Trad. Maria Luísa Ferreira. Lisboa: Edições 70, 1986.

SALGADO, Joaquim Carlos. *A Idéia de Justiça em Hegel*. São Paulo: Loyola, 1996.

SALGADO, Joaquim Carlos. *Princípios hermenêuticos dos direitos fundamentais.* In: *Direito e legitimidade.* MERLE, Jean Christophe, MOREIRA, Luis (org.). São Paulo: Landy, 2003, p. 195-211.

SALGADO, Joaquim Carlos; HORTA, José Luiz Borges (Org.). *Hegel, Liberdade e Estado*. Belo Horizonte: Editora Fórum, 2010.

SALGADO, Ricardo Henrique Carvalho. *Hermenêutica filosófica e aplicação do Direito*. Belo Horizonte: Del Rey, 2006.

SANTOS, José Henrique. *O trabalho do negativo* – Ensaios sobre a Fenomenologia do Espírito. São Paulo: Loyola, 2007.

Decentralization:
New values and new rights

Prof. Juan Alberto del Real Alcalá, PhD[1]

Abstract: Globalization has expanded the areas in which rights can be considered a legal category. Globalization has opened new areas to manage and enforce rights at world level as well as the subnational level, in the Constitutional State. Moreover, state centralism cannot attend to all the rights claimed by the people in Constitutional States. This phenomenon has caused rights to be present at multiple levels. At the subnational level, this multilevel presence is linked to the contemporary decentralization process in the Constitutional State and to the emergence of specific rights: new rights at the federal, regional local levels. This paper approaches the bases of these specific rights in the Constitutional State and their linkage with the new constitutional values.

Keywords: Decentralisation; constitutional values; specific rights.

I. Introduction: Decentralisation and current constitutionalism

The decentralisation processes adopted in many western European countries in the second half of the 20th century and Latin America at the end of the century are ongoing in the 21st century. Decentralisation has not always occurred to the same extent and intensity, and therefore it has a specific singularity in each country via their respective constitutions. Several types of decentralisation can be distinguished in the Constitutional State:

Firstly we can differentiate the case in which decentralisation is deployed in relation to the Constitutional State's institutions. This, in turn, involves two different levels of decentralisation: a minimum and a maximum level. The minimum level corresponds to a "merely administrative" level of decentralisation that does not imply a decentralisation of political power – which is still concentrated in a single location –,

[1] Professor of Philosophy of Law, University of Jaen, Spain. Email: adelreal@ujaen.es.Website: http://www4.ujaen.es/~adelreal

but only of the institutions that administrate it. Currently, in addition to the centre, political power is extended to other territorial locations[2]. We can also distinguish a maximum level of decentralisation that is "political", characterised by a re-distribution of political power among the traditional central location and multiple territorial seats, as opposed to a merely administrative decentralisation. The institutions that administrate political power are also reorganised according to said distribution, given that this more intensive type of decentralisation necessarily implies the corresponding administrative decentralisation[3]. The novelty of institutional decentralisation (regardless of whether it is administrative or political) resides in the new administrative locations (merely administrative decentralisation) and/or new seats of political power (political decentralisation). Therefore, I classify this type of decentralisation as "organic decentralisation" because it mainly involves a decentralisation of the functions of the main bodies of a State, either at the legislative, executive or judicial level.

Secondly, apart from the decentralisation of institutions, we can distinguish the decentralisation arising in the citizenship, which could be classified as a "decentralisation with regards to rights". This type of decentralisation emerges as an instrument for the attribution of "new rights" based on the recognition of singular individual and/or collective rights at subnational levels (autonomous communities/regional/local) in the State of Law. In general, the new rights will involve empirical contexts that are more closely and specifically related to peoples' lives. For that reason, such rights often have to do with the content of "cultural diversity" and its manifestations. Whereas the novelty of organic decentralisation processes consists in the appearance of "new locations" for the management of institutions (whether political and administrative, or merely administrative) , the novelty of this type of rights-related decentralisation lies in the emergence of "new rights" linked to the new territorial locations (autonomous communities/regional/local) as result

[2] See, MARTIN RETORTILLO BAQUER, S. (dir.): Descentralización administrativa y organización política, Alfaguara, Madrid, 1973; also, GARCÍA DE ENTERRÍA, E. and FERNÁNDEZ RODRÍGUEZ, T.R.: Curso de Derecho Administrativo, Cívitas Ediciones, Madrid, 2011.

[3] See, FERRANDO BADÍA, J.: "Corrientes doctrinales de la descentralización política en España de los siglos XIX y XX", in Anuario de Derecho Parlamentario, Madrid, 1997, No. 3, 1997, pp. 17-40.; and also, SAENZ ROYO, E.: Estado social y descentralización: una perspectiva constitucional comparada de Estados Unidos, Alemania y España, Thomson-Cívitas, Madrid, 2003.

of said organic decentralisation.

In this section, I will address the latter cases of decentralisation related to the assignation of new rights allocated by the Constitutional State, taking into consideration the following characteristics:

Firstly, rights-related decentralisation normally starts with some type of organic decentralisation, such as political decentralisation. In other words, merely administrative decentralisation tends not to involve the allocation of new subjective rights. Rather, its impact is restricted to the institutional context of Public Administration.

Secondly, when decentralisation has operated in relation to rights, it often does so with the intention of opening new avenues and more optimal methods of actually attaining "rights for everyone". The strategy has consisted in bringing rights closer to their holders in order to mitigate the disconnection that occasionally arises between stated rights and people's real lives. This frequently justifies the setting up of new territorial locations (autonomous communities/regional/local) and regulations to which the recognition and implementation of rights can be allocated. In other words, rights-related decentralisation is frequently linked to the issue of the effectiveness of this legal category via the subnational levels of a Constitutional Democracy.

Thirdly, since the new rights linked to the new territorial locations are supposed to be very close to the actual situation, they have much to do with the specific contexts in which the life styles of their holders are expressed. Consequently, in many cases they are linked to the recognition of "cultural diversity" and its various expressions. This has made it possible for closed, monocultural societies to evolve towards open[4] multicultural societies on the basis of the new rights. They are also able to show their multiculturality not as a negative social weakness that should be hidden, as it has been in the past[5], but as a positive empirical-social characteristic that should be recognised, preserved and made visible, despite the problems posed by multicultural management[6].

---

[4] See, POPER, K.: La sociedad abierta y sus enemigos, Paidós, Barcelona, 2010.

[5] DEL REAL ALCALÁ, J.A.: "Neoconstitucionalismo con descentralización como mecanismo de generalización de los derechos. El caso Bolivia", in STORINI, C. and ALENZA GARCÍA, F.J. (dirs.), Materiales sobre neconstitucionalismo y nuevo constitucionalismo latinoamericano, Thomson Reuters-Aranzadi, Parlamento de Navarra, Universidad Pública de Navarra, Pamplona, 2012, pp. 361-379.

[6] DEL REAL ALCALÁ, J.A.: "Problemas de gestión de la diversidad cultural en un mundo plural", in ANSUÁTEGUI ROIG, F.J.; LÓPEZ GARCÍA, J.A.; DEL REAL ALCALÁ, J.A.; and RUIZ, R. (eds.), Derechos fundamentales, valores y multiculturalismo, Dykin-

Despite this, decentralisation in our times is not an *ex novo* phenomenon. Rather, it is based on the anti-centralist tradition that took shape in the 19th century, which I will outline briefly in the following section.

II. Decentralisation and new values

Whereas decentralisation in a liberal State of Law in the 19th century was not a successful process and the State of Law became strongly centralised, the result one century later has been very different: decentralisation has involved *moral* and *constitutional-legal values*, and generated new *subjective rights* that seek to increase citizens' well-being. To this end, it has promoted not only changes in ordinary legislation but also constitutional amendments, and even fostered processes to set up new constitutions. In other words, from the 20th century onwards, decentralisation has had a clear impact on the theory of rights, the full historical genesis of which could not be covered without taking decentralisation into account. This is because decentralisation is part of the historical process of the extension and specification of rights[7].

In general, the decentralisation that gave rise to citizens' rights required important *legal adjustments* and a *legislative framework* that have not been an isolated fact in the legal system. Rather, they have been shaped by a *series* of norms established in the Constitution and other legal bodies of a general and territorial nature (autonomous communities/regional/local), as well as numerous *interconnected* legal categories. I will now mention the "legal values" and "subjective rights" that seek to carry them out.

To be precise, following the above explanation, the decentralisation processes that lead to rights are frequently connected with the most important legal values in the legal system. Given the *normative* value of the Constitution[8], legal values consist of norms – according to PECES-BARBA – "that indicate the aims to be attained, and leave the choice of the best procedures for making them effective to the legal practitioners, despite the fact that the some of the procedures are enshrined in the

---

son, Madrid, 2005, pp. 177-198.

[7] On the process of specification of rights, see PECES-BARBA, G.: Lecciones de derechos fundamentales, cit., pp. 120-128.

[8] See, GARCÍA DE ENTERRÍA, E.: La Constitución como norma y el Tribunal Constitucional, Cívitas, Madrid, 2006.

Constitution: via its configuration as a constitutional legal principle; the fundamental rights[9]; the fundamental duties of the public authorities; and the relations between individuals, via the organisation of institutional authorities"[10]. It follows that there is a conceptual connection between legal values and the other aforementioned legal categories, insofar as the latter constitute mechanisms for implementing the former[11]. Hence, this conceptual connection serves to establish a significant link between the rights arising from decentralisation and the principle legal values of the legal system. Moreover, in reference to rights (and, therefore, to the rights created by decentralisation), the conceptual connection includes the Constitution, because it recognises those rights, and the State of Law, which cannot be conceived without them[12].

Occasionally, decentralisation-related rights and decentralisation as such appear to be the direct expression of an ulterior (or primary) moral value that lays the *foundation* for the Constitution: human dignity as a universal *moral value* [13]. This means basing said moral values *directly* on the material value that presides over the constitutional system and the rest of the legal system. When this occurs and decentralisation is associated with moral values and, by receiving the latter in law, with core constitutional legal values[14], it is highly likely that the rights arising

[9] In the next section I address the path of fundamental rights in relation to decentralisation as a mechanism for implementing the content of higher legal values.

[10] PECES-BARBA, G.: Los valores superiores, Tecnos, Madrid, 1984, pp. 89 and 97-100; also, PECES-BARBA, G.: "Los valores superiores", in Anuario de Filosofía del Derecho, Ministerio Justicia, Madrid, 1987, pp. 373-388.

[11] PECES-BARBA, G.: Los valores superiores, cit., pp. 89 and 97-100.

[12] Cfr. ANSUÁTEGUI ROIG, F.J.: La conexión conceptual entre el Estado de Derecho y los derechos fundamentales. Modelos y evolución, Grijley, Lima, 2007; also, ANSUÁTEGUI ROIG, F.J.: De los derechos y el Estado de Derecho. Aportaciones a una teoría jurídica de los derechos, Universidad Externado de Colombia, Bogota, 2007.

[13] See ASÍS ROIG, R. from: "La apertura constitucional: la dignidad de la persona y el libre desarrollo de la personalidad como fundamentos del orden político y de la paz social", in MOLINA NAVARRETE, C. et al. (coords.), Comentarios a la Constitución socio-económica de España, Comares, Granada, 2002, pp. 153-176.

[14] To the contrary, when decentralisation does not go hand in hand with citizens' rights and becomes a strictly administrative aspect, it is not necessarily related to the Constitution and could be reduced to a specific legal body that regulates a country in general or in relation to one or more specific territories. In such cases, decentralisation does not need to be based on constitutional values and may reside in the general principles of Administrative Law, that is, functional organisational principles of a general, regional or local nature.

from decentralisation – or at least some of them – will acquire the quality of "fundamental rights". In fact, the conceptual connection between decentralisation-related rights and higher legal values is so strong that when the two are found to be incompatible, decentralisation has been able to promote a constitutional amendment or even prompt a process to provide a country with a new Constitution.

In Europe, for instance, this has occurred in Spain, where the decentralisation process is included in the Constitution, mainly in Title VIII of the Spanish Constitution (SC). Here, decentralisation is not devoid of the constitutional values on which the Magna Carta is based, as stated in Article 10.1 SC: "The dignity of the person, inherent inviolable rights, free development of the personality … are the foundation of political order and social peace"[15].

This has also occurred in the case of Bolivia's Constitution of 2009, to cite a Latin American example. Decentralisation in that country led to the drafting of a new Magna Carta that included the redistribution of the (legislative, executive and judicial) functions of the State. It gave rise to the emergence of new territorial locations (the Autonomous State), a new decentralised government (at the regional and local level), new fundamental subjective rights, the recognition of numerous jurisdictions and the criterion of intercultural interpretation. Bolivia's decentralisation is a long-term process based directly on the value of *human dignity*, for individuals (*personal dignity*) as well as groups (*collective dignity*). It also derives from the recognition of *multiculturality* and *plurinationality* by the constituent political power as new legal-constitutional values that are higher than the Constitution and the rest of the legal system.

Moreover, those higher values have been mainstreamed into the Political Constitution of the Plurinational State of Bolivia (PCS) from the normative and institutional points of view. Thus, they permeate the core of Bolivia's legal system, constitutional system and the entire legislative, executive and judicial institutional system. It is worth mentioning that decentralisation in Bolivia has meant nothing less than a transition *from* a highly centralised neoliberal[16] "single nation/single culture State of

[15] Although Spain's decentralisation began late, with the amendment of the Main Law of the Autonomous Community of Catalonia in 2006 and Andalusia in 2007, it clearly established distinct new rights for the citizenship, related to the existing territorial locations (at the subnational level). See, ÁLVAREZ VELEZ, M.I.; ALCÓN YUSTAS, M.F.; MÁRTINEZ GARCÍA, C.: "Derechos y libertades y Estado de autonomía", in Revista Vasca de Administración Pública, No. 87-88, 2010, pp. 47-78.

[16] On the conservative origin of the "Single Nation State of Law", see DEL REAL AL-

Law"[17] *to* a decentralised "State of Law based on national plurality" that seeks to build a *social* model underpinned by the notion of the "good life"[18].

The connection between higher law-values is further reinforced in Bolivia's constitution from the moment that *personal dignity* and *collective dignity* (of the indigenous farmer nations and people, and of the Afro-Bolivian and intercultural communities) have been regulated by the constituent authority as an "inviolable" principle that must be protected and respected as a "primary duty" of the State, pursuant to Article 22 PCS[19]. The moral foundation of personal and collective dignity, which are enshrined in the Constitution, include a series of "ethical and moral principles of a plural society" that are at the *heart* of multicultural and plurinational values. As such, they are recognised by the Fundamental Law and "assumed" by the State of Law with a commitment to "promote" them (Article 8.I. PCS: "ama qhilla, ama llulla, ama suwa (don't be lazy, don't be a liar, don't be a thief), suma qamaña (to live well), ñandereko (harmonious life), teko kavi (good life), ivi maraei (land without evil) and qhapaj ñan (noble life or path)." Other political principles that underpin the State and are also related to the moral dimension of multiculturality/plurinationality are (Article 8.II. PCS): "inclusion", "dignity", "harmony", "social equality", "common well-being" and "social justice".

This means that the ethical and moral dimension of multiculturality and plurinationality raise these constitutional values to the level of the main "driving force for equality" and an important *pillar* of the new "justice system" (multicultural and plurinational justice) that Bolivia's new Magna Carta seeks to implement. Such constitutional values underpin the rights arising from decentralisation, which are com-

---

CALÁ, J.A.: "Estado cosmopolita y Estado nacional. Kant vs. Meinecke", in CASTRO, A.; CONTRERAS, F.J., LLANO, F.; PANEA, J.M. (eds.): A propósito de Kant. Estudios conmemorativos en el bicentenario de su muerte, 2nd edition, revised and extended, prologue by Antonio Enrique Pérez Luño, epilogue by Pablo Badillo O'Farell, Editorial Grupo Nacional de Editores, Seville, 2004, pp. 307-340.

[17] See, FRAILE, L.: "La experiencia neoliberal en América Latina: políticas sociales y laborales desde el decenio de 1980", in Revista Internacional del Trabajo, vol. 128, No. 3, 2009, pp. 235-255.

[18] DEL REAL ALCALÁ, J.A.: Nacionalismo e Identidades colectivas: la disputa de los intelectuales (1762-1936), Dykinson, Madrid, 2007, pp. 373ff.; and 401-418.

[19] Article 22 PCS stipulates that "The dignity and freedom of the person are inviolable. Respecting and protecting them is the fundamental duty of the State".

plemented with other legislative values via the constitutional value of *freedom* (i.e. *positive* freedom) and of *equality* (i.e. equality in the sense of *differentiation*). They also replace the merely negative freedom and simple equality proclaimed by the former highly centralised republican State of Law.

Naturally, the moral and legal scope of Bolivia's values of dignity and multiculturality/plurinationality do not lessen their *importance* as "political values" fully assumed by the constituent authority, to be implemented via the Constitution, designed institutionally by the State and set out in the Constitution[20]. Thus, such moral and constitutional-legal values are not of ordinary importance, therefore, but of *foundational importance* for Bolivia's Constitution, State and the country itself. The Preamble to the Constitution is evidence of this, as well as the regulatory content of the values and their core placement in Section II (*Principles, Aims and Values of the State*) of Title I (*Fundamental Bases of the State*) of Part One of Bolivia's Constitution[21].

To conclude, decentralisation is directly linked to the legal category of constitutional values also has a bearing on the *function* fulfilled by these higher values as legal "interpretation criteria": as the material metanorms for interpreting other norms when there are loopholes in the law and new regulations. In this respect, as PECES-BARBA indicates, legal values "show that we are dealing with an authentic legal norm, although the norm goes beyond the values. An undeveloped critical morality remains to put pressure on the values, as positive law, thus enriching and complementing them by gradually developing them in that direction. Legislators, judges, other legal operators and even the citizenship also develop and interpret the higher values."[22]. Thus, it should be emphasized that when there is a close conceptual relationship between decentralisation (and the rights arising from it) and core constitutional values, the former can have an impact on "criteria that are substantially valid" or "materially" valid in law, and which complement the criteria of formal validity. In such case, they necessarily place a condition on the

[20] Cf. PECES-BARBA, G.: Ética, Poder y Derecho, Fontamara, Mexico DF, 2006.

[21] This can be seen, among other norms in the PCS, in Article 1, according to which "Bolivia is constituted in a Social Unitary State of Plurinational Communitarian Law, free, independent, sovereign, democratic, intercultural, decentralised and with autonomies." It also appears in Article 5.II ("The plurinational Government…"), Article 13.III ("…the Plurinational Legislative Assembly…"), Article 126.IV ("…the Plurinational Constitutional Court…") and Article 158.I.4 ("…Plurinational Electoral Body…").

[22] PECES-BARBA, G.: Los valores superiores, cit., pp. 89 and 97-100.

ordinary legislator's task, and on the implementation and interpretation of legal norms.

III. Decentralisation and the new rights

The conceptual connection between the legal categories of values and rights makes it easier for the decentralisation processes in the Constitutional State that arise from moral and legal-constitutional values to be expressed, as they often are, by creating *new* "subjective rights" at State level and/or the *subnational* level. As mentioned in the preceding section, this legal category can even be considered as fundamental (a "fundamental right") that is recognised and enshrined in the Constitution.

Naturally, in such cases, the regulatory recognition of a subjective right is of capital importance for the right to exist, because laws are the main method by which a right can become a part of the legal system[23]. If we have a right, it is because it has been conferred to us by a law[24]. Thus, there is a very close relationship between the right and the law that confers a right. A close relationship must also exist between the conditions for implementing the right and the law. By "conditions" we mean the actual circumstances that must concur before the regulation or right can be implemented[25]. The conditions for implementation are an essential step for the material existence of the law and the right. Thus, taking this into consideration with regards to the laws for rights, the conditions for the implementation of a subjective right will come from the factual circumstances (content) of the law that confers the right. Moreover, if the conditions for implementation can be drawn from the content of the law that confers the right, then they are no different than the conditions arising from the circumstances of that same right. In other words, the conditions for implementing a law that confers a right can be equated to that right.

The decentralisation processes that give rise to rights often seek to eliminate – or at least mitigate – the barriers imposed by *too abstract* a

[23] ANSUÁTEGUI ROIG, F.J.: Poder, Ordenamiento jurídico, derechos, Cuadernos Bartolomé de las Casas, Dykinson, Madrid, 1997, pp. 27ff.

[24] See, ALEXY, R.: Teoría de los derechos fundamentales, Centro de Estudios Políticos y Constitucionales, 1993, Madrid, pp. 47ff.

[25] See, VON WRIGHT, G.H.: Norma y acción. Una investigación lógica, translation by P. García Ferrero, Tecnos, Madrid, 1979.

configuration of the subjective rights that the Constitutional State grants the citizenship, when said rights are *excessively uniform*. This occurs when three conditions are met:

a) The factual circumstances of a subjective right (and the law that confers it), as well as the *conditions of implementation* underpinning the right are legislated in a disproportionately abstract and vague manner, with the result that the right is too uniform to be implemented[26].

b) The resulting uniformity arises from the fact that, when making the objective law that attributes the subjective right, the legislator failed to take into consideration the *particular* and *specific* contexts that apply to the right, and in which the *significant* life experience of some of the holders of the rights takes place.

Contexts of "significant life experience" means the *singular* characteristics that are an essential part of an individual's identity and *modus vivendi*.

c) The *singularities* and *specifications* in the context of implementing a right that were not taken into consideration by the legislator become actual "material difficulties" for carrying out the right for some of the beneficiaries of the right.

It is true that a law that confers a right exists in the cases in which the conditions *a)*, *b)* and *c)* are met; and that the conditions for implementing the law and the (subjective) right are also met; and yet the right is not actually carried out for some holders of the right. Therefore, *ineffective* rights can easily arise from this manner of legislating rights *without* taking the specific contexts in which they are to be implemented, even when the rights have been recognised in a constitution and/or legislation.

The problem with such cases is that it is extremely easy for them to give rise to situations of "negative discrimination". In fact, the inability to exercise a right because the factual circumstances surrounding it have been too uniformly drawn up in the law may give rise to situations of *inequality* that are "negatively discriminating" for the holders of the rights insofar as it prevents them from exercising their rights. Naturally, it is not a case of *discrimination by operation of law* if the subjective right is legally or constitutionally attributed to all the estimated recipients by an objective legal norm. It consists in "discrimination in fact", or *factual* dis-

[26] Cf. ENDICOTT, T.: "El Derecho es necesariamente vago", trans. by J. Alberto del Real Alcalá, Derechos y Libertades, No. 12, Universidad Carlos III de Madrid and Boletín Oficial del Estado, January-December, 2003, pp. 179-189.

crimination, because specific contexts for exercising the right have particularities that affect actual possession of the right and cause material difficulties for complying with it. Thus, a material inequality (*discrimination*) arises between those whose life experience develops in said specific contexts (which become barriers to exercising the right) and those who are not bound by such contexts.

In view of this situation, to *overcome* the aforementioned barriers, decentralisation processes seek to resolve *factual discrimination* arising from *material inequality* established in a legal system. In this respect, they are guided by a premise of *equality*, according to which "rights belong to everyone and are for everyone". Consequently, they follow the criterion of the need to extend rights to everyone in an effective manner. The strategy deployed by decentralisation to attain this aim is to attribute "specific new rights" to the holders of rights who are in *significantly singular* material contexts. Hence, the new rights will take into consideration the *particular* characteristics of the *specific* context in which they will be implemented, to the point that said specific context will be integrated into the "factual circumstances" of the right and, as a result, into the factual circumstances of the law that confers the right. This will facilitate its actual implementation from the legislative point of view. Thus, decentralisation generates "specific rights" that objective law attributes to certain individuals only, via the "equality strategy" of *reverse discrimination*[27]: those who are more vulnerable can enjoy the rights attributed by law because their living conditions are interrelated with factual situations that would lead to material situations of negative discrimination if they were not considered as such by objective law.

The foregoing shows that *decentralisation* is part of the historical process of the *specification* of rights. Secondly, that decentralisation operates in the direction of equality in the discourse on rights[28]. Thirdly, that decentralisation affects rights that are also closely linked to the issue of their *effectiveness*. Finally, as PECES-BARBA asserts, the theory of rights is justified, from a moral, political and legal viewpoint, in basing rights

[27] ALEMANY, M.: "Las estrategias de la igualdad. La discriminación inversa como un medio para promover la igualdad", in Isonomía. Revista de Teoría y Filosofía del Derecho, Instituto Tecnológico Autónomo de México-Fontamara, Mexico DF, No. 11, October-1999, pp. 95-98.

[28] See ASÍS ROIG, R. from: "La Ley de igualdad en el discurso de los derechos humanos", in GÓMEZ CAMPELLO, E. and VALBUENA GONZÁLEZ, F. (coords.), Igualdad de género: una visión jurídica plural, Servicio de Publicaciones de la Universidad de Burgos, Burgos, 2009, pp. 41-58.

on *differences* (*reverse* discrimination with regards to vulnerable groups) and refusing to accept that *inequality* and *negative discrimination* can be based on rights[29].

Moreover, the specific rights caused by decentralisation start with the significant relevance of *singularities* that are an essential part of the life of the holders of rights, and attain significant relevance in the configuration of subjective right. Therefore, such rights often have to do with the *diversity of life styles and cultures*. Thus, they acquire a *cultural* meaning and their material content is related to *cultural diversity*. Obviously, due to the conceptual connection between rights and legal values, some legal-constitutional values constitute the foundation-root that justifies the regulation of certain rights. Accordingly, if decentralisation provides new subjective fundamental rights that have to do with cultural plurality, it must occur this way necessarily, because the value of cultural diversity will be assumed by the political authority (*political value*) as a higher value of the legal system (*legal value*).

Such is the recent case of Bolivia's Constitution, which integrates its own highly significant list of *specific cultural rights* as "fundamental" rights that are clearly founded-rooted in multiculturality and plurinationality as the core foundational and constitutional values of the new Bolivia, as mentioned in the preceding section. Said constitutional values have generated, of their own accord, a "series of fundamental subjective rights" with multicultural and plurinational roots, such as: the "basic fundamental rights for the preservation of live", which are the multicultural/plurinational underpinnings[30]; the fundamental "civil" rights of multiculturality and plurinationality[31]; the fundamental political rights

[29] PECES-BARBA, G.: La dignidad de la persona desde la filosofía del Derecho, 2nd ed., Dykinson, Madrid, 2004, p. 72.

[30] Such fundamental rights (or supremely fundamental rights) are enshrined in the Chapter Two (Fundamental Rights) of Title II (Fundamental Rights and Guarantees) of Part One of Bolivia's Constitution. The basic fundamental (supremely fundamental) rights of a multicultural and plurinational nature are to be found, for instance, in the "right to an intercultural education, with no discrimination" (Article 17 PCS); the "right to health" in a single universal, gratuitous scheme that is intracultural, intercultural and developed by public policies at all levels of government (Article 18.III. PCS); or, according to Article 35.II. PCS, the right for "the traditional medicine of the indigenous farmer nations and people" to be a part of the national health service.

[31] Section I (Civil rights) of the Chapter Three (Civil and Political Rights) of Title II (Fundamental Rights and Guarantees) of Part One of the Constitution. Among the fundamental civil rights of plurinationality, mention should be made of the "right to cul-

of multiculturality and plurinationality[32]; the "specific fundamental" rights of the indigenous farmer nations and people[33]; the fundamental "social" rights related to plurinationality/multiculturality[34]; the fundamental "educational" and "cultural" rights of plurinationality/multiculturality[35]; and the fundamental rights of social communication based on

---

tural self-identification", for instance (Article 21.1. PCS); the "right to freedom of residence and permanence" as another right of the indigenous farmer nations and people to live and remain in their ancestral lands (Article 21.7. PCS); the "right to dignity", the moral root of multiculturality/plurinationality, as an "inviolable" right that the State has a primary duty to respect and protect (Article 22 PCS); the Constitution also protects the "collective freedom" of the indigenous peoples, and recognises their constitutional right to self-determination (Article 2 PCS).

[32] That right is in Section II (Political rights) of the Chapter Three (Civil and Political Rights) of Title II (Fundamental Rights and Guarantees) of Part One of Bolivia's Constitution. The fundamental political rights include, for instance, the "right to participate (politically) in the Collective Democracy" (Article 26.I and 26.II.3. PCS, according to "their own norms and procedures" (Article 26.II.4. PCS).

[33] These are in Chapter Four (Rights of the Indigenous Farmer Nations and People) of Title II (Fundamental Rights and Guarantees) of Part One of the Constitution. The Constitution makes them particularly relevant as a mechanism for recovering the minorities that have been made invisible as political subjects throughout history. The "right to exist freely" is one example of this (Article 30.II.1. PCS); the "right to their cultural identity, religious creed, spiritualities, practices and customs, and to their own world view." (Article 30.II.2. PCS); the "right to have the cultural identity of each of its members, if wanted, be registered alongside the Bolivian citizenship in their identity document, passport or other identification document with legal validity." (Article 30.II.3. (PCS); the "right to self-determination and territoriality". (Article 30.II.4. PCS); the "right to have their institutions be part of the general structure of the State." (Article 30.II.5. PCS); the "right to the collective titling of lands and territories." (Article 30.II.6. PCS); the "right to an intracultural, intercultural and plurilingual education in all the educational system." (Article 30.II.12. PCS); the "right to be consulted by means of the appropriate procedures (Article 30.II.15. PCS); the "right to the exercise of their political, legal and economic systems according to their world view." (Article 30.II.12. PCS).

[34] Chapter Five (Social and Economic Rights) of Title II (Fundamental Rights and Guarantees) of Part One of the Constitution. The fundamental social rights of plurinationality/multiculturality include, for instance, the "right to engage in work and employment according to the communitarian methods of production (Article 47.III. PCS); the "right to ethnic and socio-cultural identity" of Bolivian children and young people, as a right inherent to their development process (Article 58 PCS), and their right to the integral development of their personality (Article 59.I. PCS).

[35] Chapter Six (Education, Interculturality and Cultural Rights) of Title II (Fundamental Rights and Guarantees) of Part One of the Constitution. The educational and cultural

plurinationality/multiculturality[36].

All these correspond to the new subjective rights provided by the decentralisation process in Bolivia at state level and the subnational (autonomic, regional and municipal) levels. The purpose of the subjective rights is to comply with the duty "to be" as a part of human dignity, which is the supreme value of Bolivia's Constitution, to the benefit of vulnerable groups that had been marginalised socially, politically and legally until the Constitution was ratified: the indigenous farmer nations and people of Bolivia. This legal classification of rights is connected to the constitutional values of multiculturality and plurinationality, as well as freedom and equality.

IV. Conclusion

Starting with a centralised state's inability to attend to all the rights sought by the population, one of the consequences that globalisation has on the theory of rights is the "broadening" of the spheres in which the rights should develop. New locations from which rights are to be managed and implemented, from the *bottom up* to level of the Constitutional State, as well as from the *top down*. This has given rise to *multiple levels* of human rights.

When globalisation occurs by extending the Nation-State from the *bottom up*, it opens rights up to a global/universal level (*globalisation of rights*), a space that is *more inclusive* of all human beings as the holders of rights. However, it also becomes more singular, because the location for implementing the rights is too *abstract* and potentially removed from the specific contexts in which peoples' lives actually develop. Consequently, in practice that sphere has often been reduced to a *declaration*

---

rights of plurinationality/multiculturality include, among others, the "right to an intracultural, intercultural and plurilingual education within the entire educational system (Article 78.II PCS), which is also a communitarian and decolonising education" (Article 78.I. PCS); the "right to receive the teaching of the world view and spirituality of the indigenous farmer nations and people in public schools" (Article 86 PCS). It also includes the "right to receive an intracultural, intercultural and plurilingual higher education that takes into account the collective knowledge of the indigenous farmer nations and people" (Article 91. I and II. PCS).

[36] Chapter Seven (Social Communication) of Title II (Fundamental Rights and Guarantees) of Part One of the Constitution. Among these rights we could cite, for instance, the "right of the social media to contribute to the promotion of ethical, moral and patriotic values of the different cultures of the country (Article 107.I. PCS).

and *moral justification* of rights.

At the same time, globalisation has also affected the Constitutional State in the opposite manner, by opening rights up to the *lower* levels of state by setting up *new locations* (at the autonomous, regional and local level) to implement them, and by consolidating existing rights in such locations. The new locations stand out because they are more *specific* and *closer* to the reality of the individuals and groups that benefit from the rights that are declared/recognised there, and which they try to secure. This effect of globalisation is linked to the contemporary processes of decentralisation within the Constitutional State.

In these cases, if decentralisation has created rights and is not limited to a mere decentralisation of institutions and administrations, it tends to have the following effects on the Rule of Law:

On the one hand, decentralisation has generated "new locations" (at the *subnational* level) for implementing rights. In this respect, as asserted herein, decentralisation may be a useful tool for implementing rights. It may be a highly useful contribution to the effectiveness of rights that complements state protection and guarantees which, on their own (State centralism) may not be able to respond to all the population's demands for rights.

On the other hand, decentralisation also creates "new rights" via legislation. Some of these are *general* rights and others are *specific* rights that may be assigned at *State* level or the *subnational* (autonomic/regional/local) level. Accordingly, decentralisation is liable to become a valid instrument for *extending* rights and making them more *universal*, thus eliminating the material negative *discrimination* of rights formulated as laws that are too abstract and uniform in their implementation.

In fact, in many cases the decentralisation processes in the Constitutional State have been deployed in both directions and, therefore, they have had a highly positive impact. It could be said that when this happens it is because decentralisation is performing in the field of the value of *equality* with regards to *widely* held and effective rights. In other words, decentralisation is integrating the *equality* referred to in the discourse on rights. Under such premises, decentralisation of this sort is backed by the theory of rights, which allows rights to be underpinned by differences but rejects basing them on inequality and negative discrimination.

To conclude, the reverse discrimination criterion mentioned *rejects* the decentralisation processes that operate against material equality, that is, that are not oriented towards conferring rights (of reverse discrimination) with which to meet the equality rule of *rights for everyone*. Rather, they assign *privileges* to some and not to others, giving rise to discrimination in fact and by rule of law.

Is there a Marxist presence in the 1988 Brazilian Constitution?

Rodrigo Augusto Suzuki Dias Cintra[1]
Daniel Francisco Nagao Menezes[2]

Abstract: The current Brazilian Federal Constitution, dated October 1988 has a very rich history. For the first time in the history of Brazil, all social forces participated in the construction of the constitutional text. This experience allowed the Constitution to be composed of various ideological currents, including Marxism. The present article to explore the influence of Marxist and progressive currents in the construction process of the Brazilian Constitution.

Keywords: Brazilian Constitution; Marxism.

[1] Graduated in Law from the University of São Paulo (USP Largo-San Francisco), Degree in Philosophy from the Faculty of Philosophy, Letters and Human Sciences, University of São Paulo (USP-FFLCH), MA and Ph.D. in Philosophy and General Theory of Law the Faculty of Law at USP. Was received with praise for the originality of theme and approach in defense of doctoral thesis at USP. He teaches at the Mackenzie Presbyterian University and the University Sao Judas Tadeu. Is founder and coordinator of LADIFILA (Laboratory of Law, Philosophy and Art). Operates on the following subjects and authors: the relationship between law, philosophy and Arts Legal Sociology, Philosophy of Law, Political Philosophy, John Locke, Machiavelli and Shakespeare. Currently, makes postdoctoral studies on Human Rights and Ideology in the Law Faculty of the University of Coimbra (Portugal).

[2] Graduated in Law from the Catholic University of Campinas (2002), specialization in Constitutional Law and Civil Procedure Law both from PUC-Campinas, Specialization in Curriculum and Teaching Practice in Higher Education at the University Center Padre Anchieta, Master in Political and Economic Law by Mackenzie University. Is currently a doctoral candidate in Political and Economic Law at Mackenzie. University Professor at the Faculty of Law of the Mackenzie Presbyterian University, Campinas campus and Colleges of Campinas - FACAMP.

1. Introduction

The current Constitution of Brazil, enacted in 1988, had a peculiar formation process, with the participation of various institutions and social actors, defending the most diverse political and ideological interests. Because it is formed by the clash of different social forces, the Constitution has in his body, various philosophical, economic, political and even Marxist bias.

Marx identified the presence of two situations. The first called the Economic Order, chapter in which is built the economic foundation of Brazilian society. In this chapter of the Constitution, although it brought elements of liberal economics as private property, contracts, free enterprise; elements such "liberal" can only be performed within the State. In Brazil, the state acts in the economy indirectly through taxation, regulation, planning and police power, directly or through state enterprises. Although there is a private economy that depends on the state for its activities in Friedrich POLLOCK (1998, p. 72) called state capitalism.

There is such a strong presence of the state in the economy in Brazil, the state can play a role in the distribution of wealth similar to what Marx proposed through the organization of the productive forces.

The second point that demonstrates the existence of a small Marxist orientation in the Constitution is in regard to solidarity among federal entities. The Constitution provides for the creation of metropolitan areas in order to better organize the utilities. It turns out that the creation of metropolitan regions involving several municipalities is only possible if there is solidarity among federal agencies, municipalities in the case. Thus, the Constitution created, based on the old Marxist maxim, each according to their means, each according to his needs, a Principle of Solidarity in which municipalities are required to cooperate with each other on matters of interest to a particular region .

The aim of this paper is to analyze in detail these two points to conclude whether there is a presence of Marxist thought in the Constitution of Brazil.

2. The Brazilian Economic Order

The current economic order in Brazil provides an interventionist State which, while allowing free competition, regulates economic activity, and participates directly in some cases.

The switches throughout Brazil and its history, with Constitutions Constitutions Liberal interventionists. The first Brazilian constitution in 1824 (Empire) and the second from 1891 (Czech), are liberal constitutions that little intervened in the economic order, taking with it the liberal perspectives in both the economic and political fields.

The 1934 Constitution introduced in Constitutional Law Brazilian social rights, and the 1937 creates the authoritarian state, although in the economic field is liberal. The 1946 Constitution and the 1967 has a distinctly liberal prerogative, either in its design philosophy, the design is economical.

The 1988 Constitution changed the paradigm, balancing the old liberal principles with a strong presence of the state, creating what we call above of state capitalism.

The law protects and manages the capitalist economic system, forming what is called the doctrine of State Capitalism[3]. For POLLOCK (1998, p. 72)

> "(1) The Market is deposed from its controlling function to coordinate production and distribution. This function has been taken over by a system of direct controls. Freedom of trade, enterprise and labor are subject to governmental interface of such a degree that they are practically abolished. With the autonomous market the so-called economic laws disappear.
>
> (2) These controls are vested in the state which uses a combination of old and new devices, including a "pseudo-market", for regulating and expanding production and coordinating it with consumption. Full employment of all resources is claimed as the main achievement in the economic field. The state transgresses all the limits drawn for peacetime state activities.
>
> (3) Under a totalitarian form of state capitalism, the state is the power instrument of a new ruling group, which has resulted from

[3] "The word state capitalism (so runs the argument) is possibly misleading insofar as it could be understood to denote a society wherein the state is the sole owner of all capital, and this is not necessarily meant by those who use it. Nevertheless, it indicates four items better than do all other suggest terms: that state capitalism is the successor of private capitalism, that the state assumes important functions of the private capitalism, that profit interests still play a significant role, and that it is not socialism." (POLLOCK, 1998, p. 72)

> the merger of the most powerful vested interests, the top-ranking personnel in industrial and business management, the higher strata of the state bureaucracy (including the military) and the leading figure of the victorious party´s bureaucracy. Everybody who does not belong to this group is a mere object of domination."

All social, cultural and economic are transferred into the state, which maintains the economic logic operation (liberal, going to present a systemic unit above the other forces in society that exist only in reason and in the State. To BERCOVICI (2006, p. 87): *"To the extent that the state and society interpenetrate each other, leading to identity between state and society (the state total), all fields become politicians, ie, there is no way to distinguish and that political identification between State and political. "*

The creation of a State Capitalism in Brazil since the 1988 Constitution stems from the process of building the charter. The Brazil lived a military dictatorship from 1964 to 1985 the transition to a civilian government elected indirectly. One of the measures of civil government (José Sarney) was to convene a National Constituent Assembly, responsible for drawing up a new Constitution.

After months of legal discussion about the possibility of convening of the Constituent Assembly, and work began that in the initial period did not generate confidence and high expectations in the population. In this context, the leftist political parties begin to work in the drafting of the document, and as natural, draw up a Constitution with leftist ideological profile. With this, are increased individual rights, social rights, especially labor rights are brought into the body of the constitution, leaving the state responsible for providing these rights. Is created in Brazil a model of the Welfare State Social fully state. The health system is universal, is guaranteed for all Social Welfare, and numerous other social activities are placed under the responsibility of the State.

In the economic field, the left has organized to defend the nationalization of the crucial points of the economy, introducing the state monopoly in several points, and ensuring the direct participation of the state in economic activities through state enterprises.

Realizing that Brazil was heading towards socialism, added to the popular movements claim that organized, right-wing parties were organized, forming what is called "centrão" and began to fight the proposals of the hard left. The centrão to realize that it would be impossible to tackle all the work left, focused its efforts on changing the economic order, including the general principles of liberal economics like free en-

terprise, private property, free competition, among other principles.

With that, the Brazilian Constitution, the Economic Order now possess the following text which was amended during the 90s under Cardoso, the president tried to reform the constitution to reduce the presence of the state in the economy.

> Art. 170. A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios:
> I - soberania nacional;
> II - propriedade privada;
> III - função social da propriedade;
> IV - livre concorrência;
> V - defesa do consumidor;
> ~~VI - defesa do meio ambiente;~~
> VI - defesa do meio ambiente, inclusive mediante tratamento diferenciado conforme o impacto ambiental dos produtos e serviços e de seus processos de elaboração e prestação; (Redação dada pela Emenda Constitucional nº 42, de 19.12.2003)
> VII - redução das desigualdades regionais e sociais;
> VIII - busca do pleno emprego;
> ~~IX - tratamento favorecido para as empresas brasileiras de capital nacional de pequeno porte.~~
> IX - tratamento favorecido para as empresas de pequeno porte constituídas sob as leis brasileiras e que tenham sua sede e administração no País. (Redação dada pela Emenda Constitucional nº 6, de 1995)
> Parágrafo único. É assegurado a todos o livre exercício de qualquer atividade econômica, independentemente de autorização de órgãos públicos, salvo nos casos previstos em lei.
>
> ~~Art. 171. São consideradas: (Revogado pela Emenda Constitucional nº 6, de 1995)~~
> ~~I - empresa brasileira a constituída sob as leis brasileiras e que tenha sua sede e administração no País;~~
> ~~II - empresa brasileira de capital nacional aquela cujo controle efetivo esteja em caráter permanente sob a titularidade direta ou indireta de pessoas físicas domiciliadas e residentes no País ou de entidades de direito público interno, entendendo-se por controle efetivo da empresa a titularidade da maioria de seu capital votante e o exercício, de fato e de direito, do poder decisório para gerir suas atividades. Revogado pela Emenda Constitucional nº 6, de

~~15/08/95~~
~~§ 1º - A lei poderá, em relação à empresa brasileira de capital nacional:~~
~~I - conceder proteção e benefícios especiais temporários para desenvolver atividades consideradas estratégicas para a defesa nacional ou imprescindíveis ao desenvolvimento do País;~~
~~II - estabelecer, sempre que considerar um setor imprescindível ao desenvolvimento tecnológico nacional, entre outras condições e requisitos:~~
~~a) a exigência de que o controle referido no inciso II do "caput" se estenda às atividades tecnológicas da empresa, assim entendido o exercício, de fato e de direito, do poder decisório para desenvolver ou absorver tecnologia;~~
~~b)percentuais de participação, no capital, de pessoas físicas domiciliadas e residentes no País ou entidades de direito público interno.~~
~~§ 2º -Na aquisição de bens e serviços, o Poder Público dará tratamento preferencial, nos termos da lei, à empresa brasileira de capital nacional.~~(Revogado pela Emenda Constitucional nº 6, de 1995)

Art. 172. A lei disciplinará, com base no interesse nacional, os investimentos de capital estrangeiro, incentivará os reinvestimentos e regulará a remessa de lucros.

Art. 173. Ressalvados os casos previstos nesta Constituição, a exploração direta de atividade econômica pelo Estado só será permitida quando necessária aos imperativos da segurança nacional ou a relevante interesse coletivo, conforme definidos em lei.
~~§ 1º - A empresa pública, a sociedade de economia mista e outras entidades que explorem atividade econômica sujeitam-se ao regime jurídico próprio das empresas privadas, inclusive quanto às obrigações trabalhistas e tributárias.~~
§ 1º A lei estabelecerá o estatuto jurídico da empresa pública, da sociedade de economia mista e de suas subsidiárias que explorem atividade econômica de produção ou comercialização de bens ou de prestação de serviços, dispondo sobre: (Redação dada pela Emenda Constitucional nº 19, de 1998)
I - sua função social e formas de fiscalização pelo Estado e pela sociedade; (Incluído pela Emenda Constitucional nº 19, de 1998)
II - a sujeição ao regime jurídico próprio das empresas privadas, inclusive quanto aos direitos e obrigações civis, comerciais, trabalhistas e tributários; (Incluído pela Emenda Constitucional nº 19, de 1998)
III - licitação e contratação de obras, serviços, compras e alienações,

observados os princípios da administração pública; (Incluído pela Emenda Constitucional nº 19, de 1998)
IV - a constituição e o funcionamento dos conselhos de administração e fiscal, com a participação de acionistas minoritários; (Incluído pela Emenda Constitucional nº 19, de 1998)
V - os mandatos, a avaliação de desempenho e a responsabilidade dos administradores.(Incluído pela Emenda Constitucional nº 19, de 1998)
§ 2º - As empresas públicas e as sociedades de economia mista não poderão gozar de privilégios fiscais não extensivos às do setor privado.
§ 3º - A lei regulamentará as relações da empresa pública com o Estado e a sociedade.
§ 4º - A lei reprimirá o abuso do poder econômico que vise à dominação dos mercados, à eliminação da concorrência e ao aumento arbitrário dos lucros.
§ 5º - A lei, sem prejuízo da responsabilidade individual dos dirigentes da pessoa jurídica, estabelecerá a responsabilidade desta, sujeitando-a às punições compatíveis com sua natureza, nos atos praticados contra a ordem econômica e financeira e contra a economia popular.

Art. 174. Como agente normativo e regulador da atividade econômica, o Estado exercerá, na forma da lei, as funções de fiscalização, incentivo e planejamento, sendo este determinante para o setor público e indicativo para o setor privado.
§ 1º - A lei estabelecerá as diretrizes e bases do planejamento do desenvolvimento nacional equilibrado, o qual incorporará e compatibilizará os planos nacionais e regionais de desenvolvimento.
§ 2º - A lei apoiará e estimulará o cooperativismo e outras formas de associativismo.
§ 3º - O Estado favorecerá a organização da atividade garimpeira em cooperativas, levando em conta a proteção do meio ambiente e a promoção econômico-social dos garimpeiros.
§ 4º - As cooperativas a que se refere o parágrafo anterior terão prioridade na autorização ou concessão para pesquisa e lavra dos recursos e jazidas de minerais garimpáveis, nas áreas onde estejam atuando, e naquelas fixadas de acordo com o art. 21, XXV, na forma da lei.

Art. 175. Incumbe ao Poder Público, na forma da lei, diretamente ou sob regime de concessão ou permissão, sempre através de licitação, a prestação de serviços públicos.

Parágrafo único. A lei disporá sobre:
I - o regime das empresas concessionárias e permissionárias de serviços públicos, o caráter especial de seu contrato e de sua prorrogação, bem como as condições de caducidade, fiscalização e rescisão da concessão ou permissão;
II - os direitos dos usuários;
III - política tarifária;
IV - a obrigação de manter serviço adequado.

Art. 176. As jazidas, em lavra ou não, e demais recursos minerais e os potenciais de energia hidráulica constituem propriedade distinta da do solo, para efeito de exploração ou aproveitamento, e pertencem à União, garantida ao concessionário a propriedade do produto da lavra.
~~§ 1º - A pesquisa e a lavra de recursos minerais e o aproveitamento dos potenciais a que se refere o "caput" deste artigo somente poderão ser efetuados mediante autorização ou concessão da União, no interesse nacional, por brasileiros ou empresa brasileira de capital nacional, na forma da lei, que estabelecerá as condições específicas quando essas atividades se desenvolverem em faixa de fronteira ou terras indígenas.~~
§ 1º A pesquisa e a lavra de recursos minerais e o aproveitamento dos potenciais a que se refere o "caput" deste artigo somente poderão ser efetuados mediante autorização ou concessão da União, no interesse nacional, por brasileiros ou empresa constituída sob as leis brasileiras e que tenha sua sede e administração no País, na forma da lei, que estabelecerá as condições específicas quando essas atividades se desenvolverem em faixa de fronteira ou terras indígenas. (Redação dada pela Emenda Constitucional nº 6, de 1995)
§ 2º - É assegurada participação ao proprietário do solo nos resultados da lavra, na forma e no valor que dispuser a lei.
§ 3º - A autorização de pesquisa será sempre por prazo determinado, e as autorizações e concessões previstas neste artigo não poderão ser cedidas ou transferidas, total ou parcialmente, sem prévia anuência do poder concedente.
§ 4º - Não dependerá de autorização ou concessão o aproveitamento do potencial de energia renovável de capacidade reduzida.

Art. 177. Constituem monopólio da União:
I - a pesquisa e a lavra das jazidas de petróleo e gás natural e outros hidrocarbonetos fluidos; (Vide Emenda Constitucional nº 9, de 1995)

II - a refinação do petróleo nacional ou estrangeiro;
III - a importação e exportação dos produtos e derivados básicos resultantes das atividades previstas nos incisos anteriores;
IV - o transporte marítimo do petróleo bruto de origem nacional ou de derivados básicos de petróleo produzidos no País, bem assim o transporte, por meio de conduto, de petróleo bruto, seus derivados e gás natural de qualquer origem;
~~V - a pesquisa, a lavra, o enriquecimento, o reprocessamento, a industrialização e o comércio de minérios e minerais nucleares e seus derivados.~~
V - a pesquisa, a lavra, o enriquecimento, o reprocessamento, a industrialização e o comércio de minérios e minerais nucleares e seus derivados, com exceção dos radioisótopos cuja produção, comercialização e utilização poderão ser autorizadas sob regime de permissão, conforme as alíneas b e c do inciso XXIII do caput do art. 21 desta Constituição Federal. (Redação dada pela Emenda Constitucional nº 49, de 2006)
~~§ 1º O monopólio previsto neste artigo inclui os riscos e resultados decorrentes das atividades nele mencionadas, sendo vedado à União ceder ou conceder qualquer tipo de participação, em espécie ou em valor, na exploração de jazidas de petróleo ou gás natural, ressalvado o disposto no art. 20, § 1º.~~
§ 1º A União poderá contratar com empresas estatais ou privadas a realização das atividades previstas nos incisos I a IV deste artigo observadas as condições estabelecidas em lei.(Redação dada pela Emenda Constitucional nº 9, de 1995) (Vide Emenda Constitucional nº 9, de 1995)
§ 2º A lei a que se refere o § 1º disporá sobre: (Incluído pela Emenda Constitucional nº 9, de 1995) (Vide Emenda Constitucional nº 9, de 1995)
I - a garantia do fornecimento dos derivados de petróleo em todo o território nacional; (Incluído pela Emenda Constitucional nº 9, de 1995)
II - as condições de contratação; (Incluído pela Emenda Constitucional nº 9, de 1995)
III - a estrutura e atribuições do órgão regulador do monopólio da União; (Incluído pela Emenda Constitucional nº 9, de 1995)
~~§ 2º - A lei disporá sobre o transporte e a utilização de materiais radioativos no território nacional.~~
§ 3º A lei disporá sobre o transporte e a utilização de materiais radioativos no território nacional.(Renumerado de § 2º para 3º pela Emenda Constitucional nº 9, de 1995)
§ 4º A lei que instituir contribuição de intervenção no domínio

econômico relativa às atividades de importação ou comercialização de petróleo e seus derivados, gás natural e seus derivados e álcool combustível deverá atender aos seguintes requisitos:(Incluído pela Emenda Constitucional nº 33, de 2001)
I - a alíquota da contribuição poderá ser: (Incluído pela Emenda Constitucional nº 33, de 2001)
a) diferenciada por produto ou uso; (Incluído pela Emenda Constitucional nº 33, de 2001)
b)reduzida e restabelecida por ato do Poder Executivo, não se lhe aplicando o disposto no art. 150,III, b; (Incluído pela Emenda Constitucional nº 33, de 2001)
II - os recursos arrecadados serão destinados: (Incluído pela Emenda Constitucional nº 33, de 2001)
a) ao pagamento de subsídios a preços ou transporte de álcool combustível, gás natural e seus derivados e derivados de petróleo; (Incluído pela Emenda Constitucional nº 33, de 2001)
b) ao financiamento de projetos ambientais relacionados com a indústria do petróleo e do gás; (Incluído pela Emenda Constitucional nº 33, de 2001)
c) ao financiamento de programas de infra-estrutura de transportes. (Incluído pela Emenda Constitucional nº 33, de 2001)

~~Art. 178. A lei disporá sobre:~~
~~I - a ordenação dos transportes aéreo, aquático e terrestre;~~
~~II - a predominância dos armadores nacionais e navios de bandeira e registros brasileiros e do país exportador ou importador;~~
~~III - o transporte de granéis;~~
~~IV - a utilização de embarcações de pesca e outras.~~
~~§ 1º A ordenação do transporte internacional cumprirá os acordos firmados pela União, atendido o princípio da reciprocidade~~
~~§2º Serão brasileiros os armadores, os proprietários, os comandantes e dois terços, pelo menos, dos tripulantes de embarcações nacionais~~
~~§ 3º A navegação de cabotagem e a interior são privativas de embarcações nacionais, salvo caso de necessidade pública, segundo dispuser a lei.~~

The constitutional text, even after the changes of the Fernando Henrique remains that From this we conclude that the presence of the state in the economic domain occurs in four ways: a) institutional b) normative or regulatory c) participatory ed) intervening.

We note, with this structure, the state is replaced with the text of the Constitution a role of central body rationalization of economic life. Every decision, even if taken in private at some point passes through the

state and suffer this interference.

There is a very large charge redistribution in the Brazilian Economic Order. The tax system retains approximately 40% of the wealth produced in order to fund social rights under the Constitution, especially the health, welfare and education.

The organization of state enterprises and the establishment of a monopoly in strategic sectors of the economy revealed that there is a rationalization of the distribution of wealth based on the common good, ensuring everyone has access to scarce resources such existing mechanisms including income redistribution, as occurs in the Bolsa Família Program.

The state as the central rationalizing is the same structure proposed by Marx and implemented in Soviet countries. Although Brazil does not have a fully productive structure state, all economic decisions pass through the state that has the capacity to intervene and structure, allowing a fair distribution of income.

3. Solidarity between loved Federated

Brazil, for its geographical features, Adopt a federative model with three levels - Federal, State and municipalities, all politically autonomous. That is, each federated entity has political and administrative autonomy, and skills (performance area) determined by the Constitution.

However, the structure of the division of powers in Brazil is insufficient to achieve the goals of the Nation provided between Articles 2 to 4 of the 1988 Constitution.

The first reason is the transformation of cities into autonomous entities, which implies freedom of management and financial capacity to shoulder their responsibilities, issues in practice imply the lack of connection with the city and state and national policies, the political economic dependence higher powers of the municipality for payment of obligations given that the tax model, and not to favor local entities, is essentially centralized.

The second point to be considered is the size of the continental Brazil implying regional disparities whose solution can not be found in the model of division of competence centers in strategic political powers between federal, state and ignores the entity transfers the "local expertise" to municipalities without adequate financial compensation.

We in Brazil, two distinct realities, one of the North, Northeast and Midwest, whose cities have the size of an entire state, and are generally sparse and low population density, especially in the Amazon region and another, with the urban conglomerates and industrialized regions of the south and southeast. This asymmetry is not confined only to the geographical issue, but also the differences that are reflected in social and economic conditions.

Anticipating the conclusion, overcoming regional disparities will only be achieved if used the Principle of Solidarity, but only in order to support inter-regional, but also in the sense of a relationship of regional development, with the award of satisfactory conditions of dignified life for all citizens regardless of their territorial situation, especially with the homogenization of the provision of key public services.

In practice this implies the development of institutional mechanisms that enforce solidarity among federal agencies. As already stated above, the Union centralized economic power, with remaining 60% of the total public budget. However, not all utilities are the responsibility of the Union, having the other ones, skills (functions) to be exercised.

It is created in Brazil, holding funds, states and municipalities, aiming at the transfer of economic resources from being central to the poorer states and municipalities, as the need for each.

Are created with this two strategic funds. The first and the Municipalities Participation Fund which transfers to municipalities, as its population and poverty rate, money to fund the activities of the municipalities. The second is the participation of the Fund that, similar to the previous background, passes not to municipalities, but the States, funds for the maintenance of the poorest states, especially in the northern and northeastern Brazil.

There is also the distribution of tax revenues. Automatically, regardless of the economic situation of the state or municipality, the Union, and in some cases the state transfers part of the collected value with a specific tax for being smaller. For example, half of the tax collected by the State on the vehicle ownership is transferred to the municipality where the vehicle.

Demonstrating that there is, in the Constitution, institutional solidarity that leads from the rationalization of the central entity (union), the redistribution of income between the richest and the most loved poor. Constitutional Law in this Brazilian institutional solidarity is called “Cooperative Federalism”.

4. Conclusions

Analyzing the theoretical framework of the Constitution of 1988, coupled with the process of historical formation, we can reach the conclusion that there is a matrix Marxist incomplete.

This is because the beginning of the construction of the Constitution had a strong bias is that so many socialist constitutional claim that the Brazilian Constitution is a program (similar to the Constitution of Portugal), a program that leads to socialism. In the course of the constituent process conservative forces altered the original design socializing, however, remaining an array Marxist, recognize and address problems of economic and social inequalities through the strong presence of the state in the provision of public services, and income redistribution.

There is a constitutional solidarity[4] between people and between federal, this solidarity that brings no constitution in the world!

References

BERCOVICI, Gilberto. **As Possibilidades de uma Teoria do Estado.** Revista da Faculdade de Direito da UFMG - Belo Horizonte - nº.49 Jul./Dez., 2006, págs. 81-100.

COMPARATO, Fábio Konder. **Ética: Direito, Moral e Religião no Mundo Moderno**. São Paulo: Companhia das Letras, 2006.

FONSECA, João Bosco Leopoldino da. **Direito Econômico.** 5ª Ed. Rio de Janeiro: Forense. 2005.

POLLOCK, Friedrich. **State Capitalism: Its Possibilities and Limitations.** *in* ARATO, Andrew; GEBHARDT, Eike. *The Essential Frankfurt School Reader*. New York: Continuum, 1998, págs. 71-94.

[4] Para Fábio Konder COMPARATO (2006, p. 577): "O substantivo solidum, em latim, significa a totalidade de uma soma; solidus tem o sentido de inteiro ou completo. A solidariedade não diz respeito, portanto, a uma unidade isolada, nem a uma proporção entre duas ou mais unidades, mas a relação de todas as partes de um todo entre si e cada uma perante o conjunto de todas elas".

Legitimate power:
Law and the theory of sovereignty

Rodrigo Augusto Suzuki Dias Cintra[1]
Daniel Francisco Nagao Menezes[2]

Abstract:The main objective of this paper is to discuss the problem of the legitimacy of power and its relations with the various theories used Sovereignty in the Philosophy of Law, Political Science and Law. The argument made in the article dialogará to the classical authors of the legitimacy of power and sovereignty, especially Bodin, Hobbes, Locke and Rousseau.

Keywords: Legitimate Power, Theories of Sovereignty.

1. Introduction

The title points to an important aspect with regard to political philosophy . In fact , many thinkers have addressed the problem - free authority . The question would be to what extent the power that comes

[1] Graduated in Law from the University of São Paulo (USP Largo-San Francisco), Degree in Philosophy from the Faculty of Philosophy, Letters and Human Sciences, University of São Paulo (USP-FFLCH), MA and Ph.D. in Philosophy and General Theory of Law the Faculty of Law at USP. Was received with praise for the originality of theme and approach in defense of doctoral thesis at USP. He teaches at the Mackenzie Presbyterian University and the University Sao Judas Tadeu. Is founder and coordinator of LADIFILA (Laboratory of Law, Philosophy and Art). Operates on the following subjects and authors: the relationship between law, philosophy and Arts Legal Sociology, Philosophy of Law, Political Philosophy, John Locke, Machiavelli and Shakespeare. Currently, makes postdoctoral studies on Human Rights and Ideology in the Law Faculty of the University of Coimbra (Portugal).

[2] Graduated in Law from the Catholic University of Campinas (2002), specialization in Constitutional Law and Civil Procedure Law both from PUC-Campinas, Specialization in Curriculum and Teaching Practice in Higher Education at the University Center Padre Anchieta, Master in Political and Economic Law by Mackenzie University. Is currently a doctoral candidate in Political and Economic Law at Mackenzie. University Professor at the Faculty of Law of the Mackenzie Presbyterian University, Campinas campus and Colleges of Campinas - FACAMP.

from authority can define the size of the freedom of individuals, or even as the right to freedom of individuals can limit the action of the authority .

Theories of sovereignty and its link to the right , where it insinuates there first, whether in a natural law, either in the social contract , or even from the life of society , attempts to match various authors to explain the difficult , tense and problematic relationship between authority and freedom.

The proposal is to discuss the phenomenon of power from the relationships between the law and the classical theories of sovereignty.

For this, you need to map the theories of sovereignty and analysis of the role that the law plays in the inside of these. The authors chosen for this purpose are: Jean Bodin, Thomas Hobbes, John Locke, Jean Jacques Rousseau and Carl Schmitt.

The work has a highly interdisciplinary perspective because, as you know, Bodin and Schmitt were more lawyers to philosophers as Hobbes, Locke and Rousseau, most legal philosophers .

The question we address is to find, at the bottom, which ensures the possibility of the sovereign rule. In addition to the question *"Who's in charge? "*, Our investigation is to verify the conditions of possibility of a sovereignty which is based on law . In other words, it is about analyzing how the law may affect the policy or, on the contrary, the policy may condition the right.

We can say that the philosophical- political guarantees to their sovereign domain- matrix was constructed by the authors in an attempt to make the architecture of the reasons why the people must obey, or the reasons why the people should rule.

In fact, none of the classical theories of sovereignty, albeit with greater or lesser extent , the right rule in the construction process of its arguments. The appeal to natural law and *juspositivism dichotom*, for example, is key to understanding the position of the authors.

The place of law in mapping theories of sovereignty is especially important to understand what lies behind the debate between the classical authors. After all, is not new to modern politics, unlike previous historical periods, need to justify the power from rational assumptions . Does not necessarily mean characterize the sovereign as a person who is assigned to the laws.

What we intend to analyze in this way is a certain discomfort regarding the sovereignty / law relationship. Two sides of the same coin, law and politics are present simultaneously in the theories of sovereign-

ty , which can lead to a situation or a situation of legitimate concern: the boss , do not need to explain why its domain.

2 . Bodin and sovereignty as a modern concept

Bodin is considered the first theorist to develop a concept of sovereignty in modern way, although that term was not foreign to the medieval period. It is located there between law and politics in this crucial moment to understand the state. The Six Books of the Republic was written in French in the late sixteenth century, which is especially interesting to note, if we take into account that is in a renaissance period. Bodin defines sovereignty as follows: *"The sovereignty is absolute and perpetual power of a Republic"*

On appeal to the Republic that we can find the definition, we read that sovereignty is an eminently public and not private power. That is why it is perpetual, does not depend on the representative figure in question at the time of command.

Furthermore, it is absolute. Therefore, indivisible, inalienable, hardcore, independent and supreme. But what identifies truly this author sovereignty, is the holder of sovereignty is the power to legislate without the consent or permission from anyone. All rights derive, in Bodin, this right to legislate. The sovereign, in other words, has the monopoly of law by the legislature .

Nor Bodin, however, the sovereign power is completely unlimited. Despite declaring that it is an absolute power, Bodin writes that the will of God, divine law, civil law and common to all men, natural law, are limiting the action of the sovereign. He does not explain very well how to operate, it is true that can often even be mistaken , and in fact , would have little importance in that no man on earth who would have the power to compel the sovereign to respect them .

The most direct consequence of disregarding the limits of sovereign power seems to give both the legal field and in the moral field. As regards morality, the ruler loses the honor. With regard to the law, the sovereign is obliged to observe the natural and divine law for all people whether they are arranged in order of positive law. In this case, the obligation not to limit arises from the fact that they are positive norms, but they have the divine origin determinations.

Interestingly, the cases in which the sovereign must respect limitations, as highlighted by Alberto Ribeiro G. de Barros, is the obligation

of contracts and the inviolability of private property.

On the obligation of contracts, the argument is simple. If even God is bound to fulfill its promises, it is obvious that the sovereign is also. Note that this limitation does not arise in the background of positive law, which may have been drawn up unilaterally by the sovereign, but rather inherent in the bilateral agreement.

As regards the inviolability of property, Bodin is defending the idea that the possession of sovereignty does not mean ownership of the property of his subjects. The sovereign can only get hold of the property of the subjects where a proven and imminent threat to the purposes of the Republic occurs. The power of imperium (sovereignty) is different from the power of dominium (ownership rights).

3 . Hobbes and Rousseau

It is interesting to note how Hobbes Bodin shared with a particularity with regard to sovereignty. Both had the need to figure sovereignty in an individual subject (or in the case of collective Hobbes) physically thought. In other words, sovereignty is an attribute that distinguishes a man from the others and is beyond the possible abstraction of the concept.

But, in Bodin 's sovereign right to initiate calls to your domain, there is a power law, Hobbes, however, is the monopoly of physical force, the power of fact , that points to who is the figure of the sovereign representative.

In Hobbes, everything goes through the logic of a sovereign representative. This office was established by an original social contract. It is there, in the figure of the initial pact, that the right to pronounce. But of course this is just a rhetorical illustration. Sovereign send simply by being in power, there is no need to get through the first justifying contract, who instituted the civil society.

On one hand Hobbes speaks of a natural law that everyone should follow rationally, on the other, there is some way to force anyone to respect you. It is a right as a non - law. No obligation, natural law can not effectively sustain a situation of stability in the state of nature. Moreover, Hobbes puts that positive law which will be established by the sovereign is, this rather effective. Note that Hobbes, therefore, is a kind of natural law in reverse. He elaborates on long pages of his works on natural law, only to ultimately declare their complete uselessness and

the consequent need for a mandatory positive law that emanated from the sovereign, all oblige.

It is clear that the sovereign is not submente laws that he himself creates. The figure above is sovereign legem. The balance between law and politics, sovereignty is an attribute, in Hobbes , much more political than legal.

Other interesting to understand the issue of sovereignty is author Rousseau. This formidable author makes a real reversal in the traditional concepts of sovereignty. For him, the attribute of sovereignty is not a man that differentiates it from the others. Sovereignty is an attribute of the people. Instead of thinking as traditionally believed, i.e., *ex principis* part of the sovereign for the other subjects, it will present the possibility of *ex populus* of thinking, i.e., proxies for individuals . In Rousseau, those in power is only in so far as it respects the law .

However, this obedience to the law corresponds precisely to the size that the freedom of each is given. Natural liberty does not disappear with the advent of the social contract in Rousseau, but as freedom of independence is readily transformed into legal freedom, which is nothing but a participation in the body politic of freedom , i.e., freedom is bounded by law.

This right that the original pact confers sovereignty does not exceed the limits of public interest, so that individuals are still in a state of freedom even as limited by law.

4 . Locke

There is a theory of sovereignty in Locke , though not explicitly appear . There is hardly on the political work of Locke expression sovereign power. Locke refers, however, several times a supreme power. Unlike Bodin and Hobbes, the philosopher puts this supreme power can only be in the hands of the legislature.

This is because the political theory of Locke, Montesquieu even before, there was already a concept of separation of powers. Locke writes about three distinct powers: the executive, legislative, and federal. It is not, as in Montesquieu, a theory of separation for the containment of power or decentralization. Rather, it is a hierarchical theory of power in the figure as the supreme legislative power. This occurs, according to Locke , because the faculty of creating laws is the most important of all the functions of the organs of civil society.

Even that legislative power is subject to the law, as is also the executive and federative. In the thought of Locke, the powers are clearly limited by law.

5 . Conclusion

If sovereignty is the power to command ultimately in a political society, a supreme authority, the big question is how is the transfer of power in fact, based on the strength, the power of law.

Everything is complicated if we take into account the lessons Schmitt, for whom sovereignty is located in the one who can decide on the state of exception. I.e., when the shift rule and normalcy, true suspension of the legal system, it is possible. So that's where the law can not deal the cards that political power creeps. Ultimately, it is a position that can undergo a series of reviews if we think the democratic point of view, but if we think in terms of praxis, such a conception, however hard it may be, seems to escape the historical examples .

Modern contemporary political theory has increasingly emptied the concept of sovereignty. First because this concept had been thought of as one of the attributes of the modern state. Beside the people and territory, the notion of sovereignty corresponded to one of the legal requirements for the architecture that we call the State.

With the crisis of the contemporary notion of the state necessarily have a crisis of the idea of sovereignty. This fact is reinforced by the growing trend of organizing a world society in supranational communities, international organizations, international courts of justice etc.. Even the world market is positioned towards creating multinational companies. Increasingly being felt degeneration of a paradigm, of State sovereignty, in the era of globalization.

Anyway, a sovereignty that is not enrolled in law seems to be highly questionable nowadays. We have an arbitrary sovereignty trumps when the power of the stronger mere caprice of subjectivity.

Hence the question posed at the beginning of our work appear openly. Sovereignty would be a power in fact, as either a Schmitt for example, that would be a power law such as stands Locke?

References

BARROS, Alberto Ribeiro G de. ***A teoria da soberania de Jean Bodin.*** São Paulo:

Unimarco Editora, 2001.

BARROS, Alberto Ribeiro G de. ***10 lições sobre Bodin.*** Petrópolis: Vozes, 2011.

BOBBIO, Norberto; MATTEUCCI, Nicola; PASQUINO, Gianfranco. ***Dicionário de política.*** Brasília: Ed. UNB, 1995.

CINTRA, Rodrigo Suzuki. ***Liberalismo e natureza – a propriedade em John Locke.*** São Paulo: Ateliê Editorial, 2010.

KUNTZ, Rolf. ***Fundamentos da teoria política de Rousseau.*** São Paulo: Editora Barcarolla, 2012.

SCHMITT, Carl. ***O conceito do político.*** Belo Horizonte: Del Rey Editora, 2009.

STRAUSS, Leo; CROPSEY, Joseph. ***History of political philosophy.*** Chicago: The University of Chicago Press, 1987.

Corporate governance and the financial crisis:
The new paradigm of the rule of law after the collapse

Postdoc.Dr. Dawid Bunikowski[1]

The aim of this paper is to explain what corporate governance is, what the principles of corporate governance are, what standards are formally valid at a global level (including both American and European rules) and how deviant practice appeared both prior to and during the financial crisis which began in 2007. It also aims to explain the difference between the institutional axiology (written codes used within companies, the state law) and the real axiology (deviance on the part of companies, breaking promises) in companies. My approach is based on Jonathan Macey's promissory theory of corporate governance and Cornelis de Groot's legal analysis of corporate governance, and this paper takes a stance against hypocrisy in matters of business and of the state. Axiological analysis of the crisis in the global economy is necessary, since corporate governance, as an element of company law, constitutes an important branch of the law and of both legal and business practice. In conceptual terms, it has a close relationship with business ethics. I maintain that the crisis in corporate governance and business ethics was one of the main factors behind the financial crisis, and that the financial crisis brought about changes in the classical rule of law paradigm. States are now willing to take all available extraordinary measures to curb violations of law by companies, to safeguard good corporate governance and to protect human freedom and rights.

Corporate governance: a concept

Corporate governance has been the subject of many studies. The literature in the field is very rich, wide and sophisticated, presenting historical, social, legal, economic, cultural and international contexts of corporate governance[2]. However, to put it briefly, in my opinion, cor-

[1] University of Eastern Finland, Department of Law.

[2] In recent years, during the global financial crisis, many books were published on the

porate governance relates to well-organised companies which maintain strict rules governing the way in which they function and a clear division of the competencies and responsibilities of the corporate organs, also including clear and rigorous supervisory procedures. Corporate governance can also be viewed as a set of values, principles and rules of behaviour for each company. On the one hand, corporate governance seems to comprise written and unwritten rules, and principles laid down in official documents such as statutes, resolutions, legal internal acts or codes of good practices (i.e. the official sphere; business law; the institutional axiology of corporate governance). On the other hand, it also comprises behavioural practices which apply in an unwritten sphere (i.e. the practical sphere; business in action; the real (concrete) axiology of corporate governance). It also impacts on business ethics. Many of these values or principles, such as transparency, honesty or objectivity, have a moral or ethical character. Of course, we can refer the two theories of axiology to the specific given companies and to *the concrete axiology of*

---

subject of corporate governance and 'corporate social responsibility' (treated as a part of corporate governance, of course). See especially: B. Tricker, Corporate Governance. Principles, Policies, and Practices, Oxford 2009; Corporate Governance Around the World, ed. by A. Naciri, London-New York 2008; European Corporate Governance. Readings and perspectives, ed. by T. Clarke, J. F. Chanlat, London 2009; Corporate Governance and Compliance. Eine Fallstudie mit Glossar, M. Roth (Hrsg.), Zurich-St. Gallen 2009; A. J. G. Sison, Corporate Governance and Ethics. An Aristotelian Perspective, Cheltenham, UK; Northampton USA 2008; Global Corporate Governance, ed. by D. H. Chew, S. L. Gillan, New York 2009; Corporate Social Responsibility and Regulatory Governance. Towards Inclusive Development?, ed. by P. Utting, J. C. Marques, New York 2010; A History of Corporate Governance around the World. Family Business Group to Professional Managers, ed. by R. K. Morck, Chicago-London 2005; S. Hakelmacher, Corporate Governance oder Die Korpulente Gouvernante, Koeln 2005; Handbook of International Corporate Governance. Country Analyses, ed. by Ch. A. Mallin, Cheltenham-Northampton 2006; The Modern Firm, Corporate Governance and Investment, ed. by P. O. Bjuggren, D. C. Mueller, Cheltenham-Northampton 2009; S. Soederberg, Corporate Power and Ownership in Contemporary Capitalism. The politics of resistance and domination, London-New York 2010; A. Tylecote, F. Visintin, Corporate Governance, Finance and the Technological Advantage of Nations, London-New York 2008; S. Anand, Essentials of Corporate Governance, New Jersey 2008; T. Clarke, International Corporate Governance. A Comparative Approach, London-New York 2007; Corporate Governance and Corporate Finance. A European perspective, R. A. I. van Frederikslust, J. S. Ang, P. S. Sudarsanam, London-New York 2008; Global Corporate Power, ed. by Ch. May, London, Boulder 2006; A. Dignam, M. Galanis, The Globalization of Corporate Governance, Farnham, UK-Burlington, USA 2009.

concrete corporate governance.

During the global financial crisis which began in 2007 in the US, the idea of corporate governance acquired an importance which is very difficult to argue against. The existence of badly organised companies whose organs acted with doubtful morality lay at the root of the crisis. A lack of vision and development strategies based on moral values and commonly acceptable aims were key factors behind the collapse of the global economy. The crisis has an especially moral and axiological context, and cannot be viewed purely as an economic or legal issue or one which purely reflects a supervisory problem in the financial sector.

1. Jonathan Macey's promissory theory and Cornelis de Groot's legal theory on corporate governance

According to Jonathan Macey[3], whose ideas on corporate governance are very original, corporate governance is 'a promise' that is 'made to investors'. He rightly wrote that '[c]orporate governance consists of a farrago of *legal and economic devices* that induce the people in change of companies with publicly owned and traded stock *to keep the promises they make to investors*' [my italics][4]. Therefore, to put it briefly, corporate governance is a promise given by the management to the investors. Macey goes on to say that '[c]orporate governance is about promises'[5]. What does this mean? He explains it as follows: 'Shareholders have almost no contractual rights and virtually no contractual rights to corporate cash flows. *Shareholders investments are based on trust*. This trust, in turn, is based on the belief that the managers who run corporations *will keep the promises* that they make to investors' [my italics].[6] Macey answers the question of why regulation is important by saying: 'Regulation can impede, discourage, and even ban the operation of particular corporate governance devices. Likewise, regulation also can facilitate, encourage, and even require corporate governance devices to operate – or to operate in a particular way'[7]. Now we must consider what is the most important aim of corporate governance. Macey maintains that '[*t*]

[3] J. R. Macey, Corporate Governance. Promises Kept, Promises Broken, Princeton-Oxford 2008.

[4] Ibid. at p. vii.

[5] Ibid.

[6] Ibid.

[7] Ibid.

he purpose of corporate governance [my italics] is to persuade, induce, compel, and otherwise motivate corporate managers to keep the promises they make to investors'[8]. But he also distinguishes corporate governance from 'bad governance'. The title of his book includes the words 'promises kept' and 'promises broken', and Macey, when talking about good governance and bad governance, goes back to this idea. He states that '[g]ood corporate governance, then, is simply about keeping promises'[9], as opposed to 'bad governance', because '[b]ad governance (corporate deviance) is defined as promise-breaking behaviour'[10]. I take the view that corporate deviance is a form of corporate governance which absolutely dominated in some firms at the beginning of the new century and during the financial crisis which began in 2007 in the US. The managers of the large companies involved in such corporate deviance were guilty of hypocrisy and cynicism or brazenness, and should be treated as corporate and economic/legal deviants.

Macey's view is that corporate governance is not only a normative term, but a rather broad descriptive term. The concept of corporate governance 'describes all of the devises, institutions, and mechanisms by which corporations are governed'[11]. Thus corporate governance also relates to the law – the law made by state institutions (including judges, by way of precedent) and the law made by companies themselves in a manner envisaged by the internal law of the companies (articles of association) and by commercial law (state law or even international law, e.g. EU directives). Macey concludes that 'the governance of an organization such as a corporation is done through a complex framework of institutions and processes, including the law'[12]. It is not only the law which is important to the concept of corporate governance. It concerns different institutions and processes, also including the law. But corporate governance understood as a promise made by or to investors is still the fundamental idea in Macey's reasoning. He argues that:

'The purpose of corporate governance is to safeguard the integrity of the promises made by corporations to investors, but investors and companies are left to their own devices (i.e. the contracting process) to define the content of the promises themselves. Generally, the baseline

[8] Ibid. at p. 1.
[9] Ibid.
[10] Ibid.
[11] Ibid. at p. 2.
[12] Ibidem.

goal is profit maximization. Corporations are almost universally conceived as economic entities that strive to maximize value for shareholders. But *the goal of maximizing wealth for shareholders* [my italics] is, or should be, a matter of choice.[13]'

Another problem is that '[i]nvestors should be free *to choose to invest* [my italics] in ventures that pursue other goals beside profit maximization'[14]. Shareholders and their interests should be the key consideration for companies, because shareholders are the legal owners of companies. When considering the issue of corporate deviance, Macey states that:

> 'For many, particularly those in the law and economics movement, any action by managers, directors, or others that is inconsistent with the goal of shareholder wealth maximization is considered a form of "corporate deviance". Economists call corporate deviance "agency costs" to capture the notion that corporate managers and directors are agents of their shareholders.'[15]

Directors are the real governors of a company[16]. How should one go about reducing corporate deviance? Macey answers interestingly and fairly that '[*t]he best corporate governance systems* [my italics] are those that do the best job of controlling corporate deviance'[17].

I agree with Macey's use of the 'promissory theory' to explain the way in which companies function. According to him, 'the contracts that constitute the corporation also can, and should be, viewed as a series of promises by management to investors of all types'[18]. It is clear that corporate governance should be conceptualised in contractual terms. What does it mean? Macey views 'the corporation as a nexus of contracts' and corporate governance as 'one of the many societal, legal, cultural, and economic factors that can, if used properly, make the contracting process more efficient and more reliable'[19]. Corporate governance has only one purpose, Macey repeats – 'to control corporate deviance'. But deviance has a concrete meaning – 'deviance from the terms of the contracts

[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid. at p. 51.
[17] Ibid. at p. 2.
[18] Ibid. at p. 17.
[19] Ibid. at p. 16.

between the various contractual participants in the corporate enterprise and the company itself'[20].

Corporate governance, of course, relates to specific companies as well as to the market at large. The corporate governance mechanisms governing the market are very sophisticated. Thus Macey talks about various elements of supervision and control, including the Securities and Exchange Commission, organised stock exchanges, boards of directors, the market for corporate control, initial public offerings, accounting rules and the accountancy industry, litigation governance, derivative and class action suits, insider trading and short selling, whistle-blowing, shareholder voting, credit-rating agencies, stock market analysts, hedge funds, banks and other fixed claimants[21].

Macey is right when he says that 'the importance of corporate law for corporate governance is far too clear'[22]. It is necessary to define the nature of the relationship between corporate law and corporate governance. For this purpose, I will draw on the ideas of Cornelis de Groot, a famous Dutch lawyer and an expert in the field[23].

Unfortunately, before we start with de Groot, we must take into account that corporate governance is sometimes a hot topic in the political sphere when politicians become aware that they must 'do something'. This awareness of the need to do something is then translated into law by politicians in response to a public outcry. Macey offers the Sarbanes-Oxley Act of 2002 and the Williams Act of 1968 as examples of this. The Sarbanes-Oxley Act increased 'the power of "independent" directors'. The Williams Act weakened 'the market for corporate control without upsetting the top managers of public companies or any other well organized special interest group'[24]. It is true that 'shareholders are not well organized into effective political coalition; managers are'[25].

It is important to be clear about the relationship between corporate law and corporate governance in order to avoid conceptual errors in defining the terms. First of all, we must state that, generally speaking, corporate law, as the law of companies or the law governing companies, concerns the law created by the state, in some sense. It should be entirely

[20] Ibid. at p. 17.
[21] Ibid. at p. 50.
[22] Ibid. at p. 28.
[23] C. de Groot, Corporate Governance as a Limited Legal Concept, Austin-Boston-Chicago-New York 2009.
[24] J. Macey op. cit., p. 16.
[25] Ibid.

consistent with state law – especially with commercial law and administrative law.

De Groot argues that corporate governance now forms part of corporate law. The use of the phrase 'corporate governance' in corporate law texts appeared after 1975[26]. De Groot explains that corporate governance is largely a branch of what we may refer to as company law[27]. Company law is an aspect of economic law, whose role is to regulate economic activities. Economic law comprises antitrust law, financial law, intellectual property law, employment law, the law of the European Community and of the World Organization, and company law[28]. Economic activities may be undertaken by different kinds of legal entities (from sole traders to listed companies). Legal entities, of course, have legal personality. The purpose of company law is to regulate legal entities, and it contains more rules of a procedural and organisational nature than rules of substance[29]. In my opinion, corporate governance concerns not only companies (understood as big companies or companies in general) but also other institutions such as foundations and associations (de Groot seems to be in opposition to my point of view[30]). Of course, the most important issue in the global financial crisis is that, generally speaking, corporate governance relates to public limited companies (large scale businesses) and private limited companies (small and medium-size businesses).

According to de Groot, there are certain difficulties in treating corporate law as part of company law. Firstly, corporate law uses abstract concepts (e.g. well-founded reasons to doubt good policy or mismanagement) and abstract rules (the business judgment standard, antifrustration, breakthrough rules). The meaning of the concepts must not be derived from common parlance, language and methods of communication[31]. Secondly, corporate law seems not to be only law but 'has a policy component, too, especially where competences lie with (quasi)governmental bodies like specialized courts or takeovers panels'[32]. Thirdly, the purpose of corporate law is to regulate 'legal entities against the

[26] C. de Groot, op. cit., p. 5.
[27] Ibid.
[28] Ibid. at pp. 5-6.
[29] Ibid. at p. 6.
[30] Ibid.
[31] Ibid.
[32] Ibid. at p. 7.

background of ever-changing economic circumstances'[33]; due to which it lacks a central idea, a fundamental paradigm. Fourthly, corporate law relates to companies which are often engaged in cross-border economic activities. This makes it impossible to study these companies on the basis of a single national regulatory system[34]. One may analyse corporate law, interpreting concepts and rules, case studies drawn from specialised courts and takeovers panels or 'specifically chosen angle' (such as international activity, relations within a group of legal entities, the way in which a legal entity is engaged in economic activity etc.)[35].

Regulation in the field of corporate governance has different sources – statutory acts, court judgments or special committees' reports. Codes and guidelines are interesting and important sources of regulation. Here are some examples. In the United Kingdom, the Financial Reporting Council published the Combined Code on Corporate Governance (2008; the first version was in 2003), which comprises 17 main principles, 26 supporting principles and 48 code provisions. The Dutch Corporate Governance Code, comprising 21 principles and 113 best practice provisions, was drawn up by the Corporate Governance Committee (2003). These codes are addressed to the listed companies and are generally successors of various reports and recommendations (from the 1990s onwards)[36]. Corporate governance is not regulated at the level of European Union law but the European Commission has set up two advisory bodies in the field[37].

As de Groot maintains (and it is difficult to disagree with his opinion), the aim of corporate law is to regulate the corporate form and 'regulation in the field of corporate governance is an important aspect of corporate law'[38]. But de Groot proposes to 'rethink' corporate governance. What does this mean and what definition does de Groot propose following such rethinking? According to de Groot, 'corporate governance is the regulation of the corporate form – by rethinking corporate law with the purpose of guaranteeing the enhancement of shareholder value in the long term – addresses the roles of the corporation's centralized administration (the unitary or dual board and the managers) and of the corporation's shareholders, by specifically taking into account ele-

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid. at pp. 11-16.
[37] Ibid. at p. 9.
[38] Ibid. at p. 17.

ments like integrity, transparency, proper supervision and accountability'[39]. De Groot regards the concept of corporate governance as including important aspects such as integrity, transparency, proper supervision and accountability[40]. Of course, it should be added that corporate governance is not only a legal concept but also seems to be embedded in organisational theory[41].

By way of conclusion to these reflections I would like to consider the real reasons for implementing corporate governance within a legal order of any given company. One might say that it is right for a company to be socially responsible and have a concept of corporate social responsibility (CSR) in corporate governance (CSR as a part of corporate governance, as noted above). This aim is often realised by helping to finance the social and regional needs of local communities (e.g. via sponsorship), since in the long term this helps the company build a good image, which may have a high level influence on the company's ability to sell its products. It might also appear an excellent solution for a company to have a code of good practice or a code of corporate governance because this type of codification helps a company present itself to the public as being serious, credible and ethical. This may well be one of the factors behind the implementation of good standards in corporate practice and governance, and generally within the legal order of a given company. However, I take the view that the reasons for implementing good standards and a code of corporate governance within companies should be more axiological and moral and less about pragmatism and public relations. Companies must want to be well organised and to act to high moral standards, rather than applying such standards only in economic categories (accounting for costs and profits) or only for economic reasons.

2. Corporate governance codes in the Netherlands and the United States

In this section, I will give some examples of standard codes of corporate governance. I will start by analysing the Dutch Corporate Governance Code from a legal perspective, before examining it on the basis of organisational theory: a strong European perspective on how

[39] Ibid. at p. 18.
[40] Ibid.
[41] Ibid. at pp. 18-20.

companies should be well organised and have respect for fundamental moral principles in the manner in which they conduct business.

According to Article 2:391, section 5 of the Dutch Civil Code, listed companies are are subject to the Dutch Corporate Governance Code[42]. In other words, implementation of the Code is a legal duty for such companies. To put it briefly, the Dutch Corporate Governance Code does not follow the shareholder-oriented model of corporate law, in which the company is primarily run for the benefit of the shareholders (and thus the interest of shareholders should come first because they have invested in the company). Instead, it follows the stakeholder-oriented model of corporate law, in which a company is run in the interests of both the shareholders and the other stakeholders (e.g. employees, creditors, suppliers, and customers). This model places the company in the context of the wider community, in which it has responsibilities not only towards government agencies but also towards special interest groups, the environment and the local community. In Macey's opinion, the stakeholder-oriented model is based 'on the idea that a corporation is just not a vehicle for creating shareholder value but should be aware of its broader responsibilities and must contribute to sustainable development because it is a part of society'[43]. From this perspective, making a profit for shareholders is not the most important role of the company. Activities of a 'profit for profit' nature are not acceptable when company law is viewed in the light of the stakeholder-oriented model. It is notable that during the recent global financial crisis there has been no evidence of the collapse of the ethical foundations underpinning corporate activity in the Netherlands. There were no liquidations or financial problems affecting companies such as ING on the grounds of corporate deviance.

The Preamble to the Dutch Corporate Governance Code states as follows:

> 'The Code contains principles and best practice provisions that regulate relations between the management board, the supervisory board and the shareholders (i.e. the general meeting of shareholders). Relations between the company and its employees (staff representatives) are regulated elsewhere. Nonetheless, the interests of the employees should be taken into account when the inter-

[42] J. Macey, p. 18. See especially the Dutch Corporate Governance Code (available at the website: http://commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF__uk_.pdf (27.02.2011).

[43] J. Macey, op. cit., p. 19.

> ests of all stakeholders are weighed in connection with compliance with the Code.' (point 3)

That is the idea of the stakeholder-oriented model of corporate law that seems to be more socially responsible, wider in its terms of reference and less egotistical and commercially driven than the shareholder-oriented model of corporate law. The Preamble repeats directly that:

> 'The Code is based on the principle accepted in the Netherlands that a company is a long-term alliance between the various parties involved in the company. The stakeholders are the groups and individuals who, directly or indirectly, influence – or are influenced by – the attainment of the company's objects: i.e. employees, shareholders and other lenders, suppliers, customers, the public sector and civil society. The management board and the supervisory board have overall responsibility for weighing up these interests, generally with a view to ensuring the continuity of the enterprise, while the company endeavours to create long-term shareholder value.' (point 7)

According to the Code (the following opinion and thesis are the result of linguistic, systematic and functional interpretation of all the principles and many provisions included in the Code), there must be a strict division of responsibilities, duties and competencies in the company, and both the management and the supervisory board must take account of the interests of various stakeholders.

The values (this being my interpretation) of the Dutch Code are as follows:

1) corporate social responsibility;

2) good entrepreneurship, understood as integrity and the transparency of the management board's actions;

3) effective supervision and accountability;

4) stakeholder confidence in management and supervision;

5) good relations between the stakeholders and constructive dialogue;

6) respect for the company's strategy;

7) respect for the principles of reasonableness and fairness with regard to shareholder activities;

8) respect for the law and applicable standards – obeying inter-

nal company procedures and legal acts which regulate issues pertaining to corporate governance;

9) honesty in business.

This is in fact the institutional axiology of corporate governance in Europe. To recap, axiology is about values, being a theory of values. Axiology is about what is important and necessary (desirable) in respect of the important and necessary (desirable) states of things. Such is the axiology in Europe, and, as we will see, the situation is fairly similar in the US.

To make it clear, the principles (values) of corporate governance are related to principles and values of business ethics. Business ethics is about how to evaluate economic activity and behaviour in commercial relations (it concerns professionals but also consumers), using moral and ethical criteria. Sometimes these are the same. In general, the principles of corporate governance are on the one hand more concrete in comparison with the general ethical values of business ethics; and on the other hand more technical, legal, and organisational, relating to the company's structure, functioning and processes. There are some subtle differences between them.

The second example is drawn from America, since US standards in the field of corporate governance should also be analysed in the context of the global financial crisis. For instance, the New York Stock Exchange Listed Company Manual applies to companies listed on the New York Stock Exchange.

Section 3 of the Manual deals with corporate responsibility. Section 301 stipulates that every listed company is expected to follow certain practices aimed at maintaining appropriate standards of corporate responsibility, integrity and accountability to shareholders. Section 3 generally 'describes the Exchange's policies and requirements with respect to independent directors, shareholders' voting rights, and other matters affecting corporate governance'. So corporate responsibility and corporate governance are interrelated. 'Corporate governance standards' are included in section 303A. The subsections include such provisions as '[l]isted companies must have a majority of independent directors' (subsection 303A.01); '[t]o empower non-management directors to serve as a more effective check on management, the non-management directors of each listed company must meet at regularly scheduled executive sessions without management' (subsection 303A.03); '[l]isted companies must have a nominating/corporate governance committee composed

entirely of independent directors' (subsection 303A.04); '[l]isted companies must have a compensation committee composed entirely of independent directors' (subsection 303A.05); '[l]isted companies must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act' (subsection 303A.06); and '[l]isted companies must have and maintain a publicly accessible website' (subsection 303A.14). The most important of these provisions is to be found in subsection 303A.09, which requires that listed companies must adopt and disclose corporate governance guidelines. These guidelines must regulate at least the following matters: director qualification standards, director responsibilities, director access to management (and, if necessary and appropriate, independent advisors too), director compensation, director orientation and continuing education, management succession, and annual performance evaluation of the board[44].

Of course, the corporate governance guidelines adopted by the board of a company directly reflect that company's views and do not distinguish between principles and substantive provisions, as is the case in the Dutch corporate governance system (and in European tradition, too.)[45]. When considering the problem of corporate governance standards in the US, we may ask what role they played in the legal and corporate order of many companies, such as (going back a few years) Enron, Bear Stearns, Merrill Lynch, Goldman Sachs, Morgan Stanley, the Lehman Brothers, Citigroup, the Fannie Mae or Freddie Mac and many more firms, not only during the crisis which began in 2007 but also earlier. The investment fund run by notorious fraudster Bernard Madoff hardly embodied any standards of honesty or transparency. Perhaps the standards I write about, were viewed merely as a sap to public opinion and clients, or as a means of reassuring shareholders that ethical principles were being adopted and upheld in practice; but Madoff's activity was an ordinary fraud (maybe even in a legal sense). It was a terrible ethical and corporate 'misunderstanding' in the corporate system, the effects of which remain visible today. The axiological and moral foundations of the activities of many American companies – the real axiology embodying anti-values such as greed, dishonesty, lies, fraud, and misinformation – were very shallow and superficial. And that is the great difference between the two theories of axiology: the institutional axiology (enshrined both in companies' internal regulations and in state law)

[44] J. Macey, op. cit., pp. 16-17.
[45] Ibid. at p. 17.

and the real axiology (the real behaviour of people within companies). To put it simply, it is the difference between corporate governance (good governance, as Macey says) and corporate deviance. That is absolutely clear in theory and research; in practice the world has always been less clear.

'Official', 'institutional' corporate governance was deviant in the practice of many of the above-mentioned American companies both before and during the crisis. But the problem persists. In my opinion, bail-outs are an inadequate remedy, and Obama's political approach to the issue is wrong because it implies the moral hazard problem and demoralisation of the management of private companies – it does not appear appropriate to solve the problem by saying that a company is 'too big to fail' if it has no real corporate governance which imposes standards of morality on economic activity (values such as honesty, transparency). It is still demoralising for the companies and the members of their management teams and boards.

3) The new paradigm of the rule of law following the collapse of corporate governance in the financial crisis

In the second part of my paper (the first was about the concept, principles and practice of corporate governance) it is necessary to develop certain ideas which could perhaps also be investigated at greater length in separate research. These relate to corporate governance in the context of the rule of law and the financial crisis. I propose to investigate, for the purpose of my thesis, the new paradigm of the rule of law after the global economic collapse.

First, it would be useful to shed some light on the relationship between the crisis in law and that in companies, corporate governance and business ethics in the face of the financial crisis and the weakening of key institutions managing public resources in the light of the classical paradigm of the rule of law. According to the paradigm, the government and its officials and agents are accountable under the law.

Second, I will examine whether the crises in law and morality have affected the financial crisis; and how the crisis in the normative systems of law and morality (ethics) have affected the financial crisis. The hypothesis is as follows: the financial crisis is also an axiological crisis – the crisis of law (and the rule of law) and the crisis of morality and ethics (ethics and morality among professionals and non-professional market

participants). There is a crisis of law, ethics, and corporate governance, which has produced a special morality and ethics in financial institutions (implicit norms and informal institutions).

Third, the question arises as to whether deregulation, autonomous delegation, the application of private law (corporate governance) failed, as appears to be the case, and, if so, whether regulation and recourse to legal intervention are a better option? The question also remains as to whether it is genuinely possible to talk about the rule of law in any given state where corporate governance and business ethics are in decay? Is such a state governed by the rule of law?

Fourth, we must bear in mind Jonathan Macey's theory of corporate governance, which is that corporate governance is a promise given to investors. If that promise is kept, it is good governance (corporate governance); if it is broken, it is corporate deviance. The lack of values such as transparency, honesty, trust, truth, responsibility, and dignity in the behaviour of companies may be regarded as fact; and as a problem of ethics in business. Business ethics is not the same as business etiquette in business, and it is important not to forget the clear difference between them. It is also a problem even of well-organised companies with good organisational structures, systems of supervision and control, and rules concerning the functioning of the corporate body. However, the most important issue is that values are respected in practice, in the ethical life of companies, and do not exist purely in written codes brought into existence purely for public relations reasons.

Fifth, the deregulation of law, the decentralisation of legislation, the privatisation of state services, the legislative autonomy of the state and companies are all factors which explain why the financial crisis was treated as being the result of processes of deregulation, and decentralisation; the autonomous law (the autonomy of companies) resulted in the financial and social crisis, and is also a crisis of law. States lose control and powers of supervision over companies, which do not properly supervise themselves. The crisis of state and law (the crisis of law) is accompanied by a corporate crisis and a crisis of corporate governance – these are parallel processes.

Sixth, changes in the paradigm of law and decision-making by the state are a parallel to a process known as corporate deviance or corporate disorder.

Seventh, the worst aspect of this process, as far as individual freedom is concerned, is the deviant behaviour of companies and the corporate fragmentation involved in this process, which results in le-

gal and organisational autonomy, and leads to a reduction of individual freedom – the freedom which is one of the foundations of law.

Eighth, the situation is paradoxical: the rule of law respects the freedom of companies (private property, free markets, freedom of economic and legal autonomy, employment law, work contracts) and agrees to disregard the freedom of individuals, company employees and clients – by which I refer to civil liberties and political rights and social or economic rights). In response, the state remedy – the state itself being in crisis over the idea of law as the supreme regulator of social relations – is to regulate financial markets and companies, leading to over-regulation and the proliferation of regulations. Another (neoliberal) proposal is deregulation – however, this approach to the matter views regulation as the cause of the crises.

Ninth, the financial crisis has caused confusion in the traditional system of sources of law – we may now find non-spontaneous sources, new sources, which are the basis of the actual actions taken by governments and administrations. It is possible to add to these sources agreements and political arrangements (such as the European Union's so-called fiscal pact), guidance from authorities and bodies not indicated in traditional sources of law (including, for instance, the recommendations of the World Bank, the International Monetary Fund, and the European Central Bank), decisions *ex nihilo* (e.g. decisions without legal basis but with a strong political influence and social justification – for further information on this issue see C. Schmitt[46]).

Tenth, and in summary, let us look at the following questions and answers. What caused the financial crisis? The financial crisis was the result of corporate deviance, corporate crisis, corporate governance and corporate law. What results have been achieved in seeking to remedy the crisis? The actions taken by Western countries in relation to the prevention of crises led to a reinterpretation of the rule of law (these actions may be regarded with skepticism from a legal standpoint). What can we do? We can say that we need new legislation to monitor the newly established institutions, services, resources and technical systems used to combat the financial crisis. Is that all? No, it is not enough. In my opinion, the financial crisis is a crisis both of law and of morality; it is a deeply axiological crisis.

Eleventh, my research considers whether the collapse of real business ethics and the hypocrisy of the moral values of companies (so-

[46] See: C. Schmitt, Legality and Legitimacy, Duke University Press 2004.

called corporate governance) are self-evident facts. I take the view that deregulation tends to fail. However, regulation is not purely a matter of bringing in legal measures (which may lead to a bureaucratic nightmare of over-regulation), but also one of ethics, morality, a new approach to life based on the idea of less consumerism, less greed, and fewer desires; and that this may bring about change in the axiologically and morally afflicted social and legal orders. That is the correct way to change bad corporate customs and morally dishonest market practices, which are a form of evil based on greed and crazy consumerism. The law is only one of the measures that may be used to resolve the problems raised by the financial crisis, and it does not appear the most important in resolving the problem of the collapse of the global economy. Moral education and the development of social and moral conscience would be more helpful. We must draw a careful distinction between the reasons for the crisis and the effects of it. And we must choose the right measures to tackle the reasons and the effects in a separate but complementary manner. States have recently reacted by using the law as the weapon to fight the effects but not the reasons. I am afraid that we are now able to build the new Leviathan: the state which wants to control everything in the market and society. It would be absolutely contrary to the rule of law and to the Western legal tradition, which is based on rights and freedoms.

Twelfth, it is obvious that the paradigm of the classical theory of the rule of law is still changing.

Thirteenth, the rule of law does not only concern states but also companies, professionals and citizens in the market. Corporate governance with business ethics seems to be part of the rule of law.

Fourteenth, the rule of law may be 'legally' broken in the crisis, because the state must take extraordinary measures which may not always be compatible with the law but are necessary.

Fifteenth, human freedom is limited by companies, which can also break the rule of law in the name of rights and freedoms. This issue relates to the freedom of workers and their rights, especially employment rights and the right to privacy – and also impacts upon the clients' right to privacy.

4)Here are some general conclusions.

1)Corporate governance is about a well-organised company which respects universal moral values such as transparency, honesty,

dignity, kindness, and truth.

2)Corporate behaviour often exhibited signs of deviance both before and during the financial crisis which began in 2007 in the US. The rule of law was not fully in force in the country.

3)Corporate governance is a part of the rule of law. Companies should obey the law (internal regulations and the law of the state).

4)Ethics, business ethics, corporate governance and corporate law are all interrelated.

5)A lack of, or a lack of a high level of, implementation or understanding of corporate governance and ethics in business both before and during the global financial crisis of 2007 (especially in US) are too much in evidence in the market. We now see the effects of this state of affairs.

6)The global economy and economic activities cannot thrive without establishing deeper foundations based on moral universal values such as honesty or transparency.

7)The global financial crisis is more an axiological crisis than a strictly economic one because the foundations of, and real reasons for, the financial crisis have a strictly moral character.

8)Greed, profit, fraud and misinformation as a norm – the new morality of *homo economicus* – have created a new world of consumers and a structurally and institutionally hermetic world of markets and companies, as well as the economic conditions we refer to as the global financial crisis.

9)Honesty, transparency and integrity in relation to behaviour are viewed as too morally odd and lacking in pragmatism to be realised in practice nowadays. This is a sad but realistic view of companies and the global economy. Although it is understandable and necessary that both the law and corporate behaviour must change, the prospects of realising this in practice seem uncertain. It is not purely a problem of human nature or hermetically sealed companies and corporate interests, or sophisticated financial instruments, but also one of political will and public awareness. Does anybody suffer from pangs of conscience nowadays? It seems doubtful.

10)The recent financial crisis led to a change in the paradigm of the classical rule of law.

By way of summary, the new rule of law says that states are willing to take extraordinary measures in order to protect good governance, corporate governance (even where this is illegal but politically and socially sustainable). If companies do not respect their own internal regulations and the law of the state, there is no rule of law in the country

concerned. Therefore, the rule of law concerns companies as well as the state, with all the legal consequences and responsibilities that this entails. Companies abuse monopolistic and hegemonic position to limit workers' freedom. This prompts the state to take extraordinary measures to counter such violations of rights, safeguard corporate governance and protect human freedom and rights.

The rule of law has changed greatly due to the economic collapse triggered by the financial crisis. Corporate governance has also changed greatly. The institutional axiology must be the real (concrete) axiology in the concrete corporate governance of the concrete corporations. We may conduct research on this relationship and its consistency with two theories of axiology now only by reference to case studies.

References

S. Anand, *Essentials of Corporate Governance*, New Jersey 2008.

The Modern Firm, Corporate Governance and Investment, ed. by P. O. Bjuggren, D. C. Mueller, Cheltenham-Northampton 2009.

Global Corporate Governance, ed. by D. H. Chew, S. L. Gillan, New York 2009.

C. Schmitt, *Legality and Legitimacy*, Duke University Press 2004.

European Corporate Governance. Readings and perspectives, ed. by T. Clarke, J. F. Chanlat, London 2009.

T. Clarke, *International Corporate Governance. A Comparative Approach*, London-New York 2007.

A. Dignam, M. Galanis, *The Globalization of Corporate Governance*, Farnham, UK-Burlington, USA 2009.

Corporate Governance and Corporate Finance. A European perspective, R. A. I. van Frederikslust, J. S. Ang, P. S. Sudarsanam, London-New York 2008.

C. de Groot, *Corporate Governance as a Limited Legal Concept*, Austin-Boston-Chicago-New York 2009.

S. Hakelmacher, *Corporate Governance oder Die Korpulente Gouvernante*, Koeln 2005.

J. R. Macey, *Corporate Governance. Promises Kept, Promises Broken*, Princeton-Oxford 2008.

Handbook of International Corporate Governance. Country Analyses, ed. by Ch. A.

Mallin, Cheltenham-Northampton 2006.

Global Corporate Power, ed. by Ch. May, London, Boulder 2006.

A History of Corporate Governance around the World. Family Business Group to Professional Managers, ed. by R. K. Morck, Chicago-London 2005.

Corporate Governance Around the World, ed. by A. Naciri, London-New York 2008.

A. Reich, *Wirtschaftsethik. Grundlagen in theologischer Perspektive*, Aachen 1984.

Corporate Governance and Compliance. Eine Fallstudie mit Glossar, M. Roth (Hrsg.), Zurich-St. Gallen 2009.

A. J. G. Sison, *Corporate Governance and Ethics. An Aristotelian Perspective*, Cheltenham, UK; Northampton USA 2008.

S. Soederberg, *Corporate Power and Ownership in Contemporary Capitalism. The politics of resistance and domination*, London-New York 2010.

B. Tricker, *Corporate Governance. Principles, Policies, and Practices*, Oxford 2009.

A. Tylecote, F. Visintin, *Corporate Governance, Finance and the Technological Advantage of Nations*, London-New York 2008.

Corporate Social Responsibility and Regulatory Governance. Towards Inclusive Development?, ed. by P. Utting, J. C. Marques, New York 2010.

Legal acts:

The Dutch Corporate Governance Code (available at the website: http://commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF__uk_.pdf (27.02.2011).

On demarcation problem between libertarianism and neoliberalism

Hashimoto Tsutomu[1]

Abstract: I shall argue that it can be problematic to attempt to identify a significant difference between libertarianism and neoliberalism (economic liberalism). For, the division between the two is sometimes ambiguous. However, I will note that following criterion is the most important: "order-disinterested thinking" versus "order-oriented thinking." To understand this criterion, I shall present two types of dichotomies. The first is "firm level" (medium level) versus "state level" (macro level), and the other is "economic value level" versus "ethical value level." When we use these two dichotomies, we are able to identify four types of ethical issues. The difference between libertarianism and neoliberalism primarily depends on the issue of "economic value problems at the macro level." While libertarians are against government intervention for maintaining market order or market value of specific companies, neoliberals typically support such action. For neoliberals, in order to guarantee a certain minimum level of living standard for society, it is acceptable if government actions to do so result in assisting the wealthy more than others (for example, by way of saving the bank accounts of the wealthiest in society when taking actions to prevent bankruptcies of large banks in order to avoid a collapse of the market order. However, libertarianism and neoliberalism also share several ideological values. Below, I further describe what they share in ethical attitudes.

Keywords: libertarianism, neoliberalism, economic ethics.

1. Libertarianism permits government interventions

In our ordinary usage, "libertarianism" is seen as an extreme type of "neoliberalism." Libertarianism is equated with laissez-faire type of economic liberalism, while neoliberalism is seen as a less radical category of libertarianism. However, some libertarians themselves are

[1] Hokkaido University, Japan. E-mail: hasimoto@econ.hokudai.ac.jp.

not so radical in terms of evaluating government interventions[2].

For example, David Freedman admits that when we have two alternative strategies for libertarianism, i.e. one that abolishes various kinds of laws in which government interventions have been legitimized, and the other that promotes a bill in a legislative body which is beneficial to a certain interest group, it is preferable choose the latter[3]. According to Freedman, since the former is too costly and the latter is less costly, libertarians should pragmatically choose to allow a particular bill to pass. As he noted, this situation however creates a dilemma for libertarians: the process of trying to make a truly libertarianism society leads to "benefits" (in the mind of the libertarian) for all citizens, but imposes costs on libertarians who need to work altruistically to pass a the legislation necessary to achieve the libertarian society. Facing such a dilemma, the libertarian takes any government intervention for granted as a "public bad". Assuming that there are many public bads, libertarians should therefore exert effort to ensure the passage of legislation that works against such public bads. Following such logic, libertarianism must therefore admit a number of government interventions. In other words, the condition of government interventions does not rule out libertarianism. Another dilemma can be identified in Ludwig von Mises' theory. Mises, on the one hand, introduces utilitarianism in his theory, which assumes the value judgments of the majority of people should be subjective, and allows for such value judgments to shape political decisions. On the other hand, Mises' argues for the supremacy of the market economy based on efficiency grounds, and against government interventions on the basis that the accumulative effect of such interventions is to increase government size and impede inefficiency. However, when majority of people prefer government interventions, Mises would not be able to deny it in his theory. Moreover, as Murray Rothbard points out[4], there might be a certain range of government interventions which do not have any accumulative extension effect. If there is no accumulative effect, people would have a good reason to support government intervention from utilitarian perspective. Mises' theory would not be able to deny this possibility. This means that Mises' libertarianism would be

[2] Murray Rothbard, on the other hand, is a classic example of extreme libertarianism. See Murray Rothbard, 1973, For a New Liberty: The Libertarian Manifesto, revised edition, San Francisco: Fox & Wilkes, Ch.8.

[3] David Freedman, 1989, The Machinery of Freedom, Open Court Publishing Company, Ch. 39.

[4] Murray Rothbard, 1998, The Ethics of Liberty, New York University Press, Ch.26.

compatible with a certain degree of government intervention.

A third example is the case of Susumu Morimura, a leading Japanese libertarian, who proposes to assist people in poverty from a humanitarian perspective[5]. He claims that a humanitarian consideration of "compassion" to help poor people can be compatible with libertarian ideas. Although the idea of compassion cannot be deduced directly from any libertarianism principle, it can be justified ethically in order to avoid extreme misery in a society. Thus, Article 25 of the Japanese Constitution, which states "all people shall have the right to maintain the minimum standards of wholesome and cultured living," is justified under his theory. This justification might be seen as a concession to the idea of a minimum welfare state, moving away from a radical libertarianism. Some libertarians or neoliberals might hesitate to admit this kind of humanitarian consideration because it opens the possibility of greater intervention by the government.

Our final example is the case of Yuko Hashimoto, another distinguished libertarian from Japan, who proposes an original theory of rights-based libertarianism[6]. For her, libertarian society is synonymous to a minimal social welfare state, which both F. A. von Hayek and M. Friedman supported in a consequentialist way. In accord with R. A. Epstein's consequentialist libertarianism, she tries to reconcile rights-based libertarianism with the economic consequentialism of neoliberalism (classical liberalism). She admits two additional rules for the libertarian justification of private property rights: one is to admit the law of condemnation of private property for public use and the other is to admit the law of redistribution of people's income through a proportionate taxation.

However, she raises a question on the consequentialist way of thinking in neoliberalism and proposes an alternative justification of minimal-welfare state[7]. She argues that each individual needs to be dealt with as a separate personhood, who should have a set of rights for seeking his or her own project. In order for allow for proper project-seeking, every individual needs to be afforded access to a certain degree of basic resources. Since libertarianism deals with each individual in their own

[5] Susumu Morimura, 2013, Libertarians think this way, Tokyo: Shinzansha, pp.74-75 (in Japanese).

[6] Yuko Hashimoto, 2008, Libertarianism and the Minimal Welfare State: Towards Minimalism of Institutional Design, Tokyo: Keiso-shobo, pp.206-207 (in Japanese).

[7] Richard A. Epstein, 1998, Principles for a Free Society: Reconciling Individual Liberty with Common Good, Perseus Books, Ch.1.

particular personhood rather than by way of an impersonal treatment, each person's project must be treated equally regardless of its social evaluation for economic contributions. Some individuals might have a project to live an idle life but they also need to be treated equally as a project-seeking person. This idea of rights-based libertarianism would be compatible with government intervention to some degree because it requires a certain degree of redistribution.

Libertarians, who support to offer equal opportunity for each individual, would agree with redistributions among people as long as it does not decrease the level of economic development. This consideration would come close to the idea of "left-libertarianism," in which basic income would be one of the most attractive policy proposals. In fact, project-based-libertarianism described above opens the door for normative justification of basic opportunities of self-realization that might be beyond the minimum standards of wholesome and cultured living. Left-libertarians investigate whether the government can offer a better condition for each individual to seek their own projects under the criterion of the basic standards of wholesome and cultured living.

2. Tension between libertarianism and neoliberalism

As we have seen, there are various versions of libertarianism compatible with government interventions. Then the question arises: can we find a significant difference between libertarianism and neoliberalism (economic liberalism)? The difference between the two sometimes appears ambiguous. Both stances seem to share an idea of "minimum welfare state" which introduces government intervention for redistribution of resources.

However, neoliberalism does not agree with many aspects of libertarian ways of thinking. Neoliberalism would prefer to pursue strategic policies for promoting effective order of the economy[8]. It would prefer to redistribute resources towards those whose projects would contribute to the wealth of nations. For example, a neoliberalist government would invest its resources to the education for unemployed workers. Further, neoliberals are against those who are parasitic to the social order. This prompts the question, when there is a certain degree of parasitic people who don't contribute to our social order, to what degree

[8] For examination of the definition of neoliberalism, see Tsutomu Hashimoto, 2007, Conditions of Empire, Tokyo: Koubundo, Ch. 5 (in Japanese).

are such people tolerable in society?

There might be found an optimum degree of parasitic people from both perspectives of project-based libertarianism and neoliberalism. Both stances can be synthetically integrated in terms of economic policies: there is a set of necessary opportunities for each individual's project-seeking as long as it is compatible with economic growth. However, since we are ignorant of this optimum, there exists a tension between libertarianism and neoliberalism. Such a tension is explained in a following manner.

The difference between libertarianism and neoliberalism is not a matter of the degree of government interventions. It is related to the tension between "order-disinterested thinking" and "order-oriented thinking."

3. Four main questions in Economic Ethics

As I have explored elsewhere, the main issues of Economic Ethics can be summarized by way of the following four questions from A to D[9].

The demarcation problem of libertarianism and neoliberalism is related to the question B.

A. Does a firm need to behave morally with a long run perspective, even if doing so might result in short-term losses and other economic disadvantages to its employees and shareholders?

B. Which society is more desirable in terms of economic policies and institutions: one which puts a priority on"fairness," or one which prioritizes "stability/ growth of social order (profit of the whole)"?

C. Should we allow communal or patriarchal relations within a firm as its right under the framework of natural liberty; or, should we require the construction of open and liberal relations, even within a firm?

D. Is it ethically justifiable for firms to pursue economic profit while ignoring other ethical requirements in a society; or rather, do firms need to operate as ethical entities?

[9] Tsutomu Hashimoto, 2008, Economic Ethics: What is Your Ideology?, Tokyo: Koudansha, Ch.1 (in Japanese).

It is possible to divide issues in economic ethics into these four realms by using the following two topics and one noteworthy division: [Topic 1] priority problem of economic versus non-economic values; [Topic 2] particularism versus universalism in ethical value; and [a division] mezzo versus macro societies or groups. Hence, Question A deals with Topic 1 at the mezzo level, Question B concerns Topic 2 at the macro level, Question C considers Topic 2 at the mezzo level, and finally Question D relates to Topic 2 at the macro level.

4. On question B: "Fairness" versus "Stability/ Growth"

The question B is which idea we should prioritize in terms of the operation of our economic policies and institutions: the principle of "fairness", or the request of "stability/ growth" of our social order.

Take the following two examples: (i) should the government lend its hand to rescue those banks that are almost out of business? Some might argue that banks are fundamentally different from other corporations because of the risk of a "run" on when a bank faces economic hardship, which can bring about a self-fulfilling downward cycle leading to definite bankruptcy. When people lose trust in the banking system itself, they will rush to withdraw their deposit from all banks, and as a result, the entire financial system is susceptible to crash. Economic history is awash in examples of such crashes throughout many parts of the world.

Financial crises are undesirable because their negative externalities typically lead to considerable contraction of the entire economic order. Therefore it can be argued to be justifiable to rescue banks so as to keep the economic order stable. However, when the government tries to save banks and the financial system, those who are most immediately benefited are either those working within the financial sector, or those who have large deposits in banks. Why should the government help those people more than others? Indeed, many would argue that such a rescue is blatantly "unfair" because such government rescue action tends to help the rich more than the poor. At the extreme, we might see the government helping banks under the guise of economic stability, even in situations where there is a low possibility of actual financial crisis. Given the ability of the rich to organize political pressure groups to promote their interest, the government can likely behave in a manner that unduly serves to protect in the assets of the most privileged.

From the perspective of fundamental and equal "fairness" di-

rected towards every agent in the market, it is desirable to allow banks facing bankruptcy, as with other firms, to go out of business. A principle of fundamental fairness suggests that there is no special reason to give preferential treatment to banks, even given the possibility of a bank "run". The principle of fundamental fairness requires us to allow failed banks to fall into insolvency and go out of business. Such a principle also holds then that there is no reason to give priority in government assistance to the rich even if there is a possibility of financial crisis or stagnation of the economy.

On the other hand, the desire for "stability/ growth" of our social order would argue to the contrary. Such a principle justifies government intervention in terms of preventing deterioration of the welfare distribution for the poor, even if such actions might bring about simultaneous economic advantage for the rich. The questions, then, is should we put a priority to "fairness" over "stability/ growth" of our social order, strictly as a matter of principle? Or, should we put a priority to "stability/ growth" since it maintains a more stable level of welfare of the poor?

(ii) Let us consider now the case of income tax. When we think about the appropriate design of a system of income tax, we again must do so under the framework of satisfying either the idea of fairness, or the idea of stability/ growth of society. Conventionally speaking, fairness is typically viewed as requiring a strong degree of progressiveness of the income tax system, with a significant amount of income redistribution from the rich to the poor, so as to allow the poor to enjoy a healthy and cultured standard of living. This view of fairness is called "egalitarianism." However, the idea of fairness can also be approached from the standpoint of "libertarianism." From this perspective, what is fair is instead to attribute all income to the earner of said income, since the purest form of the system of individual property rights can be regarded as the absolute criterion of fairness. This stance would deny any redistribution of income as a violation of property rights.

Thus, we observe two contrasting views on the principle of fairness in regard to income distribution: egalitarianism and libertarianism. According to their strictest interpretation, both views insist the principle of fairness needs to be adhered to, even if doing so might lead to a contraction of the economy.. However, there is an alternative, so-called "balanced" view based on the idea of "stability/ growth" of our society, which requires an "appropriate" degree of progressive income taxation in order to both stabilize society, and promote economic growth. This goal is to strategically implement a system of income taxation so

as balance the interests of both the rich and the poor. This third view would also allow for strategic government actions which would contribute to the growth of national economic wealth. For instance, if bestowing certain targeted educational opportunities for the poor is believed to increase economic growth rates, the government can justify imposing progressive income taxes on the rich and redistributing resources to improve the educational experiences of children from disadvantaged households. On the other hand, when the income tax system becomes so progressive that the rich are motivated to actively (and successfully) evade income tax payments, it is appropriate for the government to reduce the progressiveness of the income tax in terms of its feasibility. From the viewpoint of this third perspective, the progressive income tax needs to be adjusted with reference to the ideas of both economic stability, *and* development. The egalitarian ideal would be more actively supported by strengthening income tax progressivity when such action would bring about economic stability and growth. Conversely, the libertarian ideal would be more actively supported by reducing the progressiveness of income taxes when such action would bring about economic stability and growth.

There is also a perspective of "local communitarianism" which requires a particular common good in place of the concept of fairness. This stance would places a priority on protecting common goods in each locality, even if the whole economic order would be caused to shrink or even suffer destruction.

There is also the perspective of revolutionary Marxism. Such a view insists that, as a matter of justice, the ruling class should be dismantled and the ruled people should rise so as to evenly distribute resources and power throughout society. This ideology supports progressive income taxation as its means of such a revolutionary power transformation. Contrary to Marxism's revolutionary ideas, "conservatism" would prefer to minimize the degree of social mobility among classes. This stance would require at most a piece-meal adjustment of income taxation for the sake of social stability.

As discussed above, there exist seven stances on income taxation. In the system of real politics, the immediate issue is typically presented as whether we should increase or decrease the progressiveness of the income tax system. However, from the standpoint of economic ethics, an important demarcation can be drawn between an ethics of fundamental principles, such as "fairness", and an ethics of orders, such as "stability/ growth" of the society. The ethical stances stated above can

be categorized in the following matrix in section 6 (question B).

5. Conclusion

The difference between libertarianism and neoliberalism depends on the analysis of question B. Libertarians adopt "(market) order-disinterested thinking," whereas neoliberals adopt "(market) order-oriented thinking." While libertarians are against government intervention for maintaining market order or the market value of specific business interests, neoliberals support it[10]. For neoliberals, it is deemed acceptable if government actions to maintain a minimum standard of living results in greater assistance flowing to the wealthiest in society. Such asymmetric benefits might accrue to the wealthiest when the value of their bank accounts is protected by government interventions intended to save the financial system in order to avoid a collapse of the market order. Libertarians would deny this. They would treat each person or each company as an equal personhood. However, libertarianism and neoliberalism share several ideals. They share responses to the questions A, C, and D (see the following section).

6. Additional Remarks

The following Chart presents a summary of the answers to the four questions, followed by a Table indicating a naming in terms of ideological vision for each of the 16 possible sets of answers.

CHART - a **Four Main issues in Economic Ethics**

A	X : Profit	Y : Morality
	(1) A firm can pursue its economic rationality. Economic institutions should be purified. (2) We need to promote an evolution of society through a creative destruction. [(3) We should make people economically autonomous as a basis for political citizenry.]	(4) An economic society needs to be ethical so as to be embedded in conventional business practice. (5) A firm should aim to make its members incorporated in an ethical entity.
B	X : The good as principle	Y : The good as order

[10] David Freedman might agree with neoliberal way of thinking in this regard. If so, his stance in this case is categorized in Neoliberalism.

	X-1 : Fairness (1) Request for a fundamental fairness of equality: egalitarianism. (Persist on the idea of equal distribution, even if this necessitates a dramatic reshaping or even the destruction of the current economic order). (2) Request for a fundamental fairness of freedom: Libertarianism. (Protection of individual property rights, even if this necessitates a dramatic reshaping or even the destruction of the current economic order).	Y-1 : Stability/ Growth (3) Request for order (Maintain the stability of the current social order so as not to deteriorate the welfare of lower class, even if such actions allow significant increases in wealth for the upper class). (4) Request for growth (Judge the appropriate policy in the light of sustainable development of the national economy. Deny any request of "fairness" that undermines the functioning of dynamic market activities or the motivation for employment).
	X-2 : Additional stances (5) Request for a particular common good. (Protect common goods in each locality, even if this necessitates a dramatic reshaping or even the destruction of the current economic order). (6) Revolutionist in principle (The strong must be brought to ruin and the weak to rise in a society.)	Y-2 : Additional stance (7) Conservatism (Keep a system of conventional patriarchic morality, even if this necessitates a dramatic reshaping or even the destruction of the current economic order).
C	X : Free relation (solidarity/ patriarchy)	Y : Artificial liberal relation
	• Preserve the values of solidarity • It is immoral to open an insider report as a whistleblower. • Accept collusion (pre-bidding agreements) as a "necessary evil" because it is reasonable as a spontaneous convention in a community. • Accept a feudal morality in a household as a privacy of individuals.	• Penetrate a principle of individual responsibility. • Protect the right of "whistle-blowers". • Inhibit collusion by introducing an artificial bidding system. • Realize a gender-equality within society even in the private sphere by promoting a remunerating calculation of housework for men and women.
D	X : Inclusion	Y : Non-inclusion
	(1) Ethical statism (Governments should restrain or promote the activities of firms in order to place them within the framework of an ethical society.	(2) A man of ethical belief (Firms should behave freely based on the individual beliefs of its ownership. Only a man of ethical belief needs to behave ethically with a long run perspective.) (3) A man of wish (I wish that firms with long-run perspective would spontaneously increase in number, while firms pursuing short-term profit would naturally be eliminated by way of the market process.) (4) Egoism (Whether firms can behave freely in pursuing profit in either the short- and/or long-run is a matter of their own responsibility)

TABLE: Categories of Ethical Attitudes

	A	B	C	D
Neo-conservatism "Neo-con"	Y	Y	X	X/Y*
Neo-liberalism "Neo-libe"	X	Y	X	Y
Liberalism (welfare state type)	X	Y	Y	Y/X**
State-communitarianism	Y	Y	X	X
Local-communitarianism	Y	X	X	X
Libertarianism	X	X	X	Y
Marxism/ Enlightenment (1)	X	X	Y	X
Egalitarianism/ Enlightenment (2)	X	X	Y	Y
Modern perfectionism	Y	Y	Y	Y
Republicanism	Y	Y	Y	X
Aesthetic destructionism/ Governor aversionism	Y	X	Y	Y
State deep ecology	X	X	X	X
Developmental Dictatorship/ Developmentalism	X	Y	X	X
Citizen-communitarianism	Y	X	Y	X
Local-communitarian anarchism	Y	X	X	Y

* Neo-conservatism would choose a mixture of X and Y in D, because it is negative to the female priority rule for the employment or the restrictions for the right of dismissal.

** Liberalism might choose X in D when the inclusive policy is understood as such paternalism to make people autonomous. Policies of X in D can be interpreted as a support for individual autonomy.

Law under Fascism:
Fascism anarchy of the monopolistic bourgeois power[1]

Marcus Vinícius Giraldes Silva

The category of fascism which I base myself on in the aforementioned study is not related to an individualized vision which presents itself as limited to the so-called experience of classic fascist regimes, that is, of the dictatorship based in the masses and territorial expansionism through war (as in the German and Italian cases). Fascism is historically related to monopolistic capitalism and, in its historical stage, is the paradigm of open, terrorist dictatorship of big capital. The functions of the political extraction of surplus value, monopolization of the economy and reactionary modernization are present in the historical movement of fascist regression. In my dissertation, I reflect that it is possible to understand fascism - or, at the very least, the fascist tendencies in regimes with varying arrangements between the state and civil society that, in other analytical perspectives appear classified into like military dictatorships or so-called authoritarian regimes, as defined by the sociological interpretation of Juan Linz. This is not to disregard the marked differences, in particular of the existence or absence of a mass base and formal variations in the configuration of repressive and ideological apparatuses2. Rather, it is to identify the determinations that are common (and perhaps for this reason, principal) which were present from the

[1] The present intervention was drawn from notes on the relationship (or lack thereof) between law and fascism, contained in my master's dissertation 'Fascism and the Bourgeois Reaction: A Brief Categorical Study', defended in August 2008 for the postgraduate program in Sociology and Law at the Federal Fluminense University, under the supervision of Professor José Fernando Castro Farias. I want to take the opportunity provided by the brief reflection below, which I here present for debate, to develop my lines of research, in the sense of preparing a text that will complement the study presented in 2008. Translated by Sharone Birapaka.

[2] I mention, in particular, Poulantzas' rich study 'A crise das ditaduras', regarding these differences between the dictatorships of Greece, Portugal and Spain, and German and Italian fascism, which, despite the solid empirical knowledge demonstrated and the acuteness of the presented analyses, still end up trapped to some typological rigidness.

1920s onward in the dictatorial solutions that emerged in response to conflicts within social formations that were either already at the stage of monopolistic capitalism or that had functionalized these dictatorships in order to politically accelerate the process of monopolization3.

The functionality of fascism is inserted into a certain form of the organization of political power, a dictatorial one, despite varying in important aspects of its concrete manifestations, which leads us to question the function, or even if there is a function, of the law.

There is a very interesting phrase in the film "Saló o le centoventi giornate di Sodoma" by Pier Paolo Pasolini (1975), based, as the title makes clear, on the literary work of Sade, entitled 'The 120 days of Sodom or the School of Debauchery': "Noi fascisti siamo i soli veri anarchici, naturalmente una volta che siamo impadrontti dello Stato, infatti la sola vera anarchia è quella del potere."[4]

The words of the character of the Duke translate a characteristic of German fascism highlighted by Franz Neumann and Herbert Marcuse: anomie, the lack of law, that breaks with the modern idea of juridical equality and equal rights of citizens vis-à-vis the State. In contrast, unlimited power is concentrated in the hands of the fascist leadership, as well as a few magnates of industry and monopolized finance, who suppress any sphere of freedom of the majority.

According to Neumann's critique, found in his texts from the 1930s and 1940s (for example, in "Behemoth: the structure and pratctice of National Socialism"), while the legal paradigm of competitive capitalism is the general law which, alongside formal equality, has the function of allowing a certain economic calculability while giving some protection to the weakest, in monopoly capitalism, there is a specific use of individual regulations aimed at specific economic and political situations (NEUMANN, 2005). The general law doesn't disappear, but a new kind of judicial norm emerges. In the context of democracy, even if it is politically weak as in the case of the Republic of Weimar, it is possible to reason that the content of these individual rules is subject to political dispute by the social forces that participate in the State. This is true even in favour of greater material equality, although in my view such a pos-

[3] This is the formulation of Álvaro Cunhal as the head of the Portuguese Communist Party.

[4] Freely translated from the original in Italian: "We fascists are the only true anarchists - obviously, once we have gained hold of the State – for the only true anarchy is that of power.'

sibility has not been emphasized enough by Neumann, most probably due to the context in which he wrote.

In German fascism, on the contrary, the individual and retroactive laws turn into mere measures in favour of the interests of the monopolies and the regime by granting privileges or applying terror. The law is only voluntas of power, while the law as ratio disappears (NEUMANN, 2005: 497). It is, according to Neumann, an Empire of anomie, an interpretation that remains close to the 'anarchy of power' mentioned in the work of Pasolini.

The work of Sade shows a fixation with calculability. The four libertines who gather (a noble, a bishop, a magistrate and a financier), before beginning their empire of terror establish an ordinance through which they are restrained by rules and the prospect of severe punishments. Time is calculated and minutely divided. However, in Sade's text, and especially in Pasolini's film, calculability is not realized in practice, because, since the rules are reduced to the voluntas of the four partners, they are altered, adapted, operated retroactively, and previously announced punishments for certain facts are applied in a diverse and unpredictable, in other words, there are technical means for the immediate satisfaction of those that hold the power.

Sade's work is important to study both the conception of citizenship and liberal republic, with its restrictions on popular participation, and fascism which, Pasolini understood, Sade adapted to the Italian Social Republic mock colonial state, during the Nazi occupation of the north of Italy. It is also true that the author sought to critique what he saw as the predominance of individualism and the ideology of consumption in post-war Italy. In other words, there is in Pasolini what we can conclude, with the help of his social and political writings in the 1970's, a strong concern for seeking a critical intervention in his present. Pasolini questioned in which ways a new victorious fascism could be different from that which had been defeated thirty years ago. Despite his preoccupation with the manipulative mechanisms of consumption which have intensified at the time, the film is nonetheless very important, specifically for the study of fascism as it really existed, a regime or tendency, especially from its category of "anarchy of power" .

José Paulo Netto, while studying in Sade a profoundly contradictory relation between liberalism and democracy, and for that drawing on the category of possessive individualism extant in the work of C.B. Macpherson, tells us that "the republic of Sade prefigures exemplarily in the fascist universe" (NETTO, 1986:160). The radicalization of the con-

ception of liberal citizenship, where "some may oppress more than others" (NETTO, 1985:159), could lead to the consequence of the freedom of a minority expanding in such a way (and thereby detaching itself from any limits), that it ends up suppressing the freedom of the majority: we are then faced with fascism at its very birth. It is not the type of freedom that is the affirmation of the emancipated individual and which does not oppose the freedom of others, but freedom according to the capital, that is, functionalized in individuals who are only free as long as they are holders of capital.

I pause to highlight that Pasolini is more radical in the critique of liberalism than Neumann. This is not to say that fascism and liberalism are the same or that fascism is a degree of liberalism. It consists, in my view, in understanding that liberalism, by the exacerbation of its sociopolitical tendencies, carries the germs of its own negation, not exclusively in the sense of a revolutionary suppression, but of a fascist regression.

It is more than well known that liberal Italians supported the fascist government during its first few years, when Mussolini, newly come to power, insisted "on the fact that the State ought to be politically strong, but should shun any intervention in the economic sphere" (KONDER, 1991:20). His economic program aroused much enthusiasm among many liberals, sparking claims like Luigi Einaudi's: "All this (...) is classical liberalism" (LOSURDO, 2004:240).

It is a fact that the arrival of the fascists to power was hailed by many liberals, in the economic sense of liberal (referred to as 'liberistas' in Italy). They considered true liberalism to be contaminated by universal suffrage, because for them "liberalism in Italy was extinguished by democracy"[5]. Such liberals credited fascism with the historic task of redeeming the purity of the regime through temporary and violent suppression of liberalism itself, thereby setting it apart from any democratic contamination. Fascism would then have the same function of a real State of exception in the sense of saving and permitting the return of a certain level of normality and normativity which, for those politicians and intellectuals, was liberalism without the democracy of the masses. You may also remember those who, in the Brazilian 1964 coup d'État believed in a short military intervention which would have lasted just long enough to put things in their proper places.

The State of exception, which fulfills the function of preserving the social order, is theorized by Carl Schmitt in 'Political Theology'

[5] Letter from Salandra to Benedeto Croce. Apud LOSURDO, 2004, p. 241.

(SCHMITT, 1996:83-130) as a time in which a political decision by the sovereign suspends the law and eliminates the occurrence of all norms in function of the self-preservation of the State.[6] The same concept is criticized by Walter Benjamin in his eighth thesis "On the Concept of History" as being a permanent space in the class struggle, though variable in its reach (BENJAMIN, 1996: 226). Schmitt writes from the perspective of the ruling class, while Benjamin does so from the point of view of the tradition of the oppressed.

Benjamin's analysis is easily understood in Brazil where, along with a parallel force to the law, the State of exception is an everyday occurence which a significant part of the population, living in the slums of large cities or in rural areas of agrarian conflict, is subject to. Since June, the resurgence of a strong movement of urban masses in Brazil, spontaneous and contradictory in the energy that they demonstrate, has witnessed the extension of exception to include the streets. This is especially true in my city, Rio de Janeiro, where the Governor of the State closely resembles one of Sade's characters. In late July this farcical character appointed a Commission, by decree, to investigate the protests (referred to as vandalism). The Commission is made up of the police, Security Bureau and the State prosecutor. In the Comission's inaugural speech, the Governor accused "foreign groups" of inciting the protests without, obviously, naming which groups these might be or presenting any proof or even a clue as to who they are. In terms of its rhetorical style (and for lack of another more accurate name), I must say that the speech was "fascist". .

Examples of moments of exception were recently historicized by two Italian authors; Giorgio Agamben's work on the State of exception (AGAMBEN, 2007) and Domenico Losurdo's work on Bonapartism (LOSURDO, 2004). The latter is more extensive, for example, than what is found in the works of Marx and Gramsci, because it includes all cases of hypertrophy of the executive and restriction of parliamentary democracy in the bourgeois State.

Brazil is not on the verge of fascism today, despite our everyday barbarism. Nevertheless, I recall that the installation of a fascist dictatorship can be preceded by a period of transition in which 'fascisization' is processed through various measures of exception that constitute the reactionary preparation and that it will, moreover, always have its course

[6] For a critique of Schmitt's juridical and sociological thought, see NEUMANN, 2005, e LUKÁCS, 1976, p. 519/537.

defined by the concrete class struggle. Exception is also linked to the corruption of elites within institutions, that begin to abandon the law, their law, even before the formal measures for their suspension are adopted. This is the theme, for example, of the film 'Z' by Costa-Gavras (1969).

One could say that, in fascism, the State of exception (always present in some space within the class struggle and the repression of the oppressed), becomes hypertrophied and turns into a "permanent State of exception[7]". Since its repressive system is characterized by the complete suppression of all autonomous spaces of the subaltern classes, who are either silenced or pictured in the aestheticization of politics, it should be added that fascism is a state of permanent and totalitarian exception, though only in the sense that Gramsci and Togliatti attach to the term totalitarian (GRAMSCI, 2002: 139).

Saló is quoted here again regarding the State of exception as a space of anomie and the suspension of law, which becomes the rule and prevents the return of the former. However, he is quoted this time to highlight the passage in which the victims are bought to the castle together and the regulation is announced by 'Excellence', the magistrate, who says: "Weak chained creatures destined for our pleasure, I hope you don't expect to find here the ridiculous freedom granted by the outside world. You are beyond the reach of any legality. No one on earth knows you are here. As far as the world is concerned you are already dead. Therein are the laws that will regulate your life in here" .

The passage may seem contradictory because, if Saló's fascism and the Nazi occupation is what exists outside of the castle, how can we speak of liberty and legality? Recall, however, that the reality of Salò is the war of resistance against the Nazi ruler as well as the civil war between divergent positions in Italian society, where fascism and antifascism were battling each other (and every civil war brings a duality of powers, of orders).

Inside the castle walls it is believed that the prisoners were stripped of all freedom, not only formal, but factual, which includes the possibility of revolt ("To everything and everyone you are already dead"). It is total slavery. Would fascism's utopia bring the end even to

[7] Cf. LOSURDO, 2004, p. 196; AGAMBEN, 2007, p. 13. There does not appear to be much sense in the differentiation established by Agambem, between ''State of permanent exception' and dictatorship , based merely on its origin. If the state of exception becomes permanent it's because its transfiguration already occurred in the open dictatorship.

politics, by the elimination of all and any conflict?

The castle is a refuge and a utopia of fascism, made possible by total control over life, which ends up being a living death ("don't you know that we would like to kill you a thousand times, to the limits of eternity, if eternity could be limitless!"). Moreover, it is a promise that is not fulfilled given that at the end of both Sade's novel and Pasolini's film, the bodies are systematically destroyed, as if they had lost their use value. To "kill you a thousand times" might be possible through the circulation of exchange values in its expanded reproduction, but the castle, a refuge in the throes of fascism in Salò, is a physical barrier to the movement of goods.

If the fascist legality, while a non-law, is in its very essence mere will to power, ideologically it must match a certain mentality in relation to the order. The film 'El Laberinto del Fauno' (2006), by Mexican director Guillermo Del Toro, presents an excellent opportunity to reflect on the difference between fascist and anti-fascist mindsets. When Captain Vidal, the sadistic Francoist official of obvious aristocratic extraction, asks the doctor Ferrero, a clandestine guerrilla collaborator, why he had disobeyed such an clear order, Ferrero responds: "Only people like you, Captain, can obey for the sake of obeying, without thinking". He then keeps walking and gets shot in the back. On the other hand, when the girl Ophelia, after being asked to undertake certain tasks that she knew nothing of and could not question, discovers that the tasks could entail the shedding of innocent blood, refuses to perform them/do so. From those who live outside the fascist domination, she hears that she made the right choice.

The film opposes two mental patterns: that of the fascist and the anti-fascist. One is to obey without thinking, the other is to think and not obey. It is the consciousness that stresses the need for criticism and subversion, which in the film turns into material strength through the practices of the peasant guerrillas. In Pasolini's film, for example, the only prisoner who, when caught in a crime, does not denounce his companions in agony, is also the one who does the partizziani communist salutation before being executed by bullets. This does not prevent a glimpse of the strong expressions of shock on the faces of the four libertine and liberticide partners. They see that there was an enemy inside the castle. Could the 'political' have been penetrated? The prisoner presents them with the contradiction of a guerilla who exposes himself as being just that and a man who, even under a regime of total slavery, engages in a free sexual encounter (which would in itself be a profound subversion)

intensified by the fact that the woman is black.

However, fascism, as despicable as it is, can be seductive. It presents a manipulative aesthetic that is attractive, but it is imperative to refuse the whole fascist banquet. Even in Pasolini's film, where the anarchy of power is devoid of any mediation (which is made clear in Sade's scene of the banquet of excrements), there are victims who adhere to it (it is said that "the refinement of debauchery is to be, at the same time, the castrator and victim"). Furthermore, in both movies a feast appears. In Del Toro, the girl Ophelia is warned not to touch any food from the table. When she does not resist and ends up awakening a monster whose eyes are in its palms, that is, a creature who can only see and destroy that which is within its reach, a representation, therefore, of Captain Vidal, her stepfather and the rest of fascism.

The fascist banquet can only offer, to the great majority, physical death, destruction, extreme exploitation, slavery, and death in life. The imperialist war has been represented seductively to the subalterns, like a banquet capable of bringing them prosperity and security, or in the worst case, a heroic death capable of inspiring those who remain obedient. The result of this banquet (of which the part in power of European social democracy never tired of participating), considering recent interventions in Libya and Syria, are historically a State of exception and, in particular, of fascism.

Does Del Toro want to lead us to believe that the exit from an unbearable reality is escape through free fantasy? This, however, can not completely avoid reality and ends up at some point reflecting upon it: in the fantasy, the parasitic toad, which sucks out the vitality of everything around him in the forest; in reality, peasants massacred by fascism, which supported itself on the parastic Catholic Church; in the fantasy, a destructive monster whose eyes are found in the palm of his hands; in reality, a fascist captain, Vidal, fixated on death, preserving the clock that registers the moment in which his father died (very much in the style of the francoist motto "viva la muerte"). Imagination drives Ofélia to reject any compromise with an unbearable oppressive reality and to establish a subversively disobedient mentality.

Having built his narrative in the francoist past, it is not difficult to see the absolute relevance in Del Toro's film at a time of the greatest imperialist warmongering, noting that when it was filmed it was the time of the government of the neocons and Christian fundamentalists in the United States. On this point, the movie helps in the self-awareness that, in relation to imperialism, as well as with fascism and the State of

exception, which are all a rule for the oppressed, no compromise is acceptable.

References

AGAMBEN, Giorgio. O estado de exceção. 2a edição. São Paulo: Boitempo, 2007.

BENJAMIN, Walter. Magia e técnica, arte e política: ensaios sobre literatura e história da cultura. 7ª edição. 10ª reimpressão. São Paulo: Brasiliense, 1996.

CUNHAL, Álvaro. Rumo à vitória: as tarefas do partido na revolução democrática e nacional. Porto: Edições "A Opinião", 1974.

_____. A Revolução portuguesa : o passado e o futuro. Relatório aprovado pelo CC do PCP para o VIII Congresso. Lisboa: Edições Avante, 1976.

KONDER, Leandro. Introdução ao fascismo. 3ª edição. São Paulo: Edições Graal, 1991.

LOSURDO, Domenico. Democracia ou bonapartismo: triunfo e decadência do sufrágio universal. Rio de Janeiro: Editora UFRJ, Editora UNESP, 2004.

_____. Antônio Gramsci: do liberalismo ao "comunismo crítico". Rio de Janeiro: Revan, 2006.

LUCKÁCS, Georg. El asalto a la razón: la trayectoria del irracionalismo desde Schelling hasta Hitler. Segunda edición. Barcelona: Ediciones Grijalbo, 1978. MACPHERSON, C.B. A teoria política do individualismo possessivo: de Hobbes a Locke. Rio de Janeiro: Paz e Terra, 1979.

MERINO, Antonio Giménez. Una forza del pasado: el pensamiento social de Pasolini. Madrid: Editorial Trotta S.A., 2003.

NETTO, José Paulo. Vigência de sade. In Revista Novos Rumos. Ano I. Número 2. São Paulo: Editora Novos Rumos, abril/junho de 1986.

NEUMANN, Franz. Behemoth: pensamiento y accion en el nacional-socialismo. Primera reimpresión. México, D.F.: Fondo de Cultura Econômica, 2005.

PASOLINI, Pier Paolo. Saggi sulla politica e sulla società. VI edizione. Milano: Arnoldo Mondadori Editore S.p.A., 2012.

POULANTZAS, Nicos. A crise das ditaduras: Portugal, Grécia e Espanha. 2ª edição. Rio de Janeiro: Paz e Terra, 1978.

SCHMITT, Carl. A crise da democracia parlamentar. São Paulo: Scritta, 1996.

_____. O conceito do político/ teoria do partisan. Belo Horizonte: Del Rey, 2008.

Humor and Damages:
Civil Liability for offensive jokes in Brazil

João Paulo Capelotti

LL.M. by Universidade Federal do Paraná (UFPR), Brazil. Lawyer.

Abstract: Brazil, in spite of its worldwide fame of non seriousness, is much more concerned with the honor, the name and the image of the victims of humoristic statements than with the freedom of speech and criticism. It is true that not every kind of humor intends to cause reflection or discussion about public issues – characteristics that would make it much more defendable for its proximity with the freedom of information. But the question is: does humor necessarily have to be about public issues to prevail over people's susceptibilities? The attempt of answering such question passes by the discussion of the most relevant decisions about the issue. After analyzing them, the article will defend a wider protection of laughter, considering it is almost always ontologically attached to some kind of offense or bitterness.

Keywords: Humor; Tort; Criticism

1. Introduction

The conflict between humor and honor, privacy and image in Brazil produces a new case almost every day.

This is a clear result of the incredible diffusion and expansion of TV, radio, newspapers, magazines and, of course, the Internet, throughout the country. The urbanization, the decrease of the illiteracy, the economic development and the absence of previous censorship are some factors that can help to explain the increasing access that most of the Brazilians have to both traditional and new media.

On the other hand, people are more conscious of their rights, in

part because of the larger access to information. Besides, the creation of centers providing public lawyers to the poor population, and the harassment of private lawyers instructing their clients to sue whatever makes them uncomfortable, probably has contributed to the generalized perception that one's moral sphere can be hurt, and there are legal mechanisms to repair it – including cases in which such damages come from cartoons, TV shows, ironic articles, sketches on YouTube, pictures on social networks and so on.

Although there is an interesting (and increasing) casuistic about the issue, the academic world apparently does not pay much attention to the matter. There are not many studies about how to solve the conflict between this specific form of freedom of speech and the rights of personhood. Most of the books and articles about freedom of speech do not approach humor or, when they do it, they dedicate only a few pages to the issue, leaving behind a considerable number of questions. Maybe because of that the courts have been deciding the cases involving humor with a dizzying variety of positions. In part, the diversity of solutions is due to the lack of a culture of respect to precedents in Brazil. The very conflict between freedom of speech and people's honor cannot accept a unique answer to problems that are naturally different. However, it seems that deeper investigations on the matter are necessary, either to provide argumentative lines to lawyers and judges, or to organize the casuistic into a minimally logical casebook, pointing leading cases and trends for the judicial debate.

Obviously, the vastness of cases cannot be covered in this article. It is necessary to draw boundaries, without losing touch of the main goal of the research behind this paper. The result herein presented intends to portray an overview of the most significant cases involving humor in Brazil, taking into consideration, when necessary, what the national literature has to say about it. This means that many important foreign references were intentionally left aside, in the attempt to convey, whenever possible, the portrait of Brazilian Law about humor as an element of freedom of speech.

It is also important to underline that the article does not explain many important and abstract concepts such as what freedom of speech is, or even how humor is inserted in this theme – however, the intuitive comprehension of such aspects seems to be sufficient to understand the discussions of the paper.

2. A portrait of humor in Brazilian Law

The diversity of cases involving humor, and the angles from which they can be analyzed, would allow uncountable ways of organizing the legal material available about the theme. The choice made herein, although it might not be the easiest one, is the best to show the true problem behind the freedom of speech: the right to say uninteresting or unpleasing things. Dividing the cases of humor into those that clearly have a social interest and the ones in which this relevance is more difficult to be seen or simply does not exist, is similar to separate the easy cases from the hard ones.

2.1. The social relevance of the criticism

The average Press activity – the reporting of facts – is the gold standard for Brazilian judges and lawyers to analyze the conflict between the rights of personhood and the freedom of speech and information. In such cases, the courts underline if the press has or not shown facts that, for its own importance, theoretically entails public interest, if those facts are true and if they were a mere narration (and not an offensive text). If the answer is positive to these conditions, chances are the right to disclose the news will prevail over the subject´s susceptibility. However, articles and other essays carrying opinions, even if they are strong and sharp, are also accepted, as long as the criticism is directed to some issue also considered of public interest.

These standards originally followed by the so-called "serious journalism" apparently also guide the conflicts involving humor.

A good example is the work of Darcy Arruda Miranda, a judge who wrote in 1959 one of the most important books regarding freedom of speech in Brazil: "The abuses of the freedom of the Press". In the middle of his considerations about the right of criticism, there are two pages about humor. Miranda starts with a Latin quotation, "ridendo castigat mores" (that is, laughing punishes the society's behavior). According to him, humor and satire are weapons and instruments of education, if they are headed for society's improvement, that is to say, if they have social interest (MIRANDA, 1959: 391).

What Miranda's doctrine defends is humor as a form of completing the "serious" information, or, in other words, is comedy as a way of catching people's attention to important points that would normally not

be noticed. This was the role of humor that Justice Carlos Ayres Britto, from Brazilian Supreme Court, had in mind during the judicial review of the Elections Act, which had been recently changed to prohibit comedians to make fun of politicians during the election period (ADI n. 4451/DF, related by Justice Carlos Ayres Britto, decided on Sept. 2nd 2010). Brazilian Association of TV and Radio Broadcasts argued that this was an unconstitutional act, and had a positive answer from the Court. Justice Britto considered that the Constitution does not authorize the suspension of the freedom of speech clause during the elections. This can happen only during the so-called "exception state", during war or situations of extreme danger to the Nation. The court also considered that humor is a mix of creativity, art and social criticism, inherently attached to the freedom of speech and the freedom of the Press.

Quoting by heart one of the most famous Brazilian humorists, Justice Britto said that humor is not only about laughter, but also a critical way of seeing the world. Thus, the benefits would be widely compensated by occasional excesses of determined cartoons or TV shows. According to the Justice, humor is a component of the Press activity, which also guarantees the right to criticism, even in sarcastic, ironic and tough ways, specially against authorities and politicians surrounding public institutions. In other words: according to this recent decision of the Supreme Court, humor is a way of presenting information, and cannot be detached from the usual guarantees of the Press, even in the elections period.

Another interesting case (Special appeal 459.857/SP) was judged by the Superior Tribunal de Justiça – STJ (that we could call "Superior Court of Justice") –, with jurisdiction all over the country when it comes to the last interpretation about the ordinary law. It was the appeal of a Police officer who felt humiliated by a sketch made by a famous TV show, which criticized, through jokes, the violent behavior of the Police in the suburbs of the city of Diadema, in the Metropolitan area of São Paulo. Justice Aldir Passarinho Jr., who wrote the vote unanimously followed by the court, pointed that the TV show intended to be funny, but also brought up criticism and information, since it was largely based on recent news. Besides, neither the name nor the image of the appealer was shown on the TV program, which satirized the situation with fictional characters.

Another good example of humor addressing social criticism involved a famous politician, who has the fame of not fulfilling most of his promises (Court of Appeals for the State of São Paulo, Appeal

0100597-75.2003.8.26.0000, related by judge Caetano Lagrasta, decided on Oct. 19th 2011). After receiving an ironical prize, called "Troféu Cara-de-Pau" ("Shameless trophee"), the politician sued the radio which gave it to him and lost. The Court considered that humoristic programs are appropriate medias to give special and colorful meanings to the words of public people, which does not necessarily imply aggression to the rights of personhood.

2.2 When the social relevance of the criticism is hard to see or does not exist

Not always, however, will humor convey laughter and clear social or political criticism.

Perhaps the most famous recent case involving humor in Brazil was the commentary made by TV host Rafinha Bastos about a pretty singer and her child (Court of São Paulo, Process 0201838-05.2011.8.26.0100, decided by judge Luiz Beethoven Giffoni Ferreira on Jan. 12th 2012). The suggestion that, if he had the opportunity, he would have sex with both pregnant mother and unborn child became an explosive discussion, with people against and in favor of the comedian, who ended up being fired from the TV show and sued by the singer. The sentence that awarded the singer, her husband and the child damages considered that the joke made by the TV host was absolutely unreasonable and rude. The appeal to the Court of Appeals of São Paulo has not yet been appreciated.

Another relevant case (Court of Rio de Janeiro, Process 2005.001.117530-6, decided by judge Rogerio de Oliveira Souza on Jul. 26th 2006) was about a famous actress, who carries the fame of being unkind. She was targeted by a certain TV show, from a channel different from the one she works for, that used to chase celebrities with such alleged behavior, in an attraction called "Sandals of Humbleness", in which the comedians tried to convince the celebrity to wear those shoes. The actress Carolina Dieckmann, since the first approach of the TV show, declared she was not interested in participating or giving interviews. But the comedians insisted, even trying to reach the window of her apartment with a derrick. The sentence decided that the TV show brought no information and could not claim the typical protection granted to journalism. The decision also considered that the actress had always been explicit about the absolute lack of interest in participating

of the show, and she could not be forced to do it by the showmen.

Other cases confirm the necessity that the victims must agree, in a certain way, with jokes that are not limited to speech. Attitudes that involve a positive behavior (such as putting on the sandals), invade the privacy or affect someone physically must be preceded by consent. This is the conclusion of two cases that punished the same TV for some disgusting practical jokes involving ordinary people walking on the street, cockroaches and sand (Court of Appeals for the State of São Paulo, Appeal 529.030.4/9, related by judge Dimas Carneiro, decided on Nov. 29th 2009; Appeal 433.412.4/8, related by Caetano Lagrasta, decided on Aug. 22nd 2006).

But these rigorous precedents do not necessarily mean that humor without public interest is illegal.

Sometimes, the behavior of the victim is evidence that the alleged offense would be even expected. A good illustration is the case involving a curious candidate to the House of the Representatives of the State of Rio de Janeiro (Court of Appeals for the State of Rio de Janeiro, Appeal 2008.001.56057, related by judge Paulo Maurício Pereira, decided on Feb. 4th 2008). He presented himself on TV obligatory election program as "Mazzaropi da carroça" ("Mazzaropi of the cart"). A humoristic TV show presented his video asking for votes, during a special part of the program called "Candidatos toscos" ("Tacky candidates"). After the video, the showmen simply laughed on it. The candidate sued the broadcast and lost. The court considered that it was natural that a candidate who presented himself with an odd and comic name (referring to one of the most famous comedians in Brazil) would be more susceptible of being target of jokes than if he had chosen his real name.

A previous behavior of the board of a TV broadcast also counted against it while judging its action against a showman well known for his sharp tongue. The Court of Appeals for the State of São Paulo considered that the TV board knew the fame of the showman Clodovil Hernandez before hiring him, expecting reasonable audience with his sarcasm, and could not complain if he directed his bitterness to them as well (Appeal 1183644, related by judge Celso Pimentel, decided on Aug. 11th 2008).

Another possibility is the abstraction, the absence of explicit reference to the target of humor, or even the creation of fictional characters.

An interesting case comes from the Court of Appeals for the State of Rio Grande do Sul, and is about an association of bricklayers that did not like a scene of a soap opera in which the villain, Nazaré Tedesco, poked fun of a character – her ex-husband Josivaldo – who had such

profession. The court considered that there was not a direct offense to the profession and, after all, the soap opera is an openly fictional form of expression (Appeal 70023682768, related by judge Luiz Ary Vessini de Lima, decided on Nov. 13th 2008).

All the cases mentioned above did not have explicit social interest, but had different denouements according to each one's peculiarities. However, the presence of a social criticism in the humoristic manifestation, although hard to see, seems to be a considerable safeguard to the comedian.

Perhaps the most intense defense of humor as a component of freedom of speech comes from the Special Appeal 736.015/RJ, in which the daughter and the granddaughter of a deceased noble felt dishonored because of an article published in a humoristic magazine called "Bundas" ("Bottoms"). This magazine was a parody of the most famous celebrities' publication in Brazil, "Caras" ("Faces"), that owns castles in France and New York. The comic magazine was also searching for its castle, and conveniently elected the castle of the Baron Smith de Vasconcelos, who made his fortune producing toilet paper in the state of Rio de Janeiro and used to have, in the town of Itaipava, the nickname "Barão da Merda" ("Baron of Shit"). Both the sentence and the decision of the State Court of Rio de Janeiro fulfilled the distinction, often pointed in the literature, between intention to offend ("animus injuriandi") and intention to joke ("animus jocandi"). The decision from the Superior Court of Justice has gone beyond. According to Justice Nancy Andrighi, who wrote the prevailing vote, it is necessary to analyze not only the isolated expression "Baron of Shit", but the context in which it was inserted. The magazine called "Bottoms" was explicitly satiric, and criticized the line followed by the celebrities' tabloids. Quoting again the proverb "ridendo castigat mores", Justice Andrighi was convinced that the purpose of the magazine "Bottoms" was to highlight the excesses of what she called a new social phenomenon: the interest about the privacy of rich and famous people. Adopting this premise, Justice Andrighi recognized that the Baron and his castle were not the final targets of the joke, but only the instruments to poke fun at another magazine. From the complete article, she says, is clear that the ridiculous is not about the castle, but about the editorial line of the other magazine, "Faces". Moreover, the magazine "Bottoms" published, in the following edition, the letter sent by the Baron's heirs, also apologizing for inconveniences. And last but not least, Justice Andrighi refused the final argument of the appealers, that the humor conveyed by the magazine would be a second class and

rude humor. For her, the Judiciary should not label high or low quality humor. This distinction would be undesirable, since it divides the humor according to its audience. The appreciation of the humor's quality would fit better in prizes and awards. With these headlines, Justice Andrighi proposed the denial of the appeal.

But the decision was not unanimous. Justice Castro Filho dissented, showing the reasons by which he found the article so offensive that the Baron's heirs would be entitled with damages. This shows that, different from "law in the books", it is hard to define objective criteria to decide if a comic speech is abusive or not.

3. Conclusion

Cases involving humor are easier to solve as much as they get closer to the traditional patterns of classic journalism, that is to say, news about true facts of public interest narrated with some objectivity. In such cases, comedy is qualified as a form of expression that contributes to the society, showing important facts or exposing necessary criticism. The problematic cases are those in which humor does not have this explicit social content. However, the conclusion that this humor more distant from the narration will be always hateful is not correct. Beside the cases with clear offenses, there are complex cases, in which the criticism to society is subtle and dependent on a deeper examination from the judge. Most of the humor indeed contains some kind of criticism, and this is the reason why Claudio Luiz Bueno de Godoy (2001: 103) says that the interpretation of humor must comprehend its inherent exaggeration. It also seems dangerous to always demand a social interest from humor, since it might destroy the spontaneity and the fun that are its most important characteristics.

The international fame of Brazil as a non serious country, with happy and peaceful people, may also hide some hypocrisy in the admittance of jokes. The criticism, having or not public interest, is rarely taken in a positive or constructive way. True freedom of speech must respect the rights of personhood, but people must be tolerant as well with the irreversible consequence of the expansion of the Internet and other means of communication: more people will speak and more people will be heard. The diversity of positions and the difference between them will increase, and so should do our tolerance. We will have more and more targets for our jokes, but we should not forget that we ourselves

are also targets.

References

GODOY, Claudio Luiz Bueno de. *A liberdade de imprensa e os direitos da personalidade.* São Paulo: Atlas, 2001.

MIRANDA, Darcy Arruda. *Dos abusos da liberdade de imprensa.* São Paulo: RT, 1959. p. 391.

Abuse of dominant position:
Function *versus* structure in outwardly equal contractual relationships

Ana Letícia Salomão e Ribeiro[1]

Abstract: The Brazilian Federal Constitution of 1988, in its Article 170, designed for the economic order a profile which establishes principles of great importance for this paper, namely, free competition and consumer protection. It is known that fair competition has always been the most important and effective instrument of consumer's protection and defence, becoming the great bond of the legal system and being able to offer support or restore a certain balance in contractual relations, when some sort of imbalance is evident. There is no way of incurring in a conduct capable of generating such effects except through the misuse (or abuse) of dominant position. However, this kind of abuse was not remembered by the constitutional power as a harmful effect to the economic order. Therefore, in the light of the functionalist theory of law, proposed by Norberto Bobbio in his studies published in the book "From structure to function: new studies of legal theory," it is questioned how the substantive equality, as a promotional function, will focus on the regulation of seemingly equal contracts in order to restrain situations in which can be verified a possibility of abuse of dominant position. This work seeks to deconstruct the premise that all economic power, especially the contractual one, would result from an abusive dominant position. Nevertheless, the overlap of a subject over another will be proved inevitable, however, it will also be demonstrated that, despite this, one should not incur abuse, which would transform this into an illicit relationship. The discussion that this paper proposes takes into account current matters, from which it can be discussed, thus enabling the construction of a connection between state and market, regulated by a Law that, although often casuistic, is seated on general and abstract principles. The convergence of various law branches

[1] Pós-graduanda em Docência e Gestão do Ensino Superior, pela PUC – MINAS. Graduanda em Direito pela Universidade Federal de Juiz de Fora. Licenciada em Letras – Habilitação em Língua Inglesa pelo Centro de Ensino Superior de Juiz de Fora. Dados para contato: Rua Barão de Aquino, 189, apartamento 201, bairro Alto dos Passos, Juiz de Fora – MG, CEP: 36026-460. E-mail: analeticiasr@gmail.com. Telefone: (32) 9102-1289. As traduções que porventura apareçam no artigo são livres e realizadas pela própria autora, sendo de sua responsabilidade.

is identifiable, demonstrating that choices influence the wanted shape of the society and the model of organization and environment that best fits this vision. Based on all these arguments, one can reach the conclusion that to reduce the abuse of dominant position, or the abuse of rights, especially in those contractual relationships in which parity is only apparent, it is necessary to pay special attention to the role of good faith and substantial equality in our legal system, striving for fairness, respect, preserving dignity and protecting the economy's interests consecrated and protected by in our Constitution.

Keywords: Law and economy – Abuse of the dominant position – Contractual Law – Functionalist Theory – Norberto Bobbio.

Classification: JEL: K11 – Contract Law, K21 – Antitrust Law.

Presentation

This paper explores part of the studies I have been committed to in the past two years, since I went to Camerino – Italy as an exchange student from Juiz de Fora Federal University.

To begin with, I would like to start the exposition of my theme based on the question that means its "kickoff": how will substantial equity relate to outwardly equal contractual relationships, embodying the most important principles of our constitution, in order to curb situations in which could be verified the abuse of the dominant position?

With this question, it is possible to evince that the object of this paper has been to study contractual disparities among corporate relationships, demonstrating situations of vulnerability that could favour the abuse of the dominant position, seeking, in the end, ways to protect the contractor who has been placed in disadvantage because of the occurrence of abuse.

Therefore, analysing contractual abuse as a sort of abuse of the dominant position in outwardly equal contractual relationships, relating private and public law, we analyse how principles of economy and principles of private law relate in our legal system, thus to protect the vulnerable one. Moreover, it is possible to demonstrate how asymmetries arising from economic dependence can result in greater contractual vulnerability, which requires a bigger intervention from the State in the private sphere, especially regarding the jurisdictional action.

From all the concepts that have been studied and exposed in the first chapter of this paper, such as free initiative, freedom of competition, antitrust law, abuse of law, abuse of the dominant position, among others, there happens to exist a premise which is sought to be deconstructed, i.e., that contractual relationships are, as a rule, parity, and, because of their nature, subsists a factual dominancy, which implies an assumed dominant position, and shall the possibilities of abuse be eliminated, as they would jolt and damage the structure of the free market.

In present times, consumerist relationships are identified as those in which there is a contractual imbalance because of the existence of a vulnerable or weak part, subsisting a presumption of equity or parity as regards to civil or corporate relationships, being ignored a variety of situations in which there is, materially, a concrete inequity, exacerbated by the abuse of law committed by corporate actions.

This is the great tenet of this work, in which it seeks, sailing from the reanalysis and conceptual reconstruction, giving it a diverse bias, from the functionalist point of view. As professor Maria Cristina de Cicco states, in her chapter published in Gustavo Tepedino's private law book, the contractor, not only and not necessarily the consumer, must be protected above all because of his status as a person, consequently, in reference the first article of our Constitution, which seeks to protect the person in its dignity.

Despite being flawed, this presumption must be suppressed. Disparities are not to be refuted, on the contrary, they are inherent to the economy, as the economic power is accepted by the legal system, and it must, therefore, serve as an instrument of development and social justice. Must be curbed, notwithstanding, the abuse practised by the one who is in a situation of advantage. Vulnerability permeates, therefore, all contractual relationship in which subsides parts in situation of patent imbalance.

The custody by the legal system cannot occur only when concerning consumerist relationships, and they should be extended to corporate relationships, seeking not only the protection of one part, but a procedure based in honesty, loyalty and in accordance to the principles consecrated in our legal system, imposing functions, duties and roles that seek the completion of our law in its greater values.

At this point, Norberto Bobbio and Pietro Perlingieri's doctrine are important, because, as the second one states, it is of great importance to identify the structure and the function of the legal fact, as they are able to answer two important questions: "how it is", highlights the

structure, and "what it serves to", highlights its function.

This dichotomy existent among structure and function, meaning, the funcionalisation of legal structures, is a process that affects most legal situations, as it reveals two aspects – structural and functional – the first one identifies the structure of powers conferred to the holder of the legal situation, and the second one explaining the practical and social finality to which it is designed. The functional aspect determines the structural one.

Thus, the function sets which powers are assigned to the holder of subjective rights, and these, when legit, will only deserve protection according to the extension of relevant social interests should be equally protected.

Between this and that, the problem is not observing the occurrence of a disparity, but the abuse practised by that one part which is in a dominant position, and should be, by the magistrate, discarded the possibility of abuse of rights. As Bobbio states, the judge ceases to be mere systematizer or interpreter of the law, acting more critically, and creatively.

Civil law based on constitutional legality seeks in the idea of unity a way of reading law as a whole, rejecting purely academic limits and legal compartmentalization, since the legal system, however complex it may be, it should be one, even if it derives from a plurality of sources.

Pursuing in the ideas of structure and function, explained by Perlingieri, one reaches the argument that all the institutes studied have not only a structure, but also a function, which would be its purpose, and those, when distorted, can lead to the abuse of rights, a mean to achieve the abuse of the dominant position. This function would be the determining reason established by the legal system to the existence of the contract, virtue to which it is worth being protected.

In order not to misinterpret the function conferred by legal system to contracts, it should be given special attention to the principle of equity, axiological matrix of our constitution, as achieving it means not only a way or regulating corporate transactions, but also lowering contractual differences, ensuring balance, good faith, avoiding the abuse of law and materializing social function.

Only from the perspective of constitutional equity it will be possible to proceed to a greater and effective protection of the disadvantaged ones, the ones who merit the protection of law.

It does not subsists anymore the dogma of formal equity, under the aphorism that everyone should be treated equally before the law,

but it highlights the substantial equity in its turn, reflected by the aphorism that unequal should be treated unequally in the measure of their inequality, with the purpose of giving protection to those vulnerable individuals, protecting them in a more incisive way, even if this protection mean a jurisdictional action, triggered through contractual remedies, such as rescission or termination of the contract by the decision of a judge.

What was sought most, in this work, was the harmonization of law, because values, principles and fundamental rights should be applied appropriately to each case, having the Constitution at the apex of the legal system, in order to realize the ideals of integrity, beholding substantive equity when solving a variety of corporate problems, as well as avoiding the abuse of law when drafting contractual clauses and establishing contractual remedies.

Despite the possibility outlined, between the demonstration of possible imbalances and vulnerabilities, even in relationships not consumerists, we seek to state the fact that contractual principles are indispensable to suppress any abuses of law and, therefore, any occurrence of abuse of the dominant position.

Moreover, for of the fact that substantial equity proclaims a different treatment whenever it points out the differences, a greater degree of state intervention will be necessary to ensure the operability of clauses and contractual remedies, when in accordance with the constitutional principles.

Taking into account the expectations of Brazil's Constitution, the State should intervene when economic concentration is achieved through practices prohibited by law, when at expense of free competition and free enterprise, two of those basic principles of the economic order. This seeks to avoid companies to impose restrictions to market competition in which they operate, also increasing their dominancy through alliances, mergers or predatory practices.

I, as a recently graduated law student, do not intend to establish a model of perfect competition, as it would be utopic, but given the fact that the existence of a "power" is a reality, a structural factor, it should be, therefore, given a social function that would serve to the development of the economy and to the achievement of social justice.

References

AGUIAR JÚNIOR, Ruy Rosado de (coord.). *Jornada de direito civil I, III, IV e V***:** enunciados aprovados. Brasília: Centro de estudos judiciários do Conselho da Justiça Federal, 2012. 135 p. Available at: <http://www.jf.jus.br/cjf/CEJ-Coedi/jornadas-cej/enunciados-aprovados-da-i-iii-iv-e-v-jornada-de-direito-civil/compilacaoenunciadosaprovados1-3-4jornadadircivilnum.pdf>. [02 mar. 2013].

BOBBIO, Norberto. *Da estrutura à função*: novos estudos de teoria do Direito. Tradução de Daniela Beccaccia Versiani. Reimpressão. São Paulo: Manole, 2007.

BOBBIO, Norberto. *Liberalismo e democracia*. São Paulo: Brasiliense, 1995.

BRASIL. *Constituição da república federativa do Brasil, de 5 de outubro de 1988.* Disponível em: <http://www.planalto.gov.br/ccivil_03/constituicao/constitui%c3%a7ao.htm >. Acesso em 30 set. 2011.

CARPENA, Heloísa. *Abuso do Direito nos contratos de consumo***.** Rio de Janeiro: Renovar, 2001. 1a Ed. p. 67-68 e 380.

COELHO, Fábio Ulhoa. *Direito Antitruste brasileiro*: comentários à Lei 8.884/94, São Paulo, Saraiva, 1995.

COMPARATO, Fabio Konder. *Concorrência desleal. São Paulo: Revista dos tribunais,* n. 375.

DE CICCO, Maria Cristina. *A pessoa e o mercado*. In.: TEPEDINO, Gustavo (coord.). *Direito civil contemporâneo:* novos problemas à luz da legalidade constitucional. Rio de Janeiro: Atlas, 2008. Pp. 103-114.

DWORKIN, Ronald. *O império do Direito*. Tradução de Jefferson Luiz Camargo. 2. ed. São Paulo: Martins Fontes: 2007.

_____. *Levando os Direitos a sério.* Tradução de Nelson Boeira. São Paulo: Martins Fontes, 2002.

_____. *Uma questão de princípio.* São Paulo: Martins Fontes, 2000.

SALOMÃO FILHO, Calixto. *Direito concorrencial***:** as condutas. São Paulo: Malheiros, 2003. 1ª Ed. 2ª tiragem.

_____. *Direito concorrencial***:** as estruturas. São Paulo: Malheiros, 1998. 1ª Ed.

On the concept of subjectivity in the promissory theory of contracts from the perspective of Paul Ricoeur's philosophy

Marcin Pieniążek[1]

Abstract: The presentation outlines one of the crucial questions of private law, i.e. the question of subjectivity of a party to a contract. The analysis will be made on the background of the promissory theory of contracts. This theory assumes that contractual obligations originate as a result of a promise made by a party to the contract. Thus, the legal bond (vinculum iuris) in a contract results from the self-expression of the subject communicating the intention of assuming an obligation. This self-expression is valid to the degree to which the subject is capable of forming a promise. For that reason, the notion of subjectivity is defined in the presentation through the constitutive features of the being, namely a party to the contract. As a result, the main part of the presentation focuses on the ontology and ethics of a party to the contract, referring to the philosophical ideas of Paul Ricoeur.

It should be explained that Ricoeur's philosophy shows a particular compatibility with the promissory theory of contracts. A promise made (much like Kantian imperative) provides a paradigmatic pattern of self-identity within it. In reference to the ontology and ethics of the person proposed by Ricouer, it becomes possible to define the non-positivist notion of subjectivity of a party to the contract, as a being capable of valid formation of a self-bond through a promise. Contrary to Ricoeur's philosophy, it is also possible to point to the source of the law-making authority of that party. In this philosophy, keeping the obligations made is an ethically meaningful way of the subject's being (ipse), contrasted by Ricoeur with the being shaped by the variable features of the human character (idem). Thus, the source of the normative authority of the party to the contract in the light of the proposed concept is the capacity of keeping the promises made (expressed in the pacta sunt servanda principle), i.e. the capacity of continued being oneself in the ipse sense.

Keywords: Ricoeur, contracts, subjectivity

[1] LLM, PhD, Andrzej Frycz Modrzewski Krakow University.

1. The paper outlines one of the crucial questions of private law, i.e. the question of subjectivity of a party to a contract. The analysis will be made on the background of the promissory theory of contracts. This theory assumes that contractual obligations originate as a result of a promise made by a party to the contract. Thus, the legal bond (*vinculum iuris*) in a contract results from the self-expression of the subject communicating the intention of assuming an obligation. This self-expression is valid to the degree to which the subject is capable of forming a promise. For that reason, the notion of subjectivity is defined in the presentation through the constitutive features of the being, namely a party to the contract. As a result, the main part of the presentation focuses on the ontology and ethics of a party to the contract, referring to the philosophical ideas of French philosopher Paul Ricoeur.

The point of reference here is a relational theory of subjectivity (being oneself – *ipseité*) developed by Ricoeur. According to him, keeping the obligations is an ethically meaningful way of the subject's being (called *ipse*), contrasted with the being shaped by the variable features of the human character (called *idem*). Consequently, a man (so called "the-one-who-is-himself") remains himself, if he is faithful to "the intention of the good life", namely "the plan for oneself", i.e., to the word given. As Ricoeur states, *"the promise serves as a paradigmatic model of the identity of oneself". As a result, the person who remains himself is the one who – regardless of the physical and mental changes that take place inside him – remains faithful to the undertaken obligations* [also legal ones – M.P.][2]. Additionally, Ricoeur relates the issue of personal identity with the theory of subject's narrativization. The identity preservation project is considered as a narrative developed by the subject who is under the influence of his own imperative, similar to Kantian concept of self-legislation.

It should be noted that the above theory (in particular, the distinction between being oneself in the sense of *ipse* and in the sense of *idem*) can provide a satisfactory answer to the key question about the reason of the validity of contractual obligations. This answer is justified in the case of rejecting the separation of law and morals assumed by legal positivism. It can be legitimately claimed that the fact of abiding by all legally relevant agreements stems from the very ontological and ethical essence of the subject who is himself in the sense of *ipse*. I would like to point out that one of the oldest legal topoi is the ancient Roman principle of *pacta sunt servanda* ("agreements must be abided by"). In the

[2] P. Ricoeur, *The Course of Recognition*, Wydawnictwo Znak, Kraków 2004, p. 119.

light of Ricoeur's theory this topos, fundamental for law, is a concise definition of the subject who remains himself, i.e. the one who performs contractual obligations despite changing factual circumstances, the passage of time, changes in the nature, etc.

Ricoeur writes: *(..) It seems that keeping promises (…) represents a challenge to time, a denial of change: even if my desire changed, even if I changed my mind or my preferences, I "shall keep my word". (..) It is sufficient to provide a strictly ethical justification of the promise that we can draw from the obligation to protect the institution of language and of reciprocal trust of another in my fidelity*[3].

Another element of the theory of the subject of law, crucial from the legal perspective, is the reflexive relationship which combines the subject of law and Another, interpreted as the relationship of equal subjects of law.

It concerns in particular the recognition of the subjectivity of Another as a prerequisite for establishing the ontologically rooted principle of reciprocity, crucial for some branches of law, especially for law of obligations.

Ricoeur - inspired by dialogical "philosophy of the face" of E. Levinas - states that obligation is always carried out vis-à-vis Another. In other words, the "ethical narrative" of oneself is always addressed to the one vis-à-vis whom we realize ourselves. It follows that, for Ricoeur, recognition of Another's subjectivity constitutes a primordial source of validity (also legal, I presume) and complies with the assumed obligations.

Ricoeur writes that: *"Preserving one's self is, in the case of a person, such a pattern of behaviour that another person can count on us. Since someone is counting on me, I am accountable, I can be held to account (je suis comptable) in my actions vis-à-vis Another. The concept of responsibility combines both meanings: to count on …, to be accountable for … This concept connects them by adding to them the principle of answering the question: 'Where are you?', raised by Another who is calling me. The answer to that is: 'Here I am!' (Me voici!) – the answer in which preserving one's self is manifested. (...) The nagging question of 'Who am I' (...) can be incorporated into a proud statement 'That's what I hold on to!' The question is: 'Who am I, unstable, so that you could still count on me?'"*[4]

The ethical acceptance of one's actions is a derivative of recogni-

[3] P. Ricoeur, *Soi –même comme un autre,* Éditions *du Seuil, Paris*, 1990. p. 207.

[4] P. Ricoeur, *Soi – même comme un autre,* Éditions *du Seuil, op. cit*., pp. 197–198.

tion which is expressed in complying with the commitment assumed vis-à-vis Another. Ricoeur takes another step and develops on this basis the dialectic of reciprocity, in which the substitutability of the roles of "oneself" and "another" coincides with the irreplaceability of the entities as such.

He writes that: *"(...) I cannot respect myself without respecting another as I respect myself ... Thus, respecting another as yourself and respecting yourself as another become equally fundamental and crucial"*[5]. That is the way in which Ricoeur constitutes the principle of reciprocity, according to which "one should treat oneself as Another" and "Another as oneself". This equalization goes as far as recognizing Another as the onto-ethical basis of legal validity. Ricoeur makes here also certain references to Aristotle's philosophy, in particular to his concept of friendship (*philia*) as a symmetrical relationship between equals. This element confirms the accuracy of this theory in the field of obligation law, in which reciprocity assumes the form of granting equal rights and duties to the contracting parties.

These remarks allow to draw an outline of Ricoeur's theory which enables us to construct a coherent non-positivist theory of (at least) the law of contracts, the central question of which remains the issue of the nature of the bond that connects the parties to reciprocal agreements. The theory which most closely connects compliance with the contracts with the subject that assumes the commitment comes to the aid of the legal notion of obligation. It should be underlined that the conceptual background of Ricoeur's theory is coherent with so called promissory theory of contracts as developed by the Anglo – Saxon legal thought (it will be mentioned below).

2. Now I would like to introduce the possible application of the above-mentioned elements of Ricoeur's philosophy in the dogma of reciprocal agreements. As I indicated before, it is of particular convergence with the Anglo-Saxon theory of contract law, with a particular emphasis on the so-called theory of a promise.

The Anglo-Saxon theory of contract law (*contract theory*)[6] developed three main positions, which attempt to clarify the nature of the

[5] *Ibidem*, pp. 225–226.

[6] As for the concept of *contract theory* see P. S. Atiyah, S. A. Smith, *Atiyah's Introduction to the Law of Contracts*, Clarendon Press, Oxford 2005, pp. 28 – 31; G. Samuel, *Law of Obligations*, Edward Elgar Publishing, Inc., Cheltenham, UK, Northampton, MA, USA, 2010, pp. 70 – 72. P. S. Atiyah, *The Modern Role of Contract Law* (in:) *Essays on Contracts*, Clarendon Press, Oxford 2001, pp. 1- 9.

bond between the contracting parties and which at the same time aim at identifying the reasons why law provides protection of that bond[7]. These theories are developed under the assumption of a necessary connection between law and morality. These are: *the reliance theory*[8], *the transfer theory*[9], and *the promissory theory*[10]. From the perspective of the continental science of civil law[11], the same issues are raised by the theories of the declaration of intent, with the greatest impact of the theory of will and the theory of the declaration[12].

The crux of the promissory theory is the assumption that the obligation arises not so much as a result of an intentional act, but rather as a result of a self-expression of the entity expressing (communicating) the intention to assume the obligation. Communication (or narrative – as I propose to put it in Ricoeur's language) is considered as a prerequisite to express the intent which shows, among others, what the entity knows about the very concept of promise. Thus, the communicated intent cannot be only the intent to take a specific action, but the intent to assume certain liabilities[13]. Therefore, it is emphasised in the Anglo-Saxon lit-

---

[7] S. A. Smith, *Towards a Theory of Contract*, (in:) *Oxford Essays in Jurisprudence. Fourth Series*, (ed.) J. Horder, Oxford University Press, New York 2000, pp. 107ff.

[8] L. L. Fuller, W. Purdue, *The Reliance Interest in Contract Damages*, Yale Law Journal 1936, Vol. 46.

[9] R. E. Barnett, *A Consent Theory of Contract*, Columbia Law Review, March 1986, Vol. 86, No. 2, pp. 291ff.

[10] Ch. Fried, *Contract as Promise. A Theory of Contractual Obligations*, Harvard University Press, Cambridge, Massachusetts and London, England, 1981, pp. 7 – 27; T. M. Scalon, *Promises and Contracts*, (in:) *The Theory of Contract Law. New Essays*, (ed.) P. Benson, Cambridge University Press, Cambridge 2007, 86 – 117; W. Lucy, *Philosophy of Private Law*, Oxford University Press, New York, 2007, p. 238; critically from the perspective of *reliance theory*: P. S. Atiyah, *Contracts, Promises and the Law of Obligations*, (in:) *idem*, *Essays on Contracts*, *ibidem*, pp. 10 – 56.

[11] G. Samuel presents a comprehensive comparative analysis of contract law, including reciprocal contracts in the legal culture of civil law and common law. See G. Samuel, *Law of Obligations*, *op. cit.*, p. 358. *Cf.* J. Gordley, *Enforceability of Promises in European Contract Law*, Cambridge University Press, Cambridge 2001, pp. 2-20; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford University Press, New York 1996, pp. 1-31.

[12] Cf. A. Jędrzejewska, *Koncepcja oświadczenia woli w prawie cywilnym* [*The Concept of the Declaration of Intent in the Civil Law*], PAN Instytut Nauk Prawnych, Warszawa 1992, pp. 10 -55; Z. Radwański, *Teoria umów* [*The Theory of Contracts*], PWN Warszawa1977, pp. 37 – 61.

[13] S. A. Smith, *Contract Theory*, *op. cit.*, p. 57.

erature that the fact of making a legally relevant promise is not merely an additional factor that influences the decision on the performance / non-performance of obligations. A decision to perform the obligation is in fact made at the time of making the promise, while the promise itself is the first and primary source of the action on the part of the obligor[14].

The objections against the promissory theory concern, among others, the bilateral nature of reciprocal agreements in which the formation of a legal bond results from the promise given to the other party (promisee), and not only from the fact of the promisor being bound by its promise. Having in mind the theory at issue, there arises a fundamental question: what it means that the promise "is binding" in some way and what constitutes the basis of "being bound" by such a promise. The answer to these questions is provided by the promissory theory which refers to the analysed topics drawn from the philosophical achievements of Paul Ricoeur[15]. The said achievements demonstrate particular applicability in the promissory theory of contracts, combining the issue of one's own subjectivity and the subjectivity of Another man with the issue of reciprocity in the context of onto-ethics of the entity who remains himself in the sense of *ipse*[16].

---

[14] The following example can be provided in reference to S. A. Smith: I made a commitment to paint the roof of my neighbour's house next week, but then I changed my mind and came to the conclusion that this work is not profitable for me. I feel to some extent bound by my promise, yet my final decision is determined on the basis of another important factor, namely purely economic calculation. From the perspective of the promissory theory my reasoning is wrong, since I already made a decision when I made a promise, therefore I am obliged to perform my obligation. See S. A. Smith, *Contract Theory*, *op. cit.*, p 58.

[15] It should be noted that the analysis of philosophical and legal issues constitutes an important component of Ricoeur's philosophy. A prominent place is taken here by the issue of law as "a grand narrative", developed on the level of just social institutions as well as the issue of the relations between legal interpretation and argumentation. Cf. P. Ricoeur, *Reflections on the Just*, The University of Chicago Press, Chicago, London 2007; P. Ricoeur, *Drogi rozpoznania* [*The Course of Recognition*], op.cit., pp. 194 – 200; P. Ricoeur, *Krytyka i przekonanie* [*Critique and Conviction*], Wydawnictwo KR, Warszawa 2003, pp. 167 – 181. Cf. also D. M. Kaplan, *Ricoeur Critique Theory*, State University of New York Press, New York 2003, pp. 69 – 74.; G.H. Taylor, *Ricoeur and Law: the Distinctiveness of Legal Hermeneutics* (in:) *Ricoeur Across Disciplines*, (ed.) S. Davidson, The Continuum International Publishing Group Inc., London 2010, pp. 84 – 101.

[16] The above issue was presented in the work *O sobie samym jako innym* (*Soi-même comme un autre*) which synthesizes a number of topics analysed by Ricoeur at the earlier stages of the development of his ideas. Cf. P. Ricoeur, *Soi-même comme un autre*, *op. cit.*

Most importantly, on the basis of Ricoeur's theory every promise is made by the subject of law vis-à-vis "oneself as Another", which means that the promise is perceived as ethically significant way of being the subject of law, self-determined by the rule of reciprocity[17]. I would like to emphasize that the concept of the subject of law (the one-who-is-himself[18]), derived from Ricoeur, unifies the problem of the promise and the problem of reciprocity on the onto-ethical level of the party who makes the promise. The phenomenon of abiding by agreements thus gains the basis in the very existence of the subject of law (*ipse*) – the contracting party.

Consequently, in the light of Ricoeur's views, undertaking the promise by the legal subject is equal to determining the subject itself as the party to the contract. What constitutes a prerequisite here is a primordial recognition of one's own subjectivity as well as the subjectivity of the other, as a party to the contract under reciprocity rule. The following activity, undertaken by the party to a contract, is the action which – from the perspective of the contract – constitutes an affirmation of the party's responsibility for complying with the obligation.

The opponents of the promissory theory point out that under the theory of the Anglo-Saxon law a promise is perceived as a unilateral act, while agreements are essentially bilateral in nature. Both the act of making an offer by one of the parties as well as its acceptance by the other party is necessary in order to conclude the contract; in addition, in the standard contracts the responsibilities refer to both contracting parties[19]. In other words, as indicated by Smith, the reciprocity of rights and obligations in the contract is not strictly related to a unilateral nature of the promise (binding the legal subject). The promissory theory, referring to Ricoeur's philosophy, provides the instrument that allows to eliminate

[17] Ricoeur writes: "*Preserving one's self is, in the case of a person, such a pattern of behaviour that another person can count on us. Since someone is counting on me, I am accountable, I can be held to account (je suis comptable) in my actions vis-à-vis Another. The concept of responsibility combines both meanings: to count on …, to be accountable for … This concept connects them by adding to them the principle of answering the question: 'Where are you?', raised by Another who is calling me. The answer to that is: 'Here I am!' (Me voici!) – the answer in which preserving one's self is manifested. (...) The nagging question of 'Who am I' (...) can be incorporated into a proud statement 'That's what I hold on to!' The question is: 'Who am I, unstable, so that you could still count on me?'*". P. Ricoeur, *O sobie samym*, *ibidem*, pp. 277 – 278.

[18] Cf. P. Ricoeur, *O sobie samym*, *ibidem*, research VI and VII.

[19] S. A. Smith, *Contract Theory*, *op. cit.*, p. 63.

the signalled problem, in particular through the relational conception of the person, according to which every promise, also the one made by the legal subject merely vis-à-vis himself, treats as an example the act of the promise made vis-à-vis another person[20].

3. The issue of the promise and reciprocity, though crucial for the law of reciprocal agreements, constitutes a part of Ricoeur's theory which is of a more extensive importance for the theory of law. It is notable from the perspective of the definition of ethical aspirations, as proposed by Ricoeur: "intention of good life with another and for another in just institutions". If promise and reciprocity are placed in the micro scale of the ontology of the legal subject, at the same time are perceived as the foundation of interpersonal relationship. If we recognize a promise and reciprocity as the elements of a specific contract *inter partes*, they will be considered as the properties of "meso" level, referred to in the definition of ethical aspiration by means of the phrase "with another and for another". At the same time, promise and reciprocity underpin the macro scale of just institutions, among which Ricoeur places positive law. So, if promise and reciprocity in law are considered as universal rules of a formal nature, being the properties of agreements in the sphere of private law, they will be placed on the third level of the quoted definition of ethical aspiration within Ricoeur's meaning, as a part of "the grand narrative" of law[21].

The definition of ethical aspiration thus unifies onto-ethical aspect of the subject, interpersonal relationships, typical for the law of reciprocal agreements and the fair institution of positive law. Since the ethical aspiration is implemented by the subject of law simultaneously on three levels, it becomes possible to justify the individualized protection that the statutory law provides for the promise made by a contracting party. This is due to the fact that the level of just institutions becomes the basis of model and codified patterns of reciprocal agreements which are considered as typification of the common situations of making a promise.

To sum up, Ricoeur's philosophy shows a particular compatibility with the promissory theory of contracts. A promise made (much like Kantian imperative) provides a paradigmatic pattern of self-identity within it. In reference to the ontology and ethics of the person proposed by Ricouer, it becomes possible to define the non-positivist notion of

[20] P. Ricoeur,., *Soi –même comme un autre, op. cit*., pp. 277-278; p. 310; p. 321.
[21] P. Ricoeur, , *Soi –même comme un autre, op. cit*., pp. 322 – 336.

subjectivity of a party to the contract, as a being capable of valid formation of a self-bond through a promise. Moreover, it is possible to point to the source of the law-making authority of that party since keeping the obligations made is an ethically meaningful way of the subject's being (*ipse* - contrasted by Ricoeur with the being shaped by the variable features of the human character, i.e. *idem*). Thus, the source of the normative authority of the party to the contract in the light of the proposed concept is the capacity of keeping the promises made (expressed in *the pacta sunt servanda* principle), i.e. the capacity of continued being oneself in the sense of *ipse.*

The supremacy of the consumer and the redefinition of the notion of citizenship in supercapitalism

Felipe Meira Marques

Abstract: This work intends to analyze the factors that led to supercapitalism, which is an evolution of the capitalism, where companies and corporations occupy the political sphere that should be occupied by every citizen. Competition, result of changes in the 1970s, such as technology, globalization, and the deregulation, expands beyond economy. In this context, consumption and investment started to be stimulated. This consumerism, however, forced companies to seek higher profits, but with bad consequences, such as work unsafeness, disrespect to Human Rights and devastation of the environment. As a result of the consumerism, Democracy is getting weaker, whereas consumers and investors do not cease to increase. In Brazil, citizenship was linked to work. The following hypothesis is risen: there was a change of citizenship notion to consumerism. Proposals are featured to restore the balance between these two facets of the human condition.

Keywords: Supercapitalism. Citizenship. Consumerism.

Introduction

Supercapitalism, Capitalism 2.0 or Turbo Capitalism are expressions that classify the present stage of the capitalist development. Concerning that, the exercise of Democracy has been uncertain, what contrasts with the expansion of capitalism.

Great corporations are fortified because of consumption advance. They have been interfering directly in other areas without difficulty. They penetrated other spheres that used to be preserved (or at least should be) by different actors: government, labor union, community, politics and environment. This last one seems to be the only force capable to interrupts the uncontrolled advance of capitalism.

It is observed that the options to the consumers have never been

wider. On-line shops with express delivery, easy credit, new products and wide range of styles are examples of those options. In addition, actions to contend disqualified products or their manufacturer are rising. In Brazil, the National Consumers League and the Prosecuting Counsel's regular interventions illustrate that posture.

Citizen's role, however, goes an opposite way. Political creed is weaker. Citizens can not unite themselves or demand changes, and their mechanisms keep scarce. Democracy is struggled for being practiced. The power of people as citizens have been replaced as if they were consumers since the 1970s.

At the same time that the consumption society has been established, the impacts are not always perceived, what could be called a kind of double personality, full of contradictions. As consumers, they require low prices and quality; as citizens, they ask for good wages to the workers. Whereas they ask for changes concerning environment, individual energy consumption has never been higher.

Another change is established as time passes, which is parallel with power transfer. Working is source of subjective, in which the individual expresses their activity, integrates social relations and is recognized by society. This used to be constructed according to worker's daily routine.

This role, however, has been replaced by the culture of consumption, in which people get products not only to their own satisfaction, but also to get social status and join groups.

It will be analyzed how capitalism developed into supercapitalism. The rules of the game have changed since the 1970s, specially after new technologies had appeared. A new period is installed in the world. An intense competition among companies for new customers and investors is the main outcome of this change.

Those companies accomplish their role: profit. Consequently, customers and investors receive low prices and new offers. Profit, however, requires salary cut and social welfare benefits, production displacement, pressure on suppliers or environment pollution. Citizens are responsible for that.

Subsequently, it will be verified that, with this advance, consumption has been redefining the notion of citizenship. In Brazil, it was linked to work matters. Precarious work and incentive to consumption in supercapitalism changed this relation in such a way that the consumer acquires sovereignty. Thus, imposing limits to companies has become difficult.

Conciliate supercapitalism with Democracy constitutes a task harder than denounce problems. They can not suggest changes, however, without knowing the situation. Some proposals to make Democracy more effective, free from the power of great companies, will be showed. Authors such as Reich, Barnes and Harvey elaborated theories in order to reallocate citizen in their right space in the democratic game.

1. Supercapitalism

Capitalism has suffered different transformation since it appeared. The characteristics of societies, such as modes of production, technologies, the role of the State, did not keep the same, even though the term capitalism serves to define British society in the nineteenth century as well as Brazil in the twentieth century.

Reich[1] defines supercapitalism as an evolution of the capital in which

Big companies became much more competitive, global and innovative. Something that we call supercapitalism has been born. Within this process of transformation, as consumers and investors, we have effectuated great conquests; however, as citizens, seeking everyone's well being, we have lost ground.

The changes that occurred in the late 1960s and early 1970s caused the supercapitalism. In order to analyze this change deeply, it is necessary to make a brief explanation on what capitalism was like at the time. Most authors describe this period between 1945 and 1973.

1.1 The previous Capitalism: 1945 -1970:

Democratic capitalism, state-controlled or 1.0 are some of the adjectives to refer to tjis time. Its main attribution is the presence of the State in the economy, controlling it and managing it. There is a balance of interests among companies, public interest, workers, consumers and citizens. Prosperity, especially the American one, facilitates the negotiation of those interests.

The balance can also be observed in Brazil. "The organization of work obeys a policy based on a juridical-social apparatus, which harmo-

[1] Reich, Robert. **Supercapitalismo**: como o capitalismo tem transformado os negócios, a democracia e o cotidiano. Rio de Janeiro: Campus-Elsevier, 2008, p. 05.

nizes perfectly capitalists and proletariat interests"[2].

At that moment, market was still local. There was no expansion because of globalization. Capitalism has always aimed that expansion, but there was not interaction as nowadays. There were longer distances, especially for communications and transportation, crucial areas to a global market.

There were fewer investors. Most people would rather keep their money for themselves, or invest it in the few banks. They did not use to give importance to investments. "Very few Americans used to pay attention to Dow Jones Industrial Average. Even fewer were the ones that used to invest on shares".[3]

Consumption existed and was stimulated. The options, however, were a few. The offer was in mass, not personal, predictable and planned. Fordism was the ideal way of production. Products prices and quality used to reflect a weak interest for researches. Reich prescribes[4]:

Success was the common outcome and the pattern of behavior consisted on avoiding unnecessary risks, what almost always meant rejecting innovations and opting for variations in products and service that were already considered popular. This tendency did not promote creativity.

Credit as well as goods was scarce. It was not easy to get loans or financing, otherwise the banks do today. There was no need. Consequently, debts used to be smaller.

Work was more stable, and the workers felt represented by syndicates. It was active and its orders used to be obeyed. It had enough power to oppose resistance to companies. Besides, in general, it used to be cheaper to follow the syndicates reclamations. According to Antunes[5]:

It can be said that together with taylorist/fordist work, it was built, particularly during post-war, a system of "compromise" and "regulation" that was limited to a small group of advanced capitalist countries, and offered the illusion that the system of social metabolism of the capital could be effective, lasting and definitely controlled, ruled

---

[2] SCHWARTZMAN, Simon. **Estado novo:** um auto-retrato. In: SCHWARTZMAN, Simon (org). Brasília: UNB, 1982. p. 353

[3] REICH, Robert, *Op. Cit*., p. 70-71.

[4] *Ibid.*, p. 29.

[5] ANTUNES, Ricardo. **Os sentidos do trabalho:** ensaio sobre a afirmação e a negação do trabalho. 2. ed. São Paulo: Boitempo, 2009, p. 40.

and founded in a compromise between capital and work mediated by the state.

Companies were ruled by the State. In Brazil, Vargas was the exponent who created and ruled the companies. In the United States, although there was a sudden fear, companies wished to be ruled, once this stabilized and guaranteed profit. This was possible because of the low number of companies and strong incorporations.

By now, those pieces of information are enough to understand what led to supercapitalism.

1.2 The way to Supercapitalism

In the late 1960s and early 1970s, some facts happened and they at first sight did not cause great impact. Their unexpected consequences, however, changed the structure so far.

Globalization, neoliberalism, technologies and wars are some of the reasons elected by different authors about the main fact to the change. All of them were fundamental to the expansion of companies beyond the economical sphere, to the consumerism revolution and to the redefinition of citizenship.

The story of what happened does not have villains nor heroes, and the plot flowed a very regular line. "Everything started in the 1970s, with the advance of new technologies"[6]. They were the essential condition so that everything happened. Without them, there would not had existed globalization, deregulation, changing of the ways of production and all the following consequences. Schumpeter says[7]:

The ways or conditions of work are the fundamental determinant of the social structures that, in their turn, generate attitudes, actions and civilizations. MARX explains this point with the so called affirmation that the *hand mill creates the feudalism, and the steam mill* creates the capitalist society. This gives great importance to the technological element, but we need to accept that proposition considering that technology itself is not all.

Cold War between the United States and the Soviet Union provoked a series of races, such as for arms, for the space and imperialist. It was also an ideologic war. The conquest of new partners was extremely important. So, they started to produce new technologies.

---

[6] REICH, Robert, *Op. Cit*., p. 55.

[7] SCHUMPETER, Joseph A. **Capitalismo, Socialismo e Democracia.** Rio de Janeiro: Fundo de Cultura, 1961, p. 31.

At that moment, governments initiated a series of financing and investments on research. Creativity, which used to be seen as disturbing for production, becomes fundamental to get new partners and develop armament or spatial projects.

Researches used to be carried in small quantities. New products were rare. With the incentive, different professionals started to produce warlike materials that can be naturally used by citizens and companies nowadays. It is the case of Internet, which was possible because of the attempts to transmit information in real time about the Vietnam War. Harvey[8] adduces that

It was only during and after the World War II that this aspect of innovative behavior became fundamental, once the arm race during the cold war. The spatial race and all the rest involved directly the state in the activity of research and development, together with capitalist companies, in different sectors of economy (everything from nuclear energy to satellite images to public health care).

Galeano[9] attests that the Pentagon was always the main financial actor and the main client of all the new things. "The satellites of communications derive from military projects and the Pentagon articulated for the first time the Internet, in order to co-ordinate its operations in international scale".

The technologies developed to the war revolutionized the commerce, though it was not the first objective. The main changes were in the sectors of communications and transportation.

In transportation, new structures were combined together to maximize the production in a shorter time. Softer boxes and larger containers that could be easily handled. According to Harvey[10]

The process of globalization was facilitated because of a radical re-organization of the systems of transportation, which reduced the costs for transit. The usage of containers – a fundamental innovation – permitted that the tools made in Brazil could be used to set cars in Detroit.

Communications developed. It allowed countries to contact more easily. The rapid change of information during the cold war was fundamental. Governments noticed that the faster they could commu-

[8] HARVEY, David. **O enigma do capital e as crises do capitalismo**. Tradução de João Alexandre Peschanski. São Paulo: Boitempo, 2011, p. 80.

[9] GALEANO, Eduardo. **De pernas pro ar**: a escola do mundo ao avesso. Porto Alegre: L&PM, 2010, p. 300.

[10] HARVEY, *Op. Cit*., 2011, p. 22.

nicate the fewer damage they could cause. Therefore, they invested so that the distances became shorter". These two facts changed the relation time-space of the world, reducing them. "The new systems of communications allowed a strict organization of the goods production in the globe[11]".

The technologies so far invented did not restrict their usage to the initial purposes. Great companies, governments and citizens, as long as they could afford them, started to use the products. Thus, this essential condition to the origin of supercapitalism also permitted other three phenomena: globalization, deregulation and changing of the production.

It is not simple to talk about globalization. It is an ample theme, complex and full of contradictions. This article, however, does not aim to analyze the phenomenon fully, but its general characteristics.

"Globalization is characterized essentially by the policy of opening the markets, whose ethical basis follows compulsorily the rules of free market in detriment of the social matters".[12]

Due to the reduction of costs with transport and communications, companies started to open in places where they could reduce the costs with production, besides getting supplies from other places. That way, companies could make larger profits.

With the reduced expenses, new companies were created, contrasting with the few ones that had been operating. They discovered that small markets could be profitable. Thay could be individualist, personalized and answering to the people's desires. Reich says[13] that starting in the 1970s, a great number of technologies replaced the so far prevailing stable systems of production to another one made up of many Sellers capable of producing and selling small quantities".

With the deregulation, new companies entered into the market. State could not avoid them from opening anymore, and they demanded that state stopped intervention. Gradually, the states yielded. We can cite as an example the case of aviation.

In the United States, in the early 1970s, new aviation companies, which were not protected by deregulation, aimed profits through more accessible prices, small airplanes and eliminating everything that could

---

[11] *Ibid.*, p.22.

[12] NARDI, Henrique Caetano. **Ética, trabalho e subjetividade.** Porto Alegre: UFRGS, 2006, p.54.

[13] REICH, Robert, *Op. Cit.*, 2008.

be possible. They pressured the Civil Aeronautics Board to deregulate taxes and routes. "In 1978, the Congress deregulated civil aviation and started to extinguish the Civil Aeronautics Board".[14]

Sector of the Economy started to pressure the governments, finance researches and to show the benefits to the Country and consumers. The neoliberal school based theoretically the movement, which had as main followers Reagan and Thatcher. Then, the deregulation was assumed and expanded, or imposed, to the rest of the world. To Ali[15]

The private financial initiatives that castigated the public sector converted in norm, and countries (like France and Germany) that did not rise fast enough toward the neoliberal paradise were denounced frequently on The Economist and Financial Times.

A sector, however, deserves prominence: the financial sector. Banks multiplied and started to offer unthinkable services so far. Credit was available[16]. Stock market went off. Reich prescribes[17]

The deregulation had changed the psychology of people, in special the youngest generation, transforming the mentality of the individuals, who abandon the idea of being a simple saving person to become investors. Our economy will compete for the resources of the investors.

As a consequence, the investors multiplied. They passed to see more opportunities to improve their income. The study of the market and the functioning spread out. And, obviously, companies passed to depend and compete on this capital. Profit was not enough itself anymore: profit had to be huge, or else the investors could migrate to others that were better valuated.

All these factors led to a huge competition. The fight for markets became wild. The ones who did not participate on the game would be out.[18] The companies that did not attract investors could not survive. The ones that did not offer good products and cheap could be extinguished either.

Then competition lost control. Companies, willing to attract consumers/investors started to fight. This combat invaded different areas of human activity, including Politics. The State started to be the stage for

[14] *Ibid*., p. 67.

[15] ALI, Tariq. O espírito da época. In: **Occupy**: Movimentos de protesto que tomaram as ruas. São Paulo: Boitempo: Carta Maior, 2012, p. 67.

[16] Hoje, observa-se que estas ações levaram ao endividamento, estourando em diversas crises. Para maiores esclarecimentos. HARVEY, *Op. Cit.*, 2011.

[17] REICH, Robert, *Op. Cit*., p.70.

[18] Vide o caso do incêndio na fábrica Malden Mills.

market fight. So, Democracy lost space to big companies, which act in varied ways in the state organization, whether legal or not.

According to what was said above, it is not a game of villains or heroes. If a company would not do it, another one could do it the same way. There were no options left for its maintenance. In case of not entering into the rules of the game, its extinction would be certain.

1.3 The installation of Supercapitalism

Consumers had excellent advantages in this scenario. The new products are much better and satisfy the individual demands. Prices got lower as quality improved. According to Gailbraith, "The ordinary individual has access to amenities – foods, entertainment, personal transportation and plumbing – in which not even the rich rejoiced a century ago."[19]

Travels got faster and cheaper, researches improved the quality of life, the communications became more accessible. Services developed. As though they were investors, people make money applying it on great corporations. A revolution in society that, no doubt, brought huge benefits for the people.

Not everything, however, was well. Those consumers/investors look for the best offers. Competition brought serious problems, not only economical, but also social, political, environmental and communitarian.

There is a great contradiction in this action. As investors, the accomplishments are excellent. As citizens, however, it is criticized what the companies do to make profit. They protest against: the low wages workers earn; the disrespect to the human rights in periphery countries; and environmental pollution.

Reich[20] says that

> Those concerns about economical security, social justice, communitarian life, environment and moral principles were fundamental in the democratic capitalism. They were and still are reasons to worry all of us, as citizens. Today's economy is responsible for doing good business, because it sacrifices other aspects. We can put the blame on big companies, but the choices were exclusively ours.

[19] GAILBRAITH, John Kenneth. **The affluent society & other writings.** Library of America Collection. USA: Penguin, 2009.

[20] REICH, Robert, *Op. Cit*., 2008, p. 100.

A self-reflection can be done and observe, for instance, how energy consumption got higher. One can complain about the companies expenses or the pollution, but individual Technologies, as tablets and laptops, increase the expenses with energy.[21]

Barnes[22] denounces three problems that this revolution brought: "the destruction of nature, the widening of inequality and the failure to promote happiness despite the pretense of doing so."

The first talks about the violence against the environment. The second is about income concentration, which is getting higher. The third mentions the happiness brought by those new products. Instead of the new options and facilities, the feeling of happiness of the human beings did not increase.

The Work Rights initiated a descending line. They became precarious. Keeping the unemployment rate is important for the companies, because it obliges them to compete. With the change of production to other poles, workers lost power to revindicate. When they did it so, the company simply moved to another pole.

The value "work" was reduced in contemporary societies. They do not oppose the capitalism anymore. Dejours[23] shows the pathology of work in contemporary society, what puts the human condition in trouble. This pathology is a result of the way work is looked in supercapitalism.

Nardi[24] demonstrates the precarious work by saying

From a situation of fixed wages, contracts lasting indeterminately with possibilities to functional progression and collective negotiation; we have today an indefinite number of work relations, such as: flexible contracts, temporary, with variable remuneration and telecommuting, individual negotiation, alternation of unemployment periods and temporary work, subcontracting and outsourcing. Finally, multiple forms of precarious work. The syndicate movement became fragile in this new scenario and is disorientated concerning combating the arguments of co-optation present in the new forms of management.

---

[21] CONSUMO de energia por habitante é recorde. **Diário do Nordeste online,** Fortaleza, 19 de junho de 2012. Disponível em: <http://www.diariodonordeste.com.br.> Acesso em 20 jun 2012.

[22] BARNES, Peter. **Capitalism 3.0**: a guide to reclaiming the commons. San Francisco: Berrett-Koehler Publishers, 2006, p. 25.

[23] DEJOURS, Christophe. Subjetividade, trabalho e ação. In: Revista produção, v. 14, n.3, p.27-34, set/dez 2004.

[24] NARDI, Henrique Caetano, *Op. Cit*., 2006, p. 58.

The state, absolute, has weakened. Great companies are now worldwide, with great influence within governments. It is hard to avoid it. There are pressure and lobbies that, in their turn, disguise as if they had public interest.

A consequence of this revolution was the debility of the state. It lost power to compete with the companies. Citizens do not feel represented anymore. Hobsbawn[25] demonstrates the decadence of the State:

The governments of the modern territory states – any one – are based in three presumptions: first, that they have more power than any other unity that operates in its territory; second, that the inhabitants of its territory somewhat accepts its authority; and third, that they can offer to the inhabitants services that they could not found effectively, for instance law and order. In the last thirty or forty years, those presumptions have lost their legitimacy.

The ethical matter starts to be questioned. As examples, the cases of Google and Yahoo in China. Either those companies yielded to the government, disrespecting the human rights, or they would lose a considerable piece of the world market.

A new character is now on the stage. The so called Chief Executive Officer, or CEOs, do not have many choices. They have to make profits at any cost. Many of them say that, as citizens, they would not like to take some decisions, but, as executives of great corporations, they must do it. If they are not efficient to the market dispute, another one will do so.

For that reason, the CEOs are considered by many people the real villains. Supercapitalism, however, happened without considering this game of evil versus good. Even the CEOs are compelled to act. To Barnes[26], "What matters at the end of the day isn't the manager's personal values, but the difference in price between recycled paper and paper made from newly felled trees."

The main problem, however, was the changing of power and citizenship as a political citizen to the consumer citizen and, consequently, the fortification of big companies in politics. Hobsbawn[27] adduces

This all reveals what may be the most immediate and serious problem for liberal democracy. In a transnational world and more glo-

[25] HOBSBAWN, Eric. **Globalização, democracia e terrorismo.** Tradução José Viegas. São Paulo: Companhia das Letras, 2007, p. 104.

[26] BARNES, Peter, *Op. Cit*., 2006.

[27] HOWBSBAWN, Eric, *Op. Cit*., 2007, p.109.

balized, the national governments coexist with forces that have at least the same impact on citizens' daily routine and are, in different degrees, out of their control.

Thus, this all reflects the change of course in which society transferred the Power to consumption.

2 Redefining citizenship in Consumption Society

Defining consumption society is a hard task. It is important to find something different from other societies that also used to get properties to their own satisfaction. We would like to reinforce that consumption bases and strengthen supercapitalism.

Lipovetsky, however, does this very well. He says that what still carachterizes the "hyperconsumption, or consumption-world, is the fact that even what is not economical, family, religion, syndicalism, school, procreation, ethics – is permeated by the mentality of *homo consumericus"*[28].

This advance brought impacts similar to the ones already mentioned above. In this topic, we defend the thesis that believes that, as consumerism was increasing, the question of citizenship started to be transferred to an individual of consumption.

When the majority of the population is more concerned with buying a defective product than with millions of money put out of the way in public tender, for example, it is time to rethink democracy. "The crisis of the political participation passes by the utilitarian view of the citizen in your society life. It is a crisis that is a reflection of the present ontological universe dominated by *homus economicus*."[29]

This question, besides being prejudicial for the human being, is excluding. It is known that only a small portion of society has access to luxurious items. In Brazil, poverty is still high, a part of the population can hardly survive.

Capitalism has to show that the system is good for all. Therefore, optimism is fundamental. Either people buy, invest, open stores, publi-

[28] LIPOVETSKY, Gilles; CHARLES, Sébastian. **Os tempos hipermodernos**. Tradução por Mário Vilela. São Paulo: Barcarolla, 2004, p. 122.

[29] D`ÁVILA, Ana Maria. A cidadania na Constituição Federal brasileira de 1988: redefinindo a participação política. In: BONAVIDES, Paulo; BEDÊ, Fayga Silveira. LIMA, Francisco Gerson Marques de. **Constituição e Democracia:** estudos em homenagem ao professor J.J. Gomes Canotilho. São Paulo: Malheiros, 2006, p. 21.

cize and enhance those action, or capitalism may come to an end. This idea is, however, illusory, once inequality has been always increasing, and very few people can consume. In Brazil, nicknamed Belindia, the rich, who consume as if they were in Belgium, cohabit with the poor, who live as though in India.

Kahneman[30], Nobel Prize of Economy, also corroborates:

To what extent will the outcome of your effort depend on what you do in your firm? This is evidently an easy question; the answer comes quickly and in my small sample it has never been less than 80%. Even when they are not sure they will succeed, these bold people think their fate is almost entirely in their own hands. They are surely wrong: the outcome of a start-up depends as much on the achievements of its competitors and on changes in the market as on its own efforts.

Capitalism needs, therefore, this illusion, this constant feedback to survive. That is the reason why there is a lot of incentive. Once you consume, you are favoring all the system and shows that you are doing your part so that everything functions correctly.

Publicity plays an important role. Dreams are sold, projects of life in the simplest products, such as margarine. Reflects of the consumption society, in which being somebody in owning some objects, publicity shows that those who have goods are the happy ones, or you are Young when you own certain products. In the cybernetic era, when the right to citizenship is based on the duty of consumption, the great companies spy the consumers and bombard them with publicity.[31]

In Brazil, citizenship was linked to work rights. Being a citizen meant having working papers and, therefore, the guarantees and exigencies. It used to be the passport to obtain political rights. According to Bercovici[32]

The juridical instrument that proves the bond between the individual and citizenship is the working papers. The extension of citizenship occurs by the regulation of new professions and by the amplification of the rights associated to the professional exercise, that is, the working rights

[30] KAHNEMAN, Daniel. **Thinking, fast and slow.** New York: Farrar, Straus and Giroux, 2010, p. 430.

[31] GALEANO, Eduardo, *Op. Cit*., 2011, p.274.

[32] BERCOVICI, Gilberto. Constituição econômica e Constituição Dirigente. In: BONAVIDES, Paulo; BEDÊ, Fayga Silveira. LIMA, Francisco Gerson Marques de. **Constituição e Democracia:** estudos em homenagem ao professor J.J. Gomes Canotilho. São Paulo: Malheiros, 2006, p.231.

With the supercapitalism, it is known that work lost its value, as described above. The subjectivity, that for a long time has been linked to work, now is sought in goods and products supplied by companies.

Work fragmented, outsourced, instability is recurring, finally, became precarious. According to Baumant, "el papel – en otros tiempos a cargo del trabajo – de vincular las motivaciones individuales, la integracion social y la reproduccion de todo el sistema productivo corresponde em la actualidad a la iniciativa del consumidor"[33]. Configurations of identity, that used to be built in the relations of everyday life, tranfer to consumption. Multiple identities, ephemeral, superficial, can be found in stores. With this, corporations gain Power. And politics loses space.

Work used to be source of expression and recognition of subjectivity of a person. This used to be built daily, and because of that the notion of citizenship was linked to the notion of worker.

There was, consequently, a changing of the notion of citizenship: work lost its force; consumption gained it. Then, the concept of citizenship followed this transformation motivated by supercapitalism.

We find ourselves in the moment that the commercialization of the ways of life does not have natural, cultural nor ideological resistance anymore; and in which the spheres of the social and individual life reorganize themselves in function of consumption[34]. The changing of this paradigm was necessary in order to rebuild Democracy. If this continues to exist, citizenship will be still linked to consumption, companies will remain strong, and the problems will be recurring.

Some proposals are presented to rebalance democracy, fortifying the role of citizens, who will become the responsible for the limits of the companies, and putting their interests seeking well-being before any other thing.

3 Proposals to overcome Supercapitalism

According to what was said above, some authors show proposals for a change to face the reality. A balance of interests can be sought. Democracy can be reconstituted or built again, because according to

[33] BAUMANT, Zygmunt. **Trabajo, consumismo y nuevos pobres.** Barcelona: Gedisa, 2000, p. 48.
[34] *Ibid.*, p.31.

Hobsbawn[35] "the ideal of sovereignty of the market is not a complement to liberal democracy, but an alternative to it."

We will present here the proposals of three authors: Harvey, Reich e Barnes.

3.1 Harvey

Demonstrating the problem, Harvey[36] exemplifies saying that

> the power of money exercised by few prejudices all the ways of democratic governing. Pharmaceutical, health insurance and hospitals lobbies, for instance, spent more than 133 millions of dollar in the first three months of 2009 to certify that the thing would go how they want in the healthcare reform in the United States.

The author, manifestly Marxist, does not believe that capitalism can be a plausible system. There will always be inequality. The first lesson that one needs to learn is that an ethical capitalism, without exploration and socially fair that benefits everyone is impossible. It contradicts the peculiar nature of the capital.[37]

The same way as the other authors, Harvey emphasizes the role of the citizen and demonstrates the lack of debate about some matters. Concerning the recurring crisis of capitalism, he says that they are moments of contradiction and possibilities, from which any kind of alternatives, including socialist and anticapitalist, may appear[38]

According to the author

> In a great part of the capitalist world, we passed through a surprising period when politics was depoliticized and mercantile. Only now that the state shows up to help the financiers, it was clear that the State and the capital are linked as never before, institutional and personal. It is seen clearly now the dominant class, more than the political class that acts as subordinate, and also dominating.

As already mentioned, diverse forces question supercapitalism.

[35] HOBSBAWN, Eric, *Op. Cit*., 2007, p.105.
[36] HARVEY, David, *Op. Cit*., p. 179.
[37] *Ibid*., p.193.
[38] *Ibid*., p.176.

"The central problem is that, in total, there is no anticapitalist movement united and decisive enough capable to challenge in an adequate way rhe reproduction of the capitalist class and the perpetuation of its power in the world."[39]

There are five chains of thinking that, somehow, combat the system and should be united. They are the non-governmental organizations, organizations of basis that deny external financing, the reorganization of work and the left political parties, social movements that resist land moving and dispossession, and emancipation movements in question of identity.

Environmental movements, concerned about the planet and the future generations, are the ones which are putting the biggest pressure on companies. An environmental conscience is being created, and even the consumers/investors are punishing the ones that pollute or degrade the environment.

In the search of a reform, four comprehensions by the people are illustrated. First, increase is not the same as development. It is reiterated that is false to say that increase is a previous condition to reduce poverty and inequality or that more respectable environmental policies are, as organic produce, luxury to the rich[40].

The second proposal exalts the one said above, in the union of the anticapitalist movements and the knowledge of how supercapitalism works. Traditional hostilities between, for example, the ones with technical, scientific and administrative knowledges and the movements of social agitation have to be solved and overcome[41].

In third place,

It will also be necessary to face the impacts and the answers from other spaces of the global economy. Different places can develop in different ways according to their history, culture, localization and political-economical condition.[42]

He illustrates that Berlin, for instance, is an antiquated city that has low indicatives of economical success based on capitalism, but it is still a habitable city and good for living in.

To conclude, He shows which objectives must be traced. Norms

[39] *Ibid*., p. 184.
[40] *Ibid*., p. 186.
[41] *Ibid*., p. 186.
[42] *Ibid*., p. 186.

must be produced. Harvey disposes[43]

You can include the respect to the nature, radical equalitarianism on the social relations, institutional arrangements based in some comprehension of common interests, democratic administrative procedures (oposed to the money schemes that exist today), work process organized by the producers, daily life such as the free exploration of new types of social relations and life conditions, mental conceptions that are reflected into selfrealization to the service of others and technological innovations and organizations orientated to the seek of the common weel-being instead of supporting military force and the corporative greed.

Aduz o autor que esses "poderiam ser os pontos correvolucionários em torno dos quais a ação social pode convergir e girar. Claro que isso é utópico! Mas e daí! Não temos como não sê-lo."[44]

Harvey[45] acredita na transformação através do conhecimento, e na superação do capitalismo por uma outra ordem. Atesta que

Talvez nós devamos apenas definir o movimento, nosso movimento, como anticapitalista ou chamar-nos de Partido da Indignação, prontos para derrotar o Partido de Wall Street e seus acólitos e defensores em todos os lugares, e que assim seja. A luta pela sobrevivência com Justiça não só continua, mas recomeça.

A realidade é tratada de forma precisa e detalhada. Realiza seu objetivo ao descrever a situação, demonstrando que o conhecimento e a crítica são peças-chave para uma transformação. Ao propor mudanças, todavia, ainda é bastante tímido. Ações concretas não são bem definidas em sua obra. Não retira, todavia, o brilhantismo de suas ideias.

3.2 Reich

Reich acredita que o capitalismo é provável, e é um bom sistema, apenas deveria ser trabalhado. Sua ideia principal é que a democracia seja valorizada e imponha limites ao capitalismo. Apenas a conscientização do cidadão e, consequentemente, seu desejo de mudança e imposição de sua força é que farão a situação mudar. Aduz que podemos ter, ao mesmo tempo, democracia vibrante e capitalismo exuberante. Para tanto, as duas esferas devem ser segregadas.[46]

---

[43] *Ibid*., p. 187.
[44] *Ibid*., p. 187.
[45] *Ibid*., p. 209.
[46] REICH, Robert, *Op. Cit*., p. 228.

Para reduzir a ação de empresas no congresso, uma série de ações são sugeridas. Entre elas, financiamento público para campanhas e limites na doação para candidaturas. Além disso, delimitar a atuação dos lobistas é essencial.

Interessante ponto de vista propõe o autor sobre a competição além do mercado. Se as empresas soubessem que as outras não estão levando vantagem no processo político, não iriam tentar influenciá-lo. Isto diminuiria os custos, que podiam ser alocados de forma diversa, como no próprio processo produtivo. A ação mais eficaz ao alcance dos reformadores é reduzir os efeitos do dinheiro das empresas sobre a política e amplificar a voz dos cidadãos[47].

Reich relembra que as empresas não estão interessadas no bem comum. Seu interesse é atrair investidores e consumidores, valorizando sua marca e oferecendo melhores ofertas. Por isso, não se deve aceitar o que os especialistas dessas corporações relatam sobre o que é melhor para a sociedade. Afirma que

> É até possível que as consequências sejam realmente positivas para o bem comum, mas não se pode aceitar a palavra deles, por que eles não estão motivados para fazer qualquer coisa tendo em vista exclusivamente o interesse público. Sua única motivação legítima, mais uma vez, é atender às necessidades e desejos dos consumidores a fim de gerar retorno satisfatório para os investidores. A única razão das empresas e de seus executivos para defender determinado desfecho político ou judicial é reforçar ou proteger suas posições competitivas.[48]

Por esse mesmo motivo, não acredita em virtudes ou responsabilidade social das empresas. Isto serve apenas para valorizar sua marca. Estas ações são utilizadas, também, para escapar de limites que deveriam ser estabelecidos por lei. Seria uma forma de não ser elaborado um regulamento e ainda ser beneficiada por isso.

Propõe, ainda, uma série de mudanças na legislação trabalhista, para fortalecer o empregado e os sindicatos. Os custos como consumidor e investidor seriam altos, mas o cidadão sairia fortalecido.

Valorizar a saúde e a educação mostra-se fundamental em seu pensamento. O financiamento destas áreas deve ser incrementado através de tributação de grandes fortunas.

---

[47] REICH, Robert, *Op. Cit*., p. 219.

[48] *Ibid*., p. 218.

Um ponto polêmico de suas sugestões é que as empresas não devem ser tratadas como pessoas físicas, pois são contratos. Daí decorre uma série de mudanças, como não ser responsabilizada criminalmente, direito à representação política na democracia além de contratos ou liberdade de expressão. Ainda

> Em conjunto com outras medidas – abolição do imposto de renda das empresas, extinção de prática de processar empresa por conduta criminal, abandono da premissa de que as empresas são patrióticas, cassação do direito das empresas de questionar por via judicial as leis vigentes – elas oferecem visão realista e logicamente coerente das empresas como ficção legal e das pessoas físicas como cidadãos[49].

Um ponto escuso ou criticável em sua obra é o "esquecimento" do judiciário. O autor concentra maiores esforços no legislativo, propõe alterações no executivo, mas pouco fala da justiça. Do quanto este último sofre influências, pressões dos mais variados poderes, onde a questão econômica diversas vezes tem sido preponderante sobre outras questões, como ambientais.

As propostas de Reich mostram-se coerentes com a realidade. Boa parte delas ainda parece utópica, pois não há uma conscientização da população. A noção de cidadania ainda permanece fraca e vem deslocando-se para a cidadania do consumo. Necessário seria um esclarecimento e educação para que reformas acontecessem.

As empresas têm o seu objetivo definido, que é o lucro, e fazem tudo por isso. Cumprem as regras do jogo. Tomam atitudes que, embora antiéticas ou criticáveis, estão dentro dos limites da lei. Cumpre aos cidadãos estabelecer esta fronteira.

3.3 Barnes

Em sua concepção, o capitalismo também deve ser mantido. As reformas, todavia, devem ocorrer. As suas propostas levam em consideração entrar nas regras do jogo. Se o capitalismo está na base da sociedade, deve-se utiliza-lo também para satisfazer os interesses do povo.

O autor demonstra que o Estado é uma das formas capazes de regular a atuação das corporações, com atos de taxação, proibição ou de-

[49] REICH, Robert, *Op. Cit*., p. 228.

marcação, por exemplo. A constante intervenção mencionada, todavia, prejudica esta atuação. Preceitua

> By contrast, ordinary citizens are cash-poor, unorganized, and ill-informed. They amble to the polls a few times per decade, if that. Of all the players in politics, they´re the easiest to fool. And though politicians do read opinion polls, these rarely concern the arcane favors corporations seek. Hence, disciplined cash-rich corporations easily prevail over ordinary citizens[50].

Outra opção seria, então, redimensionar a função das empresas, para estenderem-se além dos lucros. This, however, is like asking elephants to dance – they´re just not build to do it. Corporations are built to make money, and the truth is, as a society we want them to make money.[51] Também não acredita na responsabilidade social dos acionistas, pois estes visam somente o lucro.

Diante do cenário supercapitalista, não acredita que as corporações percam espaço no congresso ou em regulações. A forma possível para que as empresas não exerçam tanta influência diz respeito à propriedade. Por isso, seu enfoque nesta área. Afirma

> Property rights, by contrast, tend to endure, as do institutions that own them. So we should focus on creating such institutions and endowing them with permanent property rights.(…) As we´ll see, I would place it in the hands of commons trustees, empowered with property rights and bound as much as humanly possible to generations hence.[52]

Além de bens individuais e privados, herda-se também bens que já estão disponíveis: natureza, linguagens, cultura e tecnologias. Esta, todavia, costuma ser desvalorizada por não haver direitos de propriedades as protegendo.

Desta forma, defende a transformação dos bens comuns[53] em propriedade. Não uma corporação, mas uma propriedade comum, que abrangeria outros interesses além do lucro. Baseia-se em dois argumentos: há pouca proteção aos bens comuns e que a busca de lucro pelas

[50] BARNES, Peter, *Op. Cit.*, 2006, p.38.
[51] *Ibid.*, p. 46-47.
[52] *Ibid.*, p. 49.
[53] Cumpre salientar que sua noção de bem comum é distinta e ampliada.

empresas dominam os demais setores.

Estas novas propriedades, surgidas com funções especificas, dependendo de sua área, tais como defesa dos animais ou um parque ecológico, devem seguir alguns princípios básicos. São eles: colocar os interesses das futuras gerações a frente, uma pessoa uma ação, quanto mais pessoas melhor, liquidez desta empresa e deixar o suficiente enquanto bem comum.

Transfere, portanto, poder aos cidadãos. Estes, ao se apropriarem dos bens comuns, sentir-se-iam responsáveis pelos atos decorrentes contra sua propriedade. E um reforço do interesse publico. Sua proposta busca uma transformação na base do capitalismo, utilizando-se de seus pontos fracos.

O autor mostra, passo-a-passo, como proceder em cada área do bem comum. É um pensamento progressista, um tanto quanto utópico, apesar de extremamente plausível.

Conclusion

Concerning what was exposed, it was intended to clarify, even in a concise way, some forces that balance society: environment, politics, economy, work, community.

Economy, however, became disengaged from this group and initiated a process of intervention in different areas as a way to expand competition. This was possible due to the new technologies of the 1970s, which motivated globalization, deregulation and changing of modes of production.

The searching for consumers and investors became intense. And they both were granted and damaged in this game. On one hand, great advantages, products, accessories that facilitated and improved the conditions for existence. On the other hand, that searching for better prices, excessive investments and consumption brought disastrous consequences.

Environmental destruction, pressure on suppliers, debility of work, income inequality, debility of the State, and mainly the constant actuation of corporations searching for profit in the political sphere are some of the consequences.

Thus, democracy is weak. Efficient mechanisms of action to combat those influences are rare. Consumers have been given power, citizen was devaluated.

We elaborated the hipothesis that citizenship was displaced into consumption, unlike when it was linked to the worker. Depreciation of work in Brazil happened concomitantly with the advance of consumerism. Whereas the first one was losing strength, the second one was gaining, end the axle that used to conduct citizenship has changed.

Proposals show that reality can be different, and the only way to change it is knowing the situation. Reich and Barnes believe that supercapitalism today can be reformed to a capitalism in which everyone is heard concerning their wish. Harvey believes that the essence of capitalism is to maintain the thongs as they are, proposing alternatives to this.

Thus, it is necessary to rediscuss democracy. The citizen must impose their conditions, in order to live in better environments. The actuation of Law is made by movements of Marching and opposite march. A new step must be taken for this to happen.

References

ALI, Tariq. O espírito da época. In: **Occupy**: Movimentos de protesto que tomaram as ruas. São Paulo: Boitempo: Carta Maior, 2012.

ANTUNES, Ricardo. **Os sentidos do trabalho:** ensaio sobre a afirmação e a negação do trabalho. 2. ed. São Paulo: Boitempo, 2009.

BARNES, Peter. **Capitalism 3.0**: a guide to reclaiming the commons. San Francisco: Berrett-Koehler Publishers, 2006.

BAUMANT, Zygmunt. **Trabajo, consumismo y nuevos pobres.** Barcelona: Gedisa, 2000.

BERCOVICI, Gilberto. Constituição econômica e Constituição Dirigente. In: BONAVIDES, Paulo; BEDÊ, Fayga Silveira. LIMA, Francisco Gerson Marques de. **Constituição e Democracia:** estudos em homenagem ao professor J.J. Gomes Canotilho. São Paulo: Malheiros, 2006.

CONSUMO de energia por habitante é recorde. **Diário do Nordeste online,** Fortaleza, 19 de junho de 2012. Disponível em: <http://www.diariodonordeste.com.br.> Acesso em 20 jun 2012.

D`ÁVILA, Ana Maria. A cidadania na Constituição Federal brasileira de 1988: redefinindo a participação política. In: BONAVIDES, Paulo; BEDÊ, Fayga Silveira. LIMA, Francisco Gerson Marques de. **Constituição e Democracia:** estudos em homenagem ao professor J.J. Gomes Canotilho. São Paulo: Malheiros, 2006.

DEJOURS, Christophe. Subjetividade, trabalho e ação.In: **Revista produção**, v. 14, n.3, p.27-34, set/dez 2004.

GALBRAITH, John Kenneth. **The affluent society & other writings.** Library of America Collection. USA: Penguin, 2009.

GALEANO, Eduardo. **De pernas pro ar**: a escola do mundo ao avesso. Porto Alegre: L&PM, 2010.

HARVEY, David. **O enigma do capital e as crises do capitalismo**. Tradução de João Alexandre Peschanski. São Paulo: Boitempo, 2011.

HOBSBAWN, Eric. **Globalização, democracia e terrorismo.** Tradução José Viegas. São Paulo: Companhia das Letras, 2007.

KAHNEMAN, Daniel. **Thinking, fast and slow.** New York: Farrar, Straus and Giroux, 2010.

LIPOVETSKY, Gilles; CHARLES, Sébastian. **Os tempos hipermodernos**. Tradução por Mário Vilela. São Paulo: Barcarolla, 2004.

NARDI, Henrique Caetano. **Ética, trabalho e subjetividade.** Porto Alegre: UFRGS, 2006.

REICH, Robert B. **Supercapitalismo**: como o capitalismo tem transformado os

negócios, a democracia e o cotidiano. Rio de Janeiro: Campus-Elsevier, 2008.

SCHUMPETER, Joseph A. **Capitalismo, Socialismo e Democracia.** Rio de Janeiro: Fundo de Cultura, 1961.

SCHWARTZMAN, Simon. **Estado novo:** um auto-retrato. In: SCHWARTZMAN, Simon (org). Brasília: UNB, 1982.

Searching the validity fundament of Civil Law in a post-national order

Daniella Bernucci Paulino[1]
Rodolpho Barreto Sampaio Júnior[2]
Thiago Penido Martins[3]

Abstract: The crisis of legal thought fell upon Brazilian civil law, conceived in another historic, economic and social context. However, although consistent with the aspirations of its era, civil law proved to be inadequate to the expectations of a welfare society and this contributed to the discredit of civil law as an instrument of regulation of private relationships. In Brazil, The Private-Constitutional School of Thought defended the Constitution as the primary legal norm in private relations. However it is observed that this claim has already been partially overcome, given the emergence of a post-national legal order marked by the development of theoretical world constitutionalism.

Keywords: The Private-Constitutional School of Thought, Post-National Legal Order, World Constitutionalism.

1. Introduction

The intention of this paper is to discuss what would be the foundation of validity of civil law in a post-national legal system, characterized by the weakening of the classical idea that associates national

[1] Daniella Bernucci Paulino earned her LL.M. in Corporate Law from the Federal University of Minas Gerais. She teaches at Pontifícia Universidade Católica de Minas Gerais and is also the General Coordinator of the Post Graduate Distance Learning Program at PUC Minas Virtual. Contact: daniella.paulino@virtual.pucminas.br.
[2] Rodolpho Barreto Sampaio Júnior earned his PH.D. in Civil Law from the Federal University of Minas Gerais. He teaches at Pontifícia Universidade Católica de Minas Gerais. Contact: rodolpho@pucminas.br.
[3] Thiago Penido Martins earned his LL.M. in Corporate Law from Milton Campos Law School. He teaches at Novos Horizontes College. Contact: thiagopenido@yahoo.com.br.

sovereignty with the power to edit norms of mandatory compliance in a given territory.

Even though one does not defend that National States will lose the prerogatives to establish norms of mandatory compliance within their respective territories, the analysis of comparative law, especially of Community law, permits us to infer that, in certain situations, it is admitted that the use of legal standards comes not from the State in which they are applied, regardless of the ratification process. This occurs, e.g., with certain deliberations of the European Parliament.

In this context it is shown that the attempt of theorists, connected to the School of Civil-Constitutional Law, situated in the Constitution of 1988, the central foundation of civil law, has been partially overcome. Contrary to what is preached, it is not the axiological board of the Constitution that civil law draws legitimacy of its norms. The setback, the analysis of some decisions of the Supreme Court finds that this Court has resorted to international treaties and decisions of constitutional courts of other countries to support their understanding, establishing the so-called transconstitutionalism.

Thus, through the analysis of the decision of the Court of Justice of the European Union in the trial of Test-Achats, we intend to demonstrate that, in a post-national legal order, or above state, the foundation of validity of civil law can be found beyond the borders of the national state.

2. *À la recherche du temps perdu*: a contemporary reworking of Civil Law

In concluding his now classic work *History of Modern Private Law*, WIEACKER said that "the great periods of legal history were always made of epochs in which the image of the right of legal experts had consciously or unconsciously been in harmony with the image of the dominant society at this time" (2004, p.717), to then add to the understanding of contemporary society is crucial in order to develop a dogmatic civilist appropriate to the changing needs of society.

The theoretical precision of WIEACKER confirmed what was already perceived by the operators of the law: the inadequacy of traditional institutes of civil law to meet the challenges posed by a highly complex society. The dissemination of the ideals of the Providence State was put into question:

> private law [conceived] as a system of spheres of freedom of the autonomous individual in the moral point of view. Here were based on the full and equal legal capacity of all citizens, the free use of property, freedom of contract, freedom of association (since Western and Central Europe the constitutional state, in connection with the patronage ceased to deprive working classes of the freedom of association). With this corresponded the great figures of the system of private law: the subjective right such as will power, the legal business activated by the autonomous will of the parties, the contract as a strict inter connection between autonomous subjects of law, the property (and its limited rights) as a right in unlimited principle and in total domination and exclusion, of whose social function does not come to light in its concept; collective people as subjects of rights according to the image of individuals (2004, p. 717).

The persistence of this model in a dogmatic society with aspirations and ideals distinct from that in which such a model was forged, engendered the crisis of civil law and the need to reformulate their ethos. The difficulty in understanding this fact and the resistances to the redesign of the civil law contributed to the discredit and disrepute of this branch, a fact that is further accentuated by overcoming the political role assigned to the Civil Code at least since the French Revolution.

2.1 The dual role of the Code

The Napoleon Code is usually appointed as the legal instrument that ushered in the ideology of civil law in the last two centuries. To have successfully established a single civil set of laws applied equally to all inhabitants in the entire French territory, Napoleon was not only able to demonstrate he achieved centralization of power but also the unification of law, which happened to be a primary source in each State. This second role, incidentally, can not be relegated in its importance: the Code, was more than just a legal document, it was also a political symbol, it represented the overcoming of the *Ancien Régime* and the concentration of powers in the hands of the monarch.

Overlooking, the unaffected civil codes watched the succession of constitutions that were altered according to the changes of political regime. Until finally, the constitutions were recognized for their normative power and ceased to be understood as mere declarations of intent. Instead, becoming recognized as the document justifying a state

and therefore as the foundation of validity of the overall infra planning, that they must necessarily conform to. The mainstay of the state thus becomes the constitution, having codes being relegated as a background nuisance.

In Brazil, it was only with the Constitution of 1988 that this phenomenon came to be truly investigated, and theoretical advancement of constitutionalism encountered obstacles in the conservative attitude of the civilists. Truly, it wasn't few voices which rose against advances contained in the constitutional text, suggesting, for example, that equality between the spouses only bind the legislature, not having the power to alter the legal framework established since the Bevilaqua Code.

2.2 The Brazilian response to the Civil Law crises

For reasons that have yet to be properly studied, the Brazilian civilists did not take the redemocritization for the betterment of civil law, as did the publicists in their area of expertise. What was observed, however, was the rejection of innovations introduced by the 1988 Constitution, maintaining a legal system linked to an ideology that is not representative of national aspirations. As an example of the lack of efforts to reshape the ethos of Brazilian civil law, sufficient to note that, after more than twenty years of the promulgation of the current Constitution, there is no theoretical consensus about the legal content of the social function of property.

Two theoretical perspectives , however , stand out in an attempt to offer to Brazilian society a civil right to a new reality : the School of Civil and Constitutional Law and the School of Economic Analysis of Law. This, in the wake of the work in law and economics has developed in other countries, but especially in the United States where it is focused on economic efficiency, a concept that would guide the drafting and interpretation of legal rules. Although relatively new, the School of Economic Analysis of Law has consolidated rapidly in some very prestigious institutions, however, their studies are still viewed with suspicion and, at least for now, we do not see that the solutions advocated by such current theory represent the model of civil society as contemporary Brazilian society would like to see implemented . Already the School of Civil and Constitutional Law enjoys a long existence and therefore greater penetration both in academia and in the courts. And although some of his theses are subject to quite compelling criticism (SAMPAIO

JR., 2009, *passim*) , one can not deny the importance of their main flag: a hierarchical and principled supremacy of the Constitution over the constitutional legislation.

It is true that one who just began the study of law is not surprised by the affirmation that, in the pyramid rules, constitutional rules are at the top. However civilists, molded under the aegis of the Civil Code as the center of the legal universe, had greater difficulty accepting the "demotion" of codes, which is why we recognize the role played by the School of Civil and Constitutional Law in particular.

2.3 The Supreme Court and transconstitutionalism

Possibly, the transformations in which constitutionalism has gone through constitute the most eloquent sign of the crisis that has faced legal thought in the course of the last century. In fact, from the U.S. Constitution of 1787 to the soi-disant neoconstitutionalist movement, the constitutional ideology incorporated itself into written constitutions, with elaborate rituals of development and reform; the pre-eminence of formal and material supremacy, beyond the allocation of the normative force of their standards; control of the constitutionality of laws and the normative recognition of the right dimension principled by the law (STABLES, 2011, p. 74-76).

Among the vortex theory that revolutionizes the contemporary constitutionalism, one can mention the phenomenon called transconstitutionalism (world constitutionalism, multilevel constitutionalism, interconstitutionality), which "operates between legal systems of different States" and is realized when "different jurisdictions interact and join total efforts to solve difficult and complex cases "in order to resolve conflicts involving human rights, two or more Courts of Justice, in different countries, disrupt their territorial barriers and abandon regionalism on behalf of the conversation and constitutional dialogue" BULOS , 2011, P. 92-93).

It is also BULOS who presents characteristics of transconstitutionalism:

> requires that the student leave, altogether, the idea, of modern constitutionalism, in that the concept of constitution binds exclusively to a determined state, where there is no need to resort to other constitutions of other states;

> Allows outsourcing and insourcing of information between States, organs and completely different activities, the exchange of experiences, knowledge, techniques etc..;
>
> Two or more legal systems of distinct intertwining States, maintaining the independence inherent to each;
>
> Promotes the existence of transition points between jurisdictions where organs of power in several states shall intercommunicate, solidifying formal and informal relationships (2011, p. 92-93).

The underlying idea of transcontitutionalism is to be able to enjoy the constitutional experience of other countries regarding universal themes such as human rights, on the reason of

> although one can not discount the classic constitutional law of the State, usually linked to a constitution, constitutionalism opens into spheres beyond the state, not properly because other constitutions have arisen (non-state), but because the eminent constitutional problems, especially those relating to human rights, pervading both legal orders, which act in an intertwining fashion in finding solutions (NEVES, 2009, p. 240).

In Brazil, constitutional theorists assert that the Supreme Court would have used, if valid, the international experience in some judgements, among them can be highlighted, in the specific area of civil law, the ruling of RE 349.703/RS, dismissed in December 2008, declaring the incompatibility of civil arrest of an unfaithful trustee with the Pact of San José, Costa Rica. Interestingly, the content of the judgment, which mentioned the previous understanding of that court, assigned the opinion of Justice Celso de Mello in the trial of HC 72,131, finalized in November 1995, for whom

> civil prison of an unfaithful trustee has, in the Constitution, the foundation of its authority and the direct support of its validity and effectiveness, with no way to make abstraction of the Constitution, with evident prestige of normativity that it emanates, bestows, without legal reason, precedence to an international convention "(BRAZIL, 2009, P. 690).

Just over a decade later, the same Supreme Court, based on super-

legal normative status of international human rights treaties, changed its position and it became unconstitutional to civil imprisonment of the trustee (although he decided in that case that the constitutional legislation is hierarchically inferior to the treaties, that is why it doesn't matter if it was before or after the incorporation of international treaty, the fact is that the Supreme Court has eliminated one of the legal events of civil imprisonment allowed by the 1988 Constitution. Worth noting, the international treaty, at the end of the day, derogated expressed constitutional provision).

Also at the trial of ADI 3.510/DF, which occurred in May 2008, the Supreme Court, in considering constitutional article 5th. of the Biosafety Law (Federal law 11.105/2005), drew on international experience in the grounds of its decision, and the same occurred in the trial of ADPF 132/RJ which legitimized the homo-affective union and ADPF 54 decision that dealt with the termination of pregnancy in case of fetal anencephaly.

Therefore, rather than to make use of the law compared to a simple rhetorical reinforcement of a legal argument, the Supreme Court drew on, in several occasions, a true dialogue with other constitutional courts, transplanting "the knowledge of other systems for us "(lobules 2011, P. 96).

3. The Test-Achats Case and the direct effectiveness of the principle of equality within insurance contracts

The Directive 2004/113/CE, published by the Council of the European Union on December 13th 2004, aims to implement the principle of equal treatment between men and women in access to goods and services and their delivery. Although it explicitly stipulates that

> any person may enjoy contractual freedom, including the freedom to choose a contractual partner for a transaction. Those who provide goods or services may have subjective reasons for the choice of the other party. Since this choice is not based on gender, this Directive does not affect the freedom of each of these choices,

one realizes that the intention was to prevent discrimination based on gender, prohibiting both direct discrimination (occurs when, due to gender, a person is treated less favorably than that of which is given to someone else in a comparable situation) and indirect (where a

provision, criterion or practice would put people of a particular genre at a particular disadvantage compared with people of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary).

In the specific case of insurance contracts, art. 5º of the Directive, it was determined that "in all new concluded contracts, after December 21, 2007, consideration of gender as a factor for calculating premiums and benefits for the purpose of insurance and other financial services fails, for the insurers, in differences in individuals' premiums and benefits. "Item 2 of the alluded article, nevertheless, made an exception to the general rule by allowing "proportionate differences in individuals' premiums and benefits where the use of gender is a determining factor in the assessment of risk based on actuarial and statistical data relevant and accurate." However, after five years the desirability of maintaining such an exception should be subject to further examination by the member countries which decided to adopt it.

The exception of item 2 of art. 5º. allowed insurers of most European Union countries to continue to use gender discrimination as a differentiating criterion of premiums and benefits. However, gender as a discriminatory criterion in insurance contracts was not accepted by the Court of Justice of the European Union, although there is explicit statutory provisions in this regard.

Indeed, at the trial of the case C 236/09, in which the Association Belge des Consommateurs Test-Achats ASBL questioned the decision of the Constitutional Court of Belgium who recognized the legality of the Belgian law which incorporates the precepts of Directive 2004/113/EC, the Court of Justice of the European Union considered that the extension for an indefinite period of exception to the rule in art. 5º. of Directive 2004/113/EU violated the equal treatment of men and women advocated by Directive 2004/113/EU, and declared the invalidity of Article 5, n. 2, the mentioned Directive, prohibiting insurers from December 21, 2012, to continue adopting the gender factor for purposes of differentiating the value of premiums and benefits in insurance contracts.

For purposes of this work, it is appropriate to have in view two peculiarities: firstly, because it highlights how, under European law, one can already speak of suprastate standards, issued by the Council of the European Union, and second, because it demonstrates that the Court of Justice of the European Union has the power to effectively invalidate state standards contrary to Directives. Even if one argues that the Directives have to be incorporated into the political structures, the test-achats

case demonstrates that the state legislating power, understood as a manifestation of sovereignty itself, longer in practice unacceptable supra-state limitations from the perspective of traditional constitutionalism.

Therefore, it is demonstrated, once again, that the foundation of validity of civil law increasingly departs from the state sphere, finding supra-national elements in its *ultima ratio*. Perhaps this is not the harbinger of a new *ius commune ...*

4. Conclusion

On June 28, 2012, the Supreme Court of the United States of America judged the constitutionality of the Patient Protection and Affordable Care Act, which imposed an individual duty to have health insurance to ensure minimum coverage (minimum essential health insurance coverage), subjecting those where you do not have to pay a penalty to the Internal Revenue Service. An Extensive Court decision deeply analyzed the permanent tension between individual freedom and the limits of state power, exposing the phenomenon that is, in countries belonging to the Roman-Germanic legal tradition, known as the public law - private law dichotomy crisis.

The causes and effects of this crisis is one of the main objects of study of contemporary privatists. After all, after losing the central role within the legal framework of countries of Roman-Germanic tradition, it was necessary to rethink the substantation of the civil law itself, the role it played in Brazil was known as the Private-Constitutional School of Thought.

Although one may disagree with some theoretical positions taken by the Private-Constitutional School of Thought, one can not withdraw the merit of trying to adapt to the constitutionalized civil law legal system, proceeding to the retelling of their traditional institutions in the light of the constitutional framework. However, it is now necessary to take a step further in the study of civil law, as noted by the study of comparative law, in particular the study of European private law and the recent decision of the European Union Court of Justice regarding the efficacy of the fundamental right to equality in insurance contracts.

It is observed to be possible to speak of a post-national legal order, which finds its sources not only within state standards, but also in the policies of the European Union, international treaties and decisions of other constitutional courts, characterizing the phenomenon called

transconstitutionalism. Even in Brazil where this trend is already seen, the Supreme Federal Court based its understanding of similar observations made by other constitutional courts.

Thus, in the present study, we sought to demonstrate that the Brazilian civil law is ready, beyond what the Private-Constitutional School of Thought intended, to seek its foundation of validity in the context of a post-national legal order.

References

BRASIL. Supremo Tribunal Federal (Tribunal Pleno). Recurso Extraordinário 349.703/RS. Recorrente: Banco Itaú S/A. Recorrido: Armando Luiz Segabinazzi. Relator: Min. Gilmar Mendes. 03 de dezembro de 2008. **Diário da Justiça da União**, p. 675-876, 05 jun. 2009.

BULOS, Uadi Lammêgo. **Curso de Direito Constitucional**. São Paulo: Saraiva, 2011.

NEVES, Marcelo da Costa Pinto. **Transconstitucionalismo.** São Paulo: Martins Fontes, 2009.

SAMPAIO JR., Rodolpho Barreto. **Da liberdade ao controle: os riscos do novo direito civil brasileiro**. Belo Horizonte: PUC Minas Virtual, 2009.

WIEACKER, Franz. **História do Direito Privado Moderno**. Lisboa: Calouste Gulbenkian, 2004.

The naturalization of the legal entity in the Brazilian legal system

Sergio Marcos Carvalho de Ávila Negri[1]

Abstract: This paper, based on the relationship between language and the objects it claims to name, seeks to analyze the process called naturalization of the legal entity, characterized by the constant parallelism between a "natural" person and a legal entity, particularly in the light of the Brazilian legal system.

Keywords: Legal entity, Naturalization, Legal capacity.

1.Introduction

In the verbalized legal world, it is very common to use abstract categories to simplify concrete situations. The resource of abstraction is useful in that it allows the human being to intellectually appropriate the phenomena that surround him, thereby facilitating communication. It just so happens that often these abstract categories become detached from the phenomena depicted, gaining a life of their own, as if they represented an autonomous reality.

The legal entity[2], for example, has been portrayed as an essential element in the description of reality, as if it were an imposition of nature itself. Consequently, we are given the impression that the term legal entity corresponds to a logical and unquestionable piece of evidence, that is, something "given" and not constructed. However, the legal entity

[1] Professor at The Federal University of Juiz de Fora – MG (UFJF) Law School - Brazil. PhD in Private Law (University of the State of Rio Janeiro - UERJ). Master´s degree in Private Law from UERJ. E-mail: smcnegri@yahoo.com.

[2] Brazilian law distinguishes "pessoa natural" ("physical person", or the individual citizen) and "pessoa jurídica" ("legal person", or legal entity, such as associations, companies, etc.), hence the content of this article.

is only "false system data" and can not be seen as a universal, timeless category.[3]

2. The Augustinian picture of the legal entity

In 1952, Hart gave a lecture entitled *Definition and Theory in Jurisprudence*, in which he denounced a common practice in the legal world: the attempt to establish precise definitions of concepts, as if every legal term described an object from reality.[4] For the author, the incessant search for the definition of terms such as "State", "property" and "right", ended up leading to the assumption that every legal concept should necessarily have a corresponding factual one.

Criticism of the modus operandi of lawyers in their way of dealing with concepts was actually a reflection of a broader process. The awakening of a new linguistic awareness was shaking the foundations of traditional philosophy, by giving language a new role in the process of integration of the human being in the world.

Wittgenstein, in *Philosophical Investigations*, an incomplete work published in 1953, claimed it was impossible to build a perfect language, able to accurately describe the reality of things. For this purpose, he used as a starting point what he himself defined as "the Augustinian picture of language", characterized by the understanding that language would be responsible for the function of describing and especially for the naming of objects and facts in the world.[5]

---

[3] See Trustees of Dartmouth College v. Woodward (1819). Chief Justice Marshall's opinion emphasized that: "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." HALL, Kermit L.The Oxford Companion to the Supreme Court of the United States. Oxford: Oxford University Press, 2005, p. 248.

[4] "There is nothing which simply 'corresponds' to these words and when try to define them we find that the expressions we tender in our definition specifying kinds of person, things, qualities, events, and processes, material or psychological, are never precisely the equivalent of these legal word though often connected with them in some way". HART, Herbert L. A. Definition and Theory in Jurisprudence. The Law Quarterly Review. v. 70, 1954, p.38.

[5] "These words, it seems to me, give us a particular picture of the essence of human language. It is this: the individual words in language name objects—sentences are combinations of such names.——In this picture of language we find the roots of the following idea: Every word has a meaning. This meaning is correlated with the word. It is the

The practice of finding "rigid eternal substances behind the concepts" can be compared to the way in which human beings have their first contact with language. From an early age, we learn to associate names to things, so that when the child hears the word, the image of the represented object arises in their mind. To dispel this mist associated with the search for false essences, philosophy was to investigate how language works, determining the meaning of words according to their use in concrete situations in life.[6]

With proper care, it is possible to extend this reasoning to the analysis of the concept of legal entity. Just as there is the illusion that every name corresponds to an object, as reported by Wittgenstein, the analysis of the legal entity has always been characterized by the attempt to determine what the ontological substrate of the institute was.

Questions like "what is a legal entity?", "What is its essence or nature?" are often formulated in such a way as to detract from their response. Underlying the issues of nature, of essence, is molded, even if in a veiled way, the idea that the term legal entity would have the function of describing a real being, like a human being.

In the wide variety of discursive practices that use the term in question, we can see the presence of this type of discourse, marked by the naturalization of the legal entity. In the same way that the first contact with language obscures the meaning of words, the way we learn the term legal entity contributes to create the illusion that there must be some entity portrayed by that name.

---

object for which the word stands. Augustine does not speak of there being any difference between kinds of word. If you describe the learning of language in this way you are, I believe, thinking primarily of nouns like "table", "chair", "bread", and of people's names, and only secondarily of the names of certain actions and properties; and of the remaining kinds of word as something that will take care of itself." WITTGENSTEIN, Ludwig. Philosophical Investigations. Translated by G. E. M. ANSCOMBE. Oxford: Basil Blackwell Ltd, 1958, p.2.

[6] "Augustine, we might say, does describe a system of communication; only not everything that we call language is this system. And one has to say this in many cases where the question arises 'Is this an appropriate description or not?' The answer is: 'Yes, it is appropriate, but only for this narrowly circumscribed region, not for the whole of what you were claiming to describe.' It is as if someone were to say: 'A game consists in moving objects about on a surface according to certain rules [...]'—and we replied: You seem to be thinking of board games, but there are others. You can make your definition correct by expressly restricting it to those games." WITTGENSTEIN, Ludwig. Op. cit., p.03.

3. The mantra of legal personality

One of the essential topics of the introductory prescription of private law has to do with the attribution of a legal personality to certain human groups, such as associations and societies, which thus come to bear their own legal subjectivity, regardless of that which is acknowledged to its members, considered separately.[7] From a linear narrative, it is commonly claimed that personification promotes the emergence of an autonomous center of imputation, which in turn reinforces the binary code, a characteristic of legal discourse, between subjects, protagonists of legal situations; and objects, which bring together the complexity of those rights and duties.

To confirm the existence of the new unit of imputation of legal relations, the discourse concentrates on listing the consequences that result from this personification. The new subject starts to have its own nationality and residence, which should not be confused with the nationality and residence of its members. In turn, the assignment of a name facilitates the identification of the legal entity in relationships that it will participate in, guaranteeing it independent operation, including when it is in litigation.

With the assignment of personality, there is also the possibility of recognizing a supposed will of the legal entity, expressed through its organs. The assets of the company, as an autonomous subject, cannot be confused with that of its partners. From this separation of assets comes autonomy as to obligations. When a company incurs any debt, it does so in its name, so that its members, individually considered, are not, in principle, responsible for the payment.[8]

---

[7] "The development of the legal personality of incorporated entities is reported to go back to the efforts of English judges in the seventeenth century to formulate a law of corporations for municipal corporations and church institutions, areas without commercial significance and institutions very remote from business corporation in general and modern large corporation in particular. This jurisprudencial doctrine of the separete corporate personality provides the foundation for corporate law governing multinational corporations today." VANDEKERCKHOVE, Karen. Piercing the Corporate Veil (European Company Law Series). New York: Wolter Kluwer, 2007, p. 136.

[8] "The concept of the ´separete legal personality of the corporation, as understood in the legal literature, is in our terms a convenient heuristic formula for descibing organizational forms which enjoy the benefit of each of the tree foregoing foudational rule types. Starting from the premise that the company is itself a person in the eyes of the law, it is straightforward to deduce that it should be capable of entering into contracts and

The variety of effects of the pedagogical mantra of the subjective otherness converges to a single objective: to ensure that the entity has an autonomous existence. Using the term *legal entity* allows the expression "X has a right" to be interpreted independently of the revelation of the asset holder. The presentation of subjective otherness, focusing on the simple transposition of rights and duties from an individual to a legal entity, reinforces the perception that there is a perfect correspondence between individual and collective legal situations.

This, however, is only a mirage. If, in the case of a natural person, the unit of interest refers to the singular figure of the human being, in the case of legal entities the center of interest is unified in terms of a particular order, which coordinates actions, activities and functions. In view of the predominant role of this structure, would it be possible to understand the predicate of the sentence "X has a right" without confronting it with this particular order? Do property, credit and debit retain the same meaning when translated to associations, companies and foundations?[9]

Most often, the process is described as if there are only advantages in recognizing this new autonomous center. It so happens that, when misinterpreted, this subjective otherness, characterized by the separation of the legal entity in relation to partners and associates, also produces harmful consequences.

4. What is the "cost" of the legal entity?

Galgano, in an article published in the 60s, with the suggestive title "*Il costo della persona giuridica*", sought to compare the advantages and disadvantages of the use of the term *legal entity*.[10] In the author's opinion, the term was used by both courts and lawyers, as if there were a being to be protected behind the label of the legal entity.

According to Galgano, this type of approach generated a serious

owning its own property; capable of delegating authority to agents; and capable of suing and being sued in its own name. For expository convenience, we use the term "legal personality" to refer to organizational forms - such as the corporation - which share these three attributes." KRAAKMAN, Reiner. [et. al.]. The Anatomy of Corporate Law: a Comparative and Functional Approach. 2ed. Oxford: Oxford University Press, 2009, p. 9.

[9] See ZATTI, Paolo. Persona giuridica e soggettività. Padova: CEDAM ,1975, p. 155

[10] GALGANO, Francesco. Il costo della persona giuridica. In: Rivista delle società. Milão: Giuffrè, 1968.p.1-16.

problem: treatment as a single unit, besides distorting the function of the institute, obscured the diversity of phenomena that were articulated around that term.

The recognition of an autonomous center of legal relations presupposes the existence of a unit. In the case of legal entities, there are a number of different substrates such as associations, companies and foundations, which are reduced, with the help of personification, to a conceptual unit.[11] This view of a unit not only projects outwards, but also affects the relationships that develop within the new subject. Indeed, the subjective unit, artificially wrought, also reverberates in the analysis of the assets, the will and the interests of the legal entity, coming to be seen, similarly to human beings, in a uniform manner.

More than 50 years after that article, we can see that the problem reported by Galgano is not far from our reality. In the question, for example, that involves the extension of rights of personality to legal entities, especially honor, we can see that same treatment as a single unit. It is often claimed that this extension depends on the examination of a supposed compatibility between the rights and the legal entity itself. There is not, however, in the study of this theme, any concern of the doctrine in analyzing the peculiarities present in the process of allocating rights and duties to the legal entity.[12]

In the Brazilian legal system, the discussion concerning the entitlement to fundamental rights is got round by the wording of the heading of article 5 of the Constitution because, even if these rights are not provided exclusively by that device, it apparently draws a sort of general logic to reason out fundamental rights. It just so happens that this device, unlike what happens in some legal systems, does not expressly mention the legal entity, putting in doubt whether this artificial being may be entitled to fundamental rights.

---

[11]"It is important to recognize that most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals. This includes firms, non profit institutions such as universities, hospitals, and foundations, mutual organizations such as mutual savings banks and insurance companies and co-operatives, some private clubs, and even governmental bodies such as cities, states, and the federal government, government enterprises such as TVA, the Post Office, transit systems, and so forth." JESEN, Michael; MECKLING,William. Theory of the Firm: managerial Behavior, Agency Cost and Ownership Structure. Journal of Financial Economics. n.3, 1976, p.5.

[12]See PERLINGIERI, Pietro, O direito civil na legalidade constitucional. Translated by. Maria Cristina de Cicco, Rio de Janeiro: Renovar, 2008.

Despite the silence of the constitution on the issue, doctrine, jurisprudence and even Brazilian infra-constitutional legislation converge, without much hesitation, to the assertion that legal entities are indeed entitled to fundamental rights. Article 52 of the Brazilian Civil Code extends to the legal entity, where possible, the protection of personal rights. In the same vein we have the precedent number 227 of Superior Court of Justice (STJ), which recognized the possibility of a legal person suffering moral damage based on the understanding that honor, initially seen as an attribute of the human being, involves a subjective aspect and an objective one.[13] Since objective honor is related to reputation, it would also be granted to collective legal entities.[14]

It is interesting to note that this comparison is not restricted to a particular legal system, such as the Italian one or the Brazilian one. The U.S. Constitution, through the 14th Amendment, provides that no State may deprive any person of life, liberty or property, except by due process of law. In several decisions, it has been established that the term "person" in the text refers to both the human being and the corporation, as the latter should be treated as a "legal person".[15]

This kind of argument, which takes as its starting point the legal entity, just like a single subject, reveals a fault in the process of assimilation of legal terms, more specifically of the notion of a holder of rights. The association with the natural person creates the impression that the entity represents a new "being" that could even share attributes that are exclusive to the human being.

---

[13] BRAZIL. Superior Court of Justice (STJ). REsp. 60.033-2/MG. Judge Ruy Rosado de Aguiar Júnior. Ruled in 08/08/1995.

[14] See TEPEDINO. Gustavo. Crise das fontes normativas e técnicas legislativa na parte geral do Código Civil de 2002.In: Temas de Direito Civil. Tomo II. Rio de Janeiro: Renovar, 2006.

[15] "In the 1886 case of Santa Clara County v. Southern Pacific Railway Company, the Supreme Court held that corporation was a ' a person' within the meaning of the Fourteenth Amendment and could sue to protect rights of due process and equal protection. Remarkably, this conclusion was reached by the Court without any argument. The Chief Justice waved off counsel, telling them the justices were already decided on the issue. 'The court does not wish to hear argument on the question "of whether the Fourteenth Amendment covers corporations, he said 'We are all of opinion that it does'. In addition to granting corporations access to the federal courts this decision opened a vast body of constitutional rights to the corporations." FRIEDMAN, Barry. The Will of The People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution. New York: FARRAR, STRAUS AND GIROUX, 2009, p.163. See also Citizens United vs. FEC, ruled in 2010 by the US Supreme Court.

Currently, efforts are being made in an attempt to prevent legal discourse - often based on evaluative elements - from leading to arbitrary postures. In this context, there is no more room for the simple formal correction of arguments; it also requires justification of the assumptions that were used to arrive at a certain conclusion.

The extraction of norms from concepts, a common practice in the legal universe, can, however, compromise this search for rationality in the decision-making process. When we assign a semantic value to the legal entity, as if the term represents a being, it is believed that the concept has the power to act as a reference for any type of reasoning.

We should not think, however, that the problem only exists in the discourse concerning the entitlement to fundamental rights of the legal entity. It is important to remember that naturalization may undermine the very protection of the human being within companies and associations. In 2003, Law no. 10,825 amended Article 44 of the Brazilian Civil Code, adding to the list of so-called legal entities of private law, two more items that dealt with religious organizations and political parties. With the change of the traditional classification of the subject, there is, even if implicitly, a certain mistake in assuming that the label of a legal entity of private law can ensure greater autonomy in the exercise of freedom of association and freedom of belief. The shift of freedom of association of the group to the new subject, given subjective otherness, can obscure the instrumental role of associations to guarantee the free development of the personality of their members.

The naturalization of the legal entity also has consequences for the analysis of business phenomena. By the creation of the individual limited liability company (EIRELI) by Law No. 12441/2011, the legislator sought to fill an important gap in our legal system: the limitation of liability of the individual entrepreneur. It turns out that the choice of creating a new legal entity ends up indirectly reinforcing the false understanding that both separation of assets and limitation of liability necessarily depend on the intermediation of a new abstract subject.[16]

Also in business companies, the discipline of the equity, the social capital, the financing and the allocation of responsibility is greatly

[16] "These 'uncorporations' are now the dominant business form for non-publicly-trade firms. Moreover, through private equite, hedge funds, and publicly traded partnerships, uncorporations have emerged as a significant force in the governance of a wide range of large firms" RIBSTEIN, Larry E. The rise of the uncorporation. Oxford: Oxford University Press, 2010, p.08.

influenced by this idea of creating a new subject, not to be confused with its members.[17] This otherness - in most cases naturalized - exacerbates the problem even more insofar as it implements, for supra-individual situations, a whole set of instruments modeled on the individual, considered in isolation.

The construction of the Brazilian legal system around the centrality given to the abstract subject produces a problem in the legal configuration of the company: the idea that the legal entity is the main protagonist in the exercise of business activity.[18]

To avoid this distorted view, we must recognize the conceptual autonomy of the activity itself in a context in which the action is placed on a level of prominence, when it is disengaged from any subjective reference. As an alternative to the action-subject, which has always guided the legal system, it is important to think of a new model, in which the subject is interpreted according to the activity itself.

5. Conclusion

According to Francesco Ferrara, the notion of legal entity acts as a lens placed against the eye of the interpreter. When properly adjusted, it allows a perfect representation of the phenomena, but out of focus, it only helps to deform it.[19]

The search for false essences ends up creating real ontological pitfalls in legal discourse. To avoid these distortions, it is important to realize that the term *legal entity* does not exactly have a descriptive function. In fact, the legal entity simplifies a number of facts and behaviors, which, with personification, come to be treated in a specific and unitary way. Being an auxiliary concept of the Science of Law, the institute should be seen as a mental shortcut, which facilitates the formation of legal statements, to the extent that the interpreter refers to other elements of the legal system itself.

[17] "The first and most important contribuition of corporate law, as of other forms of organizational law, is to permit a firm to serve this role by permitting the firm to serve as a single contracting party that is distinct from the various individuals to engage together in joint projects". KRAAKMAN, Reiner. [et. al.]. The Anatomy of Corporate Law: a Comparative and Functional Approach. 2ed. Oxford: Oxford University Press, 2009, p. 06.

[18] See FERRO-LUZZI, Paolo. I contratti associativi. Milano: Giuffrè Editore, 2001, p. 200.

[19]FERRARA, Francesco. Teorie delle Persone Giuridiche. 2ed. Torino: Unione Tip-Editrice Torinese,1923, p.35.

References

FERRARA, Francesco. *Teorie delle Persone Giuridiche*. 2ed. Torino: Unione Tip-Editrice Torinese, 1923;

FERRO-LUZZI, Paolo. *I contratti associativi* . Milano: Giuffrè Editore, 2001;

FRIEDMAN, Barry. *The Will of The People:* How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution. New York: FARRAR, STRAUS AND GIROUX, 2009;

GALGANO, Francesco. Il costo della persona giuridica, In: *Rivista delle società.* Milão: Giuffrè ,1968;

HALL, Kermit L. *The Oxford Companion to the Supreme Court of the United States*. Oxford: Oxford University Press, 2005;

HART, Herbert L. A. Definition and Theory in Jurisprudence**.** *The Law Quarterly Review*. v. 70, 1954;

JESEN, Michael; MECKLING, William. Theory of the Firm: managerial Behavior, Agency Cost and Ownership Structure*. Journal of Financial Economics.* n.3, 1976;

KRAAKMAN, Reiner. [et. al.]. *The Anatomy of Corporate Law*: a Comparative and Functional Approach. 2ed. Oxford: Oxford University Press, 2009;

PERLINGIERI, Pietro. *O direito civil na legalidade constitucional*. Translated by Maria Cristina de Cicco, Rio de Janeiro: Renovar, 2008;

RIBSTEIN, Larry E. *The rise of the uncorporation.* Oxford: Oxford University Press, 2010;

TEPEDINO. Gustavo. Crise das fontes normativas e técnicas legislativa na parte geral do Código Civil de 2002. In: *Temas de Direito Civil*. Tomo II. Rio de Janeiro: Renovar, 2006;

VANDEKERCKHOVE, Karen. *Piercing the Corporate Veil* (European Company Law Series). New York: Wolter Kluwer, 2007;

WITTGENSTEIN, Ludwig. *Philosophical Investigations.* Translated by G. E. M. ANSCOMBE. Oxford: Basil Blackwell Ltd, 1958;

ZATTI, Paolo. *Persona giuridica e soggettività*. Padova: CEDAM, 1975.

Equality and justice in children's rights

Patrícia Pereira Cava[1]
Ernani Santos Schmidt[2]

> [...] *childhood is the being's well.* […] The well is an archetype, one of the darkest images of the human soul. […] A well has marked my first childhood. I would never get close to it, unless I was holding hands with one of my grandparents. Who, after all, was afraid: the grandparent or the child? (Bachelard, 2001, p.109, highlighted by us).

Introduction

Who is this child as subject we speak of? Is it someone we must (as the adult world, being responsible relatives and teachers) *introduce* the world lived and thought out by adults in their particular and collective life stories? Or is this subject-child someone we should *embrace* in our world while we learn about their doubts and discoveries? Should we hold their hands or let them walk by themselves? Or are they actually someone we should hold and release hands with, introduce and embrace, protect and let be, every time each one of those possibilities presents itself as the precise form of what we need the most: a hand to lend?

What we aim is to contribute to the assertion of criteria for understanding the boundaries and possibilities of what is due to children, both as attitude and abstention; especially the child's ownership con-

[1] Adjunct Professor, Faculty of Education, Federal University of Pelotas. E-mail: pcava@via-rs.net

[2] Lawyer. Assistant Professor, Center for Legal, Economic and Social Studies, Catholic University of Pelotas. E-mail: schmitis@via-rs.net

cerning rights that are enforceable against adults, either his parents/guardians or educators. It is in the interface between education and law that we hope to establish our debate, aiming to organize a sensitive theoretical framework concerning what is just/unjust in adult's authority.

So that children's rights aren't just what Arroyo (2004) designates as easy abstractions, a revision of the ways in which the recognition of one as subject of rights is paramount, specifically during a life period: childhood. We will keep in mind the concerns raised by the author about the need of creating proper ways to deal with the radical transformations our time has imposed on "childhood images", changes that, by consequence, bring the need of self-criticism about the perception we have of our own adult world as school and family.

We postulate that the dialectic that makes the father and son, teacher and student identities real, as well as all the power relations they hold, has its definitions blurred in the modern constitutional democracies by the inefficacy presented in the traditional notions that political and juridical culture (especially in Brazil) have made about autonomy as extension and boundaries on faculties and obligations. This way, thinking on the idea of subject in children requires new comprehension about their rights, concerning the ethical implication of thinking how much school and family are providing just or unjust experiences while developing practices aimed at the diverse ways to face the coexistence issues.

Children's subject statute, *childhood sentiment* and children's rights

About the subject's statute on children, Meirieu (2002) in his book *A pedagogia entre o dizer e o fazer* (*Pedagogy between saying and doing*), discussing Hannah Arendt's ideas, proposes that we think of three registers: political, psychological and pedagogic.

The political register relates to an educational authority to "inaugurate the world", "[…] the fact that, before reaching adult age, the child undergoes the restrictions of "the world" and is able to develop while protected from men's violence warrants stability, continuity, it allows the social bond amongst generations" (Meirieu, 2002, p.127, our translation).

The psychological register is about the aid in the continual development of a person and the possibility of expression "of those who, although not yet recognized as adults, have important things to say to

adults" (Meirieu, 2002, p.128, our translation). The possibility of expression is paramount to the development of autonomous and responsible thinking.

In the pedagogical register emerges the contradiction between education as "formation" of the subject and education as "recognition" of the subject. In children or teenagers we have a constituted subject that is capable of interacting with us as an equal, a freedom we can only evoke, and, at the same time, a subject still in formation, one to whom we must propose knowledge and method, so they can fully take on responsibility.

When talking about subject, one must not leave any of these registers, political, psychological and pedagogic, untouched, in a manner so we do not narrow the possibilities of reflection about who is this subject we speak of. Therefore, we must understand how much the existence of each one of these registers makes it possible to analyze the adult-child relation under the ownership of rights spectrum and its integration to large notions of equality and justice.

Childhood is realization in history. According to Philippe Ariès (1981), until the end of the 19th century, children appeared mixed up with adults in western civilization's everyday life. It is only by the end of that century that we notice a tendency to separate the adult's world from the children's world. When he talks about *childhood sentiment*, Ariès points to the conscience of children's particularities through history and how they mark this construction. The three feelings are: the possibility of spoiling them; the concern with disciplining them and preserving costumes; the concern with children's hygiene and health. The consciousness of children's particularity is built under the mark of disciplining body and mind, the "enclosure" and profiling by age, class and genre in school. Distinctions that over time outline being a child, their body, the way they live and occupy time and space. Knowledge about being a child that was constituted in history ended up giving sense to what being a child is.

Just as the childhood sentiment is historical, so are children's rights. Inside a social history of people's rights (touchstone of modernity) there is a considerable variation in juridical positivity of those values brought by the transformations of what "being a child" means. And in the diverse ways of childhood realization, the juridical form of children's rights has its origins in the variation started by rationalists and empiricists in the idea of person and in the appearing of a subject's philosophy that has constituted the needed implication of the questions

concerning knowledge and justice.

In civil law systems, the modern day enthusiasm with rational authority creates a large normative system sit upon principles and codifications that have, arguably, its efficacy in hypothesis of ever increasing particularity incidence. It is possible to see in the French Revolution, more precisely in the "Declaration of Rights of Man and of the Citizen", an embracing modern origin of establishing universal rights which had to be respected[3]. In 1924, after World War I, the first "Declaration of Rights of the Children" was written by the League of Nations. It stated "the right of the under-aged to grow up, protected from any kind of exploitation" (Rocha, 2002, p.45, , our translation). In 1948 the U.N., created after World War II, approved de "Universal Declaration of Human Rights", stating once again the dignity and the rights of all human beings. Alongside UN, UNICEF (The United Nations Children's Fund) was created to aid children that were victimized by war and later on it expanded its activities worldwide. In 1989, Brazil took part in the "Convention on the Rights of Children", taking on, alongside other countries, "the commitment to aid parents or guardians of citizens under 18 years of age" (Rocha, 2002, p.46, our translation). As a result of this participation, in 1990 the "Child and Adolescent Statute" [4] was promulgated.

This juridical form of concern with the under-aged, proceeding to the expansion of the generation of rights, forwards the theoretical assertion of a branch of law as legal knowledge on childhood and political affirmation of a particular jurisdiction and public administration required for compliance with the rights then known. In this context numerous imperatives to family and school regarding the treatment of children become clear. The conversion of "paternal power" to "family power", for instance, imposes an equality logic inside the family that demands an accurate reflection about the power of sentiment and of authority in relationships between parents and children; the conversion of authoritarian state forms of political power to democratic ones turns the school into a quintessential space of all fertility pluralism that is typical of contemporary democracies.

Particularly in Brazil, the traditional legal doctrine is founded on the dogmatic assumption that the location of the subject takes place

[3] For a conceptual and chronological understanding of statements of rights see: BOBBIO, Norberto. *A era dos direitos*. 11 ed. Rio de Janeiro: Campus, 1992. TRINDADE, José Damião de Lima. *História social dos direitos humanos*. São Paulo: Peirópolis, 2002.

[4] Brazil, Law n. 8069, July 13th, 1990.

from descriptive systems. That is, in the form of normative statements that assign to each law expression one specific kind of person as its holder. This tradition fixates law reality in the legal entity abstraction, determining that rights exist as people's relationships with each other and with institutions, or as power relations of people over things. Thus, the general rule affirms the capacity to act in civil life to guide the legitimacy of the individual will to the exercise of powers and obligations. With this, liberal individualist culture assumes to ease the theoretical tension in the subjectivity theme from law's point of view. The whole supposedly legal treatment of the subject becomes a strictly formal act of searching in the statutes general statements about *who* is entitled to *what.*

Children appear in different State and international legal statutes, in which there's no hermeneutic difficulty to recognize that all children have right to what is good and necessary. What happens is that the description has limited fecundity: the error of a juridical comprehension of the subject limited to enumerating the obligations and responsibilities of individuals and institutions towards children. At best we have reached the idea of ineffectiveness, always important to know the degree of social commitment to rights. But in the idea of inefficacy as simple material denial of the listed rights the problem of just isn't contemplated as a providing and present family and a qualified school (from the point of view of official evaluating methods and systems) can still be tyrannical to children when they choose to educate them limiting the knowledge processes to mechanical forms and the dimension of motives to the demands of the market.

Ricoeur (1995) warns us that when we ask about the juridical form of the subject we are not far from the moral question about who is worthy of affection and respect, as well as the anthropological question about why the "self" is worthy of affection and respect. In this articulation of senses it is possible to notice that the subject realizes himself from constitution levels as a capable subject and that these levels are not due to classification, but demand identification. Capacity is a phenomenon that only occurs to those having a strong personal and collective identity bond, and that is why it happens side by side with responsibility, as some kind of a will to live collectively, as a true will. This way, affection and respect trigger the legal and ethical dimension of the individual as it is established that we can respect and like each other as authors of our own actions, and that we can evaluate those actions from the point of view of what is good and binding.

In this sense, the fecundity of the proposition is that the subject

is only capable while upgrading skills in interpersonal and institutional relations, in which the associative vocations forge learning of various forms of alterity – I, you, we – close (face to face relations) and especially, a "we-every-body" (relations with unknown third parties). Fitness for freedom is updated amidst a nature that guides acquiring knowledge, in a somewhat precise sense, on conduct obligations to strangers, identical to those one has with his loved ones. It is the perception that a capable subject is a necessarily responsible one that is subject to allocation. An embracing law will then define a field in which someone (capable subject) will answer *for* and *to* when facing an act, and the subject will be either debtor of reparation (civil law) or deserving of punishment (criminal law). What lies underneath this logic is precisely the fact that only the subject is liable of imputation, while things are not. Thus, all attitudes (causalities) are, from the point of view of the imputation idea, acts of freedom. It is from the inherent obligation not to cause damage as an attitude that the justification to force someone to repair or suffer punishment comes.

Now, Ricoeur emphasizes, to upgrade skills for sociability becomes a prerequisite for a real subject of rights, as he is only possible with real power in the infinite relation orders with others in which he proposes himself as a subject of recognition. So it is not enough to list supposed rights this subject owns without measuring the conditions in which this ownership happens.

Notion of justice: equality as movement and dialogue as a condition

Walzer (1997) draws from Aristotle the idea that education is performed as an expression of the deepest collective desire: to survive despite time. But the problem is that there is no consensus on what it is, is becoming or should be. There is no consensus regarding the "best character", nor the "definitive method", much less accuracy regarding the strict duty of the family or school. And for that reason it is necessary to try and understand it under the critical scrutiny of the idea of administering justice. And out of respect for family and school and how much of selflessness we know there is in such institutions, it is known that one should not speak as if you could not speak aloud. Making justice is an ethical implication due by all those who are *subjects in relation* with childhood, regarding its various interests of professional or affective na-

ture.

In the specific aspect of children, from the rights that require us to abstain to the rights that demand fulfillment, the requirement of the conditions for update of aptitudes becomes evident, since children speak to us about the usurpation of their rights in different ways (Cava, 2007), as already stated in documents and conventions. We hear of the extinction of living spaces and the experience of games and toys; we hear of the distinctions that are still given to children according to social classes: distinctions of school, feeding, housing, leisure spaces, access to culture, among others. If the right to freedom includes the right to have an opinion, expression, to play, to practice sports and have fun, how can we speak of freedom with the restrictions imposed by adults by imposing their particular ways of life? If they do not find what they need, which ideas of being an adult are they building? A helpless, lying adult, removed from its place of authority? How can they build bonds of trust with adult subjects like this? How can they learn without building bonds of trust? This recurring scenario requires us to be able to rescue the virtuous character of the revolt expressed by children. Let us remember with Ricoeur (1995, p.10, our translation) that "our first entry in the dimension of law was screaming: This is unfair!"

Justice, according to Walzer (1997), is related to social goods and happens in its distribution for internal reasons. With a theory of social goods the author reflects on the explanation and limitation of distributive possibilities pluralism. This theory can be summarized in six propositions: 1) any asset considered by distributive justice is a social good – holder of a shared meaning that emerges in the social process that builds its own conception and creation; 2) individuals assume concrete identities by means of creation and conception of social goods and without their histories of transactions among themselves and with the material and moral world, they would not be recognized as humans; 3) there is not a single asset or valid ensemble for all of the material and moral worlds; 4) from the social signification of the asset results the legal parameter of its distribution; 5) social significances have a historical character of their own and, therefore, are variable at best, there are social assets that have a normative structure that reiterates itself in many times and spaces; 6) assets with different social significances must possess relatively autonomous distributive spheres, holders of criteria and dispositions of their own.

In general, the theoretical approaches to distributive justice have taken as reference a process in which people distribute social assets to

others. Walzer notes that under this assumption, the distribution assumes significance of donation or exchange centered on individuals placed at the ends of the relationship, just as recipients or distributors. The definition for what is acceptable or what is entitled is sought in the flaunting of distributive principles alleged as controllers of the movement of assets. It happens that this type of formulation is not suitable to the complexity of the world of facts, since it invokes the compulsory assimilation of authority judgments about human nature and morality, which could never be general facts.

The philosopher reminds us that the original meaning of equality is negative: equalitarianism emerges as an abolitionist policy. The guidance is not to eliminate all distinctions, but part of them and in a particular time and place. Your target is always specific – aristocratic privilege, capitalist usury, bureaucratic power, sexual or racial supremacy. In any case, the desire is always the same: to prevent domination. Equality policies are not generated by differentiation, but by the actions taken by the privileged with their peers. It is worth saying that the struggle for equality does not originate in the mere existence of rich and poor, aristocrats and simple men, bureaucrats and ordinary citizens. It comes from the fact that the rich impose poverty, aristocrats impose hierarchy and bureaucrats impose the distance – in short, the struggle for equality comes from what people or groups can do to people or groups without power. Egalitarianism is, therefore, the political movement for a free of domination society. The word equality chains the magnificent hope (WALZER, 1997) to overcome the submission and the command and not a requirement that all have the same things in the same amount; it does not assume the extinction of differences, but preventing the control of means of domination, so that all are equal for all relevant issues in moral and political terms.

The means of domination vary in time and space. Kinship, education, divine grace, state power, capital, and other social assets, in various times and places, have fulfilled the role of favoring that men dominate each other. Walzer (1997, p. 13, our translation) notes that, "even though the experience is personal, nothing in people themselves determines their character", and so he insists that equality does not imply repressing men and women but controlling social assets. His purpose is the description of a society in which no social asset serves or can serve as a means of domination.

Tyranny always has a specific character, drawn on the breach of any border, in the violation of any particular social significance. Walzer

uses two assumptions operated by Marx and Pascal and summarizes the following: social assets have a social meaning and in its interpretation we walk towards distributive justice, seeking internal principles for their various spheres of distribution, it is the predominance over assets that materialize dominance of individuals and groups, through means of tyrannical invasion of an autonomous sphere. It is not unfair that inequalities within the spheres based on merit, need and free exchange to the extent that the social good that underlies not allow conversion to another sphere – in this case, there is no domination. The critique finds its fundamental principle: any individual or group that has X may require that Y will be due only for having X and not for any intrinsic connection with Y. This principle urges us to go through the meanings of social assets and study the distributive spheres from within, therefore, it is an open principle.

In affirming the principles of a liberal theory of dialogical legitimacy (rationality, consistency and neutrality), Ackerman (1993) proposes that it is only possible to capture the source of rights under the assumption that these emerge in a community dialogue that takes place in facing scarcity and its normative consequences, because it is at the core of efforts to give reasons for the claims of power that the rights are given reality and meaning. This way, the most essential right is the one to be a free and equal member of a dialogic community. And the basic way in which it can occur is the participation in the public process of deliberation about the essential themes of forms of sociability. It means that all citizens have the right to join the process of political deliberation and take part on the definition of substantive content of other rights. From these postulates, the author strives to enable dialogue as a resource against domination and observes that social justice requires political and intellectual effort under which liberalism is to be conceived beyond its tradition.

There is, however, something peculiar in that endeavor: while effecting a defense of liberalism, it also establishes a kind of internal critique, one of reflection on the western liberal experience that sees a gap between theory and practice, similar to the one between Stalinism and communist principles[5]. If political liberalism is to be a public culture that enables the community in diversity because it does not represent a sin-

[5] "It would be naive to insist that a political ideal must have a trouble-free implementation, only a silent acceptance of the status quo can ensure the absence of any tension between ideals and reality". (Ackerman, 1993, p. 54, our translation).

gle substantive conception about good and decent life and promotes anti-sectarianism that allows different strategies of justification, we must also recognize that the postures and notions that believe the classic man of liberalism was the limit of human creation are not satisfactory, nor are the ones those that imply authoritarianism under the guise of going beyond it.

Ackerman states the *principle of neutrality*[6] as the impediment in dialogue to the claims of privileged moral authority. In summary, he states that no demand can be justified in holding that its content or tenderer are inherently superior to others. Every induction in the behavior of others is exposed to critical examination in a just society. And for this, all reasons (material and/or symbolical) that place desiring subjects into conflict will have a more or less just solution, in accordance to their possibilities of legitimation in a consistently rational and neutral dialogue, that is, one in which the popular belief that "no one is better than no one" prevails. This represents the full recognition, the reciprocity in one's condition as subject. Thus, postulating the limitation to those who want an unfair share of the world's benefits, the author emphasizes that no form of power is exempt from proving their legitimacy and he claims critical aptitude in the liberal dialogue in face of major contemporary challenges.[7]

Now, the same way that the sovereignty of the despot or the exploitation of labor by capital does not have legitimacy in a natural law, because they do not withstand a dialogue demanding reasons settled in the goal of reducing the influence of the "hazards of nature in the lives of each person"[8], authorities of family and school are also submitted to the test the dialogue. Families should not act as seeing "weeds preventing its private garden" (Ackerman, 1999, p.187, our translation) when children show themselves resilient to plans formulated by this same family; and schools cannot contain cultural freedom, which is usually done when the teacher summarizes the access to the citizenship experience to

[6] Not to be confused with the idea of scientific neutrality from traditional positivist theories.

[7] "The blindness of the supporters of laissez-faire that do not acknowledge that the owner of private property must legitimize his power no less than the government bureaucrat; the blindness of the communist who avoids this first error to immediately protect the leaders of the party power from the tests of dialogue ". (Ackerman, 1993, p. 36, our translation)

[8] GARGARELLA, Roberto. *Las teorias de la justicia después de Rawls*: un breve manual de filosofia política. Barcelona: Paidós, 1999, p. 138.

the management of prevailing bureaucratic forms. Discussing the fair treatment of children is not so different from the problem of justice in general. It is necessary, then, to understand the limits of the power of adults over children, and knowing that to love sincerely a child requires us to love all children in a very special political and legal way.

In a well-delimited plan, like the authority of adults over the test of neutral dialogue (once again: only where nobody is better than anybody else) the ongoing problem is to find the right means of settling accounts with the seriousness required on the issue of legitimacy as it is peculiarly displayed by children. Initial education – responsibility of the various expressions of family and school – composes a scenario of development of cognitive, language and behavior skills, in which the power of adult authority is under the permanent test of just being real because it is founded on fear, or may be legitimate as it is founded on respect and affection.

Traditionally, political philosophy addressed the issue of children in view of the peculiarity of an alleged incomplete subject to the demands of reason. Ackerman is vehement in stating that this incompleteness, if true, makes children even more due to more complete cultural freedom such as unrestricted access to various modes of conduct demonstrations of value pluralism etc.

The authority of family power as an objective implication of boundaries to the will, which still may imply in coercion, requires something more than the assumption that *adults have intrinsic superiority*, that *age determines reason* or even that *parents and teachers know what is best.* While it is not possible to assume that a single empirical manifestation is "the right one" regarding the adult/child relationship in school and family, in neutral egalitarian dialogue it is possible to arrange elements that make the truth and taking a position on this or that situation simpler. Well, committing to the child, respecting them as a subject, involves thinking about the encounter with others, in the various forms of listening to others, to see them, in the different ways to live with this other who challenges us, instigates us, who resists our intentions. An ethical commitment towards our own process of humanization. A project that passes through the continuity of what constitutes us as humans in the legitimate relationship with each other and also involves the breaking of real ties that condition us. Breaking these ties without losing, however, our references, requires that we become aware of our own "inconclusiveness", pointing toward the eternal search process in which learning is a face.

When it comes to equal treatment towards children, we do not deny that there is a reasonable level of power in adults' determinations, but we hope to find out which aspects are inexorably coercive, because beyond them we must recognize the child as an equal. The contemporary family power consists of expressing restrictions intended to preserve the child of danger and violence. We seek the determination of an adult presence as an obligatory imposition that teaches children to enjoy the experience of life and its many possibilities and does not give reasons for the loss of freedom. Restrictions to children's momentum and inclinations that integrate with several orders in which are developed the conditions for recognition of themselves in their rights throughout their lives. This is how the traditional legal systems of "parental rights" have been replaced by a right of families in which, despite of form, the power in some aspect is not in a supposed strength/nature, but definitely in convention. And the convention assumes pedagogical tone because authority is required when the child insistence of satisfaction needs to be confronted by another subject that does not exist just for her – the family and the school must teach the limits to self-aggrandizement as a condition for cultural coherence (Ackerman, 1999), without which no one learns to be free and freedom cannot occur.

It so happens that there is no single standard of what should be done and what we have seen repeatedly are authoritarian practices which violate the right to recognition as a subject of rights in the child. Particularly in what Ackerman (1993) calls "horticultural school", which understands the pedagogical action as shifting management between pruning and permissions, resulting always in control and repression of the peculiar way that children subvert the order – with tenderness or anger. Education in the broadest sense, made possible by a theory of justice, cannot be considered through its results as a vegetable garden, but on how much it takes seriously the issue of legitimacy posed by children in the resistance movement to the initial containment of impulses and desires up to the capacity to dialogue on responsible decisions in social life.

Final considerations

The conditions under which children join adults in relationships are ones of protest from the beginning. It is with great indignation that everyone comes to the world! Everything else then becomes an experi-

ence of determination by adults. In our epigraph we bear the image of holding hands near the well so we could think about the delicate but necessary relations between adults and children. Is it the child who asks the adult's hand to be introduced into the world of knowledge and the world of social life, or are the adults who take the children's hand, afraid of flights they can possibly make? Who releases and who holds tight? It is like the child we – adults – once were insisted on hiding inside the pit, afraid to leave, afraid to take flight, afraid to look for another child and realize that she lives in a world different from that of our childhood time (neither better nor worse, only different).

Amid all the complexity of everyday actions, but also in the countless possibilities to dream and imagine the world, it is that children constitute themselves as subjects. On the other hand, they lose opportunities due to interdictions by family, school, society – the square which cannot be visited, the game that cannot be played, the violence in the streets and in people, the thought that wants to run wild and that the adult will not let go, the impediment to the adventure that is an everyday experience marked by randomness, and finally, the rights that are stolen from them. Children challenge us to think about the family and the school as spaces/points in time where they can apprehend the world and learn to make choices that give meaning to personal/collective identity and not as places to get stuck performing a determined script.

Children are exposed to various forms of sanction when their expressions and behaviors are not approved by adults who have power over them, especially in family and school environments. The forms of this exercise have a direct effect on how children will cope with the various conceptions of good latent in different ways to live and how they will compose expectations and plans for their own lives. And because life always presents scenarios of difficult choices, under which no decision enjoys guaranteed approval, the legitimacy of sanctions and disapprovals is to be always proven, never presumed.

It occurs that choices, particularly regarding the effects of the will and conduct of children, are always operated within limits and the problem is not exactly in the recognition of this reality, but in the extent of these limits. The perspective of the right to treatment as an equal (Walzer/Ackerman) strengthens the reflection on itself –it is possible to debate everything and all values, intentions and motives are subordinate to critical examination. We must remember, concerning the statute of the subject in children, that the political record imposes the education authority as a guarantee of development under the protection against

violence, but only an egalitarian stance allows us to know how violence is, when is it happening and what we must do to prevent it. On the other hand, the psychological record admits children have important things to say, and therefore it implies the possibility of expression as a condition for learning autonomy and responsibility. It would be impossible for anyone to even learn to deal with the restriction to impulses and immediate desires and subsequent integration into forms of otherness without ever making symbolic exchanges while being taken seriously.

The liberal individualist tradition has a hard time integrating the relationship with children in the context of thinking about justice because it does not seem to want to admit that this relationship should be governed by the same principles of dialogue and equality that define fairness in any power relationship. The restrictions on children are only legitimate when they may be anchored in something beyond the factual power of adults. And this, rather than prevent it, accentuates the need for adults to exercise their authority as an effort in ethical formation and to realize the fruitful contradiction in the pedagogical record of the constitution of the capable subject – to recognize in formation and to form to recognition – for children provoke us to build a living, human and sympathetic world, in which subjects have the right to learn and teach in all feasible and possible conditions. The persistent inventiveness of the subject-child can constitute itself into an encouraging source for our numbed inventive capacity and our deadened ability to recognize the subject.

References

ACKERMAN, Bruce. *La justicia social en el Estado liberal*. Tradução Castelhana de Carlos Rosenkrantz. Madrid: Centro de Estudios Constitucionales, 1993.

_____ *La política del diálogo liberal*. Tradução castelhana de Gabriela L. Alonso. Barcelona: Gedisa, 1999.

ARIÈS, Philippe. *História social da criança e da família***.** 2.ed. Rio de Janeiro: Ed. Guanabara, 1981.

ARROYO, Miguel. *Imagens quebradas*: trajetórias e tempos de alunos e mestres. Petrópolis, RJ: Vozes, 2004.

BACHELARD, Gaston. Os devaneios voltados para a infância. In: _____. *A poética do devaneio*. São Paulo: Martins Fontes, 2001. Cap. III, p. 93-137.

CAVA, Patrícia Pereira. *Criança constituindo-se sujeito na sala de aula*: uma fabulo-

sa emergência de complexidades. Porto Alegre, 2007. Tese (Doutorado em Educação) – Faculdade de Educação, Universidade Federal do Rio Grande do Sul.

MEIRIEU, Philippe. *A pedagogia entre o dizer e o fazer*: a coragem de começar. Porto Alegre: Artmed, 2002.

RICOEUR, Paul. *O justo ou a essência da justiça.* Lisboa: Instituto Piaget, 1995.

ROCHA, Ruth. *Os direitos das crianças segundo Ruth Rocha*. São Paulo: Companhia das Letrinhas, 2002.

WALZER, Michael. *Las esferas de la justicia*: una defensa del pluralismo y la igualdad. México. Fondo de Cultura Económica. Trad. Heriberto Rubio. 1997**.**

_____. La crítica comunitarista del liberalismo. *La Política: revista de estudios sobre el Estado y la sociedad.* Primer semestre 1996. Numero 1, liberalismo, comunitarismo y democracia. Barcelona: Paidós, 1996.

Global logic and surrender
How to think about the antipodes

Kory González-Luis, PhD[1]

Abstract: We live a new disenchanted realism, where the discourses of the equality, the justice and the emancipation does not seem to occupy a relevant place on the agenda of the policy; among other reasons, because the instrument designed to carry them out, the State, has also entered into crisis. Not only have crumbled the ideas of communism and socialism or the pride model of the Welfare state, but also the doctrines of the market economy and of the National State. It is the inherent contradiction to the system; the capitalism, even the domesticated one for the democracies and up to sanctified by they, has the great fault that limits their havoc: its link with the process of environmental deterioration in addition to the finding of the destructive effect reconstructs his hereditary trait of privilege to minorities with the derived effect, its Achilles heel: the excluded great majority urges its presence in the forts of the well-being. Poverty already no can be considered in terms of national State (declined in his sovereignty), it is an international and mobile poverty, which arouse entirely new challenges to institutions, politics and science.

Keywords: equality, justice, crisis, human rights, poverty mobile, community sense

> "Far from the distinguished resignation and charming utopia still being possible another way. Today there is a place for the redefinition of a true reform, radical in its analysis and ambitious in its objectives, that gives back, at the same time, a positive sense to a necessary part of utopia in politics. Nothing obliges to be happy with a managerial speech that equals to deny deep transformations, or with dreamer nostalgic speech of rejection. Yes, current tensions are the result of the fundamental dynamics of modern societies and the market economy. But these tensions must be mastered. And they can be. If it wants to regain its role, the policy must be devoted to formalize this diagnosis and perspectives that leads." (Fitoussi and Rosanvallon, The new era of inequalities)

[1] University of La Laguna (ULL)- España.

Power and counter-power: readings from Ulrich Beck[2]

The board on the table. –

The new global logic introduces immense challenges. It is a force of regulation that imposes guidelines and global policies. The neoliberal hegemonic discourse generated applying a recipe book whose results have been disappointing. The result of these policies has been a significant increase in social exclusion, amid a series of crises affecting some of the largest countries in the periphery, in the first instance, and then ends up hurting the very stability of the core. At the same time, the accelerating pace of globalization progressively constrains the power of nation states, subordinating them to strict monetary targets that prevent them from practicing Keynesian principles in force in most of the second half of last century. Trying to face these new challenges mean, as a first condition, accept that we are definitely inserted in the global reality, and it defines a very big stagnation.

People are increasingly vulnerable in all parts of the world. The erosion of the welfare state removes safety nets. And the financial crisis is now a social crisis. Globalization erodes the tax base of countries, particularly developing countries, reducing public resources and limiting the institutions that protected the citizens.

Economic liberalization has made many promises unfulfilled. Globalization has not given more fruit than the reproduction of old asymmetries and makes new ones, reflecting the contrast between the rapid internationalization of a few markets and the absence of a global agenda complete and less distorted.

Progress has been frustrating in terms of economic growth, changes in production, increasing productivity and reducing inequalities.

Vulnerability has become a dominant social trace in much of the geography of the globe. The market dominance in the economic life, the economy opened to the world and the withdrawal of the state of the functions that had in the past left insecure broad layer of the population of middle and low income.

The neoliberal hegemonic speech of the period following the end

[2] Beck, Ulrich (2003). Pouvoir et contre-pouvoir à l´ère de la mondialisation, París, Éditions Flammarion.

of the Cold War, which promised the largest countries in the periphery a new era of prosperity from the policies of "opening, privatization and estabilization" was ineffective. The results were generally disappointing. The increased flow of trade resulting from the opening benefited the countries with greater capacity to add value to local production, generating recurring trade deficits. The automation and outsourcing of production processes reduced the growth of jobs and expanded the informality of its labor market. The fiscal balance has required very tight public budgets precisely at a time when the perverse social effects of privatization are in full force, further reducing the legitimacy of governments and political classes. And the privatization of public services has required tariff adjustments over the earning capacity of the population.

The world has learned that the global economy presents greater risks than anyone could imagine. The logics of globalization and fragmentation of production chains, very appropriate for the strength of contemporary capitalism, joined the global cheap labor groups without necessarily increase them revenue. The formal jobs grow less rapidly than direct investments. And if there are well-paid opportunities in flexible working, the informal sector basically accumulates more precarious work and misery. Large transnational corporations, responsible for the development of technological options, reinforce structural unemployment claiming that their mission is to compete and grow, and not necessarily create jobs.

In the last two decades of the twentieth century, the neoliberal speech swept the world economies. The theoretical vacuum and the inability of management of the national states, phenomena that followed the post-Keynesian crisis, opened space for the fiery advocates of the minimal state, the reduction of size was presented as fundamental to solving the problems of public sector strangled by debt. And it preached the labor market flexibility as an important condition for facing unemployment.

Indeed, the consolidation of capitalism in the period after the Cold War had clearly defined the contemporary hegemonic tone. The mobility of capital and the emergence of a global market created a new elite that controls the flow of financial capital and information, acting especially in clusters networks, and gradually reducing the ties to their communities of origin. As a result, while the international market was unified, state authority is weakened. With this increased fragmentation, tribalism revived and accelerated the loss of legitimate monopoly of violence by the state, which now competes with armed groups and orga-

nized crime in various parts of the world.

The consequence of this process was a series of crises that have caused a significant increase in social exclusion in much of the world and the marginalization of groups that until shortly before, they were integrated into the model of development. To further complicate this picture, the revolution in information and communication technologies, incessantly increased the consumption aspirations of much of the world's population, including the excluded. The process of globalization also progressively limited the power of states, limiting their ability to operate their main discretionary instruments. National borders became transposed all the time, being assumed as obstacles to the free play of market forces.

Nation states failed to continue to respond to calls to ensure the survival of the citizens who are being driven to a large amount of formal labor market. Occurs what may be called "democracy effect": increases the number of unemployed and poor, growing his political base. We introduce, in this way, a clear dissonance between liberalizing discourse of elites and their political practice. Meanwhile, the question of the future role of nation states remains open, and the growing disparity between social demands and the inability of the State to meet them in the conventional way, because while global capitalism thrives and nationalist ideologies move across the world, the nation-state loses significant parcels of their power.

Moreover, while the periphery countries are threatened by speculative resource flows, mature economies have to face sudden liquidity outbreaks and periods of recession. And, especially in the poorest countries, governments have no budget or effective structures to ensure the survival of new excluded.

This context of 'new poverty' and 'generations of uncertainty' has created a wave of immigration, including middle-class individuals, unprecedented in contemporary history. In continental agendas the issue of forced exodus will become, yet a little time, a serious and big problem without management formulas.

The best understanding of this painful and complex picture forces us to deepen the analysis of the mechanisms of the new global logic and identification of structural imbalances it favors.

Pieces of the meta-game. –

This new century has placed in full force a new global logic. It introduces immense challenges in the practice of world politics and has features much more complex than those that were in effect at the end of the Cold War. Using a competent metaphor by Ulrich Beck (2003), we call this new reality 'meta-game'. Consider here the term "meta" in the sense of what transcends previous models. This new system introduces many paradoxes and lots of lack of foresight, because the rules are not already relatively stable, they change in the course of the game, confusing categories, scenarios and plots. In the aftermath of globalization, the state loses more relevant position of power of collective action, its borders are despised and are no longer able to regulate the rules of political action. The nation-state and the welfare state are diluted. With the liberalization of borders arise unknown rules and roles, new contradictions and conflicts. Like a game of checkers where movements occur with unusual freedom of the chess pieces, the most powerful players jump on each other and change direction without notice, inventing new roles. It is true that the old national-international game was dominated by rules of international law that started from the assumption that states could do whatever they wanted with their citizens within their borders.

These rules tend to be questioned. The paradigm of sovereignty is placed in check, making more room for international humanitarian interventions; diplomatic immunity seems more relative. But who decides today the rules to be applied? Beck recalls that the possibility of action of the players, especially the strongest, depends heavily on how they define themselves and their new conceptions of politics. In this new context, nationalism can become extremely expensive, preventing the discovery of new strategies and power resources.

The first condition to unblock this view is to accept the fact that we are finally inserted into a new -and often vicious- global reality. It involves the assumption of a cosmopolitan outlook of citizens and public and private institutions that become part, like it or not, of the overall logic. Is this realistic attitude which maximizes the chances of action of meta-game players. Reversing the Marxist principle, this new essence that will determine the awareness of the future space of action.

Contemporary globalization is a force legislation imposing guidelines and policies. If they lead to serious crises or deadlocks to countries that assume alone the risk of behaving as they were required,

the international system, whose current rich countries often systematically violated those rules, wash their hands. Through instruments like the investiment-grade, is decided who behaved according to expectations or not. The former are included in the game, the others will be excluded and suffer the harsh penalties of investment flows.

We can group the actors of the new global game in three main areas: capital, civil society and state. In more recent years, terrorist groups acquired status of new global players, playing with States the monopoly of violence. The countries are under pressure on two fronts. It demands a minimalist state, where autonomy comes down to choices restricted to the implementation of neoliberal rules. On the other hand, the markets are non regulated, services are privatized and we are witnessing a progressive deterioration of the social box, which, paradoxically, requires a strong and very efficient regulatory apparatus, including to have the power to impose harsh conditions to the civil society as the indexation of rates higher than the increase of the salaries, considered necessary measures for the adequate remuneration of capital.

Nations, especially the big countries in the periphery, are forced to take down the costs of their production factors to attract part of the production chains of transnational corporations, what is called specialization strategy, highly competitive and predatory that stimulates an overall decrease of costs of labor and a tax exemptions war.

The traditional concept of state power was linked to the control of territory, population and resources. Large corporations and capital flow - cores of the global economy - circulate freely in the global space, allowing them to maximize their power over the states, encouraging competition and throwing them against each other simply exercising the "exit" option: "I do not invest more, I go to another country". No matter more territorial control but other open access to the market and cheap labor: all factors of production transit freely -corporations derive their profit- excluding labor, eternal prisoner of its territorial boundaries.

Under these conditions, little remains of the foundation of territorial and national economic authority. Real wages decrease as a function of increasing global supply. To participate in the production chain is no longer an option , it becomes an imposed obligation by the global logic: get out of them is even worse.

It operates in the interstices of an unregulated system, in a meta-legal field, taking the digital space and exerting a growing influence on the decisions and state reforms, making them coincide with the priorities of the global market, both in the rules relating to the work and the

processes of international arbitration. The ancient sovereignties are now shared between states and economic actors.

Those ones always the "exit" option as a weapon, leading many states to come closer to the interests of the neoliberal regime. With this pass TNCs take almost political decisions. Governments and public opinion are transformed into spectators and democratic legitimacy gets weak. There is no clear definition of responsibilities nor legal, political and social system that approves or legitimize them.

In regard to civil society, on the one hand their power was limited to the ongoing weakness of the union movement, incapable of becoming viable in supporting the growing number of informal employment and unemployment, especially caused by intense processes outsourcing and automation. Despite this, with huge gaps left by the state, the civil society was incorporating into public life countless autonomous civil associations and a media vision for social, economic and political activities of individual groups, increased the demanding public nature of their interests, demanding recognition, regulation and safeguards of its institutions.

In this new public space are mainly what became known as non-governmental organizations (NGOs) , but also a new association from neighborhoods , people, and cultural, environmental and recreational of local character initiatives; small professional associations and solidarity with different social groups; associations of claim or advocacy focusing gender, race, creed, sexual orientation, ethnicity ... or any other identity system for membership. These new players introduce substantial changes in the political culture, since in theory no more aspire to joining the State and defend a new model of collective action linked to territorial criteria and / or theme .

The action of NGOs and social movements, even if they advanced enough, not even know who to claim and how to influence the wider national and global alteration process, which leads to progressive asymmetries, increasing poverty and concentration of income and power.

It is necessary to highlight a very special part of the new global economic logic, who is still out of play and can play a key role in the future balance of power: the consumer, the sleeping giant, which, as may well remember Beck -it might transform his shopping in a vote (or veto) on the political role of large groups in the global scale – in so vital issues as automation, unemployment, environmental pollution and hazardous - technologies, struggling with their own weapons: money: or rather its absence (refuse to buy). But this is not a simple utopia, we have to work

hard at transnational level.

While several countries are disputing these investments and playing ones against others, these actions of civil society simply take large companies to wield his fatal threat again: the "exit" option .

In the intense and changing variable geometry that promotes the new game, today's ally may be tomorrow's enemy. It's a classic case of South-South ally, type Group of Twenty (G-20), temporary agreements like India - Brazil - South Africa and the support of international NGOs in specific resistances. Still, there are blocks of interests that define basic conflicts. One of them places multinationals corporations against social movements. Large corporations, with its immense faceless power, define the direction of techno-scientific research and technological vectors, the global distribution of production and products are considered as objects of desire.

They model the means by which penetrate the discourse designed in shaping minds, consciences, desires and lifestyles (including, in the first instance, the ones which seem alternatives). With all this power, are continually exposed to criticism about the consequences that society can attribute to them, environmental degradation, risk of using biogenetic, food toxicity, growing unemployment and informality, misleading propaganda. The effectiveness and legitimacy of social movements will rest on their long-term credibility in the role of fact witnesses and revealing hidden truths or made-up for long time.

As it seems obvious, it is essential therefore to redefine the role of government and public bodies. And hence, the necessary resemantization of 'politics', the speeches, the stages and the field of political action, as tools to rebalance, tame and reverse the forces at play.

Subverting the rules. -

Depending on the impasses configured here, the transnational political gains a new importance as it can become a response to the expansion of market forces. If it is true that states have reduced resistance or adaptation options, it is also true that a federation of states can recover and develop the cooperative power of politics and conquer in the economy world new features and options to influence the directions of balance of power.

Beck reminded that autarchic capital strategies aim to minimize global independence of States. Its goals are achieved through three

movements of fusion: capital with law; capital with the state, and of economic rationality with personal identity. Strategies of capital sufficiency are confused with global experience neoliberalization of law. They are incompatible with any state intervention.

The mobility of capital and the investor dictatorship establishes a brutal competition between States and gives the world economy the power to exclude. Its main strategies are the control of transnational space, control of innovation through science and technology, the incentive to specialization and outsourcing to minimize overall costs, the issue of transnational law and submission of communities to their strategic decisions.

The legitimacy of this process is induced by the "authoritarianism of efficacy", a kind of self-legitimation that rests on the rationality of the specialists and the power of the media and the powerful ones. Efficiency and power, here as absolute synonyms, tries to impose the regulatory power of the transnational private 'state' as organizational strength of the global economy.

In the global era, this is the role of the IMF, the International Bank for Reconstruction and Development (IBRD) and the WTO, which try to consolidate the power of economic actors in the transnational space. But if private authority replaces or undermines legitimate public authority, not just because it is more effective, but because it gives these powerful actors a means of legitimizing their interests without having to assume the public consequences of their actions, without having to search complex democratic and without the obstacles imposed on the States issued constitutional always required to renew its legitimacy authority consent. The ultimate responsibility for the social consequences of these global actions ends up being of the government, which did not foresee, regulated or prevented.

To which is attending for the first time, Beck recalls, "is the emergence of a state without territory, not political, without public opinion, a state without society, located in a no-place, practicing a no-policy, in which he restricts the power of national societies fracturing them from within." Anyway, is identified on the global stage a sovereignty in formation perfectly symmetrical to state sovereignty, a new form of non public organization, of private power, that is imposed to sovereign states, a network of supranational governance of the economy, unprecedented political combination which causes its flow of legitimation in private authority. Are developed, in this way, new types of private courts and transnational arbitration bodies, governed by private law known as

lex mercatoria.

However, and paradoxically, the interests of society and the public good can be re-energized by serious impasses caused by the experience of the current political crisis. The world economy and the market in general are in need of a new state policy that creates a regulatory box key to its operation, especially for dealing with anomalies and disparities created by private economic agents. This could be solved with the legitimizing force of reorganization trans-regional, democratically organized and reintroducing the space of political mediation in the overall picture, now involving citizens and consumers linked by networks.

This new conception of power will be strengthened by a curious coincidence of interests. Apparently, the global economy can not do without the state and its policies. She needs a powerful trans-state in the global political support plan, able to impose an ordering and acceptance without which the power of transnational actors is complicated. Although the strategies of global capitalist generate the adequate accumulation to keep it in expansion -what appears to be the case at present- how to treat the losers of globalization and their barricades, with the continuing crisis in the peripheral countries and fundamentalism mushrooming all over the world?

The periphery countries try to attract capital at lower costs, fewer controls and exemption areas. Specialization is materialized by a paradoxical regulation: abolition of the rules. This is not a free choice, but a kind of "choice of Sofia" –with the option of the less bad-. We walk into a kind of proletarianization of States. The competitive strategy of radical inclusion matches the interests of rich nations, which maintain their cultural values ??and open spaces to the highest rate of accumulation of their capitals. This way, it does not seem to be a light at the end of the tunnel.

Transnational collaboration strategies, including regional cooperation agreements - can enable the start of a new power play. Thanks to its mobility, companies are able to launch some states against others and weak them. This strategy, which aims to increase competition among private actors and decrease it between states, has a high price: restriction of national autonomy. The only way that states react to this system of mounting losses is to understand the game of the companies and imitate it. This can only be achieved with an interstate cooperation, which requires a progressive dissolution of the 'natural' unity between state and nation.

Transnationalization strategies requires a new policy of bound-

aries. The economy finally turned and went from national to global; but politics, that defines the legitimacy, it remains territorial and prisoner of its national characteristics. Political sovereignty is always understood in its national boundary, determining the way in which we see the international relations of cooperation. The cooperation between nations no longer be designed and developed as a international cooperation but transnational. You can not revitalize politics in the neighbourhood, community, tribal, national space without transcend the narrow and cheats alcoves of the neighbourhood, the district, the tribe, the nation.

In another generation strategy to find a power anti-power, the idea is to open a new transnational public space to convenes the wounded, rescues the expelled, gathers indignant wills, that, ultimately, reverses the idea and the reality of docility of the category 'people', from a re-foundation of the policy as practice of full humanity from an ethic of miscegenation, the only viable for a condition of future.

From Art to Politics
Challenging representation

Lucas de Oliveira Gelape[1]
Thiago Álvares Feital[2]

Abstract: The 20th-century witnessed two convergent movements. The first assumed the form of an aestheticization of the politics and the second of a politicization of the art. Paradoxically, still nowadays the common sense propagates a romantic vision of the artwork, in which art assumes the character of an instance in between the transcendental and the humane. Isolated from the world, the artist, herald of the sublime, would see its works advance according to the inspiration and endowment, notions so naïve as dangerous. Separated from the art by a deep and seemingly unfathomable cleavage, and bound to the materiality of the world, it is found the field of politics. Looking back to the tension which delineated the Modernism throughout its history (during the period of the 1930s to the 1980s, approximately), it is found and increasingly close relation between State and Art first, and big companies and art institutions later. The relevance of the problems offered by the Modernism derives partially from the manner that they were placed. Definitely, the 20th-century art went beyond the geometric space of the art galleries, and its inevitable result ricocheted on the politics of representation, and the political representation. Whether through the reorganization of artworks in a permanent exhibition room, or the recapture of issues related to minority rights, or the search for new ways to exercise political participation, the task of what has been conventionally called post-modern leaves a challenge for law, arts and politics. In the field of politics, from Nadia Urbinati's three perspectives on Representative Democracy, the political representation faces challenges similar to those faced by post-modernism. After the collapse of juridical and institutional perspectives, the representation, this "operative term within a political process that seeks to extend visibility […] [to] political subjects […]", in the words of Judith Butler, is questioned under the sieve of the deconstruction of the subject; the constant tension between emancipation and regulation, proposed by Boaventura de Sousa Santos, sets the

[1] Law student at the Federal University of Minas Gerais (UFMG). CNPq Scholarship for Scientific Initiation. lgelape@gmail.com
[2] Law student at the Federal University of Minas Gerais (UFMG). thiago.feitalv@gmail.com

tone of the contemporary law, crossed by organized movements with different ideologies, that fight (or bargain) their rights in the stage of civil society. The questions which Modernism proposed itself on the 20th-century are still without answers. Those are the political questions that the 21st-century is trying to respond. Between arts and politics, where is the emplacement of representation in the contemporary world?

Keywords: Representation. Modernism. Representative Democracy.

1. Introduction

Il faut être absolument moderne.
Arthur Rimbaud

In order to understand the history of Modernism in the 21st Century, it would be necessary to proceed to a genealogy of the concept "modern". This intent, by its grandiosity, is beyond the limits of the present article. However, we need to return at least to the 19th Century, to Baudelaire's texts. The fundamentals of the concept of modernity, to which the 20th Century is heir, are found in this author. Modernism is relevant to the present study because the problems of representation are problematized more than ever. ***Between arts and politics, where is the place of representation in the contemporary world?*** The answer to this question can be found in Modern Art.

2. Modern, modernity, modernism

If "the modern" is understood as a particular conscience of an epoch which refuses its immediate past when positioning itself with respect to the time, this concept has been recurrently used in the Western history:

> The modern rejects the dead body of a petrified tradition, exalts the absolute beauty of the present moment, but condemns itself in one stroke to the History's tyranny. It is not modern if not by a *preliminary* instant, by a non-existent length in the inexorable march of Time. One who is pretentiously modern today knows well that he should, tomorrow, yield to other more modern than him. Every

> modernity implies its own denial.[3] (FROIDEVAUX, 1986, p. 90).

In this sense, in a way very familiar to Romanic languages speakers, the modern is the opposite of the antique or the classic. It is spoken thus in an indiscriminate way and loosely, for example, of "classical music" as opposed to "modern music" and, more generally, in "modern times" as opposed to "old times"[4]. Probably, this is even the sense of "modern" used by Habermas (1983, p. 02, our italics) in his trendy criticism of post-modernism:

> The word "modern" in its Latin form "modernus" was used for the first time in the late 5th century in order to distinguish the present, which had become officially Christian, from the Roman and pagan past. With varying content, *the term "modern" again and again expresses the consciousness of an epoch that relates itself to the past of antiquity*, in order to view itself as the result of a transition from the old to the new.

The definition of modern which opposes that concept to what *came before* is recurrently showed in narratives about art[5]. On the other hand, if one situates the modern on the time of historical narratives, historiography is proved to be vacillating. Accordingly then, it is more useful to think of the modern as a *stance*. This conception of modernity as an *attitude* is found in Baudelaire. For this writer, modernity corresponds to the intention of an ironic heroization[6] from the present. In this intention,

---

[3] In French in the original: "Le moderne rejette le poids mort d'une tradition pétrifiée, exalte la beauté absolue du moment présent, mais se condamne du même coup à la tyrannie de l'Histoire. *On n'est moderne que pour un instant liminaire*, pour une durée zéro dans la marche inexorable du Temps. *Celui qui, aujourd'hui, se prétend moderne, sait bien qu'il devra, demain, céder à plus moderne que lui. Toute modernité implique sa propre négation.*"

[4] In this same sense, "modern art" assumes the meaning of "abstract art" or "contemporary art" on common sense.

[5] To Bourdieu (1996, p.160), these displacements constitute proper peculiarity of the artistic field: "[…] by virtue of an almost perfect unification of the artistic field and its history, each artistic act which leave its mark by introducing a new position in the field 'displaces' the entire series of previous artistic acts. By the fact that the whole series of pertinent 'coups' is present in practice in the last one, an aesthetic act is irreducible to any other act situated in another position in the series and the series itself tends towards uniqueness and irreversibility."

[6] "Something of this heroism is reflected in the dandy. It is the very absurdity of giving

respect and transgression are simultaneous and materialized in a strict practice of structuration of the own being *in* the present (FOUCAULT, 2001, p. 1390). Modernity presents itself as an obligation to the *men* of its time. To Baudelaire it is not sufficient to insert itself comfortably on the present-time flux. Moreover, being merely updated, inserted in its own epoch, is characteristic of the *fashion* which is inferior to the truly *modern art*. To the poet it is necessary to go beyond: it is not enough to *stay modern*, it is necessary to *be modern*, and to be is to *make itself* constantly:

> One must be forever drunken: that is the sole question of importance. If you would not feel the horrible burden of Time that bruises your shoulders and bends you to the earth, you must be drunken without cease. But how? With wine, with poetry, with virtue, with what you please. But be drunken. (BAUDELAIRE, 2013).

"One must *be* absolutely modern", Rimbaud would say (2013, without italics in the original). In this sense, modernity is not about liberation. It is not about a continuation of emancipation proposed by the thinking heroes of Enlightenment. It is about a burden always to be fulfilled, an imperative decentralization to which the contemporary must submit itself:

> Baudelairean modernity is an exercise in which extreme attention to what is real is confronted with the practice of a liberty that simultaneously respects this reality and violates it. However, modernity for Baudelaire is not simply a form of relationship to the present; it is also a mode of relationship that has to be established with oneself. The deliberate attitude of modernity is tied to an indispensable asceticism. To be modern is not to accept oneself as one is in the flux of the passing moments; it is to take oneself as object of a complex and difficult elaboration: what Baudelaire, in the vocabulary of his day, calls dandysme." (FOUCAULT, 1984, p. 34).

In order to problematize a history of the contexts which does not transform itself into a history of developments (CHIPP, 1996, p. 08), and in turn to escape the illusory continuity, it is necessary to understand the modern as a mode of action. It is also necessary to escape the risk of succumbing to the vanguard myth. The two movements which loom in

---

such a priority to one's appearance and dress which distinguishes him. […] Baudelaire likens him to a stoic." (TAYLOR, 2001 , p. 436).

the 20th Century, the a*estheticization of politics* and the *politicization of art*, are shifts consistent with the modern process of decentralization.

The intention of this article is to argue that arts and politics cannot be understood to be detached spheres as in the old and strict system which juxtaposes aesthetics, ethics and politics. Modernism is one of various historic forms of superposition of arts and politics, which goes, according to Habermas:

> […] with the decisive confinement of science, morality and art to autonomous spheres separated from the life-world and administered by experts, what remains from the project of cultural modernity is only what we would have if we were to give up the project of cultural modernity altogether. (HABERMAS, 1983, p. 14).

In its own way, Modernism intends the coronation of modern tradition, the climax of a critical route with origins in Enlightenment. Its almost aseptic neutral discourse – befitting the project of establishing a neutral basis on which to evaluate the painting of its time – is exemplified in the writing of critics such as Greenberg.[7] It is not by chance that Greenberg (1992, p. 754) – the same who will insist on the narcissist neutrality of paintings turned back entirely to its own pictorial means – will bind Modernism to the Kantian critic:

> I identify Modernism with the intensification, almost the exacerbation, of this self-critical tendency that began with the philosopher Kant. Because he was the first to criticize the means itself of criticism, I conceive of Kant as the first real Modernist.

A more careful look at the disputes which have shaped the limits of Modernism makes clearer that the selection of its canons is quite controversial. The delimitation of the field of the modern deviates, naturally, from the sterilized process intended by the intellectual sponsors of Modernist painting. Actually, it is the contrary. Modernism is the most penetrating result of the approximation of Arts and Politics in the 20th Century.

In fact, after Cézanne the painting will change its relation with itself. The pictorial technique will not promote any more illusions by the improvement of the means, but will exercise, to its limits, the intrinsic

[7] Clement Greenberg (1909-1994) was a North American art critic involved with abstract expressionism promotion and theoretical development.

properties of the act of painting. To Foucault (2001, p. 1512), "the painting has been since Cézanne, the tendency to become transparent to the act of painting."[8] Therefore, it was about developing peculiarities of the painting, highlighting it in the field of arts. However, a change in this direction is not neutral, obviously. First of all, it is about taking a stance according to the impulse of denying the past,[9] identified as the birthplace of the immobilizing *tradition*. Modernism moves away from its past, the "[…] horrible burden of Time that bruises your shoulders and bends you to the earth […]" (BAUDELAIRE, 2013), overvaluing the creative subjectivity, as if art could do without any and every reference. The master of post-impressionism would say: "one must learn to see by itself" (CHIPP, 1996, p. 10). And more: "[…] we have to transmit the image of what we see, *forgetting all that has existed before us*." (CHIPP, 1996, p. 16). This search for objectivity – which presupposes the appreciation of the painter-subject – reflects one of the fundamental aspects of modernity's paradigm: the belief of an absolute split between subject and object.[10]

Modernism, since its alleged origin,[11] inserts itself in the modern gesture of the present's capture by the *subject*, who is one of the many knots which gives cohesion to modernity's speech. Doing so provides the instruments of its critics. One can think no more on the subject, resorting to "anthropological universals" (VEYNE, 2011, p. 107) and must pay attention to the painful process of subjectivity which shifts to the margins of the "subject" all that does not precisely identify with the center. Since subjectivity and representation are concomitant moments of the same discursive process,[12] nothing authorizes neglecting the status of representation on the process of the modern's subject construction.

In the 20th Century, the vanguard's ascension puts into question the sensibility on which was based the *arché* of the previous periods. Twentieth Century art went beyond the *geometric space* of the art galleries, openly assuming a political duty. Dislocating the traditional spaces

---

[8] "La peinture a eu, depuis Cézanne, tendance à se rendre transparente à l'acte même de peindre […]."

[9] Habermas (1983, pp. 3-4) highlights the amplitude of this movement: "modernity revolts against the normalizing function of tradition; modernity lives on the experience of rebelling against all that is normative."

[10] A critic of this paradigm is found in Boaventura (2011).

[11] To Greenberg the historical origins of modernism are found in post-impressionism. Cf. HARRISON and WOOD, 1992, p. 756.

[12] "[…] representation is extended only to what can be acknowledged as a subject." (BUTLER, 1990, p. 1).

of formation and acquaintanceship from the artistic speech, the vanguards will project their claims on the political sphere in the first half of the 20th Century.

The Dada implodes the traditional art cube and questions its means of intelligibility.[13] Simultaneously born, in its majority, from the Dadaist negation, the surrealists[14] turn themselves against the system of representations which legitimized, complacently and silently, colonialism[15]. Affirms Leclerq (2010, p. 10):

> It's equally to the level of representations and mythifications that happens the impact of surrealism. [...] Since the beginning, the surrealists look to overcome the literary and artistic academicism, but also expect to provoke social disturbance through political engagement and positioning on the intellectual field of its time. This dual ambition is presented as one by the Surrealist Manifesto of 1924. Appealing to the "revolution", to the "reclassification of values" and also to the "over-realism", these young poets made the discourse of their ambitions.[16]

In this movement, the surrealists turned themselves against the politics of representation[17] that forced the center into a civilizing race

[13] Duchamp's suitcases, portable galleries, small universes similar to the art universe, exemplifies the implosion of art spaces in the dadaist questionings, on the iconoclast and mocking way of the French-American artist which foreshadowed the conceptual art. Cf. TOMKINS, 2005.

[14] "The surrealist movement was built by a highly organized group of artists and writers, the majority of them who were old dadaists who, in 1924, gathered around Breton in Paris, when he released his *Surrealist Manifesto*." (CHIPP, 1996, p. 374).

[15] In this regard, refer to Leclercq (2010).

[16] In French in the original: "C'est aussi au niveau des représentations et des mythifications que se joue l'impact du surréalisme. […] Dès les débuts, les surréalistes recherchent un dépassement de l'académisme littéraire et artistique mais espèrent aussi provoquer un bouleversement social par un engagement politique et par un positionnement dans le champ intellectuel de leur temps. Cette Double ambition est présentée comme une seule par le Manifeste du surréalisme de 1924. En appelant à la «révolution», au «reclassement des valeurs» et même au «sur-réalisme», ces jeunes poètes ont eu le discours de leurs ambitions."

[17] To Leclercq (2010, p. 10) this happens in the beginning of Surrealism: "D'emblée, dans la préface qui inaugure les douze numéros de La Révolution surréaliste, Paul Éluard, Roger Vitracet Jacques-André Boiffard ont conscience que ce qui est tenu pour la «réalité» se construit à partir de représentations, lorsqu'ils écrivent:«Entre Napoléon et le buste des phrénologues qui le représentent, il y a toutes les batailles del'Empire.»"

towards the edges of the world. The inevitable result ricocheted onto the *political representation*, because

> […] the avant–garde became, as it were, part of established culture; it became at least partly absorbed into the fabric of everyday life; and – perhaps above all – it became dramatically politicized, perhaps more so than the high arts in any period since the Age of Revolution (HOBSBAWN, 1994, p. 181).

From the surrealists' invectives to the art that will be shaped between the texts of Greenberg and Rosenberg,[18] there is a distance of one War. This distance covers the growing awareness of a historicity of Surrealism. This awareness, inserting the movement in a historical framework because of its conditions of origin and development, provoked the death of the vanguards. Posteriorly gathered in New York, the majority of the arts that would integrate within the Modernists circles, retrospectively disposes the vanguards' elements and practices, as Chipp argues (1996, p. 526):

> Conscientious of the new world view that dominated the post-war years with persistency, matured in the most cosmopolitan of the environments and equally conscientious of its varied origins, they visualized the past as if they had it in their hands and the future, however highly uncertain, opened up with its whole amplitude in front of them.

Always presenting itself in opposition to the Soviet Realism, American Expressionism emulated, at least discursively, the centrality that characterized the vanguards' Paris. Still today, New York, presented as the capital of contemporary art, centralizes the market. If not economically dominant, due to the ascent of other equally powerful markets, New York still retains a fundamental role in the complex networks that characterize the contemporary art world.

Despite massive investment undertaken by countries and the private sector, after the vanguard's death, in the cultural domain[19], the

[18] Harold Rosenberg (1906-1978) was one of the American art critics responsible for the construction of the modernist canon. His position is orthogonal to Greenberg's.

[19] "On the 1970s, despite generally continuing in the passive role of receiving donation requests, the companies started to actively participate in the formulation of the contemporary culture discourse. But, contrarily to the prior involvement, unequal in practice

common perspective, setting aside the turbulent processes from which originated the contemporary art, still sees the artist's work in an epiphanic way:

> […] a certain understanding of art has run continuously through the modern world since the Romantic era. It is the conception I've been calling epiphanic, and it encompasses not only an aesthetic of the work of art but also a view about its spiritual significance and about the nature and situation of the artist. It is a view not only about art but about the place of art in life, and its relation to morality (TAYLOR, 2001, p. 425).

Probably due to the historical distances between the vanguards and the masses, the common sense still promotes a romantic vision of artwork, in which art assumes the character of an instance in between the transcendental and the human. Isolated from the world, the artist, like a herald of the sublime, would create works according to *inspiration* and *endowment*. These are notions so naïve as to be dangerous. The vanguards hardly found a connection point with the masses:

> […] we must never forget that, throughout this period, it [the vanguards] remained isolated from the tastes and concerns of the mass of even the Western public […]. Except for a somewhat larger minority than before 1914, it was not what most people actually and consciously enjoyed (HOBSBAWN, 1994, p. 181).

Perhaps because of the distance between the vanguards and the masses, the association between nonfigurative art and deterioration remains vigorous in the non-academic discourse.[20] On the other hand, the vigorous clash between Expressionism and Realism resulted in a restricted valuation grid which expurgated from the art domain all forms of manifestations which were not framed in its restricted field of intelligibility. What was not Abstract Expressionism should be Soviet Realism and vice-versa. It is to deviate from the isolation to which Modernism is committed that Post-Modernism arises: a rupture to its artistic meta-

---

and with a limited reach, the corporate intervention over the last two decades is becoming universal and embracing" (WU, 2006, p. 26).

[20] As an hyperbolic example of this posture which associates the non-representative to the monstrous, there is the gross "*Haus der deutschen Kunst*" debuted in 1937.

narratives.[21]

More than a movement, Post-Modernism is the denial of pre-established criteria which can guide the practices. Post-modernism is about breaking away from the exaggeration which led the Modern to a blind field; it is not arrived at by simple historical progression.[22]

Whether through the reorganization of artworks in a permanent exhibition room, or the recapture of issues related to minority rights, or the search for new ways to exercise political participation, the task of what has been conventionally called *post-modern* creates a challenge for law, arts and politics.

Honoring Greenberg's terms, we could ask if it is the role of the arts to simulate an *imaginary equivalent*. An answer to this question finds its roots in the idea of *representation*, and its effects would be extended not only to the artistic field but also to law and politics. As Pitkin points out (2004, p. 336), "the concept [of representation] does have a central core of meaning: that somebody or something not literally present is nevertheless present in some non-literal sense. But that is not much help."

3. Political representation

Pitkin clarifies that the word "representation" has Latin roots, *repraesentare*, meaning "to make present or manifest or to present again" (PITKIN, 1989, p. 133). However, in its original form, it has no relation to representing people or the Roman State. The word gains the connotation of political agent only with the participation of knights and burgesses in the English Royal Parliament.[23] From this idea, Hobbes delineated in 1651 its classic definition in the *Leviathan*, which even today influences political representation theory: "a representative is someone given authority to act by someone else, who is then bound by the representative's action as if it had been his own" (PITKIN, 1989, p. 141). After this classic definition, many were the revisions made of this concept through the

[21] "Simplifying the most, it is considered 'post-modern' the incredulity in relation to metanarratives." (LYOTARD, 1986, p. xvi).

[22] Boaventura (2011) criticizes the fact that the word is perfectly rendered to justify developmentalists conceptions.

[23] "Although the ancient Greeks had a number of institution and practices to which we would apply the word *representation*, they had no corresponding word or concept." (PITKIN, 1989, p. 133).

modern age (by Rousseau, Burke, and Condorcet, for examples), giving rise to numerous theories to explain the concept.

The first deep examination of those divergences was made by Hanna Pitkin, in her classic *The Concept of Representation* (1967). In this book, Pitkin, starting from the idea that representation is "[…] a making present again" (PITKIN, 1967, p. 8), suggests that the problem of conceptualizing this word is not the fact that the many meanings exclude each other, but that all of the meanings are considered by its authors as the correct ones, when they are actually only parts of a whole (she therefore uses the metaphor of snapshots taken from a tridimensional structure from many different angles). She then analyzes different ideas on representation (especially representation as a *standing for* or as an *acting for*) to formulate her own concept, based on the tension between substance and institutionalization (PITKIN, 1967, p. 239-240).

From Pitkin's analysis, many new ideas erupt in the field of political representation. Initially, those ideas were restricted to institutional representation. However, the serious crisis of representation (or rather, of representative democracy) experienced by Western societies at the end of the 20th Century stimulated new analysis on this topic of democratic theory.

3.1. A representation crisis?

Currently, it is believed that we live under a crisis of representation. This expression, in established use, is not completely false, and is a worldwide phenomenon. Yves Sintomer cites the rejection by voters in two European countries of the European Constitution when submitted to a referendum, and also shows, in numbers, the disillusionment of the French population in its politicians: "in France, 39% of the electors have little confidence, and 37% have no confidence on the politicians" (SINTOMER, 2010, p. 27)[24]. In Brazil, according to the results of the "ICJ Brasil" research conducted during the fourth trimester of 2012 by the "Fundação Getúlio Vargas", the National Congress and the political parties are, among the researched institutions, the two most discredited in Brazil, with only 21% and 10% (respectively) of the interviewed answering that they have trust in these institutions (CUNHA et al., 2012, p. 21).

[24] In the original, in Portuguese: "na França, 39% dos eleitores têm pouca confiança, e 37% não têm nenhuma confiança nos políticos" (SINTOMER,2010, p. 27).

According to Sintomer, we can list "six structural causes" for the representation crisis. They would be: a powerless politics; the political disengagement of the popular classes; the emergence of a "risk society"; the crisis of bureaucratic public action; the ideological obstacle; and internal causes to the political system (SINTOMER, 2010, p. 29-35). To Sintomer, an aspect of the representation crisis is more pronounced than others: the crisis of party representation. According to him, "[…] an epoch seems extinct: the one in which the democracy was organized almost exclusively around them [the political parties]" (SINTOMER, 2010, p. 35).[25] Performing an important role, as Urbinati stresses (2006a, p. 218),

> the political parties articulate the "universal interest" from peripheral viewpoints. They are *partial-however-communal* associations and essential reference points which enable the citizens and the representatives to recognize each other (and the others) and form alliances and, moreover, enable them to ideologically situate the compromises which they are ready to make.[26]

However, as Sintomer points out, political parties have acquired several vices while developing its functions, transforming into "[…] bureaucratic structures, centralized and authoritative […]" (SINTOMER, 2010, p. 36)[27], which contradict their democratic ideal. Using support from Bernard Manin's theory, Sintomer says that currently we have seen the rise of an "*audience democracy"* or, as he would also call it, an "*opinion democracy*."[28] Therefore, "more than the representative democracy crisis, then, it would be necessary to talk about the crisis of a specific model of representative government: the party democracy and its progressive

[25] In the original: "[...] uma época parece extinta: aquela em que a democracia se organizava quase que exclusivamente em torno deles [partidos]" (SINTOMER, 2010, p. 35).
[26] In the original: "os partidos políticos articulam o "interesse universal" a partir de pontos de vista periféricos. Eles são associações *parciais-contudo-comunais* e pontos essenciais de referência que possibilitam aos cidadãos e representantes se reconhecerem uns aos outros (e aos demais) e formarem alianças e, além disso, situarem ideologicamente os compromissos que estão prontos a estabelecer." (URBINATI, 2006a, p. 218).
[27] In the original: "[...] estruturas burocráticas centralizadas e autoritárias [...]" (SINTOMER, 2010, p. 36).
[28] In the original: "Bernard Manin acrescenta que hoje […] assistimos à emergência de uma nova forma de governo representativo, a 'democracia do público' ou, num outro vocabulário, a 'democracia de opinião'" (SINTOMER, 2010, p. 39).

disappearance in favor of another model" (SINTOMER, 2010, p. 39-40).[29]

In order to overcome this legitimacy crisis of representative democracy, Sintomer asserts that

> [...] developing actions capable to even catch the attention of the mass media, a series of social movements, in the last two or three decades, have been developing new organizational and popular forms, based on horizontal coordination and in a strong deliberative dimension (SINTOMER, 2010, p. 40).[30]

Furthermore, one can see an attempt to strengthen the institutional devices of participative or deliberative democracy, which values discussion, debate, and participation (SINTOMER, 2010, p. 42-43). Sintomer calls attention to the participative dimension of democracy, since participative democracy would not only be the result of a criticism to representation, but

> also implies another history of democracy, whose chronology is not identical to the one of representative government (even though they both get blended), with its founding moments […] (the revolutions, the Paris Commune, the French Resistance, 1968), its own imaginaries (the libertarian and socialists utopias, certain tendencies of political liberalism or environmentalism, a part of the Anglo-Saxon republicanism etc.), its specific actors, and also its intrinsic inquiries and contradictions (SINTOMER, 2010, p. 44).[31]

---

[29] In the original: "mais que da crise da democracia representativa, então, seria necessário falar da crise de um modelo específico de governo representativo: a democracia partidária e seu progressivo desaparecimento em favor de um outro modelo." (SINTOMER, 2010, p. 39-40).

[30] In the original: "[...] desenvolvendo ações capazes de atrair até mesmo a atenção dos meios de comunicação, uma série de movimentos sociais, últimas duas ou três décadas, vêm desenvolvendo formas de organização e de mobilização baseadas numa coordenação horizontal e numa forte dimensão deliberativa" (SINTOMER, 2010, p. 40).

[31] In the original: "[...] implica também em uma outra história da democracia, cuja cronologia não é idêntica à do governo representativo (ainda que as duas se misturem), com seus momentos fundadores mais ou menos míticos (as revoluções, a Comuna de Paris, a Resistência, 1968), os seus imaginários próprios (as utopias libertárias e socialistas, certas tendências do liberalismo político ou do ecologismo, uma parte do republicanismo anglo-saxônico etc.) seus atores específicos, e também seus questionamentos e suas contradições intrínsecas" (SINTOMER, 2010, p. 44).

Hanna Pitkin, by its turn, in an article published in 2004, brings other elements to the 21st Century discussion about the representation crisis. The author describes the three main obstacles today to the "alliance" between democracy and representation. The first would be "[…] the scope of public problems and private power" (PITKIN, 2004, p. 341). For her, the problems which currently affect the population are results of the activities "[…] of huge, undemocratic organizations, be they national mafias, transnational corporations, or even government bureaucracies and armies" (PITKIN, 2004, p. 341). However, they are necessary consequences to the political action of the population.

> For local politics to be able to provide the experience of active citizenship, it must be real. Something that genuinely matters to people, some problem in their actual lives, must be at stake. A mere pretend politics, a simulacrum of public action without significant content or consequences, will not do (PITKIN, 2004, p. 341).

The second obstacle would be the *money*, or rather, the *wealth*. Reclaiming the Marxist studies of the influence of capital, she states that the obstacle is not the influence of corruption in elections, but "[...] the more general, age-old tension between the power of wealth and 'people power', meaning the power of numbers and of commitment" (PITKIN, 2004, p. 341).

Lastly, Pitkin talks about the obstacle related to the ideas and their formation. To Pitkin, "deception, propaganda, and indoctrination have always played a role in the rough and actual political life, but they take on new, disturbing dimensions in our age of electronic media and satellite surveillance […]" (PITKIN, 2004, p. 341). People, therefore, will get used to their role as spectators, and the thin line between fantasy and reality will begin to blur (PITKIN, 2004, p. 341).

Pitkin's vision is full of pessimism. Sintomer's vision, however, indicates that one should search for answers to the representation crisis in deliberative democracy and, especially, in popular participation. Over the last decades, many political scientists have examined this subject, trying to find answers to the challenges faced by representative democracy, and formulating many theories in order to reach this goal. Those theories have clear connections with the questions raised by Modernism. The current movement of democratic theory does not demand the end of political representation, but rather its strengthening, combining it with participation, greater legitimacy, and other notions that were

not previously explored

3.2. Questioning a standard account of democratic representation

As mentioned before, the crisis of representative democracy can also be understood as crisis of party representation. So why not extend this concept to a "State" representative democracy crisis? Some of the main criticisms of classical political representation theory are based on the fact that they are concerned only with a standard account of democratic representation[32], understood by

> […] four main features. First, representation is understood as a *principal agent relationship*, in which the principals—constituencies formed on a territorial basis — elect agents to stand for and act on their interests and opinions, thus separating the sources of legitimate power from those who exercise that power. Second, *electoral representation identifies a space within which the sovereignty of the people is identified with state power*. Third, *electoral mechanisms ensure some measure of responsiveness to the people* by representatives and political parties who speak and act in their name. Finally, *the universal franchise endows electoral representation with an important element of political equality* (URBINATI; WARREN, 2008, p. 389, our italics).

However, as Mark Warren and Dario Castiglione point out (2006, p. 1), "[...] contemporary democracies have evolved in ways that increasingly undermine the adequacy of the standard model." The emergence of transnational decision-making arenas, the control of political decisions by specialized and expert bodies, the increasing demands for group recognition, and the diffusion of more informal structures and opportunities for democratic representation (WARREN; CASTIGLIONE, 2006, p. 1-2) are new developments which call into question the *standard account of representation*.

Nadia Urbinati, in her book *Representative Democracy* (2006b), defended the existence of three theories of representation, namely, *juridical*, *institutional*, and *political*.[33] The juridical and institutional theo-

[32] Leonardo Avritzer (2007, p. 445) states that "the modern representation theory is based on three elements: authorization, monopoly and territoriality."

[33] "All of them can also be used to define democracy (direct, electoral, and representative, respectively)" (URBINATI, 2006b, p. 21).

ries are intimately related, since both start from a conception based on a State-Person analogy and a voluntaristic conception of sovereignty. Thus, they would both be connected to a *state-centered* theory of representation.

The juridical theory, older than the others, "[...] treats representation like a private contract of commission (granting 'license to perform an action by some person or persons who must possess the right to perform the given action themselves')" (URBINATI, 2006b, p. 21). This theory follows a nonpolitical and individualistic orientation, considering that the representatives would be chosen by their personal qualities and not by their ideas or political projects. It adopts the logic of "[...] *presence/absence* (of the sovereign) and detaches representation from advocacy and representativity […]" (URBINATI, 2006b, p. 22). And "[…] it makes representation into a rigorously state-centered institution whose relation to society is left to the judgment of the representative (trustee); and it restricts popular participation to a procedural minimum (election as magistracy designation)" (URBINATI, 2006b, p. 23).

In the institutionalist theory, anchored in theorists such as Sieyès, "[...] representation can be a strategy of institution-building on the condition that the subjects are given only the job of selecting the law-makers" (URBINATI, 2006b, p. 23). The sovereignty, in this case, is kept on a voluntaristic basis, and the nation only speaks through the voice of its representatives.

Both perspectives, therefore "[...] assume that the state (and representation as its productive and reproductive mechanism) must transcend society in order to ensure the rule of law; and that the people must hide their concrete and social identities to make public officials impartial agents of decision" (URBINATI, 2006b, p. 23). In other words, these *state-centered* perspectives limit the perspectives of political representation to a mere state organization in order to express a unified "will of the nation." There was, thus, a clear separation between the political and the social spheres, so as to ensure "[...] legal equality and the impersonal organization of the state [...]" (URBINATI, 2006b, p. 23).

According to Urbinati, with society's democratic transformation, a third theory emerges, and breaks with the two previous ones: the *political* theory of representation. In this new conceptualization, representation starts to be seen in a dynamic way, being constructed by representatives *and* constituents together, and not from a preexistent entity (the unity of the State or the People). "Representation does not just pertain to government agents or institutions, but designates a form of political

processes that is structured in terms of the circularity between institutions and society, and is not confined to deliberation and decision in the assembly" (URBINATI, 2006b, p. 24).

This conception is a direct reflection of the author's proposal to change the focus of "representation" from the ideal of sovereignty to the ideal of political judgment as the foundation for the legitimacy of representation. Representation does not arise from sovereignty's delegation, as seen with Hobbes, but from a constantly reconstructed process of the relationship between representative and constituent, based on the idea of political judgment. With the 20th Century democratic transformation and especially with the increase of the complexity of social relations and the creation of new representation instances, the notion of political judgment arises as an important foundation of legitimacy to justify the representative-constituent relationship. This relationship cannot be justified by the sovereign relationship anymore, since this last ignores the political differences among citizens when they are "forming" the representation, in the name of a political unity. It's a *making the social political* process (URBINATI, 2006b, p. 24).

> Political representation scorns the idea that electors rather than citizens hold this center [center of gravity of the democratic society], that the act of authorization is more important than the process of authorization. It marks the end of a yes/no politics and the beginning of politics as an open and common arena of contestable opinions and revisable decisions. It amplifies the meaning of presence itself because it makes *voice* its most active and consonant manifestation and *judgment* about just and unjust laws its content (URBINATI, 2006b, p. 24).

The monopoly of representation in the hands of the elected representative, in a state-centered view, in which this representative would be like a *herald of the people,*[34] often isolated from the world, surrounded

[34] Traditional political theorists, such as Rosseau and Montesquieu, denounced the aristocratic feature of political representation. To Rousseau, the *res publica* was directly connected to the self-government, while the representative government would be an aristocratic kind of power (URBINATI; WARREN, 2008, p. 391). Montesquieu, on the other hand, argued that the sortition idea would be democratic, whilst the representation would be aristocratic (URBINATI; WARREN, 2008, p. 392). In the 20th Century, many Democratic Theory defenders, such as Joseph Schumpeter, Giovanni Sartori and Niklas Luhman, "[…] replicated Rousseau's view that representation is essentially aristocratic,

by the walls of the government palace, is increasingly criticized. The traditional argument, shown by Pitkin (1967, p. 222-223), that the representative has greater knowledge about the matters under discussion, and because of that takes divergent decisions in relation to those his constituents wish (those who he would, at least theoretically, represent — based on a territoriality relation),[35] has been losing credibility. New forms of representation are created and/or theorized. Just as 20th Century art broke away from the geometric spaces of art galleries, political representation, in the post-representative democracy crisis context, has also been creating new spaces outside government arenas.

4. New spaces for political representation

According to Leonardo Avritzer, deliberative democracy, for example, "[...] tackles this problem [of the declining legitimacy of representative government] by arguing that the declining quality of the political process is due to current tools used to aggregate citizens' opinions" (AVRITZER, 2012, p. 11). Thus, it searches to develop new institutional designs to the system which may be capable of aggregating opinions, overcoming the limits set by the traditional design that is based on the state monopoly of representation. Those new institutions introduce a new participative perspective, incorporating "civil society actors in the process of decision-making on public policies" (AVRITZER, 2012, p. 13).

However, as Avritzer also points out, this new movement of political participation, which in Brazil is characterized by an "[…] enlargement of civil society's presence in public policies and the growth of the so-called *participative institutions*" (AVRITZER, 2007, p. 443), creates an "inescapable" problem, "[…] the emergence of new forms of representation connected to [the civil society]" (AVRITZER, 2007, p. 443).[36] These new forms of representation escape in three aspects from the standard account of democratic representation (as defined by Urbinati and War-

while viewing democratic participation in political judgment as utopian" (URBINATI; WARREN, 2008, p. 392).

[35] "[...] although the political representative may ignore or even override constituency opinion, he may offer justifications, rationales, for doing so, in much the way that a substantive representative must be prepared to do. If we ask an American legislator whether he acts independently of constituents' wishes, and why, he is likely to answer in terms of his knowledge and their ignorance and true interest" (PITKIN, 1967, p. 222).

[36] In the original: "[...] um problema tornou-se inescapável: o surgimento de novas formas de representação ligadas a ela [sociedade civil]" (AVRITZER, 2007, p. 443).

ren, 2008), since there is no stated requirement of authorization and no structure of territorial monopoly, and neither a "[…] assumption of mathematical equality among the individuals who can originate the representation" through elections (AVRITZER, 2007, p. 444).[37] The loss of state monopoly of representation can be seen here: it flees the space in which was enclosed, acquiring new shapes, through new institutional designs.

These new institutional designs stressed by Avritzer are frequently ignored by the majority of the democratic theory literature. Still extremely focused on the northern hemisphere, contemporary democratic theory has been ignoring progress made by new institutional designs on the so-called peripheral and semi-peripheral countries. Similarly, New York still maintains a fundamental role in the complex network which characterizes the contemporary art.

Another important transformation movement is one which questions the fact that "[...] many groups within the established democracies lacked even passive inclusion" (URBINATI; WARREN, 2008, p. 394). Many previously organized civil society groups would be underrepresented or even not represented at all. In the painful process of the subjectivization of the construction of the modern being, common perspectives can be identified among some of these subjects. These perspectives are found on the margins of those subjects, differentiating them, and resulting in their underrepresentation. Using this idea, Iris Marion Young proposes the concept of "perspective representation." For her, "the group differentiation provides resources to a democratic communicative public which aims to establish justice, since the differently positioned people have different experiences, stories and social comprehensions, derived from that positioning. This, I call *social perspective*" (YOUNG, 2006, p. 162).[38] Young's proposal of perspective representation seeks institutional representation for groups whose subjective construction is based on many common perspectives.[39] This model has the objective

[37] In the original: "[…] suposto de uma igualdade matemática entre os indivíduos que dão origem à representação" (AVRITZER, 2007, p. 444)..

[38] In the original: "a diferenciação de grupos propicia a recursos para um público democrático comunicativo que visa estabelecer a justiça, uma vez que pessoas diferentemente posicionadas tem diferentes experiências, histórias e compreensões sociais, derivadas daquele posicionamento. A isso chamo *perspectiva social*" (YOUNG, 2006, p. 162).

[39] "The social perspective consists in a set of questions, experiences and assumptions through which the more properly starts reasoning than draws conclusions" (YOUNG, 2006, p. 163).

of guaranteeing the promotion of certain starting points to the political discussion, and not of inducing a specific conclusion (YOUNG, 2006, p. 168), so as to allow new views to influence the political discussions and decisions and, in addition, to stimulate the participation and engagement of excluded or marginalized groups (YOUNG, 2006, p. 174-175). Thus, the subjectivity process starts to have a singular importance in the appearance of new forms of representation. For example, according to the model proposed by Iris Young, it can be determinant to highlight certain perspectives in the political arena.

5. Some final thoughts

Our intent is to show that Modernism has raised many questions which pertain not only to artistic representation but also to political representation. Modernism generated and strengthened the process of questioning traditional forms of artistic representation and its exhibition, reflecting political representation. Following Art's movement beyond the art galleries, Politics leaves the government arenas, assuming increasingly more extra-institutional representative functions. The subjectivization process of the modernist echoes the complex issue of political representation, especially in reference to marginalized groups which seek representation. All of this exists within a context of confronting the idea of the political unity of the Nation, sustained by archaic theories of political representation.

References

AVRITZER, Leonardo. Democracy beyond aggregation: the participatory dimension of public deliberation. Journal of Public Deliberation [online]. 2012, **8**(2), article 10 [viewed 16 July 2013]. Available from: http://www.publicdeliberation.net/jpd/vol8/iss2/art10/

AVRITZER, Leonardo. Sociedade civil, instituições participativas e representação: da autorização à legitimidade da ação. Dados – Revista de Ciências Sociais. 2007, 50 (3), 443-464. ISSN 0011-5258.

BAUDELAIRE, Charles. Intoxication [online]. In.: BAUDELAIRE, Charles. Little poems in prose [viewed 21 September 2013]. Translated from French by James HUNEKER. Available from: http://www.gutenberg.org/files/36287/36287-h/36287-h.htm#INTOXICATION

BOURDIEU, Pierre. A produção da crença: contribuição para uma economia

dos bens simbólicos. Translated from French by Guilherme João de Freitas TEIXEIRA. 3rd ed. Porto Alegre: Zouk, 2008.

BOURDIEU, Pierre. The Rules of Art: Genesis and Structure of the Literary Field. Translated from French by Susan EMANUEL. Cambridge: Polity Press, 1996.

BUTLER, Judith P. Gender Trouble: feminism and the subversion of identity. New York: Routledge, 1990.

CHIPP, Herschel Browning. Teorias da arte moderna. Translated from English by W. DUTRA, et al. 2nd ed. São Paulo: Martins Fontes, 1996.

FOUCAULT, Michel. What is Enlightenment? In: P. RABINOW, ed. The Foucault Reader. New York: Pantheon Books, 1984, pp. 32-50.

FOUCAULT, Michel. Pierre Boulez, l'écran traversé. In : DEFERT, Daniel, François EWALD and Jacques LAGRANGE, eds. Dits et ecrits: 1954-1988. vol. 2. Paris: Gallimard, 2001.

FROIDEVAUX, Gérard. Baudelaire: representation et modernité. Paris: José Corti, 1986.

HABERMAS, Jürgen. Modernity: an incomplete project. In: H. FOSTER, ed. The anti-aesthetic: essays on postmodern culture. Port Townsend: Bay Press, 1983, pp. 01-15.

HARRISON, Charles and Paul WOOD, eds. Art in theory, 1900-1990: an anthology of changing ideas. 2nd ed. Malden: Blackwell Publishing, 1992.

HARRISON, Charles and Paul WOOD, eds. Art in theory, 1900-2000: an anthology of changing ideas. Oxford: Blackwell Publishing, 2003.

HOBSBAWN, Eric J. The age of extremes: 1914-1991. New York: Vintage Books, 1994.

LECLERCQ, Sophie. La rançon du colonialisme: les surréalistes face au mythe de la France coloniale (1919-1962). Paris: Les Presses du Réel, 2010.

LYOTARD, Jean-François. O pós-moderno. Translated from French by Ricardo Correia BARBOSA. Rio de Janeiro: José Olympio, 1986.

PITKIN, Hanna Fenichel. Representation and Democracy: Uneasy Alliance. Scandinavian Political Studies, 2004, 27(3), 335-342. ISSN: 0080-6757.

PITKIN, Hanna Fenichel. Representation. In: BALL, Terence, James FARR and Russel L. HANSON, eds. Political Innovation and Conceptual Change. Cambridge, Cambridge University Press, 1989, p. 132-154.

PITKIN, Hanna Fenichel. The Concept of Representation. Berkeley: University

of California Press, 1967.

RIMBAUD, Arthur. Farewell [online]. In.: RIMBAUD, Arthur. A Season in Hell [viewed 21 September 2013]. Translated from French by Paul SCHMIDT, and published originally in 1976 by Harper Colophon Books. Available from: http://www.mag4.net/Rimbaud/poesies/Farewell.html

SANTOS, Boaventura de Sousa. A critica da razão indolente: contra o desperdício da experiência. 8th ed. São Paulo: Cortez Editora, 2011.

SINTOMER, Yves. O Poder ao Povo: júris de cidadãos, sorteio e democracia participativa. Translated from French by André RUBIÃO. Belo Horizonte: Editora da UFMG, 2010.

TAYLOR, Charles. Sources of the self: the making of modern identity. Cambridge: Harvard University Press, 2001.

TOMKINS, Calvin. Duchamp: uma biografia. Translated from English by Maria Theresa de Resende COSTA. São Paulo: Cosac Naify, 2005.

URBINATI, Nadia and Mark E. WARREN. The Concept of Representation in Contemporary Democratic Theory. Annual Review of Political Science. 2008, **11**, 387-412. ISSN: 1094-2939.

URBINATI, Nadia. O que torna a representação democrática? Lua Nova. 2006a, 67, 191-228. ISSN: 0102-6445.

URBINATI, Nadia. Representative Democracy: Principles & Genealogy. Chicago: University of Chicago Press, 2006b.

VEYNE, Paul. Foucault: seu pensamento, sua pessoa. Translated from French by Marcelo Jacques de MORAIS. Rio de Janeiro: Civilização Brasileira, 2011.

WARREN, Mark E. and Dario CASTIGLIONE. Rethinking Democratic Representation: Eight Theoretical Issues [online]. 2006 [viewed 21 September 2013]. Available from: http://www.hks.harvard.edu/hauser/PDF_XLS/AccountAndRep/5-Castiglione%20&%20Warren.pdf

WU, Chin-tao. Privatização da cultura: a intervenção corporativa na arte desde os anos 1980. Translated from English by Paulo Cezar CASTANHEIRA. São Paulo: Boitempo, 2006.

YOUNG, Iris Marion. Representação Política, Identidade e Minorias. Lua Nova. 2006, 67, 139-190. ISSN: 0102-6445.

The "authoritarian culture" in a historical perspective
A comparative study between the mafiosi police in Rio de Janeiro and Buenos Aires

Luciana Araújo de Paula[40]

Abstract: During the past decade we observe a growing optimism on the Latin American continent. However, it is also the continent where we see the highest rate of homicides and a political corruption increasingly embedded in "organized crime" from the state and in particular, from the members of its security institutions . We refer to new "mafiosi phenomena" who question the belief that Latin America "organized crime" is always linked to "drug traffickers". These new "mafiosi phenomena" are formed in the heart of the state through an "authoritarian culture" firmly rooted in the political and security institutions in Latin America. The evolution of this "authoritarian culture" has followed a common denominator powered by a dual mechanism: individuals require more security against a rising crime, while the state responds advantage repression. We find in the history of the Latin American countries 'standardization' of the repressive behavior of the state in the name of democracy, while strengthening its authoritarian tendencies. Nowadays the emergence of a kind of "police mafiosi" that imposes tax and the "illegal protection" to the poor and relies on the cooperation of politicians eager to vote is nothing other than the perverse result of this process. This "snowball" is it due to the structural weakness of the Latin - American counties? To what extent this paradox is it intrinsic to the process of democratization of Latin American institutions in a transnational context? To what degree this "authoritarian culture" was the springboard for the consolidation of the phenomena of more and more complex within the state apparatus? To address this issue we will do, at first, a comparative study, observing how the phenomenon of "police mafiosi" has established itself in Brazil through the case of "Milicias" in Rio de Janeiro, then Argentina, through the example of the "Policia Maldita" in Buenos Aires.

Keywords: authoritarian culture ; mafiosi police ;

[40]PhD in Political Science, Institut des Hautes Etudes de l'Amérique latine - Sorbonne Nouvelle/Paris III. E-mail: luciana.araujodepaula@gmail.com.

1. Avant-propos

During the last decade we see a climate of increasing optimism on the economic level of the Latin American continent. However, it is also the continent where we find a very high rate of homicide as well as political corruption more and more linked to the crime from the state in particular, members of its security institutions. I refers to new "mafia phenomena" groups composed of police officers who have developed and consolidated in this atmosphere of economic and "democratic" euphoria. How to understand this paradox?

These new "mafia phenomenon" appeared and gradually rooted in the heart of the state through an "authoritarian culture" well anchored in the political and security institutions. In this paper I analyze the structure of the "authoritarian culture" present in the security institutions in Rio de Janeiro and Buenos Aires. I understand by "authoritarian culture" that Paulo Sérgio Pinheiro called a "socially implanted authoritarianism." This means that "certain behaviors and authoritarian values are not affected by the political transitions and institutional change. These behaviors are historical legs, constantly reactivated by the characteristics of social interaction. "

This presentation is part of the fieldwork for my thesis where I analyze some paradigmatic examples of historic joint triptych policy / politics / crime in both Latin American contexts. To understand the phenomenon of "mafiosi police" itself it is necessary to consider other forms of criminal operation of the police who are not necessarily mafia.

Then, how authoritarian culture is present in the practice of security institutions in Rio de Janeiro and Buenos Aires?

To answer this problem I decided to develop an overview of the functioning of the criminal police and separate it into three major groups: 1) "police corruption", 2) "death squads" and, finally, 3) "mafiosi police".

The "mafiosi police" is the one which best articulates this triad (police / politics / crime) on a "territory" and a specific "population". However, it is very important to note that this division does not refer to a "logical evolution of crime", that is to say, from 1 to 3. These three forms of operation are organized in accordance with the characteristics of each historical political context / social /. Thus, even if they have different modes of action, they often identify with each other because they are from the same institution security: the police.

For example, if the "mafiosi police" uses some features of the "death squads", it can not be mistaken as to the latter. Moreover, there are "territories" or even historical and political contexts that lend themselves to some form of action and not to others. "Police corruption" Brazil is a common mode of operation in certain "territories" of the southern area of the city of Rio de Janeiro usually controlled by factions of drug trafficking. In Argentina, the "death squads" that had a strong nationalist tendencies have spread in specific historical and political contexts: "Ligua Patriótica Argentina" in the '20s and the "Triple A" in the 70s in the third Peron government.

I adopt the binomial "city / territory" in order to better understand the control of certain physical spaces by criminal groups in both countries. The notion of "territory" refers to the idea of a microcosm that includes rules and forms of social organization that differ from those of the city. "Territories" are characterized mainly by constant intersection between formal / informal, legal / illegal which promotes the development of these areas groups.

The "Police mafia" itself feeds such blurred distinctions between the formal / legal - they are members of official security institutions and therefore have a duty to protect - and informal / illegal - they take advantage of the lack of distinction on the "territory" to develop their mafiosi activities, for example, selling protection, the sale of water, electricity, control of alternative transportation, vehicle theft, prostitution, extortion, among others.

In Rio de Janeiro I will analyze 1) "police corruption" through the model of the "arrego" or "mineira", 2) "death squads" through the model of "the Escuderia Le Coqc" et finally, 3)" mafiosi police" through the model of the "milicias".

In Buenos Aires, I will analyze 1) "police corruption" through the model of "Jaurias de perros" («pack of dogs»); 2) "death squads" through the model of the 'triple A' e finally, the «mafiosi police" through the model of "porongos".

2. Police corruption

2.1 Rio de Janeiro

The fact that the police "negotiating" with organized crime is called "arrego" or "mineira". This practice has been very widespread

in 90s. The members of the State Security allow criminal groups, including drug traffickers, develop their illegal activities on a "territory" given (usually in a "point of sale" called "boca de fumo") for a percentage on the profits generated by these sales. Insofar as that trading is profitable for the policy it ensures the smooth running of this "business" and therefore "peace" of "territory". However, if the dealers do not pay the "arrego" the agreement is broken and the police reprises his role and combat it.

2.2 Buenos Aires

The model of "Jaurias de perros" has materialized during the mandate of Security Minister Leon Arslanian (2004-2007) that ended the pyramidal system of command within the bonaerense police. This has been positive because it overthrew the entrepreneurial character and hierarchically organized illegal police activities. However, it has also made possible the formation of different autonomous bands of police (called "Jaurias de perros") who disputed the management of illegal activities in the province of Buenos Aires in an uncontrolled manner and extremely violent.

3. Death squads

3.1) Rio de Janeiro

The model of "Escuderie le Cocq" refers to a criminal association formed by the police in Rio de Janeiro to promote the summary execution of suspected individuals bandits. It was founded in 1965 and acts in the 70s, 80s and early 90s. The "Scuderie Le Cocq" was formed to avenge the death of Milton Le Cocq, famous detective and member of the personal guard of Getúlio Vargas. This group was led by the "Twelve gold men" chosen by Luis França, Secretary of Public Security of Rio de Janeiro, to "clean" the city of «bandits». This group has been very active during the Brazilian dictatorship and it solicited its services and used his clandestine methods persecution and torture has against the common bandits to combat resistant left of regime.

3.2 Buenos Aires

The model "Triple A" refers to the "anticommunist argentine alliance", a death squad of extreme right founded by José López Rega, Argentine Minister of Social Affairs in the third Peronist government from 1973 to 1975. Lopez Rega was head of the Ministry of Social Welfare, which funds were diverted to finance the organization and armament of this group to fight leftist (early actions were primarily directed towards the left wing of Peronism). After the coup of 1976, the Triple A was taken over by the army and more concretely by SIDE ("Secretary of State Information"). The "Proceso de Reorganización Nacional" has been responsible for the dissolution of the Triple A since "terrorism" became a state policy and actions of the Triple A (now called "Comando Libertadores de América") become institutionalized by the army itself.

4 Mafiosi Police

4.1 Rio de Janeiro:

The model of the "milicia" refers to the "Police Mineira" formed in the late 1970s in the community of Rio das Pedras, region of Jacarepagua in Rio de Janeiro, after a humiliation afflicted by drug traffickers to a resident of the community. Than, this resident formed a group with other residents to establish their own righteousness, expel traffickers and protect the population. The first informations on the "Police Mineira" were ambiguous: they were referring firstly to the presence of coercion, threats and extortion, and secondly to restore order positively perceived by the population. However, certain abusive attitudes have generated discontent among the local population. Due to this the agents of Public Security (polices, firefighters, soldiers...), residents of the community, decided to intervene and arrest the leaders of the "Police Mineira." These agents have replaced the previous group and have expanded their operations in the community, forming the embryo of what the press began to call the "milicia". This model of "territory" control by members of the police claiming the "protection" of the local population through the "sale security" was adopted in neighboring communities forming the bastion of "Milicia" or "blue commando" (due to the color of the uniforms of the Military Police in Rio de Janeiro which has produced the majority of these groups) in the western part of the metropolitan

area of the city, especially during the government of the clan Garotinho (Anthony Rosinha and from 99 to 2007).

4.2 Buenos Aires

The model of "porongas" (thinking head of a criminal gang, also used in prisions Argentina to refer to the chief prisoner. Makes also echo of manhood as associated to the male sexual organ) has materialized during the Government of the Province of Buenos Aires by Eduardo Duhalde (1991-1999). At this time the triad Police / politics / crime in the metropolitan area of Buenos Aires has become systematic and the term "maldita policia" was born. This system is pyramidal, hierarchical, organic and is characterized by illegal financing ("black box") of each police department in the metropolitan area. Thus, the functions are very organized and defined : the anti-drug department is responsible for the management of drug trafficking; the department to combat flight is responsible for the management of flights; the anti-kidnapping department is responsible for management kidnapping and extortion ...This model is reinforced by the policies of "mano dura" because they allow the police play with the feeling of insecurity among the population : when they want to promote a political ally they are placed in the street and protect the population, but when it prevents them from developing their illegal activities, they "liberan zonas" for the bandits allies (this strategy has been widely used for removing of leftist activists under the dictatorship: the police "liberava zonas", that is to say, did not intervene in a "territory" determined by the army allowing the death squads execute the "dirty work"). In the 90s, the "mafiosi police" was also used to demonstrate its dissatisfaction with the government through "political messages" for example, several Israeli cemeteries profanations took place in retaliation for investigations against police accused of involvement in the attack against AMIA.

5 Concluding

At this point of my research I can forward the following differentiation between "mafiosi police" in Rio de Janeiro and Buenos Aires:

In Rio de Janeiro, "police mafia" consists of officers whose purpose is to control the "territory" the local population in order to extortion, saying the fight against crime, particularly against trafficking

drugs. Here we see a close relationship "police mafia" / "territory" / locals. They are those who "protect" at the same time that taking advantage the local population of these territories.

In Buenos Aires, the "police mafia" took place the very heart of the police force with the objective of funding the "slush fund" for each department: for example, those who fight against crime on a "territory" are determined also those who manage, which articulate the same crime and redistribute gains. Here we see a close relationship "police mafia" / "territory" / crime management. They are those who "protect" at the same time take advantage of that crime management of these territories.

References

CHAMPEYRACHE, Clotilde, Sociétés du Crime : um tour du monde des máfias, Paris : CNRS éditions, 2007.

DABÈNE, O., GEISSER, V., MASSARDIER, G., CAMAU, M., Autoritarismes démocratiques et démocraties autoritaires au XXIe siècle : convergences Nord-Sud mélanges offerts à Michel Camau, Paris : la Découverte, 2008.

DELMAS-MARTY, Mireille, Libertés et surêté dans un monde dangereux, Paris : Seuil, 2010.

FAORO, Raymundo. Os Donos do Poder. Formação do patronato político brasileiro, Porto Alegre: Globo, 2000.

FREIDENRBERG, Flavia, La tentación populista : una vía al poder en América Latina, Madrid : Editorial Síntesis, 2007.

FREGOSI, Renée, Parcours transnationaux de la démocratie : Transition, consolidation, déstabilisation, Bruxelles : P.I.E. Peter Lang, 2011.

GAUCHET, M. La democratie contre elle meme, Gallimard, Paris, 2002.

GAUCHET, M. La démocratie d'une crise à l'autre, Cécile Defaut, Paris, 2007.

HINTON, Mercedes. The state on the streets: police and politics in Argentina and Brazil, 2006.

LEAL, Vitor Nunes, Coronelismo, enxada e voto : o muncípio e o regime representativo no Brasil, São Paulo : Companhia das Letras, 2012.

O'DONNELL, Guillermo. (1999). "Polyarchies and the (Un)rule of law in Latin America: a partial conclusion" in MÉNDEZ, Juan E., O'DONNELL, Guilhermo, PINHEIRO, Paulo Sérgio (eds) The (Un) Rule of Law & the Underprivileged in Latin America. Indiana. University of Notre Dame Press.

O'DONNELL, Guillermo, Schmitter, Philippe C., Whitehead, Laurence (dir.), Transitions from Authoritarian Rule: Latin America, Baltimore, Md.: The Johns Hopkins University Press, 1986.

PADOVANI, Marcelle. La Sicile comme métaphore, 2003.

POPPER, K., La societé ouverte et ses ennemies, Paris, Seuil, 1979.

ROUQUIÉ, Alain, À l'ombre des dictatures : la démocratie en Amérique latine, Paris : A. Michel, 2010.

SAIN, Marcelo, Política, Policia y Delito : La red Bonaerense, Buenos Aires : Capital Intelectual, 2004.

TELLES, Vera. A cidade nas fronteiras do legal e ilegal. Belo Horizonte: Argvmentvm, 2010.

VALLESPIR, Alejandra, La policia que supimos conseguir, Buenos Aires : Planeta, 2002.

The recognition of new social actors and the checkmate of statutory law

Maria Fernanda Salcedo Repolês[1]

Abstract: The starting point of the 'Polos de Cidadania' Research Program of the University of Minas Gerais, in Brazil, is the lack of effectiveness of fundamental rights on a day-to-day basis. Our paper aims to discuss this reality through the theoretical debate of the exhaustion of the legalist paradigm; the concealment of pluralism inherent to legal order; and the questioning of the functions of statutory law in the legal system.

When statutory law was converted into the primary social control in the XIX century a series of presuppositions were constructed. We argue that they can no longer stand because such paradigm ignores the dynamics of the application of statutes and its hermeneutical character and it conceals the political consequences of decision making. We will analyze these two aspects from the stand point of four basic presuppositions that support them: that there is a complete or at least a high standard of transparency between the citizen and the legislator; that the statutes have a message accessible to all; that social relations are standard and, finally, that the State is the only way to the solution of social conflict.

Using examples of ground research of the 'Polos de Cidadania' team in the periphery of Belo Horizonte, Minas Gerais, in Brazil, our paper exposes an experience used to reformulate the traditional presuppositions of the Theory of Law and advance towards a comprehension of Law that can be called pluralist, or dialogical. Our paper will propose a new role for statutory law in a context of contemporary societies, and a path, or a methodology that makes the transition of paradigm an open, inaugural process.

With this paper we expect to contribute to the discussion about new methodology of law, to share experiences from different parts of the world in

[1] Professor at the University of Minas Gerais Law School; JSD Constitutional Law; Ms Social Philosophy; General Coordinator of the 'Polos de Cidadania' Research Program, Coordinator of the Posgraduate Law Program at the University of Minas Gerais Law School.

which the methodology of law has been challenged by situations of rights violations, and to diffuse the results of the research conducted in our university in order to perfection it.

Keywords: Law's Crisis. Legalist Paradigm. Pluralism. Functions of statutory law. New Social Actors. 'Pólos de Cidadania' Program.

Introduction

The starting point of the 'Polos de Cidadania' Research Program of the University of Minas Gerais in Belo Horizonte, Brazil, is the lack of effectiveness of fundamental rights on a day-to-day basis. This lack could be understood as a generalized disobedience to the basic legal system and to the statutory law, specifically. Such phenomenon has been described by sociology as anomy. It also involves the lack of application or the selective application of statutory law by the official power organs. Our paper aims to discuss this second point taking into account the thesis that there is an exhaustion of the legalist paradigm; that this paradigm conceals pluralism inherent to the legal order; and that a path out of this deadlock involves the questioning of the functions of statutory law in the legal system.

The problem we identify is that statutory law when converted into the primary social control in the XIX century constructed a series of presupposition that can no longer stand. First of all, such paradigm ignores the dynamics of the application of statutes and its hermeneutical character. Second, it conceals the political consequences of decision-making. We will analyze these two aspects, but first we must mention the presuppositions that support them.

Such a system could work as a primary social control if there was complete or at least a high standard of transparency between the citizen and the legislator. This presupposition has a close relation to the democratic political system and the questions that rose in contemporary societies about the efficiency of representation and the limits and possibilities of direct participation. The legalist paradigm also presupposes that the statutes have a message accessible to all. This access is understood in two ways: the access to the statutes themselves, the capability to know they exist and that they are valid; and the access in the sense of understanding what is written, the meaning and the duties and rights

imposed by the texts. In addition, statutory law as a primary social control presupposes that social relations are standard. In fact, the paradigm of written, codified law carries with it a claim of universality, which ignores that society is by definition pluralistic and that pluralism is an accentuated feature of contemporary complex societies. Thus it is difficult to use as a starting point a claim by which a text can capture "reality" in its wholeness. Finally, and still related to the theme of social pluralism, the legalistic paradigm claims that the State is the only way to the solution of social conflict. That is, the presupposition of a homogeneous, standard society is translated into the legal system in a way that it too, just as it happens in politics, economy and other social aspects, claims itself to be a monistic, closed system.

Using examples of ground research done by the 'Polos de Cidadania' team in the periphery of Belo Horizonte, Minas Gerais, in Brazil, we want to present to the XXV World Congress of Philosophy of Law and Social Philosophy an experience that helps us reformulate the traditional presuppositions of the Theory of Law, based on the legalistic paradigm, and advance towards a comprehension of Law that can be called pluralist, or dialogical. This transition involves questioning the role played by statutory law in the application of the legal system, especially as this application is demanded by a public that is not the typical, expected "client" of this system. The unsteadiness of the legalistic paradigm is made clear by the inclusion of new social actors in public policy, the direction taken by statutes, which try to regulate social behavior in broader ways, and non-legal social variables that interfere directly in the application of law.

As we show this 'crisis' throughout our paper, we will present the role we suggest that statutory law must play in order to be more efficient in a context of contemporary societies. Two roles will be specially analyzed: statutory law as 'due process'; that is, written law has an important attribution to establish conditions for the formalization of relationships when this is demanded by social actors involved. The symbolic force of writing lends legitimacy to political actions and stabilizes the mutual expectations. The other role that will be approached is that of statutory law as a 'value basis', in a way that social actors may project their world views and discuss what are their differences and common grounds utilizing a minimum group of directive principles that they agree to share in order to make the discussion possible.

Our paper also suggests a path, or a methodology, that makes the transition of paradigm an open, inaugural process. Our suggestions

are constructed along an 18 year research, that involves numerous professors from different areas such as law, psychology, philosophy, social science, architecture, communication, economy; a solid technical assistant team as interdisciplinary as the first; and most important, several generations of students who changed their view of law. The research team learned the consequences of centuries of the construction of a legal system that perpetuates inequality and prejudice using a technical and impartial discourse. In contrast, it found a way to practice law in a way that it may open society to the construction of emancipation, subjectivity and citizenship.

Accordingly the path suggested starts with the construction of a map of discursive and non violent forms of conflict solution in a way of a sociological diagnosis; afterwards, the recognition and the communication with such forms; especially through the language of art and theater; and third, the establishment of partnerships that stimulate collective organization and discussion of problems and solutions. Through this discussion it is possible to make explicit the political character of statutory law and the necessity to find institutional and non-institutional ways of making rights effective in circumstances of profound and permanent rights violations. Finally, the refusal to idealize the non-official forms of conflict solution, that is, the necessity to do a permanent revision of social and political practices using critical methods of violence diagnosis.

With this paper we expect to contribute to the discussion about new methodology of law, to share experiences from different parts of the world in which the methodology of law has been challenged by situations of rights violations, and to diffuse the results of the research conducted in our university in order to perfection it.

The exhaustion of legalist paradigm and the concealment of legal pluralism

In the margins of Nossa Senhora do Carmo Avenue, which cuts the main neighborhoods of one of the richest sections of the city of Belo Horizonte, there is a small shanty town, only a few poor houses starting to grow in a steep side road. The São Bento Villa, as it is known, has 200 families, considered the poorest among the poor inhabitants of the Aglomerado[2] Santa Lúcia – a shanty town that counts approximately

[2] Aglomerado can be understood as a pile of poor houses, a crammed neighborhood. It is the politically correct term for the more commonly used word "favela" or shanty town.

150.000 people. The City Hall has maintained a policy of evictions using the following arguments: Vila São Bento is located in a risk area, easily affected by the strong rain periods; it is a more recent formation from the rest of the "favela". The former has one hundred years, the latter, only twenty; it is located nearby a environmentally protected area which is being negatively affect; the possession of the public land is illegal and it is the duty of the City Hall to empty the area.

Two hundred meters ahead from Vila São Bento a big concrete construction has been lift up. It includes a fancy supermarket and delicatessen, a famous vehicle dealer, and a construction material shop. The buildings have two years, they have been partly lifted in public land, they lack the environmental licenses and two other municipal licenses to function, they have invaded part of an environmentally protected area and some of the construction is out of the municipal parameters, specially the structures built for the rain water control. These structures have several tubes that collect the rain water and throws it directly on top of some of the houses in Vila São Bento. In December 2009, during the rainy period, the water collected by the supermarket building fell over twenty houses of Vila São Bento, it provoked the downfall of five of these houses and turned fragile the other fifteen. Five families or a total of thirty people lost all furniture, clothes, documents, family photos and other personal belongings.

On January 2010, the community leader approached the Mediation Center of the Pólos de Cidadania Research Program[3] opened in the Santa Lúcia Agglomerate since 2003. The community leader wanted mediation between the community association and the families of the Vila São Bento and the construction firm responsible for the supermarket building. The Mediation Center approached the engineers, asked several times for meetings, without success. Finally, a letter signed by the professors that coordinate the Research Program turned the invitation effective. The engineers accepted a meeting to talk about the case, but did not show up the scheduled day. The Mediation Center approached City Hall and discovered the real conditions of the supermarket build-

[3] The Mediation Center staff is composed by Adriana Sena (professor, research coordination), Antônio Eduardo Nicacio (lawyer, chief of staff), Carolina Brognaro P. Drummond de Alvarenga (lawyer), Breno Azevedo Bucek (psychology trainee), Carlos Eduardo Santos (Law trainee), Gustavo Pessali Marques (law trainee), Isabelle Carvalho Curvo (Law trainee), Lucas Jerônimo Ribeiro da Silva (law trainee), Lucas Silvani Veiga Reis (Law trainee), Regina Pollyana Bernardes Silva (social science trainee). The information hereby exposed took the reports written by the staff as a basis.

ing. The government was then pressured to do its job and notify the supermarket and the engineers on the disrespect of the municipal rules and postures.

This case partially shows the "crisis" of the rule of law. Meant to be universally valid and applied to all, rules often have a selective application, in which social conditions have a definite weight: economic, social, political differences account for the different ways of applying the law. It ignores the fact that the State law enforcement organs are influenced by these differences and that their interpretation and application do not work in the same way. Thus practice makes fragile the theoretical presuppositions of the nineteenth century theory of law.

It was especially in the nineteenth century that statutory law became the main kind of social control. Both the constitutionalism movement that brought the model of written Constitutions and the codification movement helped to create an idea that Law reduced itself to statutory law, to those mandates produced by the Legislative Power by the means of preordered procedures. The very idea of law order, of systematization and unity of the system are based on a series of social and political presuppositions that structure themselves into the general notion of Rule of Law.

The Rule of Law presupposes that statutory law is the main source of Law because there is transparency in the relationship between citizen and legislator. Thus, an effective model of Rule of Law cannot work unless there is a correspondent democratic system with communication procedures that guarantee the relationship legislator and legislated. In such a system the legislator is *la bouche de la loi*, but additionally it is *la bouche du peuple*, that condensates the "general will". Another presupposition of the legalist model is that the message written into the statute is accessible to all. It raises a pretention of universality, abstraction and generality. Accessibility is to be understood in two ways: first, as if all have access to the text, everybody knows it has been promulgated and it is valid. Second, accessibility is the understanding of the content of law, as if all had the comprehension of the senses of the text, they are able to read its message and understand what expectations it creates.

The third legalist presupposition is that the pretention of universality, generality and abstraction of statutory law creates a pattern for social relationships, in a way that all will be expected to act and to be affected in the same way and in the same level by the text. It is thought that law is equal to all, and it is this factor that turns it just and capable of overcoming concrete inequalities, which are understood as contin-

gent elements in face of the stability of the text. Finally, we would like to remember the legalist presupposition that dictates that statutory law is the main social control because the State is the unique source of social conflict resolution. Thus, the model of the Law current in the nineteenth century is profoundly connected to the model of the Nation State since one concept gives theoretical and factual support to the other to such an extent that they become inseparable.

The sum of all these presuppositions form Modern Law in a way that the text and the formal procedures are transformed into a fetish that replaces *phronesis* so much used by Ancient and Medieval Law. The criticism of this model is generally released and accepted nowadays and finds two general problems connected to the presuppositions exposed above. The dynamics of the application of the texts of law have a hermeneutical character. Therefore, the meaning of texts cannot be fixated looking only at text itself. On the contrary, the meaning demands that the interpreter uses certain instruments that permit him to incorporate these dynamics. The dynamics of application also has a practical sense since it is directed to the resolution of real conflicts from the day-to-day experiences of real people who do not necessarily follow formal logic. These demands from the interpreter *phronesis*, that is, the use of practical reason related to the experiences of present conflicts and shared values of the community that may serve as a guide for the overcoming of conflict. Second of all, the presuppositions of the legalist paradigm conceal the political consequences of the choices that are justified by a formal logic accepted by specialized and technical discourses. It also fails to accept the stand point of the non-technical social and political conflict, that makes evident the discriminations, the differences and the distance between members of the community and its technical and legal corporations.

We believe that behind the unequal treatment given to the poor community of São Bento Vila and the rich companies involved in the supermarket building one may find a legalist comprehension of Law, a dogmatizing reading of statutory law, and a comprehension of private property that the legal system itself has long overcome, but that continues to operate in the imagination of law enforcers in a way that it becomes an unquestionable truth.

The difficulties to mediate these parties also demonstrate the ignorance of normative pluralism in society. The engineers of the powerful firm that builds the supermarket deny the legitimacy of the community association and the community leaders, as if they were not parties.

The City Hall acts the same way, it denies the legitimacy of the community leaders in this conflict because it argues that it cannot negotiate with whom is in illegal situation. On the other hand, in other circumstances, for instance, when it has to apply public policy against poverty, financed by Federal Government, the City Hall takes initiative to find and hear these same leaders, in order to receive financial resources from taxation.

Function and limits of statutory law and new social actors

Maria Francisca, a divorcée, mother of a 12 year old girl, a cleaning person, lives in the Serra Agglomerate. Francisca approached the Mediation Center[4] in may 2005. She was seeking legal counseling about her labor rights. Arriving in the Center she understood it was a free space of questioning and discussion, so she ended up exposing a conflict with her neighbor. He had built a stairway right beside the window of her house, which took all of her privacy. She was clearly bothered, but she would not say anything to the neighbor because she depended on him to get water. As this conversation went on, the mediators understood that all the people living in the Maestro Alley where Francisca lived had the same problem. They had to depend on one another for water, only a few had installed and functioning water system, some even had to get water from wells distant from the houses. This was not an isolated problem but a collective demand that had to be taken to the water company in order to be solved.

The mediators suggested that Francisca promote a mobilization of the Maestro Alley residents in order to find a collective solution and that the Mediation Center would help to get a meeting with the water company. She accepted to help but she did not show much enthusiasm or hope with the suggestion received. The mediators visit the Maestro Alley, Francisca introduced them to the residents and a diagnosis of the problem was made along with the collection of information. The residents had many complaints, such as, water bills charged with abusive values because of leaks and water connections that served more than one residence, many neighbors that had to share water, the need to get water from distant places, among others. It was clear that the residents

[4] The Mediation Center staff was composed by Miracy Gustin (professor and senior researcher); Antonio Eduardo Nicacio (lawyer, chief of staff), Vivian Martins (lawyer), Sielen Caldas (staff member), and undergraduate students.The information hereby exposed took the reports written by the staff as a basis.

of Maestro Alley were, as it is common in many Agglomerates, forgotten by the public policy.

The mediators went to the water company, explained the problem and heard the technicians who explained the difficulties involved in the solution of the case. The mediators insisted on a meeting with the alley residents in order to inform them and give them a chance to find solutions. The mediators formalized their need for a meeting. While they waited for the water company to schedule it, several assemblies were promoted with the alley residents in order to make a mobilization that could take a significant general and collective character. The residents started to collect signatures and visit one another to talk about the importance of being motivated and participant in order to conquer the right to treated water for all.

The day of the meeting arrived and surprised all. More than twenty-five people crowed in the Center' small room together with the water company representatives. They brought more than one hundred signatures that were handed in at the end of the night. At the beginning, the water company representatives explained the problems and difficulties concerning the regularization of the problems exposed. The alley residents heard courteously. The exposition ended with the water company saying that the solution would take long to come. At this point Maria Francisca stood up, loud and clear, and argued that she would not wait any longer, she had already waited for years and that she would mobilize all people in the alley to make a parade in front of the water company, that she would take cooking pots to make noise and would also call the press. She also said: "I am not asking for any favor, I am demanding a right". These were the exact words of a hopeless cleaning lady who first approached the Center with her head down. Francisca's intervention stimulated others to talk and all of them demanded a quick solution. The water company representatives promised to visit the alley first thing in the morning. Two weeks after the mediation, the new hydrometers were installed; it was not long before the water started flowing regularly.

Inclusion / exclusion[5]; recognition[6], citizenship[7] are concepts that can only be understood within a historical process of struggle, in which the ambivalent social positions are taken in one or in the other side. The

[5] (Habermas, Jürgen)

[6] (Honnet, Axel)

[7] (Santos, Boaventura de Sousa)

example above shows how a unmotivated, hopeless person, who has suffered discrimination and has been ignored by the public policy becomes an active social actor, who is willing to unite with others for a cause and confront a powerful company and demand from the government the enforcement of law with equal standard for all.

Law evolves in this historical process. On the one hand, one has the impression that law is static, as the text seems to show; on the other hand, the recognition of new social actors within social conflict bring new arguments and new perspectives to the text, which shows that it is, in fact, dynamic.

This dynamism may open to injustice, since the text may be interpreted in a different manner for different people, using economic, political and social conditions as a way for discrimination. Nonetheless, it also permits that these social actors claim isonomic treatment, or a differentiation that takes into account the social differences in a way that it promotes equality.

To overcome the legalist paradigm of Law – to which this dynamism is invisible – one needs to start by turning explicit the political character of Law and to analyze its impact in practice, in interpretation and in application. This makes easier the diagnosis of the problems generated by the 'crisis of modern Law' and points to possibilities to revise the methods of Jurisprudence towards a new paradigm. 'Polos de Cidadania' Program searches the virtuous circle constructed by the practical experiences of the field actions and the revision of theories by the means of research. This is the basis of the action research methodology developed by the program.

In general lines, the action research developed by Polos Program follows these guidelines. A diagnosis is done, that maps the discursive and non violent forms of conflict resolution used in a given socially vulnerable community or group. Even in socially vulnerable situations it is possible to find legitimate community leaders, associations, sociability groups, mobilization for a common cause, among others. Sao Bento Vila is an example of this since, as it has been mentioned, it is the poorest community within the Agglomerate and despite of this it mobilizes its population for the protection of a right and search for a pacific conflict resolution through the Mediation Center. The example of the Maestro Alley case shows how these leaders can appear spontaneously and the demands of the community are closely related to day-to-day situations and needs in contrast to abstract revolutionary causes. A non-institutionalized discursive space brought to light a demand that was not ini-

tially the reason to visit the Mediation Center. In an official legal space such demand would probably not appear or would appear as an individual and isolated problem.

After the identification of these discursive forms, the Program promotes their recognition in different levels: an internal level of the members of the group that legitimate the actions of the group and place their trust in collective organization. There is an external level of these groups and communities with their partners, which can be similar groups, university and its programs, right forums and organized civil society. Additionally, in the external level one needs the recognition of the public powers and of society in general, which includes the economic power. In São Bento Vila the Mediation Center made a concentrated effort to promote and help turn real the recognition in these various levels. There were common obstacles in order to get people to participate in the meetings with the City Hall or the engineers and to have a unique discourse that was also directed towards the different interests that were exposed in the association's meetings. It is also a challenge to get the engineers of a private corporation to recognize those people of the Vila as citizens with an important, legal and legitimate cause. In the Maestro Alley case it is possible to see how the mediation and the recognition of people and their demands by the public powers can redirect their actions towards more effective solutions. In this case the self-recognition was especially important, considering that Maria Francisca is not a "typical" community leader but a person that considers herself as a "normal citizen who is not involved in politics". In an interview made afterwards, when asked about the reasons why they had succeeded, Francisca replied: "I am a fighter, I fight for the things I want!"

Polos Program diagnose the violence, the counter spaces to the discursive forms of conflict resolution in order not to idealize the non-official forms of conflict resolution as if they were a solution to all social problems. Conflicts such as the one brought out in the São Bento Vila provide great mobilization of the community and leadership and opinion and interest contrast are evidenced. It is fairly common that in communitarian meetings the community leaders reproduce non-discursive and authoritarian forms. During the debates that lead to the mobilization and mediation with the engineer company there were "spiritual guides", "nation saviors", individualistic and egoistic people who intended to negotiate "off the line".

The outcome of the mediation case in Vila Sao Bento has brought unexpected results. Not only has the engineering company been oblige

to change the rain water system, but the mobilization of the Vila started a massive mobilization of the Agglomerate to discuss the urbanization policy that the government planed without dialogue or participation. This is a long and fascinating case that will be told in other papers. The families who lost their houses have not received any compensation for it. They are now in a judicial process against the companies. Nonetheless, we hope this to be a citizenship learning process. Such a conflict can burst a line of self-reflection and of dialogue between public powers, private entities, university and the vulnerable community about the role, the responsibilities and the rights of each one.

The Maestro Alley conflict is a success case, which makes impossible to describe the happiness of the mediation team who, above all, had unexpectedly created compromises and trust laces with the Alley community. Thanks to their emancipatory movement the solution to a long-term problem had been found. They had tried to solve the problem in individual ways, but a well articulated collective action was enough to achieve results. Additionally one of the best results of the Maestro Alley case is the emancipation of a cleaning lady who did not come from a technical juridical discourse. She used the law to legitimate her political demands originated in a real day-to-day conflict. She succeeded in capturing and internalizing the importance of social mobilization for the conquest of rights, which provided the Polos Program with the fortune of having such an emblematic case. The mediation reached positive results, the water problem was solved and by a domino effect many other neighbor problems. This case gave us a better comprehension of the relations between public power and people in vulnerable situations and of strategies and possibilities of collective mobilization.

Conclusion

Even though the cases do not ever come to an end: poverty and social exclusion are a reality of Brazilian favelas, and similar cases appear constantly, some final considerations on the general question are possible. What is the role and what are the limits of Law as statutory law? The enunciation of a crisis does not mean that we ignore the functional gain obtained with the formation of written Law. Statutory law continues to have an important function in legal dynamics, but it is not the one attributed to it by Jurisprudence in the XIX and XX centuries. A more definite answer to this question would need extensive research

much more than what is possible in the limits of this work. For now we simply put into perspective some possibilities given to the functions of statutory law in a new paradigm of Law.

Statutory law can work as the concretization of the form of a principle of "due process". It allows the institutionalization of some social relationship that benefit from its form. It is clear to us that statutory law does not include all social relationships possible. This is why we can speak of legal pluralism, as many social relationships are regulated by legal norms and principles that have not been become explicit in text. On the other hand, the formalization of the statutory texts allows the stabilization of behaviors, gives element for the vindication of rights, and establishes criteria for the debate of rights and the attribution of duties. Thus, statutory law allows organizing the processes of attribution of rights and duties and is a starting point to this debate.

In this path, statutory law has the function of being a minimal value basis that allows directive principles to be introduced in the debate on the attribution of rights and duties. Statutory law gives the format and the procedure that allows to regulate how this debate will occur and to establish a minimal content, open to interpretation, that qualifies the arguments of parties in accordance to a fundamental rights logic. Thus, in the debate on the attribution of rights and duties, each of the parties must prove through arguments that her interest is justifiable in the light of a principle and fundamental rights Law. This is, in our point of view, the main function of the written Constitution.

The other role we attribute to the written Constitution if that of a symbolic authority, a role that was opened as the figure of the medieval kings disappeared. Therefore, the written Constitution would be more than a legal text as the others. In it are written the paths of a political community that thinks itself as a principle and fundamental rights community. The Constitution depersonalizes authority and neutralizes the relations of favoritism and hierarchy. The text does not have enough symbolic power to operate by itself as the unifier of principles; but, taken as a collective production of a community that thinks and rethinks itself, it is able to elevate itself to the degree of maximal authority that guarantees aperture to this process. The written Constitution is a warrant that works more as it allows people to solve their conflicts discursively, taking the text as a directive argument. The difference between a written Constitution and a medieval king is that the latter is not a person that has to be pleased or feared. It is in a neutral position that can be taken by all, as it does not belong to anyone.

This path is precarious and highly risky and it does not diminish the possibilities of the abuse of rights. It is possible to use a constitutional and principle discourse to defend and justify the violation of rights. This is a risk inherent to the dialogical process and to pluralism. Because it is inherent, the risk can be administered but not eliminated. We count on the fact that the same risk that allows an "embezzlement" of the Constitution is the same that allows us to admit that it is constructed in an open process to new subjects and to new conflicts. They can also use the principles in their favor, to construct a free, just and solidarity society. We can admit with Habermas and Dworkin, that this is a process that corrects itself and makes the constitutionally correct answer prevail.

On the dubious position taken by the City Hall, one last note is important. One of the arguments used by the community leaders of Vila Sao Bento an of other Vilas and Slums that are confronted by the compulsory eviction of City Hall is to work this dubiousness in their favor. Thus, if City Hall arguments that these land possessions are illegal and that it is imperative to evict them without any compensation, then why does the same City Hall promote improvements, offers public services and even, in some occasions, charge taxes? The community in slums are included and excluded. This ambivalent position opens to paths and struggle for recognition.

References

DUSSEL, Enrique. Ética da Libertação: na idade de globalização e de exclusão. Petrópolis: Vozes, 2002.

DWORKIN, Ronald. O Império do Direito. Tradução de Jefferson Luiz Camargo. São Paulo: Martins Fontes, 1999.

GUSTIN, Miracy Barbosa de Sousa. Constituição de Capital Social: minimização da violência e regularização fundiária sustentável. Belo Horizonte: Anais do 7º. Encontro de Extensão da Universidade Federal de Minas Gerais, 12 a 15 de setembro de 2004.

GUSTIN, Miracy Barbosa de Sousa. A metodologia da mediação. Belo Horizonte: Faculdade de Direito da UFMG, Programa Pólos de Cidadania, 2003.

HABERMAS, Jürgen. Constitutional Democracy: a paradoxical union of contradictory principles? Political Theory, vol. 29, n.6, p. 766-781, dez. 2001.

HESPANHA, Antonio Manuel. Lei, Justiça e Litigiosidade. História e prospectiva de um paradigma. Lisboa: Fundação Calouste Gulbenkian, 1993.

SALCEDO REPOLÊS, Maria Fernanda. Quem deve ser o guardião da Constituição? Do Poder Moderador ao Supremo Tribunal Federal. Belo Horizonte: Mandamentos, 2009.

SALCEDO REPOLÊS, Maria Fernanda. Identidade do sujeito constitucional e controle de constitucionalidade: raízes históricas da atuação do Supremo Tribunal Federal. Rio de Janeiro: Fundação Casa de Rui Barbosa, 2010.

SANTOS, Boaventura de Sousa. Para além do Pensamento Abissal: Das linhas globais a uma ecologia de saberes, In Santos, Boaventura de Sousa e Meneses, Maria Paula (Orgs.), *Epistemologias do Sul*. Coimbra: Editora Almedina, 23-71.

SANTOS, Boaventura de Sousa. Poderá o direito ser emancipatório? Revista Crítica de Ciências Sociais, Coimbra, n. 65, p. 3-76, mai. 2003.

SANTOS, Boaventura de Sousa. O discurso e o poder: Ensaio sobre a sociologia da retórica jurídica.

SANTOS, Boaventura de Sousa. Conflito e transformação Social: Uma paisagem das justiças em Moçambique. Porto: Afrontamento, 2003.

Labour Law and its essential nature within the capitalist scene of the 21st Century[1]

Érica Fernandes Teixeira[2]

Abstract: Labour Law is the main instrument for the insertion of the citizen in any capitalist society. Starting from the fundamental value of work for every citizen, we can say that there are several roles played by an employment relationship, in relation to the citizen's individual and family life. Thus, through a formal relationship of employment, regulated by Labour Law, the labour law branch has largely contributed to the materialisation of human dignity. This allows human beings to get affirmation in the broadest content, whether in the personal, social, economic or even family aspect. The exaltation of dignified work is one of the most effective ways of making Democracy more effective in contemporary societies. Labour Law is a pioneer branch with a social judicial base, of interventionist nature, generating interests of a social ilk. Even though Brazil has not experienced the real experience of the Welfare State, the supremacy of work and employment has been incorporated into the judicial culture, particularly after the enactment of the Federal Constitution of 1988, becoming one of the most significant democratic conquests in the Western capitalist world.

Keywords: Labour Law branch of the legal profession; essentialness; human dignity; insertion; protection; democracy; worthy work; fundamental right.

1. Labour Law as an instrument for social insertion

In the contemporary democratic system the relationship of em-

[1] TEIXEIRA, Érica Fernandes. **O Direito do Trabalho e sua essencialidade no cenário capitalista do século XXI.** [Labour Law and its essentialness in the capitalist scene of the 21st Century]. Percurso Acadêmico Magazine, Interdisciplinary Magazine of the Pontifical Catholic University of Minas Gerais (PUC Minas) in Barreiro. Electronic Edition. Belo Horizonte, v. 1, n. 2, Jul/dez. 2011. Disponível em: http://periodicos.pucminas.br/index.php/percursoacademico/ ISSN: 2236-0603.

[2] Doctor and Master in Labour Law from PUC Minas, Teacher of Law and Labour Law Procedures (IEC/ PUC/MG). Solicitor.

ployment, which is regulated by Labour Law, is indeed an essential instrument of social insertion. Through this relationship, the citizen actually becomes a player in the democratic system, and gets integrated with the capitalist system, making feasible the necessary social justice and also the distribution of wealth.

Like with any judicial phenomenon, the labour law branch also seeks an essential purpose. Having been implemented through the activities of the working classes in the 19th Century, as a reaction to extreme and uncontrolled exploitation of human labour, Labour Law has, in this direction of purpose and greater value, its basic fundamentals for its establishment and perpetuation. Indeed, the very functions of this branch of the legal profession also mirror its strong social character, mainly in the regulation of the relationship of employment, which is the main type of relation which binds the citizen to the capitalist system. For this reason, it can be said that Labour Law is the most efficient instrument for carrying out the principle of Dignity of the Human Being, which is established in item III to Article 1 of the Brazilian Constitution, thus being one dimension within Human Rights.[1]

As Delgado teaches us[2], the main function of the Labour Law branch of the legal profession is that of "improving the working conditions borne by the work force in the socioeconomic order". Delgado also states that "this decisive responsibility of the labour law division, in fact, carries out a basic intention of democracy and also the demercantilisation of the workforce within the capitalist social and economic system restricting the free rein of market forces, exercising control over supply and the management of human labour"[3]. In addition, through this same process of demercantilisation of human labour, Labour Law ennobles and benefits work, with rules that are different from the simple rules dictated by the market, always seeking to reduce the intensity of the conflict between capital and labour.

This is the function that can best be confirmed over more than 150 years of development. Even though, particularly in Brazil, we have been through a scenario of crisis and also resistance to the affirmation of this branch of the legal profession during the 1990s, Labour Law has

[1] ALVARENGA, Rúbia Zanotelli, *"O Direito do Trabalho como Dimensão dos Direitos Humanos"*. [Labour Law as a Dimension of Human Rights] São Paulo: LTr., 2009.

[2] DELGADO, Maurício Godinho. *Curso de Direito do Trabalho* [Course in Labour Law], 11th Edition, São Paulo: LTr, 2012. page 58.

[3] DELGADO, Maurício Godinho. *Curso de Direito do Trabalho* [Course in Labour Law], 11th Edition, São Paulo: LTr, 2012. page 58.

already overcome this phase and has consistently entered a process of strengthening and expansion, right from the first decade of the 21st Century.

Throughout the 1990s, the spreading of chains of greater precariousness of labour and low prestige given to the protection of Labour Law, led to a high rate of concentration of income.[4]

Official data of the Brazilian Ministry for Labour and Jobs (MTE) show a rise in the number of formal employees as from 2001, when a total of 23 million citizens worked formally. In the period between 2003 and 2020, RAIS data suggest a generation of 15.384 million formal jobs. In 2010 alone, there was the creation of 2.590 new contracts of employment following the Brazilian Consolidated Labour Laws (CLT) and 270.4 thousand statutory workers, which led to an increase in the participation of CLT jobs in the total formal employment, from 79.84% to 80.53% (and hence a reduction in the participation of statutory employment, from 20.16% to 19.47%).

This is a total that is as yet unprecedented in the history of formal employment over a period of eight successive years, which undoubtedly shows the increase in the value of work and also the greater value given to a regulated relationship of employment in our country. Over this period, the average growth in the GDP was 4.32% which reflects a highly favourable formal employment/product ratio.

This favourable performance is also due to some other economic factors, including the strengthening of internal demand by the real rise in the salary mass by 8.2%; expansion in the volume of credit given by

[4] According to official data of the Brazilian Institute of Geography and Statistics (IBGE), mentioned by Delgado "general income increased in Brazil in the 1990s but, together with the rise in income, there is a growing distance in salary terms between the richest 10% and the poorest 40%. In 1992, the difference between the top and the base of the national income pyramid was aboht thirteen national minimum wages. By 1999, this figure had increased to about seventeen. These figures were obtained by the study Synthesis of Social Indicators 2000, which was disclosed yesterday by the Brazilian Institute of Geography and Statistics" (Gazeta Mercantil, São Paulo, 05/04/2001, p. A-10 – *Income grows, but inequality remains.)* The same research study also shows thet the number of people in formal employment (with a signed work card) has practically not grown throughout the 1990s, having increased from 19.2 million to 19.6 million workers. At that time, Brazil was in 74th position in the world, in he ranking of the Human Development Index (HDI) of the United Nations, PNUD (Monitor Mercantil, Rio de Janeiro, 05/04/2001, page 08). In: DELGADO, Maurício Godinho, *Curso de Direito do Trabalho* [Course in Labour Law], 11th Edition, São Paulo: LTr, 2012. page 114.

the financial system with free funding for individual people, of 17.6% in nominal terms; and also a rise in investments of 21.8% - the highest accumulated rate in four quarters, ever since the series started in 1986. This positive result in terms of GDP surely affected the situation of formal employment, which recorded a generation of 2.861 million jobs, the highest figure in the RAIS historical series, giving a growth rate of some 6.94%.[5]

Graph 1: Variation of generation of jobs, from 2003 to 2010, in Brazil.[6] *Source: RAIS/MTE*

According to statistical data from the Brazilian Ministry of Labour and Jobs, in 2010 we counted some 66.3 million Brazilians who were formally employed. In 2011, it is expected that the figure shall edge up to 70 million. Preliminary results from the questionnaire of the Sample of the Demographic Census of 2010, disclosed by the Brazilian Institute of Geography and Statistics (IBGE) on 16/11/11,[7]the percentage of employees with formal employment grew substantially in all the regions of the country, rising from 54.4% in 2000 to 65.2% in 2010. Also as an answer to the process of generalisation of Labour Law and improvement

[5] Available at: http://portal.mte.gov.br/data/files/8A7C812D2E7318C8012FE039D8AA15D9/resultado_2010.pdf. Accessed on 13/04/2012.

[6] Available at: http://portal.mte.gov.br/data/files/8A7C812D2E7318C8012FE039D8AA15D9/resultado_2010.pdf. Accessed on 13/04/2012.

[7] Available at: http://www.brasil.gov.br/noticias/arquivos/2011/11/16/posse-de-carteira-assinada-chega-a-65-2-dos-empregados-segundo-censo-2010. Acesso em 12/04/2012.

of the "minimum civilisatory threshold"[8]implemented by this branch of the legal profession, we highlight the fact that, as informed by the Brazilian Ministry for Labour and Jobs (MTE), the result for 2011 – which observed a rise in the number of job openings in Brazil – was the third best in the series of the Brazilian Register of Employed and Unwaged People (Caged) between 2003 and 2011 (here we stress the fact that, this being a register aimed exclusively at companies, this register does not include those workers who have been hired by individuals, as domestic workers)[9].

All this data shows the full compatibility of economic growth of the country, with the growing application of Labour Law. Once the crisis phase of this key area of the legal profession has been overcome and after the democratic transition in our country, the number of job openings based on the Brazilian Consolidated Labour Laws (CLT) has increased considerably, which shows and confirms that Labour Law is indeed essential in the promotion of social justice.

Being the main instrument for the insertion of the citizen in any capitalist society, the relationship of formal employment as regulated by Labour Law is directly related to human dignity. It is through it that the human being obtains self-affirmation in the broadest sense, whether in the personal, social, economic or family sphere. For these reasons the greater value of dignified work in the main Western capitalist economies has established itself as one of the pillars of social democracy in the contemporary world[10]. There shall be no human dignity that can survive in places where Labour Law is not minimally assured (mainly through the guarantee of fundamental rights of absolute unavailability).[11]

In the teachings of Trindade:

> "Labour Law, in one fell swoop, values labour, preserves the human being, seeks to protect other human values outside work, and

[8] DELGADO, Maurício Godinho, *Curso de Direito do Trabalho* [Course in Labour Law], 11th Edition, São Paulo: LTr, 2012. page 193.

[9] Available athttp://portal.mte.gov.br/imprensa/brasil-cria-mais-de-2-2-milhoes-de-empregos-formais-em-dez-meses.htm. Accessed on: 12/04/2012.

[10] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigma of destruction and the paths to reconstruction] *São Paulo: LTr,* 2005. page 29.

[11] DELGADO, Gabriela Neves. *Direito Fundamental ao trabalho digno*. [Fundamental Right to Dignified Work] São Paulo: LTr. 2006. page 207.

> also regulates the model for production, from the perspective of construction of social justice within the capitalist regime."[12]

2. Development of Labour Law and social inclusion

The historical approach is an important instrument to check the progress of the developmental process that has been experienced by Labour Law, as also by Pension Law. Considering that both branches of law have essentially social functions, it is necessary to stress the main social and economic events that have legal repercussions throughout history, and the respective relationships with the promotion of citizenship and social inclusion.

According to the doctrine of NORBERTO BOBBIO:

> "the rights of the human being, however basic they may be, are historical rights, which means they are born out of certain circumstances, characterised by a struggle in defence of new freedoms against old powers, and born gradually, not all at once or once and for all".[13]

Through an analysis of the process of formation and consolidation of Labour Law, experienced by the countries of central capitalism, it is possible to paint a picture of the advances and setbacks of the social justice indices and, hence, of labour inclusion.

According to best doctrine[14] the **phase of establishment**of Labour Law started in 1802, with the implementation of some restrictions on the employment of minors through the English document known as*Peel's Act*. This phase is characterised by laws that are still somewhat

---

[12] TRINDADE, José Damião de Lima. Terá o Direito do Trabalho chegado a seu esgotamento histórico? [Has Labour Law reached its historical exhaustion?] In: SILVA, Alessandro da; SOUTO MAIOR, Jorge Luiz; FELIPPE, Kenarik Boujikian; SEMER, Marcelo (Coords.). **Direitos Humanos**: essência do Direito do Trabalho. [Human Rights: essence of Labour Law] São Paulo, LTr, 2007, page 36.

[13] BOBBIO, Norberto. A Era dos Direitos. [The Age of Rights] Translated by Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992, page 5.

[14] See: DELGADO, Maurício Godinho. *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. page 95 **and** FILHO, Evaristo de Moraes. *Tratado elementar de Direito do Trabalho* [Elementary Treatise on Labour Law], v.I. Rio de Janeiro: Freitas Bastos, 1960. page 81.

dispersive and in early stages, seeking only to stem the abusive and brutal exploitation of child and women's labour.

This period for systematisation of this branch of law is strongly marked by growing recognition of the right to free trade union association of the workers, through normative instruments in many European countries. It is also important to note the increase in the creation of labour laws and the development of collective agreements, both in more democratic countries such as France, as also in countries with authoritarian experience like Germany. Maurício Godinho Delgado, quoting Evaristo de Moraes Filho[15], highlights that the Berlin Conference was an important material source for the establishment of Labour Law in the world. This because it was the first formal recognition, by European countries, of the need to regulate the labour market, through edition of different labour standards, in line with the reality of each country.

With the end of the First World War in 1919, there is the start of the phase of **formalisation and independence of Labour Law**, obtaining effective citizenship in countries with a central economy. There is the creation of the ILO (1919); the constitutionalisation of Labour Law (Mexican Constitution of 1917 and the Weimar Republic in 1919), as well as the enactment of a considerable framework of labour law, as a reply to the harmonisation between the group action of the workers and the dynamics of the state. After the Second World War, the advancement of labour constitutionalism and the hegemony of the*Welfare State* marked the peak of this phase of institutionalisation of Labour Law.

The release of the Communist Manifesto by Marx and Engels in 1848, like Chartism in England and the French Revolution, have had a decisive effect on the phase of intensification of the development of this branch of the legal profession. This is the first moment in the history of the world when there was considerable action on the part of the workers against the institutional order that was current at the time, and more precisely against the entrepreneurial classes.

According to Geovani de Oliveira Tavares:

> "In the French Revolution, the Right to Resistance showed itself with greater efficiency in the defence of the idea of freedom. Backed by the Enlightenment and liberalism on the rise, the French justified their violent resistance to the order established, in the name of freedom, their greatest principle. Thus, freedom would represent

[15] DELGADO, Maurício Godinho. *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. page 97.

> a Fundamental Right of the human being, above any law intending to harm this principle."[16]

The assumption of social rights as being essential, by the judicial order, is crucial to the Democratic State of Right, representing ambitions which had been sought ever since the French Revolution, but not made positive. The action of the State started to become more significant in working towards intervention, through the issuance of heteronomous regulations binding on all citizens, making up the model of private subordinate regulation.[17]

What is certain is that, even with awareness-building and the constitutionalisation of social rights, these first went through an implementation crisis, due to the discretionary action of Government administrators, whose interests insisted on upholding the interests of the bourgeoisie. As Bonavides points out, such rights were referred to the programmatic sphere, in the light of lack of procedural instruments that could implement the rights to freedom, thus passing through a crisis of non-observance and execution. (BONAVIDES, Paulo. *Curso de Direito Constitucional.*[Course in Constitutional Law] 11th edition. São Paulo: Malheiros. 2001. page518).

The lack of effectiveness of social constitutionalism generated much social unrest at the time, and this was worsened by the inconstancies of the capitalist system. This all played a part in getting the capitalist world to experience one of the most devastating crises in history from 1929 to 1933, causing significant social decline in many countries, with rising unemployment and poverty, together with the destructuring of the productive and the business system.

Since then, Labour Law has incorporated this direction of social purpose in a different way from other branches of the legal profession, with the scope being the search for social justice. This branch of the legal profession started to reorganise the fundamentals that were informed by the liberal system in effect, imposing a new path based on the principle of equality, basically seeking to soothe the imbalance which was inherent to the parts that agree on the contract of employment. The democratic constitutions of France, Italy, Germany, Portugal and Spain,

[16] TAVARES, Geovani de Oliveira. *Desobediência Civil e Direito Político de Resistência. Os Novos Direitos*. [Civil Disobedience and the Political Right to Resistance] Campinas: Edicamp, 2003, page 11.

[17] Refer to: DELGADO, Maurício Godinho. *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. pages 100 to 104.

after the Second World War, incorporated not only labour standards as also rules to value human work, and principles as protection, such as the Dignity of the Human Being and Social Justice.

With the end of the Second World War, there was the establishment of a consistent level of rights and guarantees given to the worker. The golden period was marked by a *pact* in which the state ensured social gains and security for the worker who, in turn, took on a commitment not to get involved in revolutionary movements.[18]What happened in fact was "an implicit or explicit consensus between employers and labour organisations, to keep workers' requests within limits that have no effect on profits."[19]

David Harvey describes this period which "was based on a set of practices for control of labour, technologies, consumption habits, and configurations of political and economic power, and that this package could, within reason, be considered as Fordist-Keynesian."[20]

Within the model of minimum state, the companies started to take up a style of management focused on cost reduction and increase in profits, structuring the Toyotist model of production, in a battle for a market which has become more and more competitive.

At the end of the 20th Century, in 1979 and 1980, developed Western countries have gone through a phase of **crisis and transition of Labour Law**. A set of factors mentioned by Maurício Godinho Delgado[21]could be confirmed at that time. These include the economic crisis which started in 1973 and 1974, known as the oil crisis, that was not duly tackled by the political forces of the time, worsened by the increase in Government debt, due to increases in interest rates, and low collection of taxes by the State. There was a significant effect on the economic system, thereby increasing inflation, competition between companies, and the rates of unemployment, generated by the intense unemployment which was, in turn, generated by the intense technological progress, which implemented robotisation of the production processes and also significant advances in the means of communication. Prestige was gained by

[18] ANTUNES,Ricardo. *Os sentidos do trabalho.*[The meanings of work] 3rd edition. São Paulo: Boitempo, 1997. page 38.

[19] HOBSBAWM, Eric. *A era dos extremos: o breve século XX: 1914-1991.*[The Age of Extremes: the brief 20th Century, 1914-1991] São Paulo: Cia das Letras. 1999. page 276.

[20] HARVEY, David. *Condição Pós-moderna* [Post-Modern Condition] São Paulo: Loyola, 1989. page 119.

[21] DELGADO, Maurício Godinho. *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. pages 98 to 100.

the restructuring of business models forecasting the decentralisation of the production process (outsourcing) and new forma of work provision (teleworking and home office), which seemed not to have been affected by Labour Law. For this reason, even the imminent constitution of a workless society was considered[22]. The model based on the greater value given to work and employment, with the creation of wide social and assistential policies, through strong intervention by the state, seems to have become unfeasible during that phase experienced by capitalism.

In this scenario where little prestige was given to Labour Law, the inauguration of the terms of office of Margaret Thatcher in 1979, Ronald Reagan in 1980, and Helmut Kohl in 1982 all had significant influences on the promotion of deregulation of the welfare state, sustaining individualist Government strategies, averse to social intervention. The affirmation that until then had been achieved by Labour Law, as the most effective instrument for the implementation of social policies that arose during capitalism started to be attacked as from the end of the 20th Century, rather than deregulation, in a process with growing flexibility. This new strategy of political and social management gained momentum, mainly as a result of there not being a consistent counterpoint which could redirect economic growth and social justice. Thus, it became no longer advantageous for sustaining the capitalist model and investment in Government policies and strong intervention in the economy, thus establishing the crisis of the welfare state.

The strong deregulation and lower degree of formality of the labour market, especially in countries on the periphery of central capitalism, was undeniable. Even so,

> "... it also seems clear that there is a historical need of a judicial segment with the essential characteristics of Labour Law. It seems unquestionable, in short, that the presence of an unequal system for creation, circulation and appropriation of assets and wealth, through a social medium based on the economic distinction between their components (like capitalism) but which coexist with individuals' formal freedom and also the judicial and cultural recognition that there is a minimum threshold for coexistence in social reality (aspects made more significant with Democracy), and cannot disregard a judicial system that is so ingrained within the

[22] DELGADO, Maurício Godinho. . *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. page 98.

core of social relations, such as Labour Law."[23]

The convergence of different factors that encourage the greater precariousness of Labour Law led to an increase in social exclusion, bringing serious consequences related to human dignity. The concentration of income and the lack of prestige of the imperative control by Labour Law are one of the most efficient ways of promoting a perverse social crisis, thus placing greater and greater obstacles to economic, social, political and cultural development, as also the effectuation of Human Rights.

Jeremy Rifkin, quoted by Nascimento, says that the crisis as here described

> "...showed the cruel side, the replacement of software employees, through data that show an ever-declining need for many employees, and the inversely proportional growth in productivity of the companies, with the use of high technology rather than detached workers, to the point where it can be said that, at present, for the first time, human work is being systematically eliminated from the production process to be replaced by intelligent machines, in carrying out several tasks in a range of sectors, including agriculture, industrial activity and commerce."24

However, what actually led to the rupture and decline of Labour Law was shown in a transition phase, going towards a renewed Labour Law.[25]

In a comparative analysis, comparing with the progress of Labour Law in the world, Maurício Godinho Delgado highlights the fact that in Brazil there was no period of systematisation of this activity, where there would be the maturity of its institutions and consolidation of structures. Due to the strong authoritarian action, in our country there was "a closed model, centralised and compact, also characterised by the incomparable capacity of resistance and duration throughout time."[26]

---

[23] DELGADO, Maurício Godinho. . *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. pages 98 to 100.

[24] NASCIMENTO, Amauri Mascaro. *Curso de direito do trabalho* [Course of Labour Law]. 23rd edition. São Paulo: Saraiva, 2012. page 40.

[25] DELGADO, Maurício Godinho. . *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. page 100.

[26] DELGADO, Maurício Godinho. . *Curso de Direito do Trabalho* [Course of Labour

With the exception of Pension Law, which separated from the corporate trade union structure in the 1960s (with the extinction of the Retirement and Pension Institutes of the professional categories, and creation of one single pension institute, which at that time was the INPS), Delgado says there were no significant changes in the Brazilian model of labour law, not even in the democratic phase (1945-1964), or the military regime which took power in 1964. This period saw the enactment of important labour laws, such as Law 605/49, which sets rules for the concession of a weekly paid rest day and paid holidays; Law 4,090/62, on the special Christmas bonus (thirteenth salary); and Law 4,266/63, which created the family wage.

Also as from 1964, under the military regime, in the search for strict economic development of the country, detached from social destination, there was the implementation of ideas of flexibility and outsourcing, already sustaining significant development in Europe and in the United States of America. In this regard, many laws were passed within this scenario, including Law 5,107/66 which set up the FGTS system, thereby scrapping ten-year stability; Law 6,019/74, which created the figure of the temporary worker, restricting labour rights; and Law 6,709/79, which addressed the twice-yearly salary readjustment.

The phase of overcoming the corporatist model and the democratic institution in the country with the 1988 Federal Constitution, associated to consistent attempts at radical destructuring of the whole specialised legal profession through influent liberalist ideologies, common in the world since 1970, mark the crisis and the transition of Labour Law.

However, here it is important to point out the democratic advances implemented by the Brazilian Constitution of 1988. Here we could mention the scrapping of State intervention on trade union institutions, and also the recognition and encouragement of the fundamental group process of creation of autonomous rules. Thus, state interventionism admits and calls to widespread participation of society in the drawing up of labour rules, so as to generate rules that truly bring out the desires of citizens. However, collective agreements do not prevail over rights to absolute unavailability, which are part of the Minimum Civilisatory Threshold[27], that are essential rights form the effective implementation of the dignity of the human being and assignment of greater value to

Law]. 11th edition. São Paulo: LTr, 2012. page 112.

[27] DELGADO, Maurício Godinho. . *Curso de Direito do Trabalho* [Course of Labour Law]. 11th edition. São Paulo: LTr, 2012. page 115.

work.

3. Opposition to generalisation of Labour Law in Brazil and impasses within social inclusion

Standing out from the European standard of development and generalisation of Labour Law, in Brazil one can see a scenario of social exclusion largely caused by strong resistance to the implementation of their institutes at several different moments throughout history. In the words of Maurício Godinho Delgado:

> "In truth, it seems clear that the decisive secret behind the impressive level of social exclusion in this country lies in the fact that capitalist development here, throughout the 20th Century, took place without a compatible generalisation of Labour Law in the Brazilian society and economy – which did not allow the establishment of an efficient, comprehensive and agile mechanism for distribution of wealth and power within a social and economic context."[28]

The justification for this situation of lack of prestige and opposition to the expansion of Labour Law is surely found in the results necessarily promoted by the generalisation of this branch, based on high levels of citizenship and social justice. The point is that in Brazil the authoritarian tradition of their Government policies has always shown clear resistance to the promotion of distribution of wealth and power to all citizens.

So Labour Law became systematic, which is an important counterpoint to the traditional preceding trend of total social exclusion. However, it cannot be said that this is a style of management based on the full generalisation of this branch of law. However, we can indeed say that this was highly limited progress.[29] This, due to the high number of Brazil-

[28] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. p. 129.

[29] As Delgado points out in his work, "Article 7 of the Brazilian Consolidated Labour Laws (CLT), as is well known, carefully established that its terms did normally not apply to rural workers. This exclusion also applied to domestic workers." (DELGADO, Maurício Godinho.*Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of

ian workers that this protection has not reached, and, as is clearly shown by Maurício Godinho Delgado "about 70% of Brazilian workers would be left out of the modernising and progressive effects of Labour Law, as the urban development rate of the country in the 1930s and 1940s was only about 30%."[3031]The Statute of the Rural Worker, approved in the Government of João Goulartby Law 4214/63 sought to strengthen the actions of the trade unions at companies and hence this would improve the living and working conditions of the labourers. However, this law never had concrete effects, due to the toppling of the democratic regime, with the military regime's rise to power in 1964.

Thus:

> "the State would show that it has no more interest in the quest for generalisation of Labour Law for the economy and the society as a whole. As a result, the state did not even equip itself with the institutional instruments that are necessary to efficiently perform a similar process of generalisation."[32]

Here, it is essential to exploit the teachings of Paulo Bonavides about the constitutions that have been effective in our country between 1824 and 1969:

> "The crisis is not, therefore, the crisis of a Constitution, but the crisis of the constituent power: a power that whenever it reorganises or enacts a Constitution shows itself, in this act, to be impotent to

---

destruction and the paths of reconstruction] São Paulo: LTr, 2005. p. 130).

[30] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. p. 130.

[31] Delgado also informs, in this passage, that the 1940 Census, "the first to divide the Brazilian population into rural and urban, notes the fact that 31.1% of the inhabitants of Brazil lived in cities". (*Almanaque Abril* – Brazil 2003. São Paulo: Abril, 2003, page 166). In: DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. p. 130.

[32] DELGADO, Maurício Godinho.*Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 132.

> stamp out the root of the social and political ills that affect the State, the regime, the institutions and society as a whole. This constituent crisis has been, ever since the origin of the Brazilian state, the crisis which has not yet been solved."[33]

One must conclude that, even marked by strongly authoritarian texts through to the end of the military regime, the Brazilian constitutions have also been important in bringing about a group conscience about the lack of implementation of its rules in the face of the tough national reality, which has had a repercussion in the eruption of social movements in the 1980s (20th Century).

Neoliberalism has arisen and spread as a quick formula to overcome the crisis and also for state action to satisfy social needs. Maurício Godinho Delgado says that the hegemony of neoliberal thought has developed through

> "...the formatting and generalisation of ultraliberal thought, seeking to become the only valid form of economic thought, allegedly without consistent competitors, in relation to the explanation and management of the contemporary economy and society."[34]

In addition, the process of construction of the liberal hegemony also had the fragmentation of part of critical thinking in relation to capitalism, or at least uncontrolled capitalism, which the author states as being "without reciprocity". The original texts, including some Marxist documents that had an important role in the criticism of capitalism in its unobstructed form, started to be part of explicative proposals of neoliberalism, unveiling the idea of a new paradigm in social and economic life, whose bases were not based on employment or jobs. This retreat shown by critical thinking, according to the author, showed a concession to the idea of the end of the priority given to work and jobs, alleging that these had lost their importance within the dynamics of capitalism and also taking in the arguments of the technological innovations of the Third Industrial Revolution, of post-Fordian productive reorganisation

---

[33]BONAVIDES, Paulo. *Curso de direito constitucional* [Course in Constitutional Law] São *Paulo*: Malheiros, *2000*. page 348.

[34] DELGADO, Maurício Godinho.*Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 95.

and also the globalisation of the markets.[35]

The neoliberal line within a Minimum State along the traditional lines of *laissez-faire* was the strategy found to eliminate all barriers blocking limitation of profits, enforced by the interventionism which was characteristic of the Welfare State. The new liberal thought sustained the importance of the private economic market in the structuring and operation of the economy and of society, with the submission of the State and of Government policies to this prevalence. Thus, the north of Government action was aimed at the monetary management of the economy and of society, as also for the creation of conditions more and more favourable to private investments.[36]

The reduction of State intervention started to be implemented through the creation of policies with a maximum deregulation of different economic activities in the quest for more favourable investments and also for programmes for the privatisation of state companies. Maurício Godinho Delgado highlights that this process was an incessant search for

> "...new paths for normative deregulation, so as to reduce the former empire of judicial regulations – as the synthesis of a certain general desire – controlling the movements of private economic agents."[37]

Apart from the hegemony of "neoliberalism" and the control exercised by key States that lead neoliberal policies, Maurício Godinho Delgado also highlights another requirement that has made globalisation feasible in the way this has presented itself:

> "The third requirement, essentially political and cultural, can be di-

[35] DELGADO, Maurício Godinho.*Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 98.

[36] DELGADO, Maurício Godinho.*Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. p. 21.

[37] DELGADO, Maurício Godinho. . *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. p. 22.

> vided into internal and external dimensions. In the external plane, this is the absence, when making international comparisons, of any consistent social and political experience which would be an antithesis or at least an effective counterpoint against the ultraliberal ideological formula – which Hobsbawm calls "a political threat worthy of credit to the system." With the dismantling of the Soviet Union, there is the disappearance of the strongest counterpoint to capitalism in the 20th Century. Internally (even though Hobsbawm essentially concentrates on the international side of the problem), the lack of this effective counterpoint is configured through the weakening of the different projects for popular hegemony in the West (socialists, social-democrats, Labour Parties etc) with the loss of political and programmatic consistency of certain parties somehow related to these projects. To this, we add the weakening of the trade union movement over the last decades (even though this is a phenomenon resulting from factors that are not always common, according to the distinct national historical experiences)."[38]

The so-called "internalisation dependent on ultraliberalism"[39] took place with the officialisation of one same standard economic thought in several countries in the world, including Brazil, with the universalisation of economic policies and practices, in favour of the globalising success of the market. For this, it has been necessary to take away the national obstacles blocking the idea of a world policy, as well as other adjustments as necessary, such as the deregulation of the labour market. This all without a real analysis of the effective gains for the citizens involved.

The absorption of ultraliberal thought was sealed by Brazil in 1982, in the last administration within the military regime. At this time there was the signing of the first of several commitments between Government policies and the IMF, suggesting a path without any commitment to social rights, to be trailed by Brazil in the following years. The end of the authoritarian regime in Brazil in 1985 with the implementa-

[38] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 17.

[39] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 26.

tion of the New Republic (1985-1987) and the political and institutional transition between 1987 and 1988 ended up braking the full consolidation of ultraliberal policies in the 1980s.Starting with the Government of Fernando Collor (1990-1992), and more significantly under Fernando Henrique Cardoso (1994-2002), the radical neoliberalist formula started to be "enthusiastically followed by the Brazilian State."[40]

Attacks upon the priority given to work and employment were evident as from the entrance of the 21st Century. The technological innovations that were observed with the Third Industrial Revolution were responsible for major alterations in the way work was carried out and also in how factories were structured. Microelectronics, robotisation, computer technologies and telecommunications are the most significant points. The unemployment that came about in the 1970s was thus worsened, and this was made even worse by the multiplication of different forms of labour provision outside the traditional model of a relationship of employment. The gathering of large throngs of workers in large companies was attacked by the introduction of machines that got more and more productive.

The production structure started to be based on lean companies, and to bring formulas used by Toyota, a Japanese automobile company. At the same time, the Fordian techniques for production were maximised, to intensify exploitation of labour. The Toyota Way recommends modern techniques for plant operation, based on the new logic behind capital, seeking internal and external control of production.

> "the internal control arises from the mechanisms of lean production or downsizing, and just-in-time service, with the purpose of inserting total quality in the whole production process."[41]

In a lean factory, goods are produced with high specialisation but are not stocked. This production strategy is conducted by market

[40] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 24.

[41] MAJNONI D'INTIGNANO, Béatrice. In: DELGADO, Gabriela Neves. *O mundo do Trabalho na transição entre os séculos XX e XXI.* [The World of Work in the Transition between the 20th and 21st Centuries] In: PIMENTA, José Roberto Freire [et al.], coord. *Direito do Trabalho: evolução, crise, perspectivas.* [Labour Law: evolution, crisis and prospects] São Paulo: LTr. 2004. page 132.

needs, defining what shall be produced at each moment.

Márcio Pochmann, on discussing the world exploitation of labour in countries peripheral to central capitalism, states that:

> "... the technological advancement, combined with the diffusion of several production chains on a planetary network, enabled a distinction between conception and execution work in a scenario of global misgovernance. Geographically, one witnessed the establishment of a new International Division of Labour which concentrated especially in rich countries, the conception work, which requires continuous education and a compatible level of quality, with more civilised remuneration and working conditions. In peripheral countries, with neoliberal reforms, on a larger scale, there was progress of economic specialisation dependent on execution, normally poorly qualified, underpaid and also in comparable conditions of exploitation (often to those oflabour flexibility) of the 19th Century."[42]

The consequences of the technology impulse can also be analysed from another standpoint, showing positive results in contemporary society. In this regard, with the sedimentation of more modern production methods, the technological innovations and enhancements resulting therefrom were responsible for a significant hike in productivity, production and also in the consumer market of the respective goods produced there. This relationship is described by Maurício, *in verbis:*

> "The fact is that there is, in truth, also a positive relationship created by the very same technological advances (and not only the negative relationship as usually mentioned). Such advances, while also strengthening the productivity of labour, also strengthen production itself and, hence, bring an important reduction in the price of goods; by logical consequence, they immediately cause a significant expansion of the consumer market for these same goods."[43]

---

[42] POCHMANN, Márcio. *Revolução no embate das idéias e projeto de sociedade.* [Revolution in the clash of ideas and project for society]*in* SISTER, Sérgio (org.) *O abc da crise.* [The ABC of the crisis] 1st edition, São Paulo: Editora Fundação Perseu Abramo, 2009. page 157.

[43] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 38.

The author also considers that technological innovations, while they did indeed eliminate certain types of labour from society, also created new employment positions as replacements, associated to a new type of production which was not even imaginable in the previous period.[44] Also according to Delgado, to this we add the advances that technology and science have caused to the life expectancy of the people.[45]This meant, according to this author, a considerable expansion of the consumer market, comprising experienced adults who also seek new services and new employment positions for their control (mainly in the health and education sectors, and pensions for the chronologically advantaged).

The vertical production mode and the concentration of the production system were eliminated thanks to the development of means of transport and communication over the last few decades. In tune with the core aim of reducing production time as also its structural size and its stocks, the companies' organisation into networks has become more popular. Thus, there is a growth in the idea of shedding industrial megaplants, strengthening *decentralisation or corporate outsourcing*, which also leads to a weakening of the trade union movement.[46]

In the process of organisation of labour, there have also been several changes within the companies, to accelerate productivity and reduce costs involved. According to the same author, three formulas have been highlighted, namely: "the reduction of jobs and posts (and, hence, of employment openings) with greater addition of roles and responsibilities to the same individuals; labour outsourcing; and the Toyotist or

[44]The exploitation of leisure and business tourism is an example of this, as it is encouraged by the advances in communications and also in transport. In: DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 39.

[45] The life expectancy in Brazil reached 73.48 years in 2010, according to the research into Mortality Tables published on 01/12/2011 by the Brazilian Institute of Geography and Statistics (IBGE). The previous year it came to 73.2 years. Over three decades, the increase in life expectancy came to 10 years and 11 months. Available at://www.ibge.gov.br/home/estatistica/populacao/tabuadevida/2010/notastecnicas.pdf

[46] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 42.

Ohnist system for labour management."[47]

Also based on the teachings of Mauricio Godinho Delgado, labour outsourcing is treated as a type of social management, of management of the workforce, that has caused a significant reduction of work benefits in the labour world. The service-providing company, which is inserted in the relationship between the worker and the company using the services, takes on the responsibility for the relationship of employment. Even though this does not lead to a reduction of work posts but rather of costs, this generates an effective disorder in the system of rights and guarantees that are associated with Labour Law, as well as weakening the action of the trade unions. This is explained thus by the author:

> "on the one hand it artificially reduces the number of workers that are statistically allocated to some important business segments (like industrial activity and the financial segment, for example). This is because the outsourced workers, from a legal standpoint, are considered members of the service sector of the economy, being associated to service providers. On the other hand, the outsourcing formula fragments the working class, thereby creating practical difficulties which are very difficult to overcome, blocking the effective application of Labour Law, due to the many peculiarities that are thus created, due to the types of economic segments, companies and workers involved. Such peculiarities lead to dispersion of the understanding and regulation of the phenomenon by the legal system, as also by the operators such as the legal system and the labour inspection system."[48]

The perverse practice of exploitation of labour through outsourcing casts the worker into a laboratory environment which is "immune" to the protective regulations established by labour safety considerations. This is because outsourced personnel are not part of the Internal Accident Prevention Committees (CIPAs) and also lack trade union representation, meaning that they have a strongly reduced possibility of

[47] DELGADO, Maurício Godinho.*Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 42.

[48] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 45.

questioning of the working conditions to which they are subjected. "Exploitation moves from capital to those without capital."[49]

The teachings here transcribed from the work of Jorge Luiz Souto Maiorlay bare the social exclusion which has been promoted by labour outsourcing, *in verbis*:

> "...outsourcing imposes a logic based on attacks against social rights, taking advantage of the perversity of presentation merely as a modern, inevitable and irreversible technique of production. In fact, the only irreversible aspect of outsourcing is the lowering of human conditions. There is no concrete possibility of establishing a legal model recommending outsourcing and effectiveness of social rights at the same time, as its logic is that of masking the relationship between capital and labour, and the fact is that one can only talk about an effective State of Social Rights when there is the social responsibility of capital in its relationship with labour."[50]

5. Final Comments

For all the points mentioned above, we see that there is no compatibility, or even the slightest degree of harmony, between implementation of social rights and the increase in precariousness of labour rights, and in this form of labour exploitation we see that the possibility of implementation of Human Rights is visibly scythed away. In addition, "this is a kind of bomb which helps to implode Labour Law, albeit not

[49] MAIOR, Jorge Luiz Souto. *A terceirização e a lógica do mal.*[Outsourcing and the logic of evil] In: SENA, Adriana Goulart; DELGADO, Gabriela Neves; NUNES, Raquel Portugal (coord). *Dignidade humana e inclusão social: caminhos para a efetividade do Direito do Trabalho no Brasil.*[Human dignity and social inclusion: paths to the effectivenss of Labour Law in Brazil] São Paulo: LTr. 2010. page 48.

[50] MAIOR, Jorge Luiz Souto. *A terceirização e a lógica do mal.* [Outsourcing and the logic of evil] In: SENA, Adriana Goulart; DELGADO, Gabriela Neves; NUNES, Raquel Portugal (coord). *Dignidade humana e inclusão social: caminhos para a efetividade do Direito do Trabalho no Brasil.* [Human dignity and social inclusion: paths to the effectivenss of Labour Law in Brazil] São Paulo: LTr. 2010. page 54.

the only one"[51], being an efficient instrument for social exclusion. [52]

As one can infer, the absorption of the Toyotist method of production by companies is a strong instrument to make Labour Law more precarious and is therefore a factor that brings about social exclusion[53]. Hence, and regardless of repeated cases of outsourcing and informal labour which are accepted throughout the world, it is believed that the spread of the ideas raised by this system is always an extreme attempt to attack the solidity of Labour Law, as also the imperative nature of its regulations. Thus, to imagine a society without the protection given by Labour Law is to treat the society in an inhuman manner, far detached from the minimum levels of dignity which is due to its citizens. For all this, in the words of Jorge Luiz Souto Maior, "employment has not finished, and indeed never will finish, at least as long as the capitalist system of production remains in effect."[54]

References

ALVARENGA, Rúbia Zanotelli, *"O Direito do Trabalho como Dimensão dos Direitos Humanos"*. São Paulo: LTr., 2009.

ANTUNES,Ricardo. *Os sentidos do trabalho.* 3.ed. São Paulo: Boitempo, 1997.

[51] In: VIANA, Márcio Túlio. *Terceirização e sindicato.* [Outsourcing and Trade Unions] In:DELGADO, Gabriela Neves; HENRIQUE, Carlos Augusto Junqueira. (coord.). *Terceirização no direito do trabalho*. [Outsourcing in Labour Law] Belo Horizonte : Mandamentos, 2004. page 329.

[52]According to Márcio Túlio Viana: "This movement is a denial of the Welfare State and the need for protection of the worker, while also producing underemployment, unemployment and even working conditions akin to slavery,; one of the clearest and most curious signs of its logic is in the fact that the New York Stock Exchange (NYSE) indices tend to rise whenever companies practice downsizing." VIANA, Márcio Túlio. *Terceirização e sindicato.* [Outsourcing and Trade Unions]In:DELGADO, Gabriela Neves; HENRIQUE, Carlos Augusto Junqueira. (coord.). *Terceirização no direito do trabalho*. [Outsourcing in Labour Law] Belo Horizonte : Mandamentos, 2004. page 322.

[53] DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução.* [Capitalism, work and employment: between the paradigm of destruction and the paths of reconstruction] São Paulo: LTr, 2005. page 51.

[54] MAIOR, Jorge Luiz Souto. *Relação de emprego e direito do trabalho – no contexto da ampliação da competência da Justiça do trabalho.* [Relationship between employment and labour law – within the context of expansion of the competence of the Labour Courts] ão Paulo: LTR, 2007. p. 22.

BARROS, Alice Monteiro de. *Curso de Direito do Trabalho*. 2. ed. São Paulo: LTr, 2006.

BOBBIO, Norberto. A Era dos Direitos. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

BONAVIDES, Paulo. *Curso de direito constitucional*. São *Paulo*: Malheiros, *2000*.

DELGADO, Maurício Godinho. Curso de Direito do Trabalho. 11. ed. São Paulo: LTr, 2012.

DELGADO, Maurício Godinho. *Capitalismo, trabalho e emprego: entre o paradigma da destruição e os caminhos da reconstrução. São Paulo: LTr,* 2005. p.29.

DELGADO, Gabriela Neves. *Direito Fundamental ao trabalho digno*. São Paulo: LTr. 2006. p. 207.

DELGADO, Gabriela Neves. *O mundo do trabalho na transição entre os séculos XX e XXI*. In: DIAS, Fernanda Melazo; VIANA, Márcio Túlio (Coord.). *O novo contrato a prazo*. São Paulo: LTr, 1998, p. 21.

GOMES, Orlando; GOTTSCHALK, Élson. *Curso de Direito do Trabalho*. 18. ed. Rio de Janeiro: Forense, 2007. CUEVA, de Mario de la. *Derecho mexicano del trabajo*. Ciudad de México: Porrúa, 1960. p. 120. In:

HOBSBAWM, Eric. *A era dos extremos: o breve século XX: 1914-1991.* São Paulo: Cia das letras. 1999.

HARVEY, David. *Condição Pós-moderna*. São Paulo: Loyola, 1989.

NASCIMENTO, Amauri Mascaro. *Curso de direito do trabalho.* 23. ed. São Paulo: Saraiva, 2008.

GOMES, Orlando; GOTTSCHALK, Élson. *Curso de Direito do Trabalho*. 18. ed. Rio de Janeiro: Forense, 2007.

BARROSO, Luís Roberto. O Direito constitucional e a efetividade de suas normas: limites e possibilidades da Constituição brasileira. 8.ed. Rio de Janeiro: Renovar, 2006.

MAIOR, Jorge Luiz Souto. *A terceirização e a lógica do mal.* In: SENA, Adriana Goulart; DELGADO, Gabriela Neves; NUNES, Raquel Portugal (coord). *Dignidade humana e inclusão social: caminhos para a efetividade do Direito do Trabalho no Brasil.* São Paulo: LTr. 2010.

NASCIMENTO, Amauri Mascaro. *Curso de direito do trabalho.* 23. ed. São Paulo: Saraiva, 2008.

PIMENTA, José Roberto Freire *et al.* (Org.). *Direito do Trabalho: evolução, crise perspectivas*. São Paulo: LTr, 2004.

POCHMANN, Márcio. *Revolução no embate das idéias e projeto de sociedade. in* SISTER, Sérgio (org.) *O abc da crise.* 1ª ed. São Paulo: Editora Fundação Perseu Abramo, 2009.

POCHMANN, Márcio. *O Emprego na Globalização – a nova divisão internacional do trabalho e os caminhos que o Brasil escolheu.* São Paulo: Boitempo, 2002.

TAVARES, Geovani de Oliveira. Desobediência Civil e Direito Político de Resistência. Os Novos Direitos. Campinas: Edicamp, 2003, p. 11.

TRINDADE, José Damião de Lima. Terá o Direito do Trabalho chegado a seu esgotamento histórico? In: SILVA, Alessandro da; SOUTO MAIOR, Jorge Luiz; FELIPPE, Kenarik Boujikian; SEMER, Marcelo (Coords.). *Direitos Humanos:* essência do Direito do Trabalho. São Paulo, LTr, 2007.

VIANNA, Segadas, et al. Antecedentes históricos. In: SUSSEKIND, Arnaldo; MARANHÃO, Délio; VIANNA Segadas. *Instituições de direito do trabalho*. 11. ed. São Paulo: LTr, 1991.

VIANA, Márcio Túlio. *Proteção social do trabalhador no mundo globalizado. In:* PIMENTA, José Roberto Freire [et al.], coord. *Direito do Trabalho: evolução, crise, perspectivas.* São Paulo: LTr. 2004.

VIANA, Márcio Túlio. *Terceirização e sindicato.* In:DELGADO, Gabriela Neves; HENRIQUE, Carlos Augusto Junqueira. (coord.). *Terceirização no direito do trabalho*. Belo Horizonte: Mandamentos, 2004.

VIANA, Márcio Túlio. As andanças da economia e as mudanças no Direito. In: RENAULT, Luiz Otávio Linhares;

MAIOR, Jorge Luiz Souto. *Relação de emprego e direito do trabalho – no contexto da ampliação da competência da justiça do trabalho.* São Paulo: LTR, 2007.

Accessory tax obligations from the perspective of the fundamental duties theory

Henrique da Cunha Tavares[1*]
Adriano Sant'Ana Pedra[2**]

Abstract: The fundamental duty fulfillment of contributing to public spending is essential for mobilizing the financial resources needed to implement fundamental rights by the State. And tax obligations named "accessories" play a major role in monitoring compliance of this fundamental duty. However, the institution of instrumental duties to be performed by taxpayers and third parties, in a progressive transfer to particulars of government tasks, taxes management and supervision inherent of the State, should be examined not only from the principle of legality aspect, its own tax field, but also in light of the rights, freedoms and fundamental guarantees of persons. This article aims to analyze, under the bias of fundamental duties theory, the criteria that must be observed for the establishment of accessory tax obligations.

Keywords: accessory tax obligation; fundamental duty; fundamental right.

1. Introduction

The fundamental duties theme was relatively forgotten by the doctrine and jurisprudence, especially when compared to the impor-

[1*] Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Post-graduate degree in Tax Law (Faculdade Cândido Mendes de Vitória) and in Civil Procedural Law (Faculdade de Direito de Cachoeiro de Itapemirim). Professor of Tax Law at Centro Universitário São Camilo. Lawyer. E-mail: henrique@tavaresegiro.com.br. *Curriculum Vitae*: http://lattes.cnpq.br/6505052521263008.

[2**] PhD in Constitutional Law (Pontifícia Universidade Católica de São Paulo – PUC/SP). Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Professor of Constitutional Law at Faculdade de Direito de Vitória – FDV (bachelor, master and doctoral program). Federal Attorney. E-mail: adrianopedra@fdv.br. *Curriculum Vitae*: http://lattes.cnpq.br/0637600349096702.

tance given to the rights. The predominance in the treatment of rights in relation to the duties is further verified in countries that have promulgated their current constitutions shortly after the fall of totalitarian or authoritarian regimes (NABAIS, 2004, p. 16), such as Brazil case.

For most people, the term "fundamental duty" still refers to limitation of rights, spaying of individual liberties and State authoritarianism. However, the fundamental duties study have been consolidated exactly in the opposite direction: fundamental duties fulfillment as a mean of realizing constitutional rights.

The rights achievements such as education, health, security, housing, among others, is only achieved through significant financial resources. Even constitutional rights related to individual citizens freedom, whose participation expected by the State is negative (GARZÓN VALDES, 1986, p. 17-33; LAPORTA, 1986, p. 55-63), that is, not to interfere or limit the freedom, cost money. The locomotion freedom, for example, is a right that, for its exercise, requires, besides State abstention in the sense of not to prevent it, a positive State action aimed to make it possible for everyone, through measures such as editing own legislation, hiring traffic agents, fixing tracks, walkways and signs, etc..

In order to facilitate the supervision and require the effective compliance of fundamental duty to pay taxes, the State may impose positive obligations (issuing invoices, submitting tax return, deeding tax books, etc.) and negative obligations (not denying free access of the tax books inspection, not transporting goods unaccompanied by tax document, etc.) to taxpayers and third parties. These obligations are called accessory tax obligations (Article 113, § 2, National Tax Code, Law No. 5.172/1966).

However, what we see nowadays – in the three spheres of the Brazilian Federation – is the delivery to taxpayers and third parties of a significant part of government tasks, management and even taxes inspection, through the establishment of several and different accessory obligations.

This study proposes to analyze, keeping in mind the fundamental duty of contributing to public spending, how is (not) possible to convert progressively taxpayers and their organizations in a "indirect tax administration *ad hoc*" (NABAIS, 2004, p. 557), without violating rights, freedoms and fundamental guarantees of persons.

2. The fundamental duty to contribute to public spending in Brazilian Constitution

Differently from other fundamental duties, the duty to contribute to public spending has no express provision in the Brazilian Federal Constitution of 1988. However, is taken for granted that the Constitution recognized, even if implicitly, the fundamental *status* of the said duty, mainly due to the abundant constitutional norms about tax and budget (Title VI, Articles 145-169).

Considering that Brazil, like most countries in contemporary times, abdicated from the direct economic activity and reserved that right primordially to private initiative (Article 173, Constitution), the resources needed to maintain the State and, consequently, the constitutional rights and guarantees funding will be given essentially through tax collection; in other words, for the compliance by all society, of the fundamental duty of contributing to public spending, which makes even more evident and undeniable essential character of this duty.

Portuguese doctrine, referring to its Constitution, which, as well as the Brazilian one, does not bring express provision of the fundamental duty of contributing to public spending, maintains that

> fundamental duties don't require a constitutional enshrinement expressed, being enough itself with a consecration implied as is currently between us with the duty to pay taxes, duty which no one doubts that has consecration is in our Constitution, because it is clear whether the wide and developed "fiscal constitution" that contains (arts. 106 and 107) whether by it State tax nature which incorporates that the recognition and guarantee of fundamental rights presupposes. (NABAIS, 2004, p. 63)

There are, even, those who classify fundamental duty in implicit and explicit one (SIQUEIRA, 2012, p. 173-174), leaving no doubt, therefore, that the duty to contribute to public spending is fundamental and is positivised in Brazilian Constitution, despite absence of express provision in Constitution text.

3. The fundamental duty to contribute to public spending and the tax law subsystem

The study of Tax Law from the perspective of the fundamental duty of contributing to public spending is not something that sticks to the tax lawyers, being this subject practically nonexistent in "courses" and "manuals" of Tax Law, at least under this terminology.

In effect, the logic of the Tax Law evolves generally limited to the norm – broad sense. The principle of legality is the responsible for ensuring, in the final analysis, legal certainty to the parties that compose – in it is own tax expert language – the legal tax relationship: active subject (State; Article 119, National Tax Code) and passive subject (taxpayer or guardian; Article 121, National Tax Code).

In order to approximate the topic covered in this article of the proper language subsystem Tax Law, it can be said that the fundamental duty to contribute to public expenditure encompasses the principal obligation, provided in Article 113, § 1, of the the National Tax Code. According to Aliomar Baleeiro (2000, 697), the main obligation (pay tribute) "constitutes the nucleus of the tax law, as an obligatory law which it is."

According to most tax classic doctrine scholars, the link between the tax authorities and the taxpayer is due to a relationship of tax power necessarily provided by law (see MACHADO, 1998, p. 45), to its interpreted from the institutions obligational logic of private law.

However, an important part of the doctrine, especially international, studies the tax relationship from the constitutional focus, moving away from the legal relations of private law. Ricardo Lobo Torres (2005, p. 235) highlights that "the constitutional overlapping in the tax relationship guides its problematic for connections field between revenue and public spending, important datum in the current phase of public finances."

It is this new vision, of the obligations imposed on the taxpayer interpretation from the bias of the fundamental duty of contributing to public spending, and beyond the strict legality, it is intended to cover in this article.

It is not wanted by it to say that the obligation to pay taxes should or can unlink the law and the legality principle, which would certainly be foolhardy and a regression. But, certainly, the legal standard that governs the relationship maintained between State and citizen in the

interest of tax collection should be seen (interpreted) through the lens of constitutional rights and guarantees, extracting from there their limitations and field action.

Contrary to what it may seem, the proposal to interpret the tax law – here, specifically, the rules establishing the accessories obligations – by the bias of the fundamental duty of contributing to public spending, presents itself as an alternative to bring rationality and the standard tax fairness in tax rule and the tax system as a whole.

This happens because the legality principle, accompanied by a deductive interpretation method, literal, did not prevent the Brazilian tax burden to become the highest among the countries with the development stage equivalent to the Brazilian (BIPT, 2010, 1-3). Nevertheless, an important part of doctrine, paradoxically, continues to indicate it as the main or even the only arsenal protecting the citizens against the State.

According to José Casalta Nabais (2004, p. 218), the legality principle, currently, is revealed "hobbling, seeing that, unlike what happened in the liberal State, we are no longer dealing with a minimal state, nor there is assurance that the law is an expression of the common good".

Thus, one can not consider legislation – broad sense – as sole and sufficient fundament for the birth of the obligation to give (principal), do or not do (accessory), imposed on taxpayer, in a logic of private law merely obligatory. The tax relationship should be seen as a result of the fundamental duty to contribute to public expenditure, so that the rules governing the taxpayer obligations are also weighed up through modern techniques of constitutional interpretation, making the correlation with the constitutional taxpayer rights and the collectivity, preventing the pretext of materializing rights, it is actually promoting their annihilation.

4. The accessory obligation as element of fundamental duty to contribute to public spending

Accessories obligations, as told in the introductory part of this article, are the formal obligations which are imposed on the taxpayers and third parties in order to ensure the compliance of the obligation to pay taxes, which effective the fundamental duty to contribute to the public expenses. Hence, accessory obligations have a close connection with the fundamental duty hereof, being an integral part of its core. In this particular, accessory obligations are presented as taxpayer's duty to

cooperate in the management and supervision of taxes.

Summing up to this the fact that, pursuant to Article 113, § 3, CTN, "the accessory obligation by the mere fact of its failure to comply with, is converted into the primary obligation on the financial penalty", *ie*, in the event of noncompliance with a formal obligation, it will be born the very primary duty to pay.

Thus, either became it aims to ensure the compliance with the duty to pay tribute, presenting itself as cooperation duty, or by the fact that his failure to comply with turns accessory obligation into principal, remains clear interrelationship between the obligation said accessory and the fundamental duty to contribute to public spending.

5. The crescent protagonism of accessory obligations: need to fix criteria to establish formal duties

It is ever increasing the protagonism of instrumental duties imposed on taxpayers and third parties in the tax relationship. Just check that the main taxes are currently made originally by the taxpayer as a consequence of compliance of accessories obligations imposed on him.

The Income Tax, the main social contributions, the Tax (of States) on the Circulation of Goods and Services (ICMS), the Tax on Service of any Kind (ISS), among others, are examples of taxes that the taxpayer has the obligation to calculate, collect to the public coffers and transmit the statement by electronic means which will lead the tribute information to the supervision system. All this, without any involvement of the state, to whom it is reserved the power to review the correctness of the procedures performed by the taxpayer or by a third party, within the statutory limitation period of five years.

And to ensure that the taxpayer will run the proper procedures management, collection and inspection tax is imposed on him and others heavy financial penalties in case of noncompliance with hundreds of accessories obligations that carriers of such procedures.

The legislative systematic planned for the institution for accessories obligations also greatly favors their proliferation. This is because, by virtue of which has in its own National Tax Code (Article 113, § 2, and Article 96), the instrumental obligations can be created by infra standards issued by the Public Administration (Decrees, Regulatory Instructions, Ordinances etc.). And, although the penalties for noncompliance with the accessory duty should be provided by ordinary law,

such legislative predictions are transmitted by open terminology and typical generic conducts as "untrusted document", "embarrassment to monitoring" or "failure to deliver the declaration", technique that deliberately embraces a multitude of behaviors and instrumental obligations imposed on taxpayers and third parties for infralegal acts.

Anyway, the accessory tax obligations may be freely established by those directly benefiting from them: Tax Administration. Using the popular saying: it is like putting the mouse to take care of the cheese.

To have an idea, only in the framework of the State of Espírito Santo, the Title III from the Regulation of ICMS (Decreto 1.090/2002), which is dedicated to accessories obligations, has more than 200 articles, with almost all the letters of the alphabet, plus numerous subsections, paragraphs and subparagraphs, which certainly must import over 1,000 instrumental obligations conveyed to tax payers and third parties. There are also obligations spread along the Regulation itself and from other state regulatory instruments, which will be added to the obligations – not less numerous and costly – instituted by Federal and local Treasury.

On those grounds, it can be concluded that the simple service to the principle of strict legality, *ie* completion of formal rules for the imposition of accessories obligations – the competent agency, vehicle specific legal etc. – it is not sufficient to confer limit, proportionality and rationality to the creation of accessory tax obligations, which are responsible for transferring to the particular, in geometric escalation, the onus of tasks essentially state of management and fiscal controls.

6. Criteria for the establishment of accessories obligations

If the principle of legality does not seem sufficient to prevent exceeding in the institution of accessories obligations, what would be the criteria for the imposition of cooperation obligations of the taxpayer in the management and supervision of taxes?

Victor Uckmar, cited by Ricardo Lobo Torres (1999, p. 25-26), proposes some fundamental principles that should be reserved for taxpayers to prevent prevarications and abuses by the Public Administration. Among them, all important, there is one particularly relevant for this study: "the right not to be forced to useless duties or excessively costly regarding to the results".

That precept, extracted from the work of the Italian tax expert, expresses the limit of proportionality that must be observed when the

imposition of accessory obligations.

Accessories obligations, for example, that offend the constitutional right to privacy of information and of privacy – such as the obligation of financial institutions to report to the IRS data from their account holders – or instrumental duties imposed to taxpayers who severely limit the principle of free initiative – as the obligation described in Article 21, § 10, of Decree No. 1.090/2002, of Espírito Santo State, which practically prohibits the sale of goods and provision of services to taxpayers not enabled in order with the State Finance Department – show up at first glance, the disproportionate sacrifices to fundamental principles. Nevertheless, continue to be used, simply for filling out the formal requirements of strict legality.

The disproportionality can also be observed in the excess of accessories obligations that aim the same purpose. It is common the imposition of various obligations to the taxpayer, by the same or different agencies to inform the same thing. In many cases, the revenue obtained in the development of economic activity has to be informed by the taxpayer to the National Treasury, for example, monthly or quarterly, and afterwards an accumulated manner annual. This same information should be released in another database to be delivered also to the State or municipal Finance Department, which does not seem reasonable, even taking into account the autonomy of federal agencies, mainly because the National Tax Code, in its article 199, imposes to the Union, to the States and Municipalities the duty of cooperation and information exchange. Added to this books, magnetic files, licenses, permits, registrations, etc., increasing obligations, never in the sense of simplifying, but rather transferring and concentrating on the taxpayer assignments that are originally from the State.

Finally, it should be required, as the main criterion, that the instrumental requirement to be imposed on the taxpayer is necessary and useful in the task of assisting, by proportional and sacrifice supportable (GARZON VALDES, 1986, p. 17), the achievement of the fundamental duty to contribute to public spending.

Whereas analysis of the excess for the identification of criteria, properly, shall be, as a rule, by proportionality means, there is no other way than a case by case analysis, because "the proportionality test is topic" (PEDRA, 2006, p. 198).

Thus, each rule establishing the respective accessory obligation, or group of them, should be analyzed by the postulate of proportionality, more specifically, by examining its three sub principles: adequacy,

necessity and proportionality in the strict sense (ÁVILA, 2011, p . 174-175). At the end, there will be offence to the principle of proportionality whenever there is disproportion between one or more ends pursued by standard stablishing the accessory obligations and the means used for their achievement (BARROSO, 1999, p. 215).

7. Final considerations

The fundamental duties constitute as a general criterion of solidarity among members of society (ROIG, 1999, p. 401). The accessory tax obligations, in its turn, constitute a duty of cooperation by the contributors or third parties in achieving the fundamental duty of contributing to public spending.

However, as result of its own idea of solidarity, it should not impose to taxpayers extraordinary sacrifices (GARZON VALDÉS, 1986, p. 17) – or disproportionate – the pretext of fulfillment of fundamental duties.

It is worth remembering that on individuals already rests the onus – which it is not easy - to pay taxes. The State is not allowed to transfer to taxpayers, in any case and at any price, the obligations to administer, collect and supervise, which are originally theirs, especially when these instrumental duties represent, as it happens today, significant administrative and financial onus, without speaking at the assumptions that affect the rights and constitutional guarantees.

References

ÁVILA, Humberto. **Teoria dos princípios**. 12. ed. São Paulo: Malheiros, 2011.

BALEEIRO, Aliomar. **Direito tributário brasileiro.** 11. ed. Rio de Janeiro: Forense, 2000.

BARROSO, Luís Roberto. **Interpretação e aplicação da Constituição**. 3. ed. São Paulo: Saraiva, 1999.

GARZÓN VALDÉS, Ernesto. Los deberes positivos generales y su fundamentación. **Doxa**, Alicante, n. 3, 1986.

INSTITUTO BRASILEIRO DE PLANEJAMENTO TRIBUTÁRIO. **Brasil sobe no ranking mundial dos países com maior carga tributária.** São Paulo, 2010. Disponível em: <http://www.ibpt.com.br/img/_publicacao/13891/189.pdf> Acesso em: 02 out. 2012.

LAPORTA, Francisco J. Algunos problemas de los deberes positivos generales (observaciones a un artículo de Ernesto Garzón Valdés). **Doxa**, Alicante, n. 3, 1986, p. 55-63.

MACHADO, Hugo de Brito. **Curso de direito tributário**. 14. ed. São Paulo: Malheiros, 1998.

NABAIS, José Casalta. **O dever fundamental de pagar impostos**. Coimbra: Almedina, 2004.

_____. **Por uma liberdade com responsabilidade**. Coimbra: Coimbra, 2007.

PEDRA, Anderson Sant'Ana. **O Controle da constitucionalidade dos atos legislativos.** Bel Horizonte: Del Rey, 2006.

ROIG, Rafael de Assis. **Deberes y obligaciones em la Constitucion.** Madri: Centro de Estudios Constitucionales, 1991.

SIQUEIRA. Julio Pinheiro Faro Homem de. Deveres como condição para a concretização de direitos. **Revista de Direito Constitucional e Internacional.** São Paulo: RT, ano 20, v. 79, p. 168-209, abr.-jun. 2012.

TORRES, Ricardo Lobo. **Curso de direito financeiro e tributário**. 12. ed. Rio de Janeiro: Renovar, 2005.

_____. **Tratado de direito constitucional financeiro e tributário**: os direitos humanos e a tributação: imunidade e isonomia. Rio de Janeiro: Renovar, 1999.

Between Two Worlds
Human Rights and Public Policies

Eric Santos Lima

Abstract: In modern society, political issues commonly turned into legal issues. The greater example is the subject of public policy has been gaining importance in the field of law. This is due to the progressive recognition that the effectiveness of human rights requires the achievement of public policy. Public policies, in turn, are guided by rights to be effected to be effected through them. These themes are not only related, as though presuppose each other, challenging legal and political thought. In the language of systems theory, this means that we are facing a difference or form, always defying the crossing from one side to another. Our research turned to this difference, trying to observe the codependency on its two sides. The mythological figure of Janus is inspiring to reflect on Human Rights and Public Policy, as it is the crossing between these two "worlds" that makes it possible, in social reality, some transformations. In this way, we reflect on the role of organizations, as social systems, in the realization of the crossing, that means, the crossing from one side to another in this form.

Keywords: human rights; public policies; organizations.

1. Introduction

In this work, we discuss the relation between human rights and public policy through Niklas Luhmann's systems theory. For Luhmann, society is composed of different communications, and communications builds systems. Among these systems are the law and politics, to which we are alluding to as "worlds" because they are complex systems.

2. Human rights: political and legal issues

In modern society, political issues are commonly turned into legal issues. The greater example of this is that the subject of public policy has been gaining importance in the field of law. It occurs due to the progressive recognition that the effectiveness of human rights requires the

achievement of public policy.

Public policies, in turn, are guided by rights. Rights that have to be effected by public policies. These themes are not only related, as though presuppose each other, challenging legal and political thought. In the language of systems theory, this means that we are facing a *difference* or *form*, always defying the crossing from one side to another.

Currently, countless social problems are related as human rights issues and that goes beyond the field of law. However, in the semantics of modern law, the label "human rights" comprehend the ambition, translated as a promise, that social problems, in general, can be legally solved. In practice, the legal discourse stands with a pretense of command and control that is wholly incompatible with the complexity of contemporary society. The answer, then, is obvious: in the conditions of social differentiation, the legal system is not in degree to of handling the particularities of politics, economy, education and health, all functionally differentiated systems.

While there may be different definitions of public policy, there are also multiple applications. Public policies, while political communication, their goals are addressed to other social systems. In a democratic environment, all themes in communication can be turned as themes of politics (DE GIORGI, 1998, p. 15), and structuring public policies. Public policy observed as part of the inclusion program conducted by the policy, but it regards many other social systems. Human rights and public policies both address their communications to other systems, exceeding the possibilities of each of these systems in the intention to solve a multitude of problems related to inclusion / exclusion of people. We treat, therefore, human rights and public policy not as separate problems, but as the two sides, legal and political, "of the same coin."

Our research turned to the difference law / policy, seeking to observe the codependency on its two sides. Janus, the mythological figure of the Roman Pantheon, a porter of heaven, as a human was recognized for his life dedicated to transformations and represented with two faces turned in the opposite direction, symbolizing the passage from one universe to another. The mythological figure of Janus is inspiring to reflect on Human Rights and Public Policy, as it is the crossing between these two "worlds" that makes it possible, in social reality, some transformations.

We say "some transformations", since we cannot assure that law or politics by itself will find solutions to all social problems. Similarly to the legal system, the political system is to merge simplified trends in po-

litical communication (LUHMANN, 2010, p. 215), trying to suppressing the differences between systems. However, social systems in response to this claim asserting their autonomy, leaving policy innocuous or producing less effects than expected. This implies a recognition that policy, as well as law, can't perform a role as "control room" in contemporary society, such as the labels "public policy" and "human rights" may suggest.

Through the lens of systems theory, our reflection on the theme of public policy is not restricted to political rationality, but think as an appeal from the political system to develop forms of *'structural coupling'* between different social systems. For that is necessary that public policies are guided in non-totalitarian conceptions of human rights, which are able to see different operations of inclusion and exclusion, building couplings between these and the others social systems, that is, seeking to create programs for highly complex action.

In this way, we reflect on the role of organizations, as social systems, in the realization of the crossing, that means, the crossing from one side to another in this form. Organizations are able to mobilize different types of communication, building couplings between different operations of inclusion, which allows programs to create highly complex action.

The possible "place" for the implementation of public policies on human rights is an organization. Organizations are able to coupling structurally different social systems. Organizations reveal the complexity of questions involved in the debate between law and politics, law and economics, law and education, or law and health. At Universidade Federal do Rio de Janeiro (UFRJ), we developed a research about the "Bolsa Família" Family Allowance Program, a public policy in Brazil based on human rights that tries to make all these connections.

Bolsa Família is a conditional cash transfer that benefits Brazil's extreme poor families with monthly incomes. In this program, poor families should meet health and education conditionalities. Obviously, a large network of organizations is required for this purpose. Law plays different roles in this social policy, especially stimulating dialogue between organizations. The present work was just a theoretical reflection on the subject.

3. Concluding remarks

The aim of political-legal rationality as a "control room" in the society can be replaced by the daring project of a society that coexists with many forms of rationality, resulting from links and possible couplings between several social systems, capable to produce, in communication, variety and therefore also redundancy and, why not, some consistency in decisions.

References

COUTINHO, Diogo R. *O direitos nas políticas sociais brasileiras: um estudo sobre o Programa Bolsa família.* IN: SHAPIRO, Mario G.; TRUBEK, David M. Direito e Desenvolvimento – Um diálogo entre os BRICS. São Paulo: Saraiva, 2012.

DE GIORGI, Raffaele. *Direito, democracia e risco. Vínculos com o futuro*. Porto Alegre: Sérgio Fabris Editor, 1998.

LUHMANN, Niklas. *Los Derechos Fundamentales como institución.* Aportación a la sociología política. Tradução de Javier Torres Nafarrate. México: Universidad Iberoamericana, 2010.

Neoliberal hegemony *versus* social justice

Natalia Pais Álvarez, PhD[1]

Abstract: It is possible that the hegemony constitutes the finished shape, the closing of the rational paradigm in the 20th century, and that from it we have met doomed to this period of disturbances, chaos, uncertainty, a sort of tedium. Already we cannot think the power from the old devices with which the privileged classes or the capital perpetuated its domination. The analyses that were uncovering the alienation, the oppression and the mystification (XIX and XXth) and were giving content to the dialectical draft owner - slave would finish with the relation, already they do not serve us; the question is that the destruction of the social links based on the domain already has taken place: it has been realized technically by means of the virtual emancipation (generalization of the exchange, reconciliation of opposite with the assumption of the Human rights…). The position of the owner is internalized on the part of the emancipated slave and there is solved quite in a paradox that, according to Baudrillard, he supposes the total liberation, the resolution of the conflicts and the free disposition of one itself they have led us to submitting us to the world hegemonic order.

Keywords: neoliberal hegemony, oppression , Justice

"It is a world in which the experienced
events have become independent of the man (...)
It is a world of the future, the world
of what happens without that happening to anyone,
and no one is responsible."
(Bouvresse)

Talking about a concept like hegemony in a time marked by the discourse of the scientific-technical performativity at the market service, involves the risk that it could be read as an infertile abstraction against a

[1] University of La Laguna (ULL), Spain.

conspirator and invisible faceless entity.

Precisely for this reason, what concerns us here is reveal them in the pursuit of the substrate of discourses and alternative/alterative practices to help overcome the historical conditions that have made it possible in the neoliberal and triumphant order on the capitalist world-system stage.

Antonio Gramsci had already established the distinction between domination and hegemony, so the domain would be crossed by a political dimension, which, in times of crisis can get to make use of coercion, while hegemony refers to an ideological-cultural and non coercive dimension, although it also involved political and social forces.

Gramsci will consider the need to traverse economist dimension of hegemony and gives great weight to ideology, that it will be a privilege engine to rethink policy as an authentic redemptive strategy for the conformation of social transformation subjectivities.

The connotation of domination, of prominence, vertical cutting, is clear and the objective of socialism exposed is governed by antagonism. The "normal" execution of hegemony in what has become the classic field of parliamentary regime is characterized by a balanced combination of strength and consensus. Strength does not overcome, but appears to be supported by the consensus of the majority, expressed by the so called organs of public opinion (which therefore, on certain occasions, are artificially increased).

Between consensus and strength, is the corruption-fraud (which is characteristic of certain situations which make it difficult to execute hegemony, in which the use of strength presents too many dangers). In other words, Gramsci purports that corruption-fraud provokes weakness and paralysis in the antagonists (123-124).

Hegemony as leadership arises, as an influence, not as domination, to the extent that is not imposed by force. It also posits the impossibility of a social order derivative of an absolute consensus. The dominance results in an imposition by force of a political-economic and social order, while hegemony, however, arises from the formula of consensus, although the strength can be used at times when it is impossible to reach it.

Now, it is not participatory and decisive consensus but, therein the problem lies, is considered democratic only insofar as it implies the absence of authoritarianism. And this returns not only dangerous reading of the concept of democracy, but that challenges Fukuyama's proclamation that we are witnessing the end of last metanarrative: the

final Consensus, absolute order, absence of conflict or virtual empire of good. Are these indicators of a perception of reality that has lost its sense of itself, a virtual reality that defines our historical time: a false "order", "consensus" and "good" that overrides all resistance as simultaneously blurs the faces of what could be susceptible to reluctance.

And this, curiously in a postmodern scene inaugurated by the proclaimed death of the metanarratives in the era of mass media communication ecstasy. During this era, paradoxically perhaps the only metanarrative that has pervaded is that of "the metanarrative evil". We must not forget that the twentieth century, the postmodern century, which saw the expansion of the democratic regimes and the right of intervention in the name of democracy, the Universal Declaration of Human rights, and the emergence of pacifist movements, remains to be the same century of wars, terrorism and gratuitous horror. It seems pertinent to highlight here Marta Giacaglia's definition of hegemony:

> The achievement of moral, intellectual and political leadership through the expansion of a discourse that offers a partial meaning around nodal points. It comprises more than a passive consensus and legitimate actions: it involves the expansion of a particular set of rules, values and positions by persuasively "re-describing" the world (155)

These brands of hegemony are real symbols of our time. And this new symbology dethrones the old and certain concepts or representations we used to read the world, including politics. In fact, this hegemony is based on a fundamental principle of deregulation of meanings and references. Displays, in what Baudrillard calls the "ecstasy of communication" (Foster 193), just a series of signifiers promiscuous, desecrated, uninhibited, without regard where the community has no place, and subjects-seduced-fascinated diluted rolled back and are engrossed to withdraw in their particular symbolic universes.

Reality acquires meaning through a common screen where commonality is not possible: loneliness is the ultimate wake of meaningless hegemony. Nothing that is not part of the scene can be real and thus witnessing the beginning of the story of a fictionalized unreality, des-semanticized, that makes invisible the inhabitants of a reality that, after being touched by hegemonic signifiers, no one wants to dwell. So the hegemony proposes a symbolic challenge, makes invisible to those living in reality and creates a 'not virtualized yet' people desire to make

the big jump to the scene of order and consensus, where there are no antagonisms, negating any form of reaction reducibility question u option globalized world system.

Precisely, that hegemony with a "democratic" mask, which accommodates an alleged plurality, is what has made it possible the end of the domain, because, among other reasons, of the absence of the "authoritarian mark" and has served as strategy in the pulse between antagonisms, annihilating them.

Public opinion now made these diluted-seduced-fascinated subjects, has made, of the capitalist hegemony, a cultural practice, an awareness, a sense of life, a way of living. Public opinion, which is no more than the new translation of the old proletariat which Gramsci said would have to aspire to occupy the political-economic-social place of the bourgeoisie.

The question is, what are the historical and philosophical constraints that have shaped this as a permanent entity we have called hegemony? We have seen that deterioration at breakneck speed in the last quarter century with the exacerbation of neoliberalism as economic theory and beyond, as an ideology and doctrine of globalization, which envisioned a self-regulating and self-regulating system where free markets conjugated in direct proportionality with greater progress and greater freedom for the subjects (individuals).

Given that this market preeminence has led to globalization is a vital global sense governed by economic laws, to this new idea-force, States are left without arguments and reveal inefficient.

I use the term globalisation, despite Chomsky's warning which I completely agree with. I have not found a substitute which better encompasses the concept I wish to convey. Chomsky tweeted on February 14th 2013 that "Globalisation is a term of propaganda and we should never use it".

The very concepts of market logic move into the political assessment, appearing then the United deficient or unworkable. These succumb seeking their upgrading in the new rationality they understand powerful. So, with the delegation of business understanding them as improper (the distance between either pure, or mixed private good dissolves becoming everything in private good), ends in their basic duties (Education, Health, Social Welfare, Justice, etc.)

We live today another debacle and explanations to this global crisis offered by the economic arms of global State -International Monetary Fund (IMF), World Bank (WB), World Trade Organization (WTO),

the Organization for Economic Cooperation and Development (OECD), United Nations Organization (UN)-, together with the brains of the overall state cabinet-the Group of Seven (G-7)- have been childish, laughable and propaganda.

But the truth is that the progression of the crisis will destroy the propaganda and exposing the inadequacy of explanations while discovering the chaotic nature of the global capitalist system and goes putting faces to those responsible of the chaos.

The real reasons for the crisis basically come from a translocation occurred in the global hegemony of the bourgeoisie. Until the end of the seventies it was a dictatorship of productive capital (Keynesianism).

Such restructuring is, in fact, the establishment of new rules of the game. Thus, what it has been called neo-liberalism is not, as suggested by Chomsky, nor "new" nor "liberalism". This is a conceptual re-semantization of a process facilitated by the corporate elites who held the transnational domain of the capital, with the complicity of media and political legitimacy of the imperial triad, which have resized their position in the great world system board following the strategy of "throw away the ladder with a kick: first we break the rules to climb to the top, then we kicked the ladder so that others can not follow and proclaim justifiably indignant: "play fair and equal" (*Esperanzas y realidades* 99) inspired by the maxim according to which the aim of matching is reduced to the distribution of risks and costs: the benefits are not distributed (socialization of costs and privatization of profits). The law of the funnel, as Chomsky points out.

Countries grow with protectionist measures and once they gain a favorable position in the marketplace, encourage free trade and prevent other countries from competing on equal terms. Chomsky says: "while protectionism and state violence benefited greatly to England and the United States, and the rich industrial countries in general, liberalization imposed by the imperial powers created, to some extent, the Third World" ("Poder en el escenario global" 236). He clarifies that really it has nothing to do with neo-liberalism seeing as the strategy followed by the US is the same as that which imperial England used during the colonisation: protectionism in the first growth period, liberalism to maintain its dominant position as a super power.

The US did not forge a new path. On the contrary, it followed the footsteps of England, its predecessor as super power. In 1846, England finally adopted a liberal agenda after more than a century of intense protectionism and state intervention. Such protectionism, Chomsky pur-

ports, was far from cutting edge, to the extent that competition seemed relatively safe.

On the other hand, these initial protectionist measures which super powers have adopted are not only applied to their country, but transcend the "official" borders. They draw imaginary economic borders which extend as far as their own interests, which are appropriated by means of discourses which contradict the liberal doctrine. A clear example are the declarations of George Kennan (16th August 1954, in the National Security Council 5432) where he urged the "protection of our raw materials", referring to Latin America. Chomsky ironically observes how what is referred to as "our" raw materials, just so happens to be found in a completely different place ("Poder en el escenario global" 236-37).

That inveterate mechanics and interventionist welfare state would be replaced by the state small and expendable, because everything would be in the hands of the "virtuous market." Recall, for example, the words of Anthony Lake (National Security Adviser) when presenting the Clinton Doctrine, announced this new world opening in front of us, presenting "immense opportunities to get to consolidate the victory of democracy and open markets, "only the logic and purposes of that market were ascribed more to a vicious circle to a virtuous one. They shifted the axis of productivity to financial speculation, were made with the management of the world irrespective of any criteria of justice or fairness. Yes, succeeded in forecasting precarious state. What in the thoughtful analysis, Liliana Buschiazzo would say today the state as the main victim of the market and how we have become the Republican utopia to the dictates of the market:

> The state of the new millennium is not missing or perhaps weakened. The new state is under construction: it is a state that has caved in certain fundamental obligations (education, health, research, culture) but was strengthened in others (security, surveillance, repression). (9)

Multilateral agencies increase gradually their power of action and decision on developing scenarios. The UNDP (United Nations Development Programme), IDB (Inter-American Development Bank), the IMF (International Monetary Fund), the OAS (Organization of American States), ECLAC (Economic Commission for Latin America and the Caribbean), WB (World Bank), among others, emerge as authentic ref-

erences (some as authors, others as recipients) of new economic guidelines to be adopted, and it seems clear that this process has advanced sponsored packages of measures within the neoliberal structural adjustment program, which in any case is focused on the structural solution of poverty, but as a policy patch containing numerous contradictions *sui generis* and that reverses in an attempt to cut costs and public spending in a process of making a market of the public, including education.

In fact, this is a process of international order, through which they have tried to make public education in to a business. Due to this, according to his notes, in 1998 the WTO (World Trade Organisation) decided to make education one of the twelve services to be transformed in to commercial goods and had to be incorporated in to in to an international fair trade agreement. Consequently education had to be completely privatised in every sense.

We would therefore need to ask ourselves, first, an analysis of the strategies employed by organizations such as the World Bank as one of the visible arms of a project that seeks to limit public policies through privatization and public spending cuts. In fact too many arguments that would lead us to question these agencies and international development, including this one, although this should not be read, following Coraggio thesis, an analysis that denies the contributions of these organisms from positions that could be considered conspiracy. In his speech questions the effectiveness of the measures the World Bank adopted for Latin America exposes some of its theoretical and practical weaknesses (n.pag.) Simply, we will just try to show, according to this author, some structural weaknesses.

First, we find that the WB is an self-legitimized body based on questionable validity criteria. The first is its undemocratic nature: its members are not elected (are elected by their peers, but can not speak of universal suffrage, representative democracy and, of course, participatory). Moreover, the WB works as the banking cooperative that it is, and the number of participants per country depends on these financial contributions to the institution, and this is an important fact to the extent that obviously weakens the legitimacy of their recommendations and makes suspect the possibility of interest that we are exposed to the public openly.

The question is also on this point, who are the beneficiaries of particular interests, that is, who serve their recommendations and if really the countries for which these packets have poured effectively demanding requirements of a group of organisms and unelected people

from a democratic procedure.

Finally, it should be noted that social policies which seeks to develop the WB are based on strictly economic criteria, are technical proposals at a time when neopositivism triumphs, where as we believe rightly suggests Samoff:

> Is regard economics as the social science that has the important practical consequences because it handles the money and the power of money defines the sense of wellbeing. No wonder the notion of development is understood particularly as economic growth (Torres 173-74).

These organisms are based on the link between development and economic growth, but in many cases, the packages offered do not consider real economic contexts of the countries for which the prescription is prescribed, nor the fact that these are measures targeted and subsidiaries. But we can not read some perversion of the strategy, while income systemically favors (the object of capitalist accumulation of income, not the development of labor), the proposed measures for developing countries translate into the formation of labor in the service of the renters. In any case it seems load real equity intention or actual modification capitalist world system.

When, for example, the WB recommends investment in primary education, when economic grants loans to countries to launch your project, no guarantees, simultaneously, the results are to be expected. But when they fail, as has happened on numerous occasions, for example in Latin America, not assumes the relevant responsibilities: recognize the error should induce them to write off the debt incurred by some countries that do not knock on their door. When they fail, as has happened on numerous occasions, questioned how countries have implemented their project or only recognize they made a mistake. But those interests are to continue to be paid. In fact, Carlos Torres makes clear that the World Bank is not an agency grants, but loans, there is nothing to indicate that it is altruistic project, while as Bank makes profits (through tax interest) of its loans.

This would lead to a first inquiry regarding the actual purpose of such agencies. Also, as noted by this author, another aspect of the lending policy of the Bank is that it is "pro-active and not re-active", ie, "very often initiates contact Bank for the design of a loan specific contacts that reflect the link between knowledge and expertise on the one hand, and

the budgets of funding on the other".

Carlos Alberto Torres suggests that these errors are the fruit of programmes that in many cases been exposed inadequate, especially with respects to their analysis of primary education. Amongst other factors, this is the result of the World Bank "experts'" naive beliefs that on finishing their studies, children living in poverty will be able to compete in a globalised labour market (Torres 174).

It also seems quite naive to think that they actually can not apply for higher paying jobs, could be used in countries with high unemployment rates. Palliative training for a global society that has no where humans occupy these assets. The WB offers solutions within frameworks of little or no operation: labor supply has also been globalized, so that only those who are willing actual mobility can access certain posts, and arguably even more: it is naive to project the link training / employability without providing simultaneously offer / mobility, at least not if you want that employability meets the minimum requirements that won't motivate employees to job insecurity (if indeed it comes to getting a job) that threatens fundamental human rights.

We can not talk about quality of life or well-being when an employee is forced to choose between no employment or precarious employment, when carried to countries whose languages ignored (in fact just have been taught through the Primary) in letters organized, although statistically the challenge of poverty reduction is met; somehow chosen mobility is a privilege, the forced, a fact which indicates the success of a particular economic and educational policy.

Propose job promotion in a globalized market and primary education as a means to reduce poverty is to condemn those who have an unfavorable starting point. The World Bank proposes, as we see, solutions (training) are not geared focused even call into question, to resolve structural errors in the system.

Coraggio is very strong at this point, when he says:

> The slogan of success, for individuals, social sectors and countries, is not cooperation and solidarity, but success in competition with others. Being competitive means being able to pass the tests posed by the market, responding quickly and efficiently to your changes. Nationwide, warned of the danger of achieving competitiveness just perverse short-term, based on the degradation of the value of labor, the environment and quality of life, it is specified that competitiveness should be "authentic", sustainable and based on Investments in human capital (5).

And here we must expose the fallacy of the neoliberal thesis, according to which the market is a cybernetic system, rational, self-regulated by the natural laws of the market. The numerous crises in the different planetary scenarios after implementing international recommendations such as those offered by WB or IMF, evidence the inefficiency of those, and this is proof of that fallacy.

It might be logical to raise competitiveness projects a utopian global system where the gap between rich and poor countries did not exist, but as suggested Coraggio "sustainable competitiveness requires a non polarized, where there are expectations of continued improvement in the quality of life of economic agents [...] Human development can not be seen as a result of competition possible, but as a condition of it" (17).

Also, as suggested by this author, the policy imposes homogeneous WB have not yielded the expected results, especially in Latin America. What may then have political legitimacy not only undemocratic but inefficient? In the name of what followed have unquestionable budgets?

The World Bank proposes measures, "recommendations" on behalf of "truth" self-legitimized, measures to be adopted by many of the countries of the South, however, it assumes no liability related to who claims the right to decide on the economic destinies of much of the planet. There is an appropriation of success, but not the ownership of the prediction errors resulting from the homogenization resulted in packages of measures that do not take into account the particularities of the countries where they could have applied.

Following Agamben, hence it follows the display of violence, public exposure of the threat, the power of repression that would give the character of intangible sacredness that uncomfortable contiguity between sovereignty and police function, "[...] but the investiture the sovereign as a police officer has another corollary requires the criminalization of the adversary [...] Today there is throughout the land a head of state who is not in this sense virtually a criminal".

Agamben agrees here that this condition has a boomerang effect because criminalizing anytime can be treated as a criminal and Agamben, neither regret *"[...] because the sovereign, who willingly consented to appear with the character of executioner henchman and now finally shows its original proximity to the criminal"(92)*.

With the modifications made in the regulatory principles of life and the market in the last thirty years, opens the new era labeled as

Neoliberalism and is not more than the emergence of orthodox capitalism founded on the privatization of services, free trade and economic deregulation.

1989, to give a date, was the beginning of the end of the bipolar world. Capitalism came to dominate the world stage. The implementation of neoliberal thesis had a starting point in making economic adjustment measures proposed in the 1989 Washington Consensus, and all public areas until then, begin to be seen as an expense that was to be minimized, through a privatization process which, as it progresses, is resulting in a smaller share of the poorest in the system. As pointed Grassi,

> "The contradiction accumulation / legitimation is in terms different from those of the Keynesian welfare state, including the «naturalization» of inequalities. The relative success of the model lies in part in the conflict have returned to a society entirely fragmented, in which the actors are individualized to the rhythm that subjects lost collective entity. It is understood, then the orientation of social policy and collective consumption, and social rights, but attendance targeted towards those «less pressure capacity»" (21).

Just as Andrea Novy, Washington stipulates, "it means the political-economic-intellectual complex integrated by international organisms (International Monetary Fund, World Bank), US Congress, Federal Reserve, top officials of the Administration and groups of experts as outlined by John Williamson". This discourse agreed on ten clear priorities summarised as follows: fiscal discipline which must guarantee a budget surplus; a change in priorities and diversion of public spending to the most productive areas; enforcement of tax reduction; liberalisation of the financial markets; maintenance of standardised and competitive exchange rates; liberalisation of trade, suppression of contingencies, and lower customs tariff; equal treatment of foreign and local direct investment; privatisation and deregulation (including sectors with social objectives); guarantee of property rights (Novy).

It seems specially worthy of mention, the last of these priorities given that the guarantee of property rights was created by those who are already property owners, without taking in to account the right to possess property of those who have nothing. Furthermore it makes no attempt to justify its protection of private property (as a priority) while the majority of people do not have their basics needs covered i.e. food, water, clothing and shelter.

The disappearance of bipolarity leads us to note the triumph of capitalist hegemony on a global scale and face the thought today for the first time, while a task devoid of illusion and alibis, "everywhere is being fulfilled before our eyes «great transformation» that drives one after another to the kingdoms of the earth (republics and monarchies, tyrannies and democracies, federations and national states) to the integrated spectacular State (Debord) and «capital-parliamentarism» (Badiou), which are end stage of the form of state" (Grassi 93).

Agamben makes us fall well aware that in the same way that after the industrial revolution destroyed the categories of public and social structures of the Ancien Regime, the same way they have transformed the terms sovereignty, right, nation, people, democracy and general will now covering a spectrum of reality that has nothing to do with what these concepts designated: "Contemporary politics is this devastating experiment, which dismantles and void worldwide institutions and beliefs, ideologies and religions, identity and community, and then returns to propose them a form and definitely affected invalidity"(93).

Our reference thinker continues at this point, unraveling the evolution of thought that claims the knot without telos of history in which we are immersed, and leads us to the choice of a thought capable of thinking both the end of history and the State end by facing each other, following Heidegger's style. The man has to take over his very being historical, of the same impropriety.

> "The appropriation of historicity can not so still have a state-form not being the State other than the assumption and stay-hidden representation of historical arche -but must clear the ground for a longer life nonstate policy and legal entities that remain completely still thinking" (95).

It is a proposal that called our partners as before "new historical project" or recovery of "republican utopia," in this case is radicalized and output Agamben appears as return to zero point, urging the abandonment of our political tradition and rethinking the concepts of sovereignty and constituent power from the beginning.

> Sovereignty is the idea that there is a link between violence and right undecidable, living and language, and that this link is necessarily paradoxical form of a decision on the state of exception (Schmitt) or one side (Nancy) in which the law (the language) is

> maintained in relation to the living withdrawing from it, abandoning it to one's own violence and lack of respect. The holy life, is life proposed and abandoned by the law in the state of exception, is the bearer of the sovereignty dumb, the real sovereign subject (95-96).

It infers from this that if there is now a social power, will go to the bottom of his own impotence and therefore the problem that has to face a new thinking, a new policy, tear of the questions "Is it possible a community policy that is geared exclusively to the full enjoyment of life in this world? But is not this precisely, if one looks, the goal of philosophy, [...] is not defined by the recovery case for political purposes Averroist concept of "sufficient life" and the "good life"? "Reminding that Benjamin left no doubt when he said that "the order of the profane should be directed to the idea of happiness." To finish deriving the redefinition of the concept of "happy life" as one of the essential objectives of thought that comes.

> The "happy life" should be based on the political philosophy can not be neither so bare life that presupposes sovereignty to make it the subject itself, or the impenetrable strangeness of science and modern biopolitics, the today it is in vain to make sacred, but precisely a "sufficient life" and absolutely profane, who has reached the perfection of one's own power and communicability, and over which the sovereignty and right no longer have any control (Agamben 93).

As rightly observed Viviane Forrester radical application of the neoliberal model in a context of economic and political globalization has created "a strange dictatorship" in which the political powers of national states are subject to institutional supranational powers, such as the International Monetary Fund (IMF) and the World Trade Organization (WTO), and factual as multinationals.

The power we have come to focus these organizations put in check Western democracies, ironically under an official speech in which show just the opposite: global democratization. A democratic process must pass the filter of these organisms as indicated, there are not chosen. These powers have contributed greatly to the precarious state and the triumph of the neoliberal state.

Neutralization of a symbolic universe is as ingrained as wide-

spread, therefore once the have been eclipsed and subsumed the real antagonisms subjectivities complex challenge for the new millennium opened and already announced Baudrillard, who wrote: "And the answer to the hegemony is not so simple. Antagonism, denial, dissent, violent abreaction, but also fascination and ambivalence. Because-and here lies the difference with respect to domination-all partake of hegemony" (La agonía del poder 26).

Utopia has become anti-utopia. The alleged rationality unifying the market is, obviously, a contradiction in termini: if the market is held on speculation is inherently irrational. Faith in the superior efficiency of the market on any other system or institution holds no empirical evidence, so that is another myth tax to disarm any new choice of economic and social planning. If I was a proven truth would not have fit-among many others-verifiable imbalances, preference for centrally programmed and controlled economies in emergency situations.

There is no excuse, today, from the memories of recidivism, to not to identify, report and disarm the new and always old ways of control of the subjectivities. Those that are reinvented, reproduce, reinstalled from the power over what emerges as threatening.

Today, from a perspective devoid of ingenuity, we find this possibility unlikely, especially given the emergence of the police state, the final entry of sovereignty in the police figure. The limited and ill state allocation of the work of control and repression in the service of a supranational order, a gendarmerie exercise far away from the administrative function of law enforcement original increasingly promiscuous naked next to the interchangeability between violence and Right.

Contiguity is no coincidence and utter confusion is today totally under judgment, constitutionality, providing States with impunity diminished one large capacity, the suspension of the validity of the law and the alibi of exceptionality: the reason of security, public order, set the exception state legitimacy. In the absurdity that has generated a system inspired by the endless accumulation of capital has been no horizon, habited by the simulated subject-seduced-fascinated, postmodernism breaks the infinite mirror fragments presenting the distorted image of a fragmented reality.

If we agree that the desire for progress, development and personal growth and group is found in the history of humanity as an ambition as legitimate as uncontrollable and excessive, we may note that the transformative effects of social mobility are merely substitutions of the actors hegemonic in the same scene.

Only players are exchanges at different times or spaces. The plot of hegemony remains unchanged. Traditionally disadvantaged sectors (not to use terms that may be obsolete such as subaltern classes, proletariat, etc.) greet a welcome descent middle class. In a system that has been commissioned to highlight the robust individualism bonanzas not be expected to generate solidarity between classes. We insist, remains a class war, but a war growing chasm between the contenders: capital is mobile, not workers.

An outstanding example (anecdote cited by Chomsky), which could be applied to any similar situation, is the case of the Illinois workers strike in the 1990s. Here it was made clear the weakness in the bonds of international solidarity between the working class and the idea that capital is mobile, but not the workers. One of the most important syndicates, United Auto Workers, lost the battle with Caterpillar (producers of construction machinery) who decided to substitute the strikers for other permanent workers.

Beside this, which as Chomsky observes, is considered legal in almost all the world, Caterpillar decided to use their capital to produce surplus abroad, even during the strike period. The workers' response around the world, from a solidarity point of view, would have been to stand in solidarity with each other, refusing to work, and joining the cause going beyond the geographical limits of the multi or transnational company operates ("Poder en el escenario global" 244).

So, it is difficult to expect that establishing the complicity necessary to generate a push for change, a change in the directionality only one that could be: from the bottom up, because what is absolutely unthinkable would be a sense of movement to the Conversely, that is, from top to bottom.

References

Agamben, Giorgio. *Medios sin fin. Notas sobre la política.* Valencia: Pre-Textos. 2001.

Baudrillard, Jean. *La Agonía del Poder.* Madrid: Ediciones pensamiento, Círculo de Bellas Artes, 2006.

Buschiazzo, Liliana. *El Estado Precario. De la utopía republicana a los dictados del mercado.* Buenos Aires: Ed. Longseller, 2003.

Chomsky, Noam. "Poder en el escenario global", New Left Review 0 (2000).

Chomsky, Noam. *Esperanzas y realidades*. Barcelona: Ediciones Urano S.A., 2010.

Coraggio, José Luis. "Las propuestas del Banco Mundial para la educación: ¿sentido oculto o problemas de concepción?". Seminario O Banco Mundiale as Politicas de educação no Brasil. Açao Educativa, Sao Paulo, 28-30, Junio, 1995.

Forrester, Viviane. *Una extraña dictadura*. Buenos Aires: Ed. F.C.E, 2000.

Foster Hal, ed. *La posmodernidad*. By Habermas, Jurgen, et al. Barcelona: Kairos S.A., 2008.

Giacaglia, Mirta. "Hegemonía. Concepto clave para pensar la política". *Tópicos*. 10 (2002): 151-159.

Gramsci, Antonio. *Cuadernos de la cárcel. Cuaderno 1 (XVI) 1929-1930.* México: Ediciones Era, 1981.

Grassi, Estela, *et al. Políticas sociales, crisis y ajuste estructural. Un análisis del sistema educativo, de obras sociales y de las políticas alimentarias).* Buenos Aires: Espacio editorial, 1994.

Novy, Andreas. Economía política internacional. En http://www.lateinamerika-studien.at/content/wirtschaft/ipoesp/ipoesp-2108.html

Torres, Carlos Alberto. *Las secretas aventuras del orden*. Buenos Aires: Miño y Dávila, 1996.

Semiotic analysis of tributary incidence matrix-rule

Piera Paula Schnaider do Nascimento

Abstract: Semiotics, outlined by Charles Sanders Peirce, is treated in this article as both science and instrument, starting from the pragmatic bias collated as per the proposition stated in "The Open Work" by Umberto Eco. Afterwards, conceptions of legal norm are devised, highlighting once again the pragmatic perspective, presenting the tributary incidence matrix-rule (sign) as a result of the interpretative process. Having established this as a starting point of the legal statements (object), from which, in turn, are constructed legal norms (interpretant), it is argued that these have the same syntactic scheme, varying, however, at the semantic level. Finally, this rule is analysed taking into the consideration Semiotics of Law and corresponding abductive method, either in its creation as interpretation, attributing it an iconic nature, considering the observation of similarity between legal statements (sign) and events subsequently converted into facts through language (object).

Keywords: Semiotic; Semiotic of Law; "The Open Work"; Abduction; Tributary Incidence Matrix-Rule.

1 Introduction

Envisioned by Charles Sanders Peirce, Semiotics – an endowed science of method (abduction) and objects (sign and semiosis) – is simultaneously treated in this work as an instrument. At first, the emphasis is put on the pragmatic approach to semiosis, in collation with Peirce's theory together with a suggestion presented in "The Open Work" by Umberto Eco, according to which there is an interference of the interpreter during the process of production and apprehension of the meaning of – and through – signs. That said, in the Semiotics of Law, the meaning can also be produced in the context of Law.

Next, conceptions of the legal norms are forged – syntactic, se-

mantic and pragmatic, based, respectively, on Hans Kelsen, Paulo de Barros Carvalho and Tércio Sampaio Ferraz Júnior – from whose is extracted idea of the legal tributary norm. Highlighting again the pragmatic perspective, is presented a tributary incidence matrix-rule as a result of the interpretative process, considering the tribute in its static sense.

Finally, Semiotics of Law is taken into the account as means of undertaking the analysis of the mentioned rule. Thanks to this are understood criteria, that the static conception of the tribute enable its configuration; abductive method, used in the application and creation process; iconic character that if attributed, opens space to the interpretation – through the use of symbols when poured into the verbal language and participation of the interpreter in the construction of meaning.

2 Semiotics for study of law as the open work

Studies of the language date back to the ancient Greece, starting with philosophers Socrates, Plato and Aristotle; in the medieval period among distinct works belong studies of St. Augustine and St. Thomas Aquinas, while in the modern age John Locke was used as a point of reference. More recently, the most prominent names are Charles Sanders Peirce from the United States of America and Ferdinand de Saussure from Europe.

This study focuses on the mentioned North-American author Peirce, who is considered to be the father of modern Semiotics. He derived semiotics nomenclature from the Greek word *semeion,* which means sign. Although Semiotics had been systematised as a science by the end of the XVII. century by British philosopher Locke – who used the term Semiotics for one of the science disciplines[1] – scientific systematization was essentially done by Peirce, who envisioned universal theory that encompasses both verbal and non-verbal aspects of the language.

According to the author, the objective of Semiotics is study of the sign, which he also calls *representamen*. Throughout his work he offers more than one definition, intertwined with its correlates that forms the semiotic triadic relation – *representamen*, object and interpretant – to serve as a basis for establishing their categories. It is understood as more didactic, among others the following:

[1] LOCKE, John. *Ensaio acerca do entendimento humano.* Trad. Anoar Aiex. São Paulo: Nova Cultural, 1999, pp. 315-316. (Os Pensadores).

> A sign or *representamen*, is what, in a certain way, represents something for someone. It is addressed by somebody, that is, it creates in the person's mind an equivalent sign, or perhaps a more evolved sign. Therefore this dependent sign is called *interpretant* of the first sign. The sign stands for something, its object (...) with reference to a sort of idea that I sometimes called a *foundation* of representamen (...).[2] (highlighted by author) (our translation)

Sign therefore is something that may represent something else or, in other words, is object created by someone – the interpreter – in his mind as an equal or more evolved sign – the interpretant. Taking this into the account, Peirce determines the most important trichotomous classification of the sign, in his understanding[3], linked to the relationship with the object – an icon, index and symbol. The author further explains:

> ...a Sign can be called *Icon, Index* or *Symbol*. An Icon is a sign which refers to the object which is denoted only by the virtue of its own characteristics, characteristics that the object should have without the relevance to if it really exists or not (...) An Index is a sign which refers to the object that is denoted by the virtue of being affected by that Object (...) as the Index is affected by the object, it necessarily has some common quality with the Object, and it is with respect to these qualities how it refers to the Object (...) A Symbol is a sign which refers to the object which is denoted by the virtue of some law, usually an association of general ideas which causes that the Symbol shall be interpreted as referring to that Object.[4] (highlighted by the author) (our translation)

Common example of the icon is a photography – assuming there is no interference, whether by taking a certain perspective or by using graphic tools – in which exists similarity between sign and represented object, i.e., person or thing. To the index, that consists of whole sign that refers directly or indirectly to the represented object, can be applied proverb "where there's smoke, there's fire", which once was an indication of the fire. Likewise, water marks on the ground may be evidence

[2] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, p. 46.
[3] *Id.*, *ibid.*, pp. 90-91.
[4] *Id.*, *ibid.*, p. 52.

of the rain or that the location has been washed, if there are no clouds in the sky and therefore they are not indication of rainy weather. As Peirce explains: "Anything that attracts attention is index. All that surprises us is index, in a way it marks the junction between two pieces of the experience"[5].

As for a symbol, Santaella considers that "(...) extract its power from the representation because is a carrier of a law which, as a convention or collective agreement determines that that sign represents its object"[6] – one example are the words. This is because the symbol is the result of a convention, with relation to which is necessary to familiarise oneself with in order to be able to communicate within the given linguistic system.[7]

Despite the various classifications made by Peirce, irrelevant to the purpose of this approach, his theory is not restricted to the classification and study of the signs. The important distinction is made between object and meaning, in which the object of the sign is a thing or occasion, yet undefined and which is to be applied, while the meaning is idea attributed to the object through assumption, order or assertion.[8] Hence, there exists contribution or direct participation of the interpreter with the sign and semiosis, understood as a process of production and apprehension of meaning through signs.[9]

Semiosis, then, as it is proposed by Peirce[10], in order to be effective can not exist without participation of the interpreter. Hence the relevance of pragmatics – particularly of the theory of Charles Morris – as well as the abductive method, is one of the three types of reasoning established by Peirce based on Aristotle. To arrive, however, to the crux

---

[5] *Id.*, *ibid.*, p. 68.

[6] SANTAELLA, Lúcia. *O que é semiótica.* São Paulo: Brasiliense, 1983, pp. 90-91.

[7] SAUSSURE, Ferdinand de. *Curso de linguística geral.* Trad. Antônio Chelini, José Paulo Paes e Izidoro Blikstein. 27. ed. São Paulo: Cultrix, 2006, pp. 85-88.

[8] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, p. 194.

[9] NÖTH, Winfried. *Panorama da semiótica* – de Platão a Peirce. 4. ed. São Paulo: Annablume, 2003, p. 72.

[10] Must be noted the consideration of Nöth: "The interpretation of a sign is, thus, a dynamic process in the mind of the receiver. Peirce (CP 5.572) introduced the term semiosis to characterize this process, referred to as 'the action of the sign'. Also conceptualized semiosis as 'the process in which the sign has a cognitive effect on the interpreter' (CP, 5.484). Therefore, to define Peirce's semiotics is necessary to say that's not exactly, but it is semiosis that is its object of study (...)" (our translation). (Noth, Winfried, *op. cit.*, p. 66).

of the matter, we need to present theory of Morris, also North-American author, who understands the Peircean Semiotics as a means of purification, simplification and systematization of the language, explaining that:

> Semiotics has a dual relationship with the sciences: it is both a science among sciences and an instrument of science (...) But if semiotics is a science coordinated with the other sciences, studying things or properties of things in its role of serving as signs, it is also the instrument to all sciences, in a sense in which each science makes use of and expresses its results in terms of signs.[11] (our translation)

Thus, Semiotics is both a method and science, providing method (abduction) and the objects themselves (sign – linguistic or not – and semiosis). There is even highlighted in the study of semiosis, as Morris asserts, since the Semiotics is not restricted to the study of signs, but embraces semiosis, as a dynamic process that directly engages interpreter.[12]

Morris also establishes three dimensions of semiosis: semantic, syntactic and pragmatic. The first dimension is concerned with the relationship of signs to the object to which they refer and with the study of this dimension. The second with the formal relationship of signs to each other. Finally the third dimension studies relationship of signs to interpreters.

With respect to pragmatics, which emerges in this study as the most relevant perspective, it is necessary to point out the contribution of Peirce, for whom the question of pragmatism – theory according to which any hypothesis accepted is (and only to the extent as is) subject to experimental verification –:

> [...] nothing more is exception to the the question of abductive reasoning. That is, pragmatism proposes a certain maxim which, if solid, should render unnecessary any subsequent norms as to whether the hypotheses are set as hypotheses, i.e., as explanations of phenomena considered to be auspicious suggestions (...).13(our translation)

---

[11] MORRIS, Charles. *Fundamentos da teoria dos signos.* Rio de Janeiro: Eldorado Tijuca, 1976, pp. 10-11.

[12] MORRIS, Charles. *Fundamentos da teoria dos signos.* Rio de Janeiro: Eldorado Tijuca, 1976, p. 8.

[13] *Id.*, *ibid.*, p. 232.

Abduction therefore constitutes of "(...) the temporary adoption of a hypothesis because they are liable to experimental verification of all its possible consequences (...)"[14]. This is the only of the three types of reasoning – which include deduction and induction – capable of originating the new ideas.[15] Consequently, if pragmatism is the question of abductive reasoning, what is meant is that it is a creation or, in other words, innovation. As Peirce clarifies:

> The Abduction is a method forming a general prediction without any positive certainty that it will occur, is a special case or typically, its justification being that it is the only possible expectancy of regulating our future conduct rationally, and that the induction from past experiences strongly encourages us to expect that it will be successful in the future.16 (highlighted by author) (our translation)

As the pragmatic dimension of semiosis deals with the relationship between sign and interpreter – whose participation is crucial – it receives special prominence in the theory of Umberto Eco, especially in his proposition presented in "The Open Work". In this work Eco has highlighted participation of the interpreter in the process of construction of meaning, text and signs in general, based on the contributions of reader, taking into account his past experiences.[17]

One can not disregard the volitional or intentional aspect[18] of the process of production and apprehension of meaning nor one can overlook that previous knowledge of the interpreter interferes with the apprehension – and this is precisely Eco's collocation. At the two instances of the semiotic process stand the intent and interference of elements, interests and ideologies that sometimes are not revealed verbally or, although they may be affected by verbal expression, that are not necessarily verbal signs nor they are apprehended at the same manner or all elements that influence construction of meaning. That is why in the context of Eco's "The Open Work" there is reference to the decisive role of the interpreter in the semiotic process, "(...) carrying their lived experience

[14] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, p. 6.
[15] *Id.*, *ibid.*, p. 220.
[16] *Id.*, *ibid.*, p. 60.
[17] ECO, Umberto. *Obra aberta* – forma e indeterminação nas poéticas contemporâneas. 9. ed. São Paulo: Perspectiva, 2003, pp. 116-117.
[18] To claim that there neutrality seem too idealized.

(in praeterito) in the construction of meaning (...)"[19].

Thus one can understand the Semiotics as a science and methodology, considering similarly as Luiz Carlos Assis Iasbeck the method as a instrument[20]. This means that, on one hand, meaning can be produced in different contexts, including the Law – which may be referred to as Semiotics of Law – and, on the other hand, that Semiotics is a science and theoretical instrument for the study of semiosis, i.e., science is provided with method (abduction) and its objects (signs and semiosis). Therefore fully active participation of the interpreter emerges, starting from symbolic signs to the effective meaning or object.

2.1 Tributary incidence of matrix-rule

2.1.1 Legal Norm

The term legal norms – an ambiguous expression, according to Paulo de Barros Carvalho[21] – is rather conceptual than univocal and absolute definition. Thus, exist syntactic concepts – focused on normative statements promulgated by a legislator –; semantics – associated normative formulations of truth and falsehood –, and pragmatic – which emphasizes language as a instrument, observing of what is possible to do instead of focusing on what is meant by a statement[22].

In classical legal positivist theory outlined by Hans Kelsen, legal norms are prescriptions or expressions due to be established by legal authority, which assigns duties and rights to the legal subjects, and may be valid or invalid and non-true or untrue. They are distinguished, however, from the legal propositions, as explained by the author himself:

> Rules of law (in a descriptive sense), on the other hand, are hypothetical judgements stating that according to a national or international legal order, under the conditions determined by this order,

[19] COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial.* Monografia (Graduação em Direito), Universidade Estadual de Maringá, 2009, p. 51.

[20] IASBECK, Luiz Carlos Assis. Método semiótico. *In*: DUARTE, Jorge; BARROS, Antonio. (Orgs.) *Métodos e técnicas de pesquisa em comunicação.* 2. ed. São Paulo: Atlas, 2006, p. 194.

[21] CARVALHO, Paulo de Barros. *Direito tributário*: linguagem e método. 2. ed. São Paulo: Noeses, 2008, p. 127.

[22] LINS, Robson Maia. *Controle de constitucionalidade da norma tributária* – decadência e prescrição. São Paulo: Quartier Latin, 2005, p. 53.

> certain consequences determined by the order ought to take place. Legal norms are not judgements, that is, they are not statements about an object of cognition. According to their meaning they are commands; they may also be permissions and authorisations; but they are not instructions.23 (our translation)

For Kelsen, the notion of legal norm presupposes a division into two separate norms, or better to say, two statements of "ought to be", contained in one another; designating the secondary norm as the first and primary norm as the second. While the secondary norm "(...) stipulates the conduct that the law seeks to cause by stipulating the sanction"[24], the primary norm establishes the sanction. This understanding, which places sanction on a secondary norm and conduct regulation on a primary norm is however not predominant.

In egological theory of Carlos Cossio[25], the primary norm is called endonorma, relating to prescript of duty before the supposed fact, while the secondary norm, which is called perinorm, consists of sanctioning providence applied by the State court in the event of failure of the primary standard. Full legal norm, then, has two propositional structures, related by the disjunction "or" and which are not verified simultaneously:

> If the conduct verifies endonorm, if the subject of the provision satisfies the expected behavior, perinorm does not come into play, which provides for the opposite behavior as a precondition of the sanction. However, in the egological theory, they have been parts of one normative whole: of one norm that only, in its constitutive duality, represents conduct in its integrity: as conduct legal and conduct illegal. We can say: legality (endonormative) and illegality (perinormative) are mutually related as meanings of the same domain of discourse, and conversely are required as ontological possibilities of object of conduct.[26] (our translation)

In this way, Cossio attaches importance to the primary norm

[23] KELSEN, Hans. *Teoria pura do direito.* Trad. João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998, p. 51.

[24] *Id.*, *ibid.*, p. 86.

[25] We adopted vocabulary employed by Carlos Cossio – "endonorm" and "perinorm" – without implying, at the philosophical level, our accession to egological school of Law.

[26] VILANOVA, Lourival. *As estruturas lógicas e o sistema do direito positivo.* São Paulo: Revista dos Tribunais/EDUC, 1977, pp. 88-89.

differently to Kelsen – for whom the so-called primary norm, following the majoritarian doctrine, is treated as the secondary norm –, which relegated the least important condition in relation to its primary norm (sanction), to the most important, to the secondary norm.

As pointed out by Carvalho, positions assumed by Cossio and Kelsen coincide substantially. Based on them, the legal norm is simplified, in a mode "(...) that both perinorm and endonorm (primary norm and secondary norm respectively, according to Kelsen) will have the same logical structure: a hypothesis, to which is associated a consequence"[27]. From the studies of Logic, the same author states that hypothesis and consequence represent corresponding functions of "protasis" and "apodosis", respectively, which together compose hypothetical judgement[28]:

> In the "protasis" we designate the presumption or hypothesis, which can be conceptualized as a set of criteria for identification of fact which having occurred, determines the incidence of certain consequence predicted in the "apodosis". This, in turn, is the set of criteria for determining certain consequence, attributed to the realisation of the fact predicted in the "protasis".[29] (our translation)

For this reason Carvalho conceptualizes legal norm "(...) as all prescriptive proposal of hypothetical structure which imputes the event to certain supposed type of human behaviour"[30]. In endonorms (secondary norms), the assumption is the description of an event that, once materially occurred does trigger the consequence attributed to it. Yet in perinorms (primary norms), the assumption is the prediction of non-compliance with the provision stipulated with a content of consequence of endonorm, with the establishment of relationship of juridical sanctioning as a consequence.

Therefore, the hypotheses of perinorms are equivalent to infringements or, in other words, to behavior that does not achieve benefits (legal duties), fixed in endonormative rules (or secondary, according to Kelsen), according to which sanctions are imputed by the Law. The consequences of perinorms, on the other hand, are equivalent to juridi-

---

[27] CARVALHO, Paulo de Barros. *Teoria da norma tributária.* 5. ed. São Paulo: Quartier Latin, 2009, p. 51.

[28] *Id.*, *ibid.*, *loc. cit.*.

[29] *Id.*, *ibid.*, *loc. cit.*.

[30] CARVALHO, Paulo de Barros. *Teoria da norma tributária.* 5. ed. São Paulo: Quartier Latin, 2009, p. 56.

cal sanctions.[31]

If, therefore, the legal norm is deontic proposition which attributes a consequence to an antecedent or presumption, then every normative consequence is the installation of a juridical relationship. In other words: "(...) the law is linked to the occurrence of the event described hypothetically, the emergence of a legal bond between people"[32], according to which active subject who holds a subjective right, may require the passive subject to comply with a legal obligation.

Primary and secondary norms are further organized in an enunciation – which differs from the legal proposition. This can be classified with regards to function, to behavior of the recipient and to the criterion of valuation, as descriptive and normative[33]. As for function, the description is to inform; prescription is to modify the conduct of others. In relation to the behavior of recipient, before the descriptive proposition "(...) the recipient's consent should be due to their belief that the proposition is true, since in the prescriptive proposition, the recipient's consent is manifested by implementation of the proposition"[34]. By the criteria of valuation, the descriptive prescriptions are true or false; normative, are valid or invalid.[35]

In this sense, as described by Norberto Bobbio, the juridical norm falls under the category of prescriptive proposals, as a way to influence and shape the conduct of others.[36] While the legal proposition consists of a set of words with united meaning the enunciation is "(...) grammatical and linguistic form through which a particular meaning is expressed, so the same proposition may have many enunciations, and the same enunciation may express number of diverse propositions"[37]. Furthermore, the term legal disposition refers to the enunciation and concerns the physical support of the proposition, whereas the norm, with *status* of the proposition, refers to the meaning.

---

[31] *Id.*, *ibid.*, p. 55.

[32] *Id.*, *ibid.*, p. 59.

[33] BOBBIO, Norberto. **Teoria da Norma Jurídica**. Trad. Fernando Pavan Baptista; Ariani Bueno Sudatti. Apresentação Alaôr Caffé Alves. Bauru: Edipro, 2001, p. 80.

[34] COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial.* Monografia (Graduação em Direito), Universidade Estadual de Maringá, 2009, p. 150.

[35] BOBBIO, Norberto, *op. cit.*, pp. 80-81.

[36] COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial.* Monografia (Graduação em Direito), Universidade Estadual de Maringá, 2009, p. 150.

[37] BOBBIO, Norberto. *Teoria da Norma Jurídica.* Trad. Fernando Pavan Baptista; Ariani Bueno Sudatti. Apresentação Alaôr Caffé Alves. Bauru: Edipro, 2001, p. 70.

In addition, Carvalho explains that the norm is not contained in the enunciation, on the contrary, norm is derived from it, as a result of an interpretative process, since "(...) legal norm is the meaning we obtain by reading texts of the positive Law. This process takes place in our mind, as a result of the perception of the outside world, captured through our senses"[38], thus the written text establishes physical support for the norm. Following the same reasoning, Lourival Vilanova explains:

> The norm, which is, phenomenologically, a significance of propositional enunciation, says that if a fact takes place (if it occurs in reality) through the presupposition referred to it in the universe of law, then a person must do or omit such or such conduct against another subject, term account to the term referent. The antecedent is descriptive and may be a natural fact or indeed an entry to the universe of law.39 (our translation)

The norm is therefore a legal proposition of two parts is formed by antecedent or descriptor – ontological type of possibility to describe a fact, taken as an objective situation – and consequent or prescriber – in which is the obligation, deontic part of the norm.[40] Carvalho also discusses implied proposition or hypothetical and implied proposition or proposition-theory, functioning as a prescriber of inter-subjective conducts. Both are connected by a neutral functor, ought be – or inter-propositional –, not modularised: "When there is antecedent, then there must be consequent"[41].

The case of obligation inside the consequent (intra-propositional) is, on the other hand, modularised in three possible deontic modes: obligatory, prohibited or permitted. In the legal propositions, two functors or deontic connectives – modularised intra-propositional and neutral inter-propositional – connect antecedent and consequent propositions through logical implication. What is meant by this is that there is a logical structure, or better to say, a constant syntactic function, consisting of primary and secondary norm, which differ in the semantic aspect, because:

---

[38] CARVALHO, Paulo de Barros. *Curso de direito tributário.* 18. ed. rev. e atual. São Paulo: Saraiva, 2007, pp. 8-9.

[39] VILANOVA, Lourival. *Lógica jurídica.* São Paulo: José Bushatsky Editor, 1976, p. 87.

[40] COL, Juliana Sípoli, *op. cit.*, *loc. cit.*.

[41] CARVALHO, Paulo de Barros, *op. cit.*, p. 131 *et seq.*.

> ...in a secondary norm the antecedent points to a violator of behavior which should be provided in consequent of primary norm whereas the consequent prescribes juridical relationship in which the active subject identifies with the active subject stated in the thesis of the primary norm but the passive position is occupied by the State, to whom is postulated the exercise of legal coactivity.[42] (our translation)

Thus, the normative propositions are intertwined by operators of logic function. Incidentally as well as Vilanova, Carvalho considers that it is a logical structure that forms the legal norm, which allows two meanings, one in the broad sense, concerned with the prescriptive statements as meanings constructed by the interpreter and, in the narrower sense, generation of messages with fully deontic legal content.[43]

Carvalho explains, moreover, the classification of the legal rule based on distinctions between abstract or concrete and general or individual, resulting in four categories of norms, which are: abstract and general – to which falls the tributary incidence matrix-rule, concrete and individual, concrete and general; and abstract and individual.[44]

For this particular approach, it is important to understand the first three. In the case of abstract and general norm, the abstract qualifier refers to the hypothetical antecedent that precepts hypothetical descriptive statement and, consequently, conduct is determined in general terms – focused on an indeterminate set of people.[45] In order to reach the entire content of their jurisdicity, the edition of concrete and individual norm is required.[46] This relates to the normative implications which in a statement containing description and event of the physical-social world, occur under certain conditions of time and space.[47]

In both cases is required a process to insert the rule in the legal system – this is to be concrete and individual norm whose assumption

---

[42] LIMA, Márcio Kammer de. *As diferentes visões sobre as normas jurídicas.* Disponível em: <http://www.conjur.com.br/2009-jul-14/diferentes-visoes-conceito-normas-juridicas>. Acesso em: 28 nov. 2012.

[43] CARVALHO, Paulo de Barros. *Direito tributário*: linguagem e método. 2. ed. São Paulo: Noeses, 2008, p. 127

[44] *Id.*, *ibid.*, p. 140 *et seq.*.

[45] COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial.* Monografia (Graduação em Direito), Universidade Estadual de Maringá, 2009, p. 152.

[46] *Id.*, *ibid.*, *loc cit.*.

[47] COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial.* Monografia (Graduação em Direito), Universidade Estadual de Maringá, 2009, p. 152.

or antecedent is an event appropriately demarcated in time and space, identified by the issuing authority. The hypothesis relates to fact that effectively occurred and to a consequent of the exercise of authorised conduct of a subject with determined rights, but with pretence of respect for other members of community – which gives it the general character.[48]

As concluded by Márcio Kammer Lima[49], the legal norms have the same syntactic scheme, ranging, however, at the semantic level; this is because the interpreter assigns meaning to the formal structure that supports it. The interpreter's consideration involves addressing the pragmatic dimension, that does not use these conceptions and is what Tercio Sampaio Ferraz Junior intended – understanding the legal norm as a rule whose content is its orientation expressed as a legal proposition with a binding character and that acts on the will of others.[50]

Consequently, as explained by Mirian dos Santos, the legal norm is a result of an interpretative process, as it is the interpreter who creates a norm, that is, through the process of interpretation of the law interpreter extracts individual and concrete norm, the interpretant.[51] Thus, the legal norm occurs only with the application of the Law, as Kelsen categorically stated "(...) application of law is at the same time a process of creation of law"[52].

2.1.2 Tributary legal norm

The normative units describe occurrences, gathered in the social environment, and control the actual occurrence of these events of creation of legal relationship between two or more legal subjects. In the case of general and abstract norms, in the normative instance, the hypothetical prediction implicates the prescription of a legal bond, while on the reality level, there is a factual statement that subsumes the hypothesis and the emergence of a bond by specification of people and regulated

[48] *Id.*, *ibid.*, *loc. cit.*.

[49] LIMA, Márcio Kammer de. *As diferentes visões sobre as normas jurídicas.* Disponível em: <http://www.conjur.com.br/2009-jul-14/diferentes-visoes-conceito-normas-juridicas>. Acesso em: 28 nov. 2012, p.12.

[50] FERRAZ JUNIOR, Tercio Sampaio. *Teoria da norma jurídica*: ensaio de pragmática da comunicação normativa. Rio de Janeiro: Forense, 2006, p. 36.

[51] SANTOS, Mirian dos. Norma jurídica: questão de linguagem. *Veredas – Revista de Estudos Linguísticos.* Juiz de Fora, v. 9, n. 1 e 2, jan./dez. 2005, p. 119.

[52] KELSEN, Hans. *Teoria pura do direito.* Trad. João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998, p. 51.

conduct, as well as the object of such conduct.[53]

In the case of individual and concrete norms, in turn, the judgement remains conditional and also hypothetical, despite the antecedent pointing to an event that already occurred. "Hypothetical" in this case does not mean that the success reported in stated descriptor has not happened yet, within the realm of possibilities, but represents type of a relationship.[54] Therefore, both the general and abstract norm, as well as individual and concrete keep the structure of hypothetical judgement.[55]

It is therefore clear, that the name "legal incidence" is reduced to two formal operations:

> ...the first, subsumption or inclusion of classes, which recognizes that a concrete occurrence, located at a particular point of social space and a in specific unit of time is included in the class of supposed facts provided by the general and abstract rule; the other, second implication, since the normative formula prescribes that the antecedent implies the thesis, that is, the concrete fact, occurring hic et nunc, also brings out particular legal relationship between two or more legal subjects.56 (our translation)

It should be noted that the incidence will not occur if there is a man making the subsumption and promoting the implication which the normative precept determines because the norms are not affected through their own forces. Instead, a man is required, extracting the general and abstract norms other general and abstract or individual and concrete and, thus, imprinting positivity into the system, i.e., propelling the higher standards of the lower hierarchy.[57]

The incidence, then, is not given automatically and unfailingly, because with the mere event – without acquiring expression in appropriate language, in fact becoming, in the case, tributary – is not necessarily phenomenon of legal incidence. "The percussion of the norm presupposes account in its own language: *the language of law constitutes the legal reality*"[58].

---

[53] CARVALHO, Paulo de Barros. *Direito tributário*: fundamentos jurídicos da incidência. São Paulo: Saraiva, p. 8.

[54] *Id.*, *ibid.*, p. 9.

[55] *Id.*, *ibid.*, *loc. cit.*.

[56] *Id.*, *ibid.*, *loc. cit.*.

[57] *Id.*, *ibid.*, p. 9.

[58] CARVALHO, Paulo de Barros. *Direito tributário*: fundamentos jurídicos da incidên-

Carvalho observes that "(...) there are only few, very specialised and individualized tributary incidence matrix-rules. In principle, there is only one for each tributary figure, accompanied by a multitude of those who could nominate the operatives or functions (...)"[59]. He calls those tributary norms in the strict sense – as opposed to the other (tributary norms in the broad sense).

Rodrigo Medeiros Guardia explains that creating such rules implies the removal of the empirical-existential context in which it occurs – deprivation of the semantic content.[60] In other words, the result is that the interpreter arrives after submitting the legal norm constructed in a process of "de-contextualization" and "formalization"[61], which isolates the constructed object of its significant content – as a consequence of substitution of the words that are composed by element of sufficiently neutral sense.

The construction of the tributary norm in the strict sense – or tributary incidence matrix-rule –, in turn, is the work of the interpreter. It is presented with its own formula of the hypothetical-conditional judgements – since having a hypothesis, assumption or antecedent to which is conjugated a consequence, being that the associative form is deontic copula, obligatory characteristic of the legal-normative imputation.[62]

---

cia. São Paulo: Saraiva, p. 9. (highlights the author).

[59] *Id.*, *ibid.*, p. 167.

[60] GUARDIA, Rodrigo Medeiros. A regra-matriz de incidência das normas jurídicas como diagrama semiótico. *COGNITIO-ESTUDOS: Revista Eletrônica de Filosofia*, São Paulo: CEP/PUC-SP, vol. 8, n. 2, jul./dez., 2011, p. 109.

[61] "Formalizing is not giving a form to data, inserting the data of language in a certain scheme of order. It is to highlight, to considering apart, to abstract the logical form that, as given, is clothed in natural language, as the language of an issuing subject to a recipient subject, with the aim to bring news about the objects. And highlight, by logical abstraction, form, extricating myself from the matter that such form covers. The matter resides in specified concepts in the determined meanings that words have as entities identifiable by their significant individuality (…) As noted, none of these formal structures is proposition that belongs to the language of physics, biology, social science. Nothing tells you about the natural and social world. Nothing is said over anything, fact or particular relationship. Nothing specific is said, because the logical forms are structures composed of constant and variable, that is, symbols replaceable by whatever objects of any domain, and symbols that exercise defined operative functions, fixed and invariables" (our translation). (VILANOVA, Lourival. *As estruturas lógicas e o sistema do direito positivo.* São Paulo: Revista dos Tribunais/EDUC, 1977, pp. 45-47).

[62] FERRAZ JUNIOR, Tercio Sampaio. *Introdução ao estudo do direito.* São Paulo: Atlas, 1991, p. 253.

While the hypothesis provides the prediction of a fact, the consequence prescribes the legal relationship (tributary obligation) that is to be established – where and when the cogitated event allegedly happens.[63] Thus, the hypothesis alludes to a fact and consequence prescribes the legal effects that will be propagated by the event, which is why it is possible to speak of descriptor and prescriber, the first to describe the normative antecedent and the second to indicate its consequent. Both in one and in the other are indicative data (criteria), whose combination enables the display, in its entirety, the logical-structural core of the tributary incidence matrix-rule, will occur in accordance to a sequence.[64]

2.1.3 Tributary incidence matrix-rule

It is necessary to distinguish, as per Ferraz Junior, "fact" from "event".[65] Fact is a linguistic element capable of organizing an existential situation as a reality, not something concrete and sensible. The fact will be a mere event until it is constituted in legal language itself. In the words of Carlos Agustinho Tagliari:

> 'Event' (...) is everything that presents itself in the world (of phenomenas), but it will belong to our reality after objectification and interpretation by competent language that will create the fact. The 'fact', in this perspective, is linguistically created through interpretative activity, i.e., is the result of the act of interpreting and pouring language into the event. The language thus creates fact through interpretation and objectification of the event.66-67 (our translation)

---

[63] FERRAZ JUNIOR, Tercio Sampaio. *Introdução ao estudo do direito.* São Paulo: Atlas, 1991, p. 253.

[64] CARVALHO, Paulo de Barros. *Curso de direito tributário.* 10 ed. rev. e aum. São Paulo: Saraiva, 1998, pp. 167-168.

[65] FERRAZ JUNIOR, Tercio Sampaio, *op. cit.*, p. 253.

[66] TAGLIARI, Carlos Agustinho. *Os princípios e a construção da norma jurídica.* Orientadora: Elizabeth Nazar Carrazza. São Paulo: PUC-SP, 2007, p. 13. 301 f. Dissertação (Mestrado em Direito Tributário) – Pontifícia Universidade Católica de São Paulo.

[67] Carvalho explains that the facts chosen by the Law represents only balises or signs from which the legal system regards inaugurated bond that preordain human behaviors. (CARVALHO, Paulo de Barros. *Teoria da norma tributária.* 5. ed. São Paulo: Quartier Latin, 2009, p. 146).

The general and abstract norm (tributary incidence matrix-rule) and the occurrence of the event provided therein therefore are not sufficient. In order to give tribute a legal percussion, on the contrary, is important that this bond is related to an act of subsumption to the fact of norm, which means the creation of individual and concrete norm – this situation permeates the incidence of tributary incidence matrix-rule, as is to be demonstrated.[68]

As recognized by Carvalho, the building of the Tributary Law uses tribute as its point of reference.[69] Having seen his concept of juridical norm, one may conclude that, on purely normative level, in fact, has merely criteria, not necessary legal relations.[70] Such criteria, however, serve to identify facts and relationships that, combined, will govern social behavior. Therefore, the legal norm is to be analysed in its static aspect, i.e., on the exclusively legislative level, and its dynamic character, i.e., after the fact hypothetically predicted occurs.

Considering endonorm as a means to establishing the institute called tribute, it appears that:

> [...] the legislator does nothing more than provides the event of a fact, giving us criteria to identify and associate this event in order to establish a legal relationship, through which the active subject is raised, as a rule of State, the public subjective law to require any person to comply with the legal obligation to pay determined amount of money. First, points to evidence that can not be restricting nature of tribute either to the object of the legal provision – the money – want to own relationship, since in numerous other figures similar phenomenon occurs.71 (our translation)

In tribute, then,

> [...] has a legal relationship that is established between the State (as a rule), as an active subject, and any person (natural or legal), as a passive subject and through which active subject may require passive subject to comply with specific legal duty, which maybe a payment of a certain amount of money. To this consequence leg-

[68] CARVALHO, Paulo de Barros, *op. cit.*, p. 108.
[69] CARVALHO, Paulo de Barros. *Curso de direito tributário.* 10 ed. rev. e aum. São Paulo: Saraiva, 1998, p. 87.
[70] *Id.*, **Teoria da norma tributária.** 5. ed. São Paulo: Quartier Latin, 2009, pp. 88-89.
[71] *Id.*, *ibid.*, p. 89.

> islator will allocate a certain class of postulate.72 (our translation)

Assuming that tribute is a legal norm, given that in a static configuration, it consists of a hypothetical judgement – "protasis" and "apodosis" in expected relationship – then it is possible to conceptualize tribute as endonorm which is presented as hypothesis, a set of criteria used to identify facts of physical reality and, as a consequence, a set of criteria to identify a legal relationship established between the State (in a rule), representing an active subject, and a natural or legal person or entity, representing a passive subject, by means of which the first will have a public subjective right to demand the fulfilment of a legal obligation by the second, embodied in a financial benefit.[73] In a dynamic view, however, tribute will occur whenever a legal relationship as described is established by virtue of the supposed event and which fits entirely in the prediction of the endonormative character.[74]

Thus,

> [...] to contradict a tribute, in static terms, the elements that are available to the scientist are the criteria, both alleged as the consequence. On the other hand, by analysing a tribute in its dynamic configuration we are dealing with the real life facts, which occurred in the world of physical reality and precisely for this reason, they determine creation of a legal bond of not only certain and individualized subjects (active and passive), but as well its content of legal duty and its correlate subjective right.75 (our translation)

The occurring fact described hypothetically, the moment in which the tributary endonorm operates should be studied on a case by case basis, since it presupposes knowledge of specific event, which will generate an equally individualized relationship. This study, therefore, can not be undertaken before this relationship emerges in the legal world, that succeeded in the objective reality, event which legislator understood adequately in order to trigger the appropriate legal relationship – the unique instrument that governs human behavior.[76]

---

[72] *Id.*, *ibid.*, pp. 91-92.
[73] CARVALHO, Paulo de Barros. *Teoria da norma tributária.* 5. ed. São Paulo: Quartier Latin, 2009, p. 99.
[74] *Id.*, *ibid.*, *loc. cit.*.
[75] *Id.*, *ibid.*, p. 101.
[76] *Id.*, *ibid.*, p. 109

Because of this, as suggested by Carvalho, we consider tribute in its static configuration, i.e., as a legal endonorm, although the majority of the theory focuses its analysis on the antecedent (assumption or hypothesis) of legal tributary norm.

> If description of a fact is in the suppose, obviously it is there where we will find criteria for recognizing the event. In a vain we seek extraneous information because suppose does not contain them. However, as a consequence we have a prediction of the legal relationship that will be established when the fact described occurs, it is there where we will reap all the data that allow us to identify it.77 (our translation)

This may serve for identification of a tributary fact, based on normative assumptions, material or objective criteria – objective description of the fact – which is the very core of the hypothesis, the spatial criteria – conditions where the event may happen – and time criterion – time circumstance which enable detecting at what moment the fact occurs. The criteria found as a consequence, in turn, relate to the legal relationship inaugurated with the occurrence of that fact, which can be identified by personal criteria – by determining active and passive subjects – and by the quantitative criterion – how a content of the legal duty will be established, a responsibility of passive subject.[78]

Tributary hypotheses, to reiterate, are attributed consequences – via deontic copula – consistent in combination of criteria. These aim to identify a legal bond that govern human behavior, i.e., the emergence of the legal relationship of obligatory character – which is always subject to economic evaluation.[79] Note that, in endonormative plan, one yet can not speak of a legal relationship, because the abstract bond is inaugurated only with the occurrence of what was hypothetically described.[80]

Therefore, the legal profile of tribute acquires, in the static sense, the normative association according to which, on one side, three criteria identify a fact of a material nature and on the other, entwined by copula of "should be", two criteria recognize an abstract bond that substantiate the legal discipline of human behavior, considered in terms of social

[77] *Id.*, *ibid.*, p. 113

[78] CARVALHO, Paulo de Barros. *Teoria da norma tributária.* 5. ed. São Paulo: Quartier Latin, 2009, pp. 114-115.

[79] *Id.*, *ibid.*, p. 158.

[80] *Id.*, *ibid.*, p. 150.

relationships. Different situation occurs when there is a legal bond duly individualized and which was inaugurated because of the occurrence of an event, determined in time and space, that fits entirely with hypothetical description (a fact) and which may be called tribute in its dynamic meaning.[81]

Given the above, and taking into consideration fact that the Law is a complex phenomenon, the way of studying it without facing the problem of its ontology, was to isolate normative manifestations, paying attention to the tributary incidence matrix-rule as a tribute norm in the strict sense – classified, in turn, as abstract and general norm. Thus, where there is a Law, there are juridical norms (tributes) and equally, where there are such norms, there certainly is a language in which they are manifested.[82]

3. Semiotics of the law as a means to study tributary incidence matrix-rule

Following Carvalho's classification of standards, we may trace the (chrono)logical thread of tributary incidence matrix-rule formation: starting with the general and abstract legal norm, from which is extracted individual and concrete norm (as a result of interpretation by the interpreter, influenced by his collateral experiences, which include values, ideologies and interests). With that emerges a general and concrete norm bounded spatio-temporally, it may be said the new experience with effects in future.[83]

In fact, tributary incidence matrix-rule does not carry, the description of specifically determined event, but instead, it refers to a class of events, which encases infinite concrete events. The logical process of including an element in a class is called "subsumption", so that the incidence of the norm will not occur in the course of individual and concrete norm, taking into the account fact that the class of events described in the course, will not be issued by the competent organ.[84]

---

[81] *Id.*, *ibid.*, p. 162.

[82] *Id.*, *ibid.*, *loc. cit.*.

[83] COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009, p. 160. 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

[84] CARVALHO, Paulo de Barros. *Direito tributário*: fundamentos jurídicos da incidência. São Paulo: Saraiva, p. 82.

> The general and abstract norm does not directly affect the inter-subjective behavior in order to regulate them. It requires positivization process, i.e., claims the presence of individual and specific norm in order to that prevised discipline can actually achieve success in most cases, modularizing conducts deonticaly. [...] (...) The field of tax law could not be different. Being the matrix-rule one abstract and general norm, in order to reach the conduct and positively discipline it, requires norm individual and concrete.85 (our translation)

Without individual and concrete norm, constituting contemplated event in language of tributary incidence matrix-rule – a fact – and also establishing in language the relational fact, by which subjects of obligation are linked, there is no tribute to be cogitated.

Such application of Law – which, as seen by Kelsen, is simultaneously creation of Law – as an essential a condition in which tributary relation is legally concrete and effective as is also evidenced by José Souto Maior Borges: "For application of the law, it is necessary to establish whether a particular fact, juridical tributary fact, specifically occurs. It consists, in part, of a function characterizing the individual norm brought by launching administrative act"[86].

In this way, law departs from comprehensive conceptions to reach the proximities of the material zone of inter-subjective conducts region, in other words, starting with general and abstract legal norms to reach norms individual and concrete – this is known as positivist process – must necessarily be covered so that the system can foster expectations of effective regulation of social behavior.[87] This occurs as an immediate problem of realization of norms and mediate problem of realization of values, since these function as the foundation of those, as noted by Lourival Vilanova.[88]

In this manner, tributary incidence matrix-rule is treated as a new creation, in a sense which treats facts and discipline behavior starting at the legislated product, to regulate actions that have not happened

---

[85] *Id.*, *ibid.*, pp. 82-83.

[86] BORGES, José Souto Maior. Lançamento tributário. *In*: *Tratado de direito tributário.* Rio de Janeiro: Forense, 1981, v. 4, p. 56.

[87] CARVALHO, Paulo de Barros. *Direito tributário*: fundamentos jurídicos da incidência. São Paulo: Saraiva, p. 207.

[88] VILANOVA, Lourival. *As estruturas lógicas e o sistema do direito positivo.* São Paulo: Revista dos Tribunais/EDUC, 1977, p. 202.

yet – and without the certainty that they will actually occur. Furthermore, using the verbs in the future tense or even written in the present tense, relates to future actions.[89]

Compared to these characteristics – experience of the new, resulting from the interpretative process with direct and active participation of the interpreter – and with effects in the future, urges the study of tributary incidence matrix-rule based on a properly equipped science methodology in its characteristics and particularities. That is why Semiotics of Law, in bias of the pragmatic dimension of semiosis and its corresponding methodology, namely the abduction, is proposed as a method with the new perspectives in future.

As Peirce explains, and as was already pointed out through this exhibit, there are three types of science reasoning, argument or inference: deduction, induction and abduction.[90-91] Peirce's theory is based on such a division, explaining that:

> These three types of reasoning [as per Aristotle] are Abduction, Induction and Deduction. The Deduction is the only necessary reasoning. It is the reasoning of mathematics. Part of a hypothesis whose truth or falsehood has nothing to do with the reasoning, and naturally, whose conclusions are equally ideal. Induction is the experimental verification of a theory [...] The only thing that induction accomplishes is determining the value of a quantity. Part of a theory is to evaluate degree of concordance of this theory with the fact. Irrespectively, it can never give rise to an idea. Nor can the deduction. All the ideas in the field of science arise through Abduction. The Abduction consists of studying facts and design a theory to explain them. The only justification that it has is that if we someday arrive to an understanding of things, it can only be achieved through this.92 (our translation)

Thus, the deduction consists of a necessary inference to prove that something must be because the inference is valid only if there is a real relationship between the provisions in the premises and the statement of conclusion. Induction consists of an experimental inference,

[89] CARVALHO, Paulo de Barros, *op. cit.*, p. 84.

[90] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, p. 5.

[91] NÓBREGA, Flavianne Fernanda Bitencourt. Por uma metodologia do direito de base pragmatista: o raciocínio abdutivo no direito. *In*: *Anais do XV Encontro Preparatório para o Congresso Nacional do CONPEDI*, Recife, 2006, p. 1.

[92] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, p. 207.

proving that something really is, as part of a theory of how to deduce phenomena to verify its correlation with a theory. Abduction, in turn, proves that something can be (hypothetical inference).[93]-[94] In this manner, Pablo Bonorino states that, in the deduction, exist rule-case-result, in induction, case-result-rule, and in abduction, rule-result-case.[95] Likewise, Peirce explains that:

> Abduction is the process of forming explanatory hypotheses. It is the only logical operation which introduces a new idea, because induction does nothing but determine a value, and deduction merely develops the necessary consequences of a pure hypothesis. The Deduction proves that something must be. Induction shows that something actually is operative; Abduction simply suggests that something may be. Its only justification is that from its suggestion a deduction can draw a prediction that can be verified by induction, and this, if we are supposed to learn something or to understand the phenomena, must be accomplished by abduction.[96] (our translation)

With regard to tributary incidence matrix-rule, by analysing the general and abstract norm, norm is abducted, in a sense that its consequences are deduced, and finally, by its application, individual and concrete norm is realized, which incorporates the event and determines a specific legal consequence for the specific case – *in praeterito*, according to Peirce.[97]

In the meantime, it is important to clarify that the "semiotic"

---

[93] FIDALGO, António. *Semiótica*: a lógica da comunicação. Disponível em: <http://www.livroslabcom.ubi.pt/pdfs/fidalgo-antonio-logica-comunicacao.pdf>. Acesso em: 05 dez. 2012, p. 58.

[94] TUZET, Giovanni, Legal Abductions. *In*: BOURCIER, D. (Ed.). *Legal Knowledge and Information Systems.* Jurix 2003: The Sixteenth Annual Conference. Amsterdam: IOS Press, 2003, p. 43. *apud* COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009, p. 162. 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

[95] BONORINO, Pablo Raúl. Sobre la abducción. *DOXA – Cuadernos de Filosofía del Derecho*, Alicante, n. 14, 1993, p. 212. *apud* COL, Juliana Sípoli, *op. cit.*, *loc. cit.*.

[96] PEIRCE, Charles Sanders, *op. cit.*, p. 220.

[97] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, p. 5.

facts[98], denominated by Jakobson,[99] or Carvalho's social – in the ultimate analysis, tributary – as statements have iconic nature, since they are constituted in pictures of a fresh past experience, which is precisely what happens with the enunciation of the event. At the moment of its expression in verbal language, the occurrence itself is now past and in the elaboration of the statement was selection of event predicates, considered important enough to be registered in language, hence the iconic nature of the semiotic facts, social or tributary.[100] Clarice Araujo von Oertzen explains that:

> Norms, in its abstraction and generality, have an iconic character, in dimension in which hypothesis are described, declare the qualities in which sufficiency determines an incidence. The regulation is also general to the extent that bind classes of legal subjects involved in the situation hypothetically described. So for the incidence to occur, it is necessary to have some attraction or affinity between the characteristics of the factual support and predicates that, assuming the legal rule, reflect the election of the legislator in order to qualify the conduct and to regulate relations.101 (our translation)

As far as the incidence implies similarity between (particular) predicates existing in factual support and (general) present in hypothetical general rule, this association will take place only when the interpreter makes the comparison between quality described in the rule and replication of this quality, effectively present in factual support.[102] This similarity when dealing with factual support, implies the interpretation of experience, along the lines of Peirce's theory, as well described by Lauro Frederico Barbosa da Silveira:

> In a crude game of action and reaction doesn't cease, however,

[98] "This representation of reality, whether verbal or non-verbal signs, is what I call, observing Jakobson, semiotic fact, which is in the condition of social fact for the purposes of legal incidence" (our translation). (ARAUJO, Clarice von Oertzen de. *Semiótica do Direito.* São Paulo: Quartir Latin, 2005, p. 59).

[99] JAKOBSON, Roman. *Lingüística e comunicação.* Trad. Izidoro Blikstein; José Paulo Paes. 24. ed. São Paulo: Cultrix, 2007.

[100] *Id.*, *ibid.*, *loc. cit.*

[101] *Id., ibid., p. 114.*

[102] ARAUJO, Clarice Von Oertzen de. *Incidência jurídica*: teoria e crítica. São Paulo: Noeses, 2012, p. 122.

> process of effectively interpreting experience. The moment of the interpretation manifests what Peirce termed semiosis. We are led to confer meaning to the phenomena and to take possession of a path by which we can interact with it in the future, and teach others to do so. This is the logical dimension of conduit determination through which we integrate the tradition and we collaborate as cultural agents. We shall then be able to perpetuate an experience in the continuity of time.103 (our translation)

Thus, only the iconic function may realize engagement between particular and general, even when there doesn't exist a material identity between object and sign.[104] Therefore, one can not help but notice that the icons do not produce infallible conclusions, since Semiotics proposes the abstraction of reasoning, but consists of a science that produces eminently fallible judgements.[105] Peirce explains further about the iconic quality in comparison with a possibility of opening:

> Every icon participates in a character more or less plain, open (overt) to its Object. Every one and all of them share the most open characteristics of all the falsehoods and deceptions - its (their) Openness (Overtness). However, they have more to do with the living character of truth than with Symbols or Indexes. The icon does not stand for [does not substitute] this or that existent thing, unambiguously - as does the Index. When it comes to its existence, Object may be a pure fiction. Much less is Object something we may discover under normal circumstances. On the other hand, icon provides certainty (assurance) to the highest degree. That is to say, that the Icon exhibits before it is contemplated by mind - Form of the Icon, which is also the Object – has to be logically possible. (...) Now the reason has to manifests its conclusion. Therefore, it should engage primarily in ways, which are the main objects of rational insight. Following this, icons are especially required for reasoning. (…) It is true that we do not learn what should be through the simple inspection of something. But when we say that deductive reasoning is necessary, we do not mean, of course, that it is infallible. What we want to say, precisely, is that the conclusion is derived from the form of the relations proposed in the premise. (...) The principal need that icons have refers to the need to show

[103] ARAUJO, Clarice Von Oertzen de. *Incidência jurídica*: teoria e crítica. São Paulo: Noeses, 2012, p. 122.
[104] *Id.*, *ibid.*, pp. 122-123.
[105] *Id.*, *ibid.*, p. 129.

> Forms of synthesis of the elements of thought. To be more precise, the icons can not represent anything other than Forms and Feelings. (...) The highest type of synthesis is that the mind is not compelled to make the attractions of their own inner feelings or representations, nor by a transcendental force of necessity, but rather in the interest of their own "I think" synthesizer; and this the mind does by introducing an idea that is not contained in the data, and that produces connections which otherwise these data would not have. (...)[106] (our translation)

It is seen, therefore, that only the abduction allows the creation of new means adopting an explanatory hypothesis that can be subjected to experimenting in order to confirm it or disprove it, marking thus, the fallibility, because it is treated as possible, but not absolute answer.

Hence Flavianne Nobrega clarifies that "The meanings of intellectual concepts of pragmatism [and therefore the resulting abductive method] are not definitive, but dynamic and open, resting on the sum of all foreseeable practical consequences of something which number is undefined (...)"[107]. Even Peirce places the strength of the validity of the meaning of the concept into the consequences because, from the philosophical perspective, the effects "(...) can be 'conceived"[108].

This perspective of openness is consistent with the one proposed by Eco in "The Open Work", by which is the interpreter who holds semiosis. In the specific field of tributary incidence matrix-rule, understanding the semiosis of the legal norm (tributary), as well as the experiences underlying the interpretation are the tasks satisfactorily performed by the Semiotics of Law. By the application, to reiterate, of abductive method – as a creation of the new for the future reference –, and the pragmatic approach –, which is concerned with the relation of signs to interpreters.

This is because legal norm is a result of a series of innovative interpretative processes: starting from the law or normative statement, seeking legal proposition, abstract and general form, to be applied to the case *sub judice* upon its interpretation – on account of polysemic and open texture of legal texts, which causes that the activity of interpre-

---

[106] PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977, *passim*.

[107] NÓBREGA, Flavianne Fernanda Bitencourt. Por uma metodologia do direito de base pragmatista: o raciocínio abdutivo no direito. *In: Anais do XV Encontro Preparatório para o Congresso Nacional do CONPEDI*, Recife, 2006, p. 5.

[108] HERDY, Rachel. Habermas, pragmatismo e direito. *Revista Kriterion – Revista de Filosofia. Belo Horizonte*, vol. 50, n. 119, jun. 2009, p. 59.

tation introduces a certain degree of creativity and choice[109] – through interpreter, with respect to individual and concrete norm able to solve the concrete conflict.

In this dimension, the conception of Law and, consequently, of the legal norm as presented in "The Open Work" allows interpreter to participate in the construction of meaning – the moment in which his experiences are employed in order to determine the content of the signs contained in the text.

4 Conclusion

As evidenced through this work, Peirce's theory, or Semiotics, revolves around the idea of sign, that is precisely the starting point for the interpreter when taking into consideration the pragmatic dimension of semiosis. In the case of the Semiotics of Law, the interpretation of the legal statements is understood as the formal structures that support legal norms.

The legal norm, in turn, designed as a legal proposition, is constructed from the legal statement resulting precisely in the interpretative (or semiotic) process. Hence one can say that legal norms have the same syntactic schema, but vary on semantic level, at the moment in which, by the tributary incidence matrix-rule hypothesis (general and abstract norm), the interpreter, influenced by his experiences, constructs the meaning, extracting an individual and concrete norm – the interpretant, which represents a new sign.

Moreover, as every legal norm, the tributary incidence matrix-rule also disciplines future conduct, i.e., of what has not happened yet – and with no certainty that it will actually occur –, taking into the account, however, that similar situations bounded in a time and space occurred in the past. Thus abductive method acquires special relevance, because it proves something can be (hypothetically) or can occur, since it conceives possible effects of the legal norm.

Thereby it is affirmed that the tributary legal norms in the strict sense have an iconic character, eventually, constitute images of past experiences, obviously, already occurred – which can be evidenced

[109] D'ÁVILA, Marília. O problema da criação judicial do Direito. *Revista do Tribunal Regional Federal 1ª Região*, Brasília, v. 13, n. 7, jul. 2001, pp. 16 e 19. *apud* Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009, p. 169. 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

through the fact that repeated events are selected and converted, by means of language, into the facts.

Hence, the conception of Law as "The Open Work" and, accordingly, the tributary legal norm, more specifically tributary incidence matrix-rule, enables the interpreter to actively participate in the construction of meaning, drawing upon their own experiences in order to determine the content of legal texts and thus the signs involved.

References

ARAUJO, Clarice von Oertzen de. *Incidência jurídica*: teoria e crítica. São Paulo: Noeses, 2012.

_____. *Semiótica do direito.* São Paulo: Quartir Latin, 2005.

BOBBIO, Norberto. *Teoria da norma jurídica.* Trad. Fernando Pavan Baptista; Ariani Bueno Sudatti. Apresentação Alaôr Caffé Alves. Bauru: Edipro, 2001.

BONORINO, Pablo Raúl. Sobre la abducción. *DOXA – Cuadernos de Filosofía del Derecho*, Alicante, n. 14, 1993. *apud* COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009, p. 162. 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

BORGES, José Souto Maior. Lançamento tributário. *In*: *Tratado de direito tributário.* Rio de Janeiro: Forense, 1981, v. 4.

CARVALHO, Paulo de Barros. *Curso de direito tributário.* 18. ed. rev. e atual. São Paulo: Saraiva, 2007.

_____. *Direito tributário*: linguagem e método. 2. ed. São Paulo: Noeses, 2008.

_____. *Teoria da norma tributária.* 5. ed. São Paulo: Quartier Latin, 2009.

COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009. 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

D'ÁVILA, Marília. O problema da criação judicial do Direito. *Revista do Tribunal Regional Federal 1ª Região*, Brasília, v. 13, n. 7, jul. 2001. *apud* Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009, 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

ECO, Umberto. *Obra aberta* – forma e indeterminação nas poéticas contemporâneas. 9. ed. São Paulo: Perspectiva, 2003.

FERRAZ JUNIOR, Tercio Sampaio. *Introdução ao estudo do direito.* São Paulo: Atlas, 1991.

_____. *Teoria da norma jurídica*: ensaio de pragmática da comunicação normativa. Rio de Janeiro: Forense, 2006.

FIDALGO, António. *Semiótica*: a lógica da comunicação. Disponível em: <http://www.livroslabcom.ubi.pt/pdfs/fidalgo-antonio-logica-comunicacao.pdf>.

GUARDIA, Rodrigo Medeiros. A regra-matriz de incidência das normas jurídicas como diagrama semiótico. *COGNITIO-ESTUDOS: Revista Eletrônica de Filosofia*, São Paulo: CEP/PUC-SP, vol. 8, n. 2, jul./dez., 2011.

HERDY, Rachel. Habermas, pragmatismo e direito. *Revista Kriterion* – Revista de Filosofia. Belo Horizonte, vol. 50, n. 119, jun. 2009.

IASBECK, Luiz Carlos Assis. Método semiótico. *In*: DUARTE, Jorge; BARROS, Antonio. (Orgs.) *Métodos e técnicas de pesquisa em comunicação.* 2. ed. São Paulo: Atlas, 2006.

JAKOBSON, Roman. *Lingüística e comunicação.* Trad. Izidoro Blikstein; José Paulo Paes. 24. ed. São Paulo: Cultrix, 2007.

KELSEN, Hans. *Teoria pura do direito.* Trad. João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998.

LIMA, Márcio Kammer de. *As diferentes visões sobre as normas jurídicas.* Disponível em: <http://www.conjur.com.br/2009-jul-14/diferentes-visoes-conceito-normas-juridicas>.

LINS, Robson Maia. *Controle de constitucionalidade da norma tributária* – decadência e prescrição. São Paulo: Quartier Latin, 2005.

LOCKE, John. *Ensaio acerca do entendimento humano.* Trad. Anoar Aiex. São Paulo: Nova Cultural, 1999. (Os Pensadores).

MORRIS, Charles. *Fundamentos da teoria dos signos.* Rio de Janeiro: Eldorado Tijuca, 1976.

NÓBREGA, Flavianne Fernanda Bitencourt. Por uma metodologia do direito de base pragmatista: o raciocínio abdutivo no direito. *In*: *Anais do XV Encontro Preparatório para o Congresso Nacional do CONPEDI*, Recife, 2006.

NÖTH, Winfried. *Panorama da semiótica* – de Platão a Peirce. 4. ed. São Paulo: Annablume, 2003.

PEIRCE, Charles Sanders. *Semiótica.* São Paulo: Perspectiva, 1977.

SANTAELLA, Lucia. *O que é semiótica.* São Paulo: Brasiliense, 1983.

SANTOS, Mirian dos. Norma jurídica: questão de linguagem. *Veredas – Revista de Estudos Linguísticos.* Juiz de Fora, v. 9, n. 1 e 2, jan./dez. 2005.

SAUSSURE, Ferdinand de. *Curso de linguística geral.* Trad. Antônio Chelini, José Paulo Paes e Izidoro Blikstein. 27. ed. São Paulo: Cultrix, 2006.

TAGLIARI, Carlos Agustinho. *Os princípios e a construção da norma jurídica.* Orientadora: Elizabeth Nazar Carrazza. São Paulo: PUC-SP, 2007, 301 f. Dissertação (Mestrado em Direito Tributário)-Pontifícia Universidade Católica de São Paulo.

TUZET, Giovanni, Legal Abductions. *In*: BOURCIER, D. (Ed.). *Legal Knowledge and Information Systems.* Jurix 2003: The Sixteenth Annual Conference. Amsterdam: IOS Press, 2003. *apud* COL, Juliana Sípoli. *Semiótica do direito para o estudo da norma jurídica judicial*, 2009, 191 f. Monografia (Graduação em Direito) – Universidade Estadual de Maringá – UEM.

VILANOVA, Lourival. *As estruturas lógicas e o sistema do direito positivo.* São Paulo: Revista dos Tribunais/EDUC, 1977.

_____. *Lógica jurídica.* São Paulo: José Bushatsky Editor, 1976.

A hermeneutical review of the principle of legality in tax law

Sarah Amarante de Mendonça Cohen

Abstract: Tax Law, while dealing with the relevant value of freedom, is a branch of law where the preservation of legal certainty proves exceedingly necessary. In this context, there are the legal principles that aim to restrict state power, among which the principle of legality is one of the postulates of greater importance. In Tax Law the principle of legality is specialized in a 'formal' sense, and in a 'typical' sense, also known as the principle of 'conceptual specification'. Therefore, in law enforcement or application, strict and textualist interpretation must prevail above legal discretion. Nevertheless, there are authors who advocate a more flexible form of interpretation of Tax Law, loosening the density rules in favor of giving interpreters greater margins of discretion.

Given: the impossibility of conceiving the principle of legality in Tax Law without dealing with the question of the interpretation and application of the standard; the need to rethink the principle of legality in Tax Law, either because: i) the traditional theory does not answer modern criticisms that are leveled against it, either because: i) part of modern reproaches leveled against the traditional view are relevant, whether as a matter of evolution of society and of science itself, either because legal positivism, the philosophical basis that sustains the traditional perspective, does not develop an adequate theory of interpretation of the standard; and, on the other hand, the impertinence of most of the solutions proposed by modern theories that aim to review the principle of legality in Tax Law, once they: i) implode its basis, ignoring the stony historical path of its construction, and ii) most of the criticisms leveled against legal positivism, the philosophical basis that supports the traditional view, fall within unfounded rhetoric; we reach the goal of this paper that is, therefore, to fill these gaps, by rethinking or reviewing the principle of legality in Tax Law within a hermeneutic or interpretive perspective, by means of a new legal and scientific formulation, that is, the 'Planning Theory of Law' of Scott Shapiro, that meets the needs of renewal of the traditional theory, but does not necessarily give in to reverting its logic and opening space for discretion.

Keywords: tax law, principle of legality, legal positivism.

1. Since ancient times, taxation has been sensitive to people's demands and wills. This is why many of the riots triggered in history were launched by reasons involved with taxation[1].

From the moment that, historically, tax transforms itself from being an instrument of power and domination to become subjected to the law, legal standards start to be the basis that will shape tax imposition and even the way to interpret legal norms.

These legal standards usually restrict state power, defining its limits. This is why one can say that the Tax Law deals with the value of 'freedom', as long as it establishes the limits of State action so that there is no abuse in individual freedom.

In this context, whether historical, or involving the characteristics of tax controversies, it can be said that, especially in Tax Law, the maintenance of legal certainty proves to be needed. In the Brazilian legal system, for example, we can highlight the existence of several principles, which are based in the Federal Constitution of 1988, that impose limitations in the power to tax. We can mention, among others, the principles of 'previousness' of the financial year, prohibition of *ex post facto* laws, ability to pay, prohibition of confiscation[2], and, above all, the principle of legality, which is the foundation of the legal system itself.

In Tax Law the principle of legality is specialized in a 'formal' sense, and in a 'typical' sense, also known as the principle of 'conceptual specification'[3]. According to Derzi[4], in both Criminal and Tax Law, in which the need for legal certainty exists in a stronger sense, 'classificatory concepts' prevail, instead of the *typus* itself (fluid concepts that accept a great deal of discretion in interpretation).

According to Derzi[5], it was the German doctrine that introduced the term *Tatbestand* (*fattispecie*, or *typus* in the 'improper' sense) in Tax Law, especially Albert Hensel (*Steuerrecht* 1924), that imported to Tax Law the structure of the criminal standard created by Beling.

The absolute need of the legal standard in Tax Law was also pioneered in Germany by Flume and Kruse, and in Italy by B. Cocivera and

---

[1] About this subject *vide* COHEN, 2012; and COHEN; 2005.

[2] Original version in portuguese: "princípios da anterioridade, irretroatividade, capacidade contributiva, não-confisco e, sobretudo, o princípio da legalidade".

[3] Original version in portuguese: "princípio da legalidade formal e princípio da tipicidade".

[4] DERZI, 1998, p.113.

[5] DERZI, 1998.

A.D. Gianini[6]. Alberto Xavier[7], in Portugal and Brazil, defends a similar thought, that is, that the legal standard should be complete and detailed to orient the activities of the Executive and Judicial powers.

Nevertheless, there are authors that think in a different perspective, and support the adoption, in Tax Law, of 'open and fluid concepts', that is, the adoption of the *typus* in its original sense. We can mention the authors Ball, Hanraths, Hoeres, Heigl and Kleist, Wallis, Klausing, Maunz, Spitaler, Schmidt, Ziztlaff, Webwe, Isensee and Arndt[8] that adopt this point of view according to which one can create 'presumptions, patterns of values, sums, etc.' justified by the principle of practicality.

In Germany there was also the emergence of the doctrine of the 'economic interpretation of Tax Law'. Headed by Enno Becker, who was the mentor of the German Tax Code of 1919 (*Reichsabgabenordnung* - RAO), standards of economic consideration of Tax Law were introduced in it, according to which the formalities adopted by the taxpayer could be disregarded by the agent of the Executive or Judicial powers in favor of its economic content.

According to Derzi[9], the economic interpretation of the tax law 'is fully developed in Germany at various times, but served at one time to the development of tax problems and legal uncertainty, and to the totalitarian and fascist Reich'.

The doctrine of economic interpretation gains strength also in Italy through E. Vanoni and Grizziotti, and Dino Jarach, later settled in Argentina[10]. Apart from the economic interpretation there is also the current trend of the pure and simple criticism of the principle of legality. Casalta Nabais[11], in Portugal, criticizes the 'traditional principle of legality in Tax Law' based on 'legal positivism', and suggests that the principle should be more 'flexible', loosening its normative density in favor of granting a margin of free decision to tax authorities. The portuguese author sets that the principle of legality in Tax Law was a full guarantee for the taxpayer in the historical context of its formation. However, with the rise of the welfare state, the increasing complexity of the tax system and the evolving of economic realities, the principle of legality has been

[6] TORRES, 2011, p. 777
[7] XAVIER apud TORRES, 2011, p. 780.
[8] DERZI in TORRES, 2004.
[9] DERZI in BALEEIRO, 2002, p. 689.
[10] TORRES, 2011, p. 777.
[11] NABAIS, 1994, p. 248.

transformed into an impotent force, which makes the empowering of state agents necessary.

Torres[12], alike Nabais, says that in our country 'positivism has sought to minimize the importance of administrative interpretation' and that this 'formalist positivist' view that defends a strong principle of legality would be consistent with an 'authoritarian ideology'. The author defends, alas, that the principle of legality would not be absolute, and that Tax Law could use undetermined concepts that should be completed, and interpreted by the Executive power.

According to Lenio Streck[13] – even though this Brazilian author does not deal directly with Tax Law – we are in a new philosophical paradigm in which Law has assumed a hermeneutical *visage*, especially after the Second World War. In this sense, the 'liberal-individualistic' paradigm would be over, and the traditional hermeneutics would also be antiquated. He creates, therefore, the basis of what he calls the 'new critics of Law' based on Heidegger's philosophy, seeking to overcome the 'subject-object scheme'.

Therefore, these authors that defend that the principle of legality should be more flexible, are located, more broadly, within the so-called 'anti-positivist rhetoric', accusing this doctrine to be decadent and wrong. By easing the principle of legality, the patrons of this vision implode legal certainty in favor of a more 'modern' or 'postmodern' approach of Law, justifying, therefore, greater freedom of the state and less protection to the citizen-taxpayer.

On the one hand, the criticism that the principle of legality in Tax Law needs new formulation or, at least, needs to be rethought according to a new paradigm, as a matter of evolution of society and of science itself, seems justified. At least, the defense of the principle of legality on its traditional bases does not respond to criticisms that are modernly directed against it. While some of the criticism directed against classical legal positivism (which would serve as the philosophical basis for thinking about the principle of legality in Tax Law in its traditional formulation) , are merely rhetorical and therefore irrelevant, we must admit that the main creators of classical legal positivism, as Hans Kelsen and H.L A. Hart, did not thoroughly and deeply develop a theory of the interpretation of the standard and its limits.

Likewise, the traditional theory about the principle of legality in

[12] TORRES, 2000, p. 95.

[13] STRECK, 2011, p. 17-22 e 376.

Tax Law is highly focused on a thorough analysis of the legal norm as such, but has not addressed the issue from the point of view of interpretation.

Thus, one can no longer think about the principle of legality in Tax Law without dealing with the issue of interpretation and application of the standard, because we can no longer understand legality as the simple 'passing of the standard through the engines of parliament', that is, one can no longer conceive tax consent without regard to the previous process of creation of the rule, neither can we think about the principle of legality disregarding the later moment of interpretation and application of the standard itself.

The importance of this issue is the fact that depending on the interpretive rules to be adopted, there could be a complete distortion or emptying of the idea of legality and tax consent, invalidating its own process of creation. In other words, one can no longer think about legality only from its *genesis*, thus this principle, in complex and organized societies, acquires a dimension that goes beyond the maxim of 'no taxation without representation' established in the *Magna Charta* of 1215. In other words, thinking about the principle of legality in Tax Law involves tackling, ultimately, the question about the hermeneutics of the standard.

Therefore, an interpretive review of the principle of legality in Tax Law is necessary because the question of legality ends up in a matter of hermeneutics. On the other hand, although an interpretive review of the principle of legality in Tax Law is necessary, because part of the reproaches that are directed against its traditional view are consistent, the review of this principle should not necessarily entail the implosion of its traditional basis and revert completely its logic, as done by the current critics of this principle, as we have seen above, ending up with the consequence of enhancing state power and diminishing legal certainty.

If, on one hand, we defend the need of revising the principle of legality in Tax Law, focused mainly on the hermeneutical question involved in it, on the other hand, modern theories that do review the principal of legality seem to implode its basis, disregarding the hard and painful historical path of its construction. Thus, a reinterpretation of the principle of legality shall be done under a new legal-scientific formulation, which means that this shall be done under an innovative light that answers the needs of renewal of the traditional theory - or at least counters the criticisms that are modernly directed against it -, while, at the same time, addresses the issue of the hermeneutics of the standard, and does not necessarily invert its logic

opening room for free discretion.

2. The review that we propose will be done based on the doctrine of Scott J. Shapiro, in his *ouvre* "Legality", published in 2011, that traces, objectively, a methodology of interpretation of Law in the positivist fashion. The author answers the question of 'what is right' to help the resolution of other major legal issues, among them the question of interpretation. The professor from Yale Law School bases his theory on the 'philosophy of action', and argues that 'law cannot be understood simply in terms of rules. Legal systems are best understood as highly complex and sophisticated tools for creating and applying *plans*. Shifting the focus of jurisprudence in this way – from rules to plans – not only resolves many of the most vexing puzzles about the nature of law but has profound implications for legal practice as well.'[14]

The main point of the theory of Scott Shapiro is the conceiving the fundamental law as 'plans', that is, that 'legal activity is best understood as social planning, and the legal rules themselves are plans or standards in the style of plans'[15].

Scott Shapiro develops a theory that he calls the 'Planning Theory of Law', according to which the rules of the legal system express the social planner's choices with regard to the system's 'economy of trust'. Thus, Shapiro draws a complete and innovative theory of legal interpretation, according to which the correct interpretive method must be identified from the allocation of trust and distrust in the system.

To offer an alternative to points of the positivist doctrine that he considers flawed, the author provides the solution in order to understand the fundamental rules of a system as plans. The plans function would be to structure legal activity so that members can work together and fulfill values that otherwise would be unachievable. He believes, therefore, that conceiving the fundamental rules of the system as plans not only demands a positivist concept of Law, but responds to the 'paradox of possibility', that is, answers the question of how authority is possible. According to Shapiro, therefore, the fundamental rules of law reside in the ability of individuals to possess and adopt plans, and this power is not conferred by morality, but by the fact that we are 'planner beings'.

The author develops the theory that legal activity is a form of

[14] *Idem, ibidem.*

[15] SHAPIRO apud BUSTAMANTE, 2012, p. 1.

social planning. The legal rules would be 'generalized plans', or 'standards in the style of plans', edited by those who are authorized to plan for others. Trials, therefore, involve the application of those plans to whom they apply .

Shapiro develops what the calls the "Planning Theory of Law", according to which:

> [...] legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality. (SHAPIRO, 2011, p. 171).

Thus, the main claim of 'Planning Theory of Law' is that Law is a mechanism of social planning, whose goal is to 'rectify the moral deficiencies of the circumstances of legality'[16].

From the description of 'Planning Theory of Law', the author goes on to demonstrate the practical implications of his theory, especially in relation to the interpretation of statutes, that is, he starts to show how the theory affects the practice of legal interpretation.

From this point the author outlines a theory or methodology of interpretation that conforms to his planning theory. This, in turn, lies within an exclusive positivist conception, and not in an inclusive positivist framework, since the existence and content of a plan cannot be determined by facts whose existence the plan seeks to solve.

Shapiro describes his theory of interpretation (within the 'Planning Theory of Law') , as one that takes the attitudes of 'trust' and ' distrust ' presupposed by the system as central to the choice of the interpretive methodology.

The 'Planning Theory of Law', therefore, defends that the attitudes of trust and distrust are central to determining the interpretive methodology. Trust would be important in the interpretation of Law precisely because trust matters in interpreting plans.

Plans, thus, would be sophisticated devices to deal with trust and distrust, 'allowing people to capitalize on having faith in others, or to compensate for the lack of faith'[17]. Thus, plans deal with distrust by detailed provisions and the use of some evaluative concepts that require a low degree of discretion in their application. Another way to deal with

[16] SHAPIRO, 2011, p. 172.
[17] SHAPIRO, 2011, p. 172.

mistrust would be denying to assign important roles to those who do not have appropriate conditions or characteristics to perform the tasks.

On the other hand, the use of generic provisions allows the planner to capitalize on trust on others, either by assigning important tasks to those who have the power to solve them, or even assigning the power to plan to these same individuals . The same plan, incidentally, can simultaneously fulfill the function of assigning and denying confidence.

Thus, plans, since they have no content, can work with the distribution of trust, which the author gives the name of 'economy of trust'. Plans can fulfill their role in managing trust, only if the interpretive methodology respects the 'economy of trust', that is, 'the interpretive methodology must not allocate decision-making power in a manner inconsistent with the attitudes of trust presupposed by the plan'. [18]

Consequently, the more 'generous' a plan is, more discretion does it assign to the applicator, that does not have to stick to the literal meaning of the text. On the other hand, a set of attitudes that generate more distrust, also lead to a more restrictive approach, requiring the applicator to stick more to the text or intentions and expectations of the planner.

Therefore, as the plans take into account the attitudes of trust and distrust, the proper way to interpret a plan cannot frustrate this function.

The choice of a specific methodology of interpretation must be determined in a similar manner, taking into account the 'economy of trust' as 'a distrustful system requires a constraining methodology, such as textualism, whereas a more trusting system demands one according greater interpretive discretion'[19].

Coming back to the question about the interpretation of plans, it shall be consistent with the 'economy of trust' of the legal system, that is, the higher the trust, the lower the regulation of the matter and the discretion of the performer, the greater the distrust, greater the regulation of matter, and lower the discretion of the performer.

According to the author, there is not, therefore, a correct interpretation to a legal text, since the legal interpretation is always relative or dependent on the actor. So proper interpretive methodology, beyond the criteria of the degree of confidence given to actors, must still be based on other criteria, as that of the role played by these actors. Thus, the me-

[18] SHAPIRO, 2011, p. 335.
[19] SHAPIRO, 2011, p. 336.

ta-interpreter, according Shapiro, within the 'Planning Theory of Law', must fulfill three tasks, namely: a) to verify the fundamental properties of various interpretive methodologies; b) extract certain information from the institutional structure of the legal system, that is, the attitude of planners regarding the competence and character of certain actors, beyond the goals they should promote; and c) the interpreter must, finally, from the conclusions reached in the first two steps, determine the appropriate interpretive methodology, that is, should make sure about which methods best achieve the aims in light of these attitudes of trust[20] .

The author, therefore, names these steps as 'Specification', Extraction' and 'Evaluation'. In these steps the interpreter must answer some questions. *In verbis:*

> 1. *Specification* – What competence and character are needed to implement different sorts of interpretive procedures? 2. *Extraction* – (a) What competence and character that the planners believed actors possess led them to entrust actors with the task that they did? (b) Which systemic objectives did the planners intend various actors to further and realize? 3. *Evaluation* – Which procedure best furthers and realizes the systemic objectives that the actors were intended to further and realize, assuming that they have extracted competence and character? (SHAPIRO, 2011, p. 359)

Thus, in the specification phase it must be taken into account the various interpretive methodologies and their differences, trying to identify in the system what are their differences and the skills required for its implementation. In the extraction phase, in turn, the interpreter must assert, from a systemic point of view, if the interpreters and other actors, in fact, have the skills to implement the methodology effectively. In the extraction process, from the identification of the 'economy of trust', the interpreter must extract the objectives entrusted to the actors in the system. The last step, the evaluation, is more general, and implies a mental experiment on the part of the interpreter .

The author concludes, thus, that, in general, systems with low absolute confidence, for example, systems whose purposes include the protection of freedom and autonomy are incompatible with highly discretionary interpretative procedures. This does not mean, however, that highly restrictive interpretive methods are needed, because if there is a high relative reliability, the system could support a methodology to

[20] SHAPIRO, 2011, p. 359.

some extent discretionary.

Described these steps, and beyond the issue of trust, well dealt by Shapiro while describing his interpretive methodology, he highlights that there is still another factor that has to be considered, that has to do with the competitive relationship between social planners.

Interestingly, this theory of interpretation opens room for theoretical disagreements, that is, interpreters may disagree about the appropriate methodology to be applied in a case, the distribution of trust and distrust, and various other aspects, that is, the proper interpretive methodology is established from the goals of the planners, and not based on a moral argument.

This apparent 'flaw' of the theory is, at the same time, its quality, to the extent that a theory of law '[...] should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution to them' and 'in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law'[21].

Last but not least, Shapiro argues that the rule of law is only served when those engaged in legal interpretation are faithful to the vision embodied by the system. That is, interpreters should not be based on their own ideas, or take advantage of skills that were not granted to them in the interpretive process. They must also work collaboratively when political relations are competitive , or *vice versa* .

Nevertheless, in our point of view, and for our purposes, the main quality of the theory of Shapiro and responsive to the aims of this work, is not exactly the question of how he conceives Law, but the fact that Shapiro fills the gap left by legal positivism on legal interpretation. Thus, Shapiro overcomes this lack of the traditional positivist theories, addressing the question of interpretation of the standards and legal argumentation, and proposes a (positivist) interpretation methodology.

Seen the central ideas of the doctrine of Shapiro, we shall apply them to Brazilian Tax Law, for the purpose of the announced 'hermeneutical review of the principle of legality' that we wish to engage in.

3. Addressing the central issue of the hermeneutical review of the principle of legality in the Tax Law, as announced in the introduction, and adopting the interpretive methodology of Scott Shapiro, we shall apply it to Brazilian Tax Law by analyzing the system to identify which is the 'economy of trust' adopted and the degree of conflict in the

[21] SHAPIRO, 2011, p. 384.

matter.

We shall do this by following the steps suggested by Shapiro (we shall not address the specification phase, as we consider it quite abstract, because it turns to the analysis, in a generic plan, of what are the skills and character necessary to implement various types of interpretative procedures, which is not relevant for our purposes). Thus, we shall move to the phases of extraction and evaluation:

i) *Extraction* – (a) What competence and character that the planners believed actors possess led them to entrust actors with the task that they did? (b) Which systemic objectives did the planners intend various actors to further and realize?

Answering this question, we can identify that the 'planners' of the national tax system considered that the tax matter has a high degree of conflict, with a severe level of mistrust (for reasons, moreover, evident, since tax imposition, throughout history, as noted, was the object of many revolts and uprisings, for violating the asset freedom of the citizen-taxpayer). Planners of the national Brazilian tax system consider that the tasks to be assigned to actors in the Legislative power should be larger than the tasks assigned to actors in the Executive and Judiciary power. That means that the system planners have granted more confidence to parliament, giving it more power, claiming that, systemically, there must be a severe separation between the three branches of powers, preventing the Executive and the Judiciary (to whom they granted less confidence) to perform people's representative tasks. Thus, the system planners did not intend that the actors of the Executive and Judicial powers perform the task of legislating, and therefore did not shape the system in this way. These conclusions can be reached from the examination of the Brazilian legal system (Federal Constitution of 1998, National Tax Code and other statutes), because the norms are closely tied up, so as to ensure, firstly, the rights of the taxpayer against the excesses of the Executive and Judicial branches of power, and to a lesser extent, of the Legislative power.

ii) *Evaluation* – Which procedure best furthers and realizes the systemic objectives that the actors were intended to further and realize, assuming that they have extracted competence and character?

The interpretive procedure that best performs the systemic objectives that actors were tasked to promote and carry out in the Brazilian tax system is the method of strict interpretation of law and adoption of legality and the '*typus*' in the 'improper' sense, that is, the adoption of classificatory concepts. This is because this kind of interpretation fulfills

the system planner's aims, because the planner has conceived Tax Law as a branch of law in which there is a high level of conflict. The planner, therefore, does not give the interpreter of Tax Law a high degree of confidence in Brazilian law and did not grant him the task of creatively interpreting Tax Law, because it would imply offense to the general framework of the system.

This is, therefore, the hermeneutical review of the principle of legality in Tax Law since, under new legal and scientific formulation, we have confirmed the need to adopt the method of strict interpretation, legality in an absolute sense and the adoption of the *'typus'* as mentioned above. This hermeneutical method regards the frame of the national tax system as is was thought and planned by its architects.

In other words, this new interpretative view has the advantage of responding to the shortcomings of classical legal positivism and the traditional theory of closure of the *'typus'*, but do not give in to unfounded criticism leveled against the traditional theory based on the anti-positivist rhetoric. That is, within the present framework of the national tax system and its rules, we can conclude that the system did not allocate trust to the interpreters so that there can be an abuse of discretionary interpretation techniques, which implies that the best method of interpretation to be applied, that is, the interpretive method that *prima facie* best responds to the wishes of the planners is still the method of interpretation that adopts strict interpretation of law.

References

BALEEIRO, Aliomar. *Direito tributário brasileiro*. Atualizadora Misabel Abreu Machado Derzi. Rio de Janeiro: Forense, 2002.

BUSTAMANTE, Thomas Rosa de. Book Reviews: Legality, by Scott Shapiro. 2012.

COHEN, Sarah Amarante de Mendonça. *O princípio da legalidade no direito tributário revisto: uma questão de hermenêutica*. 278 fls. Tese de doutorado na área de concentração em Direito Tributário. Faculdade de Direito da UFMG, 2012.

COHEN, Sarah Amarante de Mendonça. *O tributo e o poder na reviravolta lingüística do pensamento contemporâneo: um estudo sobre a relação entre normas de tributação e poder do Estado, sob a perspectiva da teoria do Direito e da democracia de Jürgen Habermas.* 194 fls. Dissertação de mestrado na área de concentração em Direito Tributário. Faculdade de Direito da UFMG, Belo Horizonte, 2005.

DERZI, Misabel Abreu Machado. *Direito tributário, direito penal e tipo*. São Paulo: RT, 1988.

NABAIS, José Casalta. *O dever fundamental de pagar impostos*. Coimbra: Almedina, 2004.

NABAIS, José Casalta. *Contratos fiscais*. Coimbra: Coimbra Editora, 1994.

SHAPIRO, Scott J. *Legality*. Cambridge, Massachussetts, London, England, The Belknap Press of Harvard University Press, 2011.

STRECK, Lenio Luiz. *Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do direito*.10. ed. Revista, atualizada e ampliada.Porto Alegre: Livraria do Advogado, 2011.

TORRES, Ricardo Lobo, KATAOKA, Eduardo Takemi; GALDINO, Flavio. *Dicionario de princípios jurídicos*. Rio de Janeiro: Elsevier, 2011.

TORRES, Ricardo Lobo. *Normas de interpretação e integração do direito tributário.* 4. ed. revista e atualizada. Rio de Janeiro: Renovar, 2006.

TORRES, Ricardo Lobo (Org.). *Dicionário de princípios jurídicos*. Rio de Janeiro: Renovar, 2004.

TORRES, Ricardo Lobo. *Legalidade tributária e riscos sociais*. Revista Dialética de Direito Tributário n. 59. São Paulo: Dialética, 2000.

Jurisprudential *Ghetto* of Zionism

Luís Homem[1]

Abstract: Corroborating at the back some twenty-five centuries of persecution of the Jews, the Papal bull issued by Pope Paul IV in the 1555 Cum nimis absurdum which confined the people from the Land of Judaea, in the case of Venice, to the neighborhood of Ghetto, not only popularized a geopolitical topic of discrimination right after Machiavelli´s death, but also in the state-run ecclesiastical manner lead-sealed and promulgated what was a preexistent reality in Europe, at least since the XIIIth century. Indeed, in the Islamized territory, the Jewish quarters (Ḥāra, Mallāḥ) were for a long time present, and even predated Islam itself. Yet, when this firsthand self and secondhand outer segregated norm took place in the context of the XXth century Shoah, first in Lodz and afterwards widely throughout in the Warsaw Ghetto, it was very different from the historical premises.

In the same line of reflection, Zionism, though intellectually affiliated with the post-French Revolution time of newborn nation-states and fresh nationalisms until the firmness of its ideology under the political spell of Theodor Herzl in the XIXth century, following severe pogroms in Russia and the Dreyfus scandal observed in person, was characterized by reaction to discrimination, instead of emancipation alone.

Therefore, Zionism, especially when materialized Der Judenstaat with the formation of Israel in 1948, was better represented by a direct reflex of the Shoah than by secular liberation and upholding of Jewish identity, just as Messianism (including false Messianism, inside and outside Judaism, in which we include Christianity, from the Jews´ point of view, and Judaism from atheists´ point of view) rose alike from subjugation and discrimination.

It shall not be forgotten, thus, that theoretically the proponents of Zionism (as throughout Jewish History, when Zionism was not even born) did just the same as the Third Reich: the former before the Balfour Declaration and soon

[1]Member of the Centre for Philosophy of Science of University of Lisbon (CFCUL), Faculdade de Ciências da Universidade de Lisboa Campo Grande, Edifício C4, 3º Piso, Sala 4.3.24 1749-016 Lisboa, Portugal (e-mail: lmhomem@yahoo.com).

after the formation of Israel, the latter before the conception of the final solution of the Jewish Question at the Wannsee Conference, actively sought and restlessly negotiated a world territory Ghetto, a Jewish in situ otherness put far-off in the globe, not necessarily Palestine, and necessarily not Palestine, ever more so.

This was as though both positively in despair and negatively in hate re-enacted Pope Paul IV´s long-dated bull to International Law. Uganda, Argentina, Madagascar, U.S.S.R, etc., as throughout centuries and increasingly many others, were essentially alternatives to the Philosophy of Law, inasmuch as to Palestine.

Keywords: Diaspora, Ghetto, Philosophy of Law, Zionism

1. Introduction

This paper purports to present a short digest of relevant elements that can best explain the *geo, philosophia et lex situs* of the land of Judea and Palestine, most especially of Jerusalem, by presenting in two sections – *Mount Zion and Temple Mount Biogeography* and *Philosophy of Law and Zionism* – a simple group of three *cogitationes causae* for the first section and two ensuing *explanationes* for the second section, bearing the reasons behind the *Ghetto* materialization of Political Zionism and of the State of Israel that still rests upon us, turning subsidiary the blemished relation between *ius gentium* (the expected discretion assent by people´s *opinion*), and *ius inter gentes* (archetypal in International Law), of greater conceptual and organic *substrata* that can help us to understand best the Philosophy of Law and Zionism *inter arma et leges* confluence.

Mount Zion and Temple Mount Biogeography

If it was imagined the intersection of the Disciplines of Geopolitics and Geophysics, in a canvas drawn by History, *ab experimenti usque facti*, in spite of most of our maps being *mental*, and even more so the Historical, for the case of the land of Judea and Palestine, the result would be very *illustrative*. Jerusalem, in particular, seems to have sublimed the *umbilicus mundi* status, degrading Imperial Rome to a faint replica. This has majestically encountered expression in the professed *orbis terrarum* T-O maps, else called Beatine Middle Ages maps, where "T" is the Mediterranean Sea (*Mare Nostrum*), the Nile and the Don (the Greek Tanais),

and "O" the all-surrounding ocean, presumably of either a disc-shaped earth or approximately a sphere, wherein all-equal in size Continents of Europe, Asia and Africa are amalgamated, with the Holy city of Jerusalem as its center (in other versions with the Aegean and Black Sea to the West, and the Red Sea and the Nile at the East). This was so as passing the scorching climate of the land to the south of Libya, all through uninhabited Africa, the antipodes were also outside a meandering red sea, eloquently an elongation of both cartography and imagination.

As Mount Parnassus in Ancient Greece was thought to be ὀμφαλός (the omphalus) of the world, presumably the *situs* where two eagles sent by Zeus would have met after having each covered the earth's length to opposite sides, so too Mount Zion, place of the Temple Mount, from where Zionism got his name, is Judaism's symbolical religious *axis mundi*. The meteorite *mater et origo* belief by the Greeks, in contrast to the dust and clay Hebrew belief wherefrom Adam, the first man, was molded does not have sufficient enough differences not to have permitted the very existence of one ὀμφαλός (omphalus) in the Church of the Holy Sepulcher in Jerusalem, the assumed site of Christ's Crucifixion and Calvary.

We know today that the surface area of the Earth is more or less 510 million square kilometers (5.1×10^8 km^2), with only about 150 million square kilometers corresponding to land. As we are referring originally to Ancient World Cosmogony, the *peripatetically* proportioned surface, as you might say, would have been of approximately 30 million square kilometers, generously a bit more so if we consider the whole Mediterranean and the Dead Sea, i.e., about the size of the Moon (37.9 million km^2 and only about 7% of the Earth). This is to explain how Ancient World Jewish and Post-Christian Medieval Cosmogony was retrospectively nearly a corridor from and to Jerusalem with the heavenly sky as a scenario.

And even more so throughout History, furthermore wholly augmented since the Hellenistic influence, without which Jewish-Christian-Islamic posterity would not have been the same as today's, it seems now greatly that Jerusalem, the Judea and Palestine are vested with the importance of a *mundus constituo locus*, as if it were its centre, in a T-O map fashion. A navel with encircling Europe, Asia and Africa, as if Tectonics and Geography's profound forces had entered Religious and Law Philosophy along with Geopolitics, behaving as if in actual fact deserved exclusively the laws of Geophysics, it has noticeably shaped both the Abrahamic and Monotheistic plateau of all the three greatest in num-

bers, Judaism, Christianity and Islam. Conjoining with this the persistent Israeli-Palestine conflict, they are, altogether, the main reasons behind the equivalent time-lasting Jerusalem´s aura as a sort of threefold combination, as we choose to describe:

(1) First, both Euclidian Geometry's and Pre-Christian to Kabbalah's תוֹרִיפְס (Sephirot; emanations) *centro et cuore mundi*, cast as a kind of Geo-Corporeity in the making, until the advent of Modern Cartography and Machiavelli´s "Geopolitics", wherein the earth is compared to a body, and Jerusalem as the head and heart;

(2) In second order, resulting from and impossible without the previous, a sort of both Newtonian and Hobbesian Universal Gravitation and Law Philosophy combination, wherefrom "Geopolitics" seems to have acquired Classical Mechanics *Principia*, having also gained a genre of Solar and Telluric Absolutism only to be ended gradually after the French Revolution.

It is to be noted that, having in mind Hannah´s Arendt concept "On Revolution" as a transference from *De Revolutionibus Orbium Coelestium* to *Potestas* (Power), what we want to express is that, in terms of a Symbolic Anthropology, the new Heliocentric and Earth Mass XVIIth century Physics had a correspondence in the re-ordering of Power Semiotics. This new Modern Power Semiotics almost, and in the least, reinvented the terms of Neolithic and Proto-Indo-European solar deities, helping to understand best the XVIIIth century category of *le Roi-soleil*, with this closing, as we see it, the *Potestas* (Power) cycle that had started with *Elagabalo Sol Invictus* and Paganism, before Christianity had become the official religion of the Roman Empire. Also to be noted is the fact that this period (from the death of Machiavelli in 1527 to the date of the Constitutional Republic French *Directoire* in 1799) was the period in History in which Palestine and Jerusalem had the nethermost Demographics (150 to 300 thousands in the range of years for Palestine). This seemingly *absens* status corresponded not only to the long-dated hard-to-recover pitfall of Black Death in the XIVth century, but also to the Discoveries initiated by the Portuguese that circumvallated Marco Polo's footsteps by oceans, and also to the wait of Ottoman Suleiman´s magnificence in the early XVIth century, liberating Jerusalem from the numbers of a poor hamlet (6 thousand or less in population). Recapitulating, this was the moment at which "Geopolitics" for the first time had

an *object* and a *method*, and in which, contingently, Palestine was a far historical past dream. This scenario lasted until the end of the XIXth century and the first Zionist *Aliyah*.

(3) And at last, we ask, what has exactly followed to contemporaneity after the Ancient *atlas centro et cuore corpora* envisagement, subsequently one Modern *potestas, orbis et tellus de revolutionibus* so powerful in conception that symbolically reenacts today in *mental* cartography, Isidore of Seville's description of Jerusalem as center *De Terra et Partibus*?

We believe that one such *orbis terrarum centrum* category in contemporaneity's Scientific and Post-Modern community of peoples is only possible by a conjugation of both the traditions, that is, (1) one of more symbolical characterization and the (2) other of a Rationalist Scientific kind. The effect is probably more pliable by one such conceptual array as found in the XXth century original ground of Geopolitics.

The result is, thus, a new dimension to Mircea Eliade's choice of words in the expression *axis mundi* in the sense that, not only to Jewish Religion, but very often to Geopolitics expertise, Jerusalem and the Palestine are portrayed, conjoining (1) and (2) as *axis revolutionis*, not only as if though we were revolving the scrolls of History continuously, but also as though it were a pivot cosmological axis around which the World revolves, in a sort of Philosophy of History spindle, in which the land of Judea and Jerusalem *situs* would represent inasmuch one Geographical Singularity as one Civilizational Distinctiveness.

Interestingly enough, the Mounting of Jerusalem is intimate with the world's lowest area of depression: the Dead Sea, the Jordan Valley, Israel, West Bank and near Jordan (obligatory elements of both the biblical and the geopolitical plots). Indeed, Jericho's springs and built battlements in the West Bank are the History's oldest human settlements, in point of fact, nearly as ancient as the Holocene (9000 BC). Besides, it demands attention of the fact that Jerusalem, in particular, is one inimitable *situs* in both T-O maps and contemporaneous Geosystem maps: as the Earth is the only densest and graced by-large water planet of the solar system, turning it habitable, Jerusalem is also a very special *situs* in representing a sort of minuscule T-O map within the original, with the surrounding Mediterranean and Dead Sea, below the Gulf of Aqaba and the Suez proximity at West, both giving passage to the Red Sea, and primarily the vase shape at the vicinity of the Jordan, Euphrates, Tigris and the Nile, fetching deluge narratives and a bounty impression.

What's more, Jerusalem (31º 47′ N 35º 13′ E) is only 579 miles far from the actual superficial barycenter of the Earth´s mass (40º 52′ N 34º 34′ E) (preferable to saying the "Geographical Centre of Earth", as we need to keep in mind the Renaissance Cosmological lesson of the Space's center being a convention). In actual fact, Charles Piazzi Smith, in the XIXth century pre-Technological and Egyptologist epoch tendency, unintentionally located the site on the Great Pyramid of Giza with adjoining Jerusalem. In the sequel, and wholly conventionally, Greenwich was chosen, by naval criteria, to be the prime Meridian, next to the Royal Astronomer having pronounced himself in favor of the prime Meridian location being in the Giza Pyramid *situs*. A prime Meridian is just a 180º sphere line, though, while in Piazzi's conception it can be said to have accommodated a sort of Geoid Philosophy, very much in the line of Charles Lyell Geology, who drastically changed the conception of the Historical Sciences and most influenced Darwin´s work.

This is so *as if* – "as if" in Kantian sense, who curiously was behind the firstly consistent *Pangenesis* Modern Cosmological idea, and simultaneously critically explored *Religion within the Bounds of Bare Reason* - Geopolitics and Astrobiology would have met by the hands of Time and History, and Jerusalem, the land of Judea and Palestine would have accrued and amassed a sort of Philosophy of History and Religion mosaic, as if it were an inverse carbon copy.

This is, most evidently, the point at which we refute Toynbee's allegation in the 1950's of Judaism as being a "fossil", *as if* it were, on our side, a critic within the bounds of bare reason.

This is possibly why Jean-Baptiste du Boyer, the XVIIIth century author of the winning and long-winded novel *Lettres Juives*, in a most probable fictional tell, is said to have replied, when King Frederick the Great of Prussia asked his ministers for "one single, irrefutable proof of God":

> "Yes, Your Majesty, the Jews"[2]

This quote beholds enough Philosophy of History and Religion bleak and seriousness as to have been elected by Werner Keller to be the frontispiece citation to his monumental *Und Wurden Zerstreut Unter Alle Völker*, in such fashion given a similar status of *argumentum ontologicum*

[2] Keller, Werner, (1966) Und Wurden Zerstreut Unter Alle Völker, *História do Povo Judeu: da destruição do Templo ano Novo Estado de Israel*, Galeria Romana.

as it was instituted by Cecil Roth.

Reiterating the aforementioned, Simon Sebag Montefiore wrote in the Preface to his book *Jerusalem, the Biography* no more no less than the following:

> "This is the history of Jerusalem as the centre of world history (…)"[3]

Having all this in mind and reflecting *critically*, neutrally and asymptomatically in this suggested widening scope of *conventional* XXth century Geopolitics, what can be said to be more peculiar than this *umbilicus* category of the Land of Judea and Palestine conjoining with the διασπορά (Diaspora) of Hebrews and Jews throughout History, as if the contingencies of the Land propelled a whirlpool of the civilizational kind?

More importantly to the aim of this paper, having Geopolitics proved to be the arena most contradictory to Natural Law, derogating statutory, binding, customary ἦθος (Ethos) except for the Hobbesian nasty and brutish "state of nature" of War, and when fulfilled with evenhandedness and justice through humanness *ius positum*, excessively feeble compared to Physics, the devastatingly single Law at War, what can Philosophy of Law teach us today? Jurisprudence, which is a sort of natural law of *ius positum* both combined, under the long-lasting Aristotelian influence of φρόνησις (phronesis), which serves not as a source nor as a doctrine to International Law, seems to be wedged in the selective ambivalence of both respect and disregard towards the three primary sources of International Law: Treaties, International Customs and General Law Principles, as listed under Article 38.1 of the Statute of the International Court of Justice.

Zionism and Philosophy of Law

It is true that the state of Israel - *Der Judenstaat* - was overwhelmingly originated by the herculean *naturali et positum iura*, administrative, literary and diplomatic work of pre-Zionists and Zionists. Both Rabbinical Ashkenazi and Sephardic renowned Yehudah Shlomo Alkalay and Rabbi Zevi Hirsch Kalischer cleaved Reformism and Human-based

[3] Montefiore, Simon Sebag, (2012) *Jerusalem, The Biography*, A Phoenix Paperback, xxxii.

Messianism with Judaism and the Tradition; Moses Hess, pacesetter of the blended Socialist formula, and a forerunner of a sort of Nationalistic GeoJurisprudence, could never imagine that the own counterfeit Marxist "Jewish question" would direct to such a perfected Socialist Zionism; the Bilu movement, the Hovevei Zion (Lovers of Zion) in Russia are all, with others, suitable examples of a new tide that was forming, making in the long run more diverged Orthodoxy and Secular Zionism. As for the case of Zionists, the vanguard Herzl himself with a positive faith similar to Prophecy, literally forespeaking history in the most powdered prospects, Ben Gurion's exemplar *realpolitik* passage from Executive Agency Leading to International Statesmanship, or Eliezer Ben-Yehuda's spectacular vivid lexicography and linguistic turn, from the *Sorbonne* in Paris to the land of Israel, are all fitting examples of historical premises that represent properly the edifying forces of *Eretz Yisrael*. The consummate result could not be completed, though, without the staggering, horrific shadow of the Holocaust. Indeed, the 1930's Jewish *Aliyah* from Hitler's Germany was the fifth, and a turning point in having forced the British Mandate cause allies to block emigration and, consequently, in fomenting clandestine sabotage and insurgency against the British interests.

My suggestion now is we divide the all-encompassing spectrum of the problem – the Zionist *Ghetto* – into two paragraphs that can concur by overlapping the already referred three from the First Section of the paper. The choice of listing remains, thus, equal.

(1) The land of Judea and Palestine are not, most certainly, one *lacunae* in International Law. It is not the case that International Public Law, either within a mandatory facet, or within a non-biddable presumption, has ever distrusted preventively, currently or subsequently any sort of event in time, in a sort of legal and communal absenteeism. Furthermore, Balfour's statement is not an epistolary abeyance rabbit on such matter. It is an *inter gens fere actum* (a diplomatic act wishfully statutory and further enacting), one that is directed and sprung only from the ruling power of Great Britain, holder by legal commission of the Mandate of Palestine, ratified also by the Council of the League of Nations, and, additionally, literally transferred to the International Sèvres Treaty, having been followed indeed by Arab exhilaration. The later Israeli insurgency against the British forces never took the form of declared war, nor did it drag a sense of diplomatic blameworthiness in relation to the Jewish Agency, in fact, very much to the contrary. It was, maybe in the genesis, certainly not in the outcome and proportions, very similar in contours with the Turkish National Movement and

establishing of the Republic of Turkey, next to the abolition of the Ottoman Sultanate and the breaking of the allied forces coalition. These two references are important insofar as the Ottoman Empire was a receptacle for unequivocal loyalty from Arab Palestinians (at which time and never before such a thing as a Palestinian Independent entity was rumored) and helps to explain a sort of Islamic, Arab and Arabized brotherhood *ad damnum* common plead. Likewise, Jewry´s *Shoah* experience which gave rise to the preferment of Public International Law after World War II (Britain handed over the Palestine question to the UNSCOP) and to the new sense of *iud ad bellum*, especially through the Cold War, did not seem to have much impact on Israel, which is not explained merely by post-Colonialism, but seems to have been engendered by reimbursement and compensatory sentiments, often trespassed by preventive war actions. To this effect it has also concurred the extinction of a *de novo iure* opportunity, after the refusal (and further dismissal through acts of war) from the Arab League of the 1947 UN *Partition Plan with Economic Union*, signed by the Jewish Agency just as readily as Herzl did so with Uganda, even if it amounted to roughly three quarters of the territory. Even if we were to neglect the formal diplomatic findings of the Peel Comission (1936-1937), and presume it was a sort of preemptive Right act after the Arab strike – impossibly so, as seen by the McDonald White Paper (1939) - the truth is it aimed unequivocally for a binational state solution, in the sequel found not implementable due to Arab boycott. Underpinning the context, we shall not forget, primarily, that it was about the territory of Mandatory Palestine, in a post-Imperialist International Lawful frame, and a commission inquiry set to find a bivalent solution, which had foretold already, in compulsory terms, that population exchange would have to take place. A lawful eviction, ejectment or repossession was foreseen to take place for both sides anyway before forcible aggression in the Civil war. This *bone fide ex parte* logic, with Jerusalem as a *corpus separatum*, and a sort of abutted desirable contract within the possibly expected legal and territorial boundaries of a chain of title sovereignty, is, though, not the reason for the debacle to have occurred. This happened so as one disarming, concessional and reparative entente such as that of Versailles is blamed to have had war guilt. A more plausible reason is found in the geopolitical characterization and decay of the Ottoman Empire. If observed carefully, it becomes evident that the Ottoman Empire was the only one which could have replicated Mackinder's geopolitical slogan:

> "Whoever rules East Europe commands the Heartland; whoever rules the Heartland commands the World-Island; whoever rules the World-Island commands the World."[4]

Notwithstanding Mackinder having revised his theory to expand the Heartland, as system-forming layers and attribute more strategic command especially to its inner crescent (Rimland), where Jerusalem is placed, the Ottoman Empire denotes several Geo, Cultural and Political assets that are worth paying attention to. Indeed, to such an author as Spykman, it was actually from the Rimland that the influential power of the Heartland was originally drawn from. The Ottoman Empire, apart from representing the Southern Eurasian power, can be said to hold a special importance from the following idea: it was ever the only terrestrial Empire to subdue continuously and long-lastingly the continental plaque at which meet Central Europe, Central Caucasus and Central Asia, in a kind of Eurasian vocation (at this level, it contrasts enormously with the only other Eurasian power, Russia, in that, apart from never having seized the southward Judea and Palestine, was always very deceiving with the political-ideological soviet acculturation model). Furthermore, it encompasses a spread ethnic affinity and majority in all the preceding Empires (the Hun, the Turkic and Khazar, Seljuks, Mongols, Timurid, Ottoman and Savafid, before the Slavic Russians). Also, it has accrued, as if different *strata* of influences uplifted to emerge in one territory, the importance of the last Caliphate of Islam, elongating from the Arabian Caliphate. This argument is extremely important, as it sets up a Lyellian *geo argumentum* that not only raises the importance of the land of Judea and Palestine, as for its roots *ab antiquo strata* it also helps to explain a commonly held feeling of political liberation, and Arab/Islamic belonging of the countries that were short before under foreign European rule. We can even observe that countries that were part of the shredded (political-ideological only) Russian sphere of influence, a very secluded contemporaneous *strata*, all in "outer crescent" *loca* such as Cuba, Venezuela, Bolivia or North-Korea throughout all the XXth century and some still today did not recognize the state of Israel, irrespective of the transference of Socialism to Zionism.

(2) It has become evident how much *Der Judenstaat* and Philosophy of Law, for the case of International Law, have in common. Apart

[4] Mackinder, *Democratic Ideals and Reality*, p.113.

from having been besieged for centuries, straitened by national laws, they can be said to have been effected at about the same time in an anticipated post-war era. And apart from *signatorius et cognitio stigma*, (one such *notatio* that is harder to conceive, for it derives from within Democracy and people's Sovereignty, emanating as well from the *body* of law that governs relations between or among states or nations) both share vilified and loathed *in situs* anatopism. Less the United Nations, wherefrom Codification and Progressive Development of International Law stems, Treaties registration and publishing rests, and International Courts and Tribunals judicial power branches from, furthermore as being an outgrowth of Atlantic influence, but most specially Israel. Likewise a certain political-institutional adjournment hinges on both due to the same reasons. More profoundly, the Chartering "boundaries" of the United Nations are similar to the self-declared "Constitutional Revolution" in Israeli Constitutional Law. The reason lies in the fact that the Israeli Judicial Law, weaved in Common and Civil Laws, inasmuch as it has been derived by the United Nations Assembly Resolution 181 (in the form of a *Potestas* transfer from Mandatory Britain to the Jewish National Council), has been, by the immediate conflagration of war and the successive events, exempted from the practice of the formation of a Constituent Assembly assigned for the task of Constitutional codification and writing. This constitutional *potestas* was transferred, thus, to the Knesset and the legislative and constitutional *bodies* merged in the Parliament. The Supreme Court in Israel has welcomed the Eleven Basic Laws, but, still, there is no codified Constitution, resting upon laws and administrative acts a sort of Supreme Judicial legislature with a constituency aura. The case with post-war International Law is similar in that the ratification of a founding document is limited to a Charter, never to be fulfilled with a constituency, and it statutes in complete people's sovereignty, an International Court of Justice with Eleven Security Council permanent members, reaffirming faith in fundamental human rights. Not only that, but it is also that Israel admissibly envisages positively a set apart community of people in the Diaspora contending against enemies of *Der Judenstaat*, as though commanded by a separate *body*, and for the exact same reasons the United Nations felt the need to base the International Court of Justice overseas, in the Netherlands (there were also tactical and domestic precaution reasons). There are several nuances in the equation and in the whole nexus, but fundamentally the fact is that the State of Israel had as a legal source International Law itself, and a National Israeli Constitution that has been gridlocked by perdu-

rable war, ensued consequentially a custodian and gatekeeper role by the Supreme Court, very much the key role actor in developing the law, as the principal state branch. It has, thus, all the more considering the Diaspora, a fairly international guised vocation and heritage, truly the emphasis being on Human Rights the judicial guardian wall. It has also played importantly the incomparably difficult act of envisaging "oneself as another", as though communitarian consuetudinary life, had elaborated, in a sort of communal equity, a "constituency of consciousness" and both judicial and moral frameworks of hearing, judging, sanction, rehabilitation and pardon were to find each citizen within and outside the wall. This sums up the characterization of the Jurisprudential *Ghetto* of Zionism, not only by acquiring the perspective of an intramural national constituency practice, as also, complementarily, by being observable that it has to reaffirm its *credo* to International Law, which, as seen by the episode of the United Nations General Assembly Resolution 3379, almost made anti-Semitism and anti-Zionism International Law *de facto et de jure*. In the long run and until this very moment, in what concerns post-State Zionism's integrity, it has barred and has been overtly biased against just and legitimate equity propounded in the Charter, just as it has deceptively incentivized "lawfare" proceedings in the international arena, as if it judicially made viable a new *Ghetto cum nimis absurdum*. Under this scenario, a binational state solution is impeded, which has constitutively been taking the proportions of a pledged International Law *habeas corpus* of its own.

This helps to comprehend thoroughly the *geo, philosophia et lex situs* of the land of Judea and Palestine, of which the most binding and inspiring is *geo*, and the less perennial is *lex*.

Fundo Clamor

Memories of stories of human rights violations during military dictatorships in Brazil and in the Southern Cone[1]

Anna Flávia Arruda Lanna Barreto[2]

Abstract: This research aims to analyse the contents of Fundo Clamor, located at the Documentation and Scientific Information Centre (CEDIC), from the Pontifical Catholic University of São Paulo/SP, between the years of 1970 and 1992, as well as its contribution to the process of rescuing historical memory of child and teenager abduction, imprisonment, and torture in the course of military dictatorships in Brazil, Argentina, Uruguay, and Paraguay. Through the consultation and analysis of documents from Fundo Clamor and the Terror Archives, the Centre for Documentation and Archives for the Defence of Human Rights (CDyA) of Paraguay Supreme Justice Court a compilation will be made with information regarding the disappearance of children and the imprisonment and/or abduction of pregnant militants in an attempt to describe the situation of apprehension and incarceration, the historical context, and the repression forces involved in the operation of arrest, kidnapping and/or torture of militants, children, and teenagers. The main argument in this research states that the archives from the Committee for the Defence of Refugees Human Rights from the Southern Cone, available at Fundo Clamor, contribute significantly to the rescue of historical memory from the dictatorial period and to the achievement of complete citizenship in these countries, considering that Brazil was the protagonist of the National Security Doctrine implantation process in South America.

Keywords: southern cone dictatorship, human rights, fundo clamor

---

[1] Translated by Virgínia Starling. This article was developed during post doctoral stage of history, the Federal University of Minas Gerais, Brazil and supervised by Professor Heloisa Maria Starling Murgel, Ph.D. and Professor, Department of History, Faculty of Philosophy and Humanities (UFMG); main research fields: Republic Project: core research, documentation and memory; email: starling@fafich.ufmg.br.

[2] Anna Flávia Arruda Lanna Barreto, Resident post-doctoral fellow in the Graduate Program of the Federal University of Minas Gerais, Brazil; Ph.D. in History (UFMG), Adjunct teacher at UNA University Center, Brazil; main research fields: History, Documentation, and Memory. Email: annaflav@prof.una.br.

1. Introduction

In the end of the 1970s, when the Brazilian military dictatorship announced their first measures of mitigation, military regimes from Southern Cone (Argentina, Uruguay, Paraguay, and Chile) practiced recrudescence measures of authoritarianism and intensification of repressive apparatus. Arbitrary arrests, summary executions of political activists, exile, political banishments, housebreaks, abductions, and disappearing of children whose parents were political activists or opponents of the regime were practices which endorsed political repression in Southern Cone countries and usurped the human rights from thousands of Brazilians, Chileans, Argentineans, Paraguayans, and Uruguayans.

Our attention turns itself to the cases of disappeared, abducted, arrested, and tortured children whose parents were political activists or opponents of dictatorships from Brazil or Southern Cone countries, registered at the Committee in Defence of Human Rights for Southern Cone Countries (Clamor), from the Documentation and Scientific Information Centre (CEDIC) of the Pontifical Catholic University of São Paulo/SP, between the years of 1970 and 1992.[3]

The reason why we have made this study arose from the verification that, in spite of the incentive from the Brazilian federal government to rescue historical memory, especially from the period of the Brazilian Military Regime, the obstacles and prejudices which are part of the routine of investigations and academic research in the area are still a lot. We believe that the rescue of content from this board and of others which are similar is crucial to the perception of the cooperation politics adopted between Southern Cone countries and Brazil, as well as of the Brazilian leadership in actions of repression, prisoner exchange, and training on intelligence areas and interrogation techniques.

The originality of the research lies in the production of academic work in the area of History that seeks to analyse the information in Fundo Clamor as a contribution to the rescue of historical memory from the period of political and military authoritarianism in Southern Cone countries and Brazil, especially in what relates to abduction, disappearance, and identity appropriation of hundreds of children and teenagers, sons, and daughters of political opponents of dictatorial regimes established in Southern Cone countries and Brazil.

We believe that the reconstitution of that period's memory

[3] Documentation period of Fundo Clamor archives.

(1970-1992) through the analysis of Fundo Clamor's archives will allow a fundamental historiographical research for the recovery of a history silenced by despotic speeches from political and military repression organisations.

2. Methodology

The methodology used in this descriptive and qualitative research embraces two directions: a bibliographical and a descriptive analytic documental research.

This work seeks to describe the cases of abduction, imprisonment, and disappearance of children whose parents were political activists during the period of dictatorial governments in Southern Cone countries – Argentina, Paraguay, Chile, Uruguay – and in Brazil. Through the consultation to Fundo Clamor (correspondence, denunciations, bulletins, leaflets from Abuelas de la Plaza de Mayo, reports, writs of habeas corpus, and files on enforced disappearances), documents will be selected that have information about the disappearance of children and/or the imprisonment and abduction of pregnant activists, seeking to describe the situation of apprehension and incarceration, historical context, the repression forces involved in the imprisonment operation, abduction, and/or torture of female activists and children involved.

The criteria used to the fulfill the bibliographic research will be based on the use of specific bibliography about human rights, about historical memory and history of present time, about dictatorships in Brazil, Argentina, Paraguay, Chile, and Uruguay, and about joint repression operations performed by military authorities from Southern Cone countries.

The primary retrospective sources present in the Fundo Clamor archives are intended to be used as documentary sources, such as, minutes of meetings, flyers, bulletins, primers, newspapers and publications from the Committee, received correspondence and denunciations, meeting's resolutions, reports, mapping of the main activities developed by the Committee and of the refugees attended to by the Committee, and newspapers from the great press. This information shall be obtained through systematic observation of the documentation made available by the board.

Other than this document collection, the patrimony of the Terror Archive at *Centro de Documentación y Archivo para la Defensa de los Dere-*

chos Humanos (CDyA), from the Supreme Justice Court in Paraguay, has also been consulted. It is a register of around 60,000 documents collected in the course of 35 years' general Alfredo Stroessner's dictatorship. They are police files, lists of the prisoners' entries and exits, notes by the investigations chief, confidential assessments, control of political parties, periodic publications, lists of suspects, information about associations and groups which were considered subversive, syndicates control, and objects such as books and identity cards. Within this archive, special attention is given to the images of microfilm 143 that contain the record of activities of Operation Condor in Southern Cone countries and in Brazil.

3. The Repression in Southern cone Dictatorships

Civil and military coups in Southern Cone countries, in the second half of the 20th century, disrupted the revolutionary perspectives of opposing branches in civil society that dreamed with the construction of a new society. Socialist moods were silenced by the speech of Order and National Security, tradition, family, and prosperity. Social and student movements and progressive sections of civil society, stupefying, went from euphoria to doubt, from offense to retreat[4].

It is worth emphasizing that civil society's growing discontent in Southern Cone countries and Brazil was in the context of Cold War, in a world marked by ideological bipolarity amongst the blocs led by the United States of America (USA), that sponsored capitalism, and by the Union of Soviet Socialist Republics (USSR), that defended socialism. It is important to highlight in this context the impact caused in the USA by the Cuban Revolution in 1959, which implanted a socialist regime in a country geographically close to the USA. With the establishment of socialism in Cuba, the interests of leaders from the USA and from Southern Cone countries are threatened by an ideology contrary to North-American and military interests, whose socialist and revolutionary principles questioned the pillars that sustained the economic development of these sectors. USA's interests in Latin America had been shaken since the Cuban Revolution that led "the superpower country to consider the internal politics from each country in the region as an extension of its own external politics".[5]

[4] About the degree of radicalization of the Brazilian Military Regime, between 1964 and 1968, refer to: Fon, 1979; Arquidiocese, 1987; Alves,1989.

[5] Padrós, Enrique Serra. As the Uruguay there ... Terror of State and Homeland Securi-

The Cold War between USSR and USA that dominated the international scenario during the second half of the 20th century had entire generations growing under the shadow of global nuclear wars, which, as they believed, could start at any moment and devastate mankind. The fear of the inevitable mutual destruction would prevent a side or the other to signal the planned suicide of civilization. The peculiarity of the Cold War was that, objectively, there was no imminent danger of a world war.

To Latin America, the greatest impact of Cold War was not the nuclear weapons or the arms race, but the "counterinsurgency war", based on the National Security Doctrine, which aimed to eliminate possible social revolutions in areas submitted to ideological influence from the USA. According to the Secretary of the Kennedy government, Robert McNamara, three types of war were being considered in that context of Cold War: atomic war, conventional war, and non-conventional war. This last type of war was interpreted as a strategy of the International Communist Party to conquer followers to socialism. To this effect, the new challenge to the USA was to stop non-conventional or revolutionary war through the establishment of the National Security Doctrine and the dictatorial regimes in South America.[6]

In that context, the disrespect for human rights had a specific target: all those who politically and ideologically opposed the dictatorships established in Southern Cone countries (Argentina, Chile, Uruguay, Paraguay) and in Brazil.

The action of repressive forces from these countries sought, by manipulating the means of communication and education to silence any manifestation that was contrary to economical, political, and ideological interests for partisans of dictatorships established after the second half of the 20th century. The abduction and disappearance of political opponents and their children was part of a deliberate and organized armed scheme, which counted on the assembled contribution of the armed forces from the other Southern Cone countries and Brazil, to the denunciation, the abduction, and the disappearance of bodies.

---

ty. Uruguay (1968-1985): the Pachecato civil-military dictatorship. 2005. 434 f. Thesis (Ph.D. in History) Institute of Philosophy and Human Sciences, Federal University of Rio Grande do Sul, Porto Alegre: UFRS, 2005. p. 47.

[6] Reis, Ramiro José dos. Operation Condor and the Hijacking of Uruguayans in the streets of a not very Puerto Alegre. 2012. 184 f. Thesis (MA in History) - Faculty of Philosophy and Human Sciences, Federal University of Rio Grande do Sul, Porto Alegre, 2012. p.34.

> Two children, (1) Anatole Boris Grisona Julien, born on 9/22/72 em Uruguay, and (2) Eva Lucia Grisona Julien, born in Argentina the 05/07/75, the 09/26/76 kidnapped in Buenos Aires, em a joint operation of Uruguayan and Argentine police, were found in the city of Valparaiso, Chile. The kids are fine. His parents, Roger Julien Caceres (Uruguay) and Victoria Grisona (Argentina), kidnapped in the same operation, are still missing. The entire family was abducted from her residence em Party San Martín, Buenos Aires Province[7].

The text above refers to a denunciation made by the Committee in Defence of Human Rights for Southern Cone Countries – CLAMOR[8], in 1979, about the disappearance of Uruguayan children Anatole Boris Julien Grisona (4 years old) and Eva Lucía Victoria Julien Grisona (1 year and 4 months old), who were abducted on 26th September, 1976 together with their parents in Argentina and illegally deported to Chile. During the kidnapping operation, the children's parents were murdered and their offspring were taken to interrogation centers. Subsequently, they were abandoned in a square in the city of Valparaíso (Chile) and handed over to an orphanage by a social assistant who was passing by[9].

From September 1976, Anatole's and Eva Lucía's relatives began a desperate search to meet the children again. According to historian Ananda Simões Fernandes, this practice is about a "State Terrorism modality of National Security dictatorships"[10], especially in Argentina,

---

[7] Boletín de Prensa del 31/07/1979. Fundo Clamor, file 1, plastic 60. Archive of the Committee in Defence of Human Rights for Southern Cone Countries, from the Documentation and Scientific Information Centre—CEDIC—Pontifical Catholic University of São Paulo/SP.

[8] Committee for the Defence of Refugees Human Rights from the Southern Cone created in 1977, supported by the Archbishop of São Paulo—Cardinal Paulo Evaristo Arns and associated to the Archdiocesan Pastoral Committee for Human Rights and Marginalized. Its aim was to protect and assist refugees from Southern Cone countries—Argentina, Brazil, Chile, Paraguay and Uruguay.

[9] On this subject refer to: LIMA, Samarone. Outcry: the victory of a Brazilian conspiracy. Rio de Janeiro: Objective, 2003.

[10] Fernandes, Ananda Simões. "*This war is us against children*": child abduction during the dictatorships of the Southern Cone National Security In: PADROS, Enrique Serra; NUNES, Carmen Lúcia da Silveira; LOPES, Vanessa Albertinence; FERNANDES, Ananda Simoes (Eds.). Memory, Truth and Justice: marks the dictatorships of the Southern Cone. Porto Alegre: ALRS, 2011. p. 48.

where the alarming number of 230 children[11] were kidnapped during the military regime (1976-1983).

The advance of denunciation and research in this area points to the practice of this "state terrorism" modality in other Southern Cone countries. Data from the Human Rights Special Office in Brazil shows the following numbers as balance of Southern Cone's dictatorships:

> in Brazil there were 50 thousand prisoners, 20 thousand tortured, 356 killed and missing, 4 children probably abducted. In Uruguay there were 166 missing people, 131 killed, 12 abducted babies, 55 thousand prisoners. In Paraguay there were from one thousand to two thousand dead and missing, 1 million in exile. In Chile there were 1,185 missing, 2,011 dead (although unofficial statistics show up to 10 thousand murdered), 42,486 political prisoners just in 1976. In Argentina there were 30 thousand killed and missing and 230 abducted children.[12]

In the Argentinean case, the majority of kidnapped children had their identities omitted and were subsequently illegally adopted by families directly or indirectly connected to the repression. An example of this situation is the story of Mariana Zaffaroni, abducted when she was eighteen months old, together with her parents Jorge Roberto Zaffaroni Castilla and María Emilia Islas de Zaffaroni in Buenos Aires on the 27th of September, 1976 by Argentinean and Uruguayan repression forces. From this date, Mariana's relatives began a search to find her. On the 20th of May, 1983, the Argentinean newspaper "Clarin" from Buenos Aires published an appeal with the girl's photograph requesting from whoever had any information about her to get in touch with Abuelas da Plaza de Mayo[13] or with Clamor group in São Paulo. Twenty days after the appeal, an anonymous letter arrived from Argentina to the Clamor group. This letter informed that Miguel Angel Furci, a member of the

[11] BRAZIL. Presidency of the Republic. Special Secretariat for Human Rights. Right to Memory and Truth: stories of girls and boys marked by dictatorship / Special Secretariat for Human Rights. - Brasilia: Special Secretariat for Human Rights, 2009.

[12] BRAZIL. Presidency of the Republic. Special Secretariat for Human Rights. Right to Memory and Truth: stories of girls and boys marked by dictatorship / Special Secretariat for Human Rights. - Brasilia: Special Secretariat for Human Rights, 2009. p. 101.

[13] Argentinean human rights organisation, established in 1977, that has as a purpose locate and restore to their families every children that was abducted and went missing during the last military dictatorship in Argentina (1976-1983).

State Intelligence Service (SIDE), was supposed to be with Mariana in a suburb of Buenos Aires. The girl had been registered, two years after her birth, as a legitimate daughter of the Furci couple.

Cases like these became state politics in Argentina and were widely adopted in the other Southern Cone countries and in Brazil with cooperation of repression forces from these countries. Usually, children and teenagers were kidnapped with their parents, when the latter were arrested and/or abducted.

The story of the "accursed babies", supposedly kidnapped by the Brazilian army, told by inhabitants of the Araguaia region elucidates these cases of human rights violation and children abduction in Brazil. According to statements by the elderly people who live in the Araguaia region, these missing children were sons and daughters of women that had had relations with guerrillas and had nothing to do with the armed conflicts. José Maria Alves da Silva's testimony, a former Army guide, given to the newspaper O Estado de São Paulo on the 14th of July 2009, confirms this story about the abduction of children by the military forces.

On the 30th of September, 1969, Virgílio Gomes da Silva Filho was arrested with his mother and his two brothers. On the previous day, his father Virgílio had been captured by repression agents and murdered. His mother and brothers were arrested while staying at a beach house in São Sebastião/SP. At the time, his elder brother Vlademir was eight years old, Virgílio was six and Isabel, and his younger sister, was only four months old. They were detained at the headquarters of Bandeirantes Operation (OBAN). The three children were torn away from their mother Ilda and taken to the Office of Juvenile Justice, where they remained for two months. They went through several interrogatories before that. Ilda stayed in prison until 1979, being out of touch most of the time. The children were separated and each of them went to live with an uncle. Sometimes they would reunite and stand in front of a post where their mother, still in prison, could see them. After being freed and reunited with her family, Ilda and her children left to live in Cuba, where they remained until they had concluded their studies at university.[14]

Carlos Alexandre Azevedo died on February 19, 2013, in São Paulo. He was tortured when he was only a year and eight months old at the State Department of Political and Social Order (Deops) in 1974.

[14] Pimenta, Edileuza; Teixeira, Edson. Virgílio Gomes da Silva: retirante of the guerrilla. Sao Paulo: Editorial Plena, 2009.

Carlos was journalist Dermi Azevedo's son, militant and a founder of the Human Rights National Movement (MDNH). On the 14th of January, 1974, Carlos Alexandre and his mother were taken to the São Paulo headquarters of Deops, where his father was imprisoned. During Dermi's interrogation the policemen threw Carlos Alexandre on the ground and hit his head. Carlos suffered from after-effects of the torture and had to submit himself to treatments with antidepressants and antipsychotics for the rest of his life. On the 19th of February this year Carlos Alexandre put an end to his life with a drug overdose.[15]

Actions like these were used as interrogation techniques to get information that were considered essential to the National Security State in force in Southern Cone countries and in Brazil. As the Nunca Mais (Never More) report from Argentina denounces:

> Because I answered negatively, they started kicking my companion with a belt, they pulled her hair and kicked little Celia Lucía, who was 13, Juan Fabián, eight, Verónica Daniela, three, and Silvina, only twenty days old…. The children were being pushed and shoved and asked if friends ever went to the house. After mistreating my companion, they grabbed the twenty-day-old baby; grabbed her feet, turned her upside down, and began hitting her, shouting at her mother: "… if you do not speak, we will kill her." The children cried and the terror was great. The mother begged them, screaming, not to touch the baby. Then they decided to do the "wet submarine" on my companion in front of the children, while they took me to another room. Until today, I know not what became of my companion….[16]

None of the children who had their parents assassinated, clandestine or incarcerated have had the right to enjoy a family, school, or communitarian life. Their relationships were marked by secrecy and restrictions. Weekends were spent in prisons, the only occasions when they could visit their parents.

There are still cases in which pregnant women were abducted and after the occurrence of the birth, usually at clandestine centres, the

---

[15] Dies in Sao Paulo man tortured by the dictatorship when he was one year. Available at: <http://noticias.terra.com.br/brasil/,ead367d062fec310VgnVCM3000009acceb0aRCRD.html>. Acess on 01 march 2013.

[16] CONADEP. Never Again: Report of the National Commission on the Disappearance of Persons in Argentina. Porto Alegre: L&PM, 1986. p. 230.

children were taken away from their mothers with the false information that they would be delivered to their grandparents. After the separations the mother would generally be executed.

Several of the children born in captivity are still missing. This repressive methodology was adopted in Latin America's Southern Cone countries as a strategy to feign a culture of fear and uncertainty, a resource to intimidate the opponents of dictatorial regimes in Southern Cone countries.

The denunciations, correspondence, and testimonials, above all from Uruguay and Argentina, are terrifying. The highlights of the main acts of violence committed by repression forces are assassinations, torture, disappearance, and abduction of relatives of political activists, especially of children whose mothers were pregnant activists arrested by the police of these countries or through the assembled action of repression forces of Southern Cone countries, usually administered by members of Operation Condor.[17] According to reports and testimonials registered at Fundo Clamor, there were adoption lists at prisons for the babies that were born from women who had been arrested during their pregnancy. The women were tortured and were killed after having given birth. Their children were offered for adoption, a great number of them to families of militaries. In the whole, the Committee helped to locate seven missing children.

The Committee has conducted many investigations in order to verify cases of missing children and has collaborated on the solution of several of them. This work allowed the group to get in touch with a group of ladies known as Abuelas de la Plaza de Mayo, founded in 1979 in Argentina. They were women who had started a fight for the defence of life and for the right to keep members that shared the same blood united. These grandmothers became known throughout the world as a symbol of the struggle against the dictatorship in defence of human rights and of the right to live once again with their grandchildren.

The abduction of children of political prisoners and the appropriation of their identities establishes itself as crimes against humanity and are, therefore, imprescriptible. Thus, to research this subject is to guarantee that arbitrariness like these will not go unnoticed by societies

[17] Assembled action of repression forces from Brazil, Argentina, Chile, Bolivia, Paraguay, Uruguay, created in 1975. This operation's main function was to neutralize and repress groups that opposed the military regimes settled in South America. The operation's name refers to an Andean bird, symbol of astuteness in the hunt to its preys.

victimized by dictatorial governments, above all where these disappearances, imprisonments, and torture were most frequent. To study this subject is to guarantee the relatives of victims of enforced disappearances the right of knowledge and memory of facts that, in a stark and brutal way, took children and teenagers away from family life, who were innocent victims of this "State terrorism".

4. Committee in Defence of Human Rights for Southern Cone Countries – CLAMOR

"Clamor" group is a civil, informal, and clandestine organisation, created in the end of 1977 with the support of Cardinal Archbishop Dom Paulo Evaristo Arns, in the city of São Paulo. This organisation aimed to denounce the violation of human rights that had been happening in Latin America, especially in Brazil, Uruguay, Argentina, Chile, and Paraguay, besides providing assistance for refugees and for the politically persecuted.

The name "Clamor" was given to the bulletin from the Committee in Defence of Human Rights for Southern Cone Countries, whose first volume was published in June 1978. The name "Clamor" was inspired by the Psalm (88: 2) – "LORD, you are the God who saves me; day and night I cry out to you. Let my prayer enter into thy presence; incline thine ear unto my cry." The intention the Committee's founders had was to emphasize one of its main characteristics: to denounce the continual violations of human rights that occurred in Latin America.

The bulletin created by the Committee was published in three languages – Portuguese, Spanish, and English, and sent without being signed to 22 Brazilian states (press), to 23 American countries (Latin-American entities of Human Rights), and to 25 countries in other continents (European and North-American entities). Throughout twelve years of existence, the Committee published 17 numbers of the bulletin. Amongst the subjects it approached, the following stand out among others: human rights violations in Southern Cone countries, the people's struggle to denounce and defeat military regimes, the situation of prisons, the treatment given to prisoners, and pertinent legislation for refugees. The Committee received a budget from the World Council of Churches so that it could maintain the Bulletin.

In 1978, when it was founded, the Committee was composed of three people connected to human rights defence – Jan Rocha, Luiz

Eduardo Greenhalgh, and Jaime Wright. The three met in São Paulo to verify the possibility of publicizing the atrocities committed against human rights of Argentineans, Uruguayans, Paraguayans, Chileans, and Brazilians during the military regime in these countries. They searched for Cardinal Archbishop Dom Paulo Evaristo Arns to communicate the massive arrival of political refugees who told unknown stories of disrespect to human rights. Dom Paulo welcomed the idea and requested that the Committee, for security reasons, remained linked to the Archdiocesan Pastoral Committee for Human Rights and Marginalized from the Archdiocese of São Paulo. At that moment, the Committee in Defence of Human Rights for Southern Cone Countries was born.

The image that marked Clamor's symbol was a drawing of a flame that shines through prison grates, created by political prisoner Manoel Cirilo de Oliveira Neto, who was freed in 1979. Other than the symbol, the Committee also had a slogan: "Human Rights have no borders." With this slogan the Committee traversed every country in the Southern Cone and sought financial and political aid from international organisms such as the World Council of Churches, Amnesty International, the United Nations, and the World Bank.

According to accusations made by political activists and by members of Clamor group, Brazil not only exported its knowledge of police and military violence, but it was also part of a connexion with other repressive forces situated in Southern Cone countries. A proof of that would be the existence of computers with terminals linked to the main airports in the continent in order to follow the movements of all of those considered subversive or enemies of the Nation.

The Committee's initial goal was to give assistance to refugees who were not recognized by the United Nations High Commissioner for Refugees (UNHCR), something that could compromise its personal security for. One of the greatest works done by the Committee was the systematisation of a list of victims of enforced disappearances in Argentina, which subsequently originated the book "Desaparecidos de la Argentina", published in 1982. The book gathered information on 7,791 missing people in Argentina.

In the 1980s, with political openness and the consequential end of military regimes in the Southern Cone region, the Clamor group gradually lost its function of protecting and assisting political refugees and terminated its activities in 1991.

5. Final Considerations

Brazilian military repression consisted in the institutionalization of torture and interrogation techniques, as well as in the development of actions and advertisements that made visible the existence of repressive apparatus in the country. To this effect, besides physical repression, the groups that opposed the Military Regime had to live with constant ideological and psychological intimidation, promoted by the repression campaign.[18]

According to the logic of dictatorial regimes established in Brazil and Southern Cone countries, being an informant working for the dictatorship was the same as being a patriot defending the nation. The assimilation of the National Security Doctrine by militaries took nationalism for a synonym of anti-communism as a component of the capitalist ideology from the Cold War promoted by the United States. The Alliance for Progress, set in the 1960s by president John F. Kennedy and the other countries in South America, gave an economic impulse to military governments in these countries, so these governments became imponderable allies with the United States.

Therefore, it is a research about the reasons, passions, and implicit desires in people's struggles in defence of human rights of refugees who, due to their political convictions, were usurped of their human and civil rights during a period of political authoritarianism. To tell this story is to tell episodes of fights in defence of human rights, but also episodes of usurpation of these rights, with clandestine, although explicit, methods of barbarism, of physical violence, psychological and cultural, capable of generating a culture of fear fed by the State terrorism effective in these countries. To tell this story is to offer the present and future generations the chance to know their past, their leaders, and their armed forces, whose maximum function is to defend the nation. To know this story is to guarantee the remembrance of facts that dishonoured humanity, that fed silence and political and social inaction. To remember these facts is to offer society the chance to know its past, learn with it and, from that, draw its future. After all, according to the psychologist Eclea Bosi, "one of the most cruel exercises of oppression is the spoliation of memories" (Eclea Bosi, 1979, p. 362).

[18] About the dead and victims of enforced disappearances during the military regime, refer to: Archdiocese of Saint Paul (1987) Dossier And The Dead And Missing Politicians From 1964 (1995).

References

Grandmothers of Plaza de Mayo. Return of children. 1997. Available at: <http://www.pparg.org/pparg/documentos/represion/ana_apropiacion/_b/contentFiles/RESTITUCION_DE_NINOS.pdf> . Acess on: 11 feb. 2013.

Alves, Maria Helena Moreira. State and opposition in Brazil (1964-1984). Petropolis: Voices, 1989.

Andrade, Ana Célia Navarro. Inventory Cry Fund: organization and description of the Fund Committee for the Defense of Human Rights for the Southern Cone countries - Faculty of Philosophy, Letters and Human Sciences, University of São Paulo, São Paulo, 2000.

Arantes, Maria Auxiliadora de Almeida Cunha. Pain and helplessness: children and parents 40 years later. Clinical Psychology, Rio de Janeiro, v. 20,n. 2, p. 75-87, 2008.

Arquidiocese de São Paulo. Brazil, Never Again. 11th ed. Petrópolis/RJ: Voices, 1987.

Bauer, Caroline Silveira. A comparative study of the practical disappearance of the Argentine and Brazilian civil-military and policy memory dictatorships in both countries. 2011. 446 f. Thesis (Ph.D. in History and History Contemporania) - Federal University of Rio Grande do Sul and Universitat de Barcelona, Porto Alegre, 2011.

Bosi, Ecléa. Memory and Society: Memories of Old. Sao Paulo: Queiroz TA, 1979.

Brazil. Presidency of the Republic. Special Secretariat for Human Rights. Right to Memory and Truth: stories of girls and boys marked by dictatorship. Brasilia: Special Secretariat for Human Rights, 2009.

Brazil. Special Secretariat for Human Rights. Special Commission on Political Deaths and Disappearances. Right to Memory and Truth. Brasilia: Special Secretariat for Human Rights, 2007.

Documentation and Archive Centre for the Defence of Human Rights (CDYA). Available at: <http://www.aladin0.wrlc.org/gsdl/collect/terror/terror_s.shtml>. Acess on: 4 march 2013.

Conadep. Never Again: Report of the National Commission on the Disappearance of Persons in Argentina . Porto Alegre: L & AM , 1986.

Dingers , John . The Condor Years: a decade of international terrorism in the Southern Cone Sao Paulo: Cia das Letras , 2005.

Dreifuss , René A. 1964: The Conquest of the state. Political Action, Power and Class Coup . Rio de Janeiro: Voices , 1981.

Fernandes, Ananda Simões. When the enemy beyond the frontier: the repressive connections between civil-military dictatorship Brazil and Uruguay (1964-1973). 2009. 275F. Thesis (MA in History) - Institute of Philosophy and Human Sciences, Federal University of Rio Grande do Sul, Porto Alegre, 2009.

Fernandes, Ananda Simões. "This war against them in es niños": the abduction of children during the dictatorships of the Southern Cone National Security In: Padrós, Enrique Serra; Nunes, Carmen Lúcia da Silveira, Lopes, Vanessa Albertinence; Fernandes, Ananda Simoes (Eds.). Memory, Truth and Justice: the marks of the dictatorships of the Southern Cone Porto Alegre: ALRS, 2011.

Fico, Carlos; Ferreira, Marieta de Moraes ; Araújo , Maria Paulo; Quadrat, Samantha Viz (Eds.) . Dictatorship and Democracy in Latin America: historical perspective and balance . Sao Paulo: FGV, 2008.

Fico, Carlos. Big Brother, the Brother Sam operating the years of lead: the U.S. government and the Brazilian Military Dictatorship . Rio de Janeiro: Brazilian Civilization, 2008.

Fico, Carlos . How they acted , the underground of Military Dictatorship: espionage and political police . Rio de Janeiro: Record, 2001.

Fon , Antonio Carlos . Torture: The History of Political Repression in Brazil . Sao Paulo: Global Publisher and Distributor , 1979.

Goes, Walder de; Camargo , Aspasia . The Drama and the Succession Crisis of the Regime. Rio de Janeiro: New Frontier , 1984.

Netherlands, Heloisa Buarque and Goncalves , Marcos . Culture and Participation in the '60s . Sao Paulo: Brasiliense, 1985.

Leitão, Matheus. Tortured before being born. Magazine Era, São Paulo, February 15. 2007. Online edition available at: <http://revistaepoca.globo.com/Revista/Epoca/0,,EDR76421-6014,00.html>. Acess on: 11 feb. 2013.

Lima, Samarone. The Compartida Penumbra: solidarity group Clamor resistance to dictatorships of the Southern Cone of Latin America (1978-1991). 2000. 155 p. Dissertation (Masters in Latin American Integration) - University of São Paulo, São Paulo, 2000.

Lima, Samarone. Outcry: the victory of a Brazilian conspiracy. Rio de Janeiro: Objective, 2003.

Lopez, Miguel H. "Stroessner and" I ": social complicity with the dictatorship (1954-1989)" In: Rollemberg, Denise; Quadrat, Samantha Viz. The Social Con-

struction of Authoritarian Regimes: Legitimacy, consensus and consent in the twentieth century. Brazil and Latin America. Rio de Janeiro: Brazilian Civilization, 2010. v.. 1. p. 437-470.

Die in Sao Paulo man tortured by the dictatorship when he was one year. Available at: <http://noticias.terra.com.br/brasil/,ead367d062fec310VgnVCM3000009acceb0aRCRD.html>. Access on 01 march 2013.

Padros, Enrique Serra et . al. (Orgs) . Memory , Truth and Justice: the marks of the dictatorships of the Southern Cone. Porto Alegre: Legislative Assembly of Rio Grande do Sul, 2011.

Padros, Enrique Serra . War booty: ownership and disappearance of children during the civil - military regimes platinum . Métis: history & culture, Caxias do Sul / RS , v . 6 , n . 11, p. 141-161 , Jan . / June 2007.

Padros, Enrique Serra . As el Uruguay no hay ... Terror of State and Homeland Security . Uruguay (1968-1985): the Pachecato civil - military dictatorship . 2005. 434 f . Thesis (Ph.D. in History) - Institute of Philosophy and Human Sciences , Federal University of Rio Grande do Sul, Porto Alegre: UFRGS , 2005.

Pereira, Anthony W. Dictatorship and Repression: authoritarianism and the rule of law in Brazil , Chile and Argentina . New York: Continuum , 2010.

Perrone , Fernando. Prague, Sao Paulo, Paris 68 , reports of wars . Sao Paulo: Busca Vida , 1988.

Quadrat, Samantha Viz. The right to identity: the restitution of appropriate children in the basements of the military dictatorships of the Southern Cone History , Sydney , vol. 22 , n . 2 , p. 167-181 , 2003.

Quadrat, Sandra Viz . Memory, human rights and politics in contemporary Argentina. X Meeting of Regional History - ANPUH - RJ . History and Biographies - University of the State of Rio de Janeiro - 2002 .

Reis, Ramiro José dos . Operation Condor and the Hijacking of Uruguayans in the streets of a not very Puerto Alegre . 2012. 184 f . Thesis (MA in History) - Faculty of Philosophy and Human Sciences , Federal University of Rio Grande do Sul, Porto Alegre , 2012.

Oriental del Uruguay Republic. Presidency of the Republic . Historical Investigation on missing detenidos . Montevideo: National Direction of Impresiones Oficiales y Publicaciones , 2007. t. 3 . Available at: Acess on: 15 feb . 2013.

Rollemberg , Denise ; Quadrat, Samantha (Eds.). The Social Construction of Authoritarian Regimes: legitimacy , consensus and consent in the twentieth century - Brazil and Latin America. Sao Paulo: Brazilian Civilization , 2010. v. 1.

Sarlo, Beatriz . Present Time . Rio de Janeiro: José Olympio , 2005.

Sodré, Nelson Werneck . The reactionary offensive. Rio de Janeiro: Brazil Bertrand , 1992.

Starling, Heloise. The gentlemen of the General: The New Conspirators and Blow 64 . Petropolis: Voices , 1986.

Teubal , Ruth . La restitución missing - appropriate Code niños por la Argentine military dictadura . Analisis of Algunos Psychological Aspects . Avaiable at: <http://rua.ua.es/dspace/bitstream/10045/5637/1/ALT_11_13.pdf> . Last access: 11 feb . 2013.

Toledo, Caio Navarro . ISEB: factory ideologies . Sao Paulo: Atica, 1977.

Vasquez, Ana ; Araujo, Ana Maria , Exils Latin américains: la malédiction d' Ulysse . Paris: L' Harmattan / CEMI , 1988.

Vera, Myriam González. "Happy Year" in Paraguay. Festival on November 3, birthday of Alfred Stroessener. In: Rollemberg, Denise; QUADRAT, Samantha (Eds.). The Social Construction of Authoritarian Regimes: legitimacy, consensus and consent in the twentieth century - Brazil and Latin America. Sao Paulo: Brazilian Civilization, 2010. v. 1. p. 393-436.

Critics of Human Rights from a historical perspective[1]

Birden Güngören Bulgan, PhD[2]

Abstract: Implementation of human rights is often criticized because it is perceived as being imposed on the rest of the world. In this case, human rights start to be seen as a sole abstraction, an empty word. What are the theoretical arguments of these critics and can we determine any historical grounds for them? In this paper, I will try to point at similar critics after the French Revolution –like that of the Historical School and Hegel- and try to show if some of these critics are still relevant. And I will compare these critics with contemporary arguments of cultural relativists. There are different streams and categorizations of human rights theories in today's world. What differentiates them is basically the source of the human rights. After the French Revolution, the historical school had criticized the individuation and Hegel had criticized the formal freedom which was, according to him, a consequence of the Revolution. In this context Hegel drew a distinction between real freedom and formal freedom. Besides the theory of sources, the theories of implementation such as human rights as a model of learning, human rights as a result of an historical process are worth attention. The crucial point is about integrating human rights as an inner process and not to use them as a tool for intervention in other countries, which we observe in today's world. And this is the exact point why I find the discussion of the sources more important. This discussion can help us to show how the inner evaluation of a society makes the realization of human rights possible and how we can avoid the above mentioned abstraction and misuse.

Keywords: *Historical law school, Hegel, cultural relativism*

[1*]The research has been financially supported by Galatasaray University Research Found
[2] Galatasaray University. E-mail: bgungoren@gsu.edu.tr

1. Natural Law Critic of the Historical Law School

The debate after the French revolution is important to understand the source of the conflict. The French revolution which began like a spring with a vital energy, very fast turned into a chaotic period in which the leaders were killed and as time went by, freedoms and rights were forgotten. The influence to other countries is also very important. German intellectuals like Goethe, Hegel, Shelling, Fichte were at the beginning very enthusiastic. Hegel even described the French revolution as a magic sun rising. Also Napoléon was described by him like the "Weltgeist" on his horse, when he arrived in Jena. But after the destructions, many of these enthusiastic intellectuals witnessed the time of terror and were much more sceptical.

When the revolution began, Burke's "Reflexions on revolution in France" was translated into German and defended by Rehberg, Fichte published his judgments of French Revolution as an answer to Rehberg. The revolution had its roots in the natural rights and the contractual theory. Burke thought that law was a result of the traditions and criticised the natural law and the contractual theory of Rousseau.[3] So after the French Revolution there was a very large discussion about rights and freedoms and their sources. On the one hand there was the traditionalist critique, on the other hand, the utilitarians' critique of the natural rights and furthermore also there was the historicist critique. [4]

The dispute between Thibaut[5] and Savigny was basically about the codification after the Code Napoleon.[6] Savigny's book *Vom Beruf un-*

[3] August Wilhelm Rehberg, *Recherches sur la révolution française* (Paris: Vrin, 1998), 64.

[4]Binoche and Cléro use the consept "critique historiciste" which include 1) the positivist critique. Here we can find the critics of Benjamin Constant and Auguste Comte 2) the organic historicism which can be analysed in two parts: the linear historicism which is used by Savigny and the dialectical historicism of Hegel. (Bertrand Binoche and Jean-Pierre Cléro, *Bentham contre les droit de l'homme* (Paris: Puf, 2007),186.

[5] Thibaut's works was his essay on the necessity of a code for Germany (*Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*).

[6] The main Problem was whether the German people are ready for a new codification or not. Savigny wanted to protect the Roman law because he saw it as something which connected different people and regions. Thibaut's wish was to adopt a new code like the Code Napoléon which had its source in the German law and traditions. Savigny wanted to show that the projects of codifications have their bases in an abstraction of natural rights. The codification must show the spirit of the nation and also Hegel said that it is as absurd to give the English constitution to the Prussians as is absurd to give the Prussian

serer Zeit für Gesetzgebung und Rechtswissenschaft was an answer to Thibaut but it could also be read as the manifest of the historical law school. The term historic school appear first with N.T. Gönner in 1807, who is a college and adversary of Savigny.[7] Savignys first article in *Zeitschrift für geschichtliche Rechtswissenschaft* ("Journal of historical legal studies" 1815) the base of this school and his fundamental notions appear.

Savigny, in a way, continued the organicism of Herder. In this movement against the rationality of the Enlightenment, notions like popular consciousness, organic development and process of growth as a result of an inner process appear.[8] We can see the principles of the historical school like the organic totality, historicism and particularism.[9] The organic totality is a notion which comes from Schelling but was also used by Savigny and Puchta.[10] It was a reaction against the atomism of the society and the individualism. The notions like historicism and the national particularism comes from Burke and Herder.[11]

The historical law school has a double orientation; one romanist-cosmopolitist and the other germanist national-popular.[12] Gustave Hugo was a Romanist and also criticised the natural law in his book *Lehrbuch des Naturrechts als positives Rechts*. Savigny saw Roman Law as an example of organic grown law.[13] Savigny, Hugo, Puchta were the representatives of the romanist-universalist[14] stream and Eichhorn, Jacob Grimm and Beseler were representatives of the germanist nation-

---

constitution to the Turks. Hegel reminded that Napoléon wanted to give Spain a constitution and they rejected it because the constitution could be good but did not reflect the spirit of the Spanish people (Georg Wilhelm Friedrich Hegel, *Rechtsphilosophie*. Ed. Karl-Heinz Ilting, 4. Band, (Stuttgart-Bad Cannstadt: Fromann-Holzboog, 1974), 663.

[7] Olivier Jouanjouan, *Une Histoire de la pensée juridique en Allemagne (1800-1918)*, (Paris: Puf, 2005), 35.

[8] Alfred Dufour, *Droits de l'homme. Droit naturel et histoire*, (Paris: Puf, 1991),158.

[9] Ibid.,182.

[10] The Hegelian Volksgeist-Theory has an influence on Savigny trough Puchtas mediation (S. Brie, *Der Volksgeist bei Hegel und in der historischen Rechtsschule*, (Berlin; Leipzig: Dr. Walther Rothschild, 1909),1).

[11] Herder understands the nation as a natural organism and cultural and historical totality (Heydar Reghaby, *Revolutionäre und konservative Aspekte in der Philosophie des Volksgeistes*, (Berlin: Inaugural-Dissertation, 1963), 63).

[12] Dufour, *Droits de l'homme. Droit naturel et histoire*, 158.

[13] Rainer Schröder, *Rechtsgeschichte*, Alpmann Schmidt, 2006, p.101

[14] Jouanjouan describes the historical school as a programme of Savigny and Puchta (Jouanjouan, *Une Histoire de la pensée juridique en Allemagne (1800-1918)*, 48).

al-popular stream.[15] The germanist stream wanted to return to the German sources and that was the source of the debate between the two.[16]

Savigny criticised the concept of a universal natural right and described the natural law school as a "unhistorical school". The historical school saw law as something which depends on traditions and developed in the society. According to them, law was something which differs from nation to nation and in each society. But Savigny defended that history has continuity.[17] For him the revolutionary rupture was totally an illusion.[18] The historical law school is against the individualism of the French revolution[19] and criticised the universal and abstract Principles and see them as the reasons of the revolution.[20] Today we can see some aspects of these arguments in the critics of the cultural relativist theory.

The historical law school tried to explain the source of rights with the notion "Volksgeist" (Spirit of a Nation).[21] Volksgeist is a notion used since Herder but has acquired a new dimension with the historical law school. Savigny said that law, like language, lives in the consciousness of a nation.[22] Volksgeist is a concept which is interpreted in many different ways.[23] Hugo used this notion for the Roman law. He tried to understand the Roman law in the spirit of his time and its transformation to his time.[24] Savigny interpreted the notion "Volkgeist" as an ideal notion for the nation and culture and understand it not like Thibaut as the whole of the society.[25] Hegel was also on the side of Thibaut in

[15] Dufour, *Droits de l'homme. Droit naturel et histoire*,162.

[16] Otto Gierke, *Die historische Rechtsschule und die Germanisten*, (Berlin: Gustav-Schade, 1903).

[17] Binoche and Cléro, *Bentham contre les droit de l'homme,* 186.

[18] Ibid.,189.

[19] Wolf Rosenbaum, *Naturrecht und positives Recht*, (Darmstadt: Hermann Luchterhand Verlag, 1972), 48.

[20] Leo Strauss, *Droit Naturel et Histoire*, (Chicago: Flammarion, Chicago Press, 1954), 25.

[21] Raymond Aron defines historicity as a doctrine which proclaims the relativity of the values and philosophies and also of the historical notions. Leo Strauss stigmatises this kind of historicism and his historicism of the historical law school, (Christophe Bouton, *Le procès de l'histoire. Fondements et postérité de l'idealisme historique de Hegel*, (Paris: Vrin, 2004), 255.)

[22] Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, (*Heidelberg, 1840),11.

[23] Christoph Maehrlein, *Volksgeist und Recht: Hegel's Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft*, (Königshausen & Neumann, 2000)

[24] Stephan Meder, *Rechtsgeschichte*, (Köln: Böhlau Verlag, 2005), 273.

[25] Schröder, *Rechtsgeschichte*, 100.

the codification-dispute and interpreted the Volksgeist[26] different from Savigny. For Hegel the Volksgeist is something which is in a permanent change and not something fixed. Hegel thinks that the Volksgeist embodies this organicism and must be rational. He sees the Volksgeist in relation with the "Weltgeist" (World spirit). For Hegel „Volksgeist" depends on the counsciousness of the Nation and is something that must be constructed. So the notion is not only related to the past like in Savigny's organic view.[27] On the contrary to Savigny's view for Hegel law can only be realised in the state, where law became objectivity but the Nation (Volk) is not yet a State.[28] For Hegel only in the State the nation has the consciousness of its rights. It must be reminded that Hegel's Volksgeist theory must be analysed with his Weltgeist theorie which is in relation with the notion of freedom.

2. Distinction of Hegel between Formal and Concrete Freedom

Hegel's critique of the natural right theory differs from the historical law school and is based on his notion of freedom. Hegel's critique is a get together from the organicism of the historical school and rationalism of the Enlightenment.[29] Hegel also criticises the natural law adopted by the Declaration and says that would be better to rename the natural law as philosophical law because when we talk about nature we understand the unconscious nature.[30] Natural law in Hegel's theory, is not seen from the classical perspective, he says that it is a mistake to separate positive law from natural law.[31] He tries to relative the natural law.[32] Natural Law and traditions must be evaluated together. So we see that Hegel as different from Savigny does not reject the natural law

[26] For the Notion Volksgeit; Hermann Kantorowics,"Volksgeist und die historische Rechtsschule", in *Historische Zeitschrift*, Bd. 108, 2, (1912): 231.

[27] The opposition between Savigny and Hegel (also Gans a student of Hegel) is also seen as the opposition between the "historical" and "philosophical" law school (Jouanjouan, *Une Histoire de la pensée juridique en Allemagne (1800-1918),* 57).

[28] Oscar Daniel Brauer, *Dialektik der Zeit, Untersuchung zu Hegel's Metaphysik der Weltgeschichte*, (Stuttgart-Bad Cannstadt: Fromann-Holzboog, 1982), 48.

[29] Binoche and Cléro, *Bentham contre les droit de l'homme,* 191.

[30] Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, (Frankfurt am Main: Suhrkamp Verlag, 1986), 35.

[31] Ibid.

[32] Philippe Gérard, *L'esprit des droits. Philosophie des droits de l'homme*, (Bruxelles: Saint-Louis, 2007), 51.

completely but tries to reconcile positive and natural law.

The French revolution is seen by Hegel as a step in the historical evaluation of the notion of freedom. According to Hegel the French revolution asks but can't resolve the question of political freedom.[33] Also, taking natural law as the base of the declaration of human rights and the contractual theory is criticized by him. As it can easily be concluded, Hegel criticised the abstraction of the rights along with the contractual theory which is accepted as one of the pillars of the declaration. In this context, he criticised Rousseau's notion of general will. Hegel says that "Rousseau reduces the union of people in the state of a contract and therefore to something based on their arbitrary wills, their opinion and their capriciously given express consent".[34]

The interrogation of the sense of liberty is one of the main aims of sustaining the legitimacy of human rights.[35] In this context Hegel's differentiation between real/concrete and formal freedom is very important. Hegel makes a distinction between formal and concrete or real freedom. Real freedom can be realised in a learning process. In the *Phenomenology of the Spirit* Hegel shows that freedom is a process of self-consciousness. We can classify this process as following: 1. Individual consciousness, 2. Cultural consciousness and 3. Absolute consciousness.[36] In the *Phenomenology of the Spirit*, Hegel attempts to pursue the development of a consciousness that finally transcendent its historical cultural conditions and relativity.

Hegel is not after a destructive form of individualism for the modern world certainly not of the sort that caused the French revolution.[37] He is after an individualism that is compatible and can be synthesized with *Sittlichkeit*[38] , a notion which is also translated as ethical life. Hegel says that individuals are constructed by their social and cultural worlds. His goal is to get beyond the destructive form of individualism.[39] For Hegel the French revolution is a step in the evolution of the

---

[33] Joachim Ritter, *Hegel und die französische Revolution*, (Frankfurt am Main: Suhrkamp Verlag, 1965), 24.

[34] T.M. Knox, ed., *Hegel's philosophy of right*, (Oxford Univ. Press, 1967),157.

[35] Gérard, *L'esprit des droits. Philosophie des droits de l'homme*, 52.

[36] Philip V. Klein, *Hegel and the Other*, (New York: State University of New York, 2005), 2.

[37] Ibid,142.

[38] Ibid,143.

[39] Ibid.

freedom but couldn't realise the concrete or real freedom.[40] The master and slave or lord and bondsman relation is important in this context. The slave becomes a dependent consciousness but also the master is not the independent consciousness he thinks he is. He is dependent of the slave. Fear and work transfer the slave. But fear is also the beginning of wisdom. Kojève analyses the master-slave relation in a historical context, antic Greek, Roman Empire, Christianity and French revolution are steps for the realisation of freedom.[41] Freedom must have four moments. First, it must be subjective, second it must be rational, third it must be concretized and fourth institutionalized embedded in the world which we live.[42] Hegel claims that each individual is the son of his nation at the specific stage in this nation's development. No one can escape from the spirit of his nation. Following this view, all consciousness develops in a specific cultural context and specific historical era.

What does Hegel mean by concrete freedom? The concrete freedom is only possible in the state because state is for Hegel the actuality of concrete freedom. "Concrete freedom consists in this, that personal individuality and its particular interests not only achieve their complete development and gain explicit recognition for their right but, for one thing, they also pass over of their own accord into the interest of the universal".[43] The formal subjective freedom[44] of individuals consist in their having and expressing their own private judgments, opinions and recommendations. The concrete freedom is that the will has not only subjective aims but also general aims which include the well-being of the society.[45] This kind of freedom is a superior form of liberty. So as a result, the real freedom is only possible in a process of the conscious-

[40] Hauke Brunkhorst, "Hegel und die Französische Revolution. Die Verzichtbarkeit der Restauration und die Unverzichtbarkeit der Revolution" *Die Ideen von 1789*. Frankfurt am Main: Suhrkamp, (1989):165.

[41] Alexandre Kojève, *Introduction to the reading of Hegel*, (Cornell Univ. Press, 1980),95; Alexandre Kojève, *Hegel Felsefesine Giriş*, (İstanbul: Yapı ve Kredi Yayınları, 2001),71-73.

[42] Klein, *Hegel and the other*, 227.

[43] Knox, ed., *Hegel's philosophy of right*, 160.

[44] This freedom is collectively manifested as "public opinion". Public opinion deserves to be as much respected as despisedfor its concrete expression and for the concrete consciousness it express, respected for its essential basis (Georg Friedrich Wilhelm Hegel, *Grundlinien der Philosophie des Rechts*, (Frankfurt am Main: Suhrkamp Verlag, 1987), 485.

[45] Hegel, *Enzyklopädie der philosophie der Wissenschaften III*, (Frankfurt am Main: Suhrkamp, 1970), 288.

ness[46] of the mind which is at the same time a learning process.

3. Human right as a culture and sentimental education

How to bloom concrete freedom in the society? Here we see the importance of the learning process. Hegel's theory of freedom related with the level of consciousness is differentiated but also used by the Frankfurt School. Taking Adorno's negative dialectics and "Education after Auschwitz" as an example, today in Germany we come across "holocaust-education". Trying to analyse the Holocaust and its sources, Adorno concludes that education is the main guarantee of that what happened in Germany never takes place again.[47] The departure point of Adorno's theory of *Bildung* is the common understanding of it as the subjective side of culture. "Culture" means here the system of representations of what Hegel calls "objective spirit", that is, of ideas, concepts, worldviews, in which the meanings of humanity in their historical development come into being.[48]

Adorno and Horkheimer draw from the assessment made by Hegel in the chapter on "Absolute Freedom and Terror" of the *Phenomenology of Spirit*, according to which there is a relationship between the ethics of utility of the Enlightenment and terror, which Hegel finds in the French Revolution.[49] Adorno and Horkheimer do not explicitly extend their reflection on ethics to the field of human rights, a bridge between moral sentiments and rights is pursued of Rorty's postmodern approach to moral progress. For Rorty the genocide of the European Jews plays a key role in his recontextualisation of human rights, and he adopts the Holocaust as the inevitable horizon of understanding from which human rights need to be thought when he refers to our rights culture as the Post-holocaust human rights culture.[50] Drawing on Hegel

[46] The constitution depends on the consciousness of the people and so the constitution can change depending on the consciousness of liberty (Bouton, *Le procès de l'histoire,* 286).

[47] Theodor W. Adorno, *Erziehung zur Mündigkeit*, (Frankfurt am Main, Suhrkamp, 1970),104.

[48] Krassimir Stojanov, "Education as Social Critique: On Theodor Adorno's Philosophy of Education", in *New College*, Oxford, 2013 http://www.philosophy-of-eucation.org/uploads/2013%20Conference/Papers/Stojanov.pdf, (accessed November 10,2013)

[49] José Manuel Barreto, "Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty", *Law and Critique*, 17, (2006): 78.

[50] Ibid.98.

and Nietzsche, Rorty asserts the historical, contextualist, or perspectivist character of knowledge, a knowledge that is not born out of the historical circumstances.[51] "To the metaphysical theories of human rights Rorty opposes a historicist perspective. In the field of the human it is not possible to speak about a human nature because the ambit of the human is precisely the sphere proper of culture. The human nature is cultural".[52]

Rorty in his Article "Human Rights, Rationality and Sentimentality"[53], talks about a human rights culture.[54] Rorty says that historicist thinkers have denied that there is such a thing a "human nature".[55] Rorty recommends abandoning "human rights foundationalism".[56] He rejects any sort of Kantian identification with a transcultural and ahistorical self and replaces it by a Hegelian identification with our own community understood as a cultural and historical product.[57] So maybe we must read the historical critics through a human rights culture which cannot be see apart from a human rights education.

Another important analyse comes from Karl-Otto Apel. Apel uses also Hegel's arguments in his article and draws attention to the problem of the plurality of the good, which is also a very important point for the cultural relativists because they say that the good for one society may not be good for the other. To solve the problem the tolerance is the key in a multicultural society.[58] Apel makes a distinction between negative tolerance which is based on indifference and positive or affirmative tolerance based on appreciation of the deep and manifold values-traditions and resources that can enrich human culture in general and social en-

[51] "The human condition is the result of the historical dynamics in which human beings and societies act on themselves. In addition, as there are no phenomena outside the domain of history, there is no human or social nature but historical and cultural configurations" (Barreto, "Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty", 99-103).

[52] Ibid.101.

[53] Richard Rorty, "Human Rights, Rationality and Sentimentality", in *The Politics of Human Rights,* ed. Obrad Savić (London: Verso, 1999),70.

[54] This Notion was first used bu Eduard Rabossi in his article "Human Rights naturalised".

[55] Rorty, "Human Rights, Rationality and Sentimentality",70.

[56] Michael J. Perry, *The Idea of human rights*, (New York: Oxford, 1998), 39.

[57] Klein, *Hegel and the Other,* 237.

[58] Karl-Otto Apel, "Plurality of the Good? The Problem of Affirmative Tolerance in a multicultural Society from an Ethical Point of View", *Ratio Juris*, 10, 2, (2002): 199-213.

gagements of individuals.[59]

Affirmative tolerance can be related to Hegel's theory of recognition. Also Taylor refers to multiculturalism with the argument of Hegel's recognition.[60] The hegemony of one culture brings problems after Taylor, so we can see the problematic of multiculturalism with surmount the problematic with the arguments of recognition and tolerance. It is this difficulty that Axel Honneth, a Habermasian commentator of Hegel, tries to correct in his major work, *The Struggle for Recognition.* Honneth argues that the struggle for recognition is the key ethical relationship or the main form of practical intersubjectivity in the Hegelian system"[61]. To redress this problem, Honneth supplements Hegel by introducing a third type of recognition, which he calls solidarity.[62] Honneth says that Hegel's solidarity has its source in the historical process of the Revolution but he tries to develop the "fraternity" of the French revolution into a intersubjective notion of "solidarity".[63] A personality based on solidarity has all the elements of legal recognition but, it additionally enjoys social esteem, the recognition of its particular characteristics and qualities developed within its group and community.[64] Honneth says that the first recognition is about law but the second recognition of values.[65] Honneths arguments for recognition are also important for human rights. Because the human rights must be recognised by law but they also have a value in solidarity.

4. Human Rights as a Learning Process

Today we can find a similar debate about rights which has his sources in the debates after the French revolution. Today cultural rela-

[59] Apel, "Plurality of the Good? The Problem of Affirmative Tolerance in a multicultural Society from an Ethical Point of View", 200.

[60] Charles Taylor, *Multiculturalisme, Différence et démocratie*, (Paris: Aubier, 1994),43;54; 62;70

[61] Costas Douzinas, "Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?", *Journal of Law and Society*, Vol. 29, Nr. 3, (2002: 394.

[62] Axel Honneth, *La lutte pour la reconnaissance*, (Paris: Cerf, 2002), 113.

[63] Axel Honneth, "Atomisierung und Sittlichkeit. Zu Hegels Kritik der Französischen Revolution" in: *Die Ideen von 1789*. (Frankfurt am Main: Suhrkamp, 1989), 182.

[64] "Douzinas thinks "This intricate but paradoxical intertwinnig of identity, desire, and human rights is Hegel's lesson for postmodern jurisprudence"(Costas Douzinas, "Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?", 395).

[65] Axel Honneth, *La lutte pour la reconnaissance*, 136.

tivists want to reject rights because they are not compatible with their own culture. This main problem in the debate of the cultural relativist can be derived from Herders enlightenment philosophy and the Volksgeist theory.[66] So we can see some arguments of the cultural relativist theories in the historical law school theory. The historical school has relativized rights which are innate. The cultural relativist theories take over this relativisation of natural rights as universal rights. But also the approaches of cultural relativists differ. For example Donnelly defends a "relative and tempered" universalism[67] and shows the defects of a strong cultural relativism.[68]

Hegel is also a philosopher who is by some interpreters seen as a cultural relativist.[69] But the interpretation of the Volksgeist theory as something which is in a permanent change and the relation between the Volksgeist and Weltgeist (World Spirit) show that we can't count Hegel in the cultural relativist theories. Hegel's concept of freedom leads us to another discussion. Real freedom is only possible in a learning process and is in relation with the consciousness. This consciousness is not only subjective but must become an objective consciousness of the society. Real freedom as something learned and not imposed can be a key for

[66] "Moral relativism, the normative base of cultural relativism (…) the protogorean thesis in terms of community as the measure of all things (…) had a foothold in philosophical thought until the eighteenth century when J.G. Herder dissented from Enlightenment philosophy claims that all nations had a unique way of being only regional and contingent principles existed. Condemning universal values he introduced the concept of Volksgeist, the spirit of the nation." (Jerome J. Shestack, "The philosohic foundations of human rights", *Human Rights Quarterly,* vol.20, NO.2, 1998, p.229)

[67] Jack Donnelly, "The relative Universality", *Human Rights Quarterly*, vol.29, no:2, 2007.

[68] Donnelly, in his book *Universal Human Rights in Theory and Practice* makes an analyse of cultural relativism, and says that the cultural relativism is understood as either strong cultural relativism or weak cultural relativism. The strong cultural relativism tries to takes culture as the source of legitimacy of one rule. On the other hand, weak cultural relativism takes cultural argument seriously but tries to surmount to the excess of universality. Donnelly tries to show the weakness of the radical cultural relativist argument and says that morally to defend this strong cultural relativism has its defects. Donnelly tries to show the weakness of the radical cultural relativist argument and says that morally to defend this strong cultural relativism has its defects. He claims that we mustn't place culture against human rights. We must also see the abuses made in the name of human rights. Donnelly is for the relativity of the universal rights and his functional effectiveness (Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Cornell Univ, 2013), 120).

[69] Kain sees Hegel as a serious cultural relativist. (Klein, *Hegel and the Other*, p.234).

the human rights education. The critique of Hegel is that the formal freedom is a step of the French Revolution but not enough can be applied to human rights. Human rights can only trough an internalisation of the rights with a learning process be realised.

We can find some of Hegel's arguments developed in the theses of Horkheimer and Adorno in relation with education but Rorty tries to develop these theses to a human right theory: sentimental education. So we see the importance that not only the education of human rights is important but also how to internalise this education and here the sentimental education can play another key role.

Culture must be understood in this context as something not imposed but something learned. Apel sees the problems when one culture is imposed and sees the solution in the positive tolerance. So in a multicultural society we cannot impose one culture, like cultural relativists try to resolve the problem. But from another perspective, cultural relativists are right, because human rights as something imposed has also no future. The "theory of recognition" developed with Taylor and Honneth's theses becomes more important because the dialogue and the positive tolerance can be a key in resolve some problems. Human rights become a culture but also a method of intervention in other countries. So like Hegel differentiates formal and real freedoms, we must differentiate between formal and real human rights. Human rights are abused by a hegemonic language.[70] Only through a learning process[71] and the consciousness of the society the human rights can be internalised and exercise.

References

Adorno, Theodor W. *Erziehung zur Mündigkeit*, Frankfurt am Main: Suhrkamp, 1970.

Apel, Karl-Otto "Plurality of the Good? The Problem of Affirmative Tolarence in a multcultural Society from an Ethical Point of View", *Ratio Juris*, 10, 2, (2002):201-234.

[70] Marcel Gauchet in his book democracy against his own "La démocratie contre elle-même" criticised the human rights as ideology Gauchet says that the ideology of human rights will be for long-time the hegemonic language of the democracy (Marcel Gauchet, *La democratie contre elle-meme*, (Paris: Gallimard, 2002), 376.

[71] Kuzgun says that the humanitarian education must be active and not passive (Yıldız-Kuzgun," İnsan Hakları ve Eğitim", *İnsan Haklarının Felsefi Temelleri*. Ed. Ioanna Kuçuradi, (Ankara: Türkiye Felsefe Kurumu, 1980), 161).

Barreto, José Manuel. "Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty", *Law and Critique*, 17, (2006):93-112.

Binoche, Bertrand and Jean-Pierre Cléro, *Bentham contre les droit de l'homme*, Paris: Puf, 2007.

Bouton, Christophe. *Le procès de l'histoire. Fondements et postérité de l'idealisme historique de Hegel*, Paris: Vrin, 2004.

Brauer, Oscar Daniel. *Dialektik der Zeit, Untersuchung zu Hegel's Metaphysik der Weltgeschichte*, Stuttgart-Bad Cannstadt: Fromann-Holzboog, 1982.

Brunkhorst, Hauke. "Hegel und die Französische Revolution. Die Verzichtbarkeit der Restauration und die Unverzichtbarkeit der Revolution" in *Die Ideen von 1789*. Frankfurt am Main: Suhrkamp, (1989): 156-174.

Brie S., *Der Volksgeist bei Hegel und in der historischen Rechtsschule*, Berlin; Leipzig: Dr. Walther Rothschild, 1909.

Donnelly, Jack. "The relative Universality", in *Human Rights Quarterly*, vol.29, no:2, (2007):281-306.

Donnelly, Jack. *Universal Human Rights in Theory and Practice*, Cornell Univ, 2013.

Douzinas, Costas "Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?", *Journal of Law and Society*, Vol. 29, Nr. 3, (2002):379-405.

Dufour, Alfred. *Droits de l'homme. Droit naturel et histoire*, Paris: Puf, 1991.

Gauchet, Marcel *La democratie contre elle-meme*, Paris: Gallimard, 2002.

Gérard, Philippe. *L'esprit des droits. Philosophie des droits de l'homme*, Bruxelles: Saint-Louis, 2007.

Gierke, Otto *Die historische Rechtsschule und die Germanisten*, Berlin: Gustav-Schade, 1903.

Hegel, Georg Wilhelm Friedrich. *Rechtsphilosophie*. Ed. Karl-Heinz Ilting, 4. Band, Stuttgart-Bad Cannstadt: Fromann-Holzboog,1974.

Hegel, Georg Wilhelm Friedrich. *Grundlinien der Philosophie des Rechts*, (Frankfurt am Main: Suhrkamp Verlag, 1986),

Hegel, Georg Wilhelm Friedrich *Enzyklopädie der philosophie der Wissenschaften III*, Frankfurt am Main: Suhrkamp, 1970.

Jouanjouan, Olivier. *Une Histoire de la pensée juridique en Allemagne (1800-1918)*, Paris: Puf, 2005.

Honneth, Axel. *La lutte pour la reconnaissance*, Paris: Cerf, 2002.

Honneth, Axel. "Atomisierung und Sittlichkeit. Zu Hegels Kritik der Französischen Revolution", *Die Ideen von 1789*. Frankfurt am Main: Suhrkamp, (1989): 174-186.

Kantorowics, Hermann. "Volksgeist und die historische Rechtsschule", *Historische Zeitschrift*, Bd. 108, 2, (1912)

Klein, Philip V. *Hegel and the other*, New York: State University of New York, 2005.

Knox, T.M. ed., *Hegel's philosophy of right*, Oxford Univ. Press, 1967.

Kojève, Alexandre. *Introduction to the reading of Hegel*, Cornell Univ. Press, 1980.

Kojève, Alexandre. *Hegel Felsefesine Giriş*, İstanbul: Yapı ve Kredi Yayınları, 2001.

Kuzgun, Yıldız. İnsan Hakları ve Eğitim. *İnsan Haklarının Felsefi Temelleri*. Ed. Kuçuradi, I., Ankara: Türkiye Felsefe Kurumu, (1980): 157-163

Mahrlein, Christoph. *Volksgeist und Recht: Hegel's Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft*, Königshausen & Neumann, 2000.

Meder, Stephan, *Rechtsgeschichte*, Köln: Böhlau Verlag, 2005.

Perry, Michael J. *The Idea of human rights*, New York: Oxford, 1998.

Rehberg, August Wilhelm. *Recherches sur la révolution française.* Paris: Vrin, 1998.

Reghaby, Heydar. *Revolutionäre und konservative Aspekte in der Philosophie des Volksgeistes*, Berlin: Inaugural-Dissertation, 1963.

Ritter, Joachim. *Hegel und die französische Revolution*, Frankfurt am Main: Suhrkamp Verlag, 1965.

Richard Rorty, "Human Rights, Rationality and Sentimentality", *The Politics of Human Rights,* ed. Obrad Savić, London: Verso, (1999): 167-177.

Rosenbaum, Wolf. *Naturrecht und positives Recht*, Darmstadt: Hermann Luchterhand Verlag, 1972.

Savigny, Carl. *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft,* Heidelberg, 1840.

Shestack, Jerome J. "The philosohic foundations of human rights", *Human Rights Quarterly,* vol.20, NO.2, (1998):201-234.

Stojanov, Krassimir "Education as Social Critique: On Theodor Adorno's Philosophy of Education", in *New College*, Oxford, 2013 http://www.philosophy-of-eucation.org/uploads/2013%20Conference/Papers/Stojanov.pdf, (accessed November 10, 2013)

Taylor, Charles. *Multiculturalisme, Différence et démocratie*, Paris: Aubier, 1994.

Unconditional legitimacy of Law
Collaboration with the Nazism

Álvaro Ricardo de Souza Cruz[1]
Bernardo Augusto Ferreira Duarte[2]

Abstract: The present paper has the objective of discussing one of the greatest critics to legal positivism: the one that says that this theory has "cooperated" with the Nazi regime. This work boards and discusses many critics about positivism, its problems on its many faces, and its oppositions (post-positivism and jusnaturalism), overcoming the superficiality and generality of some of them, through the discursive rationality. It even analyzes the absence of a real dialogue between positivists and post-positivists, who do not seek to comprehend each other, as victims of their own paradigms. In the end, we wish to show our alternative view, guided by a different rationality, different from the jusnaturalist Radbruch's formula (that involves a moral discussion). Although is doubtful that positivism was a simple support to the Nazi regime, we could notice that while the positivists see the Nazi system as a true "law", and its outrages like a mere narrative, we approach to the vision that does not accept this descriptive narration. A definition cannot be separated from evaluation, mainly from evaluation of law's legitimacy. We claim for the impossibility of an extreme injustice to be called "law", the impossibility of neutrality in law, and the impossibility of a detachment between the human being and his environment, just like between Law and Morality. The main critic is against the positivist concept of science. To us, science cannot be neutral, apart from reality, and only formal. This positivist concept of science takes to unintended consequences such as the "docilization" of people, immunization of juridical agents and, in the end, the "legitimation" of totalitarian legal systems, enabled by the confusion that the popular imagination make between legality and legitimacy. Every totalitarian

[1]* Procurador da República em Minas Gerais. Mestre em Direito Econômico e Doutor em Direito Constitucional. Professor da Graduação e da Pós-Graduação da Pontifícia Universidade Católica de Minas Gerais. Vice-presidente do Instituto Mineiro de Direito Constitucional. Membro do Instituto de Hermenêutica Jurídica (IHJ).

[2]**Advogado. Especialista em Direito Constitucional pelo Instituto de Educação Continuada (IEC). Mestre em Direito Público na Pontifícia Universidade Católica de Minas Gerias. Professor de Introdução ao Estudo do Direito e Teoria da Constituição do Instituto Metodista Izabela Hendrix.

regime has the veil of legality to base them. That is why, starting from Derrida, Lévinas and Ricouer, we seek for a conception of science from "deformalization", deconstruction and attestation, opposed to the formality and the certainty of the positivist concept.

Keywords: Jusnaturalism; Positivism; deformalization; deconstruction; attestation; Post-Positivism;

In the Brazilian scenery, the debate about the possibilities of overcoming the Positivist paradigm of Law is quite sharp. In general, the critiques presented are (1) that it regards to a juridical thought which is already outdated; (2) that its authors would be supporters of a mechanical application of the law; (3) that they would also be partisans of an unconditional legitimacy of Law and of incoherent points of view, as, for instance, (4) the unjustified adherence to the Jusnaturalism.The objection according to which (5) the Juridical Positivism would have "contributed" to the Nazi regime would also be usual. This kind of critiques can be found in countless Brazilian texts of authors like Margarida Camargo Lacombe, Cláudio Pereira Souza Neto, Mário Bigotte Chorão, Lênio Luis Streck, Ana Paula Barcellos, Paulo Bonavides, Lúcio Antônio Chamon Junior, Ricardo Lobo Torres, among many others[3].

This present article aims to go through the last objection with a little more attention. As it is known, it is very common to link the argument of the *reductio ad hitlerum*, according to which the positivism somehow would have approved the Nazi regime, to the normative inertia supported by the juridical positivists. By working with formal validity criteria and thus supporting the independence of Law in relation to other social systems, such as Moral and Politics, positivism would have worked as a driving force for nameless normative acts to be admitted in the quality of "legal right".

This critique, originally spread by Radbruch, was created in 1950 as a jusnaturalist reaction against the absurdities and atrocities perpetrated by the Nazi system, supposedly "in the name of Law". According to Gustav Radbruch, the moralist approach of Law would be absolutely essential, as wherever there wasn't at least a search for justice, that is, where the equality (justice core) was deliberately betrayed in the cre-

[3]For further details, refer to the book "Beyond Juridical Positivism" (2013), by the present authors.

ation of a positive system, only a "flawed right" would be characterized, needy of the Law nature itself[4]. In his perspective, people should arm themselves against the recurrence of a criminal law, like Hitler's, by overcoming positivism, which would not only have covered up this "legal antijuridicity", but also weakened all the possible defenses against the abuses derived from the national-socialist legislation[5].Therefore, a "juridical" system that adopted/perpetrated atrocities and an "extreme injustice" could not be regarded as Law.

In Brazil, according to certain degrees, 'Radbruch's formula'[6]would have been consubstantiated in one of the two fundamental accusation pillars. The first one was in the sense that positivism would be insufficient to protect the human rights and, besides, it would have "contributed" to the military dictatorship due to its neutrality. Behind this accusation was the perception that the dictatorship intended to produce agents of Law that were disconnected from the political life, and, therefore, without interdisciplinary knowledge as the ones related to Philosophy, Sociology and Economy, for instance. As simple process technicians, the juridical agents would be little critical or not critical at all in relation to authoritarianism, turning themselves into reproducers of the *status quo* of the Law. Thus, the juridical positivism, in its conceptual kind, ended up being seen as an ideal theory for the fulfillment of such desiderate.

A second argument would be added to the previous one above: the "(neo) liberal project", predominant during the military time and insensible to people's difficulties in terms of the fulfillment of the social rights, would also be connected to the juridical positivism in the country, so that a neutral posture before the law would be nothing more than a disguised applause to the social injustices experienced around here.

Against all those arguments, Dimitri Dimoulis (2006)adduces that "Radbruch's formula" would reflect a wholly "strategic" option of fight against positivism[7]. In his opinion, as the postwar context demanded a "scapegoat", Radbruch's thesis would end up gaining notability in

[4]In this sense, refer to RADBRUCH *apud* BUSTAMANTE, 2008a, p. 165.

[5]See RADBRUCH *apud* BUSTAMANTE, 2008a, p. 164.

[6]As explained by Bustamante (2008a), it expresses an argument of injustice with a remarkably jusnaturalist nature.

[7]This confirms an ordinary practice in times of paradigmatic transitions, according to Thomas Kuhn. We recognize that the to know/not to know code of Science is not immune to ethical or moral flaws, so that science production needs ethical and moral interference.

the juridical realm of the 1950's, making the Jusnaturalism thrive again and dominate the scenery of the European doctrine and jurisprudence until the 1960's.However, according to the Greek jusphilosopher, there would be at least four arguments capable of infirming the coherence of the critique based upon the mentioned formula.

Firstly, the Third Reich would not have innovated significantly the juridical system in effect then, exception to the promulgation of the legislation related to the "fight" against the political opponents and the minorities regarded as the regime's "enemies". Therefore, if the legislation had changed little, the positivist action surely could not explain the horrors of the concentration camps.

Secondly, during the Nazi period, the **objective teleology** method was predominant in the German jurisprudence, whose primary intention was consisted of adapting the norm to the historical picture of the society. The "people's courts", which were emblematic in the Hitlerite period, evoked the use of "values" and "needs" of the German people as a hermeneutical support, something typical of a limitless interpretation (*Unbegrentzte Auslegung*) and that completely differed itself from the juspositivist theoretical model.

Thirdly, Hitler intended to destroy the *Rechtsstaat*- that is, the State of Law in its formalist aspect (positivist) - in favor of a Law that complied with the superior morality of the German people. In other words, against a State founded in the "government of laws", Hitler defended a "State of Justice" (*Gerechtigkeitsstaat*) that was scarily "based" upon a questionable notion of morality, for his own speeches already refuted the connection between the juridical positivism and the Nazism.

Fourthly and last, one of the most important doctrines to support the Nazism would be the "decisionism" by Carl Schmitt –who was a classical opponent of the Kelsen's juridical positivism – which always referred to the high values and ideals of the organic community formed by the German people. For this, it wouldn't be incoherent to conclude that the "jurisprudence of values", considered by many as an icon of the postpositivism, would be closer to the Nazism than the juspositivism effectively.

Taking the assumption that we do not confuse Nazism with positivism, it is still possible to question some of those arguments.

Firstly, it would be viable to ask Dimoulis if **Nuremberg's racial legislation** was actually marginal as he leads his readers to learn, or if it would have changed the face of German Law fundamentally in the 1930's. Of course an analysis like this could not stick to quantita-

tive aspects, but especially to qualitative ones. It seems to him that the answer is negative. In our perception, Weimar's Constitution, which is clearly born under the auspices of the German re-democratization and which enters history as one of the first texts to constitutionalize the social rights, was the text in effect during the Shoah's period. That's why we take the second alternative. We believe that Dimoulis minimizes excessively one aspect that is absolutely essential to us!

Secondly, the assumption that the juridical positivism as a whole would abominate the objective teleology seems to be too much elastic. Here we refer to Joseph Raz who, before situations in which the interpreter could take a discretionary position, would never be prevented from adopting supplementarily a teleological analysis in order to fix the sense of norm. Thus, even the use of extrajudicial reasons, such as moral ones, would still be covered by the Razian logic of excluding reasons. For him, admitting such argumentation could not be understood as an incorporation that is neither necessary nor at least contingent of the Moral to the juridical normativity. However, what is interesting here is to notice that Raz does not discard the possibility of applying the objective teleology[8] in the Law application, as Dimoulis conceives. Neither do the moderate positivists. The simple assertion that the people's courts in the Nazi regime used it does not imply, by itself, its difference from the positivism.

On the other hand, the third and fourth arguments seem acceptable to us. In fact, the Nazi courts' way of operation embraces Schmitt's juridical decisionism. In addition, we cannot adopt a manichaeistic posture in the sense that positivism would be a follower of fascism and that the jusnaturalism would always be in favor of justice and democracy. It would be absurd to forget that the jusnaturalism was employed to justify a number of abominations throughout history, once its source of transcendent validity varied according to the traditions in time and space. Plato's and Aristotle's arguments defending slavery based upon the natural law cannot be forgotten. In this sense, Ross reminds us that:

> The noble guise of natural law has been used in the course of time to defend or fight for every conceivable kind of demand, obviously arising from a specific situation in life or determined by economic and political class interests, the cultural traditions of the era, its prejudices and aspirations – in short, all that goes to make what is

[8]The objective teleology does not have to be understood just as a simple axiologism or as Aristotelic *telos*. For more details, see our Beyond Juridical Positivism (2013).

> generally called ideology. (…) Carl Ludwig von Haller (…) claims that according to the law of nature, the strong shall rule over the weak, the husband over the wife, the father over his child, the leader over his men and the teacher over his pupils. In the same way, Thomas Dew (…) upheld the institution of slavery in the Southern States, and (…) if the institution of slavery were abolished, the slaves would be deprived from their natural rights. In the political sphere, it is well-known that natural law (…) has been used successfully to justify all kinds of government, from the absolute power (Hobbes) to the absolute democracy (Rousseau). (…) In the social and economic spheres, the natural law of the 18th century preached extreme individualism and liberalism. The inviolability of the private property and the endless contractual liberty were the two dogmas the 19th century inherited from the natural law; dogmas which were asserted in the North American courts to nullify many social laws. (…) **Like a whore, the natural law is available to everyone. There is no ideology that cannot be defended when falling back on the natural law.** And, actually, how could it be different when considering that the main fundament of every natural law lies in a direct private apprehension, an evident contemplation, an intuition? Why shall my intuition not be as good as that of the others? (ROSS, 2007, p. 302-304, our emphasis in bold).

This argumentation is really blunt. Following the line that "the best defense is the attack", it has a heavy weight against the naturalist thought. However, the fact that the jusnaturalism cannot overcome the referred accusations does not anyhow invalidate the objection placed against the juridical positivism. This last statement must be explained better in order to avoid some misunderstandings.

Certainly, as many Law theorists remark, it is possible to see the differences between the **conceptual positivism** and the **ideological positivism**. However, we have identified a point of connection between these two conceptions that is relevant, problematic and polemic at the same time. The conceptual positivism defends a morally neutral posture in the search of the definition of Law. This metaphysical belief in the neutrality, as Nino explains (2010), is also identified in the ideological positivism, more specifically, in the pretension that the judges take a morally neutral posture and limit themselves to deciding according to the law in effect.

In our viewpoint, the countless conceptions of conceptual positivism happen to get closer to the ideological positivism – even though

they do not get confused with each other – by choosing formal criteria of Law validity and, thus, giving up the concern with the juridical norms legitimacy. In other words, we think that the pretension of neutrality would approach or at least be a point of connection between the conceptual and ideological positivisms. We see this approximation both in the positivism exclusive versions and in those called moderate. However, the coherence of our thinking is questioned by Struchiner:

> **Supposing that the ideological positivism supports a neutral position is illusory. By demanding that the judges (and citizens) limit themselves to deciding according to the law in effect, one takes a valuational position that claims that the judges (and citizens) must take into account, in their decisions, a single moral principle: what prescribes the observance of the law in effect and exclusively of the law in effect.** The ideological positivist, by determining that law, by the simple fact of existing, is fair and must be obeyed, is privileging and choosing certain values, such as security and predictability, over other values that could clash with them. At the same time, he is closing the doors to any possibility of critique of the positive law by juridical subjects and by the judiciary. (...) However, it is hard to find some exponent of the juridical positivism that really supports this conception. In fact, some explicitly reject this possibility. **The ideological positivism is nothing but a caricature of the juridical positivism and the main caricaturists are the jusnaturalists and the practical jurists.** Although the most prominent positivists do not adhere to the ideological positivism, this is the position that is mostly attributed to the positivists by the jusnaturalists. They attribute this thesis to the positivists and they will criticize them for adhering to it by saying that the positivism is used to legitimate any regime of power (e.g. Nazism). **Such argument is deceptive inasmuch as the main positivists do not defend the ideological positivism: the jusnaturalists corrupt the juridical positivism theses to make their opposition easier. Thus, it is clear that the juridical positivism does not identify itself with the ideological positivism, either** (STRUCHINER, 2005, p. 30-31 – our emphasis in bolds).

The quote above raises some objections that we need to discuss. Firstly, we would never state that the juridical positivists were Nazists or followers of authoritarian regimes. On the contrary, we believe that the juridical positivists do not adhere to the ideological thesis, standing by Nino in the opinion that this statement is also valid in relation to

Kelsen. We did not try to caricature, in any of our previous studies, the juridical positivism based on statements that its followers never defended in order to weaken it or make it less dignified for acceptance. This article intends to briefly elucidate what we really think about this issue. As we still intend to explain, the postpositivist critique differs a lot from the jusnaturalist posture, and this is due to several reasons, among them is the fact that its fundaments are purged by a discursive rationality that overcomes Radbruch's formula. Secondly, we do not believe that an ideological version is really neutral, but we claim that it assumes metaphysical neutrality as he intends that the judges must limit themselves to deciding the concrete cases in compliance with the law in effect. Of course one thing is very different from the other. In other terms, the ideological positivism would act normatively by requiring that the judges limited themselves to judging cases according to the positivist law, but it would do so because it assumed that, by doing it, the applicators would be keeping a morally neutral posture.

Despite these clarifications, at this point of the "debate", there is no way to not take into account the presence of a great *incommunicado.* We believe that the different assumptions embraced by the positivist and the postpositivist wings, in order to focus on the speech field that interests us more, made them have a dialogue of the deaf between each other, in which some shout on one side and the others shout on the other side, but neither side really understands or listens to what the counterpart is saying. Both assume the incorrectness of the arguments prepared by the opponent party without really considering up to what degree both sides have a part of reason. It is in this great misunderstanding context that, at least in our standpoint, we should try to deepen our arguments so that the debate that "got lost without having been" can be restored. For doing so, we need to go back a little.

The core thesis of the ideological positivism[9] is explicitly criticized by authors like Ross, Struchiner and Dimoulis. Even among the classic positivists, only the Exegesis School would present itself unequivocally receptive to the ideological positivism, by which it is shown to be incorrect to expand this assertiveness to the utilitarian versions defended by Bentham and Austin and, at least questionable, to the Historical School and to the Jurisprudence of Concepts. Furthermore, even if the assertiveness of this kind of consideration regarding Kelsen can be discussed,

[9]More details about Struchiner's view of ideological positivism are found in Struchiner (2005, p. 29).

the reason really seems to be with Nino (2010), Struchiner (2005; 2002) and Dimoulis (2006) in the sense that such accusation also proves to be too much abusive in relation to the Austrian. As Raz elucidates:

> (...) it is clear that the examination of social institutions is an important task, despite its moral value. It does not mean that we should ignore the moral values, but we should recognize that a single social institution can be sometimes used for fair purposes and, other times, for unfair purposes. The fact of being sometimes good, sometimes bad, does not depend on its character as a social institution; it depends on the circumstances. If a certain norm works exactly the same way as the other norms, if its effects on the economic or social activities are as significant as the effects of the other norms, if the attitude towards it by the politics or by the courts is the same, then the statute of law shall not be denied to it just for being unfair. (RAZ, 2010, p. 163).

All of this becomes more evident when we take the question to the inclusive juridical Positivism field[10], specifically to Hart (2001; 2010). For the English jusphilosopher, the notion that the juridical positivism would approve every and any political regime sounds absurd. His juridical positivism version, besides compelling that the juridical norm meets the *pedigree* requirements in order to belong to the juridical system, some how it also evaluates the juridical system legitimacy conditions themselves, thus taking into account the aspects related to the social efficacy bound to the popular acceptance element. Besides, Hart even supports that any system must contain minimal elements of natural Law to be considered "Law". On the same side, another positivist called Luigi Ferrajoli, a follower of the "critical positivism', fights for a positivism that operates only in democratic political regimes, in which the fundamental rights are effectively guaranteed.

Thus, it is very clear to us the perspective that, for the juspositivists in general, on one hand, it would be very distinct to give unconditional support to every and any kind of political regime, especially the authoritarian ones and, on the other hand, to search for an impartial description of Law without looking for the personal involvement and posture of the one who interprets it. It looks blatant to us that the juridical positivism, in the quality of a Law theory, cannot be understood as a support for the Nazi regime. For sure, it would occasionally be possible

[10]About the inclusive juridical Positivism, see (DUARTE; POZZOLO, 2006, p. 46/47).

to find one or another jurist with a positivist formation that supported the Nazi regime or that, around here, contributed to the military dictatorship. But this would not lead to a relation of direct causality, that is, to the claim that we would have to overcome positivism because it would imply a "Nazi" or radically "authoritarian" theory.

In this context, then, we must ask: Would all the jurists that criticize positivism based on such fundaments be "schizophrenic"? We do not think so! And there are important reasons for that. As we said before, all the conceptual positivists approve the possibility of a normatively inertial approach, as if science could really be neutral and impartial. In this sense, even if they are shown to be widely against authoritarian regimes, by also defending the possibility of overcoming the juridical norms inscribed in them, their approaches bring along a risk of a side effect that is unwished: that of contributing somehow to the "docilization" of people and the "immunization" of the juridical agents as they accept to identify completely abusive systems, and disnatured by the logic of the power by power itself, as being juridical. Thus, supporting that the Nazi regime, the Italian Fascism, the Sovietic Stalinism or the Cuban Castroism, to give some examples, were consisted of juridical systems, that is, that despite all their barbarianism they would have a juridical frame behind them, may mean to award them with an honorable title and encourage attitudes of adherence to their norms.

Therefore, man acquiesces to the world through language and this is not neutral. Man's openness always implies an affective translation of the denotation we give to words. When we prefer to use the expression "disabled person" to "deformed", "monstrosity", "crippled" "mongoloid", we do it because we cannot disregard the illocutionary elements of the language. This also occurs when we choose to use rhetorical expressions like "good faith", "social role" and "virtue". Thus, claiming that "someone acted juridically" gives the connotation that this person acted legitimately, correctly. This is not the only problem herein, though.

The "normative inertia", to use an expression that recurrently appears in Struchiner's thesis to characterize the **conceptual positivism**, has the subjacent perspective that the jurist is an observer who is able to get away from the observed event. From this point of view, the Law philosopher would become capable of separating the norms content from their form, and of consequently searching for criteria that are likely to characterize whether "this or that" system is juridical, not necessarily due to its content, but, precisely, in light of its form. That is why positiv-

ists intend to separate the knowledge clearly, and thus to distinguish the Science of Law from Sociology or Politics, in terms of ethical prescription.

As far as we are concerned, the main controversial point is exactly this one. The critics of the positivism, among which we place ourselves, do not believe in the possibility of neutrality as an element of Science. Besides the fact that the "observer's perspective" is impossible, once the scientist has always been a participant who takes glances from his/her life world, description and prescription, form and content cannot be separated scientifically, under the penalty of the Science itself to vanish. In other words, the sense of which is understood as Science is distinct between the positivists' and their critics' viewpoints. For the latter, the pretension to separate the description from the evaluation would be platonic and irrational and that by the single reason that the observer has always been a thrown being, a participant. That what the former sees as an empirical or essentialist description of the Law, the critics see as an evaluative posture of it. This is a remarkable difference and it should be more stressed between the positivists and their critics.

In particular, we understand that it is impossible to defend the descriptive neutrality as an element that characterizes Science. With regard to that, we emphasize once again that the neutrality is never "neutral", as it also takes the side of something in terms of *status quo*, whether consciously or not, besides producing internal consequences that are very distant from a supposed normative inertia. Nobody in their right mind would claim that Kelsen was a Nazist! But Kelsen's attempt to "clean" Law from all values, Ross's effort to construct a legal right free from any metaphysical assumptions or Raz's claim that all considerations of a moral character were extrajudicial and that they would only be tolerated due to the inexorability of the discretionary condition of the interpretation of laws, leads to evaluative elements, such as ethical, moral, religious and agnostic ones, to give some examples, that could be disregarded during the definition of what "is" and "what is not Law"[11]. And if law is the way of "re-cognizing" the human, of stating the human condition, our disagreement gets larger as this perspective would bring along a side effect that was not predicted, not thought about, not wished by any supporter of the positivism, but that is typical in the entropy of any Science: the "legitimacy (unwished by them) of totalitarian systems!

We should stress again, in this diapason, that, in general, people

[11]About exclusive positivism, see (DUARTE; POZZOLO, 2006, p. 42/45).

today still connect that which is licit, that is, that which is allowed or mandatory inside a juridical system, with the assumptions of "veracity", of "correction", of "fair"! We can corroborate this assertiveness with the fact that all the dictatorships in the 20th century searched for a "veil of legality" as a factor for consolidating their power, that is, an element for stabilization or facilitation for their continuity. Two very clear examples are those of the "People's" Republic of China and the German "Democratic" Republic that incorporated to their names elements that intended to support their legitimacy. They explored explicitly the affective load favored by these words in order to strengthen the "legitimacy" of the "juridical system". Likewise, all Latin American dictatorships always had constitutional texts behind them (if it is possible to address them this way…). Therefore, the assertiveness expressed by Bobbio (1995), that it is very difficult to set apart the concepts of legitimacy and legality in the popular belief, looks correct to us.

Supporting, like Raz, the thesis according to which a norm is juridical since it shows an excluding reason does not stop us from asking: Did Nuremberg's racial norms really act like the other juridical norms? In fact, wouldn't his example, according to which soldier Jeremy understood his superior's order as a reason that excluded all the other ones to use, without authorization, someone else's vehicle, fit the arguments of defense in Nuremberg's court? And the question becomes another one: isn't the *contra legem* argumentation a fundamental element to define what is licit and what is illicit? And if a norm is illicit, how can it belong to the Law? How can it be a juridical norm? After all, when a norm is declared null, don't we have a reasoning of excluding it from the juridical system as well? And doesn't such exclusion reasoning end up also "defining" what Law is, or better, saying what role the word "law" plays in this language game?

In our standpoint, noticing a necessary connection (and not an identity) between Law and Moral does not result in dis-differentiation from the former, as the exclusivists think, but it is condition for its differentiation from the other systems. This does not only keep us away from the exclusive positivists, but also shows how our conception overtakes the simplistic presumption of the inclusive ones. When, at this point, we partially follow Habermas to defend the existence of a necessary relation of complementarity between the Law and the Moral, we do not disregard that, despite referring to the same problems, they do it from distinct angles. Clearly, Law does not regularize only the interpersonal action conflicts, but also the fulfillment of political programs and politi-

cal delimitation of goals, with which arguments of a moral, ethical and pragmatic nature relate.

Yet, we cannot deny the clear relation of reciprocal complementation between Law and Moral since, in dialogue with Lévinas and Derrida, liberty and equality do not determine responsibility, but it is the ethical responsibility, as an *ek-xistential* opening of man, which enables him to be free and by that to be fair to the other.

Going back to Habermas, even though they must be interpreted as juridical, the Fundamental Human Rights have a moral content and, as we know, a *"juridical system can only be legitimate"* if these moral principles are not contradicted. Therefore, *"through the components of the juridical validity legitimacy, law acquires a relation with moral"*, which is not of subordination or identity (HABERMAS, 2003, p. 140-141). Where as the Law must relieve the reflexive rational moral act (that is, post-conventional), which imposes cognitive (knowledge of the best way of applying the norm to solve the "concrete case"), motivational (the must of acting according to the norm, even against their own interests, in order to harmonize the must and the obligation), and organizational (requirement of an organizational strategy for the best way of fulfilling the moral musts) requirements to the individuals, the Moral contributes with the construction of the *system of subjective rights* which is fundamental for a discursive practice.

In this context, Law cannot do without Moral just like every Science, Art and Religion can not. Why? Because man is only man as he is a responsible being. The responsibility makes man a human being. How will this association with moral take place? In the current law sphere it is possible to adhere to a dialectical notion between universalism and cultural relativism about a discursive reading of the fundamental rights. But this concept of law adopted here can only "seer" a provisory concept as the recognition of the Other, and with him, the recognition of himself varies in time and space. For instance, yesterday a slave was not recognized as a human being. Today a household worker is not recognized as a worker that deserves the same rights as the other public-sector employees. What is coming next?[12]

Besides, it is exactly for incorporating and assuming pragmatically certain moral requirements that the *discourse principle* (D) provides the construction of a Law that wants to be legitimate. In fact, the Fun-

[12]This year, in Brazil, a constitutional amendment increasing the rights of household workers was approved. It is the 72nd amendment.

damental Human Rights assumed as a condition of (D), unswervingly have a moral content[13] which is, however, fluid as it is permanently built and rebuilt with its own discourse[14]-[15].In the core of this discourse, consequently, the participants recognize each other in a system of Fundamental Human Rights under the penalty of vanishing their own pretension of regulating its living with the positive law means. By taking the form of *democracy principle*, transcending the limits of the *morality principle* (U) and by enabling the possibility of rational decisions in every and any kind of deliberation, the discourse principle is enabled, in dialogue with Bustamante (2008a, p. 185), as *"an argument of the universal-pragmatic injustice"* that overcomes the one provided by Radbruch's jusnaturalist formula which is already worn out nowadays[16]. After all, as participants of the discourse, people will reiteratively test the legitimacy of the norms, even if the limits for that are different on the basis of justification and application.

For all this, the view that it is possible to separate the definition of evaluation from what is juridical seems intolerable to us. Saying that the "Nazist Law was juridical", as Kelsen did, does not make him a Nazist. But, it must be observed that such posture cooperates indirectly with the "immunization" of such regime, as it "seems" to give reason to the typical defense of the Nazists that were accused at Nuremberg's Court: "We were just following superior orders! We were under the legality of the German State!" In other words: "We disregarded any other actions but the one of taking the Jewish to the gas chamber once the German legislation was an excluding reason of other behaviors to us".

Anyhow, it is necessary to alert that our point of view attempts to go beyond the limits in which the present debate is set. In this sense,

---

[13]The debate between Apel and Habermas regarding the relation of Moral with Law is very important, and we discussed about it in other books. In this sense, please refer to Cruz (2007) and Duarte (2012). As to a comprehensive approach of Apel's view, see Oliveira (2004).

[14]Thus, we say that the Fundamental Human Rigths are, at the same time, condition and consequence of the discursive practice. For more details, check Habermas (2003), Cruz (2007) and Duarte (2012).

[15]Regarding our concept of discourse, see Cruz(2011, p. 175).

[16] "The image of a Natural Law 'above' the Positive Law goes precisely with Radbruch's Formula.(...) I believe that it is necessary not to eliminate the argument of injustice, but otherwise review it in order to exclude Radbruch's Formula and its platonic elements that come along with it. Habermas' model seems to be more suitable" (BUSTAMANTE, 2008a, p. 187-188, nota 101 – free translation).

the post-positivists notice the needed co-relation between the "e-valu-a(c)tion" and the "de-finition" of Law as a mandatory necessity of "content-giving" of the Law. That is, they notice that the Law deals with human issues and, therefore, scientists need to take the moral and ethical aspects into account in the conformation of the Science of Law. On the other side, positivists claim that such view is inadequate, since it implies a blend of concepts from distinct Sciences, "moralizing the Law" by making it become dependent on the Moral. Such view, to the inclusivists' and exclusivists' eyes, would be supported due to a romantic, "idealistic" and little realistic view of the Juridical Science, which would have the demerit of contributing to the dis-differentiation of the Law. Due to everything that has been said until now, however, there are no longer any doubts that this reading is not only mistaken, but also insufficient.

In our standpoint, the problem can be taken to another level. The lack of dialogue between positivists and post-positivists happens due to the phenomenon of paradigmatic incommensurability, that is, due to the difficulty of an analysis that has been produced since ever from the assumptions of the paradigm itself. In this aspect, our view is in favor of the perspective that the "de-finition" cannot be separated from the "e-valu-a(c)tion" of the Law legitimacy, as we know that *Dasein* always ontologizes, for man always accepts the world through concepts and these concepts always "take place" through our opening to the mundanity, an opening that is affective. Our position is, thus, based upon arguments of a philosophical ground, which come from the pragmatic-linguistic turn and that open our eyes to the impossibility of valuational neutrality.

It is not absolutely about saying that our position is simply better than the positivists' or stating that they are insensible to human sufferings. This would never be acceptable at all! Our analysis tries to "demo(n)strate" that we have scientific and philosophical arguments that have fully "différance" from the positivists' to claim that, nowadays, the Nazi Law cannot be considered "Law", that an "international war law" is as unacceptable as an order of a robber to anyone (so that he is given the possessions that do not belong to him) which is not juridical either. And these arguments prove to be more suitable to the discursive rationality patterns than those defended by most kinds of positivists. Once it was set on non-discursive bases, against notions of "re-cognition", of "unconditional hospitality", of reciprocity, of pluralism, of respect to the Fundamental Human Rights of the minority, and, therefore, completely indifferent to the post-conventional morality notion, the Nazi "Law"

does not pass the test of the democracy principle. It could never be accepted by its addressees, for it did not go through the *universal-pragmatic injustice argument*, which is post-metaphysical by excellence. Thus, what is being discussed are the bases of the Science itself, or, as we prefer, the conditions of the concept itself of something that is assumed to be scientific!

The "Nazi Law" is far below from what the ontology of the law concept authorizes, sure that any "de-finition" of what is crime against humanity is insufficient to *"dé-**crire**"* what took place in Shoah for the simple assertion: How can a man go "beyond" humanity? How can an action be compliant with the "law" of a country and be absolutely/endlessly anti-juridical? The excess that hypostatizes the concept of this crime makes it "im-possible" to conceive Nuremberg's racial laws as juridical. Its own persecution imprescriptibility is an answer to such "im-possibility" as it also implies an excess, a hyperbolic reaction to any temporalization attempt, to any finition/finitude, to any limit of the juridical ontology.

It is a good sense to observe that, actually, the critiques posed against the juridical positivism are too much generalist. Even if Figueroa (2008, p. 203) is right by saying that, to a certain extent, simplifications are unavoidable, especially when discussing such complex theories, the generalization and the superficiality many times do no good to the scientific work. Here is one of the reasons implicit in the critique made by Dimoulis against the postures that do not pay attention to the differences between exclusive and inclusive positivisms. Saving the reservations made until now, this concern is also implicit in Struchiner's objection to those that disregard the differences between conceptual positivism and ideological positivism. However, all the effort we have made until now shows our concern about the risks of excessive simplifications.

At this point, we realize the importance of what Derrida understands by writing, by that which we must understand as writing, an inconvenience (*"unheimlich"*), as it is about what has just "passed away", "a there" that is also "a not there", an absent presence, "a still here" that "is not here anymore" of the present of "I" (we) who write about the present of the one who is now reading. How to deal with this "gap" in this discourse opening? The maximum we permit ourselves is to try to think about what a positivist would understand about what was claimed in this issue. Perhaps some are supporting that this intricate word game implies a simple and pure return to the jusnaturalism; others may understand that our view is a mere variation of jusmoralism.

May they be right? Accepting the pragmatic argument of co-originality of the law with a non-conventional moral also implies a critique of the logocentrism and a critique of the naturalism of the classic theory of the conditions of the knowledge possibility and validity from an effort of compatibilization (in what is possible) of the Derridean deconstruction and the Lévinasian responsibility.

We will surely be at least accused of eclecticism. How can one try to conciliate a logocentric author, curator of the Enlightenment traditions in the past century, of the *Aufklarüng*, Kant and Hegel's dignified heir, like Jürgen Habermas with, on the other side, authors like Derrida and Lévinas who, bound to a Jewish tradition, adopt the French language to express themselves and to do it "for beyond the logocentrism", "for beyond the ontology"? "Obje-ction" "(taken) noticed"since we were willing to (take) riskwith such conjunction, especially if someone read the text "The Supplantation of the Temporalized Prima Philosophy: Derrida's Critique of Phonocentrism" inserted in the book "The Philosophical Discourse of Modernity" in which Habermas attempts to mark his approximations with and, especially, his distancing from Derrida's Project.

Nevertheless, we still believe that our proposition has a salvation, maybe because we have been reading Walter Benjamin (2011) very much lately, who is one of the main exponents of the first generation from Frankfurt School, from which Habermas together with Apel form the second one, and that influenced Derrida's work so much. Or maybe due to the historicgathering of these authors in the work coordinated by Giovanna Borradori (2004), "Philosophy in a Time of Terror", in which the distance between them seems to narrow a lot[17].

And what about Lévinas? His proximity with Derrida does not look problematic to us. Despite the originality of each one's project, we believe that the connection, not only the intellectual one, but the friendship that brought them together in a personal sphere, is very much known. Thus, the connection with Habermas sounds more indirect, more *subjectile*, smoother, but not less evident to us. After all, isn't humanism a mark in Habermas' and Lévinas' thoughts? And the reading of works like "Theological-Philosophical Fragments" and "Between Naturalism and Religion", at least as we feel it, shows interesting approximations between them. This article does not aim at deepening in the theme about the approximation between such giants of philosophy.

[17]In this sense, see Cruz; Duarte (2009, p.37 *et. seq.*).

We prefer herein to believe in the value of the allusion, of the understanding of such proposition as a hypothesis, as a hypostasis rather than a daydream...

The objections will surely not stop there, though. Even if we admitted (tolerated?) the approximation between such philosophers, wouldn't this post-positivism imply a more sophisticated (complicated?) return to the jusnaturalism? So wouldn't it be possible to suppose that we are here only replacing Grotius' or Kant's straight reason for the **"right as an aporia by Derrida"**? For Alf Ross's horror (nausea?), by taking Justice as an element of the unpredictable, wouldn't we be diving into metaphysics? Wouldn't it be possible to imagine that we are just exchanging Thomas of Aquino's divine law for Derrida's Justice? And regarding Lévinas, wouldn't the situation be even worse? Wouldn't we be just releasing an idyllic dream of a fair law? A mere pedagogy of a humanism typical of a philosopher (we'd better say 'poet')? Doesn't the inclusion of the third, relativizing/enabling the endless responsibility in Lévinas, imply a new predication which is typical of the jusnaturalism?

The ambiguity is a constant in these authors' thought. Wouldn't it be being employed here strategically in order to gild the jusnaturalism with 'modern' elements of the French philosophy? How to do Science from this ambiguity? After all, as Günter Figal claims, isn't the ambiguity the proper language of the impersonal, a manifestation of the heideggerian's chatter?

We notice laughters! A histrionic laughter that is uncontrolled, desperate, immoderate can be heard now. It ran away from the footnote, escaped from the margins evading from this marginalization and, without asking for any permission, it invaded the text body. What can we understand about a non-linguistic body expression like a laughter? A hint: isn't the ambiguity then the opposite of Science? How can we do Science, how can we search for rational arguments based on subtleties of (in) the language or even in contradictions? Checkmate? Curé? Indecipherable proposition? Performative contradiction that is so beloved by Aristotle and Apel?[18]

[18]In "Beyond the Juridical Positivism", from where this article stems, we worked all the time with a rationality notion which is different from that provided by the Galilean Science Paradigm. This passage, in the mentioned work, attests an evasion from the margin into the text. As Ribeiro (2013) explained well in his preface to the work, the footnote – which herein is part of the text – plays a role which is very different from the usual one. It starts to play an outstanding role as it symbolizes the persistent search for overcoming something simply given that was standardized, as it is known, the *modus operandi* of

Is, by any chance, anyone listening to a *samba-enredo* as well? Or is it a carnival cry? Or is it really the American "cavalry" (wouldn't Argentinian be better?) that arrives giving some help? A **"baiano being"** (how we miss him!) is "presented" in the discussion! We used to call him Luis Alberto Warat! He and his pieces of work:"The juridical Science and its two husbands" and "The carnavilized epistemology". Warat (2000; 2009) always supported that law was not Science but, otherwise, it was hermeneutic, distant from Apolo's harmony and close to the Dionysiac desire, in which the truth is nothing but a delusion. Soon, the pretension that the rationality could keep the uncertainty away is nothing but a tragic summer dream of those "penguinized" jurists (wouldn't they also be "peacocked"?). In his point of view, the necessity of the understanding to include fundamentally the affection would split the Philosophy between its Apathetic thinkers that would describe emotions and sensibility rationally, like Kant and Hegel, and the Pathetic ones that would "des-cri-be" them as an indissoluble condition of the human being, like Merleau-Ponty, Deleuze and Derrida.

Thus, would the way out be pointing out the difference between Social Science and Natural Science? Or stating that the law is not a Science? Or claiming that the epistemology died? We do not think so! (Un) fortunately we are not *baianos*! We are rooted behind these mountains! We can do nothing but contemplate the infinite that unfolds with and from them. We cannot deny our difference from this one who was and still is one of the most genial thinkers we know. But, yet, we shyly whisper: Warat's thought lacked radicality! (How good it would be to hear his reply!), for his concepts of epistemology as an antimonic of doxa, of science as the opposite of hermeneutics, sound like a return to the conceptual mentalism to the authors of this work, as they seem to "freeze" such concepts. It implies to treat them from an essence that he himself denounced. Science and Law are not purely reason, for man is not! Such conception still represents one letting him/her be tied up by the totalization, by the reduction of any difference from the uniformization of the naturalism as an exaltation of the rationalization as the only means of knowledge. But, **"il y a"** more than that! If knowledge must aban-

doing science. Thus, it is about a clear allusion to someone (the other, the otherness that reads and participates in the permanent and ongoing re-construction of the text) that does not restrain themselves to stay at the text margins, by overflowing into its body. Something that causes strangeness to the one who sees science just in the Galilean styles, but that plays a fundamental role in an attempt to rethink this paradigm. For further details, we suggest the reading of Cruz; Duarte (2013).

donthis "rationalizer", "rationalizing" prepotency, if we need to bet, as Warat would say, in a multi-diversity of the knowledge, or as Boaventura (2007) de Souza Santos prefers, inknowledge "ecology"; we cannot purpose to "close" the concepts of law, of science, of truth, of epistemology and of rationality!

A less prepotent knowledge that knows about the implosion of the Cartesian individual, that knows about everything, that can know about everything, that reduces everything to the objectivity, that denies everything that cannot be reduced to certainty, that deprives the ego in favor of the humanism of this deposed individual (wounded, but never disregarded), but that cannot be deleted/crossed out (stained?), annihilated, as it is seen in the "structuralism" and in Nietzsche. A knowledge that, instead of certifying, of demonstrating, simply "attests", as Ricouer intends.

> Between the need of an absolute guarantee offered by Descartes (that enables the Cogito to have its pretension of final fundament) and the widespread threat of the doubt stemmed from Nietzsche (that shakes any fundament), Ricouer seeks another criterion of verifiability or even of truth; there lies the **attestation**, which is a certain kind of verification of knowledge. I say "a certain kind" because, if the terms verifiability or verification suggest the deletion of an error, the attestation always goes through doubt. The kind of knowledge that hermeneutics can claim of the self goes beyond the classical opposition between the doxa (opinion) and the episteme (science or knowledge). It approaches the doxa as it is a belief, but it is different from it as it isn't a matter of "believing that" but rather "believing in". In this sense, it is close to the witness. (...) The attestation, thus, is not only of an epistemological order, but, above all, ethical: it is the confidence in man's ability to say, do, recognize himself and take his moral responsibility. (DOUEK, 2011, p. 48-49, our emphasis in bold).

The attestation should not be understood as a mere stretching of the demonstration concept. The attestation goes far beyond the notion that truth is not purely epistemic, it incorporates a doxa perspective. At the same time the attestation rewrites the concept of truth, it can only be understood in Ricouer from its notion of narrative identity of its own reflection with the instancy of the individual's deposition. In this sense, as he sees it, the ipseity supports the "hermeneutics of the self", imposing an overcoming of the static sameness, which is typical in Aristotle's

quiddity. The being is contingent on himself, but man keeps himself (*mantien soi*), supports himself because he attests. This attestation as a renewed criterion of the truth is fundamental to the Ricourean thought, once it only takes place as this support is connected with ethical correction that lies in his notion of reciprocity and an ethic that also takes the role as an element of *prima philosophi*e. Man exists because he promises. And by doing so, he commits himself as he becomes a responsible being. So, as we feel it, this is promoted in the/with the fragmentary dialectic ipse-idem between memory and forgetfulness, as the promise is essentially an act that is fulfilled in time.

If the Cartesian (hyper) certainty becomes an impossibility, the Lévinasian ambiguity and the Ricouerian attestation become bets for saving the reason itself, the Science itself. After all, even harmony depends upon the combination of consonances and dissonances. We are not before an exchange of delusions: the search of the sphinx of security by the positivists for the justice chimera, as Warat would say. What is proposed here is to replace an "egological" way of "knowledge" with an "ecological" way of "knowledge", an overcoming of the Monadic egology, which is a solipsist of the Cartesian inheritance, with the deconstruction of the "ab-ysm" of the positivists' delusions with and from an "ecological" knowledge."*Uai*", are we green now? Yes and no! We surely worry about the environment and the protection of the ecosystems, but we are "deformalizing" the word "Eco-logy" herein. "Eco-logy" would be a knowledge that is known to be reflective, a non-inertial passivity, because opening oneself to the other is always a "de-cision". "Eco-logy", a knowhow, a knowledge from the Lévinasian echo, so usual (would it also be sectionalism?) in the mountains of Minas. The mountains which confine us in /through the liberty. The Liberty which is imposed by the ethics about the care with the otherness.T he Otherness which enables its own attestation. The Otherness which allows the "self" recognition and of the "Other" and, through it, the way of being of the Law. The Otherness which fixes our necessity of help for the infinite. That demands evasion, inviting to the existence of the ipseity through the need of the answer: "Here I am!"Answer that gives us ground. Answer which is given according to each one's measure, as nobody can make themselves less than they are. Answer that constitutes us as human beings for approaching us to the infinite, something that takes us "to God"-bye!

Deformalizing, deconstructing, attesting would be ways of knowledge that lie beside demonstration. Exactly because of the ambiguity inserted in them, supposing that our adherence to postpositivism

implies a return to jusnaturalism does not imply falling into absurdity. However, we just ask for the right to understand in a differe(a)nt way! And we have good arguments for that. The first one has already been clearly shown: Derrida, Ricouer and Lévinas, each with his own way, deal with a notion of existence that is totally different from that of the jusnaturalists and the positivists themselves. The great collaboration of the Phenomenology since Husserl was putting at stake the way through which man knew. Well, it does not suit this article discussing whether Ricouer, Derrida and Lévinas are followers of the Phenomenology, but insisting in the fact that they work from this philosophical language[19]. All the critiques about the scientific objectivity stem from a specific way of treating/conceiving ontology.

Deformalizing, deconstructing, attesting imply, then, ways of evading from an apophantic and totalizing rationality that intends to be unique. Such pretension denies the validity conditions for any alternative way of rationality. However, these ways of evasion must not be considered at all as the only ways of overcoming the jusnaturalist/positivist (JP) paradigm. As we see it, **deformalizing, deconstructing, attesting** must be understood just as some exemplifications that man can/needs to work with alternatives. They lie next to other ways of overcoming the naturalist rationality of the Galilean scientificism. Among them, we can point out, even here in Brazil, some efforts about Heidegger's philosophical hermeneutic, about the discursive theory of law, about Dworkin's artistic interpretation and about Luhmanian systemic rationality, which, by the single fact of not approving a causality logic, it implies, as far as we are concerned, an evasion from scientificism. In this sense, **Deformalizing, deconstructing, attesting** do not imply an only way for constructing a new paradigm of law. They do not even imply the "option" of the authors of this work, as the opening has been a constant in the proposition of their work.

In this sense, supported by Figueroa, saying that, at this viewpoint, positivism does not get separated from jusnaturalism implies recognizing a critique that would involve a unique paradigm that, now, tries to overcome itself.

The same can be said regarding the way positivists and jusnaturalists understand what ethic is and what moral is! Both conceptions

[19] Our construction is based on Derrida (1967; 1972; 1992; 2004; 2006; 2007); Levinas (1968; 1974; 1983; 1988; 1998; 2008; 2009) and Ricouer (1985; 2006; 2007; 2008; 2009). For more details, see Cruz; Duarte (2013).

treat the ethical issue as a way of living, in such a way that the ethical wisdom takes place as a consequence of the theoretical wisdom. The sage is the one who knows how to live according to the Goodness, and for getting to know it, he needs to dominate the "sophia". This inheritance of the Socratic *paideia*, well developed in Plato's *"Republic"* and Aristotle's *"Ethics to Nicomaco"*, dominates this paradigm and explains the reasons why it becomes possible to separate description from evaluation, denotation judgment from value judgment, "allowing" the Science neutrality. Well, from the moment the ethics takes the condition of *prima philosophie*, from the moment the responsibility becomes an *ek-stase* that is inseparable from man, from the moment a beyondness of ontology (hypostasis) is searched, it seems to us that it is unlikely to suppose that we are purely and simply returning to the jusnaturalism. Thus, in dialogue with Sebbah (2009, p. 87), "if the Lévinasian ethics (…) is not the search done by the Greek philosophy relatively to its good behavior, neither is the simple observance of the rules and, even less, the blind respect of an abstract and formal law".

Dissatisfied with these answers, it will always be possible to say to some reader: this text is nothing but an alphabet soup, a linguistic fruit salad that translates nothing but a desire for justice, a dream of equality, a daydream of humanism that is disconnected from the practice of law. Yes, this interpretation is always as possible as endless others. Nevertheless, it is relevant to remind that Lévinas' work was always in the holocaust horizon and that the innate violence perspective dominates law like the aporia for Derrida. We are all urged by idylls, by dreams or daydreams. However, in our standpoint, saying that the search for what "de-fines" us as humans is nothing but a daydream seems to be an interpretation that is at least unlikely.

Nevertheless, the nomenclature does not matter. For the authors, what is important is the pretension to construct law on new bases, under new assumptions, neither better nor worse than those that guide the JP paradigm, but based on a differentiated rationality. The incommensurability of these assumptions allows us to claim that, in this case, truth yields to the Lévinasian responsibility!

It is on these grounds that we reaffirm what we said before: when countless conceptions of conceptual positivism choose idealistic criteria of validity in Law, such as Kelsen's Fundamental Norm or Hart's Recognition Rule, - as long as this last one is not "necessarily" idealistic when it takes its constitution in its application, but only occasionally in the supposition of an external observer – end up getting away from the concern

about the juridical norm legitimacy, thus falling on a serious problem. Obviously, the supposed "neutrality" regarding the question "what is/works as Law" happens to "justify" those who claim that there is a certain approximation with the ideological positivism. As, actually, in our viewpoint, there will never be a neutrality, either because the adoption of any perspective will always be evaluative or because the most varied choices will necessarily bring about direct and indirect effects, we understand that the conceptual positivists are as much mistaken as the ideological ones (at least in what this matter concerns).

Even without explicitly defending a normative posture concerning the decision of difficult cases, at least not in the sense that is defended by the ideological side, regarding the definition of Law, the conceptual positivism contributes indirectly to the "docilization" of the population and to the "mechanization" of the Law agents, as they approve collaterally everything that is in effect with an honorable title of "legitimate" and encourage attitudes of adherence to their norms. Its attitude of equalizing validity and vigor, and, furthermore, of approaching validity to efficacy (Kelsen), even if it does not culminate in the ideological positivism thesis, many times it ends up generating indirect and side effects that are not usually accepted well by the confessed followers of the conceptual positivism only. It is usual to say that the opposites attract each other. In magnetism, this is true. In Law, the dichotomy between the definition of what law is and the evaluation about its legitimacy, therefore, allows one to allude to the Political "Theology" by Carl Schmitt when he states: "The state of exception is law!"

References

BENJAMIN, Walter. **Escritos sobre o mito e linguagem.** Organização, apresentação e notas de Jeanne Marie Gagnebin. Tradução de Susana Kampff Lages e Ernani Chaves. São Paulo: Duas Cidades, 2011.

BORRADORI, Giovanna. **Filosofia em tempo de terror.** Diálogos com Habermas e Derrida. Trad. Roberto Muggiati. Rio de Janeiro: Jorge Zahar Editor, 2004.

BOBBIO, Norberto. **Positivismo Jurídico:** lições de Filosofia do Direito**.** Trad. Márcio Pugliesi, Edson Bini, Carlos E. Rodrigues. São Paulo: Ícone, 1995.

CRUZ, Álvaro Ricardo de Souza. **Hermenêutica Jurídica e(m) debate.** 1ª ed. Belo Horizonte: Fórum, 2007.

CRUZ, Álvaro Ricardo de Souza; DUARTE, Bernardo Augusto Ferreira. O ter-

rorismo como distorção discursiva ou fracasso logocêntrico. In: MACHADO, Felipe Daniel Amorim; OLIVEIRA, Marcelo Andrade Cattoni de (Coordenação Geral). **Constituição e Processo:** a resposta do constitucionalismo à banalização do terror. Belo Horizonte: Del Rey, 2009c.

CRUZ, Álvaro Ricardo de Souza. **A Resposta Correta:** incursões jurídicas e filosóficas sobre as teorias da Justiça. Belo Horizonte: Arraes Editores, 2011.

CRUZ, Álvaro Ricardo de Souza; DUARTE, Bernardo Augusto Ferreira Duarte. **O terrorismo como distorção discursiva ou fracasso logocêntrico.** In **Constituição e Processo: a resposta do constitucionalismo à banalização do terror.** Coordenação Geral: MACHADO, Felipe Daniel Amorim; OLIVEIRA, Marcelo Andrade Cattoni de. Belo Horizonte: DelRey, 2009.

CRUZ, Álvaro Ricardo de Souza; DUARTE, Bernardo Augusto Ferreira Duarte. **Além do Positivismo Jurídico.** Belo Horizonte: Arraes Editores, 2013.

DERRIDA, Jacques. Il faut bien manger ou le calcul du sujet**.** In: Elizabeth Weber (org). **Points de suspension:** entretiens. Paris: Galilée, 1992.

DERRIDA, Jacques. **Gramatologia.** Trad. Miriam Chnaiderman e Renato Janine Ribeiro. São Paulo: Perspectiva, 2006.

DERRIDA, Jacques. **Força de lei**. O fundamento místico da autoridade. Trad. Leyla Perrone-Moisés. São Paulo: Martins Fontes, 2007.

DERRIDA, Jacques. **Margens da Filosofia.** Trad. Joaquim Torres Costa & Antônio M. Magalhães. Porto: Res editora, 1972.

DERRIDA, Jacques. **Adeus a Emmanuel Lévinas.** Trad. Fábio Landa & Eva Landa. São Paulo: Perspectiva, 2004.

DERRIDA, Jacques. **L'Écriture et la Différence.** Paris: Seuil, 1967.

DIMOULIS, Dimitri. **Positivismo Jurídico:** introdução a uma teoria do direito e defesa do pragmatismo jurídico-político. São Paulo: Método, 2006.

DOUEK, Sybil Safdie. **Paul Ricouer e Emmanuel Lévinas**. Um elegante desacordo. São Paulo: Edições Loyola, 2011.

DUARTE. Bernardo Augusto Ferreira. **Direito à Saúde e Teoria da Argumentação. Em Busca da Legitimidade dos Discursos Jurisdicionais**. Belo Horizonte: Arraes Editores, 2012.

DUARTE, Écio Oto Ramos; POZZOLO, Susanna. **Neoconstitucionalismo e positivismo jurídico.** As faces da teoria do Direito em tempos de interpretação moral da Constituição. São Paulo: Landy, 2006.

HABERMAS, Jürgen. **Direito e democracia:** entre facticidade e validade. vol. I.

Trad. Flávio Beno Siebeneichker – UGF. Rio de Janeiro: Ed. Tempo Brasileiro, 2003.

HART, Herbert Lionel Adolphus. **Direito, liberdade,moralidade.** Trad. Gérson dos Santos. Porto Alegre: Sérgio Antonio Fabris Editor, 1987.

HART, Herbert Lionel Adolphus. **O conceito de direito.** Trad. A. Ribeiro Mendes. 3. ed. Lisboa: Fundação Calouste Gulbenkian, 2001.

HART, Herbert Lionel Adolphus. **Ensaios sobre Teoria do Direito e Filosofia.** Trad. José Garcez Ghirardi e Lenita Maria Rimoli Esteves. Revisão técnica por Ronaldo Porto Macedo Junior e Leonardo Gomes Penteado Rosa. Rio de Janeiro: Elsevier, 2010.

LÉVINAS, Émmanuel. **Totalidade e Infinito.** Ensaios sobre a Exterioridade. Trad. José Pinto Ribeiro e Revisão de Artur Morão. 3. ed. Lisboa: Edições 70, 2008.

LÉVINAS, Émmanuel. **Autrément qu´être ou delà de l´éssence.** La Haye: Martinus Nijhoff, 1974.

LÉVINAS, Émmanuel. **Da existência ao existente.** Trad. Paul Albert Simon & Ligia Maria de Castro. São Paulo: Papirus, 1998.

LÉVINAS, Émmanuel. **O humanismo do outro homem.** Trad. Pergentino Pivatto. 3. ed. Petrópolis: Editora Vozes, 2009.

LÉVINAS, Émmanuel. **Ética e infinito.** Trad. João Gama & Artur Morão. Lisboa: Edições 70, 1988.

LÉVINAS, Émmanuel. **Le temps et l'Autre.** Paris: Quadridge & PUF, 1983.

LÉVINAS, Émmanuel. **Quatre lectures talmudiques.** Paris: Minuit, 1968.

NINO, Carlos Santiago. **Introdução à análise do Direito.** São Paulo: Martins Fontes, 2010.

OLIVEIRA, Manfredo Araújo de. Moral, Direito e Democracia: o Debate Apel versus Habermas no contexto de uma concepção procedimental da filosofia prática. In: MOREIRA, Luiz (Org.). **Com Habermas contra Habermas:** direito, discurso e democracia. São Paulo: Landy, 2004.

RAZ, Joseph. **The authority of law**. Essays on law and Morality. Oxford: Oxford Press University, 1979.

RAZ, Joseph. **Razão prática e normas.** Trad. José Garcez Ghirardi. Revisão técnica Wladimir Lisboa. Rio de Janeiro: Elsevier, 2010.

RAZ, Joseph. **A moralidade da liberdade.** Trad. Carlos Henrique de Oliveira Blecher e Leonardo Gomes Penteado Rosa. Revisão técnica de Rafael Mafei Ra-

belo Queiroz. Rio de Janeiro: Elsevier, 2011.

RAZ, Joseph. **Can there be a theory of law?** Balliol College, Oxford and Columbia University, New York, 2005. Disponível em: <http://ssrn.com/abstract=1010287>. Acesso em: ago. 2012.

RICOUER, Paul. **Soi-même comme un autre.** Paris: Seuil, 1985.

RICOUER, Paul. **Teoria da interpretação.** O discurso e o excesso de significação. Trad. Artur Morão. Lisboa: Edições 70, 2009.

RICOUER, Paul. **A memória, a história e o esquecimento.** Trad. Alain François. Campinas: Editora da Unicamp, 2007.

RICOUER, Paul. **Outramente.** Trad. Pergentino Stefano Pivatto. Petrópolis: Editora Vozes, 2008.

RICOUER, Paul. **Percurso do reconhecimento.** Tradução de Nicolás Nyimi Campanário. São Paulo: Loyola, 2006.

ROSS, Alf. **Direito e Justiça.** Tradução e notas de Edson Bini. 2. ed. Bauru-SP: Edipro, 2007.

SANTOS, Boaventura de Sousa. **La reinvención del estado y el Estado Plurinacional.** Santa Cruz de la Sierra: Alianza Interinstitucional CENDA – CEJIS – CEDIS, 2007.

STRUCHINER, Noel. **Direito e linguagem.** Uma análise da textura aberta da linguagem e sua aplicação ao direito. São Paulo/Rio de Janeiro: Renovar, 2002.

STRUCHINER, Noel. **Para falar de regras:** o positivismo conceitual como cenário para uma investigação filosófica acerca dos casos difíceis do direito. Rio de Janeiro: PUC-Rio, Departamento de Filosofia, 2005.

WARAT, Luis Alberto. **A ciência jurídica e seus dois maridos.** Santa Cruz do Sul: Edunisc, 2000.

WARAT, Luis Alberto. Conferência de encerramento do 2º seminário internacional Direito e Cinema. Visões sobre o direito e a ditadura.

The freedom as subjective right in the William of Ockham's thought

Gabriel Lima Marques[1]

Abstract: The discussion of freedom has long been presented as a problem for humanity, not being different in the medieval period. In the early fourteenth century, the English philosopher William of Ockham, also known as Doctor Invincibilis, surprised everyone when defending for the first time in the history of legal thought the ius as an individual potestas. This feat earned him subsequently the tribute made by authors such as Michel Villey, to regard him as the father of subjective rights. Developing a theory based on the subject and in particular situations, in complete contrast to the classic Aristotelian thought and consequently Thomist, who were concerned in understanding the universal nature of things, Ockham argued that each individual had a right given by God and by nature to choose between yes and no, and between what was or was not appropriate. In other words, using the Evangelical Law, as did all the philosophers at that time, but in a different way, the Franciscan author will defend that the human being has a natural subjective right, and raising the power to make decisions, to the dignity of law, Ockham will challenge the tyrannical power, which he said would only serve to corrupt the subjective freedom, the free will given by God. In this sense, the scope of this paper is to present the subjective right as a corollary of the concept of freedom introduced by William of Ockham in his works, as well as the consequence of such fact to the legal thought.

Keywords: Freedom; Subjective Right; William of Ockham

1. Introduction

Little is known about the life of William of Ockham. However, it can be stated based on some works dedicated to study the medieval po-

[1] Lawyer. Graduated in Law by State University of Rio de Janeiro. Master in Law by Federal University of Rio de Janeiro. Research of Brazilian Judiciary Observatory – CNJ/ Project, UFRJ group. CAPES-Fellow. E-mail: gabriel-marques@hotmail.com.

litical thought, that the English philosopher born between the years 1280 and 1290, in the small village of Ockham, Surrey County, near of London (Coleman, 2000: 170). According to Alessandro Ghisalberti (1997: 15), the first record of the author that we have notice, date from February 26, 1306. Such record, is a document that contains a list of Franciscan friars minors who had been ordained sub-deacons in the church of St. Mary in Southward, diocese of Winchester. This ordinance, according to canon law of that time, allowed candidates to the priesthood to attend courses in philosophy and theology, what make us believe that Ockham probably has moved in the following year to Oxford, where was a Franciscan convent with professors that taught such subjects. Furthermore because it was there where he became *baccalaureus formatus*[2] and received the sacrament of order in the year 1318 (Ghisalberti, 1997: 16).

After his priestly ordination, Ockham began to devote himself to the study of an academic nature. With an effective and innovative potential, the English theologian, for about six years, lived in transit between Oxford and London. In this same period the effervescence of scholastic discussions in the Franciscan houses, gave to him seven[3] *Quodlibetas*,[4] whose issues were associated with subjects ranging from logic to metaphysics and theology (Spade, 1999: 07). Incidentally, in this vein, it is important to point out also that the characteristic brilliance of his theses was equally responsible for the nickname, *Venerabilis Inceptor*, attributed to him. This is because, it seems, Ockham, despite the demonstration of its extreme intelligence and have completed all requirements to become *Magister actu regens*, that is, master in theology, he did not definitely take a catedra, remaining thus as mere *Inceptor*,[5] mere postulant, due to a conflict with the then Chancellor of the University of Oxford, John Lutterell.[6]

---

[2] Equivalent to bachelor degree today.

[3] For more informations see: OCKHAM. W. ***Quodlibeta Questions***: Volumes 1 and 2, Quodlibets 1-7 (Yale Library of Medieval Philosophy Series). Trans. Alfred J. Freddoso and Francis. E. Kelley. New Haven: Yale University Press, 1991.

[4] The medieval quodlibets were works philosophical, detailed and dense, targeted to solve contemporary intellectual issues. In other words, were essays used to resolve mainly philosophical and theological problems, aimed to overcoming critical placements of other authors in certain matters (KEELE, 2007: 653).

[5] Title that allowed graduates, candidates for the office of Master, give lectures in universities.

[6] Dominican. Doctor of Theology. Thomist. Was chancellor at the University of Oxford between the years 1317 and 1322.

From what is known, the origin of this dispute began with the deposition of Lutterell from the post of ambassador, by decision of the Bishop of Lincoln, Henry Burwash. This decision was prompted by a request made by the professors of the University of Oxford, including Ockham, who for a long period kept differences with the Chancellor. However, nonconformist with the decision, the former diplomat in the year 1323, after request an authorization to the King Edward II (Baudry, 1950: 86-95), decided to address to the court of Pope John XXII who was in Avignon, France.[7] There sought to assert his reasons against the dismissal from the office of Chancellor, and took the opportunity to give His Holiness a dossier (Mcgrade, 2002: 07) where he listed 51 items extracted from the comments to sentences of Peter Lombard,[8] made by Ockham, who according to his understanding contained errors and heretical professions. Conscious of the accusation, the Pope appointed a commission of theologians to examine such propositions and called Ockham to submit to his court, and present a defense, fact that eventually led the British theologian to leave the college career, before the imposition of the Master's degree.

For three years, the committee which was composed by John Lutterell, former chancellor of the University of Oxford and disaffection of Ockham, Raymond Bequin, Dominican and Patriarch of Jerusalem in exile, Durand of St. Pontian, Dominican and bishop of Le Puy, Domingos Grima, Dominican and bishop of Pamiers, Gregorio de Tauri, Augustin-

[7] In 1309, Pope Clement V, French, convinced by the King of France Philip IV the Fair, transferred the headquarter of the papacy from Rome to Avignon, in the banks of Rhône River. This episode known in the history as the Avignon's crisis, started the period of the Babylonian captivity of the popes, which lasted about 70 years, and only found his final term in the year 1377, with the determination of Pope Gregory XI, that demanded the reinstallation of the papal residence in Rome. However, because of the death of Pope Gregory in the very next year, there was a period of enormous controversy between 1378 and 1414, about the headquarter of the Papacy, and even more on the succession of the pope himself. This historic moment commonly called Western Schism, only finished with the convening of the Council of Constance and the subsequent election of Pope Martin V in 1417.

[8] Peter Lombard was an italian and scholastic philosopher of century XII. Became famous for writing the Libri quatuor sententiarum, The Fours Books of Sentences, a work which made a compilation of passages, phrases, or sentences, of the bible, and from the works of the most prominent medieval thinkers that synthesize the Christian theology . In the centuries following the death of Lombardo, became a constant editing comments to their sentences, examples are the comments made by St. Thomas Aquinas and Duns Scotus, to name a few.

ian, bishop of Belluno-Feltre, and Paynhota Giovanni, an Augustinian monk and master in theology, met to study the works of Ockham and issue an opinion (Larsen, 2011: 90). After the refusal of the results contained in the first report prepared by the committee on the grounds that it had not been sufficiently severe, the commission submitted a second in which explicitly acknowledged that seven of the articles were indeed heretical, thirty-seven were false, four were daredevils and three did not have any need for censorship (Baudry, 1950: 86-95). However, as the report was a purely advisory opinion, to acquire condemnatory nature, it demanded a pronouncement of the Pope in this sense, something that according to Leon Baudry (1950: 100), never came to fruition.

In this sense, one can say that the excommunication of Ockham of June 6, 1328, is not directly related to the final document prepared by the Commission, but rather with his escape from Avignon (Amman, 1931: 868), at last, as alluded Alessandro Ghisalberti (1997: 20), after becoming aware of the serious crisis involving his congregation and the Pope about the Franciscan poverty,[9] as well as after his frustration with the trial process of their works, there was no other option to Ockham than to flee to Italy, with the general minister of Franciscan Order, Michael of Cesena and close ranks against the pope, under the protection of Louis IV of Bavaria.[10] However, after dock in Pisa, Ockham and his

[9] Conflict involving Pope John XXII and the Franciscans called "conventuals" on one side, and the Franciscans called "spirituals" in another. The dispute had as the spark, the understanding established in the year 1322 at a meeting of the Franciscan order, in the city of Perugia, Italy. On occasion, despite the resistance of the Conventual Franciscans of spiritual thesis that Christ and his apostles did not own anything, neither collective, nor in particular, the thesis of the latter was the winner. This was the same understanding of other popes, for example, the contained in the bull *Exiit qui seminat* from Pope Nicholas III. However, from the decree of Pope John XXII in the year 1323, that such an understanding was heretical, the political struggle rather than finished intensified and spread further.

[10] Louis IV of Bavaria was elected king of Germany in 1314 by most Germans. However, in the same election, a minority had voted in Frederick of Austria. Because of this, both asked the pope to recognize the right to the crown, but John XXII remained neutral. So Louis of Bavaria proclaimed himself king and after a long internal dispute with Frederick, in the year 1322, Louis becomes sovereign lord of Germany. However, again, John XXII remains inert to recognize Louis as emperor of the Holy Roman Empire. To further aggravate the situation, in 1323 Louis appoints Count Bertoldo Neiffer as his representative in Italy. However, such an appointment infuriates John XXII, who during the war in Germany had taken advantage of the rule that in case of vacancy in the German king, the Vatican administered the Italian throne. Because of this, John XXII demanded Luis,

conferees still await for about three months, until finally succeeded a personal encounter with the Emperor. In the context of this meeting, was assigned to the English theologian the famous phrase, *o imperator defende me gládio et ego defendam te verbo*, that is, the Emperor defend me with the sword that I will defend with words (Baudry, 1950: 124). Now if it was or not uttered by Ockham, we don't known, but it is known that such an event was rather striking in the author's life, since it was from that moment that the Ockham merely concerned with philosophical and theological meditations, left the scene to give rise to an Ockham, who living at the court of Louis of Bavaria in Munich, undertook all the intellectual resources at its disposal, in the composition of works of legal and political controversy that favored the interests of the emperor (Ghisalberti, 1997: 21).

In this context, it is here that lies the crux of this Article: demonstrate how Ockham, dived to head in secular struggles of his time, and carried his philosophical theory, framed in Christian theology, for the plan of the law, and how this in some extent contributed to the formation of modern legal thought. Thus, to achieve the proposed goal, this work is divided into three parts. At first, for a better understanding of the philosophical thinking of Ockham, we intend to present a brief characterization of its nominalist theory. This way we will be able to realize later in the text, the influences of this particular way of thinking in the writings legal-political of *Venerabilis Inceptor*. Already in the second stage, the proposal is to perform a context from the work *Opus nonaginta dierum*, about conflicts in which Ockham became involved, namely, the disagreement over the scope of evangelical poverty, and conflict about *plenitudo potestatis* the pope, that is, the possibility of interference of the pope in temporal matters. In view of this, the last stage of this paper will demonstrate how Ockham, inspired by his nominalism and by the Franciscan philosophy who understood freedom as a requirement for the Christian life, will influence the philosophy of law in the following centuries, to study two issues of great importance, legal positivism, and the individual power, source of the subjective right.

---

to, under penalty of excommunication, dismiss the Count, and await the Holy See to decide the question of legitimacy. But Louis disagrees, and says that the pope could not intrude in the internal affairs of the empire. So, to solve the problem, the emperor calls convening of an ecumenical council. The idea gains strength, and because of that John XXII in the year 1324 excommunicates Louis, giving rise to a dense political conflict (Eguren, 2005: 110).

2. The nominalist theory of Ockham: emphasis on the singular and instrumentalization of universals

According to Michel Villey (2005: 223), Ockham Ockham was the founder of a "new way" (*via moderna*), that is, a new way of philosophizing, destined to do great fortune throughout the late of Middle Ages and beyond. In other words, for the French historian, the peculiar nominalism of Ockham, represents a milestone for the philosophy of law. Located on the border between two worlds, takes on the characteristic of being both a legacy of medieval thought, as a opening to the modern legal thought. Without a shadow of doubt, Ockham was not the first to develop a theory nominalist. Before, we even have reports of authors like Roscelin of Compiègne[11] and Peter Abelard.[12] However, on account of his political involvement, and the historical period in which he lived, Ockham, was certainly the most notable thinker of this school.

Thus, consonant the work of Claude Panaccio (2012: 393), it is correct assert that at the time of Ockham, there were a several nominalisms. And just so, it is significant accentuate that each of the exponents quoted of this school has added a special feature to the theory. However, despite numerous singularities, it is possible to assert that all nominalists departed from a common principle, that of all that exists, all that is in the real plane, it's just the particular, the individual (Macbride, 2009: 276). It happens that this assumption was not unanimous in that historical period, and so met strong resistance from those who claimed to be supporters of realism, philosophical current that despite also having disagreements, was based on the belief that the world was not made only by individuals but also by universal. Thus, we can see clearly, that the moment in which Ockham writes his theory was not peaceful, after all, there was a group that understood as him, that only the objects that are presented to our senses constitute an objective reality, and the rest is only content of our mind, however, expressed by a name (nominalism). And in opposite direction, there was another group, that besides not being composed of few, argued that universals, that is, the concepts which expressed by the same name the essence of a thing, objectively exist outside the mind (Armstrong, 1978: 12).

Therefore, is in this path marked by controversy, that Ockham,

[11] French monk, philosopher and theologian, who lived between XI and XII centuries.
[12] Roscelin's disciple. Was a french philosopher and theologian, who distinguished himself in the XII century, after the publication of his major work, called the Dialetic.

mainly through two of his major philosophical writings, *Summa Logicae* e *Scriptum in Librum Primum Sententiarum*, will state that in the objective world, only exist the substances and qualities of individual (Panaccio, 2012: 396). The universals, would be, superfluous, soul intentions, concepts, signs, whose aim is merely to express many individuals, many singular beings (connote). Thus, "humanity" itself does not exist as a reality extrinsic, but only and solely as an expression, a name used to represent a set of concrete individuals, human beings, those belonging to the real world (Panaccio, 2004: 10). In other words what all men have in common is that they are considered as "human", however, this "humanity" is nothing more than an outside sign, an abstract nominalization, a linguistic classification of individuals, John and Mary, for example, but not its substantial essence, because only the singulars individuals have real existence (Ockham, 1974b: 48). Thus, the man would be singular to Ockham both, in itself, and in its essence (Alféri, 1989: 15).

At seen it, it appears clearly that for Ockham, against the majority of philosophers and theologians before him, as, for example, St. Thomas Aquinas, who understood that the common genres and forms belonged to the world of being the central issue was no longer explain individuals by reference to universal, but rather to account for the universal in a world of individuals (Left, 1975: XXI). Therefore, to the English theologian, the universals are just signs that serve to connote things, there is no way to talk in the real existence of structures, genres, natural law, or any other category universalizing. This is, in a reality exclusively singular, to the universal remains only the function of be an instrument of thought, to explain individual knowledge which is hidden, but that is concrete (Villey, 2005: 231).

In this sense, we can conclude that what the philosophy of Ockham proposes, is to think all things from the individuals, after all, it is clear that for the British thinker, nothing is above the singular. This claim, let us say in passing, revolutionary, brought as a consequence the generation of a new worldview, whose influence can be noted in several disciplines, among them, and the object of our research, the field of law. Until then, the idea that the individual should be the center of it all was almost unknown, which makes Ockham, without fear of error, one of the pillars of a new way of seeing reality. It is from his nominalism, that the basis for the abandonment of natural law are released, because if there are no universals in factual world, there is no plausible justification for the law to be withdrawn from a supposed cosmic order. In fact, if the focus is the individual, the judicial qualities, in turn, only may

stem from the individual, this is, can only be subjective (Villey, 2005: 233). Here, then, we have the main germ of Ockham's philosophy which as we shall see in later chapters, will greatly influence his political-legal writings.

3. The political conflicts in which Ockham was inserted: an analysis from the work *Opus nonaginta dierum*

There is almost a consensus among those who have proposed to study Ockham, that the first political controversy in which the English theologian entered, was the dispute that had dragged on for nearly a century about the Franciscan evangelical poverty. At the beginning of the twelfth century, St. Francis of Assisi proposed those who wanted to follow him, to live a life of absolute poverty in the light of the Holy Gospel. In the rule of life, *non Bullata* of 1222, the saint urged the religious brothers, to live on alms, and, above all, following the example of Christ, to don't take possession of any place or thing (De Boni, 2003: 218). Already in the 1223 rule, this one *Bullata* by Pope Honorius III under the title *Solet annuere*, there was only one item that just limited to say that the religious of order should be poor, however, without specifying whether the poverty should be in fact or in law. Faced with this impasse, some understood that the legislation had just prevented individual property, and as there was no mention to collective ownership, it would be perfectly possible that the order as an entity possessed churches, convents and other goods. However, for others, and among them St. Francis himself, poverty meant literally *vivir sin proprio* (Eguren, 2005: 147).

It happens that in 1226, St. Francis of Assisi comes to death. And in the same period, the order, that grew precipitously throughout Europe, accumulated numerous assets received through donations. So, as the congregation gained body, internal conflicts regarding the extent of evangelical poverty also intensified, what increased the fear among the religious, that they were being unfaithful to the Franciscan rule. Exactly why, it was extremely necessary finding a solution, which only came in the year 1230, after much insistence with the Pope Gregory IX. The pontiff in the bull *Quo Elongati*, takes three decisions of utmost importance. The first one, in the sense that it was up to him, as supreme head of the Church, the right to interpret the rule of Franciscan life. The second by its turn, pointed the need to do a differentiation between the Franciscan rule and Gospel, as well as postulated the no obligation of St. Francis'

will. As a result, the religious would only be obliged to observe the evangelical counsels expressed in the rule, that is, poverty, charity and obedience. Lastly, the final decision was about the question of ownership. For pope Gregory, according to the rule of life of the Franciscans, the friars could not own property on both the individual and in the collective. Thus, to the friars would only be lawful to use, remaining the properties in the hands of those know that were the owners (De Boni, 2003: 221).

But what at first seemed to facilitate the life of the Franciscans in the end turned out to complicate matters further. The simplicity of the first religious, gradually gave way to a life in spacious convents and universities. The mendicancy confident in divine providence lost space to the monastic life. And the most menial services were delivered to servants. In this context, the legal questions also proliferated, after all, the friars did not know how harmonizing such growth and the poverty required by the founder. To whom, for example, belongs the property donated to the Franciscans, whose owner has already passed away? Hungry for answers, the Franciscans not visualized other solution but to resort again to the pope, this time, Innocent IV, who in the year 1245 establishing two bulls, *Ordinem Vestrum* and *Quanto studiosius*. There, the pope declared that all property of the congregation Franciscan were from that moment *in ius et proprietatem beati Petri*, this is, belonged to St. Peter, belonged to the Holy See (De Boni, 2003: 221-222).

However, the legal output found by the pope deepened the conflicts, and generated strong resistance in some religious, that understood that the real evangelical poverty, required by San Francisco, was being outraged by a supposed legal poverty. For this group, was impossible to live faithfully to the rule under the papal favors. On that account, they postulated the right to live spiritually the rule, this is, in a mendicant way, what led them to become known as the spiritual. Notwithstanding, in a different perspective, there was another group what believed that the changes that were occurring were nothing but a natural evolution of things. This group, was called, the conventuals, or community group. For many, many years, both groups have accused each other of infidelity to the rule and the desire of the founder, what became even more complicated, the extent that the order, had yet to face a strong resistance from both those who held high positions in the church hierarchy,[13] as the university professors, among them, William of Saint'Amor, secular

[13] The Council of Lyon come to think about the end of all religious orders emerged after the IV Lateran Council, among them, the Franciscan order.

master at the University of Paris, who fearing that the university chairs were colonized by religious professors, taught openly that mendicancy was contrary to the Gospel (De Boni, 2003: 225).

Thus, in order to sanitize the discussions that were accumulating, St. Bonaventure, during the years that he was the minister general of the Franciscan order, wrote two important works, *Quaestiones disputatae de perfectione evangelica* (questions about evangelical poverty) and *Apologia pauperum* (poor's apology), in which asserted first that poverty, despite the criticism was, in fact, the greatest grade of evangelical perfection, and second, that the religious brothers were entitled to, wanting, live a life of mendicancy. These arguments were supported by the bull *Exiit qui seminat*, enacted in the year 1279 by Pope Nicholas III. However, this was not enough. The debate did not stop to intensify, and the conflict seemed to have no more control. The spirituals gained strength, as well as the thinkers who supported them. Peter of Macerata, Angelo Clareano and Peter John Olivi, just to name a few, formed a theological battle front against the conventuals, and even against the Church, accused by them to being carnal (De Boni, 2003: 225-233).

In 1312, Pope Clement V, through the bull *Exivi de paradiso* still tries, unsuccessfully, trimming the edges, and reestablish the internal and external unity of the congregation. However, it was too late. Conventuals rebels occupied convents by force. Spirituals, in turn, refused obedience to their superiors. Until in 1316, with the ascension of Pope John XXII, the dispute reaches its period of greatest upsurge. By the bull *Quorumdam exigit*, the pontiff begins a relentless pursuit to the rebels who start to be excommunicated, accused of heresy, tried and burned alive at the stake. Nevertheless, it doesn't satisfy John XXII, who, maintaining his attempt to stifle the conflicts, abrogates, by the bull *Quia nonnunquam*, all provisions of the bull Exiit qui seminat of Nicholas III. In answer of this, religious, gathered in the city of Perugia in 1322, decided emit a statement confirming the anterior bull, that stated categorically that Christ and his apostles owned nothing. However, the document has only served to further promote the fury of the high priest, who in the same year, by the bull *Ad conditorem canonum*, first, asserted his right to modify the decisions of previous popes, second, that the goods purchased by the order no longer would be part of the domain of the Holy See, and thirdly that the Franciscans did not exercised the mere use (*usus nudus*) on the property, but the usufruct (De Boni, 2003: 234-238).

In July 1323, John XXII, also utters, one that would be considered as the final blow against the Franciscans, the bull *Cum inter non-*

nulllos. Through it, the Holy Father declared heretical, two of the most expensive propositions to the Franciscan order: that Jesus and his apostles owned nothing, and that they had no right to use, purchase, and sale goods, in the mode of right civil. The statement put in check the meaning of poverty dreamed by the founder, and consequently divided the order into two distinct groups. Those who placed themselves, at the service of obedience to the Successor of Peter, and those who remained faithful to poverty wished by San Francisco. It is precisely in the group of rebels, that is, in the group that decided to turn against the Pope and defend the ideal of the founder, that William of Ockhan, during his stay in Avignon, decides to enter.

Now, the problem of poverty was the main theme of the first political writing of English theologian, *Opus nonaginta dierum.* Text published in 1333, and that has this name because according to Ockham, was written in 90 days (Ockham, 1974a: 857). In line of Esteban Peña Eguren (2005: 168), the work had a purpose to comment three documents promulgated by John XXII related to the topic of poverty, as well as the bull *Quia vir reprobus*, come, by which the pope deposed the minister general of the Franciscan order, Michael of Cesena, and determined the election of a new one. Concerning the issue of poverty, it is noteworthy that Ockham begins his argumentative thesis through a historical-theological analysis of the property, making a tour to the period in which Adam and Eve lived in paradise, that is, before original sin. The English theologian, in the light of Scripture and by this exercise, concluded that during that time there was no division of property, but only and solely the distribution of the common use of things. In this sense, for Ockham, as there was no property in the state of innocence, this would not, therefore, divine creation, but human. So much it is, that according to the author, the first domain division that we know in the Bible, was what happened between Cain and Abel, that is, just after leaving Eden (Eguren, 2005: 169-171).

However, despite the rule being, no divine intervention, when it comes to determining domain, the English theologian, continuing his argument, recognizes that according with the evidences present in the scriptures, is verifiable existence of some moments where God manifests in this sense directly. It happens that with the promulgation of the Gospel, yet according to the author, this no longer happened. Because of that, Ockham comes to another conclusion, that all the properties that existed at the time, could only have your basis in law and the will of man, not in the Divine Right. In this sense, it could be argued that both

the duty to give alms as the duty to support the clergy is based on divine law, since it is found in the scriptures. However, belongs to the orbit of the human, deciding how those goods will be delivered to the Church. Thus, if will be translated the using, or the property, of goods, it varies case to case, once it depends on the wishes of the donor, or depends on the legal precepts established by men. This is so because God did not express about it. Thus, in general, it is clear that for Ockham, unlike John XXII, the *usus* could not be confused with the *ius* (Eguren, 2005: 172). Thereby, the religious can instead use the goods that do not belong to them, even in a individual or common plan.

From this, Ockham will devote most of the pages of his work to carry out a defense, about the poor life of Christ and his apostles. However, it is not idle to point out that the foundations of his theses are always religious or philosophical, but his horizon, on the other hand, is always to give an answer to the political problems in which he found himself. Therefore, in one of many aspects in which the English theologian will engage, the purse of the apostles, a point of greatest divergence in dispute with the pope, Ockham will seek to answer the following questions, whom was the owner of the bag of currencies? to Christ as head of the group, or to him and his apostles as a community? For the author, there was no doubt that the money contained therein was indeed common property. However, this community aspect, was in a broad sense, since it included not only Jesus and his apostles, but the whole community of believers, and especially the poor, to whom was allowed use the money contained in the bag to minimize their needs. With this, we can say that everyone, including Christ had only the use of money. Regarding ownership, this continued with the donor, who only proffered their possessions for use by the community (Eguren, 2005: 181-182).

This was, including, the understanding that continued in the Church for many years, after all, the same reasoning was proclaimed by Pope Nicholas III by bull *Exiit qui seminat*. However, as the bull was expressly repealed by another enacted by the Pope John XXII, the understanding that passed effective from then on it was just the opposite. For this reason, Ockham, in his work, under discussion, directed severe and heavy criticism to the pontiff. One was that Church, could not be surrendered to the mere whims of the popes. So if Nicholas III recognized that Christ and his apostles were poor in the individual and collective sense of the term, and if it was accepted by the Christian community, another pontiff can't later contradict the official position of the Church, which has become true unchallenged, and impose a completely differ-

ent interpretation in the sense of what has already been assimilated by believers. Thus, in the light of the experience of Jesus and the apostles, it was lawful to Ockham, that the Franciscans had the right only to use the goods in their possession, remaining the property therefore, with its donors, or with the Church. That's because, according to the author, the property, as stated in the holy scripture, is superfluous, useless, so that a religious may well perform their tasks without having any full domain, using only nature in case of need (Eguren, 2005: 180-193).

And Ockham does not stop there. The theme of Christian poverty, certainly, is the main point of his work in comment, but, the English theologian also will focus on two other points of great importance to political disputes with the pope, the sense of royalty and lordship of Christ. These points, including, will have direct repercussions in another conflict in which Ockham was inserted, the conflict around the fullness of the power of the papacy. It is worth noting, however, that despite Ockham having been dedicated diligently to this conflict in two of its other works, namely, the *Dialogus* and the *Breviloquium de principatu tyrannico*, the germ of his theory that he will work more thorough and specific in these writings, is already here in the work under review.

The idea that the pope possessed both the spiritual and the temporal power, was already been discussed many centuries before the conflict between John XXII and Louis of Bavaria. For example, Boniface VIII and Philip, the beautiful, of France, in the past, came to dispute around the boundaries of the secular power of the pope. However, according to Sérgio Ricardo Strefling (2002: 22), the origin of this dispute goes back many centuries before, from the promulgation of the theory of the two swords, by Pope Gelasius I in 494. On occasion, the Church claimed it was their responsibility to care the souls, while the civilian government had the responsibility on the body. However, as according to the Church itself, the soul possessed a nature superior to the body, the Church, was in a superior position in relation to the civil power. Thus, over the years and through an obvious consequence, it did not take until the Church passed to state that as the pope was the head of the Church, and more than that, God's representative on earth, the pontiff, as consequence, should appear above kings and emperors.

However, in contrast to this doctrine, Ockham, who believed that Jesus was not a king supreme temporal, understood that any claim in this regard by the pontiffs was illegitimate. This is because, firstly, as Christ was not judge in secular claims, nor was concerned with the temporal government, He could not be considered a civil king. Also, if there

can't be two legitimate kings in the same territory, and if Caesar was the true king of Judea, therefore, Christ was not a sovereign just as Caesar, because in no time, the Roman emperor shared with Him this authority. Moreover, if Christ taught in words and examples, to contemn temporal kingdoms, would not be correct to say that He himself was a secular monarch, after all, He would be going against himself, which would not be logical. Finally, based on the comments made by St. John Chrysostom and St. Augustine, as well as, drawing on the analysis of two pieces of sacred scripture, one from the book of John[14] and another from the book of Luke,[15] Ockham concludes that when the presentation of Jesus to Pilate, under the accusation of doing himself, King of the Jews, the governor found no fault in Him, because it was clear to the Roman, that the kingdom which Jesus spoke was not civil, but spiritual (Eguren, 2005: 177-178).

Not satisfied, Ockham, apart from weave some considerations about the kingship of Christ, will also seek to work another aspect of Jesus' life, the landlord. For the English theologian, Christ was not the owner of all secular things, neither from its conception, nor then. Basing itself on Scripture quotations, arguments coming from theologians of the Church, and papal bulls, the author comes to the conclusion that Christ borned poor and was poor throughout his life, thereat, would not be possible to say that He was Lord of all temporal goods. In this sense, when Christ instituted St. Peter as His vicar on earth, He didn't give to the saint, unlike that interpreted the pope, the domain of the secular world. Because, He could not give what do not belonged to him.[16] Thus, stating that the successor of Peter holds the fullness of power by inherited, is a complete nonsense. As soon, the primacy of the Pope could only relate to the spiritual plane. It was only on this plan that Christ wanted to engage (Eguren, 2005: 179).

Thereby, based on the brief accounts above, we see that the circumstances in that Ockham lived, making him an occasional lawyer. After all, despite the fact that he was essentially a theologian and a philosopher by formation, the policy framework in which Ockham was inserted, from his escape of Avignon, made him giving a greater legal focus on his texts, unthinkable in his times of academic, in Oxford. Thus, although in his writings we perceived the theology and philosophy oc-

[14] Jn 18, 36.
[15] Lk 1, 32-3.
[16] Mt 16, 18.

cupying a prominent place, we can also realizes, the emergence, concerning the sources of law, of a legal positivism, and concerning to its structure, of a notion of subjective individual right, themes that will be further explored in the following chapter (Villey, 2005: 225).

4. The impact of political writings of Ockham in Law: legal positivism and the freedom as subjective right[17]

According to Arthur Stephen McGrade (2002: 04), the Ockham's political writings were destructive to both the medieval social organization, as for the thought that until then reigned sovereign, the scholastic. Proof of this is that over the centuries, Aristotelian realism, as well as its Christian version, the Thomistic realism, virtually disappeared. Indeed, within philosophy, the thought of Ockham for many years reigned sovereign in Europe. For many generations, we have the information that practically, no philosopher, accepted recognize another start point for knowledge, than by the singular experience (Villey, 2005: 294).

In terms of Law, in turn, many of the essential features of modern legal thought, were already contained, in potency, in the work of the English philosopher (Villey, 2005: 233). After all, as seen above, the nominalism urged the law enforcers to find legal solutions not more through observation of nature and by the order which it emanates, but from the individual, more precisely, from the expressed and positive will of them, men or God himself. In this sense, to replace the natural law by the will of the legislature (Vandrunen, 2010: 48), it can be said that the philosophy of Ockham, applied to political issues of his time, eventually generating the substrate what some centuries later would be adapted and qualified by Hobbes and Locke as legal positivism (Villey, 2005: 295).

In this vein, the expression *jus*, leaves their traditional meaning to take on a new conception. So if in the past the term was used to designate the relationship fair, as of Ockham, the expression appears as a synonym for law, order, command. That is, every right from then, is expressed through an explicit act of will, and the law therefore, becomes a

[17] It is worth highlighting that here we'll use especially authors like Michel Villey and Stephen Mcgrade, who visualize the genesis of the subjective right on William of Ockham. In a different sense, however, we must also mention the position of Brian Tierney (1988: 23), who understands that the birth of subjective rights, took place in the twelfth century.

product of the emanation of individual power. As a direct consequence, the science of Law, changes his eyes before focused in a *datum object*, that is, in the observation of the order expressed by the social and natural body, or by the share borne by each sharing in the assets, to a plan essentially subjective, individualistic, centered on the nature of man and in his faculties and powers (Villey, 2005: 245-255).

Now, if men were created in the image and likeness of God, and if as God, men have free will, since this was granted by Him, it is obvious that they have a *potestas absoluta* (Lisska & Tierney, 2007: 325). I mean, it is symptomatic that each individual, be a focus of free conduct, a center of absolute powers (Villey, 2005: 281-282). And thus, with the exception of the power of God, to whom all are submitted through His divine positivism, no other power rests above the power of every man, unless this is granted. In other words, from the divine law, every individual power is in the same plane and in a permanent state of free action. This power, also may be delegated to a third party, usually a prince, when so think fit.

In this sense, both the socio-political tissue, as the set of legal order, are now made by a veritable cascade of power (Villey, 2005: 286), arising, in its turn, by a number of individual concessions, successive and free. God gives to man through His divine laws, read the Holy Scriptures, the power to institute heads, and the power to live freely according to their own wills. The people, in turn, through a contract, elects its princes, giving them the legislative power. Finally, the sovereigns edit laws that engender powers *stricto sensu*, in favor of the people.[18] The social order now appears no longer as a network of proportions between objects shared between people, but by a system that on the one hand, is marked by powers subordinate to each other and, secondly, by laws, that comes from powers (Villey, 2005: 285-287).

Thus, as seen, one can conclude that Ockham assigns a legal rubric to a power of the subject, the power named indifferent, requirement of the Christian life. This *potesta*, and behold a trait of Franciscan theology, would be freedom (Villey, 2005: 253). This right granted by God, and that in turn meant the power conferred upon all individuals to choose volitionally (Herbert, 2002: 69), that is, without any causal necessity, for example, if they wanted one thing and not another, if they wanted to do or not to do something, or if a particular behavior was good or bad (Himes, 2004: 45). As to the author, all men had the same capacity, that

[18] Such as usufruct, *jus utendi*, among others.

is, how this power was inherent to individuals in general, and according to his theory nominalist, that accepts only the individual existence, for obvious that to him, both the social structure of a certain nation, like its Law, would not be anything but a representation of choices made free and uniquely. After all, for Ockham, were not the ecclesiastic-spiritual authorities, or the political-temporal authorities, that sustained public life, but the existential authority that is in every individual (Greenaway, 2012: 256).

Thus, it becomes possible to see why the English philosopher vehemently repudiate both the tyrannical power, represented by the plenitude of power of the pope, as the impossibility of the Franciscans reject the right of ownership. After all, if to the author, every Law in the end is composed by individual powers freely considered, any power that stands above the others, without concession for this, as well as, any power that is imposed on individuals, without freedom to use or not, must be utterly rejected. Since for Ockham, the law is legal, but with freedom of disposal (Villey, 2005: 286). Thus, the *plenitudo potestatis* of the pope should be contained in some divine positive law, and the subjective rights, also known as *jura fori*, promulgated by human laws, could not be of compulsory observance, since for the author, in the light of Christianity, the brand essential of freedom is the free act.

5. Conclusion

This study aimed to present some considerations about how Ockham, applying his nominalist theory to the political issues of the historical moment in which he lived, contributed in some way to the formation of modern judicial thought. Therefore, it has proved necessary to demonstrate who was primarily William of Ockham, after all, little is known about the author. In addition, we saw what were the essential characteristics of his nominalism. On occasion, we observed that the author's purpose was to build an explanation of the world ruled by the individual reference, and not based on the cosmic order of things. This is, for the English theologian there would be nothing beyond the unitary, nothing above the singular, because it all comes from individuals, be they men, be he God himself. In this sense, the universal, would therefore only a function of instrumental connote singular realities, but which are still eclipsed..

Moreover, it has proved necessary also work with a succinct

explanation of the political conflicts in which Ockham was inserted, as well as, from the analysis of the work *Opus nonaginta dierum*, present the author' position in front of them. Such contextualization was extremely important for the final analysis of the *paper*, since it was the author's motivation for his inclusion in the Law field. In this context, maintaining the consistency with their philosophical theory, Ockham, laid the foundation for a legal system centered on the individual and their qualities, contributing, thus, for the decline of the influence of natural law, markedly objective, in the following centuries. This is because, as seen earlier, the English theologian, besides equate freedom, to the innate individual power granted by God to all men, raised the men's subjectivity, to the dignity of law. In this sense, the term ceases to represent the equitable partition of goods, for, from then, express individual wills, now expressed by law.

References

Alféri, Pierre (1989). *Guillaume d'Ockham*: le singulier. Paris: De Minutt.

Amman, Émile (1931). Occam, *in* Jean Vacant (Ed.), *Dictionaire de théologie catholique*. Paris: Letouzey et Ané.

Armstrong, David Malet (1978). *Nominalism and realism*: universals and scientific realism (v. 1). Cambridge: Cambridge University Press.

Baudry, Leon (1950). *Guillaume d'Occam*. Sa vie, ses oeuvres, ses idées sociales et politiques. Paris: Librairie Philosophique J. Virin.

Coleman, Janet (2000). *A history of political thought from the middle ages to the renaissance*. Oxford: Blackwell Publishers.

De Boni, Luis Alberto (2003). *From Abelardo to Lutero*: studies about practical philosophy in middle age. Porto Alegre: EDIPUCRS.

Eguren, Esteban Peña (2005). *La filosofia política de Guillermo de Ockham*. Madrid: Encuentro Editiones.

Ghisalberti, Alessandro (1997). *William of Ockham*. Porto Alegre: EDIPUCRS.

Greenaway, James (2012). *The differentiation of authority*: the medieval turn toward existence. Washington: The Catholic University of America Press.

Herbert, Gary Bruce (2002). *A philosophical history of rights*. New Jersey: Transaction Publishers.

Himes, Kenneth. B (2004). *Catholic social teaching*: commentaries and interpretations. Washington: Georgetown University Press.

Keele, Rondo (2007). Oxford Quodlibeta from Ockham to Holcot, *in* Christopher Schabel, *Theological quodlibeta in the middle Ages*: the fouteenth century. Boston: Brill Academic Pub.

Larsen, Andrew (2011). *The school of heretics*: academic condemnation at the University of Oxford, 1277-1409. Boston: Brill Academic Pub.

Left, Gordon (1975). *William of Ockham*: the metamorphosis of scholastic discourse. Manchester: Manchester University Press.

Lisska, Anthony & Tierney, Brian (2007). Philosophy of Law in the later Middle Ages, *in* Fred. D. Miller Jr. & Carrie-Ann Biondi (Ed.), *A history of the philosophy of Law from ancient greeks to the scholastics*. Dordrecht: Springer.

Macbride, Fraser (2009). Universals: the contemporary debate, *in* Robin Le Poidevin *et al* (Ed.), *The routledge companion to metaphysics*. London: Routledge.

Mcgrade, Arthur Stephen (2002). *The political thought of William of Ockham:* personal and institutional principles. Cambridge: Cambridge University Press.

Ockham, William of (1974a). Opus nonaginta dierum, *in* Hilary Seton Offler *et al* (Ed.)*, Opera politica* (v. 2). Manchester: Manchester University Press.

_____ (1974b). Summa Logicae, *in* Boehner Philotheus *et al* (Ed.), *Opera philosophica* (v. 1). New York: Franciscan Institut, St. Bonaventure University.

_____ (1991). *Quodlibeta questions*: Volumes 1 and 2, Quodlibets 1-7 (Yale Library of Medieval Philosophy Series). Trans. Alfred J. Freddoso and Francis. E. Kelley. New Haven: Yale University Press.

Panaccio, Claude (2004). *Ockham on concepts*. Hampshire: Ashgate studies in medieval philosophy.

_____ (2012). Universals, *in* John Marenbon (Ed.), *The Oxford handbook of medieval philosophy*. New York: Oxford University Press.

Spade, Paul Vincent (1999). Introduction, *in* John Marenbon (Ed.), *The Cambridge companion to Ockham*. New York: Cambridge University Press.

Strefling, Sérgio Ricardo (2002). *Church and power*: plenitude of power and popular sovereignty in Marsílio of Padua. Porto Alegre: EDIPUCRS.

Tierney, Brian (1988). Villey, Ockham, and the Origin of Individual Rights, *in* John Witte & F. S. Alexander (Ed.) *The weightier matters of the Law*: essays on law and religion, a tribute to Harold J. Berman. Atlanta: Scholars Press.

Vandrunen, David (2010). *Natural Law and the two kingdoms*: a study in the development of reformed social thought. Michigan: Eerdmans.

Villey, Michel (2005). *The formation of modern juridical thought*. São Paulo: Martins Fontes.

Consilience and Macrophilosophy
Contributions to a post-disciplinary Philosophy of Law

Renato César Cardoso

Abstract: This paper aims to address the problems brought about by the current state of hyper-specialization in both science and philosophy, and analyzes two of the most promising alternatives to the present situation of rigid disciplinarity: Consilience and Macrophilosophy. Such analyses are then followed by a brief evaluation on how these two proposals may connect with each other, and how they relate to legal philosophy.

Keywords: Consilience, Macrophilosophy, Post-disciplinarity.

1. Introduction

Aphorisms of great genius can sometimes transcend their authors; some words of wit may even become untraceable back to their origins. Especially since there came the Internet.

Take this one for example: "A scientist is someone who seeks to know ever more about ever less, until he knows absolutely everything, about absolutely nothing." This intriguing quote, in this form or in similar ones, has been credited simultaneously to many distinct individuals, people such as Gandhi, William J. Mayo, Konrad Lorenz, Nicholas Butler and others. I once even heard a fellow professor attribute it to a wise old doctor, from his unknown hometown.

The authenticity conundrum speaks volumes to the brilliance of the idea: after all, a dull piece of text would never get so many distinguishing "authors". Whoever he may be, the one who came up with this clever jest grasped a very important point about the current state of affairs in the world of sciences and philosophy. Such state is the topic of the text that follows.

2. Disciplinarity

Unlike Athena, the multitude of scientific disciplines we see today did not spring up, perfect and armed, from the aching head of Zeus. Quite the opposite: there is a long list of developments, successes, failures, hard work, luck and, over all, disputes – philosophical and theoretical ones, as well as economic and political – that marks its history. The emergence of todays fragmented scenario in the field of sciences cannot be understood properly without due reference to the history of science itself.

First things first, though. The very term "discipline" is not without its fair share of ambiguity. Originated from the Latin *discipulus* "student, pupil, follower," itself derived from *discere* "to learn", and directly from Latin *disciplina* "instruction given, teaching, learning, knowledge," also "object of instruction, knowledge, science, military discipline", it has nowadays come to mean several diverse things. Collins English Dictionary definitions, for example, include, among others: 1. training or conditions imposed for the improvement of physical powers, self-control, etc; 2. systematic training in obedience to regulations and authority; 3. the state of improved behaviour, etc, resulting from such training or conditions; 4. punishment or chastisement; 5. a system of rules for behaviour, methods of practice, etc; 6. a branch of learning or instruction; 7. the laws governing members of a Church; 8. a scourge of knotted cords.

Actually, it stands very clear that the meaning of "discipline" may vary enormously according to the context: improvement of self-control or punishment? Improved behavior or chastisement? More than that, even in the same context, it can assume radically different uses, depending on whose discourse it is coming from. A postmodern philosophy scholar and a military strategist would, I imagine, largely disagree on the merits of discipline.

In the sense that we are going to address here, discipline is much more than just "a branch of knowledge":

"When we speak of a discipline, therefore, we speak not merely of a body of knowledge but also of a set of practices by which that knowledge is acquired, confirmed, implemented, preserved, and reproduced. Disciplines mark the point at which this knowledge and these practices are institutionalized, or, so to speak, the word is made flesh. Disciplines differ in how they institutionalize knowledge. Disciplines vary in the ways they structure themselves, establish identities, main-

tain boundaries, regulate and reward practitioners, manage consensus and dissent, and communicate. Disciplines also differ in the internal coherence of their methodology and subject matter." (Post: 2009, 751)

Discipline – or disciplinarity-, in this broader and richer sense, also has its detractors and its defenders. Even if it does not seem that way in the present landscape, disciplinarity is not without supporters, however disparaged it may have recently been in some (many) academic circles.

Christie and Maton (2011, 1-2) assert, for example, on this topic: "For disciplinarity is far from dead, although the nature of disciplinarity – what it means to be 'disciplinary', 'interdisciplinary' or even 'postdisciplinary' – remains largely undertheorized. Alongside calls to abandon disciplines, a more measured reconsideration of disciplinarity is gathering pace that highlights its continuing relevance. (…) These essays challenge the idea that disciplinary formation involves merely constraint and ideological support for the status quo and undermine the comfortable pessimism of Foucaultian scholars who reduce disciplines to mere technologies of control."

Others have emphasized different aspects and benefits of disciplinary standards: "Principles of academic freedom are the primary defense against these efforts to intimidate and censor classroom teaching. These principles protect the freedom of professors to educate their students in the attainment of "a mature independence of mind." But these principles also condemn the abuse of classroom authority to indoctrinate students in ways that are without legitimate pedagogical justification. Academic freedom defends the autonomy of classroom teaching only insofar as such teaching constitutes education rather than indoctrination. Disciplinary standards offer the most cogent and secure way to distinguish education from indoctrination." (Post: 2009, 753)

We must not fail to recognize the importance of disciplinarity and the central role that it played in the scientific revolution that completely changed our civilization. No one should deny the fact that it represented a colossal and necessary step in the direction of scientific development. It seems impossible to overestimate the contributions it has brought.

Like anything else, as Aristotle reminds us, the problem with disciplinarity lays in the extremes. Most of the voices raised today against disciplinarity focus on the current state of scientific hyper-specialization and do not fail to recognize the importance that disciplines had in the past. It is the excess, rather than the process itself, that calls for criticism.

Some have seen the problem earlier. By 1930, Ortega y Gasset

had famously warned, long before the process of hyper-specialization became as drastic as it is today, about the devious consequences that the entire practice was leading to. He referred to it as "The barbarism of specialization" and condemned the "learned ignorant". C.P. Snow, for his part, denounced back in 1959 the abyss that separated science and the humanities, which he called "The two cultures". Despite the warnings, the scenario has not changed for the better in the last decades. The two cultures not only continue to exist but have grown as far apart as they could possibly be, appealing to radically different logics, justifications and rationales.

"The university today is, as we know, divided into two broad magisteria, the humanities and the natural sciences, usually located on opposites sides of campus, served by separate funding agencies, and characterized by radically different methodologies and background theoretical assumptions. Although rarely explicitly acknowledged in our secular age, the primary rationale behind this division is a rather old-fashioned and decidedly metaphysical belief: that there are two utterly different types of substances in the world, mind and matter, which operate according to distinct principles. The humanities study the products of the free and unconstrained spirit or mind – literature, religion, art, history – while the natural sciences concern themselves with the deterministic laws governing the inert kingdom of dumb objects. (Slingerland: 2008, 3)

The separation of these two very distinct universes is only the most conspicuous problem. Even inside these broad areas, division has reached the point in which dialogue is ever less possible. The progression of specialization continues to deepen and deepen. Nonetheless, it seems to many that it has finally reached the limit. Aware of the restrictions imposed by traditional disciplines, scientists and intellectuals, from the broadest array of fields, have been trying to overcome these boundaries by the overthrowing of disciplinarity itself:

"Disciplinary boundaries within the natural sciences are disappearing, to be replaced by shifting hybrid domains in which consilience is implicit. These domains reach across many levels of Complexity from chemical physics and physical chemistry to molecular Genetics, chemical ecology, and ecological genetics. None of the new specialties is considered more than a focus of research. Each is an industry of fresh ideas and advancing technology. Given that human action comprises events of physical causation, why should the social sciences and humanities be impervious to consilience with the natural sciences. And how can

they fail to benefit from that alliance? It is not enough to say that human action is historical, and that history is an unfolding of unique events. Nothing fundamental separates the course of human history from the course of physical history, whether in the stars or in organic diversity." (Wilson: 1998, 11)

By now, almost everyone has already realized that rigid and limited disciplines do not offer the same benefits they did when the modern sciences were developing. Interdisciplinarity, multidisciplinarity, transdisciplinarity, and crossdisciplinarity have become more than just common jargon in presently academic discourse. In whatever form it may be, it is clear that we are now entering a new time for knowledge – a new paradigm, if we may be so bold – one in which the boundaries are not so clear anymore: post-disciplinarity.

3. Consilience

It is somewhat symptomatic that, nowadays, the recognition of the deleterious effects brought about by the absolute separation between sciences and humanities has been much more troublesome to those dedicated to the first. In fact, it is amongst some hardcore scientists that we will presently find some of the most interesting works seeking to close that gap. There is promising research in various fields, from evolutionary psychologists, linguists, and physicists, to cognitive psychologists, anthropologists, neurophysiologists, primatologists, and so on. All perfectly aware of the difficulties of their endeavor, but, overall, not willing to comply with the restrictions imposed by the separation established between the two cultures. Paramount among those is Edward O. Wilson.

Preeminent biologist, considered the world's leading authority in myrmecology, Wilson had all the reason in the world to embrace hyper-specialization and be glad for it. His brilliant intelligence, instead, led him to a more noteworthy path. The publication of "Sociobiology", in 1975, cemented his name as an important figure in the studies of the intersections between natural and cultural sciences:

"Sociobiology synthesized a vast literature on animal behavior using new ideas on natural selection from George Williams, William Hamilton, John Maynard Smith, and Robert Trivers. It reviewed principles on the evolution of communication, altruism, aggression, sex, and parenting, and applied them to the major taxa of social animals such as insects, fishes, and birds. The twenty-seventh chapter did the same

for Homo sapiens, treating our species like another branch of the animal kingdom. It included a review of the literature on universals and variation among societies, a discussion of language and its effects on culture, and the hypothesis that some universals (including the moral sense) may come from a human nature shaped by natural selection. Wilson expressed the hope that this idea might connect biology to the social sciences and philosophy, a forerunner of the argument in his later book Consilience." (Pinker: 2002, 109)

The repercussion that followed Wilson's book is a chapter that deserves another paper all by itself. He suffered several attacks and critics were nothing but ferocious. For trying to cross the line between the natural and the social (cultural) universes, he had to endure all kinds of animosity. Fascist and Nazi were adjectives frequently and loosely used. It appears that there is nothing as controversial as saying that men are, after all, animals.

The polemic, however, would serve him well. In 1998, he published one of his most philosophical works, marinated in years of controversy: "Consilience: the unity of knowledge". In this book, Wilson would attempt to finally show the connection between sciences and the humanities and reestablish the long lost hope for a unified theory of knowledge:

"The greatest enterprise of the mind has always been and always will be attempted linkage of the sciences and humanities. The ongoing fragmentation of knowledge and resulting chaos in philosophy are not reflections of the real world but artifacts of scholarship. The propositions of the original Enlightenment are increasingly favored by objective evidence, especially from the natural sciences." (Wilson: 1998, 8) Moreover: "There has never been a better time for collaboration between scientists and philosophers, especially where they meet in the borderland between biology, the social sciences and the humanities. We are approaching a new age of synthesis, when the testing of consilience is the greatest of all intellectual challenges". (Wilson, 1998, 12)

However, what does consilience actually mean and where does it came from? The term was first coined by William Whewell, in 1840, and appears in his synthesis "The philosophy of the inductive sciences". It literally means a "jumping together" in reference to the proposed linkage of fact-based theories across several disciplines to create a shared basis, to support common explanations. Wilson (1998, 8) defends the use of consilience rather than coherence, for the rarity of the expression preserved its precision.

Consilience, then, is the final goal, the ultimate explanation that would reunite sciences and humanities in the holistic vision that has been lost amidst the ultra-segmentation of knowledge. It is a goal, as much as it is a method, a proposed way to get over disciplinarity and reach new heights and peaks: "The strongest appeal of consilience is in the prospect of intellectual adventure and, given even modest success, the value of understanding the human condition with a higher degree of certainty." (Wilson: 1998, 9)

Let it not be said that there scientists are the only ones worried about this questions though; there are those in the "other side" as well, that are perfectly aware of the mutual gains to be made by everyone once the bridges are placed. That is the only way for consilience to work, and how it should be understood: as a joint effort from natural sciences and humanities, mutually beneficial, without dominance or preponderance on either part. Edward Slingerland has made this point perfectly in his book "What Science Offers the Humanities: Integrating Body and Culture":

"If we humanists have much to learn from the natural sciences, the reverse is also true: humanists have a great deal to contribute to scientific research. As discoveries in the biological and cognitive sciences have begun to blur traditional disciplinary boundaries, researchers in these fields have found their work bringing them into contact with the sort of high-level issues that traditionally have been the domain of the core humanities disciplines, and often their lack of formal training in these areas leaves them groping in the dark or attempting to reinvent the wheel. This is where humanist expertise can and should play a crucial role in guiding and interpreting the results of scientific exploration – something that can occur only when scholars on both sides of the humanities–natural science divide are willing to talk to one another. (Slingerland, 2008, XIII)

The path to achieve consilience, however full of promises it may be, is not without its perils and we will surely find problems along the way. Detractors spring up continuously from both sides and defenders of the *status quo* are always fast to repudiate any attempts to shake things up and to follow new directions. Those who try to cross borders assume serious risks. If they come from the humanities, they are likely to be labeled "scientificist", "reducionist" or – even worse – "positivist". Scientists, on their turn, would be regarded as "unempirical", "metaphysical", and, most terribly, "philosophical".

In the humanities, the adversaries are well known. The SSSM

(Standard Social Science Model), as denounced by Steven Pinker (2002), has three basic concepts that contradict directly most of the conclusions reached by the natural sciences today. Nevertheless, the Holy Trinity – the Blank Slate, the Ghost in the Machine and the Noble Savage - continues to shape social science in great extent, mainly for political and ideological reasons. The greater enemy of integration, however, seems to lay beyond those three. Widely rejected amidst natural scientists, it appears to have profound and impenetrable roots in the social and cultural sciences. The Golias that has to be tackled is that of omnipresent dualism:

"If we are to take the humanities beyond dualistic metaphysics, these human-level structures of meaning need to be seen as grounded in the lower levels of meaning studied by the natural sciences, rather than hovering magically above them. Understood in this way, human-level reality can be seen as eminently explainable. Practically speaking, this means that humanists need to start taking seriously discoveries about human cognition being provided by neuroscientists and psychologists, which have a constraining function to play in the formulation of humanistic theories – calling into question, for instance, such deeply entrenched dogmas as the "blank slate" theory of human nature, strong versions of social constructivism and linguistic determinism, and the ideal of disembodied reason. Bringing the humanities and the natural sciences together into a single, integrated chain seems to me the only way to clear up the current miasma of endlessly contingent discourses and representations of representations that currently hampers humanistic inquiry." (Slingerland: 2008, 9)

So you have it, the way to integrate nature and culture is a clear one: leave dualism in the gallows and start paying attention to the colossal amount of data that is continuously being produced, aiming to explain the natural evolutionary processes that produce thinking, consciousness, language and culture. This last one, specially, calls for special attention, since it has been paraded as the key element for the distinction between the "human" and all the rest. Culture is the poster boy for many the defendants of dualism, as if it originated in some kind of magic ether and not in biologically grounded bodies. For some reason, Baron von Münchhausen never fails to come to mind when we hear such silliness.

The biggest problem in all of this effort toward integration is that it requires social scientists and alike to actually take and interest and study something outside of their pre-established and comfortable cannons. And that is not something that is easy to do. There is always good

rationalization behind the arguments against it, however dogmatic and obscurantist they might be.

Seeing beyond the mind-body problem is not as easy as it would seem. Refusals to accept the arguments in favor of an integrative solution vary enormously in kind, no matter how solid the evidence against them. But we have to keep pushing:

"We need to see the human mind as part of the human body rather than as its ghostly occupant, and therefore the human person as an integrated mind-body system produced – like all of the other body-mind systems running around in the world – by evolution. This is the sentiment behind the arguments for an explanatory continuum extending equally through the natural and human sciences that have recently and prominently been offered by, for instance, the entomologist E.O. Wilson with his call for "consilience". (Slingerland: 2008, 10)

That is, concisely, the case for consilience. As the ideal that it is, it can never be fully vindicated, but that does not mean it should be forsaken. It is just the nature of things: "The idea of the unity of sciences not idle. It has been tested in acid baths of experiment and logic and enjoyed repeated vindication. It has suffered no decisive defeats. At least not yet, even though at its center, by the very nature of the scientific method, it must be thought always vulnerable." (Wilson: 1998, 5)

4. Macrophilosophy

In analogy with macroeconomics, macrosociology or macrohistory, the neologism macrophilosophy has been created by the Catalan philosopher Gonçal Mayos Solsona, to designate a new approach to philosophy itself. One that differs profoundly from the typical academic methodology that dominates philosophical research and departments almost everywhere today.

In itself, no knowledge can be considered big or small; it is a role different thing to state the obvious fact that there are knowledge of big and small things. Macrophilosophy, thus, is interested in concepts and ideas in a wider sense, not as they were postulated and developed by this or that specific work or philosopher (Mayos: 2012, 9) but rather as they present themselves trough much larger periods of time and trough much broader perspectives:

"Macrophilosophy dwells on all fundamental concepts and questions in the way that they have occupied the conjunct of societies

and eras, going beyond the more personal contributions made by any specific philosopher, as valuable as they may be in itself. Even though macrophilosophy also accounts for those, of these more idiosyncratic aspects, linked to the individual genius or focused in details and particular aspects, microphilosophy occupies itself, in an equally important way." (Mayos: 2012, 10)

But exactly what is macrophilosophy? How can it be assessed? Isn't all philosophy, by definition, macro? Well, that is precisely the point: if philosophy had kept itself on track, honest to its principles, if academic pressure for segmentation and results hadn't driven it to turn, for the most part, into microphilosophy, strictly closed inside its own traditions and closed to the outside the world, there would be no need for a macrophilosophy:

"Today, microphilosophy – the study of the philosophical tradition from the past and the meticulous analysis of the texts written by those that taught us how to think (which Kant used to call scholar philosophy) – predominates largely, obliterates thinking itself and leads to the overlooking of the problems we face today. It obliterates that which Kant called philosophy's "cosmic concepts", in all its complexity (what we call macrophilosophy)." (Mayos: 2014, 13) "That is why it is so unjustifiable and inexcusable for philosophy to renounce its macrophilosophical inquiries, precisely in the first decades of this new millennium, when we are opening wide the doors to new inter-, trans-, multi-, and post-disciplinary perspectives" (Mayos: 2014, 15)

There is today, everywhere, tremendous pressure in favor of pragmatically effective knowledge, positively validated, bearing quantitative data and clear economic effects. Those disciplinary studies often succeed to impose their ways and their methods on others and exclude those that do not comply. This is why we witness now, amongst professional philosophers and professional philosophy, an overwhelming tendency to turn the eyes back and analyze, repeatedly, the philosophic tradition, sometimes in its most insignificant details. We life in a time of hyper-specialization; the disciplinary scientific and technical model enforces itself in the most extensive way, affecting even philosophy itself. (Mayos: 2014, 12)

In fact, it has been a long time since philosophy last attempted to live up to its original expectations. The holistic, integrating and disinterested view pursued by the philosophical tradition of the past has no place in today's discipline oriented Universities. As some cynic once put it: the world has problems, Universities have departments.

Macrophilosophy address these problems, utterly aware of these difficulties but also of the vital role scientific knowledge has in the pursuit for true philosophy: "It must be sad that, in some way, philosophy today cannot claim any exclusive or special object, nor can it be totally independent from the sciences, for it depends on their contributions". "Sciences have opted - with undisputable pragmatic success – for hyper specialization; that has left to philosophy alone the aspiration to a holistic understanding, as well as the theme of the basic perspectives, common to all distinct forms of knowledge". (Mayos: 2014, 14)

On a finishing note: "What is the macrophilosophy? (….) Macrophilosophy, nowadays, will only be able to clarify a global philosophical "meaning" by assembling, integrating and synthesizing, in an interdisciplinary way, the most solid and recent discoveries from the various specialized sciences. Furthermore, it has to make them rigorously compatible, in spite of the disentangling and discouraging effect that springs from the ultra-specialization of knowledge. That is why we can only talk about macrophilosophy once we have gone through holistic and comparative analysis that, in act or potentially, project themselves in widespread processes." (Mayos: 2012, 13)

By now, it should not take an expert to see that consilience and macrophilosophy share some central features and a lot more. Let us dwell on how those two relate to one another.

5. Consilience and macrophilosophy

Consilience and macrophilosophy are very much akin. They both take part on that intuition once called the "ionic enchantment", the ideal that it is possible to achieve a holistic knowledge, a broader worldview, which has no use for the artificial separation of reality in a multitude of tiny objects, destined to be scrutinized by some few myopic specialists.

Good philosophy, real philosophy, cannot ignore the scientific achievements of its time. It is a reflection mediated by science, not apart from it, not above it. Macrophilosophy does not evade this lesson and, being fully conscious of the problems brought about by the disconnected state of scientific knowledge, cannot look past it. Consilience, as a method to escape the fundamental division that marks the scientific landscape, appears to be the model of investigation upon which macrophilosophy should try to establish its tenets.

A holistic philosophy cannot satisfy itself with some fragmentary

model of science. If we are serious about post-disciplinarity, it's specter should orient efforts in both of these realms. It is only logical that both consilience and macrophilosophy must join efforts, for they are not only complementary, but also mutually indispensable.

6. Philosophy of law

There is no denying it, legal philosophy cannot be understood as something apart from philosophy itself. It is a very important and inextricable part of it, but by no means something that stands alone and by itself. It would be an utter mistake to try to separate it from ontology, epistemology or ethics alike, for all of them are essentially linked.

As a matter of fact, we don't need to dwell so much here; all that has been said about academic philosophy nowadays applies perfectly (maybe more) to philosophy of law as well: there is a lot of legal-microphilosophy, petty discussions and textual regurgitation going on, almost everywhere. We could only imagine the improvements, profits and developments that a real macrophilosophy of law could bring to such a weary field.

The Hellespont it would have to cross is not an easy one, though: the bridge between the cultural and the natural sciences has many guardians. Dualism, for one, is not an easy adversary to supplant. Furthermore, even if we could somehow get beyond this point, that would only be the first of many challenges. Consilience is easier said than done. It takes a whole lot of heroism to embrace an entirely brave new world, to leave one's comfort zone in the humanities and adventure oneself through the raw "natural realm".

Nevertheless, it must be done. Knowledge should have no limits, no frontiers. It is time to break the chains and ask ourselves: can we find the answers to the most significant questions inside the boundaries of our narrow-minded legal-microphilosophy? How does this completely new set of knowledge coming from the hard sciences fits in the current paradigm? Can we even ask if it is possible to search for a non-dualistic theory of law? Should we give up free will in favor of a deterministic approach to human behavior? May we inquire into the evolutionary function of justice? Of the law? Can we make way for questions on the natural fundaments of ethics? Could the natural sciences that try to explain human behavior finally be considered worthy of some attention? Or maybe we are supposed to be always relegated to the traditional dis-

course, that culture has absolutely nothing to do with nature, that it is a reality in itself?

Are we bound to repeat endlessly that truth is a myth, and does not exist anyway, while keeping a serious face and trusting that we will continue to do it with impunity forever? Post-modernism has had its fair run, enjoyed its fair share of flamboyance, but it now seems the time to talk straight: let us raise above the paralyzing suspicion, the sceptic nuisance, and look up to the example of these brave intellects that dare search for wider and better perspectives. Even if they prove, in the end, to be just that.

References

CHRISTIE, F. MATON, K., Disciplinarity: Functional Linguistic and Sociological Perspectives. London: Continuum International Publishing Group, 2011. ISBN: 978-1-4411-0885-2

MAYOS, Gonçal. Macrofilosofía de la Modernidad. Barcelona: EDICIONES dlibro. 2012. ISBN: 978-84-615-7529-9

MAYOS, Gonçal, COLLARDO, Francis, COELHO, Saulo. Cultura, Historia y Estado: pensadores en clave macrofilosófica. Barcelona: La Busca Edicións, 2014. ISBN: 978-84-941816-1-0

PINKER, Steven. The Blank Slate. The Modern Denial of Human Nature. New York: Penguin Books, 2002. ISBN 0-670-03151-8

POST, Robert C., "Debating Disciplinarity" (2009). Faculty Scholarship Series. Paper 164. http://digitalcommons.law.yale.edu/fss_papers/164

SLINGERLAND, Edward. What Science Offers the Humanities:Integrating Body and Culture. New York: Cambridge University Press, 2008. ISBN-13 978-0-511-38812-5

Communitarianist perspective of Fundamental Rights
Issues about the objective dimension

Raoni Macedo Bielschowsky
Rodrigo Antonio Calixto de Pina Gomes Mello

Abstract: A worldview and the freedom perspective are very influent in the political standpoint, consequently in the State conception, in the Constitutional Theory positioning and in the fundamental rights point of view. Especially these rights are very close to the freedom topic discussion, which reveals not only philosophic issues, but, also, pragmatics and dogmatic consequences. Consider the fundamental rights the apex of a cultural system, on its axiological basis, implies to identifies the objective dimension of fundamental rights with a particularly importance. Because if the freedom is understood by a holistic and concrete angle: "my freedom is part of the others community members' freedom and the freedom of each community participant is also part of my own freedom".

*Keywords***:** *Communitarianism – concrete freedom – fundamental rights*

1. Introduction

The Liberalism vs. Communitarianism debate takes shape in the '70s and '80s Anglo-American philosophical discussion, especially since the Rawls' publication "A Theory of Justice", first edited in 1971[1]. There are two important aspects in this struggle. The first one concerned to which is the individual subjacent to modernity[2] and another one about the justice idea and sources distribution politics.

Actually, this dispute is inserted in two others wide issues. The

[1] The book has a revised edition of 1999. RAWLS, John. *Theory of Justice*. 2nd Cambridge: Harvard Press, 1999.This is the edition used for this paper.
[2] PEREIRA COUTINHO, Luís Pedro. *Autoridade moral da Constituição*: da fundamentação da validade do Direito Constitucional. Coimbra: Coimbra Editora, 2009.

first, an ancient epistemological debate, which "Liberalism *Vs.* Communitarianism" is just a new chapter of a long history[3]. Looking for this discussion, the two sides of this dichotomy are: one stream that involves a deontological, formal and universalist conception of justice and of law – which binds liberalism; and another that offers a different concept of good and justice, material, teleological, historical and culturally contextualized – which binds communitarianism. The second issue is regarding to a political matter related to the question about which are the fundaments of subjects' freedom. If this fundament shall be related just to "individual and atomistic rights" (liberalism) or if is grounded on common standards shared by all community's participants (communitarianism).

Truly, despite this division, neither liberalism nor communitarianism is homogeneous streams. Lining with each perspective there are varied streams. For example, in the liberal side are inserted a cluster of liberal authors, bound to Liberal Equality ideas – Rawls, for instance – as well as conservative liberal authors, known as libertarians – the case of Robert Nozick. While in the communitarianist group can be easily found various streams of thought, represented, for example, for radical anti-liberal communitarianist, such as the neo Aristotelian Alasdair MacIntyre – which aims a community with strong bases in tradition and in *virtue ethics* –; some with specially identification with Republican tradition – as Michael Sandel – and others as Charles Taylor who tells about a "liberal communitarianism"[4]. And still, there are authors who sometimes are considered liberals and sometimes communitarians, as Ronald Dworkin[5].

These are quite different two worldviews, that influence a whole State conception, a Constitutional theory perspective, hence, necessarily, a fundamental rights theory[6].

Indeed, these two concepts, in some manners, also can be linked with what Alexy calls *positivistic fundamental rights theory* and *non-pos-*

[3] GARGARELLA, Roberto. *As teorias da justiça depois de Rawls:* um breve manual de filosofia política. São Paulo: Martins Fontes, 2008.

[4] Taylor describes the modern identity in a similar way to the liberal concepts. However, he is precise to fundament this identity in a historical-phenomenological construction. TAYLOR, Charles. *Fontes do Self*. 2nd ed. São Paulo, Edições Loyola, 2005.

[5] BIELSCHOWSKY, Raoni Macedo. *Democracia Constitucional*. São Paulo: Saraiva, 2013.

[6] BÖCKENFÖRDE, Ernst-Wolfgag. *Escritos sobre Derechos Fundamentales*. Baden-Baden: Nomos Verlagsgesellschaft, 1993.

itivistic fundamental rights theory. It means, the liberalism's fundamental rights speeches incline to split the legitimacy Law argument to the validity Law argument, working closely to the *positivist concept of law* that has developed around a cluster of ideas, as the social fact thesis, the conventionality thesis and the separation thesis. On the other side, it is common to all communitarianist's fundamental rights arguments identify the necessity of material basis to these rights, thus, approaching to *non-positivist concept of law* that has developed with the connection between morality and law, the overlap thesis[7] and, in some ways, with culturalistics theories. Therefore, there is a connection between the positivistic standpoint with the liberalism point of view and a link between the non-positivistic concept of law (and fundamental rights concept) and communitarianists perspective[8].

So, concerning the fundamental rights issue the two main questions to this dichotomy are related: in one hand, to the fundament of fundamental rights – if they demand some material basis to theirs *jus-fundamentality* or if this condition is just established by a formal criterion; and, in the other, to pragmatic implications, especially about the objective dimension of fundamental rights.

A last introductory comment seems necessary. I consider is needed to make an observation considering the English idiom, which the text is written. The issues and considerations here exposed are concerning a Roman-Germanic legal system[9] (continental law, civil law). Some concepts, ideas, definitions and, even, world concepts cannot be precisely described in English as well as would be delineate in continental mother languages, because the common law and the civil law juridical-political reality are quite different. For example, we do not agree that the translation of *Rechtsstaat, l'Etat du Droit, Stato di Dirito, Estado de Derecho* or *Estado de Direito* has precisely the same meaning of *Rule of Law*, the usual translation. They are to different experiences – cultural experiences – truly differents. In fact, the *Rechtsstaat's* definition is one of the most difficult civil law institutions/experience to translate to English. On this order, "The Rechtsstaat, whether used by Heller or Schmitt, remains the 'state based on the rule of law,' even though Heller and Schmitt bring

[7] These two usualy linked to Nature Law Theories.

[8] BIELSCHOWSKY, Raoni Macedo. *Democracia Constitucional*. São Paulo: Saraiva, 2013.

[9] Indeed, even at this point, for example, we would prefer the precise literally meaning of the expression: system of Eight.

to it vastly different attitudes and meanings. It is precisely consistency that allows one to map variations in attitude that Weimar theorist had toward their common legal and theoretical heritage"[10].

2. Liberalism and Communitarianism: Freedom and Liberty

Montesquieu had already said about the "*Different significations of the word Liberty:* [that] There is no word that admits of more various significations, and has made more varied impressions on the human mind, than that of liberty"[11].

Beyond Liberty[12] is a word, and, more than that, a feeling that is very hard to be precisely defined, philosophically, the meaning of Freedom/Liberty also has been comprehended by innumerous different perspectives. As was said, an interesting chapter of this ancient debate has been caught between Liberals and Communitarianists. Naturally this is a very deep and complex *dispute*, not just because several streams of Liberalisms and Communitarisms can be identified; neither only because this is just a new chapter in an antique epistemological discussion[13]; but also because this debate includes a clash between whole different world perceptions, which interferes in a lot of issues as the appropriate role of State, distributions of goods and, even, about the individual and human self-identity[14]. Despite all the complexity and amplitude of this discussion, the Freedom issue is a particularly important point for the debate about fundamental rights and, particularly, theirs objective dimension.

In this discussion, the Fundamental Rights' history is frequently articulated from a liberal perspective. Likewise, the fundaments of these rights are usually referred on liberal arguments.

---

[10] JACOBSON, Arthur J.; SCHLINK, Bernhard eds. *Weimar*: a jurisprudence of crisis. Berkley: University of California Press, 2002.

[11]MONTESQUIEU. *The Spirit of Laws*, Book XI, Of the Laws Which Establish Political Liberty, with Regard to the Constitution. Available from: http://online.santarosa.edu/homepage/jwikse/Montesquieu_spirit-of-the-laws.pdf.

[12] There is an interesting linguistic debate about the precisely meanings and differences between the terms Freedom and Liberty http://archive.lewrockwell.com/stromberg/stromberg14.html

[13] NINO, Carlos Santiago. El nuevo desafío comunitarista al liberalismo kantiano. In: NINO, Carlos Santiago ed, Ética *y derechos humanos*; un ensayo de fundamentación. 2nd Barcelona: Ariel, 1989.

[14] TAYLOR, Charles. *Argumentos filosóficos*, São Paulo: Edições Loyola, 2000, pp. 197 e ss.

In general, the Liberal perspectives understand the man in an atomistic, egoistic, individualistic manner, *grosso modo*, detached from his community, with a transcendental self-identity explanation. Coherent with this idea, the Liberal's freedom goes along the same path. To them, freedom is realized by an individual perspective, atomized, egoistic, split, transcendental and, *a priori*, unlimited. Because of that, the legitimacy is just found in formal processes, separated of any substantial argument. Since everyone is unlimited free, with any binds or parameters, the fair political choice is merely found in the simple sum of individual wills, statistically. The State must be neutral, composing uncritically with the will of the majority. In this case, a formal structure and a legitimacy imposition are enough to say that a Right is fundamental, hence, paraphrasing Kelsen, admitting that "any right can be a fundamental right".

However, we should ask if this liberal point of view really comprehends the whole Fundamental Rights frame and its role on the Constitutional Culture. Does this individual and atomistic perspective attends the juridical demands and perceive carefully the Constitutional State frame? Moreover, is this liberal perception really reliable to comprehend and substantiate the Fundamental Rights on all their dimensions? We think it doesn't.

We understand the legitimacy and validity of Law, especially, of fundamental rights, must be connected to material arguments, to a *background idea*[15]. However, these substantial arguments cannot be established by natural basis, but, in a historical, cultural, community *common ground*[16].

On its side, the Communitarianism(s) realizes that the man, the Law, the freedom and all the human experience cannot be understood by an atomistic, formally or individually way. On contrary of Rawls and other liberal's standpoint, the Communitarianism understands our identity, at least in part, deeply characterized by our group's belongings, linked to belonging feelings, marked by the fact we born inserted in certain communities and cultural practices[17]. The men just can be perceived as members of a cultural and moral community. All the experi-

[15] WALDRON, Jeremy. *God, Locke and Equality*: Christian Foundations in Locke's Political Thought. Cambridge: Cambridge University Press, 2002.

[16] DWORKIN, Ronald. *Is democracy possible here?*: principles for a new political debate. Princeton: Princeton University Press, 2008.

[17] GARGARELLA, Roberto. *As teorias da justiça depois de Rawls:* um breve manual de filosofia política. São Paulo: Martins Fontes, 2008, p. 140.

ences, frames and rights must be observed as a product of the community interactions[18]. And even the individual freedom just can be truly understood by a holistic perception.

More than that, in the Hegelian manner, Gonçal Mayos points out freedom cannot be comprehended as an individual task, but as a mission to all community members. Because of it, the adequate concept of freedom should create a connection between the persons, so they do not close upon themselves. Included to Hegel, the mutual recognition of individual freedom should imply the shared recognition[19].

3. Fundamental Rights and the Communitarianism Freedoms perspective

Since that, we think the Freedom Culture – the culture that the Constitutionalism realizes and often consolidates – demands a concrete and holistic perception[20], characterized by the individual liberties, but also, by all Fundamental Rights and all community's interests[21]. In this direction, we recognize that the fundamental rights are connected to this cultural background. They are the heart of the *maximum* ethical from a culture[22]. Without them we could not exercise a lot of other rights, so,

[18] GARGARELLA, Roberto. *As teorias da justiça depois de Rawls:* um breve manual de filosofia política. São Paulo: Martins Fontes, 2008, p. 140

[19] MAYOS SOLSONA, Gonçal. *G. W. F. Hegel.* Vida, pensamento e obra. Barcelona: Planeta De Agostini, 2008, pp. 109 e ss: "Para Hegel, a liberdade nunca pode ser a tarefa de cada indivíduo no seu isolamento particular, mas de todos os indivíduos juntos em comunidade e na qual se verifica uma institucionalização efectiva – em última instância, estatal – para garantirem precisamente a liberdade. Por isso, o conceito correcto de liberdade deveria ser para lançar pontes entre os indivíduos e não para que estes se feche sobre si mesmos, apesar de se apelar à sua consciência moral. Hegel, tal como Rousseau, Herder e Hörderlin – apesar de estes três, cada um à sua maneira, também denunciarem o despotismo das instituições sobre os indivíduos –, pensa que o reconhecimento mútuo da própria liberdade deve também implicar o reconhecimento do partilhado. Rousseau, Herder e Hölderlin dão igualmente muita importância ao reconhecimento emotivo da amizade, do amor e do sentimento que leva os homens a sentirem-se como irmãos e não só como participantes de frias e distantes instituições – o pior sentido de concidadãos".

[20] SALGADO, Joaquim Carlos. *A Idéia de Justiça em Hegel*. São Paulo: Loyola, 1996.

[21] SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*. 10. ed., Porto Alegre: Livraria do Advogado, 2010. p. 141.

[22] SALGADO, Joaquim Carlos. *A Idéia de Justiça no Mundo Contemporâneo*: fundamentação e aplicação do Direito como *maximum* ético. Belo Horizonte: Del Rey, 2007.

they are the fundament of all the other rights[23], because they are "*the representatives of a concrete value system, of a cultural system that sums the meaning of the State life contained in the Constitution*"[24].

Therefore, the fundamental rights are the essential content of the material constitution. With this role, signifying the mainly connection between positive law and community values, the fundamental rights politically represent the community's *material integration will* and legally the legitimation of the positive legal and state order itself. Indeed, the positive order is *valid* just while it represents this community system of values[25].

Consequently, a communitarianist Fundamental Rights Theory – not based on a atomistic individual freedom, but on a *concrete and holistic freedom* – implies different arguments and consequences from the orthodox (and liberal) Fundamental Rights Theory. For example, according to this communitarianist base, the Fundamental Rights – even the traditional *blue rights* – cannot have their efficacy valuated from an individualistic angle, just concerning singular person standards and his defense against the State. Instead, it shall be considered as values and aims that the political community wishes to promote and achieve. According Taylor, for example, the State shall not be understood only by an instrumental perspective, but, truly, as important part of the individuals themselves[26]. So, considering the individual is part of his cultural community, on the same extent that the community is an essential part of the individual's identity, the *concrete freedom* is common to everyone.

---

[23] SALGADO, Joaquim Carlos. Os Direitos Fundamentais. *Revista Brasileira de Estudos Políticos*, vol.82, 2006, p.15 – 69.

[24] SMEND, Rudolf. *Constitución y Derecho Constitucional*. Madrid: Centro de Estudios Constitucionales, 1985. It's curious that in *Constitutional Theory* Schmitt follows Smend in this viewpoint, besides has different posterior developments: "*Significación histórica y jurídica de la Declaración solemne de derechos fundamentales*. La Declaración solemne de derechos fundamentales significa el estabelecimiento de principios sobre los cuales se apoya la unidad política de un pueblo y cuya vigencia se reconoce como el supuesto más importante del surgimiento y formación incesante de esa unidad; el supuesto que – según la expresión de Rudolf Smend – da lugar a la *integración* de la unidad estatal", SCHMITT, Carl. *Teoría de la Constitución*. Madrid: Alianza Editorial, 2011.

[25] SMEND, Rudolf. *Constitución y Derecho Constitucional*. Madrid: Centro de Estudios Constitucionales, 1985.

[26] NINO, Carlos Santiago. El nuevo desafío comunitarista al liberalismo kantiano. In: NINO, Carlos Santiago ed, Ética *y derechos humanos*; un ensayo de fundamentación. 2nd Barcelona: Ariel, 1989.

Thus, the neighbor's freedom is also indispensable part of my freedom.

4. *Jusfundamentality* and Objective dimension

Naturally, this special axiological basis of a fundamental right, implies, also, some positive specifications, usual and similar in all constitutional world. Recognize the *jusfundamentality* of a right, based on its closeness with this cultural *background*, implies some special conditions of protection.

The normal Constitutional rules usually presents a special protection compared to ordinary legislation – at least in the current structure for rigid Constitution. Generally it is recognized a higher hierarchic level of these constitutional rules, with a distinguished legislative process. But, even among the constitutional rules, to the fundamental rights are recognized some others exceptionalities in addition to these superior legislative conditions.

They can basically be identified in six general characteristics about this particular positive protection, typically used by the constitutional frames. They are: a) the fundamental rights' norms are universal and absolute in the legal system[27]; b) the unavailability of fundamental rights, even by their owners, themselves [28]; c) the binding of the constituted authorities (executive, judicial, and even legislative), which have their choices, decisions, actions and controls guided, materially parameterized by the fundamental rights; d) the immediate applicability (directly) of the rules of fundamental rights; e) the fact that the fundamental rights' rules have special protection (or even a real impediment) to the possibility of constitutional amendment through its protection as an entrenchment clause; f) and, considering all these points, we could also identify that the norms of fundamental rights should be placed on the

[27] On the universality, that means an abstract universality as an essential feature of the Right. Naturally, there are fundamental rights norms which are targeted to particular groups of citizens, such as workers, children or the elders. However, this is not what is considered "universality" as an essential category of Law. For further developments on key categories of law: SALGADO, Joaquim Carlos. *A Idéia de Justiça no Mundo Contemporâneo*: fundamentação e aplicação do Direito como *maximum* ético. Belo Horizonte: Del Rey, 2007.

[28] MARTEL, Letícia de Campos Velho. *Direitos Fundamentais Indisponíveis*: os limites e os padrões do consentimento para a autolimitação do direito fundamental à vida. 2010. 461 p. Tese de Doutorado. UERJ. Rio de Janeiro, disponível em: http://works.bepress.com/leticia_martel/5/.

superordinate level of the legal system.

So, on this argumentative line, even concerning an exclusively positive standpoint, we can see that the objective dimension of Fundamental Rights is not exceptional, instead, it is an important part of the regular normative force of the Fundamental Rights' norms. This point of view implies a whole different structure, particularly on three issues: a) the Fundamental Rights as normative obligations to *constituted authorities*; b) it is necessary to recognize an immediate Fundamental Rights efficacy (application), objectively binding the State action; c) as well, it is mandatory to identify an horizontal efficacy to the private interactions.

Since the very moment the *freedom* is comprehended as a *concrete freedom*, so, the freedom of each community members is part of the freedom of every community member, it is logical recognize the mainly addresser of the fundamental rights' norms are each individual, as well.

Therefore, this objective dimension is a result of this necessarily concrete freedom perception. From which the fundamental rights themselves are comprehended as grounding community values that their effectiveness is in the interest of all its members. And, because of that, it's also an objective duty for the State itself and, even, for all the citizens themselves.

5. Conclusion

So, worldview and the freedom perception are two important topics for the moral philosophy. They are very influent in the political standpoint, consequently in the State conception, in the Constitutional Theory positioning and in the fundamental rights point of view.

These rights are very close to the freedom topic discussion, which reveals not only philosophic issues, but also, pragmatics and dogmatic consequences. Take a position by a communitarianism perception implies to understand a *holistic* freedom standpoint. Infers in a *concrete freedom* point of view, culturally communed, parameterized by equality common basis.

This stance causes a different attitude toward the question of the objective dimension of fundamental rights because with a concrete freedom concept the respect to each community member fundamental right is a common task for every community participant.

My freedom is part of the others freedom, and the freedom of each community participant is also part of my own freedom.

References

BIELSCHOWSKY, Raoni Macedo. *Democracia Constitucional*. São Paulo: Saraiva, 2013.

BÖCKENFÖRDE, Ernst-Wolfgag. *Escritos sobre Derechos Fundamentales*. Baden-Baden: Nomos Verlagsgesellschaft, 1993.

DWORKIN, Ronald. *Is democracy possible here?:* principles for a new political debate. Princeton: Princeton University Press, 2008

GARGARELLA, Roberto. *As teorias da justiça depois de Rawls*: um breve manual de filosofia política. São Paulo: Martins Fontes, 2008.

JACOBSON, Arthur J.; SCHLINK, Bernhard eds. *Weimar*: a jurisprudence of crisis. Berkley: University of California Press, 2002.

MARTEL, Letícia de Campos Velho. *Direitos Fundamentais Indisponíveis*: os limites e os padrões do consentimento para a autolimitação do direito fundamental à vida. Ph.D. Thesis UERJ. Rio de Janeiro, 2010. Available from: http://works.bepress.com/leticia_martel/5/.

MAYOS SOLSONA, Gonçal. *G. W. F. Hegel.* Vida, pensamento e obra. Barcelona: Planeta De Agostini, 2008.

MONTESQUIEU, Charles de Secondat. *Do espírito das leis*. São Paulo: Martin Fontes, 2007.

NINO, Carlos Santiago. El nuevo desafío comunitarista al liberalismo kantiano. In: NINO, Carlos Santiago ed, Ética *y derechos humanos*; un ensayo de fundamentación. 2nd Barcelona: Ariel, 1989.

PEREIRA COUTINHO, Luís Pedro. *Autoridade moral da Constituição*: da fundamentação da validade do Direito Constitucional. Coimbra: Coimbra Editora, 2009.

RAWLS, John. *Theory of Justice*. 2nd Cambridge: Harvard Press, 1999.

SALGADO, Joaquim Carlos. *A Idéia de Justiça em Hegel.* São Paulo: Loyola, 1996.

SALGADO, Joaquim Carlos. Os Direitos Fundamentais. *Revista Brasileira de Estudos Políticos,* vol.82, 2006, p.15 – 69.

SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*. 10. ed., Porto Alegre: Livraria do Advogado, 2010.

SCHMITT, Carl. *Teoría de la Constitución.* Madrid: Alianza Editorial, 2011.

SMEND, Rudolf. *Constitución y Derecho Constitucional.* Madrid: Centro de Estu-

dios Constitucionales, 1985.

TAYLOR, Charles. *Argumentos filosóficos.* São Paulo, Edições Loyola, 2000.

TAYLOR, Charles. *Fontes do Self*. 2nd ed. São Paulo, Edições Loyola, 2005.

WALDRON, Jeremy. *God, Locke and Equality*: Christian Foundations in Locke's Political Thought. Cambridge: Cambridge University Press, 2002.

General Law *versus* Specific Law

Rodrigo Augusto Suzuki Dias Cintra[1]
Daniel Francisco Nagao Menezes[2]

Abstract: The intention of this article is to analyze the differences between the General and Specific Law Act. These institutes, linked to very large systems of Common Law and Civil Law are in a moment of reflection on their limits to globalization. The text will take you to a background thread that is the space of liberalism in the current law.

Keywords: General Law; Specific Law; Liberalism.

1. Introduction

The Introduction Law Books in Latin America and their own legislative bodies of this region of the world teach that good law is a gen-

[1] Graduated in Law from the University of São Paulo (USP Largo-San Francisco), Degree in Philosophy from the Faculty of Philosophy, Letters and Human Sciences, University of São Paulo (USP-FFLCH), MA and Ph.D. in Philosophy and General Theory of Law the Faculty of Law at USP. Was received with praise for the originality of theme and approach in defense of doctoral thesis at USP. He teaches at the Mackenzie Presbyterian University and the University Sao Judas Tadeu. Is founder and coordinator of LADIFILA (Laboratory of Law, Philosophy and Art). Operates on the following subjects and authors: the relationship between law, philosophy and Arts Legal Sociology, Philosophy of Law, Political Philosophy, John Locke, Machiavelli and Shakespeare. Currently, makes postdoctoral studies on Human Rights and Ideology in the Law Faculty of the University of Coimbra (Portugal).

[2] Graduated in Law from the Catholic University of Campinas (2002), specialization in Constitutional Law and Civil Procedure Law both from PUC-Campinas, Specialization in Curriculum and Teaching Practice in Higher Education at the University Center Padre Anchieta, Master in Political and Economic Law by Mackenzie University. Is currently a doctoral candidate in Political and Economic Law at Mackenzie. University Professor at the Faculty of Law of the Mackenzie Presbyterian University, Campinas campus and Colleges of Campinas - FACAMP.

eral law that clearly and comprehensively, reaches the entire population of a given territory, both in extent and in understanding of the law.

The view that the law should be generic, as taught in Latin American universities is one of the possibilities of analysis of the law. Behind the generic nature of the law is a philosophical and political: Liberalism. This current philosophy and economics argues for the existence of formal equality between individuals, besides being equal, they are free to act. Considering that all men are equal and free, the legal system should follow such patterns, reason reaches all men equally.

The political liberalism, coming from the American and French revolutions had as an essential characteristic individualism, forging a state that allows the free participation of all citizens in the political process given the formal equality among all individuals is also essential requirement of political liberalism.

This liberal model - individual, does not hold with the massification of society, took place mainly after the Industrial Revolution. With the inclusion of the masses in the democratic, that is, elections, political decision-making process removes the element of rationality, philosophical basis of liberalism. The masses act irrationally.

The inclusion of the masses in the political process leads to the impossibility of dialectic debate political issues made in the legislature. This new configuration of the masses, no longer allows the use of the old model of liberal democracy, which must be replaced by a model of technocratic government that is responsible for making rational decisions, the masses away from the political process (deliberative) and transforming them into an element of the government's political legitimacy by acclamation.

By removing the people from the government (democracy stuff) or the execution or decision, arguing that the government should be technical, democracy loses its essential function, which is the government of the people. In thinking of the Brazilian Francisco Campos and German Carl Schmitt, the mass to be unable to make technical decisions (rational) should be removed from power, leaving the function of government to state technicians.

The model of general legislation - arising from the decision of the people in parliament - is replaced by centralized technical decision, which happens to be specific to the case, in opposition to the liberal proposal of the seventeenth century.

This paper seeks to criticize the universalist conception of the law from the authoritarian thinking developed in the 20 and 30 century,

this thought that attacks the form of drafting the law, and eventually empty the contents of the universal law.

2. Aristotle: the origin of the universal thought

Aristotle, the founder of the philosophy of law, is the first that deals with the concept of universality applied to law. The Greek thinker works with the concept of Universal Justice and not with the concept of Universal Law, but the structure of their reasoning is based on the universalist thought of centuries later.

The Universal Justice for Aristotle is that everyone should respect the law (positive) of each state and these laws in turn, represent the totality of social life. This representation of social life made by positive law derives from the political model proposed by Aristotle, a model of social life that can be said, was the basis of communism. This is because Aristotle held that every man belonged to a community, and only lived a result of belonging to this community. The man is a political animal, as Aristotle claimed.

> "If the law (nomos) is a prescription of generic and that all links, then your order is the realization of the good of the community, and as such, the Common Good. The action that is linked to the legality follows a standard that everyone and everyone is addressed, and as such, this action must correspond to a fair and lawful form of justice to it consequently is here called legal justice "(BITTAR, ALMEIDA, 2010, p 130).

So life was given to the community and there is no possibility of life alone. There is a shed individualistic in Aristotle's thinking. With this, all participate in community life, and there is the representative model developed after the French Revolution. The submission to law is not to protect the individual but for the common good, the common good that they all participate.

This leads to the concept of equality, which is a *conditio sine qua non* for the functioning of the political model. All will govern and be governed born there the need for equality between citizens. The models proposed by Aristotle seek justice match, one way or another, so that citizens can exercise political justice (dikaion politikon) that result in self-sufficiency of community life (autárkein). The local authority is linked to the concept of sovereignty is the ability of the community to

self-organize, and there is, fill in wealth distribution.

The law for such reasons are exercising sovereignty community. There are, for Aristotle, individual laws, based on the will of the ruler. Soon the law is above the individual will and the man has residual function (complimentary) in the event that the law does not contemplate the case, but always with a view to achieve the common good.

The thought of Aristotle is broken with the Roman law which shall focus on the individual. The Roman society creates essential concepts of liberalism, such as personality and private property. The concept of justice in this period, subsequently endorsed by St. Augustine, was "giving to each what is his." This design focuses on the individual especially considering that in the Roman period there is confusion between public and private.

> "So far from accepting the mere formal distinction that reside says the distinction between public and private as the distinction between what is and what is Roman state interest and usefulness of particular passes to realize that the mechanics of the class dominant, accessibility to public functions and the exercise of political decision making and / or legal jogging on the basis of the lack of distinction between public and private. So much so that the indications for public office stemmed necessarily one that was example of bonus paterfamilias, who possessed wealth and nobility of prominence, ie, their way of being deprived influenced his political rise, and vice versa. " (BITTAR, 2011, p. 121)

St. Augustine radicalized individualist thinking by proposing that the salvation of man, different conceptions of the Greek and Roman, was attained by faith. Thus, human actions (act) no longer mattered. Justice for Augustine was the Laws of God and not the laws of man or his actions. Thus the measurement of justice can not occur by the analysis of the acts of man, but merely the measurement of God. The fair would come from a divine grace, men would fit only have faith to be saved or blessed by God.

Faith, in turn, is an individual act away by the thought of St. Augustine design of any collective or state. The thought of St. Augustine is full of individualism.

The thought of St. Augustine, which lasted nearly a thousand years, was broken with St. Thomas Aquinas that perfects the concept of St. Augustine affirming that salvation comes not only faith, but also of

human action. Justice is not a virtue generally. Justice is always relative to another. The sin against the neighbor is not a general sin, but only opposed to the sin committed against himself. Therefore justice is not a virtue generally, as proposed by Aristotle. However, the same relationship that an individual must possess in relation to each other must be considered in relation to all individuals reason, it is generally indirectly. In sum, ultimately becoming a standard of conduct, an order that directs man to the common good.

This Court is also called cool, by the fact that - as St. Thomas Aquinas - Racing the law ordering the man to the common good. The text of the Summa of Theology reads, referring to the response and resolution of the three objections:

> *"I answer. Justice orders the man in his relations with others. What can happen in two ways. With others considering singularly, or with others in general, considering that it serves the community, serves all individuals who belong to it. Now, both of these modes can be applied to justice in their own sense. It is, in effect, that all who belong to a community with it have the same relationship of parts to the whole. Now the part, for all that it is, belongs to any and all assets of the party must be ordered to the good of the whole. Thus the good of every virtue, either order the man to himself, whether the order to other people, includes a reference to the common good, which guides the justice. Thus, the acts of all the virtues can belong to justice, while it directs man to the common good. In this sense, justice is a general virtue. And as befits the law ordering the man to the common good, as has been said, that justice is often called cool because, in fact, for her man to submit to the law that guides the common good. (...). The third, it must be said that the things that concern us can be ordered individually to another, mainly because of the common good. Therefore, legal justice, while orders the common good, can be named virtue general. And for the same reason, injustice can be called common sin, hence the biblical sentence: all sin is lawlessness. "*(AQUINO, 2005, p. 63)

St. Thomas Aquinas ends up influencing the later Renaissance - movement resumption of classical studies, transferring percent of the knowledge of God to man, which was inaugurated by Machiavelli in his book "The Prince" puts the government depends not only on fortune, but also the virtue of the ruler, in other words, good government depends not only God, but also the quality of the man, although there is also this period Absolutism that justifies government power by a divine will.

To overcome this contradiction, many historians of philosophy have come to designate the Renaissance as a period of transition to modernity or initial rupture against the medieval knowing who prepared the advent of modern philosophy. In this perspective, the Renaissance would have two main characteristics: firstly, it would be a time of great intellectual and political conflicts (between Platonic and Aristotelian between atheists and humanists Christian humanists, between church and state, between secular and religious universities academies, between concepts geocentric and heliocentric, etc..), and on the other hand, a theoretical moment of uncertainty, the Renaissance has not yet found ways of thinking, concepts and discussions that had definitely abandoned the land of medieval polemics.

Alysson MASCARO (2010, p. 133) sums up what happened during this period:

> "The economic and social base on which to develop the legal and philosophical thoughts of this time is the emergence and consolidation of capitalism. The state, which begins to be exalted in the early thinkers and then limited by others, is a typical instance of social causes intimate born with capitalism. Individualism, which implies a specific reflection on the relations between society and the state with the bourgeois private interest, is also a product of an era that is based on individual boldness in pursuit of profit, in individual ownership, private foundations in anyway at all a productive system today present in our reality. "

Capitalism as socioeconomic structure ultimately forge the Philosophy of Law of the modern age, whose main features are: individualism, subjective rights, limitations of state law, the universality of rights, antiabsolutism, contractualism. These characteristics form the Enlightenment which served as the philosophical basis of the liberal revolutions (American and French).

The individual becomes the center of all things, including their own knowledge, and organize society from an agreement will among individuals. For Crawford Brough MACPHERSON (1979, p. 275) there are seven characteristics of individualism:

> "(a) which gives the attribute of human beings is the freedom from dependence on the will of others;
> (b) the freedom of others means freedom from dependence on any relationship with other, less relationships in which individuals

seeking to voluntarily enter their own benefit;
(c) The individual is essentially the proprietor of his own person and their own capacities, for which he owes nothing to society;
(d) While the individual is unable to sell all of its ownership of his own person, he can alienate his capacity for work;
(e) Human society consists of a series of market relations;
(f) Since the freedom of the will of others is what makes the human person, freedom of each individual can only be legitimately limited by the duties and standards needed to ensure the same freedom to others;
(g) The political society is a human contrivance for the protection of individual ownership of one's own person and property, and (therefore), to maintain orderly exchange relations between individuals, considered as owners of themselves."

3. The Legal Positivism and Individualism

Transporting this philosophical context for the legal context we are faced with positivism. Legal positivism right away from all metaphysical element, natural, sociological, historical, etc.. In fact, positivism is away is the communal conception of the basis of legal obligations and transferring this legal obligation for the individual, whose reason becomes the source of law itself.

Thus, all individuals, by an act of your reason, know the legal rules in the same way, thus, the same interpretation to the standard positively valued by the state, this argument justifies the universalism of positive law. As the application of the law an act of individual interpretation of the law, by force of reason, will result in universal understanding of law, the validity of positive law becomes a purely formal criterion, not implying the historical and geographical context in which the law positive is inserted.

The function to create positive law rests, turn to the state. This law created by the state, especially the representatives of the people, also has the effect of limiting the state itself to trace the main lines of action of the State. We created the so-called rule of law. Rule of law is a state or form of state-political organization whose activity is determined and limited by law.

The rule of law would be profiling, as well as a legal-political paradigm of Western culture, forming the so-called liberal state in the West.

Was in the natural environment of Western culture, the site of the forge of a state-based consensus on principles and values that, taken together, form the so-called rule of law. Are fundamental dimensions of this legality: government laws (and not men!) General and rational organization of power according to the principle of division of powers, the rule of the legislature, independent courts assurance, recognition of rights, freedoms and guarantees, political pluralism , operating system state bureaucratic subordinate to the principles of responsibility and control, exercise of state power through legal constitutionally determined.

The power of the law is not only to regulate and limit the power of the state but also to regulate the whole society. To this creates a model of division of functions. Initially, representing the people, which happens to be the holder of sovereign power, is the Legislature that has function to create laws that will organize the state and social life, the Executive will comply (execute) laws and the judiciary to intervene in case of breach of the law or doubt in its interpretation.

As we all know through an act of reason, everyone will know also the determination of the law, which made by the representatives of the people, always seek the common good. This is the belief of the liberal model.

4. Reviews of the Liberal Model

Brazil and Germany lived in different contexts in the interwar period (a period of greatest intellectual output of Schmitt and Fields). The first country left the classical liberal model of the First Republic and recovered with relative success of the economic crisis of 1929 while the second sought to rebound from losses of World War I, and the shackles of the Versailles Pact. The World War II seals the end of this historic moment of global reorganization of power and economy in shock state positions arguing for a return to the Belle Époque, the expansion of Soviet communism or even intransigent defense of nationalism.

Although both authors are remarkably illiberal by their positions, there is a curious fact that little is handled by the human sciences. To the authors, although the state is strong, with total presence in social life, allows the existence of a free economy without any government intervention. Thus, the common criticisms Campos and Schmitt restricted to liberal political model, and, in the economic area, the state of the economy remains distant, both believing in the existence of its own rationali-

ty of the market that allow the distancing of the state (political .)

The political liberalism, coming from the American and French revolutions had as an essential characteristic individualism, forging a state that allows the free participation of all citizens in the political process given the formal equality among all individuals is also essential requirement of political liberalism .

This liberal model - individual, does not hold with the massification of society, took place mainly after the Industrial Revolution. With the inclusion of the masses in the democratic, that is, elections, political decision-making process removes the element of rationality, philosophical basis of liberalism. With general and abstract concepts, especially issues such as equality and freedom, no longer find space in the new reality, mass. Are "elegant ideas and abstractions of intellectual luxury" (Torres, 1914, p. 93). Both authors recognize that liberalism, and the right - especially the Constitutions do not apply in practice because they do not reach all the individuals, and only an elite, are disconnected with reality. The mass, the people, do not act as rationally propose liberals.

The inclusion of the masses in the political process leads to the impossibility of dialectic debate political issues made in the legislature, this structure extremely clear in parliamentary speeches Francisco Campos which were published throughout his career.

This new configuration of the masses, no longer allows the use of the old model of liberal democracy, which must be replaced by a model of technocratic government, especially in public administration, economics and education (CAMPOS, 1950, p. 37) that is responsible for making rational decisions, the masses away from the political process (deliberative) and turning them into an element of political legitimacy of the government. To SEELAENDER and CASTRO (2010, p. 268):

> "According to Campos, the main consequence of this irruption of the masses and the irrational within the political process was the gradual divorce between liberalism and democracy. Given the emotions of the masses, the regime of free discussion of liberalism, subjected to methodical doubt all the key decisions of the company, started to threaten the very political integration. In this context, democracy, to maintain and sustain the appearance of rationality of the political system, had to resort to methods paradoxically irrational political integration. The brainstorming gora had to be limited to subjects unable to generate tensions threatening the political unity, the fundamental decisions of the national community had to be removed for discussion and made into constitutional dogma,

to which would require at least one external reverence."

From this reasoning the masses are limited to a plebiscitary democracy in which only manifest themselves in support or disapproval to the leader, who plays a charismatic leader of the nation that is composed of the mass. Arise then, all the mechanisms of the relationship between the state and the masses, the common fields and Schmitt, as the idea of nation, national unity, charisma, leadership, spirit of the people, among others.

By removing the people from the government (democracy stuff) or the execution or decision, arguing that the government should be technical, which would not happen in mass democracy, democracy loses its essential function, which is the government's people. In thinking of the authors analyzed (Campos and Schmitt) mass to be unable to make technical decisions (rational) should be removed from power, leaving the function of government to state technicians.

Thus, both authors are interpreted as illiberal, because contrary to political model coming from the eighteenth century who believed in the existence of a rational model of decision making which, according to the authors, was obsolete in the twentieth century.

From this premise, is built both in Europe and in Brazil, a theory illiberal, whose leading exponents legal form Francisco Campos and Carl Schmitt, which, based on previous doctrinal formulations - especially Francisco Campos - reinterpret various legal concepts adapting the Law , Politics and Economics reality that historical moment.

Taking as true that one of the fields and the thought of Schmitt is the need of technical rationality, justifies the statement made above that the economic bias, both maintains a liberal stance.

The masses, as stated by Carl Schmitt (2006, P.17), lose their meaning before the technique, which ultimately generates the twentieth century, the era of technical neutrality.

This is because, in the economic field, there is the influence of the irrationality of the masses, making the economy immune to moment decisions, which characterizes democracy. In economics, the rational element is the market itself, which is sufficient to organize economic forces, even should the economic order as a model for some policy decisions, especially in the provision of public services by the state.

Thus, it allows the coexistence frictionless please Authoritarian State, and Economy Liberal one, which in fact was a rearrangement of the structure of social policy for maintaining economic system, creating,

in the words of Friedrich POLLOCK (1998, p . 72) as a "state capitalism."

This is because it is society that ensures the economic order and the state to absorb and regulate society, ultimately regulate also the economic order, changing both countries, their state structures, to preserve the capitalist economy.

The political action - state and society - are the essential elements of the training market (Polanyi, 2000, p. 17) and they may not be designed as self-sufficient. The emergence of the "market" as a place of trade, was stimulated by the State as a result of their economic and monetary policies. The Liberal Theory, in the century. Century, with the rise of the political importance of the "markets" the survival of the States, has to defend the hypothesis that the market did not need institutionalization and could organize itself, removing the political participation of the state and society.

Fields and Schmitt restate the policy control of the economy, without, however, making changes in the forms of production and distribution of wealth. These recognize that the human economy is a market economy, but maintains the existence of market society, ie social forces organized to produce and consume, but now, organized by the State and not by the market itself.

5. Final Thoughts

Carl Schmitt and Francisco Campos converge their thoughts toward criticizing the liberal model that provides for the establishment of general laws. For both, the period in which they lived (30s of last century) lived the end of liberal thought of earlier centuries, and the correct path to salvation was in technique. The life of the state (bureaucracy), social life and economic life should become as technical as possible, away from the field of political passions that were irrational.

The field of art, which would lead to the era of neutrality, in turn, ends up denying the old concept that the law has a general, ie, it is valid for everyone, including those who have drafted the law.

In designing the authors, the law is used as an instrument of reason, and is directed to purposes (recipients) specific. What determines the drafting of the law, is the effectiveness, rationality and not the old concepts of universality and equality of all.

In thinking of the authors, especially Carl Schmitt, the political decision is to decide who is friend and who is foe, and the legal appara-

tus is used to implement state actions within this policy decision.

The laws are directed to specific people or groups, and may even exclude other persons or groups in the same situation, and this was common in economic law German Nazi period, at which time, only a few economic groups were able to exercise their economic activities, with the remaining excluded from the right to economic exploitation.

References

AQUINO, Tomás de**. Suma Teológica .** Vol. VI. São Paulo: Loyola, 2005.

BITTAR, Eduardo Carlos Bianca; ALMEIDA, Guilherme Assis de. **Curso de Filosofia do Direito.** 8. ed. São Paulo: Atlas, 2010.

BITTAR, Eduardo Carlos Bianca. **Curso de Filosofia Política.** 4ª ed. São Paulo: Atlas, 2011.

CAMPOS, Francisco Luís da Silva. **Ensino Clássico e Ensino Técnico.** *in* Digesto Econômico, Vol. 06, n. 69. São Paulo: ACSP, agosto 1950, págs. 33-38.

MAPHERSON, Crawford Brough. **A Teoria Política do Individualismo Possessivo.** Rio de Janeiro: Paz e Terra, 1979.

MASCARO, Alysson Leandro Barbate. **Filosofia do Direito.** São Paulo: Atlas, 2010.

POLANYI, Karl. **A Grande Transformação – As Origens da Nossa Época.** 2ª ed. 13ª tiragem. Tradução Fanny Wrobel. Rio de Janeiro: Elsevier, 2000.

POLLOCK, Friedrich. **State Capitalism: Its Possibilities and Limitations.** *in* ARATO, Andrew; GEBHARDT, Eike. *The Essential Frankfurt School Reader.* New York: Continuum, 1998, págs. 71-94.

SCHMITT, Carl. **La Época de la Neutralidad.** Buenos Aires: Editorial Struhart & Cia., 2006.

SEELAENDER, Airton Cerqueira-Leite; CASTRO, Alexandre Rodrigues de. **Um Jurista Adaptável Francisco Campos (1891-1968).** *in* MOTA, Carlos Guilherme; SALINAS, Natasha Schmitt Caccia. (coord.) *Os juristas na formação do Estado-Nação brasileiro (de 1930 aos dias atuais).* São Paulo: Saraiva. 2010. p. 255 -292.

TORRES, Alberto. **A Organização Nacional.** Rio de Janeiro: Imprensa Nacional, 1914.

From Pontes de Miranda to Mireille Delmas-Marty

A journey to review the theory of sources of law to accommodate the new rights generated by nanotechnological revolution

Wilson Engelmann[1]

Abstract: There is a revolution on an unprecedented scale in progress: the nanoscale, which can be represented by the scientific notation 10^{-9}. The positive and negative effects of this revolution are still poorly understood. Because of this, the legal frameworks do not exist yet, being a challenge to Law. The Theory of Legal Fact of Pontes de Miranda is a structural model present in all branches of Law, although it has been created especially for Private Law. This theory shows to be inadequate to account for the new rights and duties arising from nanotechnology. It is proposed the adoption of a dialogue between the sources of Law, in which national and international standards can interact to accommodate new situations, giving them constitutionally and conventionally adequate legal effects. The idea of organizing the rules in a pyramidal structure will be replaced by horizontal forms of arrangement of the several sources, which can be handled as if they were open and flexible rings for formatting Law with the use of discretion in a responsible and creative form.

Keywords: Nanotechnology. New Rights. Theory of Legal Fact. Sources of Law.

Introduction

Products of different kinds, which are available to consumers, are already being produced at the nano scale. In laboratories, research continues in an accelerated process of development. Industries invest on these novelties, trying to increase their profit, considering the added value that nanotechnology can provide. Scientists have not yet reached a consensus on the most appropriate methodology for measuring the potential risks that production and commercialization of products at the

[1] Doctor and Master in Law by the postgraduate Programo f Law of Unisinos/RS.; CNPQ Grant holder of Research Productivity; Professor of the referred Program of Master and Doctorate.

nano scale may generate for workers, for consumers and for the environment. Also, legal frameworks do not exist yet. There is a global debate on this topic, but considering the lack of the referred methodology and the absence of an inventory of the number of nano particles that already exist, the establishment of regulation probably will not be very simple. Law, as a representative of Human Sciences, seems indifferent to the effects — positive and negative — of the revolution caused by nanotechnology. It is necessary to bring the innovation that is under development in Exact Sciences into Law. Therefore, this article aims to bring some details about nanotechnology and to enhance that nanotechnology requires changes in legal production. Thus, it is necessary to review the Theory of Legal Fact, formulated by Pontes de Miranda, especially in the setting of factual support and in how the incidence and interpretation of legal production are facilitated, in order to accommodate the new rights and duties that are emerging from the discoveries at nanoscale. The theory of sources of law has to be revisited, so that through the dialogue between the sources of law it becomes more flexible. The topic is relevant and necessary considering the need to integrate Law in the innovative and challenging path generated by nanotechnology. Given these objectives and justification, the article also aims to answer the following question: under what conditions the revision of the Theory of Legal Fact, as planned by Pontes de Miranda, may be sufficient and adequate to account for the new rights and duties generated from nanotechnology and bring innovation to the construction of legal structures? This is a problem that shows up to Law as a whole, but it can be examined from the Theory of Legal Fact, formulated by Pontes de Miranda, as a central anchor of his Treaty of Private Law. As Pontes de Miranda admits, its formulation applies not only to private law, but it also supports the construction of Public Law. So, it seems to be a paradigmatic theory to analyze the need to review the way of construction of law as a whole. From this perspective, it is possible to see the importance of this theory and the need for its reformulation in order to ensure a longer and more effective life to law.

1. Theoretical foundation

There is a technological and scientific revolution in progress. It is developed on a scale that is poorly known, but that has unprecedented possibilities and potential. It is the construction of things at the nano

scale, which is, on the billionth part of a meter (ENGELMANN, 2011).

"Nanotechnology is a [new] field of very recent human knowledge, which is transverse, promising, inter/multi and transdisciplinary, in rapid expansion, with potential for innovation and transformation in the XXI century" (BINSFELD, 2011, p. 90). Here it is possible to see an indication of the necessity of innovation in Law, especially in the way legal effect is attached to social facts: nanotechnology. As nanoscale permeates various technologies, nanotechnology is a new industrial and scientific possibility, with unprecedented benefits and risks, considering the physicochemical interactions with different characteristics from those produced at larger scales, it is not a "scientific breakthrough" that will be linked to an area of knowledge, but it will involve all areas characterized yet, each one with specific contributions and looks; Law will have a relevant role, as legal frameworks are all to be built. There will be influences in all branches of law. This will require an effective (r) evolution in the conformation of legal effects; Law must learn to deal and interact with the other areas of knowledge, especially the "Hard Sciences", to understand the Nanotechnological phenomenon. There is a significant difficulty in developing regulatory frameworks, because not even the exact and/or technological areas know all the possibilities and risks that work at nanoscale may generate. There is no consensus or uniformity regarding the methodology for carrying out these assessments. And more than that:

> "[...] The basic principle of molecular nanotechnology is the construction of nanomaterials (nanowires, nanotubes, nanocoated, quantum dots, fullerenes, dendrimers and nanoporous materials) that are useful to life, from nanoparticles, atoms and natural elements that have physical and chemical properties completely different from natural elements, due to quantum effects" (BINSFELD, 2011, p. 90).

Nanoscale has always existed in nature. However, now, human beings are able to visualize them and reproduce them in laboratory because of the development of special equipment. Therefore, another challenge is the artificial production of nanostructures that, when interacting with the environment and with human beings, can produce toxic effects, many of which are still unknown. Anyway, an effective human intrusion in the creation of things is set up. From Eric Drexler on, the history of nanotechnology is told through the perspective of promises

and dreams, visions and expectations:

> "[...] Human beings are very bad, very poor at making things. [...] When we can get good at it, the results will be revolutionary. [...] With precision control at atomic level, physics tells us that we can build computers with a thousand times higher capacity, consuming less than 1/100.000 that energy, with about one millionth of the weight and a tiny fraction of the cost" (DREXLER, 2009, p. 46-7).

However, these possibilities are not built separately and the mastery of this technology is complex and emerging, being operationalized with the participation of various actors, which are networked together and make the effects of globalization even more striking. All this will influence the formatting of the Theory of Legal Fact, as planned by Pontes de Miranda, demanding complex and sophisticated answers, combining internal and external order, in a way that has not yet been seen in the history of Law. What should be observed in the propositions of Drexler is the exclusive focus on "Exact Sciences or Hard Sciences" to outline the path of "technological revolution" called nanotechnology: the need:

> "[...] of global partnership for development, with a partnership that gives increasing attention to molecules, to molecular technologies and to nanoscale machines; and to goals that can be achieved through the coordination of scientists and engineers in order to make components that come together to make systems" (DREXLER, 2009, p. 55).

The challenge for Law seems to have come: it must take place in the construction of this "technological revolution", under the penalty of losing its place in history. A beginning proposed in this article is to review and reconstruct the Theory of Legal Fact of Pontes de Miranda, for the importance it has in Brazilian legal scenario.

In Pontes theory, "legal fact comes from the factual world, but not everything that is part of it is, always, in legal world. [...], legal rule discriminates what can and what, by default, cannot enter. Determining the factual support of each legal rule is a task to be done with care" (PONTES DE MIRANDA, 1977, volume II, p. 183, § 159). The "factual world" is split from "legal world" and the first can only join the second if there is prevision in factual support previously drawn in legal rules. The possibilities generated by nanotechnology (the "new", the "unantic-

ipated") could not enter "legal world" because they have not been preliminary consecrated in factual support, at least so far, of any legal rule. What is not yet defined by "Hard Sciences" will have difficulty to be accommodated by "Humanities", especially in Law. Thus, the prospect of Pontes de Miranda, "[...] due to the lack of attention to both worlds many errors are committed, and what is worse, human intelligence is deprived from understanding, intuiting and mastering Law" (PONTES DE MIRANDA, 1983, volume I, p. 3-4, § 1), proves inadequate for understanding and producing Law in the XXI Century. Although it is a theory forged in the early twentieth century reflecting their epistemological assumptions, it now shows signs of inability to accommodate the rights and duties created by Nanotechnological Revolution.

According to Pontes de Miranda, in the context of the mentioned dichotomy, the notion of "factual support" is central: "[...] what is predicted by it [the rule of law] and on which it focuses is *factual support*, a concept of the highest relevance for exhibitions and scientific research" (PONTES DE MIRANDA, 1983, Volume I, p. 3, § 1). The facts of life that may enter the world of Law are always drawn previously because "[...] when it comes to legal facts, the substance lies in the essential data that integrates its factual support, as described in legal rules" (MELLO, 2010, p. 117). It is possible to say that what is likely to be legal must have been previously enrolled in the characterization of factual support of the rule of law (to use Pontes language). This generates a final result: "so it is important to stress that it is not possible, for the interpreter, to add or to delete elements to the factual support for configuring the legal fact, under penalty of error" (MELLO, 2010, p. 131). The dynamics of human life in our society — postmodern — does not show symptoms of this predictability, people are not born bringing "conduct manuals". Rather, there are actions and reactions from the movements of other social actors and this is becoming more and more unpredictable. Perhaps because of this, instead of reviewing the Theory of Legal Fact, it is more suitable to reconstruct this theory, in order to promote its effective approach to the unprecedented facts of life, promoting the emergence of new rights and duties, such as: a) juridicization of legal facts: looking specifically to the "act of creation" of things from the nanoscale: it will be possible to attach atoms and molecules and build what humans want, or by the opposite path, starting from larger particles and going down to the lowest, formatting what human inventive ability can plan. Here the notion of legal act-fact should be redesigned; b) the concept of illicit: in which it will be possible to launch, for example, the responsibility

without damage, the generation of damage without guilt, the question of limits of scientific ethics in this scenario, the question of damage to future generations; c) juridicization of risk, the actual risk of development; d) reduction to nanoscale changes the characteristics of things, this implies a change in the Theory of Goods, reflecting on the question of ownership, as new "things" can be created in laboratories and factories; e) the concept of rule of law, sheltering the principles. When Pontes de Miranda wrote his Treaty of Private Law, the conception concerning principles did not have the normative force that principles have today. Therefore, instead of the "dialogue of sources", designed by Claudia Lima Marques, a more audacious structural action will be needed: the "dialogue between the sources of law". It is time to appraise the lessons of Introduction to the Study of Law and of General Theory of Law, bringing up the topic and the exercise of Sources of Law. Although it is known for a long time that Law is only the most important source, if it still can be this way, but without the proper valuation of the other sources of Law. The dialogue between the sources of Law intends to leave the echelon or pyramidal form of organization of legal sources. Law is still seen from "the great pyramid", designed by Hans Kelsen, where "[...] a rule, from the point of etymology, is something that is set to provide a pattern (standard) upon which other things are judged; a standard is something to what one must conform" (Riddall, 2008, p. 153-4). If it was just this perspective, one could include all sources of Law. However, Kelsen establishes another condition: "[...] in any legal system, the standards that form it can be considered valid if the validity of the basic and original standard is assumed (Kelsen calls it *Grundnorm*)". With this, "if the system of rules is displayed in pyramid form, with a *Grundnorm* situated at the highest point, it would be considered that from this highest point the standards appear less general and more specific". The validity of inferior standards depends on a standard that is superior to them. There is a hierarchy among norms and a dependency on the existence of a superior standard. Because of this, "[...] the validity has no relation with the content of law. A law (or as Kelsen prefers, a norm) is valid, because it was created by a determined process" (Riddall, 2008, p. 157-64). The relation between content and form also appears in the proposal of Pontes de Miranda, from the moment that the production of legal effect depends on the prediction of the characteristics of social fact in factual support. If there is any element missing, the rule cannot be imposed, and juridicization cannot occur. To some extent, this phenomenon happens by the following observation: "precisely because it is legal and formal,

modern state Law collapses and is always buried in a text. [...] Law has become an extremely tough and rigid reality; reduced to an admirable system, which is logic, right, clear, therefore inevitable" (Grossi, 2010, p. 80-1). It is precisely because of all these characteristics that Law is unable to cope with the unprecedented movements proposed by nanotechnology. Thus, it is proposed that the dialogue between the sources of Law, with the replacement of the pyramid, in which the standards are arranged vertically, by a figure, still without a more specific name, in which the rules are laid out horizontally. This will make it possible to take advantage of the contributions from several sources simultaneously; and the design of the factual support can be supported from this dialogue, permeated by principles and substantially irrigated by Natural-Human-Fundamental Rights, amalgamated, for example, in the article 5 and its sections of the Constitution of the Republic of Brazil of 1988. In the dialogue between the sources of Law, "international standards", especially treaties and conventions dealing with Human Rights, also receive a new approach.

According to Mireille Delmas-Marty, it is necessary to operate the "restoration of a landscape" (2004, p. 1). The French author will be used to support the structuring of the mentioned dialogue between the sources, and not simply a "dialogue of sources", in which one law is only connected to another in order to solve a case of legal antinomy. It is required to open the stage of "evolutionary sources", which is, "[...] to renounce to the past of customary and to the future of laws to resolutely locate the sources of Law in the present, by unstable nature" (DELMAS-MARTY, 2004, p. 65). It will be needed to move and to reframe the role of laws as source of Law, by listening to the voice of tradition, announced, for example, by habits. To keep developing its role of providing the rules (or normative parameters) that should guide the behavior of people in society, Law needs to operate an effective recovery in its panorama, here understood as the Theory of Legal Fact: "[. ..] the panorama still inscribed in our memories did not disappear, but its components dispersed. [...]" (DELMAS-MARTY, 2004, p. 4). The "promises and disappointments of legal positivism" are still present in tradition and in legal actions of many jurists. Getting free of these jurists is a difficult task, though many of their features have already shown their weaknesses. Thus a model that starts with a threefold phenomenon arises:

> "[...] (phenomenon) of removal of landmarks, of emergence of new sources that would eventually relegate the state and law to the

> category of accessories and of displacement of lines, modifying the composition plan, so that the pyramids, still unfinished, are surrounded of weird rings that mock the old principle of hierarchy" (DELMAS-MARTY, 2004, p. 4).

These three movements are on the basis of the dialogue between the sources of Law and will be placed one next to the other, rather than one over the other. Instead of placing the Constitution, which in this model should be read from the interaction with international standards, especially those related to Human Rights, the Constitution comes to occupy a central place, through which all legal responses created by inter-sources dialogue should pass. It (the Constitution) will be the referential for the conformation of factual support. Thus, a control of constitutionality will be made, accompanied by the so-called "conventionality control", drawn from the approach of the legal response to the Universal and Regional Human Rights Declarations, as well as a look to the decisions of International Courts of Human Rights. Movements triggered for structuring the legality of the response may be compared "[...] to the image of the ring [that] introduces the idea of an interaction that does not necessarily entail the disappearance of all hierarchies, but rather the entanglement of these and, therefore, the emergence of new modes of generation of law" (DELMAS-MARTY, 2004, p. 98). The vision of the ring triggers the movement itself intended for dialogue, something that can flow between several sources, passing and passing several times through the controls mentioned above. With this, a legal-constitutional-conventional response will be ensured.

2. Methodology

The phenomenological-hermeneutic method will be used, oriented by the contributions of Martin Heidegger and Hans-Georg Gadamer. This method starts from the presupposition of ensuring certain amount of freedom to the researcher in the construction of the structures of their investigation, what enables an approximation between the subject (researcher) and the object of the research. The choice of the object is part of the world where there is the researcher. There is the phenomenon. There is no split between these two components. The choice of the object is due to this aspect, being part of the context of the researcher, who assigns meaning to it. The hermeneutic character: "[...] the word 'phenomenology' expresses a maxim which can be formulated in the phrase: 'the

things in themselves!' — by opposition to disconnected constructions, to accidental discoveries, to the admission of concepts only apparently checked, [...]" (Heidegger, 2002, § 7, p. 57). This is the point. The research is oriented by the relevant questions to nanotechnology, which are experienced by the researcher, and their (necessary) interface with Law. They are not detached from their experience and are connected with the world of their life. This experience is projected in the time horizon: "[...] from there, any phenomenological investigation is understood as a research of establishment of units of/in time consciousness, which presuppose, in turn, the constitution of this temporal consciousness. [...]" (GADAMER, 2002, § 249, p. 372). The researcher is inserted in a world where nanotechnological revolution is installing its effects. The researcher is in the world and wants to assign meaning to the movements required for Law to give its best contribution, performing its social function, in possible and adequate standardization, in order to safeguard human beings and the environment. In addition to this method of approach, there will be used, as methods of procedure, the historical, comparative and case study methods. As the main research technique bibliographical research will be used.

3. Development

By the aspects seen, Law will not take the role of sovereign source of Law, having to accept the emergence of other sources. The threefold phenomenon (*withdrawal of marks, the emergence of sources and the displacement of lines*) is necessary and will serve as a tool to update the proposal built by Pontes de Miranda, through the dialogue between all sources of Law. Nanotechnology will eventually produce a "[...] universe of events that, on the verge of misunderstanding, suggests to be apart from any possibility of control [...]. This finding implies, on legal perspective, understanding that Law needs to reframe in face of all this range of information and demands triggered by rapid changes of the social body" (FACHIN, 2012, p. 41). There is a great variety of aspects that are demanding new forms of regulation of society. The jurists (considered here as all actors of Law) are taking too long to realize this challenge. The various possibilities — positive and negative — brought by nanotechnology are incompatible with the legal structures that are still practiced. It is still operated within the following scenario, which — although has been written just for Private Law and within it to Civil Law — will serve to re-

flect on the situation of Law as a whole: "in the last two centuries a supposedly neutral system, trampled on abstract legal categories, designed for an impersonal being, with pretensions to longevity, printed formulation to the project of support of Civil Law" (FACHIN, 2000, p. 324). The construction of the notion of rule of law and of its accommodation in the elements of factual support keeps a close relation with this system, which goes far beyond the area of Civil Law, but it is still the cloak of legality that covers all branches of law. And more: "the right of the human being alone, centered on a hypothetical self-regulation of their private interests, and conducted by formal equality, served to frame the beautifully finished model" (FACHIN, 2000, p. 324). It is talked about an abstract, hypothetical, and preliminary anticipation of everything people will be able to do in society, driven by the notion of formal equality, which is not concerned with the concrete life and everyday reality. Considering the contours brought by nanotechnology, it is clear that this model does no longer fit, showing blatant signs of disability and of loss of space in the regulatory scenario, as almost all areas of knowledge are opining on the regulation related to nanotechnology. This phenomenon would be healthy if Law was leading the process. However, this is not what happens in reality. At this point, it is possible to observe the danger of the loss of space of Law as a field of knowledge, by excellence, of regulation and specification of the means of formatting of legal effects. The symptoms of loss of regulatory space on new issues emerging from new themes generated by society were already denounced by Franz Wieacker, who also gazed at Private Law, but which, on account of the overcome of the dichotomy between contemporary Public Law and Private Law, can be used to analyze the situation of Law brought by advances in nanotechnology. "Without a new grounding for legal convictions there will not exist any future for the history of European private Law. Thus the conditions of this review are the most burning question of the future of private law" (WIEACKER, 1993, p. 716). As already mentioned, the new foundations for legal structuring lie on the dialogue among sources of Law and on the substantial conformation conferred to legal responses by means of fundamental-natural-human rights. These rights bring to light the learning generated by historical tradition of human beings and of their Law. For this, it is done the proposition of "[...] replace the authoritative pyramidal image by a system of rules that are not placed over one another, but at the same time, connected one with the other by a reciprocal interconnection relation" (Grossi, 2010, p. 83). This set, which operates as a network, starts by finding natural rights — marked

at the actual passage of the state of nature to civil state, in a Hobbesian conception, through their consecration especially in the Universal Declaration of Human Rights and, thereafter, in other texts, especially regional ones, until reaching the constitutionalization of these rights, giving rise to fundamental rights. In the case of nanotechnology, due to the difficulties already mentioned, there will not be traditional regulation — legal — the solution that Law will present. Maybe it is time to adopt voluntary "compliance programs" of existing standards, although not directly related to the nanoscale. This means that the dialogue between the sources of Law is projected onto these programs that will ensnare all social actors who may be affected by the effects of nanotechnology. It will be necessary a "normative power", which permeates integration between hard and soft law, without going into the merits of this dichotomy. This "normative power" has to aim to enable a corporate social responsibility, through a change in the mindset of organizations, what means, promoting a code of good practices, settled on a precautionary attitude that takes into account the current and future generations of living beings on Earth (Gorgoni, 2011, p. 371-83). These are some assumptions for the construction of the dialogue between sources of Law, supported by the principle of solidarity, "[...] which is, of responsibility, not only of governments, but also of society and of each of its individual members, for the social existence (and even for well-being) of each of the other members of society" (WIEACKER, 1993, p. 718). Therefore, with this passage it appears that there should be no concern about the dichotomy between public and private, but that everybody is responsible for the alignment of Law, and for the unconditional respect of its guidelines and standards. Other aspect that should be examined differently refers to legitimacy, which will no longer be "[...] in a single supreme source identified in whom holds the political supreme power, but, most often, in a spontaneous way of that varied and mobile reality that is the market" (Grossi, 2010, p. 83-4). It is not thought of defending the simply market matter. It is suggested to read the term "market" as the set of coordinated relations between the various actors operating in society, especially with the contours of globalization. And more: legitimacy will be promoted by the content — the respect for Rights (of) Humans, from its historical origin embedded in the deepest root of its genesis, which is Natural Law — and not by the presence of authority or power, with a simply formalistic bias. It will be necessary to take the challenge here delineated: "today, the jurist lives a fertile and hard moment: fertile, because their role is too active and stimulating; and difficult not only for

the serious responsibilities that weigh on their back, but also for the extensive quotient of uncertainty surrounding their cognitive-applicative action" (Grossi, 2010, p. 86). This is the question: it is required to leave the castle of certainty that does not allow full view of the reality that is presented to jurists and to Law in order to launch a space of uncertainty, but with the probability to envision the new and challenging scenario that human creativity is sketching through technoscience and that will have to be housed by Law.

Final considerations

Federal Constitution, in this space, should be considered as a "moral authority", able to support the constitutional validity of responses obtained in the dialogue between the sources, which has the language as condition of possibility. Law and legal production cannot be satisfied with the abstract prediction of legal rules and of assumptions of factual support. It is needed to interact with the social reality that underlies any regulation, considering local and global transformations, foregrounding "human things". So, paraphrasing Carlos María Cárcova, who mentions the opacity of Law, resulting from the unawareness of legal norms, it is intended to insist on the opacity of Law in the sense of unawareness of effective potentialities of the sources of Law. Besides this, the unawareness of the entanglement of sources existing today, many of them specified by the advances of globalization and by the emergence of new production centers of normativity. Law should not be opaque and motionless; on the contrary, it should be colorful and vibrant, opening its arms to embrace the new rights and duties generated by society. It should be observed that:

> "technological development that enables other forms of human communication; communication that accelerates and turns flows, impacting perceptions and cognitive processes; circulation of power and control, risk and possibility, here are other dimensions of complexity in which we are immersed and that imply challenges of very diverse nature, among others, challenges for the familiar institutional structures and for traditional forms of regulation of social relations" (Carcova, 1998, p. 175).

This is the situation of Law today: it is being challenged as a field of knowledge and also in its intrinsic aspect, in the structuration and in

the mode of building and listing the ways of attributing legal effects to the new risks and possibilities produced in nanoscale.

Substituting the pyramid by the horizontal arrangement of the sources of Law, connected by means of rings, in which the movements of communication occur in a much more fluid and fast way, and allow appropriate legal responses in tune with the values of a society that is local and global simultaneously. In this figure, there is also no concern to establish factual support elements previously, but, on the contrary, that are tuned with fundamental-natural-human rights. The dialogue between the sources of Law, by the constant ring movement of coming and going of sources, conducted by the thread of social solidarity, which is excited by the consonance between the three levels of rights, can bring the following composition for the generation of Law (DELMAS-MARTY, 2004, p. 116-7): a) "predetermination, which refers to the conditions of emission of the standard, to the legislator in the broad sense": it should be observed that it is not thought of a strictly state Law, but of large enough opening for the entrance of other sources of Law and of their actors of creation; b) "co-determination, which results from the margin left to the receiver, who must apply the standard, the judge in the broad sense": the standard will be assigned hermeneutic attribution of meaning, from the confrontation with the characteristics of the concrete case, giving to the applicator, who is not restricted to the judge, a creative and responsible margin of discretion for the construction of legal response; c) "overdetermination, which is, the code of values that is imposed to the legal field, to both the legislator and the judge, the implicit cultural code or 'a law that is expressed in silence'": it is worth saying, a "code" that is in consonance with the principles, values and fundamental-natural-human rights, in a substantial conjugation that must be steeped in constitutional control and in the control of conventionality. This "law which is expressed in silence" carries the screams of tradition and of the learning of experience, showing the relevance of flexibility of rings, to facilitate the movements of various formats until one finds the most suitable solution respecting living beings and the environment. This is the format of a new Theory of Legal Fact, able to respond and ensure a legally acceptable implementation of challenges, risks and possibilities — new rights and duties — generated by nanotechnology. These are the conditions, in a preliminary construction, for Law to be able to account for new rights and obligations generated by scientific-technological revolution wrought by human possibility of accessing the nanoscale. Therefore, it will be necessary to deconstruct the legal fort of certainty, so that

Law can follow the path of innovation initiated by Exact Sciences, promoting renewal, even if it is by the path of uncertainty and without the shelter of the fortress of legal precision advocated by legal positivism, notably by the legalistic aspect.

Because of this scenario, which is innovative and challenging at the same time, it is proposed the motion of ideas proposed by Pontes de Miranda to the new figures designed by Mireille Delmas-Marty, especially to enable the construction of a "world statute for scientific expertise, able to work with a "ordained pluralism" (2013, p. 62-3). There is the central point of the dialogue between the sources of Law, envisaged from a resistance to dehumanization, through the responsibility of the authors involved, seeking an anticipation of risks that are arising, for example, from nanotechnology (DELMAS-MARTY, 2013th). It will be necessary to create legal production alternatives that are ethically based on the respect to human beings and on the preservation of the environment. And more: legal mechanisms that can act in preventive or precautionary way, anticipating the likely adverse effects generated by the nanotechnological scientific revolution, changing the profile of juridicization delimitation of social facts: instead of happening after the facts, it should occur concomitantly with them.

References

ABDI – AGÊNCIA BRASILEIRA DE DESENVOLVIMENTO INDUSTRIAL. Nanotecnologias: subsídios para a problemática do risco e da regulação. Brasília: ABDI, 2011.

_____. Panorama de Patentes de Nanotecnologia. Brasília: ABDI, 2011a.

_____. Estudo Prospectivo Nanotecnologia. Brasília: ABDI, 2010.

BINSFELD, Pedro Canisio. Nanotecnologia: a interação célula e nanopartícula. IN: MINISTÉRIO DA SAÚDE. ORGANIZAÇÃO PAN-AMERICANA DA SAÚDE. Inovação em Temas Estratégicos de Saúde Pública. Brasília: Ministério da Saúde, 2011. Volume I. Coletânea de Textos.

CÁRCOVA, Carlos María. A Opacidade do Direito. Tradução de Edilson Alkmim Cunha. São Paulo: LTr, 1998.

DELMAS-MARTY, Mireille. Un statut mondial pour l'expertise scientifique, IN: Sciences et Avenir, Paris, n. 794, p. 62-3, avril 2013.

DELMAS-MARTY, Mireille. Résister, Responsabiliser, Anticiper ou comment

humaniser la mondialisation. Paris: Seuil, 2013a.

DIDIER JR., Fredie; EHRHARDT JR., Marcos (Coords.). Revisitando a Teoria do Fato Jurídico: homenagem a Marcos Bernardes de Mello. São Paulo: Saraiva, 2010.

COUTINHO, Luís Pedro Pereira. A Autoridade Moral da Constituição: da fundamentação da validade do Direito Constitucional. Coimbra: Coimbra Editora, 2009.

DELMAS-MARTY, Mireille. Por um Direito comum. Tradução de Maria Ermantina de Almeida Prado Galvão. São Paulo: Martins Fontes, 2004.

DREXLER, Eric. Os Nanossistemas. Possibilidades e Limites para o Planeta e para a Sociedade. IN: NEUTZLING, Inácio e ANDRADE, Paulo Fernando Carneiro de (Orgs.). Uma Sociedade Pós-Humana: possibilidades e limites das nanotecnologias. São Leopoldo: Unisinos, 2009, p. 41-55.

ENGELMANN, Wilson. Nanotechnology, Law and Innovation. Saarbrücken, Germany: LAP LAMBERT Academic Publishing, 2011.

FACHIN, Luiz Edson. Pessoa, sujeito e objetos: reflexões sobre responsabilidade, risco e hiperconsumo. IN: TEPEDINO, Gustavo e FACHIN, Luiz Edson (Orgs.). Diálogos sobre Direito Civil. Rio de Janeiro: Renovar, 2012, vol. III, p. 25-44.

_____. Teoria Crítica do Direito Civil. Rio de Janeiro: Renovar, 2000.

GADAMER, Hans-Georg. Verdade e Método: traços fundamentais de uma hermenêutica filosófica. 4. ed. Tradução de Flávio Paulo Meurer. Petrópolis: Vozes, 2002.

GORGONI, Guido. Modelli di responsabilità e regolazione delle nanotecnologie nel Diritto Comunitario. IN: GUERRA, Giorgia et al (a Cura di). Forme di Responsabilità, Regolazione e Nanotecnologie. Bologna: Società Editrice il Mulino, 2011, p. 371-95.

GRADY, Wayne. Technology. Groundwork Guides. Toronto: Groundwood Books, House of Anansi Press, 2010.

GROSSI, Paolo. O Direito entre Poder e Ordenamento. Tradução de Arno Dal Ri Júnior. Belo Horizonte: Del Rey, 2010.

HEIDEGGER, Martin. Ser e Tempo. 12 ed. Tradução de Marcia Sá Cavalcante Schuback. Petrópolis: Vozes, 2002, Parte I.

INVERNIZZI, Noela. Nanotechnology between the lab and the shop floor: what are the effects on labor? IN: J Nanopart Res. DOI 10.1007/s11051-011-0333-z, Springer, março 2011.

ISO TC 229 nº 944b. Nanotechnologies – Vocabularies for Science, Technology and Innovation Indicators. Disponível em: http://www.iso.org/iso/iso_technical_committee?commid=381983 Acesso em 06/01/2013.

MARQUES, Cláudia Lima. O "Diálogo das Fontes" como método da nova Teoria Geral do Direito: um tributo a Erik Jayme. IN: MARQUES, Cláudia Lima (Coord.). Diálogo das Fontes: do conflito à coordenação de normas do direito brasileiro. São Paulo: RT, 2012.

MELLO, Marcos Bernardes de. Teoria do Fato Jurídico. Plano da Existência. 16. ed. São Paulo: Saraiva, 2010.

PONTES DE MIRANDA. Tratado de Direito Privado. 4. ed. 2ª tiragem. São Paulo: RT, 1983, tomo I.

PONTES DE MIRANDA. Tratado de Direito Privado. 4. ed. 2ª tiragem. São Paulo: RT, 1977, tomo II.

RIDDALL, J. G. La gran pirámide. Hans Kelsen. IN: _____. Teoría del Derecho. 3. ed. Tradução de TsEdi, Teleservicios Editoriales, S.L. Barcelona: Gedisa, 2008.

SITE INOVAÇÃO TECNOLÓGICA. Tecnologias emergentes para o século 21. 15/02/2012. Online. Disponível em <www.inovacaotecnologica.com.br/noticias/noticia.php?artigo=tecnologias-emergentes>. Capturado em 05/01/2013.

WIEACKER, Franz. História do Direito Privado Moderno. 2. ed. Tradução de António Manuel Botelho Hespanha. Lisboa: Fundação Calouste Gulbenkian, 1993.

Norms, Semantics and Ontology

Wagner de Campos Sanz, PhD[1]

Abstract: Standard deontic logic has assumed that a norm is a proposition obtained by applying a deontic operator (obligatory, forbidden, permissible) – expression of an "ought to be" – to another proposition. This analysis assumes that norms are propositions expressing duties, or "ought to be" propositions. Hintikka is a former proponent of the idea.

Norms as "ought to be" propositions is not a particular conception of XXth century logicians. Philosophers like Hume and law philosophers like Kelsen, although not sharing the same point of view, also understood that the expression of a duty is essentially the expression of an "ought". Both have stressed the distinction between "is" and "ought". Most of the interpretations understood such contraposition as one between "to be" and "ought to be".

From the point of view of formal (Kripke) semantics, "ought to be" propositions are interpreted in a way that depends of a framework of possible worlds in which some of them are ideal worlds. In ideal worlds, norms are ideally valid, i.e., always fulfilled. This concept is close to utopia. The applicability of Kripke semantics to deontic logic thus requires models with a distinguished non-empty set of possible worlds, the ideal worlds.

However, it is questionable that norms are expressions of "ought to be's". We claim that Castaneda – mainly in Thinking and Doing – has the merit of defending an alternative analysis of duties in terms of "ought to do" in a broad philosophical analysis of practical reason. We are going to consider it in what follows.

*Keywords***:** *ought to do, ought to be, norm, semantics, deontic logic, philosophy of law, philosophy of language, practical philosophy*

1. Introduction

It seems to be a common feature of human cultures the concept, or idea, of an ideal world. It may be a world to be attained by means of

[1] Post-graduation Program in Philosophy, Philosophy Faculty, Universidade Federal de Goiás, Brazil. E-mail: wsanz@uol.com.br

some special practices or even a world impossible to achieve during a life time, maybe in the "after life".

Human culture and Christianity, in particular, have many times assumed de existence of an ideal world. The concept of an ideal world has been part of a cultural framework intended for explaining and giving sense to our universe. As a consequence, because of the characteristics of this ideal world, directives for human and social action were often shaped having it as a *telos*. Our supposed ancestors were expelled from Paradise because of their supposed inappropriate behavior. And this is why we now suffer and live in an imperfect world depending on our own labor. The after death ideal world will be a joyful world for the chosen. And to be chosen depends on the behavior on earth, depends on following certain directives.

It is not necessary to keep going on describing this well known metaphysics, with its accompanying "metaphysical history". This is not our objective. We want to point to the fact that when considering human behavior this metaphysical picture of an ideal world seems very entrenched, even in sophisticated philosophical explanations. No wonder then if historically the analysis of ethics and morals makes reference to this concept of an ideal world as a basic feature. To put it bluntly, it has been generally assumed that a moral rule has to be followed because this is "the" mean to achieve a supposed higher good, a better world or even to be chosen for living in the perfect world.

Paying attention to our reality it is surprising that the concept of an ideal state of affairs still plays a role in our thinking concerning legal systems, morals, ethics, etc. It is true, and we cannot deny, that many of our social rules are shaped having in mind the production of certain effects, supposedly desirable effects, although only effects happening in this imperfect world. But the picture reveals to be misleading when we apply ourselves to consider human experience with legal and regulatory systems. What kind of higher good is attained when someone fills a form according to some prescribed legal rules? Filling a form in a wrong way may produce unpleasant legal results. Why then legal and moral norms should be linked to any kind of ideality?

As human social beings we have this strange ability to build institutions. Institutions are not physical entities, although some institutions may "own" a few buildings. Institutions are not even volitional beings, although, we often talk about the will of an institution: the will of the Brazilian government, the will of the G8, etc.

It is true that historically there were moments in which the will

of a person was confounded with will of a sovereign, as Louis XIV's old times. Nonetheless, this is at most an historical accident. Institutions are essentially structured around a normative code, be them social clubs or parliaments. So, we can ask, in what sense the norms of a social club are designed envisaging an ideal world or a higher good? Why the fact of someone following norms of a social club, are supposed to be related with an ideal world? At least, if we want to maintain an explicative role for the concept of an ideal world, we don't see why many of the legal rules should be considered a way of attaining higher goods.

One of the main philosophical movements of XXth century was analytical philosophy. More important than deciding to be pro or against it, we should recognize that it had a methodological impact over the philosophical practice and this impact consists mainly in considering the role of language and the use of language when dealing with old philosophical questions. The old descriptive metaphysics was too contaminated to serve the purpose of elucidation for some of the most important philosophical questions in western tradition. But the task is not finished. Even in deontic logic, the concept of an ideal world makes his way by the back door.

Instead of a metaphysical analysis of legal and moral directives what we should seek is a more down to the ground analysis of the ways we interact and use language when dealing with moral and legal directives. In this respect, the semantical and also pragmatical analysis of norms and imperatives should replace that old way of doing metaphysics. If the nature of norms corresponds to "*ought to be's*", then there will certainly appear some data providing confirmations for this semantical analysis.

To the question of what is a norm, you'll find different answers. Some of these answers consider commands to be norms too. This is a controversial point. Additionally, many authors have considered norms to be the expression of "*ought to be's*", some of them still alive. The core underlying idea is that deontic expressions when applied to propositions produce new propositions, i.e., propositions saying that something **ought to be the case**. For example, it **ought to be the case that nobody smokes inside a public building** is supposedly an explicitation of the meaning of the norm **it is forbidden (for everybody) to smoke inside a public (government) building**. However, we believe, there is room to doubt this explanation, since between a prohibition and its fulfillment there is a long road. Indeed, were it a correct analysis, almost all norms would never be fulfilled. Just one smoker between millions would make

the norm false. But can we really say that the above norm is false? It belongs to Brazilian legislation, after all.

In our opinion, one author deserves attention for questioning this kind of explanation. He puts it in a different light. We are refereeing to Hector-Neri Castaneda, a philosopher from Guatemala that developed his career in EUA. In a nutshell, what he has done is just to propose in a number of writings to consider norms as "*ought to do's*" instead of "*ought to be's*". To be fair, he never said that there is no role for "*ought to be's"* in legal and moral questions. He just advocated the idea that norms should be primarily seen as "*ought to do's*" and this implies a different explanation of the semantics and the logic of norms. We observe that the author does not consider commands (imperatives) to be norms, although they are still expressions of "*to do's*".

Again, to be fair, we must recognize that Von Wright started in 1951 considering deontic logic to be related to "*ought to do's*" latter changing his point of view for the "*ought to be's*". Anyway, we consider his former deontic logic system not well succeeded and, maybe, the main reason is that he tried to reduce the concept of action to the concept of proposition.

There are good reasons for reading norms as "*ought to do's*". Imperatives are not norms, if norms are propositions, since imperatives are not propositions. In any case, norms contain deontic operators (*obligatory*, *forbidden*, etc.). Let's have a closer look.

2. *Ought to do* versus *ought to be*

The concept of proposition is a theoretical concept. Propositions are mainly aired by assertions. Propositions are held to be either true or false. Above all, their main use is a descriptive use. If we want to say that John bought a new car, we just say, using indicative mood, that John bought a new car, i.e., we describe a situation. And this description is related to a proposition. When the proposition is true, the description describes matters of fact.

Now, if norms are to be taken as propositions, in what sense are they descriptive? What do they describe? The answer akin to the "ought to be" point of view is to say that they describe a certain set of possible worlds. As a matter of fact, many times propositions are identified with sets of possible worlds, those sets in which the proposition is true. But that is not really an answer to the above question.

Let's consider that norms are like the following: *it is forbidden to smoke inside public buildings* or *it is obligatory to use seat belt while driving* are norms. What do they mean, if they are propositions?

Well, according to the mainstream tradition in deontic logic, those expressions of obligation refer to an ideality. If you don't use seat belt while driving this is because you live in an imperfect non-ideal world. In any ideal world (there is no reason to suppose that there is only one) all norms are respected, i.e., every driver, when driving, uses seat belt. An ideal world is then a kind of fiction, it is a world differing from the actual world and, there, all norms are respected. As a proposition, the norm *it is obligatory to use seat belt while driving* is true if and only if every world that can be accessed (can be viewed) from the actual world has it as a true proposition. Additionally, all ideal worlds are to be accessible from the actual world. In other terms, all designated ideal worlds are such that nobody drives without using seat belt in them.

In the above sense, the deontic operator *obligatory* is just a trick way of using the modal operator *necessary* (or *necessarily*). The mathematical machinery for dealing with the semantics of modal operators is interesting, but its application to deontic logic is no more than a trickery. In the end, we just reduce the explanation of the meaning of a norm *qua* proposition to the concept of a possible world. As currently used as it may be, the truth is that the very concept of a possible world is not a clear concept. And it should be questioned also if this concept really adds something to the explanation of what are norms. We have mathematical tools to deal consistently with possible worlds, but many questions at the philosophical core lie unanswered. If some stupid norm requiring us to fill a form with capital letters is to be understood as a description of an ideal world this world is everything except ideal. We may have good mathematics for dealing with the idea of ideal possible worlds, but it is nonetheless bad philosophy.

The answer to the above question – what a norm *qua* proposition describes? – is, therefore, that it describes a fictional world. It is true depending on the postulation of a (some) fictional world(s). We can call them *utopia*.

We remind that for some philosophers like Kelsen norms are not propositions or, at least, there is a reading of the sentences expressing them in which they are not interpreted as propositions but as commands. It seems a very difficult position, since the main verb in sentences expressing norms is customarily the indicative mood and this mood is normally used for conveying propositions, for describing, not

commanding. The second reading, in which it is interpreted as a proposition, is really as a description of belonging. In this sense, a proposition saying that something is obligatory means that this very obligation belongs to some normative order.

Castaneda's analysis is a mix of pragmatical and semantical analysis. Let's consider the norm **it is forbidden to smoke inside public (government) buildings**. It seems clear that what is forbidden is something described by the (secondary) verb which appears in infinitive form: **to smoke**. The expression presenting what is forbidden is an expression used for describing kinds of actions, kinds of "*doings*". In the above case, a specific kind of smoking: smoking inside a public building. Only by means of a bad twist of the former sentence we read this norm as a norm concerning states of affairs: **it is forbidden to be the case that someone smokes inside a public (government) building**. In this twist the expression complementing the deontic operator is a proposition, i.e., an expression describing a state of affairs. However, it is very curious that the way norms are usually expressed does not make this propositional content clear. And we should ask: why not? Just consider the first and more natural formulation of the example above. Usually, norms contain an expression refereeing to actions as a kind, and not to states of affairs. The secondary verb in the norm is usually given in infinitive form. This is the starting point of Castaneda's analysis.

From Castaneda's point of view, a good semantical theory must accommodate a concept dealing with expressions that cannot be assimilated to propositions, as in the case of norms. There should be room in any semantical theory for expressions involving agents and actions which is not the result of a propositional copulation. In Castaneda's words there should be room for expressions that result from another kind of copulation: a **prescriptional** copulation. A norm like **it is obligatory to use seat belt while driving** is for the author the proposition we obtain when we apply the deontic operator *obligatory* to an expression expressing a *prescription*: **to use seat belt while driving**. More precisely, the corresponding prescription can be presented using the following (non-period) construction: **everybody, to use seat belt while driving**. Now comes two questions. What is the role of the deontic operator in this semantical analysis? After all, if norms are propositions the deontic expressions should have a specific role. Next question, do we have extra data not depending on the analysis of norms for giving support to the semantical concept of a prescription?

Starting with the last question, we do, is the answer. Indeed, the

most basic way of expressing a prescription is by means of imperatives (commands). The fact that the command *John, use the seat belt* contains a name of an agent and also contains an expression used to refer to a well determined action being commanded means for our author that a kind of copulation has been practiced here bringing together in a whole an agent and an action. This whole is a prescription.

In support of his point of view we can easily realize that the above command is formulated by using a verb which is not in the indicative mood. Although the English sometimes does not make sharp syntactic distinctions on the respective moods, we nonetheless assume in cases similar to the above one that they are in the imperative mood. In other languages (Latin languages, for example) this distinction is more clear. Also, as propositions describe states of affairs, the preferential mood for their expressions is the indicative mood, not the imperative. As is well known, imperatives are neither true nor false. And prescriptions are also neither true nor false.

To be clear, the above prescription formulated as a command does not have a subject. The agent John is only invocated. It is to him that the command is directed "as a you" (and never "as he"). Or, yet, the action of using seat belt is not being predicated of John. It would be predicated if the statement were *John is using the seat belt* and in this case the name *John* would be used "as a he".

Now, going back to the example *it is forbidden (for everybody) to smoke inside public buildings*, Castaneda says that the deontic operator *forbidden* is being applied to what should be seen as a prescription: *everybody, to smoke inside public buildings*. Naturally, in the example, the prescriptional content is being precluded, and this is being indicated by the deontic expression *forbbiden*. The agents are identified by the quantifier and the action being prescribed (or, more precisely, being precluded) is the action of smoking inside public buildings. Summing up, prescriptions (or prescriptional contents) are the initial core around which norms are erected, and they are in a relation to linguistic acts of commanding (requesting, inviting, etc.) like propositions are in a relation to acts of assertion.

Concerning the first question then, the application of a deontic operator over a prescription (or prescriptional expression) has the effect of giving us a whole that becomes a proposition, i.e., an expression that has descriptive powers. Therefore, the answer to the second question – that concerning the descriptive content - can only be that the deontic operator somehow brings in "referentiality". It brings reference to a social

context, to be more precise. Thus, the deontic operator *forbidden* is being used to indicate a reference to a certain state of affairs, a human or a social state of affairs. This explains why Castaneda postulates a sub-index attached to every use of a deontic operator. This index has the function of pointing to an aspect of the social reality. According to him, in the surface form, this index is, most of the time, implicit.

In our above example, the most explicit way of formulating the norm making explicit the social/institutional reality that goes hand in hand with the deontic operator is by means of an observation between commas. The index accompanying the deontic operator can be made explicit as follows: *it is forbidden, **according to Brazilian law**, to smoke inside public buildings*. In other words, according to Castaneda's theory, the above norm is exactly equivalent to the following proposition: **Brazilian law precludes smoking (for everybody) inside public buildings**. We see then that what Castaneda calls a norm roughly corresponds to what Kelsen has named *norm proposition*. Of course, Kelsen's expression *norm proposition* is completely redundant from Castaneda's point of view. There is no way of reading a norm like *it is forbidden to smoke inside public buildings* as a command, according to our author, contrary to what Kelsen intended. Naturally, we can extract directives for action from a norm, but norms are not commands.

Of course, the point of view delineated assures applicability of logic to norms, since they are propositions. However, the author goes beyond and claims that principles of logic also apply to prescriptions. But we are not going to consider this question here.

Castaneda considers that commandment acts could also be taken as part of the social reality in such a way that a norm may refer to this act. For example, if someone commands *John, arrest Mary*, then, depending on the relative authority of who issued the command, we can describe the situation by using a deontic proposition, or norm, like *it is obligatory for John, according to authority X, to arrest Mary*. What seems beautiful in this description is that norms are truth bearers and the truth of a norm depends on the fact of X being really an authority plus the fact and that X really issued the command. And these are social facts, socially determined, in this imperfect world. There is no need to make fictions in order to explain the truth of a norm. In more detail, if the person that issued the command has no authority at all, then it is completely false to say that *it is obligatory for John to arrest Mary*. Also, if nobody issued the command to arrest Mary, the norm is equally false. Therefore, falsity of a norm does not depend on it being fulfilled in an ideal world.

Going back to the smoking example. There is a norm in Brazilian law forbidding smoking inside public buildings. Therefore, the norm *it is forbidden for John to smoke inside public buildings* is a norm obtained by (logical) instantiation from the more general norm, the one belonging to Brazilian law. As such, John can clearly devise a directive for action for himself taking as a basis this instantiation of the norm. And, if he decides to be on the legal side, he will abstain of smoking inside public buildings. It does not seem correct to say that John is imperatively commanding himself. The reason is, according to a grammatical observation, there is no verb conjugation for the first person singular in the imperative.

There is a point where we diverge from Castaneda's explanation. It is where he seems to imply that underneath every true deontic proposition, or norm, there is a command issued by an authority. It seems to us perfectly plausible that other kinds of social events might well serve the purpose of anchoring a norm, making it true. Although a legal authority may say *I now pronounce you (to be) husband and wife* the same authority may also pronounce *you are now legally married*. Both cases are acts of *fiat*, the first one might be interpreted, with some effort, as a command, but not the second, since its verbal form is clearly in the indicative mood. Also, the fact that a law has been promulgated doesn't mean that a command has been directly issued, only that a norm has been made valid by a legal authority, be it a parliament, a president, etc. This is what we could name *authority fiat*. By means of authority *fiats* we can create social reality, institutions as well, which by its turn will serve to anchor a true norm. And these *fiats* are not necessarily commandments. By its turn, from a legal point of view, authorities are empowered also by authority *fiat*. However there is no infinite chain of authorities. The first empowerment is an act of sheer power.

3. Consequences of the paradigm "*ought to do*".

Since its formulation, standard deontic logic has been plagued with many paradoxes. A great deal of this paradoxes involves a principle according to which the deontic operator *obligatory* distributes over implication, i.e, if p and q are propositions and O is the deontic operator, then the following is an axiom of standard deontic logic: $O(p \supset q) \supset (Op \supset Oq)$.

From Castaneda's point of view this is a wrong axiom. And it is wrong because of the "ought to be" interpretation of deontic prop-

ositions or norms. Since deontic operators should not be applied to propositions but only to prescriptions, then the axiom should be reformulated as: $O(P \supset Q) \supset (OP \supset OQ)$, where P and Q are now prescriptions. This apparently simple semantic move is very powerful; it solves many paradoxes, although not all of them. The author himself was obliged to extend further his framework to deal with situations in which we have an action inside a more complex prescription like in the action of *cooking slowly*. If it is obligatory to cook béchamel sauce slowly (in order to be successful, let's say), then what is obligatory in this case is not the action of cooking but the act of doing it **slowly**. However, it is not clear that such a move can solve all problems. Also, it seems to us necessary now to develop more deeply the notion of what is, from a semantical point of view, an action. And this can be very complex.

Even if Castaneda's theory is only partial, it still has the merit of pointing to the fact that deontic operators usually operate not over propositions but over a different kind of semantical items: prescriptions. This is why deontic operators should be seen as "o*ught to do's*". If norms are propositions containing deontic operators which are pointing to a social reality or to an institutional reality is yet a subject open to discussion. But the starting point is good. Indeed, when someone tells us that something is obligatory, it seems a perfectly rational and well suited behavior to ask which authority is behind such an obligation.

From our point of view, Castaneda's proposal is a huge turn in the whole tradition of ethical studies, because the notion of "*ought to be*" has now lost its privileged place. If the claim is correct, then norms (and also commands), although being issued by someone having an intention backing it, are no more easily connected to the idea of an ideal world to be reached or the idea of a higher good. That moral rules and part of the legal rules where produced with the intention of giving us a better world to live is something that nobody would deny. Nonetheless, it is not true that all moral norms and legal norms are really a way of bringing to the horizon a better world. Not even to consider ideal worlds as a fiction helps anything. After all, we cannot be assured beforehand that the whole of legal norms (or moral norms) being considered as valid, as holding at some region in space and time, that they form a consistent set of norms. If they are not consistent, no such ideal world is really possible. The fiction is aborted before starting.

Experience shows that we indeed find ourselves in situations in which we have conflicts of duties. To believe that every conflict can be solved by an analysis of the norms involved is a belief that has no empir-

ical support and it cannot also be a principle of pure reason. Therefore, if norms were expressions of "*ought to be's*", then it might be the case that there is no ideal world corresponding to some set of norms, since this set is inconsistent. This consequence is deniable by those for whom norms are not propositions, since, then, logical principles would not be applicable.

If deontic operators in norms represent "*ought to do's*" and norms are propositions, then the question of authority comes to the fore front. A norm is true if it was really issued and the issuer had enough authority. When legal norms and moral norms were thought to be given or to be grounded either by a rational divine being, either by nature, either by pure reason, it is understandable that the obvious complement of the norm given was the respect that the norm should be involved in, and this respect is nothing more than the respect for the authority that issued it. Such marvelous beings like God, nature, angels or pure reason could not be doing wrong or doing evil, thus it would be better to follow their directives, either because they were good either because some punishment would be in the oven for sinners. But, when such a picture is no more capable of satisfying sharper minds, then the question of the authority that issues norms and directives becomes essential. There must be social ways of giving authority for norm issuers that are either minimally rational or minimally backed by experience. But this will never be iron rules. It is normal that authorities may undergo defiance on their status. Good authorities will stand up criticism or, at least, their critics will not fare better, more probably they'll fare worst, when issuing norms.

Now, regarding legal codes it is clear that Castaneda's concept of what is a norm applies only to a small fraction of the expressions in the code. But, first of all, it has to be kept in mind, a code is a code. That is, it is formulated as concisely as possible. Nonetheless, it is natural that some expressions in the code are not norms in the above sense, because they are, for example, definitions or declaration of principles. A faithfull examination of legal codes has to open room for other categories of expressions and, so, the work cannot be considered to be finished.

References

CASTANEDA, H.N. Thinking and Doing. Kluwer 1975.

CASTANEDA, H.N. Obligations, Aspectual Actions, and Circumstances. In: Philosophical Papers, 15:2-3, 1986, p.155-170.

CASTANEDA, H.N. On the Semantics of the Ought-to-do. In: Synthese, v. 21, nº3-4, 1970, p.449-468.

FORRESTER, W. Gentle Murder, or the Adverbial Samaritain. In: The Journal of Philosophy. V.81, n.4, 1985, pp.193-1977.

HUME, D. Treatise of Human Nature. 1740.

HINTIKKA, J. Models for Modalities. In: Synthese Library. D. Reidel. 1969

KELSEN, H. Pure Theory of Law. UCLA Press, 1967

MCNAMARA, PAUL. Deontic Logic. In: Stanford Encyclopedia of Philosophy. See http://plato.stanford.edu/entries/logic-deontic/.

PAULSON, S.L. & PAULSON, B.L. Normativity and Norms. Claredon Press, 1998.

VON WRIGHT, G. Norm and action. See http://www.giffordlectures.org/Browse.asp?PubID=TPNORM&Volume=0&Issue=0&TOC=True.

Questions of fact and questions of law
Distinction and consequences

Gabriel Cabral[1]
Luiz Felipe Teves de P. Sousa[2]

Abstract: This paper intends to argue that even though there is no clear test on how to differentiate fact from law questions, such evaluation is imposed on the ones who have to make decisions in judicial framework. In judicial practice, it is not a judge's role to promote speculative or theoretical discussion, but practical arguments that reach a decision. According to the Law motto, no judge can free himself from a decision about a conflict that was given to him by claiming that the question is somehow complex enough that could prevent him to use his technical knowledge and experience, nor yet pacified in the correspondent science field, in such a way that the own assistance from an expert can also become useless. The State, when provoked, can not abstain from giving an answer. Such problematic reality based on the obligatoriness of taking early decisions is common to both juridical traditions of the occidental world. While in the Common Law such questions have entailments in the division of appreciable subjects between Jury and Judge, and in the filtering of the questions that can be revised (questions of law); in the Civil Law, such questions focus on the restriction of subjects that would be appreciated by the appeal courts. Thus, as the distinction is essential, it is fundamental to research how it occurs. The jurisprudence is analyzing this question limiting it in three matrices: ontological, epistemological and analytical – classification presented by Allen and Pardo (2003). The first field regards the distinction of the nature of fact and law. The second examines if the epistemological objectives such as accuracy, justification and the separation of knowledge from mere belief, are different. Finally, the purpose of the third is to check if they can be differed as sets with mutually exclusive elements. If in none of these fields it could be possible to establish a grounded distinction, the only choice to those applicants would be a pragmatic one. In this sense, the line that divides the questions to be treated as of fact or law would be drawn by allocation. Finally, it will be analyzed how the higher Brazilian Courts have been facing this question. Which paths have been taken by these Courts to filter fact

[1*]Graduate Student at Federal University of Rio de Janeiro (gabrielac00@yahoo.com.br)
[2**]Graduate Student at Federal University of Rio de Janeiro (lftdps@gmail.com)

issues? Do these Judges have the democratic legitimacy to restrict the access to judicial review by establishing alone the paradigms to what they wish/can decide?

Keywords: Questions of Law and Fact. Distinction. Democratic Legitimacy.

1. Introduction

This paper intends to bring the discussion about the difference between questions of fact and questions of law[3]. It will be considered how this dichotomy is treated by the jurisprudence and by the ones who operate it, as well as how it should be interpreted and what the solution is for its incongruence. Therefore, it will describe how the common understanding of this difference is, to then present how it ought to be done.

As a first step, we ought to present its importance. Both in the Common and Civil Law Tradition, the difference has two purposes: (i) serves as a line that filters matters of fact from appellate review[4]; and (ii) divides functions at a trial court – the jurors responsible for questions of fact and the judge for the questions of law. Despite serving these key doctrinal functions, it has been seen that this difference has not been understood as it should, especially by those who are obliged to use it in the daily judicial activities. In this sense, lawyers and lawmakers, in general, seem to neglect the jurisprudential effort to deal with this complex subject, and use those terms as their differentiation was obvious, devoided of any further analysis[5]. This mismatch between jurisprudence and decision makers, poles that should cooperate, is what intrigues us and makes us question: can a conceptual distinction elaborated by jurisprudence be sustained at a dynamic environment of the courts? In other words, can *a priori* difference – easy and simple enough – be elaborated and used by these?

---

[3] This discussion is about one of the most difficult distinctions to be determined in both law and jurisprudence, just as noted by MacCormick, in: MACCORMICK, N. *Editor Preface* (1999), Law and Philosophy, v. 18, p. 443.

[4] As an example, in Brazil, the Supreme Constitutional Court has as a precedent the following state: "Para simples reexame de prova não cabe recurso extraordinário" – STF, Súmula 279 –, it means that one cannot appellate for simple reexamination of proof.

[5] The difference remotes to the old approach of Lord Coke: "ad questionem facti non respondent judices (…) ad questionem juris non respondent juratores". POUND, N. R. *Jurisprudence* (1959), v. 547 (citing Co. lit. 155b, p. 1628). In the sense of the quote, jurors would appreciate only questions of fact and judges questions of law.

To answer this question it is first crucial to realize that there is an immanent obstacle. The difficulty arises from the fact that it is not the role of judges to promote speculative or theoretical discussion, but to present practical arguments that must reach a concise and timely decision. This collision between the principles of correctness – here considered as a result that can be better achieved by a deep and unchained examination – and celerity is often problematic. Hence, judges are necessarily bounded to early and superficial decisions in contrast of an exhaustive analysis, otherwise made by academic theorists, about the complex of the difference. Henceforth, what can be done to solve this obstacle? In other words, is there a way to establish a conceptual differentiation, especially regarding the matter of the questions of fact and of law that could be easily understood and applied by the judges in their daily activities?

After exploring many authors, some sustaining that there is a qualitative difference between fact and law[6], it will be defended, otherwise, that the beginning of a solution for this puzzle can be found in a text of Ronald Allen and Michael Pardo. In the article *Facts in Law and Facts of Law*[7], they propound that the difference is nothing but an illusion and should be approached in terms of its allocation. It is understood that they have found a very persuasive way of treating this complex subject. They organized their enquiry dividing it in three matrices: ontological, epistemological and analytical. Our purpose is, by using their formula, which follows the main idea of simplicity and usefulness here sustained, to deepen precisely the first two. The third one will be left aside once it is not treated by the authors as a fundamental ground for a philosophical speculation, instead, gathered different theories designated as analytical and establish critical to them. Finally, it should be asserted that the methodology used here is the analysis of the arguments exposed by these authors in the cited paper, so it is possible to contribute to the ideas.

---

[6] In example: FRIEDMAN, R.D. *Standards of Persuasion and the Distinction Between Law and Fact* (1992). Northwestern University Law Review, v. 86, p. 916; MONAGHAN, H.P. *Constitutional Fact Review* (1985). Columbia Law Review, v. 85, p. 229; WEINER, S. A., *The Civil Jury and the Law-Fact Distinction* (1966). Cal. L. Rev., v. 54, p. 1020.

[7] PARDO, Michael; ALLEN, Ronald. *Facts in Law and Facts of Law* (2003). The International Journal of Evidence & Proof, v. 7, p. 153.

2. Ontological

Regarding the ontological matrice, a question should guide the study: could a difference be drawn that establishes a clear test to differentiate a fact from the law? To initiate the discussion, here is what Allen and Pardo consider a fact: "any proposition that has true value, that can exist in the world and be described in terms of its truth or falsity"[8]. Thereafter, why do they consider the law as a fact? They formulate two answers. In the first response, they argued that our linguistic practice just exposes this treatment. For instance, when we say "it`s a fact that the law A rather than law B applies to C", we`re implicitly saying that the law A exists and urges to be applied[9].

In the second response, they asserted that the law constrains the behaviors in the "real world". In this sense, we quote them: "drivers stop at stop signs, merchants honor contracts, and people refrain from punching those whom they dislike"[10]. So, they have concluded: "To say that law is factual, then, is to say that there is such a thing in the world referred to as 'the law', that the law 'exists', 'is', 'is one way rather than another', or that a given answer to a legal question 'is true', or 'is the case'"[11].

To consolidate the argument, they noted that the consideration of law as a fact is not a new one. In the tradition of the jurisprudence, classical positivists, when insisting on the thesis of separation law/morality, recognize the law as an inextricably social or institutional fact (for instance Bentham, Austin, Hart and Raz). Oppositely, those who reject the separation thesis also presuppose the law as a fact, in the way that the law is dependent or coextensive with the moral facts[12]. Despite agreeing with this behavior constraining characteristic of law, this argumentation should be taken into a deeper analysis. Considering the thesis of the social ontology of John Searle[13], this discussion would gain much in clarification and the simple assertion that the law is factual would be more grounded.

What is a social ontology? And, in that sense, why does the law

---

[8] PARDO, Michael; ALLEN, Ronald. Op. cit. p. 156.
[9] Ibid. p. 158.
[10] Ibid. p. 159.
[11] Loc. cit.
[12] Ibid. p. 157-158.
[13] SEARLE, J. *The Construction of Social Reality* (1997).

constrain? First, it should be illustrated the idea of John Searle. Imagine somewhere a natural wall of rocks and that, one day, some people began to use this wall as a protection from other people. A division between two populations would arise ever since. Then imagine that, by the course of time, somehow this wall was destroyed until its complete disappearance. At that moment, despite the physical inexistence of the wall, the boundaries between the two populations were still recognizable and limit their moves. This example shows that humans do create new beings, and despite the new wall was ontologically subjective, only existing in the minds, it could be objectively known, as to say, it could be described by propositions with truth value. Thus, when lawmakers create a norm that will guide and constrain people's life, it exists in the same way as the wall, as both can limit the free will of a person, even if the first only exists due to its recognition by the majority of the population, while the other by its very physical properties. Henceforth, law exists due to its recognition and, in this sense, is a fact.

However, this outcome is not immune to critics. The American philosopher Frederick Schauer[14] argues that fact and law cannot be together in the same ground. According to him, fact is ontologically different from law. A fact would involve a description of an event and the law a prescription applied to a hypothetical fact, in a very simple way. While one describes what the world is, the other shows what it ought to be; while the first is in the realm of the fact, the other is in the realm of the value[15]. Thus, the problem would arise when lawyers try to use this simple ontological distinction in the practice. So, on one hand, his thesis is conceptually concise and clear: there is an ontological difference between fact and law; on the other, the author recognizes the ineptitude of the applicability of this thesis to establish a difference in the practice field. In other words, although it could be established a very schematic difference between fact and law, it is still very difficult to do the same operation to what concerns the distinction between a question of law and a question of fact.

The thesis that Schauer sustains, that law and fact are not the same, does not confront the main purpose of the present paper, as his analysis is correct only in a pure conceptual ground. To say that the law prescribes human behavior – and in Schauer`s sense not factual – does not affect its possibility to fit the status of a thing that can be truth-

[14] SCHAUER, F. *Thinking Like a Lawyer* (2009). ch. 11.
[15] Ibid. p. 205.

fully described in the world – Allen and Pardo`s sense of fact –, which concerns its ground of existence. The linguistic nature of the law is not necessarily related to its existential possibility. Law, morality and politics are normative instances, but they can still be described truthfully objectively. In this sense, from the existential view of the discussion, it's almost fruitless try to differentiate something from a fact. A fact embraces anything that is real in world, even if it is real only through the minds.

An effort could be made to differentiate the approach of the subject, in other words, maybe the distinction propounded by Schauer, contrary to his own thinking, is the best approach regarding the criteria of applicability in the judicial daily activities. Hence, as easy as it can be, judges could separate the questions by the very nature of them: on one side, what regards descriptive thinking, on the other, prescriptive. The problem is that this thesis cannot survive once scrutinized and, as it will be shown, the conclusion that a fact is a being and law another, as they were ontologically different entities, is of less importance in the specific context of the differentiation of questions of law and fact.

In this subject, Maria Gascón Abellán's lecture[16] should be accentuated. Gascón argued that thinking about questions of fact as they are used in the Courts also includes considerations of value judgments. The author considers that in the judicial syllogism the minor premise deals with the individualization of what is prescribed in the hypothetical fact of the major premise. Regarding this hypothetical fact, Gascón proposes a division: external facts, psychological facts, and the ones that require evaluations to be relevant[17]. It can be seen that there is at least one situation that value considerations are required in the analysis of questions of fact. An example in this sense is the requisite of obscenity of a conduct to be able to engender legal consequences. In situations like these, triers of fact would have to determine what happened with purely practical or evaluative assessments about what is obscene and what is not. In this specific case, Schauer`s conceptual notion of the difference between fact and law, or fact and value, cannot be sustained when the matter of discussion is, otherwise, the legal fiction of the questions of fact and of law.

It can be seen that there are two possible approaches to the question regarding the ontological matrice: on one side, Schauer`s conceptualistic approach to the ontological matter, considering that fact and law are different; on the other side, Allen and Pardo`s existentialistic

[16] ABELLÁN, M. G. *Los Hechos en el Derecho: bases argumentales de la prueba* (2010).
[17] Ibid. p. 69-70.

approach, that considers that there is no difference on the ontological level, considering law as a form of fact. As for what has been said so far, the effort made in this paper was to demonstrate that both approaches are viable and defensible, but considering the argument brought by Gascón it is clear that, considering the distinction between questions of fact and of law, the conceptual distinction cannot be sustained at the complex environment of the Courts. So, when concerning the practical instance, it is not possible to establish a differentiation between the two questions on the ontological level, i.e. as if they were referring to entities of different nature.

Going even further in the discussion, it will be demonstrated that the distinction is also insuperable due the very structure of the legal norm.

A rule, in its basic coercive structure, describes a generic and hypothetical fact. In example: "to kill is a crime". First, we have that "to kill" is related to a piece of the reality, once is a fact to which has been given relevancy in context of the law. Hence, it's a fact in law. "is a crime", on the other hand, refers to a fact of law, once it derives from a legal rule and is something created by humans and used especially by them. While the act of taking a life from another form of being, whether practiced by humans or bacteria is as old as the world we know, the act of making this natural fact something prescribed not to be done or prohibited is a particularly human activity.

Thus, humans can create realities that, as the reality created by the law, would be otherwise none existent in a world of bacteria. This relatively new fact known as law concerns many aspects of the life of its creators, the humans, and regulate what would be naturally not regulated. If the fact of law, a very unique and technical system of norms, different from other systems of norms that can be found in other social animals, has its own existence linked to a human characteristic to regulate almost every aspect of their lives to make it better, its formulation always refers to another fact. Then, the fact of law to fit its purpose must be inseparable to the other facts it makes reference, making necessarily a fact about a fact.

To follow the purpose of the paper, in a trial, a question of fact is always analyzed according to the hypothetical fact that was described in the law, as well as a question of law has its own existence dependent to the same factual hypothesis. For example, to kill someone is only important to be considered in a trial for its derivation from law, likewise, the determination if that killing action was a crime or not – a question of

law consideration – is essentially derived from an individualized naturalistic fact that was proven occurred.

3. Epistemological

Once surpassed the ontological investigation, the epistemological remains to be analyzed. In this dimension, Allen and Pardo take their attention especially to the possible equivalence regarding the epistemic situation in the analyses of questions of fact and law. Accordingly, the authors assert that both evidences and inferential processes are alike[18].

First, regarding the evidences, it is considered that in both questions they are factual. Judges, just like jurors, would have a spectrum of conflicting evidence to work with and call upon different sources too. These would be legal doctrines, different laws and case laws. In this sense, they would have to deal with evidences too, but evidences of law. A juror analyzing the testimony of contradictory specialist would be as a variation in the legal doctrine about certain law or laws of the case.

Concerning the inferences, it is sustained that both questions are equivalent due to the fact that both are worried to achieve the same epistemic goals. These goals would be accuracy and differentiation of knowledge from mere belief, in the deal of the respectively evidences. Just as the triers of fact, judges would have the care to be precise and clear in theirs decisions, which is endorsed by the rule of law, the regime that this paper clearly focuses.

Although the conclusion of the authors is, as it will be shown further, precise, it is also noticeable that their argumentation could be deepened.

Regarding the evidence discussion, it could argue that, when it is considered judicial trials, there is no real conflict between evidences. This argument is sustained when one is considering that in the most of the cases, which are the ones that there is no appellation, the fact of law – a law or a case law – seems to be easily precised by the judge. In fact, in most of the cases, the ones that the news do not cover, that do not involve renowned attorneys or a very polemic matter, a judge simply adjudicates and no one appeal. In these daily occurrences, it seems like the facts of law when used are not controversial between them, like they have a nature of being undebatable, which exceptions are the very few cases that lawyers debate passionately to defend their positions.

[18] PARDO, Michael; ALLEN, Ronald. Op. cit. p. 162.

This assertion based on an empirical assessment that attributes to the nature of law the cause to the context hereby stated is but an illusion. Rules are never clear enough. Regarding this subject, Schauer argues that every norm has in its very nature the perspective to overinclude or subinclude factual situations[19]; moreover, they are written with an open texture[20]. Considering the essential controversial characteristic of the law, then, in a trial, a part only abstains to appellate due to its lack of interest, never due to a consent to an adjudication that represents an undoubtedly interpretation of the norm. Evidences of law are always controversial.

Regarding the epistemic goals, especially how they are the same when it is being considered what kind of worries should the decision makers be worrying about when analyzing questions of fact and of law, it could be introduced a new feature to the argument brought by the authors, which is the concept of different propositional attitudes.

In 1992, the philosopher Jonathan Cohen developed this notion of propositional attitudes. He asserted that belief is different from acceptance[21]. Belief would consist on an attitude of, when confronting some evidences, and only because of them, it creates an intuition, a feeling about the occurrence of an event. For example, when facing an evidence of a wiretapping, the trier of fact reaches the conviction of the guilty in a murder. This act is involuntary, because there is not a way to ignore the trigger of the conviction in the mind. When you believe in something, there is not a way to remove the thought. Furthermore, it is independent from the context, because it occurs in the same way anytime: when someone sees an evidence, he/she elaborates an immediate thesis about what happened.

On the other hand, acceptance is voluntary and dependent of the context. It consists on the attitude of, when in front of an evidence, having the capability to sustain a policy to include the reason prior to the determination of what has happened. As so, imagine the same situation described in the last paragraph. If it were proved that the wiretapping was obtained illegally, the consequence would be its exclusion from the consideration of the triers of the fact. In this case, although the trier would still believe in the guilty, he now needs to ignore his belief and

[19] SCHAUER, F. *Playing by the Rules* (1991). pp. 31-34.

[20] BIX, Brian. *H. L. A. Hart and the "Open Texture" of Language* (1991). Law and Philosophy, v. 10, pp. 51-72.

[21] COHEN, J. *An Essay on Belief and Acceptance* (1992).

only follow the path that is acceptable, the one that can be rationally justified. Acceptation is voluntary once it is a rational effort of choice, and it is dependent on the context, especially the judicial one, with its epistemic constraint mechanisms. There is a necessity of a different attitude in the determination of the facts, which goes beyond the simple analysis of evidences. In this sense, we can consider that while belief is truth-oriented, acceptance is goal-oriented. Then, there would be no conflict if a trier believe in something, but cannot accept it in a certain context.

Hence, it becomes clear that in face of the epistemic constraint in the Judicial System – that can exclude evidences, disqualify witnesses, etc. – the most virtuous propositional attitude, the one that achieves the maximum effort in the search of the truth, is the acceptance.

Then, should the judges hold an attitude of acceptance in the determination of the law, even though not subjected to the same constrains of the triers of fact?

In order to answer this question, we must consider what Manuel Atienza asserted in the context of a critic to the American realists. Legal reasoning also includes the context of justification, not only the context of discovery[22]. The first context refers to the need of a logical fundament for a decision and the last to the necessity to explain the causes that converges to that, like psychological and historical investigations.

Therefore, judges are also institutionally constrained in their decisions, not by rules of evidence, but for the need of a justification. They cannot use their psychological motivation as foundation, once they have to logically substantiate what they have decided. Thereby, while deciding about law, judges cannot use every law they simply want, once they are constrained to some choices that can be rationally justifiable.

This constraining environment of the legal trials whose consequence is a requirement of its actors to be in the specific proposition attitude of acceptance, for the analysis both questions of fact and of law, can be seen whether it is being considered the presence of the jurors or judges as triers of fact. Jurors for the reasons stated above, because of the exclusionary rules of the evidence law and judges due to their need to justify logically every aspect of their decisions, even when they are acting as triers of fact.

[22] ATIENZA, M. *Las Razones del Derecho* (2006). ch 1.

4. Conclusion

As it has been exposed, reaching a clear way to distinguish questions of fact from questions of law seemed to fail. We could not figure out any solution that could help judges in their challenge to define which each one is *a prior* among them in a more comprehensive way. If there is a difference, whether it is in the ontological or epistemological level, it is not certainly something uncontroversial or that could be easily sustained.

Beforehand, what we have left is the solution presented by Allen and Pardo: the pragmatic approach. Judges simply choose what they want to consider as reviewable, as well as what jurors should decide. It is not a technical decision, but political. For example, we bring a Gascon Abellan's observation: the non-observable characteristic of the psychological facts, like intention, desires, etc., are being considered value judgments and therefore not factual by the Spanish Supreme Court[23]. The author realized that this understanding had the solely objective to conduct the matter to be appreciated by the Spanish Courts, which would be denied by them otherwise.

The same manipulation – if it is considered the main thesis of the pragmatic difference between questions of fact and of law – also happens in Brazil. The Brazilian Supreme Court is currently adopting a new way to interpret the precedent[24] that refers to the filter of questions of fact. According to this precedent, questions concerning reexamination of proof (of questions of fact) cannot be reviewed since only a reevaluation could occur. It must be noticed that the rule is silent to what regards the concept of revaluation. Under the pretext of a legal difference between reexamination and reevaluation, judges and lawyers - the first aims to choose which questions to judge, the second the interests of their clients – are arguing that in some cases, it is possible for the Supreme Court to judge questions it was otherwise unable to do.

This arbitrary way of treating the distinction is not a new one. Dean Green, back in 1930, already asserted: "No two terms of legal science have rendered better service than 'law' and 'fact'. They readily accommodate themselves to any meaning we desire to give them. What judges have not found refuge in them? The man who could succeed in

[23] ABELLÁN, M. G. Op. cit.

[24] Same text of the precedent of note 2, but it is a different Supreme Court, which is responsible for nonconstitucional issues, named Supreme Tribunal Of Justice.

defining them would be a public enemy"[25]. As we can see, there is not a simple solution to the distinction and we think that the deciders themselves do not want to look for it.

Furthermore, it is sustained that the real problem is with the terms that are used. Establishing a comparison between two entities, like it happens with the distinction between questions of fact and of law, with the term fact rooted on one of the sides is to give too much discretionary power to judges – which is probably the very goal of this distinction –, once the semantic of word "fact" can refer to almost everything. Whether it was intentional or not, what can be stated nowadays is that it is an inglorious enterprise that is serving only to arbitrariness.

Finally, since it has been given a description of what can be stated on both jurisprudential and practical analyses of the differentiation of question of fact and law, we would like to discuss the solution. Lawmakers, due to the democratic legitimacy have to prescribe how they think the judiciary should work, should, by their own forces, intervene in the very letter of this specific legal fiction. Instead of the dichotomy about the "question of fact" versus "questions of law", it should be between "questions of what the lawmakers dictate to be tried by jurors" versus "questions to be tried by judges" and, in the same way, what issues could be revisited and what could not. It would be the end of the confusion and of the possibility of arbitrariness of its use by judges.

As an afterthought, there would be still two other possible formulations regarding equivalences between these: one about the inferences practiced by their respectively triers, as we think both start with an adductive reasoning; other, taking account studies made by both Barbara Spellman and Frederick Schauer, concerning the possible difference between jurors and judges capacities to deal with evidences. But these are discussions for a next opportunity.

References

ABELLÁN, M. G. *Los Hechos en el Derecho: bases argumentales de la prueba* (2010).

ATIENZA, M. *Las Razones del Derecho* (2006).

BIX, Brian. *H. L. A. Hart and the "Open Texture" of Language* (1991). Law and Philosophy, v. 10.

COHEN, J. *An Essay on Belief and Acceptance* (1992).

[25] GREEN, L. JUDGE AND JURY 270-71 (1930).

FRIEDMAN, R.D. *Standards of Persuasion and the Distinction Between Law and Fact* (1992). Northwestern University Law Review, v. 86, p. 916.

GREEN, L. JUDGE AND JURY 270-71 (1930).

MACCORMICK, N. *Editor Preface* (1999), Law and Philosophy, v. 18, p. 443.

MONAGHAN, H.P. *Constitutional Fact Review* (1985). Columbia Law Review, v. 85, p. 229.

PARDO, Michael; ALLEN, Ronald. *Facts in Law and Facts of Law* (2003).

POUND, N. R. *Jurisprudence* (1959), v. 547.

SCHAUER, F. *Playing by the Rules* (1991).

_____. *Thinking Like a Lawyer* (2009).

SEARLE, J. *The Construction of Social Reality* (1997).

WEINER, S. A., *The Civil Jury and the Law-Fact Distinction* (1966). Cal. L. Rev., v. 54, p. 1020.

Lights, camera, jurisdiction
Communication technology and the myth of transparent justice in Brazil

Joana Machado de Souza[1*]

Abstract: This paper approaches televising judicial proceedings as a relatively recent innovation adopted by the Federal Supreme Court of Brazil and examines its possible effects on judicial activity. Initially, it explores the bureaucratic conception of judicial activity from a classic civil law framework, in order to point out how it has been undermined by the contemporary global expansion of judicial power and therefore to contextualize the current claims for judicial transparency and accountability. The paper provides an overview of how, when and why we started to broadcast live, through "Justice TV", the debates of the Federal Supreme Court of Brazil, highlighting the contrast between American judges resistance to and Brazilian judges optimism about cameras in the respective Supreme Courtrooms. Ultimately it is argued that television judicial proceedings can give the public the sense of participation in an extremely important governing activity, if only by observing it, nevertheless it adds the risk that judges will tailor their actions in a populist direction, thereby undermining some of the value of (particularly) constitutional review.

Keywords: judicial activity; cameras; innovation

1. Introduction

At the same time as they are putting forward for discussion, on the agenda of the U.S. Congress[2], the advisability of inaugurating the practice of live television coverage of the open sessions of hearings in

[1*] Assistant Professor at the Federal University of Juiz de Fora – MG (UFJF) Law School – Brazil. PhD student in the field of State Theory and Constitutional Law at Pontifical Catholic University of Rio de Janeiro (PUC-Rio). E-mail: joana.machado@ufjf.edu.br

[2] Bill in Congress, January 2013: "Cameras in the Courtroom Act - Requires the Supreme Court to permit television coverage of all open sessions of the Court unless it decides by majority vote that allowing such coverage in a particular case would violate the due process rights of any of the parties involved". Available at: http://www.govtrack.us/congress/bills/113/hr96#summary/libraryofcongress

the Supreme Court of the United States, in Brazil we are completing a decade of "Justice TV", an experience which to a certain extent puts the country at the forefront of the administration of the legal service.

Among the judges of the U.S. Supreme Court, there is great concern about the possible impact of television cameras on the functioning of the institution[3], which largely contrasts with the positive tone of the balance so far made in Brazil on the exercise of doing justice before the cameras[4].

Justice TV is a non-profit-making public television channel, run by the STF (Federal Supreme Court), the highest organ of the Brazilian Judicial Power. It was made possible as a result of Law 10461 of May 2002, curiously sanctioned by a member of the STF, Minister Marco Aurélio, who, during the government of Fernando Henrique Cardoso, had the role of Acting President of Brazil[5]. Since the law anticipates the need to reserve a channel for the Supreme Court to divulge acts of the judiciary and other correlates, Justice TV began on August 11, 2002, becoming the first broadcasting station in the world to show a schedule exclusively related to the judiciary.

In order to provide transparency and bring constitutional justice closer to society, this cable TV channel broadcasts live trials and public hearings of the court, among other initiatives such as news programmes, news bulletins, educational programs, interviews and debates. Over this last decade, with the same purpose, Justice Radio (2004) and the institutional channels "STF on YouTube" and "STF on Twitter" have also been created.

Among the innovations constructed and/or adopted by Brazil to divulge the acts of the Judiciary, Justice TV is by far the greatest gamble, especially since it allows people to see and hear, in real time, trials in the Supreme Court, without needing to travel to the capital, or even leave home.

But what is the scope of this innovation? What is the appeal of the liturgy and the stage wings of a decision-making process of the judiciary for anyone other than the parties directly involved?

---

[3] See compilation of judges' opinions, available at: http://www.c-span.org/The-Courts/Cameras-in-The-Court/

[4] See documentary produced by Justice TV itself, celebrating its 10th anniversary, with positive manifestations by Ministers of the Supreme Court, available at: http://www.youtube.com/watch?v=CamBItfAuGQ

[5] Information available at: http://www.tvjustica.jus.br/

2. Legal traditions and distinct conceptions of judicial activity

If times were others, of insulation of the judiciary from politics[6], there would be little point in investing so much in bringing society and judges closer together. In countries historically more inclined to the legal tradition of Civil Law[7], as is the case of Brazil, the cult of certainty, safety and truth[8] by means of codification condemned judicial activity, for a long period, to a bureaucratic and mechanical nature, referenced to the past. This is perfectly understandable if we consider the strong influence of the French revolutionary process about this normative understanding of the judge as the "mouth of the Law".

After the experience of an aristocracy in robes[9], France cultivated certain hostility to the figure of the judge[10], and made sure that the

---

[6] DELMAS-MARTY, Mireille. *Les forces imaginantes du droit (III):* la refondation des pouvoirs. Paris: Seuil, 2007, p. 41.

[7] I have adopted, on this point, a distinction between legal system and legal tradition, on the lines proposed by Merryman and Pérez-Perdomo: "a legal system, as that term is here used, is an operating set of legal institutions, procedures, and rules […] in a world organized into sovereign states and organizations of states, there are as many legal systems as there are such states and organizations […] a legal tradition, as the term implies […] rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective" MERRYMAN, John Henry; PÉRES-PERDOMO, Rogelio. *The Civil Law Tradition*: an introduction to the legal systems of Europe and Latin America. 3 ed. Stanford: Stanford University Press, 2007, p. 1-2.

[8] Civil Law is the oldest and most widespread legal tradition, marked by the ideology of encoding, that is, by the intention to concentrate in one single document (the code) without competition, all the reasons of Law, in a process of the production of truth. See: GARAPON, Antoine; PAPAPOULOS, Ioannis. *Julgar nos Estados Unidos e na França*: cultura jurídica francesa e *Common Law* em uma perspectiva comparada. Translated by Regina Vasconcelos. Rio de Janeiro: Lumen Juris, 2008, p. 38.

[9] "Before the French Revolution, judicial offices were regarded as property that one could buy, sell, and leave to one's heir on one's death. Montesquieu himself inherited such an office, held it for a decade, and sold it. The judges were an aristocratic group who supported the lands aristocracy against the peasants and the urban working and middle classes, and the centralization of governmental power in Paris". MERRYMAN, John Henry; PÉRES-PERDOMO, Rogelio. op. cit. p. 16.

[10] GARAPON, Antoine. *O juiz e a democracia.* Translated by Maria Luiza de Carvalho. Rio de Janeiro: Revan, 2001, p. 35.

separation of powers would give long service to the insulation of the judiciary from politics. Under the empire of this depoliticized conception of the judge, it was logical to defend the institutional independence of the Judiciary with regard to society itself, in view of the web of the most varied private interests. It was for good reason that the Goddess of Justice, blindfold and equidistant from conflicting interests, conferred such a perfect aesthetic synthesis to the Judiciary – even if only provisionally.

Immersed in another legal culture, the U.S. laid down a very different relationship between judges and politics. The judiciary was not the target of the American Revolution, but an ally of individuals in the fight against the abuse of their rulers[11], consolidating itself since then, though not linearly, as a natural and necessary character in the political scene, in the deepening of the democratic process.

But countries that had fed for years not only on the practice, but on the ideology of codification and on the consequent mechanistic idea of judicial activity, have got used to the political-institutional framework in which the legislator deliberates about the future; the administrator or the executive deals with current problems in a way delimited by the law, and the judge acts guided by the past (a dated decision by the legislator, conveyed by law)[12].

For the construction of the Welfare State, this repertoire was insufficient. The role of the state needed to acquire the sense of planning, that is, a political process with a view to the transformation or consolidation of a certain socio-economic structure, of a certain political structure, which would not be possible with a retrospective legal practice[13], guided by previously and exclusively fixed political reasons.

Law is compelled to change its own reference time from the past to the future, which has an impact on the way of determining the law and on the composition of the actors who exercise this power[14], to determine the law and politics.

The legislation of the welfare state is open, and can be indeterminate. It transcends the traditional formula propagated by imperativist

[11] MERRYMAN, John Henry; PÉRES-PERDOMO, Rogelio. op. cit. p. 16.

[12] HABERMAS, Jürgen. *Between facts and norms:* contributions to a discourse theory of law and democracy. Translated by William Rehg. Cambridge: The MIT Press, 1998, p. 245.

[13] VIANNA, Luiz Werneck [et al.]. *A judicialização da política e das relações sociais no Brasil.* Rio de Janeiro: Revan, 1999, p. 20-21.

[14] BOURDIEU, Pierre. O Poder Simbólico. Translated by Fernando Tomaz. 14 edição. Rio de Janeiro: Bertrand Brasil, 2010, p. 212.

theoreticians[15] of "order and coercion" (which presupposes a previous selection between right and wrong), and presents new alternatives for the relationship between state and society, for politics[16].

In view of that, this new profile of legislation, marked by the presence of open clauses, by norms of principle, the judge is challenged to participate, along with the legislator, in composing solutions for the present and future, in the resolution of problems that no longer belong to a strictly legal field.

3. New Judicial Power, new claims: from distancing to accountability

Brazil is no exception to this process. Themes of great popular appeal began to appear with reasonable frequency on the agenda of the summit of the Brazilian Judiciary, such as research on embryonic stem cells, abortion, racial quotas, demarcation of indigenous lands, homo-affective union, among others.

According to the literature, it is a global trend of growth of the judiciary[17], a possible approximation of the countries of Civil Law with the American standard of determining and making the Law – a standard that, whether as a matter of principle[18], or because of a more pragmatic perspective of Justice[19], does not hesitate to allocate to the judge the role of a protagonist in the creation of law.

In countries such as Brazil, marked by substantive Constitutions[20], the judicialization of politics is a reality imposed by the constitu-

---

[15] For all, the model of "order based on threats" proposed in: AUSTIN, John. *El Objeto de la Jurisprudencia*. Trad. Juan Ramón de Páramo Argüelles. Madrid: Centro de Estudios y Political Constitucionales, 2002.

[16] CAPPELLETTI, Mauro. *Juizes legisladores?* Translated by Carlos Alberto de Oliveira. Porto Alegre: Sergio Antonio Fabris editor, 1999. p. 41.

[17] TATE, C. Neal; VALLINDER, Torborn. *The global expansion of judicial power.* New York: New York University Press, 1995.

[18] DWORKIN, Ronald. The moral reading of the constitution. In: *The New York Review of Books*, 21 March 1996, p. 46-50.

[19] NONET, Philippe; SELZNICK, Philip. *Direito e Sociedade:* a transição ao sistema jurídico responsivo. Translated by Vera Pereira. Rio de Janeiro: Revan, 2010, p. 104.

[20] MACHADO, Joana. Império da Constituição e atividade judicial: ecos do Caso Lüth sobre o novo constitucionalismo brasileiro. In.: Boletim CEDES, out/dez/2011. Available at: http://www.cis.puc-rio.br/cedes/PDF/out_2011/imperio.pdf

tional agenda itself[21]. Whether this is a desirable course or not, it seems, to some extent[22], irreversible: the judiciary appears on the contemporary scene as a field of new possibilities for political representation[23].

In this context, the judiciary has come to have demands on it previously restricted to the areas of the powers that are traditionally considered political – the legislative and the executive. The discourse in favour of independence and distancing of the judiciary are giving way to demands for accountability[24], transparency, publicity, closeness to society.

It is natural, in this light, to require greater and greater access to the decision-making processes of the judiciary, to increase social interest in the activities and the members of that institution.

In Brazil, the Constitution of the Republic itself provides in article 93, IX[25], for the publicity of judgments by the organs of the judiciary. Unlike what happens in many constitutional systems, in which the actions of unconstitutionality are judged in private hearings, the trial sessions of the Supreme Federal Court have a public character and the votes of the judges, at least officially, may only be disclosed in this environment, even if they are preceded by a request for examination[26].

At the end of the trial, the findings, drafted by the rapporteur of

---

[21] CITTADINO, Gisele. Judicialização da política, constitucionalismo democrático e separação dos poderes. In.: VIANNA, Luiz Werneck. (org.). *A democracia e os três poderes no Brasil*. Belo Horizonte: Editora UFMG, 2002.

[22] I analysed this question in more detail in another work, in which I differentiate the "judicialization of politics" of the trend of "judicial activism", specifically in the context of the Supreme Federal Court of Brazil: MACHADO, Joana de Souza. Ativismo judicial no Supremo Tribunal Federal. Dissertação de Mestrado de Direito, PUC-Rio, Rio de Janeiro, 2008.

[23] ROSANVALLON, Pierre. *Democratic legitimacy:* impartiality, reflexivity, proximity. Translated by Arthur Goldhammer. Princeton: Princeton University Press: 2011, p. 07.

[24] FILGUEIRAS, Fernando. Accountability e Justiça. In.: AVRITZER, Leonardo [et al.]. *Dimensões políticas da justiça*. Rio de Janeiro: Civilização Brasileira, 2013, p. 261-268.

[25] Article 93, IX, CF/88: "all judgments of the organs of the Judiciary will be public, and all decisions well-founded, under penalty of rendering them invalid, and the law may limit presence in certain acts, to the interested parties and their lawyers or only to the latter, in cases where the preservation of the right to privacy of the person concerned does not jeopardise the public right to information" [translated by the author] – Text amended by Constitutional Amendment No. 45, 2004.

[26] MENDES, Gilmar Ferreira. Controle constitucional e processo de deliberação. In.: *Revista Consultor Jurídico*, 12 de maio de 2011. Available at: http://www.conjur.com.br/2011-mai-12/controle-constitucionalidade-processo-deliberacao

the action or the judge whose divergence leads to the final judgement, are published in a printed and a digital version, in the Journal of Justice, the daily national newspaper of the official Brazilian press. Moreover, the whole content the trial is made available, that is, all the votes cast and the transcript of any oral debates that took place in the session, on the official website of the Supreme Court[27]. In addition, the debates are broadcast live on "Justice TV" and "Justice Radio".

In the U.S., although the Supreme Court already makes available the daily transcript of the trials and the audio recordings weekly, there is still strong resistance on the part of judges to accept the presence of video cameras in the courtroom, a stance that a great part of American society, the press and the academic community fails to understand. With so many possibilities of access to the decisions of the Supreme Court, what is the reason for closing the door only to video cameras, when all other means of publicity make the Supreme Court a kind of glasshouse[28]?

4. The risks added by the cameras

As stated at the beginning of this essay, the judges of the American Supreme Court still largely fear that the video cameras might modify the dynamics of the institution. Are these fears well founded?

A consistent answer to this question would certainly require empirical research in which the behaviour of judges with and without the presence of the cameras was observed.

With a full decade of "Justice TV" in Brazil, although we have no news of research conducted in the above terms, some impressions have begun to be discussed.

A quantitative study of the impacts of "Justice TV" on the judgments of the Supreme Federal Court found interesting data in the Direct Actions of Unconstitutionality: the votes have taken longer in the "post-Justice TV" era, the collective production of the Court has suffered a reduction, whereas the individual output of Ministers has increased significantly. This study rightly took care not to assert a clear causality between the operation of "Justice TV" and the data obtained, since it did not take into account other possible factors that could have an impact on

[27] www.stf.jus.br

[28] WEST, Sonja R. The Monster in the Courtroom. In.: *The Brigham Young University Law Review*, 2013. Available at: http://lawreview.byu.edu/articles/1361462114_09.west.fin.pdf

the decisions analysed[29].

In any case, from the data collected, the study concludes that the votes of the STF are more referenced to the general public, and that fact could contribute to greater legitimacy of the court.

So it is in this last conclusion that the study seems to assume the delicate premise that the legitimacy of the Supreme Federal Court is being tuned between public opinion and the opinion of the judges, apparently disregarding the important counter-majority function that the judiciary is still supposed to fulfil.

It is in this very point that the great danger to exercising judicial power before the cameras lies, that is, the danger of the temptation of populism, in other words, attempting to embody the deepest real feelings of the people, understood as a self-evident truth, and which dispenses with the bureaucratic deviations of mediation proceedings[30].

On the other hand, the viewers run the risk of falling prey to the illusion of free access to the truth produced by the judges[31], which in Brazil still has obvious difficulty in assuming the political nature that largely encompasses its function.

The live broadcast of trials sells viewers the sensation of being eyewitnesses to the production of justice, blurring their view of the mediation carried out, the difference between the naked eye and the aided eye[32].

A logic of spectacle is imposed on judges and other actors, who, since they know they are being observed, can be even more stimulated to carry out performing acts, administrating their images and different interests, without necessarily making public reason prevail over private reasons. Judges are promoted to celebrities, almost all-present via the technology. The promise of bringing us closer to justice by the presence of cameras in the courts may ultimately be misleading, to the extent that the object tends to alter before the viewer.

In this historic year of 2013, when Brazil is taken by proceedings,

---

[29] FONTE, Felipe de Melo. Votos do STF são cada vez mais para o grande público. In.: Revista Consultor Jurídico, 20 de maio de 2013. Available at: http://www.conjur.com.br/2013-mai-20/felipe-fonte-votos-stf-sao-dirigidos-cada-vez-grande-publico

[30] GARAPON, Antoine. Op. Cit., p. 66.

[31] These broadcasts represent transparency for me, because there's nothing there except the truth, except the actual event there" [translated by the author] – expression used by one of the people interviewed in the aforementioned documentary produced by Justice TV, available at: http://www.youtube.com/watch?v=CamBItfAuGQ

[32] GARAPON, Antoine. Op. Cit., p. 66.

as yet undeciphered, of teeming multitudes, demanding various political and social changes, the result of an opinion poll[33] on the presidential succession in Brazil, carried out in the heart of the demonstrations, is, at the very least, intriguing. Although he has never presented himself as a candidate for the post, the favourite in the opinion of the protesters was the current president of the STF, Minister Joaquim Barbosa, who became a bastion of the morality of the country after his "heroic"[34] role as rapporteur in Criminal Case no.470, the famous trial of the "monthly allowance scheme", accompanied live by many via " Justice TV ".

Those are basically empirical claims, and we ought to investigate them. Once we know whether these effects occur and how substantial they are, we would be in a position to make a normative evaluation of whether the benefits of televising judicial proceedings exceed their costs. Ultimately though we need to reflect more, and urgently, about what people take home when we do justice before the cameras, instead of simply assuming we are in a better place with them.

References

AUSTIN, John. *El Objeto de la Jurisprudencia*. Trad. Juan Ramón de Páramo Argüelles. Madrid: Centro de Estudios y Political Constitucionales, 2002;

BOURDIEU, Pierre. O Poder Simbólico. Translated by Fernando Tomaz. 14 edição. Rio de Janeiro: Bertrand Brasil, 2010;

CAPPELLETTI, Mauro. *Juizes legisladores?* Translated by Carlos Alberto de Oliveira. Porto Alegre: Sergio Antonio Fabris editor, 1999;

CITTADINO, Gisele. Judicialização da política, constitucionalismo democrático e separação dos poderes. In.: VIANNA, Luiz Werneck. (org.). *A democracia e os três poderes no Brasil*. Belo Horizonte: Editora UFMG, 2002;

DELMAS-MARTY, Mireille. *Les forces imaginantes du droit (III):* la refondation des pouvoirs. Paris: Seuil, 2007;

DWORKIN, Ronald. The moral reading of the constitution. In: *The New York*

[33] Opinion poll carried out on June 20, 2013, among demonstrators in São Paulo, by Datafolha, as reported in the newspaper Folha de São Paulo. Information available at: http://www1.folha.uol.com.br/poder/2013/06/1299095-joaquim-barbosa-lidera-corrida-presidencial-entre-os-manifestantes.shtml

[34] Minister Joaquim Barbosa, throughout the trial of the "monthly allowance scheme" was dubbed in social networks as the "Brazilian Batman". See "a disparada de Joaquim Barbosa, o Batman brasileiro", available at: http://exame.abril.com.br/brasil/politica/noticias/a-disparada-de-joaquim-barbosa-o-batman-brasileiro

Review of Books, 21 March 1996;

FILGUEIRAS, Fernando. Accountability e Justiça. In.: AVRITZER, Leonardo [et al.]. *Dimensões políticas da justiça*. Rio de Janeiro: Civilização Brasileira, 2013;

FONTE, Felipe de Melo. Votos do STF são cada vez mais para o grande público. In.: Revista Consultor Jurídico, 20 de maio de 2013. Available at: http://www.conjur.com.br/2013-mai-20/felipe-fonte-votos-stf-sao-dirigidos-cada-vez-grande-publico

GARAPON, Antoine. *O juiz e a democracia.* Translated by Maria Luiza de Carvalho. Rio de Janeiro: Revan, 2001;

GARAPON, Antoine; PAPAPOULOS, Ioannis. *Julgar nos Estados Unidos e na França*: cultura jurídica francesa e *Common Law* em uma perspectiva comparada. Translated by Regina Vasconcelos. Rio de Janeiro: Lumen Juris, 2008;

HABERMAS, Jürgen. *Between facts and norms:* contributions to a discourse theory of law and democracy. Translated by William Rehg. Cambridge: The MIT Press, 1998;

MACHADO, Joana. Ativismo judicial no Supremo Tribunal Federal. Dissertação de Mestrado de Direito, PUC-Rio, Rio de Janeiro, 2008.

_____. Império da Constituição e atividade judicial: ecos do Caso Lüth sobre o novo constitucionalismo brasileiro. In.: Boletim CEDES, out/dez/2011. Available at: http://www.cis.puc-rio.br/cedes/PDF/out_2011/imperio.pdf

MENDES, Gilmar Ferreira. Controle constitucional e processo de deliberação. In.: *Revista Consultor Jurídico*, 12 de maio de 2011. Available at: http://www.conjur.com.br/2011-mai-12/controle-constitucionalidade-processo-deliberacao

MERRYMAN, John Henry; PÉRES-PERDOMO, Rogelio. *The Civil Law Tradition*: an introduction to the legal systems of Europe and Latin America. 3 ed. Stanford: Stanford University Press, 2007;

NONET, Philippe; SELZNICK, Philip. *Direito e Sociedade:* a transição ao sistema jurídico responsivo. Translated by Vera Pereira. Rio de Janeiro: Revan, 2010;

ROSANVALLON, Pierre. *Democratic legitimacy:* impartiality, reflexivity, proximity. Translated by Arthur Goldhammer. Princeton: Princeton University Press: 2011;

TATE, C. Neal; VALLINDER, Torborn. *The global expansion of judicial power*. New York: New York University Press, 1995;

VIANNA, Luiz Werneck [et al.]. *A judicialização da política e das relações sociais no Brasil*. Rio de Janeiro: Revan, 1999;

WEST, Sonja R. The Monster in the Courtroom. In.: *The Brigham Young University Law Review*, 2013. Available at: http://lawreview.byu.edu/articles/1361462114_09.west.fin.pdf

Judging online hate speech:
Challenges brought by the perspective of recognition

Anna Clara Lehmann Martins[1]

Abstract: This paper brings into discussion the challenges that online hate speech presents to law, especially to judging activity, in light of Honneth's theory of recognition. Whereas online hate speech can be regarded as a denial of recognition in terms of equality and difference value, law stands as a counterpart system, responsible for answering to disrespectful situations by means such as the judicial sentence. The sentence emerges, thus, as a channel for the judge to establish new reciprocity relations. In order to address the problem completely, however, its scope must go beyond the cognitive notion of equality, entering at the realm of valuing differences, in which both reason and emotion are present. In this sense, this paper aims to discuss measures which could be taken by the judge while responding to online hate speech cases so as to contemplate matters of difference value without putting at risk his impartiality and respect towards the constitutional system. Among appropriate measures, it is envisioned the usefulness of empathy and interdisciplinarity to judging activity.

Keywords: online hate speech, recognition, judging activity, empathy, interdisciplinarity, Honneth

As it can be evidenced by recent events, from the easy sharing of opinions on personal profiles to the articulation of complex popular manifestations, Internet emerges as an instrument of enhancement of freedom of speech[2]. And, if this media is considered on the basis of its

[1] Obtained her Bachelor of Law degree from the Universidade Federal de Santa Maria (UFSM), Brazil, in 2013. Currently pursues a Master of Law degree from the Universidade Federal de Santa Catarina (UFSC), Brazil. Founder member of the Informational Law Nucleum (NUDI), at UFSM, under the coordination of Professor Rosane Leal da Silva. Former administrator of NUDI's website: http://www.ufsm.br/nudi. Lattes Curriculum: http://lattes.cnpq.br/8850449779801389. E-mail: laclaramartins@gmail.com. Santa Maria (RS), Brasil

[2] We are fully aware that this assertion is object of much discussion in literature. Here, what we mean is that now a new kind of communication is made possible: a faster and

instrumental potential, we can admit that it largely remains at the choice of the user whether to employ it in a positive form – case of cultural diffusion and open dialogue – or in a negative one – case of hate speech – the object of this paper. Here, we aim to discuss the challenges that online hate speech presents to law, especially to judging activity, in light of Axel Honneth's theory of recognition.

Yet, one may ask: is online hate speech a noticeable problem? Is it remarkably present at cyberspace? If so, has it already reached the courts? In Brazil, the issue has achieved alarming proportions. Statistics from the National Center of Report of Cybercrime, an organ powered by the non-governmental organization SaferNet and allied to the Brazilian Prosecution Service, show that, in 2012, from a total of 52.000 online reports, no less than 15.000 (30%) involved hateful content, such as racism, religious intolerance, homophobia, xenophobia and neo-Nazism (SaferNet, 2013). Regarding lawsuits at courts of appeal and superior courts, until 2011 at least 1% of the demands involving social networks were about hate speech (Silva et al., 2011). The issue gained national prominence in 2011 with the 'Mayara Petruso Case' – in which a law student was condemned because of a discriminatory message posted on Twitter[3].

As law, among other instances, is called to give response to such cases – especially through the figure of the judge, who establishes an important dialogue channel between victim, offender and society throughout the procedure –, it is necessary, firstly, to define what is being judged in an online hate speech case. From this point, the challenges inherent to the issue may be properly addressed.

***

simultaneous all-to-all communication, in opposition to the former one-to-one (letter, telephone) and one-to-all (newspaper, television) types. As evidenced by Manuel Castells, among other researchers, the user of the new media is enabled to make his voice heard by a larger scope of people, disposing of a wide range of tools to better express and deliver his message. From these changes, however, it does not follow that the online environment presents no rules or limitations to speech. As many scholars have argued, by employing perspectives from, for instance, Michel Foucault or Boaventura de Sousa Santos, Internet holds the potential to embrace veiled mechanisms of speech control and speech homogenizing, though its role is not reducible to it.

[3] The case was closely followed by national media: one example is the coverage by UOL Tecnologia (2012). It also called the attention of foreign press vehicles, such as The Telegraph (2012).

According to Honneth (2004; 2011), the construction of personal identity is directly attached to experiences of recognition. If the individual is able to refer to himself as a separate being, as a person both common and unique, he does so because of the interaction he establishes with other beings, more specifically with other persons. By himself, he does not possess the means to answer to the question 'who am I?'. The individual needs the external perspective of otherness, namely, recognition.

It does not mean, however, that the recognizing process involves uniformity or completeness. Inspired by the sketches of the young Hegel from the Jena period, Honneth explains that recognition takes three basic forms: love, law and solidarity. Each of them concerns a specific dimension of personality, the first being related to affectivity, the second to cognition, and the last, to both. On this basis, the success or failure of reciprocity relationships triggers an individual reaction called 'practical relation-to-self', which, in other words, is the immediately emotional and mediately cognitive result from the encounter with the other to the shaping of the individual's identity. Thus, whereas positive recognizing processes lead the individual to achieve self-confidence, self-respect and self-esteem, relationships of denial of recognition promote the lack of such traits.

One may wonder where does online hate speech stand in this context. According to Brugger (2007, p. 118), hate speech contains 'words which tend to insult, intimidate or harass people because of their race, color, ethnicity, nationality, gender or religion', among other attributes, enabling the instigation of violence, hatred and discrimination against targeted groups. It is, before anything, violence at the symbolic level (Wieviorka, 2007, p. 71).

Per se, its effects are already very serious: exclusion, denigration, further hatred. Transposed to the online level, they are made even worse. As demonstrated by Castells (2011), new media are characterized by the surpassing of time and space ordinary obstacles: they display high-velocity information flows and all-to-all modes of communication, regardless of the content of a given message. Among new devices, emphasis must be placed on social networks, recently incorporated into the daily lives of millions of users spread all over the world[4] due to their

[4] According to Statistic Brain (2014), Facebook, for example, counted 1,3 billion of monthly active users by January 2014. Users come mainly from the United States, India and Brazil.

decentralized and friendly structure (Riva, 2010, p. 70).

Though the primary intention of these devices is to approximate people, the willingness of disclosure and the feeling of safety behind a computer screen may also lead to a state of indifference towards the other's pain and, thus, to the publication of contents that would normally be inhibited, such as intolerant speeches. From this point, it does not take much to prompt aggressive behavior. In a few words, what we mean is that, with the aid of the Internet, hate speech is dangerously allowed to expand the reach of its damage and recruitment in global proportions.

For all that has been said so far, it follows that hate speech articulates itself within the specific traits of a given culture and society. It relies largely on social context. Thus, if we apply Honneth's theory of recognition to the case of online hate speech, we will soon perceive that it concerns more intimately to the two historically situated forms of recognition, namely, law and solidarity.

These forms were once deeply mingled, as in the case of the Middle Ages[5]. The perspective of modernity, however, has drawn a rather clear distinction between the two: while on one side we have rights and obligations, of which any human being is entitled to partake of, just for the sake of being human, on the other we have social esteem, which relates to the particular value of each manifestation of diversity in society, taking in consideration the framework of cultural references adopted.

In such sense, as Honneth poses it, the recognition sphere of law addresses the individual in its equal dignity, an issue of cognitive respect. The recognition sphere of solidarity, on its turn, is concerned with the value of the individual, regarded in his uniqueness, to social development, an issue of rational tolerance and also of affective interest towards difference[6]. The hard strokes of this division have begun to be delineated during the Illuminism, but they are object of development to present day, with the advent of the Informational Society. One can say,

[5] A wide range of recent works deal with this unique entanglement between rights and social value, characteristic of the medieval period. The approaches vary from history of mentalities (Chartier, 2009; Duby, 2005) to critical history of institutions (Hespanha, 2005).

[6] This interest, expressed as active caring – or responsibility, as preferred by Ruiz (2003) and Lévinas (1997), constitutes a key aspect to the achievement of goals in a plural society. This is so because different skills and characteristics are capable of contributing to social goals only while preserved, cared for, an operation which necessarily requires involvement, not indifference.

thus, that within these spheres of recognition human being has been continually (re)discovered as simultaneously universal and singular.

Yet, such process of identity discovery through recognition is not always targeted at a positive direction. As shown by many examples spread in history, it can be reversed by operations of recognizing denial, such as hate speech. But how does hate speech specifically relate to each sphere of recognition? According to Douzinas (2009, p. 300), a single manifestation produces a double-folded damage: offended people suffer, in the first place, the non-recognition of their dignity and the denial of the correspondent equal respect, and, in the second place, the ruin of their esteem among themselves and before society, caused by the destruction of the positive evaluation of their character and shared history.

In short, we have that hate speech attacks people by discursively depriving them both of their equal humanity and their social relevancy, damaging their sense of self-respect and self-esteem. These lesions, we remind, are made even deeper because of the faster and expanded reach of the Internet. Such is, thus, the manner in which online hate speech addresses the recognition spheres of law and solidarity.

Having sketched how the double harm is articulated, one easily perceives that an effective judicial response must cover the two spheres of recognition attacked. Yet, a problem arises, especially when facing the sphere of solidarity: the interest towards difference – with its necessary affective dimension – does not endanger the impartiality imposed on the judge?

***

In order to properly answer to that question, first we must ask ourselves: what is impartiality? Our heritage from Positivism provides us a ready response: it is a neutral and strictly rational conduct at the performance of all judicial procedures, always placed within the narrow limits of law and aiming at its purely logical enforcement. In this context, the norm plays the role of a framework which contains reality, hardly the opposite. The lack of a place for the solidarity sphere of recognition is evident.

Nowadays, however, the growing complexity of social structures claims for more than mathematical solutions: the sentence is no longer regarded as an isolated soliloquy, but as part of a greater dialogue. It is the answer of the judge to the parties and to society, in which it is

intended, on one hand, an immediate response to the conflict, in the sense of a direct action towards the involved parties; on the other hand, a mediate response is also awaited, in which expectations external to the parties will be taken into account, given the weight that society exerts over immediate responses (Ferraz Jr., 2008, p. 287).

This is so because, while judging and motivating his point of view, the judge is not on his own, solely with a normative system to recur to. Rather, he is situated among a whole complex of references: the legal context of the past; the current legal context; contemporary theories that favor one decision, as well as the ones that are opposed to it; the decisions from superior courts; the judge's own previous experiences; and, primarily, the expectations held by the parties and by society, which can be anticipated and further apprehended by the judge on the course of the procedure. Thus, the sentence emerges as a single link in the midst of an intricate polyphony of ideas and feelings. Using the terms of Bakhtin and Volochínov (2006, p. 99), it is an utterance among a vast chain of acts of communication. An act, therefore, referred to the other: an act of recognition.

In this sense, it is important to remark that the aim of the sentence focuses no longer on the safety provided by subsumption, but on the justice achieved by creative (and legal) decisions. This ethical shift is explained by the ever stronger realization that our real life problems, be they triggered by historical, social or technical reasons, easily surpass the reach of norms as written in great codifications. Law, more than ever, is in need of interpreters, of creativity, for it does not deal with abstract premises. It plunges into a complex of plural registers. So, if the judge is to give a satisfactory answer to a concrete conflict, he must first be able to understand the languages spoken. He must consider difference.

This is why, today, the mingling between neutrality and impartiality does not sustain itself. As defended by Portanova (2003, p. 74), neutrality is unattainable. Every human act is reported to value. Even the pursuit of indifference, for it values precisely the lack of value, or the 'values of tradition'. Law itself is woven in accordance to political wills, necessarily evaluative (Portanova, 2003, p. 65).

Judging activity, as posed by Silva (2006, p. 280), shows most brightly its unavoidable relationship with value at the moment of interpretation, in which the judge is not only challenged to reach the primitive sense of a normative precept, but also to harmonize it with the actual circumstances surrounding the case, breathing new life upon the written law. Even if it were possible to keep the judge away from any value, it

would, in equal measure, keep the sentence away from its main goal, that is, justice. For the latter, when related to recognitive balance, to the good life in the context of a given community (as defended by Ricoeur, 1991), it relentlessly requires the addressing of all involved spheres of recognition, and thus, of values as well as rights.

This being said, we have that impartiality has gained a more specific meaning. According to Portanova (2005, pp. 77-79) it is restricted to the judge's immediate subjective connections, that is to say, to his personal interest towards one or both parties, and to his economical interest on the advantages which he may obtain directly or indirectly from the dispute. It does not concern in any way to aspects such as his interpretation of the law, his political views or his opinion on social issues. As we have seen, the idea of the judge as an acritical technician, as a *bouche de la loi*, is long surpassed. The very Brazilian Code of Civil Procedures supports this view, since it approaches the subject in the negative form, by enlisting specific cases of impediment and suspicion[7], related to personal and economical connections. In the list, there is no mention to values as historical and cultural manifestations.

If, however, there still remain doubts on the possibility of the judge to address the recognitive sphere of solidarity, one must remind that judging activity in Brazil is situated within a constitutional framework which values difference. Our Constitution (1998) devotes a whole section to the promotion and protection of the plurality of cultural manifestations[8]. Also, an individualized penalty is assured for offenders[9], demonstrating that they too must be treated according to their unique circumstance.

---

[7] These cases are enlisted in the Articles 134 and 135 of the Brazilian Code of Civil Procedures. For example, we have impediment when the judge figures as one of the parties (the same holding for his spouse and his relatives), or when he has already worked in this specific procedure as a lawyer or a prosecution officer. On the other hand, we have suspicion when the judge is known to be a close friend, a capital enemy, a creditor, a debtor or an heir in relation to one of the parties.

[8] We make reference to Title VIII, Chapter III, Section II: 'Of Culture'. The Article 215 reads: 'The State shall guarantee to all the full exercise of cultural rights and the access to the sources of national culture, and shall support and encourage the appreciation and dissemination of cultural manifestations'. Among the goods that Article 216 enlists as part of the Brazilian cultural heritage we call attention to (I) forms of expression and (II) modes of creating, making and living, besides creative work and cultural spaces.

[9] As it reads from Constitution's Fifth Article, XLVI: 'The law shall regulate the individualization of punishment'.

As a democratically elaborated Constitution, consonant with the goals and characteristics of Brazilian society, it evidently transcends the point of view of individuals, including those with the power of judging. It follows that this complex of norms stands as a valuable guide – and also an objective limit – on how a judge must regard cases of denial of recognition. As we can perceive, solidarity issues are fully allowed to be raised by his pen.

What matters now is how. In face of new problems, such as online hate speech, the judge is required to be creative, while within the legal limits. Which tools may best help him to approach the solidarity sphere of recognition? In this study, two instruments are suggested: the resource to empathy and the resource to interdisciplinarity.

***

The resource to empathy recovers the necessary complementarity between reason and sentiment in the apprehension of reality. Studies on the field of psychoanalysis, combined with recent discoveries on neuroscience, share the same contesting tone when the subject is the solitary reign of reason over the realm of decision. As noted by Damásio (2011, p. 276), there is no rationality without sentiment. Both are part of interconnected systems. In this sense, the openness to emotion, along with the realization that reason and sentiment form together a unique and complex system, contribute decisively to the achievement of the recognitive goals of the sentence.

This is so because recognition is a matter of putting oneself in the perspective of the other, in order to approximately experience his circumstance. In other words, it involves empathy: the ability to 'know' what others feel. Most often this trait is referred to at the level of the individual: one must develop empathy so as to cultivate healthy personal relationships (Goleman, 2001). Yet, it is no less true that the activity of 'putting oneself in the other's shoes' should also be present at the institutional level (Slote, 2007; Nussbaum, 2008). It constitutes a prerequisite for the accomplishment of justice (Dubber, 2006), since the just answer must be suitable to the situation of those who plead and those who receive.

In order to achieve this kind of immersion, the judge must firstly be aware of his own context and preferences. Empathy is nourished by self-knowledge: the more we are conscious of our own emotions, the

more easily we will come to understand the emotions of others (Goleman, 2001, p. 109). Only after a mature stage of self-awareness the judge will be able to put aside himself and, thus, be receptive to the alterity of offender and victim, as well as other involved people. How does a member of the targeted group feel after reading a hateful message? What moves a person to display publicly her hatred towards a given group, in despite of all current efforts in benefit of equality and diversity? In this sense, we see that empathy provides the necessary openness to difference and to its subsequent evaluation, that is to say, to the recognitive sphere of solidarity.

A purely rational approach, instead, could compromise the sense of justice inherent to judging activity, as pointed by Damásio (2011, p. 282): 'When human beings are not able to see the tragedy inherent to conscious existence [*an eminently emotional operation*], they feel less compelled to do something to minimize it and may show less respect towards the value of life'. It means that the pretense of neutrality via the asphyxiation of feeling ultimately converts the sentence into an empty monologue, indifferent to the situation of both parties – and therefore selfish, solipsistic, even arbitrary. Of course we do not mean to support an absolute primacy of emotion over reason. Rather, we defend a joint and collaborative use of both faculties, in accordance with the affective and cognitive dimensions encompassed by the theory of recognition.

The second resource which comes to aid the judge at the approach of solidarity issues is interdisciplinarity. It recovers the need of a deeper understanding of the case in its multiple aspects, the 'understanding of the misunderstanding' (Morin, 2005, p. 109). This is so because the legal world, the judge's nearest tool, organized in prescriptions, permitted or prohibited conducts, is incapable of containing the world of life, considering its multiple and mobile nature, full of interactions, uncertainties, nuances between the ideal and the forbidden. In order to face this unbalance and, thus, improve the judge's analysis of reality, it is advisable for him to utilize tools present in other fields, from the sciences to philosophy and even to the arts.

The contact with new horizons of knowledge allows a more complex apprehension of the case, in as much as it aims to unveil the involved social structures and underlying non-recognition relationships. In this sense, the interdisciplinary approach might reveal itself especially useful while judging cases related to the Internet, because of the new (and not yet fully explored) circumstances of this media and its consequences.

Here we might recall, for example, the variable profile of offenders – from the 'domestic' profiles of students to the wider networks of neo-Nazi sympathizers (this when both are not connected!). We can remember as well the inconstant degree of awareness displayed by users on what concerns the consequences of a disrespectful message spread online.

Such circumstances articulate themselves in a very different way when compared to offline life, and the judge must be prepared to recognize and properly consider them. Whether he will do it by personal research, team research or consultation of court assistants, such as the *amici curiae*, it depends on many factors such as availability of time and personnel, but, most of all, it relies on his choice.

Having enabled the construction of a deeper contextualized procedure, as a result, the interdisciplinary approach increases the chances of effectiveness of the decision. It promotes the building of sentences with a greater ethical compromise. In this operation, law constitutes an important criterion to be observed (Portanova, 2003, p. 123), but, as we have seen, it is hardly the only one: there is also the social context behind the conflict, the applicable principles – emphasis being given on the protection to human dignity as well as on reasonability, almost always present –, the judge's own reason and emotions, the contribution of other fields of knowledge, among others. Summing it up, the judge must be attentive to the social, economical and political concerns of his time, assuming a conscious and responsible position regarding his historical context.

The adherence of all these elements to judging activity suggests the overcoming of the long-standing Cartesian paradigm that excludes the cognitive subject – the judge – from the subject-object relationship. As remarked before, the judge is no longer obliged to hide his values and ideas on the basis of an alleged duty of neutrality while judging. Instead, he is now stimulated to reintegrate himself as subject, in the fullness of his singularity, as defined by Morin (2008, pp. 30-31):

> The reintegrated subject is not the metaphysical Ego, foundation and judge of all things. He is the living subject […], random, insufficient, vacillating, modest, who mentions his own finitude. He does not carry the sovereign consciousness that transcends time and space: he introduces instead the *historicity of consciousness*.[10]

[10] Free English translation.

Therefore, even if the individual normative precept contained in the sentence reproduces exactly the same words from written law, its meaning is unavoidably different, unique, for it was envisioned for the sake of a specific context. Both the case and the judge, accompanied by their respective circumstances, are unrepeatable. This is why judging activity is ultimately artistic.

***

From the foregoing, one is allowed to conclude that the search for recognitive balance between parties and between them and society is fully compatible with an open, interdisciplinary and ethically compromised judging activity. This becomes clear as the sentence is seen not just as the procedural ending of conflict, but as an opportunity of harmonizing, within the contextual possibilities, the reciprocal relationships involved.

The ethical goal of the sentence, that is, the closest approximation to the good common life, encounters its translation in Honneth's theory as the closest approximation to collective success at the three sphres of recognition. In this sense, the sentence emerges as an instrument through which the judge is able to inaugurate new relations of recognition, in order to put an end to the harmful effects of previous denial.

Admittedly, the solidarity sphere can be more freely managed and reach the attention of a wider range of people on other fronts, such as public policy. Yet, the judge cannot escape dealing with this feature. It is part of his very circumstance as member of a historically situated environment. All public institutions, in fact, should give more attention to this aspect of recognition, by stimulating the use of more appropriate tools to deal with it, such as empathy and interdisciplinarity. Thus, it would be more clearly perceived that both these actions, judging activity and public policies, are complementary.

The sentence possesses social weight, such is an undeniable fact. It has an educative character, inasmuch as it establishes a dialogue not only with the immediate parties, but also with society. It remains as a relevant indicative of which differences are to be taken into account and how they are to be valued. In addition to that, one must remind that it is through the procedural path, whose summit it is the sentence, that constitutional norms are actualized, or rather, made reality – in terms of equality and in terms of difference.

Further on, it must be remarked that not considering the sphere of solidarity may give vent to aberrations such as that present in the 'Richarlyson Case' - in which the judge, refusing to withdraw from his own perspective in order to know the other (or perhaps he ignored such possibility was possible), shows a flagrant assent to situations of prejudice towards homosexuals[11].

It certainly remains for other sectors, as the press and education institutions, the hard work of 'translating' relevant judicial sentences, in order to make them accessible to people who are not familiar with the jargon used at courts. Such is a work which must involve great care and supervision, under the risk of deviating to sensationalism. But the importance of this task does not obfuscate the fact that the judge himself bears high responsibility in procedures involving recognition. In such a way that he must be encouraged to refine his modes of assessing reality, by getting actualized on the new trends – such as the ones presented by new media – but also by getting in touch with the specific parties and their contexts. For the judge is more than an interpreter of the law: while dealing with online hate speech cases he is touching matters of identity, of self-realization, of common good living. And he will have to transcend the predictions of pure law if he is to give a complete answer to the problem.

References

Bakhtin, M.; Volochínov, V. N. (2006) *Marxismo e Filosofia da Linguagem*, São Paulo: HUCITEC. [Original title: *Marksizm i Filossófia Iaziká*]

Brugger, W. (2007) 'Proibição ou proteção do discurso do ódio? Algumas observações sobre o direito alemão e o americano', *Revista de Direito Público*, 15(1), 117-136.

Castells, M. (2011) *A Sociedade em Rede*, São Paulo: Paz e Terra. [Original title: *Rise of the Network Society*]

Chartier, R. (2009) *História da Vida Privada, 3: Da Renascença ao Século das Luzes*, São Paulo: Companhia das Letras. [Original title: *Histoire de la vie privée, 3: De la Renaissance aux Lumières*]

Damásio, A. R. (2011) *O Erro de Descartes: Emoção, Razão e o Cérebro Humano*, São Paulo: Companhia das Letras. [Original title: *Descarte's Error: Emotion, Reason*

[11] For further information on the case, see the online coverage by Folha de S. Paulo (2007).

and the Human Brain]

Douzinas, C. (2009) *O Fim dos Direitos Humanos*, São Leopoldo: Unisinos. [Original title: *The End of Human Rights*]

Dubber, M. K. (2006) *The Sense of Justice: Empathy in Law and Punishment*, New York: New York University Press.

Duby, G. (2005) *Le Origini dell'Economia Europea: Guerrieri e Contadini nel Medioevo*, Roma: Editori Laterza. [Original title: *Guerriers et Paysans. VII-XII^{e} Siècle. Premier Essor de l'Économie Européenne*]

Ferraz Jr., T. S. (2008) *Introdução ao Estudo do Direito: Técnica, Decisão, Dominação*, São Paulo: Atlas.

Folha de S. Paulo (2007) 'Futebol é varonil, não homossexual', [online], available: http://www1.folha.uol.com.br/fsp/esporte/fk0308200721.htm [accessed 15/02/2014].

Goleman, D. (2001) *Inteligência Emocional*, Rio de Janeiro: Objetiva. [Original title: *Emotional Intelligence*]

Hespanha, A. M. (2005) *Cultura Jurídica Europeia: Síntese de um Milênio*, Florianópolis: Fundação Boiteux.

Honneth, A. (2004) 'Recognition and Justice: Outline of a Plural Theory of Justice', *Acta*

Sociologica, 47(4), 351-364.

Honneth, A. (2011) *Luta por Reconhecimento: A Gramática Moral dos Conflitos Sociais*, São Paulo: Ed. 34. [Original title: *Kampf um Anerkennung*]

Lévinas, E. (1997) *Entre Nós: Ensaios sobre a Alteridade*, Petrópolis (RJ): Vozes. [Original title: *Entre Nous: Essais sur le Penser-à-l'Autre*]

Morin, E. (2005) *O Método 6: Ética*, Porto Alegre: Sulina. [Original title: *La Méthode 6: L'Éthique*]

Morin, E. (2008) *O Método 3: Conhecimento do Conhecimento*, Porto Alegre: Sulina. [Original title: *La Méthode 3: La Connaissance de la Connaissance*]

Nussbaum, M. C. (2008) *Upheavals of Thought: The Intelligence of Emotions*, New York: Cambridge University Press.

Portanova, R. (2003) *Motivações Ideológicas da Sentença*, Porto Alegre: Livraria do Advogado Ed.

Portanova, R. (2005) *Princípios do Processo Civil*, Porto Alegre: Livraria do Advogado Ed.

Ricoeur, P. (1991) *O Si-Mesmo como um Outro*, Campinas (SP): Papirus. [Original title: *Soi-Même comme un Autre*]

Riva, G. (2010) *I Social Network*, Bologna: Il Mulino.

Ruiz, C. M. M. B. (2003) 'O (ab)uso da tolerância na produção de subjetividades flexíveis', *Alteridade e multiculturalismo* [org. Sidekum, A.], Ijuí (RS): Unijuí.

SaferNet (2013) 'Indicadores da Central Nacional de Denúncias de Crimes Cibernéticos', [online], available: http://indicadores.safernet.org.br/ [accessed 14/02/2014].

Silva, R. L., Nichel, A., Martins, A. C. L., Borchardt, C. K. (2011) 'Discursos de ódio em redes sociais: Jurisprudência brasileira', *Revista Direito GV*, 7(2), 445-468.

Silva, O. A. B. (2006) *Processo e Ideologia: O Paradigma Racionalista*, Rio de Janeiro: Forense.

Slote, M. (2007) *The Ethics of Care and Empathy*, New York: Routledge.

Statistic Brain (2014) 'Facebook Statistics', [online], available: http://www.statisticbrain.com/ facebook-statistics/ [accessed 14/02/2014].

The Telegraph (2012) 'Brazilian law student faces jail for "racist" Twitter election outburst', [online], available: http://www.telegraph.co.uk/news/worldnews/southamerica/brazil/ 8111046/ Brazilian -law-student-faces-jail-for-racist-Twitter-election-outburst.html [accessed 14/02/2014].

UOL Tecnologia (2012) 'Justiça condena universitária por preconceito contra nordestinos no Twitter', [online], available: http://tecnologia.uol.com.br/noticias/redacao/2012/05/16/justica-condena-universitaria-por-preconceito-contra-nordestinos-no-twitter.htm [accessed 14/02/2014].

Wieviorka, M. (2007) *O Racismo: Uma Introdução*, São Paulo: Perspectiva. [Original title: *Le Racisme: Une Introduction*]

Methodology in comparative legal studies

Leonardo Machado Pontes[1]

Abstract: Regarding the history of comparative law we have traditionally methods such as descriptive (Aucoc), evolutional (Saleilles), functional (Rabel), factual (Schlesinger, Markesinis), structural (Sacco) and cultural (Legrand). The article will explore the functional and the cultural methods, but also the factual method, which is an extension of the functional method and was carried out by Rabel's disciples and others. The history of comparative legal studies will be shortly introduced, followed by the explanation of functionalism, the authors behind it, its later developments and main critics. Afterwards, functionalism will be confronted by structuralism and the hermeneutical methods, as possible solutions to functionalism's lack of theory. The article tries to portray a general picture of comparative legal studies and points of contradiction and ambiguity in the scholar literature of the present days.

Keywords: Compared law; comparative legal studies; functionalism; Rabel; Legrand; Sacco

1 Introduction

Compared legal studies are receiving from methodology a great importance and an extensive production of articles[2]. For 'method' one

[1] Partner with the Minas Gerais based law firm Hildebrando Pontes & Associados, Belo Horizonte, Brazil; L.L.M *Commercial Law,* Milton Campos's Faculty of Law (2011-2013); LL.M *European and International Intellectual Property Law,* Strasbourg's University Centre d'Études Internationales de la Propriété Intellectuelle (2013-2014, on progress); International coordinator of Brazilian's National Copyright Association (Associação Brasileira de Direito de Autor – ABDA). Contact: lm.pontes@hotmail.com.

[2] Just to cite a few: BRAND, Oliver. Conceptual comparisons: towards a coherent methodology of comparative legal studies. *Brook. J. Int'l L.*, v. 32, n. 2, p. 405-466, 2007; LEGRAND, Pierre. Comparative legal studies and commitment to theory. *MLR*, v. 58, p. 262-273, 1995; MOROSINI, Fabio. Globalization & law beyond traditional methodology of comparative legal studies and an example from private international law. *Cardozo J. Int'l*

should understand the technique used in relation to the comparison, which could be so much as historical, functional, evolutionary, structural, thematic, empiric or statistic.[3] Etymologically, 'method' means the search for a certain form of truth. From the Greek word '*methodos*', consists of the prefix '*meta*' (later) and in the suffix *'hodos*' (path). In the Latin form, 'procedure way' or 'rational process'.[4] As stated Descartes "*j'avois toujours un extrême désir d'apprendre à distinguer le vrai d'avec le faux, pour voir clair en mes actions, et marcher avec assurance en cette vie*".[5]

& Comp. L., v. 13, p. 541-561, 2005; ZUMBANSEM, Peer. Comparative law's coming of age? Twenty years after Critical Comparisons. *GLJ*, v. 6, n. 7, p. 1073-1084, 2005; MARKESINIS, Basil. Understanding American law by looking at it thought foreign eyes: towards a wider theory for the study and use of foreign law. *Tul. L. Rev.*, v. 81, p. 123-185, 2007; RENNEN, van TP. Philosophical underpinnings of modern comparative legal methodology. *StellenboschLRev.*, v. 7, n.1, p. 37-60, 1996; PICKER, Colin B. Comparative Law Methodology & American legal culture: obstacles and opportunities. *Roger Williams U. L. Rev.*, v. 16, p. 86-99, 2011; SACCO, Rodolfo. Legal formats: a dynamic approach to comparative law (Installment I of III). *Am. J. Comp. L.*, v. 39, n. 1, p. 1-34, 1991; KÖTZ, M. Hein. Comparative law in Germany today. *RIDC*, v. 51, n. 4, 1999, p. 753-758; PLATSAS, Antonios Emmanuel. The functional and the dysfunctional in the comparative method of law: some critical remarks. *EJCL*, v. 12.3, p. 1-16, 2008; GORDLEY, James. Is comparative law a distinct discipline? *Am. J. Comp. L.*, v. 46, p. 607-615, 1998.

[3] PALMER, Vernon Valentine. From Lerotholi to Lando: some examples of comparative law methodology. *Am. J. Comp. L.*, v. 53, p. 263, 2005. The 'scientific' character of comparative legal studies is object of controversy, although without the same intensity as before. There are those that simply describe it as a 'method' and not as a 'science', and those that defend its 'scientific' character. Cf. MALDONADO, Marco D. Silva. Crítica a la comparación jurídica y al método que emplea. *Alegatos*, n. 74, p. 131-146, 2010. In the beginning of the siècle XX Lambert, Arminjon, Nolde and Wolf defended compared law as a 'science'. Gutteridge, Ascarelli, Hamson and René David later would just treat it as a 'method', once that it could not, as they told, be disconnected from the other branches of law. The additive 'compared' thus would not create a separate 'scientific identity'. Cf. BLAGOJEVIC, Borislav T. Le droit comparé: method ou science? *RIDC*, v. 5, n. 4, p. 649-657, 1953. There are also those that defend comparative legal studies as both a science and a method, being of great importance the work of the French scholar Constantinesco. Cf. CONSTANTINESCO, Léontin-Jean, *Traité de droit comparé: introduction au droit comparé*. Librairie générale de droit et de jurisprudence, 1972. For a debate, cf. ROTONDI, Mario. Technique du droit, dogmatique et droit comparé. *RIDC*, v. 20, n. 1, p. 5-18, 1968.

[4] GLANERT, Simone. Method? *In*: MONETERI, Pier Giuseppe (*org*). *Methods of comparative law*. Glos: EE, 2012, p. 65.

[5] DESCARTES, René. *Discours de la méthode*. Avaible at http://www.gutenberg.org/files/13846/13846-h/13846-h.htm. Accessed in 27.01.2012.

Or, as pointed by Legeais, "methods are necessary to do justice to comparative legal studies"[6].

Regarding the history of comparative law, we have traditionally methods such as: a) *descriptive* (Aucoc[7]), b) *evolutional* (Saleilles[8]); c) *functional* (Rabel[9]); d) *factual* (Schlesinger[10], Markesinis[11]); e) *structural* (Sac-

[6] LEGEAIS, Raymond. *Grands systèmes de droit comtemporaines: approché comparative*. 2ª ed. Paris: Litec. 2005, p. 256.

[7] AUCOC, L. *De l'usage et de l'abus en matière de législation comparée*. Paris: F. Pichon. 1892.

[8] SALLEILLES, R. Conception et objet de la science du droit comparé: *bulletin de la société de législation comparé*. Paris: LGDJ, 1900; See also MECCA, G. Un jurista del modernismo: Raymond Saleilles y los origines del derecho comparado. *Erste europäische Internetzeitschrift für Rechtsgeschichte*, p. 260-270, 2010 and JAMIN, C. Le vieux rêve de Saleilles et Lambert revisite: a propos du centenaire du Congrès international de droit comparé de Paris. *RIDC*, v. 52, n. 4, p. 733–751, 2000

[9] RABEL, E. *Gesammelte Aufsätze*. Tübingen: H.G. Leser, 1965; *Grundzüge des römischen Privatrechts*. 2 ed. Tübingen: Benno Schwabe & Verlag, 1955; *Das Recht des Warenkaufs*. Berlin: Walter de Gruyter, 1958; *The conflict of Law: a comparative study*. Michigan: University of Michigan Law School, 1950. See also GERBER, David. Sculpting the agenda of comparative law: Ernst Rabel and the facade of language. *In*: RILES, A. *Rethinking the Masters of Comparative Law*. Portland: Hart Publishing, 2001, p. 190-208; CAEMMERER, E-V; ZWEIGERT, K. Évolution et état actuel de la méthode du droit comparé en Allemagne. *In*: *Un siècle de droit compare en France (1869-1968)*. Paris: Librairie Générale de Droit et de Jurisprudence, 1969, v. II, p. 269 e ss.

[10] SCHLESINGER, R. B. *Comparative law: cases, text, materials*. 3 ed. St Paul: Foundation Press, 1970; The past and future of comparative law. *Am. J. Comp. L*., v. 43, p. 477 e ss, 1995. Ver também METTEI, U. The comparative jurisprudence of Schlesinger and Sacco: a study in legal influence. *In*: RILES, A. *Rethinking the Masters of Comparative Law*. Portland: Hart Publishing, 2001, p. 238

[11] MARKESINIS, Basil. *Comparative law in the courtroom and classroom: the history of the last thirty-five years*. Oxford: Hart Publishing. 2003; *Foreign law & comparative methodology: a subject & a thesis*. Oxford: Hart Publishing. 1997; Comparative Law: a subject in search of an audience. *Mod. L. Rev*., v. 53, p. 1-21, 1990; Understanding American law by looking at it thought foreign eyes: towards a wider theory for the study and use of foreign law. *Tul. L. Rev.*, v. 81, p. 123-185, 2007.

co[12]) and f) *cultural* (Legrand[13]).[14] I'm going to explore in this paper the functional and the cultural methods, but also the factual method, which is an extension of the functional method and was carried out by Rabel's disciples and others[15]. Nevertheless, Sacco's ideas of formants are more original and less neo-Rabelian. Mattei gets to call it *structural comparativism*, acknowledging the influence of Schlesinger in Sacco's work, even though Sacco's work was quite independent, being more complex than the factual method[16]. Sacco and Schlesinger never met, except for one time. They were introduced by Gorla, and Gordley carried out the project of translating some of Sacco's works to English[17]. Since Sacco was more influenced by Schlesinger and not by Rabel we can understand the differences between Sacco and Markesinis as well, although both of them descend from the functionalist heritage.

Comparative law was related to several different ideas, such as the idea of improving the national law; a science annexed to international law; an instrument of intelligence and progress; a historical-cultural method[18]. There is only 'compared law' when reflections are made in relation to the problem that the work intend to analyze. A work purely

---

[12] SACCO, R. *Trattato di diritto comparato: introduzione al diritto comparato*. Torino: UTET, 1992; *La comparaison juridique au service de la connaissance du droit*. Paris: Economica, 1991, p. 36-59; La formation au droit comparé: l'expérience italienne. *RIDC*, v. 48, n. 2, p. 273-278, 1996; Legal formats: a dynamic approach to comparative law (Installment I of III). *Am. J. Comp. L*., v. 39, n. 1, p. 1-34, 1991; GAMBARO, A.; SACCO, R.; VOGEL, L. *Traité de droit comparé: le droit de l'occident et d'ailleurs*. Paris: LGDJ, 2011.

[13] LEGRAND, P. *Le Droit Comparé*. Paris: Universitaire de France. 1999; Comparer. *In*: ROBERTT, R. *Le droit comparé aujourd'hui et demain: colloque du 1er décembre*, 1995, p. 28-29; La compairason des droits expliquée à mes étudiants. *In:* LEGRAND, P. *Comparé les droits, résolument*. Paris: Presses Universitaires de France, 2009, p. 210 e ss; Comparative legal studies and commitment to theory. *MLR*, v. 58, p. 262-273, 1995.

[14] JALUZOT, B. Méthodologie du droit comparé: Bilan et prospective. *RIDC*, v. 57, n. 1, p. 29–48, 2005.

[15] M. M. GRAZIADEI, The Functionalist Heritage. *In*: LEGRAND, P.; MUNDAY, R. J. C. *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, p. 107.

[16] METTEI, Ugo. The comparative jurisprudence of Schlesinger and Sacco: a study in legal influence. *In*: RILES, Annelise. *Rethinking the Masters of Comparative Law*. Portland: Hart Publishing, 2001, p. 238. SACCO, Rudolf. *La comparaison juridique au service de la connaissance du droit*. Paris: Economica. 1991, p. 36-59.

[17] METTEI, *The comparative jurisprudence of Schlesinger and Sacco: a study in legal influence*, p. 248

[18] RODIÉRE, René. *Introduction au droit comparé*. Paris: Dalloz. 1979, p. 34.

descriptive, that doesn't apply any type of critical reflection or a form of reinterpretation of the object of study cannot be called 'compared law'[19].

The comparison can be synchronous or horizontal, when it is compared regarding the space dimension, or diachronic or vertical, when it is compared regarding the time dimension. There is microcomparison when are compared fragments or institutions of the law; macrocomparison when the juridical systems are compared. The 'genotypes' of a law are present and permanent human activities in the juridical cultures, while 'phenotypes' are the analyzed data of first appearance. It is called 'operational formant' the rule that defines the decision, and of 'conceptual formant' the concepts used to understand the rule. There is no prominence of a formant in relation to the other. When the formants are not expressed, but implicit, we have a 'criptotype' – an obvious juridical and cultural mentality, which defines so completely a jurisdiction, that is not necessary to express it directly [20].

The formants ideas are based on the theory of the 'legal formants' or 'dynamic theory' of the Italian professor Rodolfo Sacco and of his fowlers, the 'group of Trento'[21]. Legal formants or structuralism develops a method by trying to study the object and what holds its relationship with the elements of the structure and with the system's totality. In structuralism there are the seeds of the postmodernism critics to functionalism, such as the possibility of conserving the *otherness*, evaluating what lurks behind the function and the system dynamics, a project that would be carried by others latter on[22]. Of course that the 'formant theory' is not the most important one, but just one of the existing theories, disputing with Ernest Rabel disciples of the 'functional method', as the

[19] ZWEIGERT, K.; KÖTZ, H. *Introduction to Comparative Law*, p. 6.

[20] ANDERSON, Miriam; AMAYUELAS, Esther Arroyo; PASA, Barbara. *Sistemas jurídicos comparados: lecciones y materiales*. Barcelona: Universitat de Barcelona. 2010, part I.

[21] SACCO, Rodolfo. *Trattato di Diritto Comparato: Introduzione al Diritto Comparato*. Torino: UTET, 1992; GAMBARO, Antonio; SACCO, Rodolfo; VOGEL, Louis. *Traité de droit comparé: le droit de l`occident et d`ailleurs*. Paris: LGDJ, 2011; MONATERI, Pier Giuseppe. Methods in comparative law: an intellectual overview. *In*: MONETERI, Pier Giuseppe (*org.*). *Methods of Comparative Law*. Glos: EE, 2012, p. 7-24; FRANKENBERG, Günter. How to do projects with comparative law: notes on an expedition to the common core. *In*: MONETERI, Pier Giuseppe (*org.*). *Methods of Comparative Law*. Glos: EE, 2012, p. 120-143.

[22] METTEI, *The comparative jurisprudence of Schlesinger and Sacco: a study in legal influence*, p. 254-255.

English professor Basil Markesinis or the Germans Zweigert and Kötz[23], and the new form of functionalism proposed by Ralf Michaels or Husa[24]. Sacco can be seen as extension of the functionalist school, although his ideas try to eliminate a few of the functionalism mistakes, specially the idea of dynamic system, which lacks in Rabel's functionalism, as I shall demonstrate[25]. Although Markesinis and Sacco ideas are different they can be seen propagating the factual method. Nevertheless, Markesinis is more Rabelian than Sacco. Mattei and Bussani, Sacco's disciples, are applying the originality of the formant theory with the functional heritage and factual method of Schlesinger, renewing comparative legal studies and the way we traditionally think about functionalism[26]. Also, there is a dispute between Sacco, the neorabelians, and the 'culturalists', as Pierre Legrand, and the followers of the post-modernism thinking - the 'Utah group'[27].

The article pretends to analyze and give a general view of compared legal studies today. Part I will briefly present the history of compared legal studies. In part II it will be studied the functionalism and its critics. In Part III I shall go deeper and analyze the differences between the hermeneutical interpretation and the functional interpretation. Part IV concludes.

2 History of compared legal studies

The idea of studying another law is not recent. Delegates, for example, went to old Athena to study the law of Solon[28]. When the history of compared legal studies is analyzed mainly in Europe it is noticed that there were moments of contraction with the emphasis on the differences, as well as moments of integration, with the emphasis in the

[23] ZWEIGERT, K.; KÖTZ, H. *Introduction to Comparative Law*. 3erd ed. Oxford University Press: Oxford. 1988.

[24] MICHAELS, Ralf. The functional method of comparative law. *Duke Law School Faculty Scholarship Series*, paper 26, p. 1-47, 2005; HUSA, Jaakko. Farewell to Functionalism or Methodological Tolerance? *Rabels Zeitschrift für ausländisches und internationales Privatrecht* Bd. 67, H. 3 (Juli 2003), p. 419-447.

[25] GRAZIADEI, *The Functionalist Heritage*, p. 117.

[26] GRAZIADEI, *The Functionalist Heritage*, p. 117.

[27] LEGRAND, Pierre. *Le Droit Comparé*. Paris: Universitaire de France. 1999; PETERS, Anne; SCHWENKE, Heiner. Comparative law beyond post-modernism. *Int'l & Comp. L.Q.*, v. 49, p. 800-834, 2000.

[28] RODIÉRE, *Introduction au droit comparé*, p. 34.

likeness. That was most of the times influenced by the historical context or by a form of philosophy of law that prevailed[29]. In the same way, the analysis could be restricted to the comparison of books or to reach the more deeply 'law in action'[30].

According to Glenn, the history of compared legal studies in Europe can be distinguished in two periods: a first preparatory period to the articulation of the national law (Roman law, canonical, customary) and a second period, starting from the XIX century, complementary to the articulation of the national laws[31]. As explains Constantinesco, the law needed to ascend its Ptolemaic condition to embrace a Copernican vision, resulting, in the light of several modifications in the commercial and political reality in the creation of a science of compared law and not just a comparative method[32]. There are authors that contributed with important works of comparison along the history, although it is only later on, in the XIX century that compared law will really become a method and it will reach its condition of a science. Therefore, there are important authors that can be seen as precursors.

For instance, the Englishman Bacon, investigating the tradition of the civil law, declared the need of a universal system of justice[33]. Besides him, the English Fortecue, Saint-German, Fulbeck, Selden and Lord Mansfield wrote important works or comparative reflections[34]; the Italians Azo, Bartolus and Vico[35]; the Dutchman Grotius; the German Leibniz; the French Montesquieu and, before him, the *coutumiers* Dumoulin, Coquille, Loysel, and Bourjon[36/37]. Montesquieu used data in a wide empiric-historical observation with the objective of legitimating a source of legislative experience, being considered one of the most important

[29] SCHLESINGER, Rudolf B. The past and future of comparative law. *Am. J. Comp. L.*, v. 43, p. 477 e ss, 1995.

[30] PALMER, *From Lerotholi to Lando: some examples of comparative law methodology*, p. 264.

[31] GLENN, H. Patrick. Vers un droit comparé intégré? *RIDC*, v. 51, n. 4, p. 842, 1999.

[32] CONSTANTINESCO, Léontin-Jean, *Traité de droit comparé: introduction au droit compare*, first chapter.

[33] HUG, Whalter. The history of comparative law. *Harv. L. Rev.*, v. 45, p. 1046, 1932.

[34] CONSTANTINESCO, *Traité de droit comparé: introduction au droit compare,* p. 74-77.

[35] DEL VECCHIO, Giorgio. La comunicabilità del diritto e le idee de Vico. *La Critica*, v. 9, p. 58-66, 1911.

[36] CONSTANTINESCO, *Traité de droit comparé: introduction au droit compare,* p. 36.

[37] HUG, *The history of comparative law*, p. 1047.

precursors of compared law[38]. This without doubt made those authors precursors but hardly could be affirmed that compared law would be created by them, once there was an absence of a rigorous methodology[39].

It is necessary to arrive to the first half of the XIX century to the first methodological attempts of systematization of compared law. That happens with the Germans of the south, of the Heidelberg's school - Thibault, Gans, Zachariae and Mittermaier –, opponents of the Historical School[40]. The historical school only had eyes for the Roman and German laws, perhaps the most Ptolemaic condition in the history of law, although, paradoxically, was the historicism and the diachronic methodological vision of the Historical School of Savigny and Eichhorn that would permit the subsequent development of compared law by its opponents[41].

There is, for instance, the so acclaimed debate between Feuer-

[38] HUG, *The history of comparative law*, p. 1050; LAITHIER, Yves-marie. *Droit comparé*. Paris: Dalloz. 2009, p. 5.

[39] CONSTANTINESCO, *Traité de droit comparé: introduction au droit compare,* p. 70. See also VIEIRA, Lacyr de Aguiar. A atualidade do direito comparado ou o direito comparado no fio do tempo. *In*: VIEIRA, Lacyr de Aguiar. *Estudos de Direito Comparado e de Direito Internacional Privado*. Curitiba: Juruá, p. 279-309.

[40] CONSTANTINESCO, *Traité de droit comparé: introduction au droit compare,* p. 95.

[41] CONSTANTINESCO, *Traité de droit comparé: introduction au droit compare,* p. 98-102. It is necessary to criticize rigorously the ideas of Monateri that affirms that the genesis of compared law is the creation of a political Aryan-Roman model, attributed to the historicism of the Historical School. Although it is the historicism as a method that supplies the tools for compared law to escape from a universalist tradition of natural law, on the other hand, is the same thing that impedes compared law in Germany, once the supporters of the historical school only had eyes to the German law. Compared law doesn't appear from the Aryan-Roman politics, but exactly from the opposition authors of Heidelberg. The work of Constantinesco, translated to German and mentioned by Zweigert and Kötz, demonstrates this precisely. MONATERI, Pier Giuseppe. Methods in comparative law: an intellectual overview. *In*: MONETERI, Pier Giuseppe (*org*). *Methods of comparative law*. Glos: EE, 2012, p. 12-15. In fact, the article of Monetari deifies the European law and turns null and without any roll other less 'prestigious' laws. According to him, there would be a 'cultural elite' that would exercise a dominance roll and that the criterion for the transplant of a given law would be the number of times which the law is mentioned and used by the cultural elite. Mittermaier himself declare that one of the purposes of comparative law was to be a weapon against the Pandectists. See CAEMMERER, Ernest Von; ZWEIGERT, Konrad. Évolution et état actuel de la method du droit comparé en Allemagne. *In*: *Un siècle de droit compare en France (1869-1968)*. Paris: Librairie Générale de Droit et de Jurisprudence, 1969, v. II, p. 269.

bach and Gans about the jurisprudence and history of compared law. In 1810 Feuerbach declared that:

> Anatomists have their comparative anatomy, so why do jurists not have comparative law? Just as the science of linguistics comes from comparing languages, so if universal jurisprudence (indeed legal scholarship *tout court*) is to vitalize it needs to compare the laws and legal practices of other nations at all times and places, the most like and the most different[42].

The German Zachariae, in his time, developed the most important treaty on French law, studying Napoleon's code[43]. Heidelberg, Mittermaier, Bernhöft, von Litsz, von Stein, Goldschmidt, Mayer and Köhler, in the same way, developed important studies comparing foreign institutes[44]. Zachariae and Mittermaier, with the objective of giving evidence to compared law, founded in 1829 the *Kritische Zeitschrift ffir Rechtswissenschaft und Gesetzgebung des Auslandes*, a prominent review, dedicated exclusively to the subject[45].

Lerminier, Laboulaye, Foelix, Foucher, Saint-Josef, Ernest Glasson and Lévy-Ullmann created important compared law works in France, and the first and the second assumed the chair of compared law in *Collège de France*. Foelix, considered the founder of the private international law in France in 1834, trying to match the German review, founded the *Revue* étrangère *of Législation* without much success[46].

Benthan and Austin in England tried to undertake works with that aim, being, however, the works of Burge and Leoni Levi that marked the British field[47]. Kent and Story in the United States undertook important works studying the English law and the continental law in relation to the North American law[48].

Only in 1894, when was found in Germany the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* and in 1869 in France the *Société de législation Comparée*, the discipline

[42] FEUERBACH, A. *Blick auf die teutsche Rechtswissenschaft*, Kleine Schriften vermischten Inhalts, 1833, p. 152.
[43] HUG, *The history of comparative law*, p. 1054.
[44] HUG, *The history of comparative law*, p. 1056.
[45] HUG, *The history of comparative law*, p. 1057.
[46] HUG, *The history of comparative law*, p. 1061.
[47] HUG, *The history of comparative law*, p. 1063-1065.
[48] HUG, *The history of comparative law*, p. 1066-1067.

of compared law became gradually recognized[49]. Those reasons were justified partially due to the enormous international success of the Bern Convention, harmonizing the subjects of copyright[50]. The projection of compared law was also due to what Kötz calls *la belle époque du droit comparé*, the first international Congress of compared law that happened in 1900 in Paris, organized by Salleilles and Lambert[51]. The important work of compared law of Lambert, published in 1903, is dedicated to Salleilles, which is described as a 'master'[52]. What the two comparatists had in mind was nothing less than an ambitious project of a *droit commun de l'humanité*.[53] Saleilles would try to renew the natural law; Lambert would seek a common legislative law as opposed to Gény's free scientific research; Lévy-Ullmann a science of universal law and del Vecchio that the science of comparative law, even regarding the diversity of systems, presented a striking number of similarities which permitted the identification of a common human spirit[54].

In the Congress, Salleilles affirmed that compared law would be a 'science' whose object would be to discover the concepts and the principles of all the 'civilized' systems, which he called *droit ideal relatif*, although, to be true, he mistakes 'science' with 'method'. Salleilles was based on the historical method and in Jhering's sociological positivism[55]. He translated from German BGB and he created numerous methodology works about compared law. Largely refuting the abstraction of legal-

[49] KÖTZ, *Comparative law in Germany today*, p. 754.

[50] KÖTZ, *Comparative law in Germany today*, p. 754.

[51] KÖTZ, *Comparative law in Germany today* p. 754; MECCA, Giuseppe. Un jurista del modernismo: Raymond Saleilles y los origines del derecho comparado. *Erste europäische Internetzeitschrift für Rechtsgeschichte*, p. 260-270, 2010. See also JAMIN, C. Le vieux rêve de Saleilles et Lambert revisité. A propos du centenaire du Congrès international de droit comparé de Paris. *RIDC*, v. 52, n. 4, p. 733–751, 2000.

[52] LAMBERT, Édouard. *La function du droit civil comparé*. Paris: V. Giard & E. Brière. 1903 (in his work, Lambert analyzes the common law and the compared civil law, studying the history of compared law in France and in the neighboring countries, undertaking a systematic analysis on family law, goods, obligations and juridical acts in relation to the succession).

[53] ZWEIGERT; KÖTZ, *Introduction to Comparative Law* p. 3.

[54] See GRESSAYE, Jean Brethe de la. L'apport du droit compare a la philosophie du droit. *In*: *Un siècle de droit compare en France (1869-1968)*. Paris: Librairie Générale de Droit et de Jurisprudence, 1969, v. I, p. 67-74.

[55] MECCA, Un jurista del modernismo: Raymond Saleilles y los origines del derecho comparado, p. 263 e ss; CONSTANTINESCO, *Traité de droit comparé: introduction au droit compare*, p. 214-219.

ism, Salleilles would look for to renew the juridical method, reacting to the strict legalism of the exegeses and looking for a universal model that would allow the French to introduce foreign elements of compared law, appealing for the general influence of the character of jurisprudence. Besides him, also shared ideas of a scientific character the Europeans Levy-Ullman, Kohler, Arminjon, Nolde and Wolff, Rabel and Brutau, as well as representing the United States, Yntema, Rheinstem and Hall[56]. Kohler, for instance, explored the idea of an Hegelian object spirit *ens realissimum*, which through a dialectical process, forms the philosophy of history and a true, a convergent and objective law.[57]

As explains Kötz, the vision that prevailed in the Congress was that of Ernest Rabel's functionalism, placing compared law beside other sciences of the time[58].

In the same way, in the United States, although lately than in Europe, compared law gained force with the creation in 1952 of the American Journal of Comparative Law, founded by Hessel Yntema in the University of Michigan and for Rudolf Schlesinger's and Arthur von Mehren's works on the same decade[59]. The work of Schlesinger follows the same tradition of René David's work and Zweigert and Kötz, a tradition therefore that establishes itself in the 50's[60].

In Italy, equally, starting from the 50's compared law will gain more force due to Gorla's work[61], although the efforts undertaken by Amari in the previous century should be pointed out, rescued by authors as del Vecchio, Maroi, De Francisci and Rotondi. Gorla undertakes a historical compared law opposite to the positivism and the Germanic systematic conceptualism. He looks for to build an empiric science of the research of the facts, focusing his work in the jurisprudence analysis, just as the North Americans[62]. The functionalism penetrates in Italy, sur-

[56] KAMBA, W. J. Comparative Law: a theoretical framework. *Int'l & Comp. L.Q.*, v. 23, p. 487-488, 1974.

[57] CAEMMERER; ZWEIGERT, Évolution *et* état *actuel de la method du droit comparé en Allemagne*, p. 269.

[58] KÖTZ, *Comparative law in Germany today*, p. 755.

[59] REIMANN, Mathias. The progress and failure of comparative law in the second half of the twentieth century. *Am. J. Comp. L*, v. 50, p. 671-700, 2002.

[60] REIMANN, *The progress and failure of comparative law in the second half of the twentieth century*, p. 685.

[61] GORLA, Gino. *Il contratto, problemi fondamentali trattati con il metodo comparativo e casistico*: Milan: Giuffrè. 1955, v. I e II.

[62] MONATERI, Pier Giuseppe. Critique et différence: le droit comparé en Italie. *RIDC*, v.

prisingly, via North American influence. It is true, though, that in 1929 Galgano already founded the Institute of Legislative Studies in Rome.

In Brazil, there is a very rich tradition of compared law, from authors such as Teixeira de Freitas[63], Valladão[64], Caio Mário[65] and Clovis Bevilacqua[66]. Comparison was applied in Brazil since 1769, where the *Law of Good Reasoning* (Lei da Boa Razão) allowed the application in Brazil of different laws of civilized nations, regarding business transactions, even against the Portuguese law[67]. Arguably, is being the subject of even greater importance[68].

3 Functionalism

"Functionalism consists of comparing the elements that represent the same function in order to show that, although there are different used technical procedures, the remaining solutions are definitively equivalent"[69]. The functionalism is one of the most traditional methods used in compared law.

When one speaks of functionalism, the first obvious reference is

---

51, n. 4, p. 990, 1992.

[63] FREITAS, Augusto Teixeira de. *Código Civil: Esboço*. Rio de Janeiro: Laemmert, 1860. VIII.

[64] VALLADÃO, Haroldo. L'étude et l'enseignement du droit comparé au Brésil: XIX^{e} et XX^{e} siécles. *In*: *Un siécle de droit comparé en France (1869-1968)*. Paris: Librairie Générale de Droit et de Jurisprudence. 1969, p. 311-321.

[65] PEREIRA, Caio Mário da Silva. Direito comparado, ciência autônoma. *Revista Forense*, v. 146, fasc. 597 e 598, p. 24-32.

[66] BEVILACQUA, Clovis. *Resumo das lições de legislação comparada sobre direito privado*. Bahia: Livraria Magalhães, 1897, p. 9-11.

[67] VIEIRA, *A atualidade do direito comparado ou o direito comparado no fio do tempo*, p. 297; VALLADÃO, *L'étude et l'enseignement du droit comparé au Brésil: XIX^{e} et XX^{e} siécles*, p. 312.

[68] COSTA, Thales Morais. D'une introduction au droit francais à un dialogue entre systèmes juridiques: mise en place d'un projet de droit comparé. In: STORCK, Michael; CERQUEIRA, Gustavo Vieira da Costa; COSTA, Thales Morais. L*es frontières entre liberté et interventionnisme en droit francais et en droit brésilien*. Paris: L'Harmattan. 2010, p.17-40; PONTES, Leonardo M. *Direito de autor: a teoria da dicotomia entre a ideia e a expressão*. Belo Horizonte: Arraes, 2012.

[69] LAITHIER, *Droit comparé*, p. 25. Philipp Hecks also approach the Idea of the 'equivalent of construction'. The same thought could be expressed by various forms and the same result could be achieved. Cf. ZIPPELIUS, Reinhold. *Introduction to German legal methods*. 10th ed. Durham: Carolina Academic Press, 2006, p. 18.

the treaty of Zweigert and Kötz that wrote: "the basic methodological principle of all comparative law is that of functionality" and "the question to which any comparative study is devoted must be posed in purely functional terms"[70]. Although, to be true, they have not explained the subject satisfactorily, as noted, for instance, James Gordley[71], or at least mentioned other methods, as pointed Samuel[72]. For example, Samuel lists at least sixth methods, regarding the epistemic universe, as pointed by Berthelot: a) *casual* (if *x*, *y* or $y = f(x)$); b) *functional* (S→ X→ S), where X is analyzed by its X→ S function; b) *structural*, where X results of a founded system, as the language, regarding the disjunctive rules, A or non-A ; c) *hermeneutical*, where X is the expression of a subjacent meaning to be discovered by interpretation; d) *intentional*, where X is the result of intentional actions; and e) *dialectical*, where X is the necessary result of the contradictions inherent to the system[73]. One of the possible explanations for the absence of methodological theoretical outlines in relation to functionalism is its pragmatic character and a general preference of authors to depart directly to the analysis of practical subjects. That reveals, on the other hand, the inexistence of a pan-disciplinarily regarding methods in general that are not able to be separated completely from the context of the investigation[74]. Nevertheless, the father of functionalism is Ernest Rabel. Rabel's functionalism, for instance, is known for an absence of a deeper methodological theory, as recognized by one of his own disciples, Ernest Von Caemmerer[75], a theme which I will explore later on. Paradigmatically, though, Rabel was responsible

[70] ZWEIGERT, K.; KÖTZ, H. *Introduction to Comparative Law*, p. 34.

[71] GORDLEY, James. The functional method. *In*: MONETERI, Pier Giuseppe (*org*). *Methods of comparative law*. Glos: EE, 2012, p. 107.

[72] SAMUEL, Geoffrey. Epistemology and comparative law: contributions from sciences and social sciences. *In*: HOECKE, Mark Van (*org*). *Epistemology and methodology of comparative law*. Oxford: Hart Publishing, 2004, p. 38.

[73] SAMUEL, Geoffrey. Dépasser le fonctionalisme. *In:* LEGRAND, Pierre. *Comparé les droits, résolument*. Paris: Presses Universitaires de France. 2009, p. 416. See also BERTHELOT, Jean-Michel. Programmes, paradigms, disciplines: pluralité et unité des sciences sociales. *In*: BERTHELOT, Jean-Michel *et all* (org.). Épistemologie *des sciences sociales*. Paris: Presses Universitaires de France. 2001, p. 484.

[74] GLANERT, *Method?*, p. 65.

[75] CAEMMERER; ZWEIGERT, Évolution *et* état *actuel de la method du droit comparé en Allemagne*, p. 267-300. See also GERBER, David. Sculpting the agenda of comparative law: Ernst Rabel and the facade of language. *In*: RILES, Annelise. *Rethinking the Masters of Comparative Law*. Portland: Hart Publishing, 2001, p. 190-208.

for a very important shift on the way as we see now comparative legal studies. He's idea of focusing the social functions of problems as *terra comparationis* rather than the text of law was a major evolution against positivism and the speculative nature of comparative law[76]. This lack of theory, nevertheless, is also seen accompanying the followers of functionalism.

Thus, for instance, it is surprising that the treaty of Zweigert and Kötz of 714 pages only 48 are dedicate properly to methodological subjects. Gordley, that criticizes them and specifically writes an article about the 'functional method', is a victim of his own criticism, because he doesn't clear in almost anything the concept, although recognizing the lack of coherence of theories in a general way[77]. The merits, thus, for the systemization of the main elements of functionalism seems to be of Michaels, that promoted a variation on the theme of functionalism, trying to correct great part of its mistakes.

As explains Michaels, equivalence functionalism is

> [...] a response to the challenge that functions are either nothing more than causal relations, or contain an element of teleology. Equivalence functionalism explains an institution as one contingent solution amongst several possibilities. As a consequence, the specificity of a system even in the presence of (certain) universal problems lies in its decision for one against all other (functionally equivalent) solutions, a concept reminiscent of Cassirer's epistemological functionalism. Legal developments are thus no longer necessary but only possible, not predetermined but contingent.[78]

The equivalence functionalism would be, therefore, a method devoted to the problems, understanding the juridical institutions in relation to them, but not in an abstract or general way. It has an epistemological nature, not a metaphysical one[79]. The equivalence functionalism proposes functional equivalents to the foreign institutes, that is, solu-

---

[76] GERBER, *Sculpting the agenda of comparative law: Ernst Rabel and the facade of language*, p. 199. See also JALUZOT, *Méthodologie du droit comparé: Bilan et prospective*, p. 31 (explaining the *descriptive method* or the *legislative method*.).

[77] GORDLEY, *The functional method*, p. 107-119.

[78] MICHAELS, *The functional method of comparative law*, p. 23.

[79] It is true that metaphysics exist in epistemology and that is impossible to escape from metaphysics. The question here is simply to point out the pragmatic aspect of the approach, opposite to the great generalization and abstraction.

tions that could be adopt, departing from comparison. This is one of Rabel's ideas, nonetheless, to improve the "stock" of possible solutions as something necessary, especially because he was lamenting the loss of prestige among Germany cultural dominance and that this was mainly a result of the lack of interest of German jurists about the world[80].

As explains Michaels, there are seven functions studied by functionalism: a) the epistemological function; b) the comparative function; c) the presumptive function; d) the formalizing function; e) the universalizing function; and f) the critical function[81].

The first of the functions, the epistemological, opts to choose an observer's perspective as an alternative to the participant's perspective in relation to the cultural approaches, focusing the vision of the law in a specific functional relationship[82]. As such, the functionalism opts for a vision of an observer outside of the legal system not placed in the position of an internal observer. If somebody analyzes the North American system, it is unnecessary that he must think as an American to understand the system. To analyze the systems for functions and problems is to look for a constructive vision[83].

---

[80] GERBER, *Sculpting the agenda of comparative law: Ernst Rabel and the facade of language*, p.191 ss.

[81] MICHAELS, *The functional method of comparative law*, p. 25. These functions also appear in the work of ZWEIGERT; KÖTZ, *Introduction to Comparative Law*, p. 32-47.

[82] MICHAELS, *The functional method of comparative law*, p. 26.

[83] The post-modernists criticize this function, insisting that the researcher must have a wide knowledge of the social and linguistic aspect of another culture, under the penalty of exercising "cognitive control in their readers and to dilute himself in the process ". PALMER, *From Lerotholi to Lando: some examples of comparative law methodology*, p. 266. Even in relation to the anthropologists, as, *i.e*, Paul Bohannan, at least is impossible to think in comparing other culture without the use of one's concepts and own terminologies, which makes intelligible the comparison. Cf. ALFORD, William P. On the limits on 'grand theory' in comparative law. *Wash. L. Rev.*, v. 61, p. 947, 1986. Among theories that were intended to be 'neutral', like Foucault's genealogical historiography, it was demonstrated latter by other authors as Habermas and Honneth that the linguistic concept of culture that he uses indirectly designates a pattern of thought of a society as a whole in a specific period, beating the supposed 'neutrality' of his theory, what demonstrates that even in the field of the ethnology the problem persists. Cf. HABERMAS, J. *The Philosophical Discourse of Modernity: Twelve Lectures (Studies in Contemporary German Social Thought)*. Massachusetts: MIT, 1990; HONNETH, A. *The critic of power: reflective stages in the critical social theory*. Massachusetts: MIT, 1991; DALLMAYR, Fred R. Borders or horizons? Gadamer and Habermas revisited. *Chicago-Kent Law Review*, v. 76, 2001, p. 825-852; LITOWITZ, Douglas. Foucault on Law: Modernity as negative

The second function, the comparative function, it's based on the idea that functional explanations are more plausible than other possible explanations. Thus, given its pragmatic nature, is more plausible to look for to compare in an empiric way than philosophically; it is easier to question functions than values[84]. Under the perspective of equivalence functionalism, the problems can be compared not because all the societies have the same problems but because the search for answers to the contingent problems can be identified as a reference to other possible answers[85]. To look for legal solutions in cases with similar facts in a similar way but with different arguments may show that those solutions are only apparently different.

The third function, the presumptive function (*praesumptio similitudinis*), traditionally presupposes that the problems are universal, and when focusing the problems it is functionally possible to compare the solutions. Those problems will only be similar with relationship to the researched elements. Although certain solutions can be the same in a certain point they will be different or dysfunctional in relation to other[86]. As such, the comparability of institutions can lead to different solutions, even due to comparison, what means that functionalism doesn't necessarily generate similarity, although departs from this premise. It is interesting to notice, though, that the *praesumptio similitudinis* only has relatively room in private law that is not carried out by moral imperatives that constitute the public order. However, in the case of a more 'relative' private law, the third function acts while a heuristic device, even between the civil and the common law[87]. Gordley understands that Zweigert and Kötz would not have established the presumptive function as

---

utopia. *Queen's Law Journal*, v. 21, 1996, p. 1-36.

[84] MICHAELS, *The functional method of comparative law* p. 29; MARKESINIS, Basil. Comparative Law: a subject in search of an audience. *Mod. L. Rev.*, v. 53, p. 1-21, 1990 (explaining that the best approach is the one that avoids great generalizations, looking for to analyze specific topics at each time.); ZWEIGERT; KÖTZ, *Introduction to Comparative Law,* p. 45 ("emphasizing that legal science should study the actual problems of life rather than conceptual constructs which seek to solve them. Law is a 'social engineering' and legal science is a social science. Comparative lawyers recognize this: it is, indeed, the intellectual and methodological starting-point of their discipline".).

[85] MICHAELS, *The functional method of comparative law,* p. 31.

[86] MICHAELS, *The functional method of comparative law,* p. 34.

[87] ZWEIGERT, Konrad. Des solutions identiques par des voies différentes: quelques observations en matière de droit comparé. *RIDC*, v. 18, n. 1, p. 5-18, 1966; ZWEIGERT; KÖTZ, *Introduction to Comparative Law,* p. 40.

a premise of the functionalism, but just as a possible step to open new research lines[88], but that seems also to be incorrect, since Zweigert and Kötz specifically treat it as a heuristic device, that is, independently of being true or false, it should necessarily be adopted as provisory. Besides, as notes Samuel, the functional method clams the *praesumptio similitudinis* in one or another way due to its own nature[89].

The fourth function, the function of the construction of the system, means that the comparatist, after deconstructing the institutions of another system in functions, should look to explain those same functions through his on institutions or vocabulary. This would be done if:

> The solutions we find in the different jurisdictions… be cut loose from their conceptual context and stripped of their national doctrinal overtones, so that may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.[90]

In the same way, it would be necessary for the comparatist to eliminate his prejudices as a result of his on education and experience in his national law. That is artificial and, as criticizes Glanert, completely naive and arrogant in the thought of the two Germans[91].The problem of an inherent ontology is inevitable, as it will be seen more ahead.

The fifth function, the formalizing function, is based on the idea that functionalism, when demonstrating the likeness or the dysfunctions of certain institutes, can supply mechanisms for the choice of laws, although functionalism doesn't have the pretension or the condition of affirming which institute or law would be the best[92].

---

[88] GORDLEY, *The functional method*, p. 118

[89] SAMUEL, *Epistemology and comparative law: contributions from sciences and social sciences*., p. 64.

[90] ZWEIGERT; KÖTZ, *Introduction to Comparative Law,* p. 44.

[91] GLANERT, *Method?*, p. 68.

[92] Even a law of local interest like *Loi Badinte*, of July 5 in 1985, related to the mitigation of the damages from the victims of traffic in the circulation, was characterized by the search of the French legislator of instruments of the foreign law for its creation. Cf. LEGEAIS, Raymond. L'utilisation du droit comparé par les tribunaux. *RIDC*, v. 46, n. 2, p. 347, 1994. The Italian legal tradition, *i.e*, in the XIX century was deeply marked by the French law. Later, by the German law. Starting from the decade of 50 by portions of the North American law, what demonstrates that the formalizing function permeates the juridical cultures. Cf. SACCO, Rodolfo. La formation au droit comparé: l'expérience italienne. *RIDC*, v. 48, n. 2, p. 273-278, 1996. In Canada, for instance, 23% of the decisions of the Supreme Court among 1984-1994 mentioned non-Canadian sources of law and

The universalizing function uses the functionalism method to the construction of uniform legislations, which transcend the obstacles of each private juridical order. In the European Union, *i.e.*, the directives are not transposed in the structure of their doctrines, but only in relation to their results, which means that the States-members are free to approve legislations that work as functional equivalents[93]. The principle of mutual recognition of the European Union do not require similarity, but equivalence, that is, functional equivalence[94].

The seventh function, the critical function, means tolerance in relation to the foreign law, critic to the foreign law, critic to one's own law, and critic to the law as a whole[95]. The controverted point is the debate if a national court could use a foreign law as a reference to the construction of its own decision. For example, Portalis, the Civil Code architect, pled in his time a transnational science, being opposed to a pure exegesis of law, having mentioned authors like Blackstone, Bynkershoeck, Heineccius, Pufendorf and Wolf; the French courts of the century XIX based their decisions on foreign precedents; a court of New York quoted Grotius and Pufendorf in 1805 to solve a case mentioned until the present days[96].

One of the critics to compared law comes from the CLS movement - Legal Critical Studies or the 'group of Utah' – an amalgam of critics of the feminism, post-structuralism, post-modernism and post-colonialism, that seeks to denounce the paper of *status quo* in compared law as indifferent to the category of the 'other' or 'different'.[97] According to them one could never understand or to compare other system without a deep analysis of its social context, that is usually a result of the work of the sociologist or the anthropologist – an 'organic method'. Other critics are addressed properly to the problems of the functionalism analysis, as the problem of the tautology or of a false teleology, that is, the repetition of the category of the functions, that hides or doesn't clarify the perception of that which is simply repeated or that which is hidden underlying

---

53% of the doctrine of the civil code of Quebec mentions foreign sources for its interpretation. Cf. GLENN, H. Patrick. Vers un droit comparé intégré? *RIDC*, v. 51, n. 4, p. 847, 1999.

[93] MICHAELS, *The functional method of comparative law,* p. 41.

[94] MICHAELS, *The functional method of comparative law,* p. 41.

[95] MICHAELS, *The functional method of comparative law,* p. 42.

[96] GORDLEY James. Comparative legal research: its function in development of harmonized law. *Am. J. Comp. L.*, v. 43, p. 555-567, 1995.

[97] PETERS; SCHWENKE, *Comparative law beyond post-modernism*, p. 800-834.

the function; still, an occult value that is used for the accomplishment of the comparison, that is unable to reflect other values in the comparison[98]. For a critic to the 'opacity' of the post-modernism in compared law, see Markesinis, getting to call it of useless under a practical point of view[99].

It is important to be clear that Rabel had already pointed out the importance of investigating the background of another culture, its history, economy, etc., what difficultly could establish functionalism as blind to these differences. *Context* and *function* is the same thing to Rabel, once that to study the social function of problems presupposes including the context in the function, although how to do this was greatly neglected[100]. According to Rabel, we should compare laws functionally, but also the problems they solve in each system; the laws should be considered in its context - bases of procedures and existent institutions; the socio-economic and cultural context should be analyzed to reach the depth of the knowledge[101]. So, Rabel's vision is a three-party idea: a) a deep study of the compared law, such as its functions, classifications and systematic exposition; b) longitudinal geographical cut and transversal systematical cut; c) critical evaluation[102]. The first step is the historical study, regarding the evolution of the systems; the second, the analysis of the operation among systems according to their social functions, showing their differences and likeness; the third, the philosophic analysis that would seek the greater knowledge among the first and second endeavors, which nevertheless he never did[103]. Kötz, a disciple of Rabel, according to Markesinis, declared the need to analyze the norms 'in its context', it's multidimensional form. It can be understood that Zweigert and Kötz follows the tradition of Rabel's functionalism, although reducing the practical importance attributed to a historical study more deepened[104].

---

[98] TURNER, Jonathan H.; MARYANSKI, Alexandra R. Is neofunctionalism really functional? *Sociological Theory*, v. 6, n. 1, p. 110-121, 1988.

[99] MARKESINIS, *Comparative law in the courtroom and classroom: the history of the last thirty-five years*, p. 51 e ss.

[100] GERBER, *Sculpting the agenda of comparative law: Ernst Rabel and the facade of language*, p. 200.

[101] REIMANN, *The progress and failure of comparative law in the second half of the twentieth century*, p. 679-680; KÖTZ, *Comparative law in Germany today*, p. 755.

[102] CAEMMERER; ZWEIGERT, Évolution *et* état *actuel de la method du droit comparé en Allemagne*, p. 272-282.

[103] GERBER, *Sculpting the agenda of comparative law: Ernst Rabel and the facade of language*, p. 197.

[104] MARKESINIS, *Comparative law in the courtroom and classroom: the history of the last*

Nevertheless, the critics to functionalism are important on three regards, as demonstrates Gerber: a) the absence of importance attributed to the process which creates the object of study (the reasons that give rise to the object are not clear); b) the absence of conceptual construction of the knowledge achieved, since as explained, functionalism does not have the tools to relate the objects, specifically how to think about context and function, because a method cannot be something loosen without any kind of theory to hold it or to be considered as an epistemology[105]; c) absence of a dynamic of systems, since functionalism does not regard the object of study during time, because a specific function is frozen, which makes the method ignore the *otherness*, the specific originality of a system and the consequences that it can have on the future functions[106].

4 Hermeneutics and functionalism

In relation to the study of a research method in compared law, it is common the opposition among two antagonistic currents. The first of them, the convergence approach, was proposed by Sir Basil Markesinis. According to this theory, although differences exist among juridical systems, in the level of the problem of its contextualization, the functional solutions to the problems tend to be similar, that is, that which really matters to the comparatist[107]. The search of similarities, as such, in the legal systems, common law and civil law, leads to a larger integration, mainly when addressed to the analysis of facts and of cases. As explains Markesinis "one way of achieving this aim was by merging the common and civil law teaching and presenting my subject thought cases"[108].

For so much, Markesinis had to choose to place aside the conceptualism of another system and to discover the true politics not-expressed that lied behind the factual situations[109]. He opted for a functional ap-

thirty-five years, p. 39.

[105] SAMUEL, *Dépasser le fonctionalisme*, p. 409.

[106] GERBER, *Sculpting the agenda of comparative law: Ernst Rabel and the facade of language*, p. 200-205. See also GRAZIADEI, *The Functionalist Heritage*, p. 114-115 (making similar critics.).

[107] MOROSINI, *Globalization & law beyond traditional methodology of comparative legal studies and an example from private international law*, p. 545

[108] MARKESINIS, Basil S. *Foreign law & comparative methodology: a subject & a thesis*, p. 3.

[109] MARKESINIS, Basil S. *Foreign law & comparative methodology: a subject & a thesis*, p. 4.

proach and not a conceptual one, through exegesis, comparison, and a historical course[110]. For instance, to analyze the German system, strictly built by the pandectists it was necessary to deconstruct it and later to reconstruct it, in order to make it palatable through the study of cases[111]. As he affirms, the base of his technique is the Germanic historical/comparative approach through the study of empiric data[112]. To be true, his book is also theoretically weak. The book should be seen as an empiric and practical testimony, not as a theoretical guide. He follows the same tradition of Zweigert and Kötz, although guiding the reader by the study of cases. As most comparatists, his efforts are addressed to the study of the thing itself for not falling in Radbruch's critic that "sciences that are too much concerned with its own methodology are sick sciences"[113].

On the opposite side, it's the *non-convergence approach theory*, proposed by Pierre Legrand, of culturalist nature[114]. According to this radical theory, the law is a part of a larger juridical culture, an alive part that cannot be limited to its own juridical framework. Departing from that premise to focus the similarities would be wrong or just superficial, once each culture builds its own cultural identity, according to different needs and movements[115]. Thus functional solutions not always will tend to similarity, what would be even counter-intuitive. Compared law, then, would not be a study for the search of the function, but a hermeneutical interpretation (*démarche herméneutique*)[116], what would

[110] MARKESINIS, Basil S. *Foreign law & comparative methodology: a subject & a thesis*, p. 5.
[111] MARKESINIS, Basil S. *Foreign law & comparative methodology: a subject & a thesis*, p. 6.
[112] MARKESINIS, Basil S. *Foreign law & comparative methodology: a subject & a thesis*, p.10.
[113] See citation in ZWEIGERT; KÖTZ, *Introduction to Comparative Law,* p. 33.
[114] LEGRAND, Pierre. *Le Droit Comparé*. Paris: Universitaire de France. 1999.
[115] MOROSINI, *Globalization & law beyond traditional methodology of comparative legal studies and an example from private international law*, p. 546; LEGRAND, Pierre. Questions à Rodolfo Sacco. *RIDC*, v. 47, n. 4, p. 943-971, 1995 (interview between Legrand and Sacco, through which is evident, regarding the questions posed by Legrand to Sacco, a culturalist conception of compared law, giving plenty importance to the analysis of the past of the comparatist, his formation, and asking how this formation would interfere with the analysis of the comparatist and asking how would the comparatist behave in relation to the 'other').
[116] BRAND, *Conceptual comparisons: towards a coherent methodology of comparative legal studies*, p. 429.

eliminate any possibility of a legal transplant[117]. In fact, for Legrand, the method would be 'formalist' and 'unidirectional'[118] which he substitutes for the study of the *mentalité*, that is, the cognitive structures that are in the appreciation of the lurking culture[119]. He says that comparative law is an interpretative discourse that cannot permit the understanding of things as they really are. What the comparatist does is a reduction of re-interpretations[120]. That's the reason why this approach is said to be of non-convergence, because once the comparatist studies the culture, the history, the politics, the ideology, etc., he will see countless differences in relation to the studied object. On the other hand functionalism, because it works with likeness it will always be more willing to identify convergences[121].

The critic is that functionalism would be capable to just unmask a layer of compared law - the technical aspect -, missing its capacity to understand underlying meanings, as the ideological, social, political and economic context of the norms. One could not speak about the creation of a model, but just of a linguistic relativism[122]. In fact, evident epistemological limitations exist in relation to 'method' that cannot be unevaluated, as its speculative character, that lead Mallarmé to say that all method is fiction and Heidegger that any method is a method-in-the-world[123]. Gadamer demonstrated that is impossible to suppress the

---

[117] BRAND, *Conceptual comparisons: towards a coherent methodology of comparative legal studies*, p. 429; ANDERSON; AMAYUELAS; PASA, *Sistemas jurídicos comparados: lecciones y materials,* p. 27. It is important to notice that although compared law has been usually considered a science in France, there was never a lot of unit in relation to the adopted method. There was a profundity of works that were in charge of the problem, although coherence does not exist in relation to the epistemological categories. PICARD, Etienne. L'état du droit comparé en France. *RIDC*, v. 51, n. 4, p. 885-915, 1999.

[118] See citation in GLANERT, *Method?*, p. 62.

[119] See citation in SAMUEL, *Epistemology and comparative law: contributions from sciences and social sciences,* p. 64.

[120] LEGRAND, Pierre. Comparer. *In*: ROBERTT, R. *Le droit comparé aujourd'hui et demain: colloque du 1^er^ décembre*. 1995, p. 28-29.

[121] It is common that comparatist authors, although receiving historical analysis well, don't see the need of its study in compared law, preferring the analysis of institutes and systems functionally. One of those comparatists, for instance, is WATT, Gary. Comparison as deep appreciation. *In*: MONETERI, Pier Giuseppe (*org*). *Methods of comparative law*. Glos: EE, 2012, p. 82. Though, the historicism is of great importance.

[122] BRAND, *Conceptual comparisons: towards a coherent methodology of comparative legal studies*, p. 429 e ss.

[123] See citations in GLANERT, *Method?*, p. 69-70.

ontological dimension of the one that interprets, what would be applied to any comparatist[124]. As also points Legrand, the comparatist is a product of a situated culture[125]. Even translation involves a creative nature[126]. What he proposes is: a) an amplified hermeneutical analysis, studying the culture and mainly the reasons which generate the object of study; b) an interdisciplinary door, which seeks to understand as deeply as possible the object of study, even if he recognizes the limit of this approach; c) preserve and respect the otherness, as a prerequisite, showing first the different or the incommensurability[127]; only after trying to organize the differences.[128]. According to Legrand, following Derrida, because the English law and the French law are so different, we cannot say that we have a dialogue among then, but just a form of negotiation[129]. What a French student does is a *projection*, viewing the English law with the notions of the French law, what Derrida thinks is a false way, because the student does not leave his own law, which is ethnocentric always, even if minimal[130]. That's way Legrand insists on the notion of *rendement herméneutique*, because this kind of interpretation revels both the interpreter context and also the context of the object of interpretation[131]. He criticizes Markesinis, Zweigert and Kötz, opposing the thoughts of Leibniz and Derrida, arguably because of the manipulations of the comparison achieved by functionalism[132]. According to Legrand, functionalism is ideologically inclined to the unification of laws and it's dangerous to the point that to achieve similarities it manipulates and sacrifices *what is*[133]. As points Örücü, functionalism changes the focus of vertical to horizontal[134]. What Legrand proposes is that we can nevertheless,

[124] GLANERT, *Method?*, p. 70-74.
[125] LEGRAND, *Comparer*, p. 24.
[126] See ARNTZ, R. La traducción jurídica, una disciplina situada entre el derecho comparado y la lingüística contrastiva, 2000. *ULPGC, Blilioteca Universitaria*, 2006, p. 1-24.
[127] LEGRAND, Pierre. La compairason des droits expliquée à mes étudiants. *In:* LEGRAND, Pierre. *Comparé les droits, résolument*. Paris: Presses Universitaires de France. 2009, p. 210.
[128] LEGRAND, *Comparer*, p. 31-36.
[129] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p. 210.
[130] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p. 212.
[131] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p. 216.
[132] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p. 222.
[133] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p. 222.
[134] ORUCU, Esin. Methodology of comparative law. In: SMITHS, Jan M. *Elgar encyclopedia of comparative law*. Cheltenham: EE, p. 444.

when studying other law, lessen our own mentality (*mentalité*) not by considering what is different bad, but respecting the different to better understand *us*[135]. Culture is a *meta-discourse*, which law is one of its discourses. We need to study the *culture* of other law to understand *how* and *why*: the simple study of jurisprudence and texts of law cannot account for this. The culture must account for the other's philosophy, literature and architecture, being of extreme importance the *inter-textualité*. For Legrand, the comparison is not impossible; what we compare are two different singularities to achieve a synthesis, nevertheless respecting the singularities[136]. That is one of the characteristics of the structural method, which, by focusing singularities and its relation regarding its opposition, creates a synthesis by discovering the subjacent structure[137]. Legrand's approach, even if it corrects two of the functionalism problems: a) the absence of importance attributed to the process; and b) the absence of a dynamic of systems, suffers from the same criticism regarding the absence of a conceptual construction, since Legrand does not create a theory to relate how precisely we must regard culture and law, creating epistemological problems. Nevertheless, we can consider this relation to be provided by his hermeneutical interpretation, somehow. The radical approach of Legrand can be criticized, though, by not accounting the inexistence of isolation among cultures:

> […] what Legrand fails to recognize is that neither linguistic communities, nor legal systems, nor civil societies/communities live in isolation from each other. There has always been cross-fertilisation, whether geographical, geo-political or cultural, whether in time or in space and these commonalities need to be recognized as much as the differences Legrand advocates.[138]

The suggestion of Bogdan that we must study the economic system, the political system, the religion, the history, the geography, the demography and even accidental or unknown factors, as interrelated categories, to see which of these develops a more leading role in one

[135] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p.226.
[136] LEGRAND, *La compairason des droits expliquée à mes* étudiants, p.226.
[137] GIL, Antonio Hernandez. *Metodologia de la ciencia del derecho*. Madrid: Valdez, v. II, 1971, p.450.
[138] LASKE, Caroline. Translators and Legal Comparatistis as objective mediators between cultures? *In*: HUSA, Jaakko; HOECKE, Mark Van. *Objectivity in Law and legal Reasoning*. Oxford: Hart Publishing. 2013, p. 222.

country's law is interesting, even if it suffers also from an absence of conceptual construction[139]. This could be explained by the hermeneutical idea itself, which says that social sciences cannot be grasped objectively as other sciences: social reality can only be interpreted.by reason or by dialectical reason[140].

The proposed debate, therefore, between Legrand and the functionalists, as Zweigert and Kötz, or proclaimed neo-rabelians, as Markesinis[141], lies in the difference between the hermeneutical interpretation and the functional interpretation. As explains Samuel, the hermeneutic interpretation is vertical, once it involves the relationship among two objects, the signifier (what is expressed) and the significant (what is). The significant, therefore, what is, would be represented by the cultural mentality. The functional interpretation, on the other hand, establishes a circular relationship, in which the significant is just another function[142]. That means that, epistemologically, the functionalists can be acting on premises that falsely understand the significant or that distort its role[143]. Although a hermeneutical analysis is deeper, it doesn't mean that is better than that functional one, once there are levels of hermeneutical interpretation, some deeper, other less. Short hermeneutical Interpretations, for instance, cannot be said better than functional interpretations[144]. In the same way, the functionalism method can be an initial apprenticeship that together with a hermeneutical analysis can be proven correct, when both interpretations will be merged in a subsequent structural level of larger profusion that can be conciliatory among both approaches.

The comparative juridical method, though, by reason of its own complexity, raises the need of some explanations. The first of them, the notion of ontological openness of the comparatist, postulates that an

---

[139] BOGDAN, Michael. *Concise introduction to comparative law*. Groningen: Europa Law Publishing, 2013, p. 55-63.

[140] BERCHELOT, J-M. Les sciences du social. *In*: BERCHELOT, J-M *et alli*. Épistémologie *des sciences sociales.* Paris: Presses de France. 2001, p. 241.

[141] It's the own author that gives himself the title. MARKESINIS, Basil. *Comparative law in the courtroom and classroom: the history of the last thirty-five years*. Oxford: Hart Publishing. 2003.

[142] SAMUEL, *Epistemology and comparative law: contributions from sciences and social sciences*, p. 61. See also BERCHELOT, J-M. *Les sciences du social*, p. 238.

[143] SAMUEL, *Epistemology and comparative law: contributions from sciences and social sciences*, p. 61.

[144] SAMUEL, *Epistemology and comparative law: contributions from sciences and social sciences*, p. 62.

analysis that doesn't intend to be a mechanical translation of foreign legislations, will be produced, unavoidably, with the interpreter's distortions. That is because 'objectivity' is a pernicious epistemology, which will always have a measure of cultural suggestibility[145].

Thus, the comparatist is always an observer-participant[146]. As such he will always look for a pragmatic strategy focused in certain institutes arbitrarily chosen by him. That will result in a legal formalism, converging to a global market that will simply ignore other cultural contingencies[147]. On the other hand, "*l'idéologie of l'autosuffisance culturalle n'est pas autre chose que l`idéologie du retard*".[148]

5. Conclusion

As points Örücü, is very hardy to talk about "comparative methodology". What we have is a range of methods and they differ deeply,[149] especially in the context of law and of social sciences. This, of course, was first an observation made by Frederick Pollock and later done by Gutteridge[150]. Nevertheless, although functionalism is quite useful and a subject of constant renovation, it possess clear limitations. One possible way to advance a better methodology is to correlate the functional method with the hermeneutical and the structural methods. The obvi-

[145] LEGRAND, *Comparative legal studies and commitment to theory*, p. 266; HOECKE, Mark Van; WARRINGTON, Mark. Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law, *Int'l & Comp. L.Q.*, v. 47, p. 515, 1998 (arguing that each comparatist would have his own paradigm, responsible for determining pre-existent values in his research. In the case of the comparatists of the western culture, rationalism, individualism and positivism would be predominant).

[146] LEGRAND, *Comparative legal studies and commitment to theory*, p. 266.

[147] ZUMBANSEM, Peer. *Comparative law's coming of age? Twenty years after Critical Comparisons*, p.1076; KUHN, Thomas S. *The structure of scientific revolutions*. 3erd ed. Chicago: Chicago University Press. 1996 (describing science as a permanent search to preserve the scientists' *status quo*. The scientific revolution, as such, unlike something on the name of pure knowledge or devoted to knowledge, would be something much more related to the impossibility of the dominant thought to endure as a false paradigm. Scientists would be rival groups that look for to sustain its same structures, being attributed to science, therefore, a dimension much more mundane and subjective than the supposition of its 'noble' aspect of neutrality.).

[148] LAITHIER, *Droit comparé*, p. 19.

[149] ORUCU, *Methodology of comparative law*, p. 451.

[150] HALL, Jerome. *Comparative Law and Social Science*. Louisiana: Louisiana State University Press. 1963, p. 8.

ously challenge is to create a theory that permits to better connect these methods to create a better understanding of the *otherness*, that is, how to relate the micro and macro comparison without creating illusions. Functionalism as proposed by Rabel does not work anymore. A radical postmodern theory that negates even the possibility of knowing the other also does not work. So Legrand's culturalist and *light*-postmodern theory insights are quite helpful, but as pointed before, he also lacks a theory of conceptual construction as precisely how to connect culture and law. Perhaps those results are clearly limitations of the jurist formation. It would seem that we need more persons from several areas of knowledge to work together. If law is just a form of interpretation validated by a community of persons or by society's legislative power, even if we have general hierarchal rules in a system theory of law, this means that comparative law is just a form of hermeneutics after all, even if we have a great range of methods. Hermeneutics, though, is rich and can be improved by the correlation with the structural method to limit its imperfections or always be the subject of the community's validation, although it will remain as subjective. Comparative law, then, must be an effort done by several scholars, from different fields, trying to minimize the error of the structural representation of the *other*. Recognizing the clear limits of comparative law may create a sad felling and negate the ideas of Lambert and Saleilles, but this is better to call something a "science" just for the sake of saying "I'm a scientist". The European project proves that the unification is possible, but I think this is much more a question of politics then really comparative law. Comparative law here is a political tool of change and reform, nothing more than a method. That's way the "functional core approach works", once that it's easier to justify politically.

Legal Research
Empirical analysis, philosophical work and the "non research" kind of studies1

Alexandre Veronese[2]
Roberto Fragale Filho[3]

Abstract: The paper focuses on the contemporary debate about legal research, with attention to the Brazilian situation. This discussion has intensified over the last decade and it is already possible to draw some prospective considerations and critical assessments about the difficulties in differentiating the various types of work produced by graduate programs and researchers. The first section reviews the discussion held so far, highlighting the emergence – both in speeches and in everyday Brazilian institutional scenario – of a different kind of legal scientific work: empirical research. The second part undertakes a critical examination of the debate and demonstrates that there are some outstanding issues related to legal research, in particular the difficulty in distinguishing between the professional studies and scientific research or philosophical elaboration. Those two kinds of legal research are identified and distinguished in order to show the possibilities of dialogue among them. Also, it indicates that it is crucial to the institutionalization of legal research a more demarcated border between the technical products and scientific products (pure or basic research), with a specific space to be granted to empirical studies. The third section concludes the paper based on the assertion that empirical legal research is an international phenomenon. Such assertion is, in this sense, comforting, since it allows viewing that the Brazilian scenario is in tune with what is being done over the world in terms of legal research. Also, it indicates that the path of consolidation of empirical research has proved to be relentless. Such research is needed due to the constant demand for diagnostic and assessments for the innovative propositions in terms of public policies. Finally, a critical argument is performed to postulate the future need of expansion in the volume of basic or pure empirical legal research to undergo the scientific objectives of refining

[1] English version: Ana Carolina Pereira (+55 21 82119693), Rio de Janeiro, Brazil, July 2013.

[2] Professor, University of Brasília (UnB), Faculty of Law, Legal and Social Theory.

[3] Associate Professor, Fluminense Federal University (UFF), Faculty of Law, Sociology of Law.

the methodological tools and theoretical approaches. As such type of research can only be carried out by academic groups linked to graduate programs and students amidst their production of theses and dissertations, a special attention should be given to these institutional development and empowerment.

Keywords: Legal research; Empirical studies; Legal theory.

Introduction

The goal of the present article is to prune some conceptual misunderstandings related to research in legal studies; it will not have the shape of a diagnosis, but will make use of the already existing studies concerning the problem of legal research. The debate about this question has been intensified at the last ten years and it is already possible to extract some prospective considerations and, mainly, critical appreciations on the difficulties of differentiating the various types of works produced by post-graduation programs and by diverse researchers. The first part will review the discussion that has been held until the present moment, highlighting the emergence – on the speeches, so as on the Brazilian institutional everyday – of a differentiated kind of scientific work on law: the empirical research. The second part will proceed to critically examine the debate and will demonstrate some pendent questions related to the legal research area, specially, the difficulty in differentiating between technical or professional studies and philosophical research/elaboration. This part will demonstrate that it is possible – and necessary – to distinguish such lines of studies. The importance of differentiation shall not be understood as a hierarchy but rather, as a more precise localization of what should be understood as pure bibliographical review or technical and juridical consolidation. The third part, by its turn, will indicate it is essential to institutionalization of the legal research that that frontier be more demarcated between the technical/practical products (applied research) and the scientific products (pure or basic research), with a specific spaced regarded to empirical studies. The work's conclusion is that empirical legal research affirmation is not a national phenomenon; being related to a wide researchers movement, existing in the occidental world. The assertive is, in this light, comforting, once it allows visualizing that the Brazilian panorama is tuned – substantively – with what is being produced in the world in terms of legal research. Also, it is indicated that the path of consolidation of the empirical research has shown itself

as inexorable, by determination of reality's imperatives, as the constant demand of diagnosis for the proposition of solutions in terms of public policies. Lastly, a critical appreciation is carried out in the sense that the volume of empirical research should be amplified as well, as a pure or basic key, in order that the techniques and approximations are refined. This kind of investigation can only be executed by research groups belonging to post-graduation programs and by students in the production phase of their dissertations and theses. Therefore, special attention must be directed to such institutional development.

1. The debate on legal research and the affirmation of empirical research as an evident factor of influence

The debate on legal research is not so new in Brazil, although it did not have a sounding board similar to the discussion on legal education. The discussion on legal education is as old as the creation of legal courses in Brazil, being the literature on the theme quite prolific, although it guards a strongly descriptive trace. There are several books, articles and reports that, since the eighties' decade, repeat this point (BASTOS, 1998; FALCÃO NETO, 2001). The goal of this section is not to retrace the historical trajectory of this debate. The idea is to demonstrate that the debate has reached a moment, in which the legal empirical research has served to oxygenate the discussion and bring new patterns to the debate on scientificity, concerning what is relevant: the rigor of research works in the area. It is for no other reason that this question must be debated over the light of reflections made by researchers that ended – by their trajectories – being inserted into the field of legal research and of social sciences. Roberto Kant de Lima is one of these researchers that have exposed their concerns about the roll of Legal Anthropology on the list of possibilities of researches regarding the legal world. In two recent works, Kant de Lima reiterates the difficulties found in the process of approximation between the fields of Anthropology and Law (KANT DE LIMA; BAPTISTA, 2010; KANT DE LIMA, 2007). Indeed, consonant to his diagnosis, "the anthropological action presupposes the relativization of consecrated truths while legal action through them reproduces itself, being this methodological contrast a significant obstacle to the dialog between these two fields."[4] (KANT DE LIMA, 2007, p. 90). This obstacle

[4] Translator's note: Freely translated from the original in Portuguese - "o fazer antropológico pressupõe a relativização de verdades consagradas enquanto o fazer jurídico

is, following, always dissected in the perspective of evidencing the problems of the comprehension between the two disciplines:

> Our legal tradition has very specific characteristics regarding the system of production and reproduction of legal knowledge. In a clearer way, our legal tradition makes use of pedagogical practices and processes of socialization on the professional field of law and on its concept of academic and scholastic knowledge which are analogue to those of the legal procedure (…). Concerning the scientific knowledge, it is performed through a progressive construction of successive consensuses which define facts, until that, by means of a revolution that produces a new and distinct legitimacy, can be countered (…). In face of this intrinsic precariousness of science, the scientific texts avoid their "manualization", in order not to affirm how should the knowledge field be. In our legal system, on the contrary, manuals, treaties and dictionaries proliferate, which are perennial fountains of controversial doctrinal opinions, to be instrumentalized (…). This brief introduction would be unnecessary, if these were not, in my already advanced opinion, the biggest epistemological obstacles that interpose between the academics of legal studies (law) and the academics of social sciences (KANT DE LIMA, 2012, p. 36-37)[5].

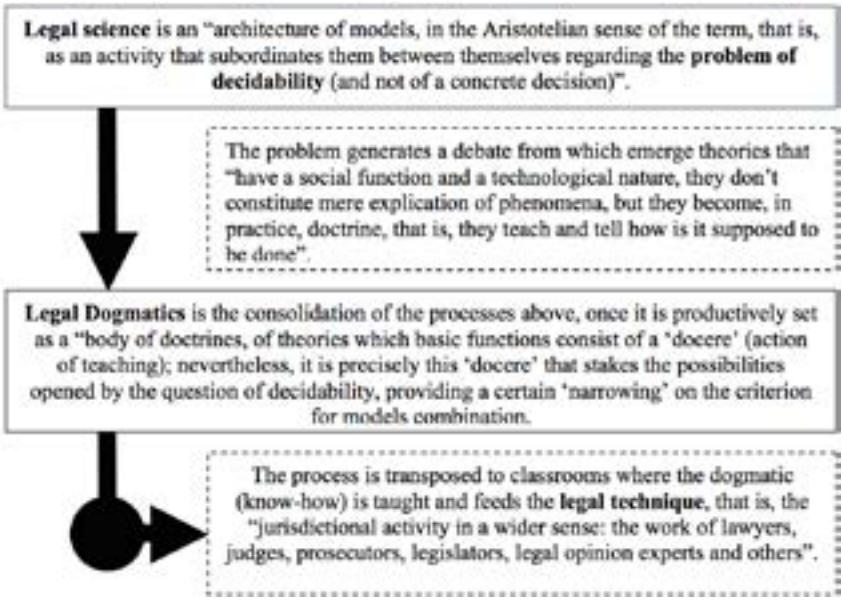
This point of view demonstrates that the question is easily equated, if visualized in the light of social sciences. The answer to the scientif-

através delas se reproduz, sendo este contraste metodológico um significativo obstáculo ao diálogo destes campos".

[5] TN: Freely translated from the original in Portuguese - "A nossa tradição jurídica tem características muito específicas no que tange ao sistema de produção e reprodução do saber jurídico. De modo mais claro, a nossa tradição jurídica utiliza práticas pedagógicas e processos de socialização no campo profissional do direito e no seu conceito de saber acadêmico e universitário que são análogas àquelas do embate judiciário (...). No caso do conhecimento científico, procede-se por uma progressiva construção de consensos sucessivos que define fatos, até que, por meio de uma revolução que produza uma nova e distinta legitimidade, possa ser contrariada (...). Em face dessa precariedade intrínseca à ciência, os textos científicos evitam a sua "manualização", para não afirmar como deve ser o conhecimento do campo. No nosso direito, ao inverso, proliferam manuais, tratados e dicionários, que são fontes perenes de controversas opiniões doutrinárias, a serem instrumentalizadas (...). Essa breve introdução seria desnecessária, se esses não fossem, na minha experiência já avançada, os maiores obstáculos epistemológicos que se interpõe entre os acadêmicos de direito e os acadêmicos das ciências sociais". (KANT DE LIMA, 2012, p. 36-37)

ic statute of legal research becomes a closer reflection to the existing in social sciences. However, through this key, this debate contains the definition of frontiers that evidence the incomprehension. There has been an alteration in the discussion from an article written by Marcos Nobre when the question about legal research gained new colors and allowed to signalize other clues (2003). Beyond his opinion concerning the relative delay of legal researches, in comparison to the existing production in the field of human and social sciences, in a broad sense, the work brought a relevant critic about the very definition of legal knowledge. In the article, the author makes a reference to the work of Tércio Sampaio Ferraz Jr. to demonstrate strangeness with the following epistemological construction (NOBRE, 2003, pp. 150-153):

Fig. 1. Conceptualization of legal science according to Ferraz Jr.



The reasoning exposed at the picture above, which we hope is faithful to Tércio Sampaio Ferraz Jr., is clear: legal science would not be cognitive. It would be an architecture of models set to critically notice the various possibilities of decision in abstract and hypothetical situations for the consolidation of doctrines, which, in the end, would be

translated in techniques for practical use. The heartwood of this exposition is the demonstration of how Marcos Nobre evidenced the huge difference between this conception of "legal science" and the other sciences, which always have the purpose of comprehending some partial aspect of the social or natural world. Tércio Sampaio Ferraz Jr., however, had already exposed that his conception of "legal science" does not aim at cognizance as the other sciences; it aims at assisting the didactic process of future professionals dedicated to decision-making:

> Legal science presents problems on order to teaching. This differentiates it from other approaches of the legal phenomenon, as Sociology, Psychology, History, Anthropology etc., which present problems and constitute models which intention is much more explanatory. While the law scientist feels bound, at the presentation of problems, to a solution proposal which is possible and practicable, the others can even suspend their opinion, presenting questions to be left open (FERRAZ JR, 1977)[6].

Of course questions derived from the indicated theory may bring a more complex appreciation than the schematic expression here indicated, as can be apprehended through the debate concerning the currency of Tércio Sampaio Ferraz Jr.'s conception (RODRIGUEZ; SILVA E COSTA; BARBOSA, 2010). Still, on the other side, it is evident that this conception of science is so diverse of the existing standard in the scientific and academic world that turns difficult to conceive its own methodological debate. Ergo, the analytical solution offered by Marcos Nobre consisted in indicating that he did not visualize any problem in which legal science could be explicative, although he had not enunciated how would this be given (2003, p. 153). The omission was given, including, in homage to the potential plurality of methods. After all, understanding the normative and jurisprudential framework in order to generate answers to legal problems seems to demand some effort of controlled com-

[6] TN: Freely translated from the original in Portuguese – "A ciência jurídica coloca problemas para ensinar. Isso a diferencia de outras formas de abordagem do fenômeno jurídico, como a Sociologia, a Psicologia, a História, a Antropologia etc., que colocam problemas e constituem modelos cuja intenção é muito mais explicativa. Enquanto o cientista do Direito se sente vinculado, na colocação dos problemas, a uma proposta de solução, possível e viável, os demais podem inclusive suspender o seu juízo, colocando questões para deixá-las em aberto".

prehension, which could be gathered in a cognitively oriented science and not only grasped to the production of techniques for the practice.

Nothing better than an example to clear this up. The conception of science exposed by Tércio Sampaio Ferraz Jr. claims that the dogmatic is the instructional basis of practice. However, what if practice is an autonomous know-how in relation to legal dogmatic, doctrine and science? The answer is not so simple, as noticed in the work of Barbara Luppeti Gomes, which consisted in analyzing the orality principle in the legal practices established at Rio de Janeiro State Higher Court. In this endeavor, she achieved an ethnography and, from the observation of practices, noticed that the dogmatic concepts were not appropriated the way they were expected to be. They were used in an entirely diverse form from what had been prescribed by the doctrine and the legal dogmatic:

> Focusing on the study of the orality principle, applied to civil procedure law, I realized that, in fact, the dogmatic and empirical speeches are like parallel lines that, never, at any point, touch themselves, because of being at absolutely different plains. It occurs that, transposing this mathematical logic to law, it is seen that, actually, the problem is precisely on the fact that that they are not parallel lines! The theory and the empirical should not be considered as different plains that much, but only as different forms of manifestation of knowledge and, as such, for splitting and sharing the same object – the law – they could not relate as if they were reverse lines (BAPTISTA, 2008, p. 51)[7].

In our reaction to the problems posed by Marcos Nobre, there has been no spotlighting to the epistemological debate, even tough it is inseparable from the discussion concerning the problem of research (FRAGALE FILHO; VERONESE, 2004, p. 53-70). The discussion, at that

[7] TN: Freely translated from the original in Portuguese - "Focalizando o estudo do princípio da oralidade, aplicado ao processo civil, percebi que, com efeito, os discursos dogmático e empírico são como retas reversas, que, jamais, em ponto algum, se encontram, por estarem em planos absolutamente diferentes. Ocorre que, transpondo essa lógica matemática ao direito, vê-se que, na verdade, o problema está exatamente no fato de que não se trata de planos diversos! A teoria e a empiria não deveriam ser planos tão distintamente considerados, mas apenas formas diferentes de manifestação do conhecimento e, como tal, por partirem e partilharem do mesmo objeto – o direito – não poderiam se relacionar como se fossem retas reversas".

initial moment, remained more focused on the field of political and technological science and on the problem of the institutions which produce science in the legal area. At the occasion, although we had recognized the existence of an epistemological problem of great bulk which confrontation was necessary, we found the space for doing so was scarce and it would not be possible to face the dilemma there. In fact, the central question is that both of us believed the central previous theoretical debate would be of little use for producing effective answers. The center of the theoretical inquietude – not debated – lies on the need of legal research to combine a realistic dimension and, with this, gain a cognitive and explicative focus. This way, there will be a legal science, combined with the influx of data collection, arising from other human science areas and improved to the legal field, as we indicated in previous works (VERONESE, 2011; FRAGALE FILHO; NORONHA, 2012).

This concern is quite present on the contemporary agenda. It is possible to indicate that this matches the diagnosis of Marcus Faro de Castro, according to which the legal conceptualism serves as a serious cognitive bulkhead. This comprehension is supported on the conclusion of falling on a misconception to consider the existence of a "legal science" inherited by Greek philosophy and Roman genie. On the contrary, such conceptualism turns into a limiting belief for the jurists' comprehension in relation to the phenomenon of law:

> Brazilian jurists absorb the 'conceptualist' legal culture of occidental European law. Treating law intellectually from prebuilt concepts, however, shows disadvantages. (…) The most common, in Brazilian legal education, is, until today, introducing and image of law as a group of decontextualized concepts, which have existed since antiquity, in the occidental world (…). It is also common that it is dumped on students, lawyers and judges, innumerous "general theories", through which conventional jurists try to give internal coherence to many ideas and about its consequences (effective impacts on society) it is now argued, because it is not researched (FARO DE CASTRO, 2012, p. 218-219)[8].

[8] TN: Freely translated from the original in Portuguese - "Os juristas brasileiros absorveram a cultura jurídica "conceitualista" do direito europeu ocidental. Tratar o direito intelectualmente a partir de conceitos prontos, contudo, apresenta desvantagens. (...) O mais comum, no ensino jurídico brasileiro, até hoje, é apresentar uma imagem do direito como um conjunto de conceitos descontextualizados, que passaram a existir desde a antiguidade, no mundo ocidental (...). É comum, também, que se despejem sobre o estudante, os advogados e os juízes, inúmeras "teorias gerais", mediante as quais os juristas

His final consideration is that it shows itself very relevant to enable the analytical exchange between law and the other human and social science areas, in order to permit a higher rigor and more functionality to researches in law:

> An ulterior group of reflections can be offered along the previous chapters – in contrary to older understandings and still in great part fossilized in Brazilian legal education – regards the importance that must be given to the effort of opening legal work to (1) the exchange with the "format" of other disciplines, an opening, therefore, to interdisciplinarity; and (2) the methodologically ordained engagement with the facts (empiric research), for them to acquire a "critical" perception – what could also be done with the help of interdisciplinarity (empiric research) or, in special, by the study of the legal approximation in relation to facticity and mirrored in courts decisions. On the context of this double overture, it must be drawn attention to the circumstance that it, as a whole, represents an strategy to avoid imprisonment of the jurist's mid to conceptualisms of little use to help the State promote effective good (FARO DE CASTRO, 2012, p. 221)[9].

In summary, we believe Marcos Nobre's diagnosis, in its epistemological key is still current, as well demonstrates the recent work of Marcus Faro de Castro. Therefore, we consider imperative that a reformulation of legal researches is set towards the quest for scholar and methodological parameters that parallels those existing in other humanities areas. At the next topic, three conceptions of research will

convencionais procuram dar coerência interna a muitas idéias e sobre cujas conseqüências (efetivos impactos sobre a sociedade) pouco é indagado, porque não é pesquisado."

[9] TN: Freely translated from the original in Portuguese – "Um ulterior conjunto de reflexões também oferecidas ao longo dos capítulos anteriores – em contrário a entendimentos mais antigos e ainda em grande parte fossilizados no ensino jurídico brasileiro – diz respeito à importância que deve ser dada ao esforço de abertura do trabalho jurídico para (1) o intercâmbio com as "formas" de outras disciplinas, uma abertura, portanto, para a interdisciplinaridade; e (2) o engajamento metodologicamente ordenado com os fatos (pesquisa empírica), para deles adquirir uma percepção "crítica" – o que pode ser feito, também com ajuda da interdisciplinaridade (pesquisa empírica) ou, em especial, pelo estudo da aproximação judicial em relação à facticidade e espelhada nas decisões de tribunais. No contexto dessa dupla abertura, deve ser chamada atenção para a circunstância de que ela, como todo, representa uma estratégia para evitar o aprisionamento da mente do jurista a conceitualismos pouco úteis para ajudar ao Estado a promover o bem efetivo".

be focused. The first will be the "non-research", because it reverberates the traditional notion that legal studies do not need to understand any other aspect of human life – both in philosophical and empirical sense – and only organize abstract concepts – without problematization or conceptual immersion, ironically – to facilitate professional practice. Even tough it seems shocking; this "non-research" is still the dominant model in Brazil.

2. The two lines of legal research and the "non-research"

Polysemy is a quite emphatic problem in social sciences. The analytical appreciation of the social phenomena occurs in attention to language. Social facts are observed and translated this way. The ultimate analytical expression, derived from scientific interpretation, is also expressed through language. Even though the social phenomena direct observation technique is used, there will be a formulation intrinsic to language, be it at the collected data organization, or at the communication of results phase. Now, being language such a relevant element on the research, interpretation and communication of results' process, it is evident that the employment of the everyday lexicon may cause confusion with analytical concepts and, in the end, may induce to miscomprehensions or even false analysis and interpretation. In the law area, research – the word (but also the practice, as will be seen following) – suffers from this problem significantly (VERONESE, 2011, p. 174-175). The miscomprehension and the mistakes are, in part, derived from the few accomplishments and the lack of control of the academic production, which mark the area. From another part, the mistakes are related to disputes – explicit or not – existing in the law field to define what should be considered as research. The first process is related to the low level of institutionalization of legal research, a picture which is being gradually altered and is to be judged by the current debate, as indicated in the previous section. The amount of post-graduated professionals in the legal field has increased. The amount of people with a degree in law is increasing (MARTINS & CARVALHO, 2003). The amount of room for producing researches and scientific studies is also raising (FRAGALE FILHO & VERONESE, 2004). Moreover, the number of researches diffusion vehicles increase in quantity and quality. Last, the funds and sources of fomentation of legal research were augmented – even though not to desirable levels. The second process is related to a more refined and com-

plex debate. This debate is profoundly imbricated with the definition of what is research in law, in terms of employable theories and methods. Can an ethnography about the operation of orality be regarded as legal research? (BAPTISTA, 2008). Can the appreciation of economic consequences of new legislation on the credit market be regarded as legal research? (ARAÚJO & FUNCHAL, 2009). Or, on the other side, can only be labeled as legal research the doctrine review studies, plus jurisprudential comments? Or, still, the philosophical debates on the nature of the legal phenomenon, without direct appreciation of reality data?

The concern with the possibility of a "legal carnival", as expressed by Marcelo Neves, is relevant and must be considered (NEVES, 2005, p. 14). Preliminarily, some consensuses that seem to be largely accepted currently in the legal area among researchers must be indicated. The first element about which there seems to already be a consensus about is that the academic products have a differentiated nature in relation to technical products. A legal opinion[10] is different from a research report. This quasi-consensus is evidently relevant for the existence some debate on the problem of legal research in Brazil. On the contrary, what could occur is a debate concerning the legal "non-research"; once it is subsumed to technical production on courts and legal advisory, public and private.

It is not easy to locate an academic source that currently postulates the scientificity of a final decision. Or, still, that legal opinions should be considered as potential academic articles. However, this confusion still exists in practice, once some legal journals still publish final decisions, sentences, and legal opinions on a par with articles, generating this gray area, never discussed or debated. However much academic practice in the legal area contains a certain confusion between the lines of academic world and the frontiers of legal area, an almost naïf optimism allows to notice that such misconceptions tend to diminish in the future. It is certain that a legal document – as well as a legal opinion – can be a source and give rise to law-based comments and that such process of appreciation may be achieved scientifically. This is what apparently could be regarded as "traditional research". Nevertheless, it is not. What we refute in the present work is that a congeries of jurisprudence

[10] Translator's note: in Brazil, a legal opinion is a document produced by an expert lawyer in a certain area in order to reinforce or give credibility to some interpretation of the law, juridical argumentation or project which needs legal support to be executed. Some lawyers dedicate their careers almost exclusively to this activity.

or doctrine can be qualified as derivative of scientific research if it does not contain a clear and discussed theory of legal sources interpretation.

It was indicated at a paragraph above, readily, that there is a "non-research" and two other strands of research in law. These three fields will be unfolded. The two strands of legal research are dogmatic and philosophical research and empirical research. However, to advance, it is needed a concept that has been used in a very frivolous way when it concerns human and social sciences research: interdisciplinarity. As the word "research" has been taken over by a wide range of meanings, the term interdisciplinarity has also suffered from a little precise use. Marcelo Neves' concern with the "legal carnival" is well explained when his critics to "legal encyclopaedism" is visualized:

> A risk that prowls around the pretension of interdisciplinary legal research in Brazil is to understand it as a legal encyclopedia. Interdisciplinarity means a sum of the most diverse knowledge about law. This tendency, which remounts to iberoamerican education tradition and legal studies in Brazil, is intimately related to the so called "graduatism", within which a generalization in the sense of a knowledge which embraces a range of science and humanities spheres was overestimated. (…) What follows from this encyclopedic model, so well-know among us, is a generalized superficiality, of little practical relevance and little theoretic meaning to the diverse areas of knowledge (NEVES, 2005, p. 208)[11].

The quoted stretch evidences the problem. With an eagerness to break with the "non-research", which motto is to simply use doctrine texts or legal documents as sources, some jurists take the path through the eclectic conjugation of other areas' references, without specific theoretical support in the legal area, solely for fattening articles, theses and

[11] TN: Freely translated from the original in Portuguese – "Um risco que ronda a pretensão da pesquisa jurídica interdisciplinar no Brasil é compreendê-la como enciclopédia jurídica. A interdisciplinaridade significaria um somatório de conhecimentos os mais diversos sobre o direito. Essa tendência, que remonta à influência da tradição iberoamericana de ensino e estudos jurídicos no Brasil, está intimamente relacionada com o chamado 'bacharelismo', no âmbito do qual um generalismo no sentido do conhecimento abrangente de várias esferas das ciências e das humanidades era superestimado. (...) O que decorre deste modelo enciclopedista, tão conhecido entre nós, é um superficialismo generalizado, de pouca relevância prática e pouco significado teórico para as diversas áreas do saber".

dissertations. In this process of thickening the work might arise the nefarious "historical chapter" or the offset "sociological chapter" in the middle of a thesis that would be better if restrained to its legal focus, in the strict sense, with great attention to the thick philosophical debate, as well noticed Luciano Oliveira (OLIVEIRA, 2003; OLIVEIRA, 2004). In the next topics it will be analyzed the modalities of "non-research" and the other two possibilities, highlighting the theoretically oriented researches and the empirical researches.

2.1. The traditional research; or the non-research

In the previous section some elements were mentioned concerning usual legal studies, which were indicated as "non-research". They are perceptible in the academic production of the post-graduation programs in Brazil, even though the process of strengthening of the other two lines that will be worked latter is in march. It is important to indicate that many are the Anglophone bibliographical sources which affirm and repeat critics to the traditional studies, indicated as obsolete and archaic. In the United States of America there seems to have been a certain triumph of legal realism, what must not be confused with sociological jurisprudence (HALIS, 2010). The first has origin in the movement of interdisciplinarity of law, and, actually, privileged the absorption of scientific methods and practices external to the legal field for the production of academic works. The second concerns the founders of a critique to the traditional studies in the USA, who proposed the construction of a decision-making practice that would break with formalism ties. The historic work of John Henry Schlegel exemplifies this trajectory by demonstrating how were teams of professors and researchers formed in the universities of Columbia, Yale and John Hopkins with the task to build thick and effective attempts of empirical research institutionalization, during the twenties and thirties of the last century, that is, right after the end of the World War One. By proposing his research project, which ended up becoming his doctorate thesis, the author recalls hearing: "We are all realists now; don't worry about these questions"(SCHLEGEL, 1995, p.2). Notwithstanding, he continued concerned with the theme and wanted to understand why the initiative of some academics of that period had failed, whereas the empirical methods had been, in a wide and general way, absorbed by the other human and social sciences. The author's final diagnosis is quite stinging, to the point that even positive advantages

contain as well nefarious oppositions:

> Professionally, the background was admittedly nowhere near as favorable. The enormous American Law Institute scholarship engine had already been set in motion, its wheels well greased with money that might have been captured for empirical research in law, but that instead lined the pockets of more traditional legal scholars. That organization provided now tax deductible opportunities for slightly left of center, upper-caste lawyers to socialize in an atmosphere that reinforced the notion that theirs was a learned profession and thus further separated them from the stench of the Untermenschen of the profession. Even more debilitating was the notion fueled by the ALI's mere existence that library, not field, research was the method of legal research among the group in the profession that was the most likely to support empirical research in law. And the profession as a whole, or at least that upper portion about which something is known, was surely not interested in social science intrusions into the "practical" training for the practice of law, although at least parts of the profession were not adverse to using "scientific" methods when such methods seemed to advance the profession's interests. But the professional background could hardly be expected to be favorable at any time; union spokesmen can be expected to oppose innovations in the craft that smell of automation or, in that marvelous English word, of redundancy, and this is as true of unions of persons whose craft skills are mental as of those whose skills are manual.

The counterpoint portrayed by Schlegel in the academic world were the traditional Law professors. These were dedicated to then current law descriptions in a pragmatic key very similar to what is produced today in Brazil as legal practice. The rupture, in the USA, was gradual and was only firmed when universities reached a posterior level in its organization. The "non-research" was migrated to anew kind of legal research, which could be called as "black and white research", in the meaning given by Mike McCoville and Wing Hong Chui, in a manual about legal research methods:

> Legal scholarship has historically followed two broad traditions. The first, commonly called 'black-letter law', focuses heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside

> the law. Deriving principles and values from decided cases and re-assembling decided cases into a coherent framework in the search for order, rationality and theoretical cohesion has been the fodder of traditional legal scholarship.
>
> A second legal tradition which emerged in the late 1960s is referred to as 'law in context'. In this approach, the starting point is not law but problems in society which are likely to be generalised or generalisable. Here, law itself becomes problematic both in the sense that it may be a contributor to or the cause of the social problem, and in the sense that whilst law may provide a solution or part of a solution, other non-law solutions, including political and social re-arrangement, are not precluded and may indeed be preferred. The law in context approach has given an extra dimension to legal studies that has been taken up in every higher education institution. (2007, p. 1).

What is inferred from the stretch transcript above is the possibility of construction of two kinds of research differentiated to law. The first lineage conjugates critical noticing of cases' evolution in search of systematization and cannot do without philosophy. From such analysis, it will be possible to identify regularities or ruptures and, with such elements, produce an analysis theoretically informed on legal sources. The second tradition lies on the field of empirical research and seeks understanding law from methods firmed in other areas. The conclusion is obvious. There seems be no more room for describing laws and for a casuistic absent from the pretension of systematization; thickly informed by law theory. To point this, it is worth to transcript the diagnosis of John Henry Schlegel, presented at his afterword, in defense of the validity of his thesis as a work about history of the intellectuals. He aimed to defend himself from the critic that narrative would be a mere story about three professors and not a relevant evaluation of the debates that had taken place on the development of legal research in the USA:

> It is my hope that this book exemplifies my wish to set us on a different, better path for thinking and learning about the ideas in our past. I have suggested three heroes Cook, Clark, and especially Moore. I have attempted to identify, when possible, where their ideas came from. I have tried to show how those ideas changed over time. I have even attempted, at some length, to explain why those ideas took the shape that they did and how they worked out in the practices that these thinkers believed that their ideas im-

> plied. I have done that work and present it as an example of what intellectual history ought to be.
>
> It will, I suspect, be easy to dismiss my work for just what it is, an example, and not a particularly representative one at that. "After all, these people were only law professors and we all know that law is not really a discipline," it will be said. There is no way for me to meet this criticism. They were only law professors and not particularly intellectually self-conscious ones at that. But law is a discipline, if a particularly silly one. There is little difference between seeing that, "If Sunstein says this and Michelman that, then it must be the case that "and Shazaam!, a newly minted assistant professor has an article, and seeing that, "If Jevons says this and Seligman says that, then it must be the case that" and Shazaam!, a newly minted assistant professor has an article. There is a dialogue in law, though a particularly inane one, just as there is a dialogue in economics, or sociology, or anthropology (SCHLEGEL, 1995, p. 260).

The sarcastic, very free, text, as usual in afterwords of technically dense works, aimed to protect his object of research from critics in the sense that the legal field would not have intrinsic relevance to be analyzed from the historic point of view. What can be extracted from the stretch is the volume of social critique existing against the scientificity of law in the academic world of USA, so understood as the absent pragmatic production of theory.

So much criticism must have a motivation. It would not be reasonable to suppose the academic USA world took path through an evident critical appreciation against a culture of knowledge production and migrated towards an interdisciplinary debate with other areas without motive. Our guess is that traditional studies face the same dilemma that exists in Brazil: is there a possibility of conducting legal researches having as source only doctrine and jurisprudence? The answer here is, emphatically, no!

The legal researches need a theoretical outline, as any social interpretation. Even though it is an intrinsic interpretation to law, that is, what Marcelo Neves puts clearly as the appreciation of possible decision limits – the term legal interpretation possibility would be too wide and would abandon the link with any potential exercise – demands theoretical appreciation. And this is the correct diagnosis. It is not possible to consider that the mere piling of legal and doctrinal opinions may form

the scientific appreciation of a legal phenomenon.

2.2 The philosophical research in law

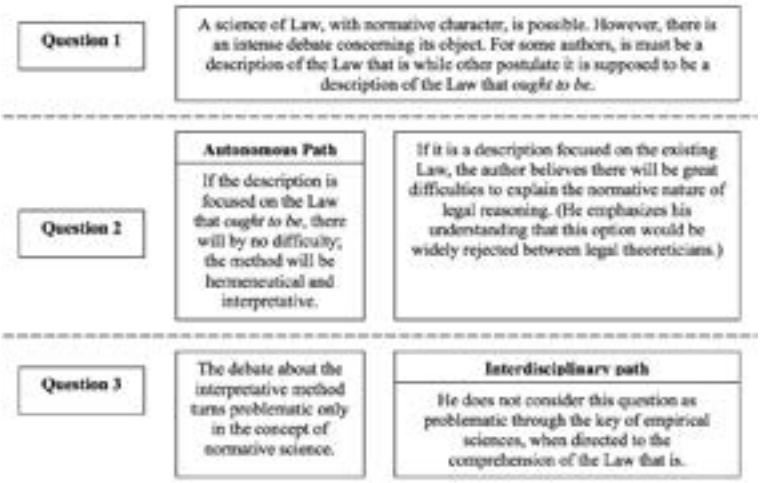
As previously mentioned, the debate about the needs of legal is historically related with the discussion around legal education and the possibility of its improvement. The diagnosis of the 90's decade on this problem was quite emphatic. The legal researches, produced on the post-graduation programs would be deficient and one of the reasons for this would be a gap in the Philosophy of Law education (CONPEDI, 2000). The diagnosis was well-written, because it focused a field still lacking rigor. The historic transition in the legal academic production evidenced a walk to overcome a past period, in which the grey zone between technical studies and legal studies were less pronounced. The current baseline has been inserting theory in the post-graduated studies, what lines off a relevant advance. Notwithstanding, as is clear throughout this text, such modification of the production's state is not plainly consolidated. The employ of the expression "dogmatic studies" has been an element of contribution to this confusion, as mentioned before. In fact, the central question is to differentiate the existence of a methodology driven to the interpretation of the law in contrast to other methodological option to the understanding of the legal system as an object. In synthesis, a question can be formulated: is a specific and particular science of law possible? In recent publication, Jaap Hage evaluated the European debate about the scientific formulation of law and brought three questions (2011, p. 43):

Fig. 2. Questions about legal science posed by Jaap Hage

Question 1	The science of law, in the sense of describing legal norms, is not impossible because of the fact that it is a normative science.
Question 2	Abstractly, all sciences' method, including legal science, is creating a coherent group of propositions that all embraces and, therefore, as well, our social beliefs about law.
Question 3	The appropriate method for a legal normative science consists primarily in the methodologies of Sociology, Psychology and Economy, once the last question to be answered if the collective effectiveness through which norms satisfy the "H" standard (happiness); the traditional hermeneutic methods are only useful to the extent that they help stabilizing the positive law that contributes to social happiness through legal security.

This debate is very antique and it can be indicated that the classic work of Hans Kelsen took a path in search of the formulation of a science of law. The question would be to find a methodological statute for such science that would allow its normative dimension, in contrast to the almost consensus about the other social sciences that, for working with an empirical key (data), walk away from the epistemological problem of legitimating normative interpretation as scientific. The mention to the "H" standard, brought by Jaap Hage, is an explicit dialog with an utilitarian formulation. After an intense analysis, the author respond to the three questions above referred (2011, p. 44):

Fig. 3. The admeasurements of questions about legal science by Jaap Hage



The formulation proposed by Jaap Hage notices that the scientific debate on the legal field is oriented by the two options indicated in this article. Either we have researches related to the interpretation of legal norms, highlighting the concept of law-object and to the interpretation method employed in a wider context, or we have empirical studies in which the author explicitly considers as existent and supposed to be taken in consideration. It may be obvious; however it is not. The definition

of these questions, as indicated by Jaap Hage, is crucial to the possibility of an academic research that follows an autonomous route in the interpretation of law. It must be indicated if the law-object studied is being described through the prism of variety of possible decisions in the sense of the *ought to be*, or if it is being appreciated in the sense of what *it is*. It is evident that the description of the law *that is*, absent of theorization, does not possess sense in the debate of scientific legal research. It only gains functionality when coupled with sources for empirical research or enrolled to the philosophical debate, as indicates Mark Van Hoecke, in the same volume:

> The fact of description and interpretation of law, together with the theoretical systematization and formulation, have been the central tasks of legal research, preventing from disregard its enlargement following interdisciplinary direction when it poses law systematically in context, as well as making use of methodologies appropriated from other disciplines . The question here is: how far should researchers of law go in this direction and when will they achieve their point of ineptitude to empirical research? Submission to the paradigm of empirical science is not a good enough reason itself to invest in such techniques; however, to effectively understand law and to elaborate theories and legal concepts, the focus on the law in context is required (2011, p. 18)[12].

The synthesis which can be extracted is positive. Even in the theoretical philosophical debate of highest level, there is an evident recognition of the interlocution required between empirical research, seen as a normative science, and the field of empirical legal research. The comprehension of the prevailing law requires apprehension of reality, that

[12] TN: It was not possible access the original text, so I freely wrote an English version of the Portuguese free translations done by the authors – "O fato da descrição e da interpretação do direito, juntamente com a sistematização e a formulação teórica, terem sido as tarefas centrais da pesquisa jurídica, não possibilita que seja desconsiderada a ampliação dela em direção interdisciplinar ao se colocar o direito sistematicamente em contexto, bem como se utilizar de metodologias apropriadas de outras disciplinas. A questão aqui é: quão longe devem os pesquisadores em direito ir nesta direção e quando atingirão o seu ponto de inaptidão à pesquisa empírica? Submissão ao paradigma das ciências empíricas não é uma razão boa em si para investir em tais técnicas; contudo, para compreender efetivamente o direito e para elaborar teorias e conceitos jurídicos, o foco no direito em contexto é requerido".

is, of how social interpretation of legal norms is given in the contexts of decision (courts, administration, corporate decisions etc.), inside the social groups dedicated to this ends. Such interpretations require social theory (RAGIN; AMOROSO, 2010). It also demands the analysis of the socially interpreted or effective law, either by groups or by social beliefs. However, the analysis field of possible interpretations of the applicable law, in frames of multivariate decisions – the law that ought to be –, is attached to the debate of normative sciences and has Philosophy and Hermeneutics, accompanied by the past discussion on the conditions of existence of law to jurists and to society, as focus. In one conclusion, it is possible to understand that the methodologies for empirical research have left the ghetto of the external look into law, to be part of the internal cognitive tool-box and that such debate is fruitful. Still, more positively, that this is happening without being necessary to disregard the need of scientific debate internal to law. The only focus that is no longer pertinent is the existence of technical works, without theoretical basis, postulating acceptance as if scientific or academic they were.

2.3. The empirical research

It's left evident that the origins of empirical legal research were given, initially, with works external to the area. It's still common identifying trajectories of legal researchers that searched for graduation in social sciences courses, once their objects of research demanded the apprehension of techniques and the supervision of Professors that were only allocated at social sciences departments or institutes. Consequently, the scientific discussion – with empirical focus – on law ends having its stronger origins in the field of social sciences and not properly in the legal field. A good example has already been given by us when we computed the research resources allocated by the Conselho Nacional de Pesquisa Científica e Desenvolvimento[13] (CNPq), and identified that part of the resources driven to research with a legal object in the areas of Sociology, Anthropology, Political Science and Economy exceeded the amount of resources allocated by the own law area (FRAGALE FILHO, VERONESE, 2004). That is, this areas external to law possessed more resources to study law then the jurists. This is not a negative fact. Is must be interpreted only as evidence that these areas were more dedicated – be it in quantity of researchers, be it in terms of their qualified demands,

[13] National Counsel of Scientific and Technological Development

that is, projects that may be object of fomentation – than active researchers in the legal field. It is evident, this way, that quantitative, qualitative and comparative research methodologies began to be initially employed by social scientists that dedicated to study law and this originated a certain rejection by the legal area regarding such methodologies. As it rests above indicated, the international contemporary literature has reviewed this posture and walked towards the dialog, while the legal empirical research field is consolidating in the world.

In the Brazilian case, it is worth to indicate which we have already made reference to. In the shadow of the classic critic of Luciano Oliveira, that undresses the historicism, the methodological syncretism, and the "manualism" practiced in the researches developed in the pots-graduations of law, it is possible to aggregate other two other compelling problems: a first epistemic, related to the naturalization of concepts, and a second, methodological, present at the elaboration of "great-hypothesis" (FRAGALE FILHO, 2013). In a context of "non-research", facing all these problems is an innocuous exercise, as, in a philosophical perspective, it reveals itself as secondary. The empirical research has the merit of evidencing them forcefully, even though it configures a straight entrance door to legal academic works, once it is seen as improper to its own purposes. With effect, in an area populated with technical norms manuals (what, by the way, only reinforces the critic made by Luciano Oliveira), the own discussion about the method seems to be absent, as evidences the surprisingly facultative character of the correlative discipline in some post-graduation programs. In the end, this absence of methodological discussion reinforces the consolidated practices that make the academic work a species of replication of the assented model of a legal opinion[14], built from a bibliographical census, that concludes in favor of an *opinio juris* ratifying of the initial position of the investigator (NOBRE, 2003). The problem is that, like this, the possibility of distortion of the hypothesis or reconstitution of the demonstration disappears, remaining as only alternative the offer of a contrary *opinio juris*, that is, of an alternative discourse based on a diverse position of authority, but that contrasts the view of the social investigator.

As long as we are not starting from a specific data-base to design a theoretical state of art, that, for this reason, is here explicitly assumed as precarious and incipient, we believe we are not equivocated when

[14] TN: Reminding that this expression possesses a different meaning from the American system, as explained at note 8.

we affirm the existence of empirical works is absolutely marginal on the legal academic field. The tradition of this area is far from incorporating such methodological strategy, as a matter of fact, well observes Maria Tereza Sadek when she indicates:

> "It's a common place finding that the biggest part of Law schools in the country are mere factories of graduateds. The courses are based on conference classes, without space for research or reflections of bigger span. Even at the most traditional courses and of highest level – usually linked to public universities – there are no disciplines dedicated to empirical research (2002, 0. 225)[15].

That is, beyond the absence of the employ of an empirical strategy as methodological resource, the legal courses do not posses a tradition of research *tout court*. The diagnosis is severe, because it postulates, on one side, that the research tradition is nonexistent at Law schools, and, on the other side, that, if anything there is produced under an academic rubric, whatever it is it does not correspond to the research traditions of higher education. The rigid diagnosis, even though it can eventually be contested by the legal field, seems to find in it some shelter, once the area, on a research fomentation ambit, repeatedly and insistently renews with the speech of its specificity, of its production's particularities, that also ends refuting the methodological strategies of other academic spaces, specially the empirical approach.

This circumstance made legal empirical research so far be effectuated almost exclusively from the outside to the inside, that is, from other disciplines' matrix. A strange view – original from Sociology, Anthropology, Economy and Psychology – seems to consolidate even more around law as an object of investigation. This view, constructed from the outside to the inside, would be guiding the empirical analysis, even when they are made from the own legal field, once the theoretical arsenal mobilized does not take its own roots. With that, the field of investigation rests completely open to other disciplines and the legal research

[15] TN: Freely translated from the original in Portuguese – Ser lugar comum a constatação que a maior parte das faculdades de direito instaladas no país são meras fábricas de bacharéis. São cursos baseados em aulas conferências, sem nenhum espaço quer para a pesquisa, quer para reflexões de maior envergadura. Mesmo nos cursos mais tradicionais e de melhor nível – normalmente vinculados a universidades públicas – não existem disciplinas voltadas para a pesquisa empírica (2002, p. 225)

closes itself around its specificity. The oddness around such studies is evident, relegating them to a sort of grey area, that turns difficult (or even forbids) the recognition by both fields involved: the internal (law) and the external (other mobilized knowledges). In other words, despite refuted by the legal field as impertinent to the area's dynamic, they don't either find shelter in the correlated areas. As highlighted by Maria Tereza Sadek, when analyzing the academic production relative to justice systems, a schizophrenia is produced in the field, questioning from the specificity of the object to the disciplinary legitimacy of the analysts, whose discoveries possess few interlocutors (SADEK, 2002, p. 247). In the end, all of this means that researches produced from the outside to the inside are not as well made in consolidated spaces and are also subjected to rejection.

Explaining how this is given is a necessary task and, under the risk of precariousness and incipience, we would like to advance with the idea consonant to which the rejection to the empirical is based on an equivocated perception that is must be necessarily quantitative. Now, nothing could be more false, because the empirical work is, actually, an activity built from observations of the world, that is, built above data, that can be quantitative or qualitative (RAGIN; AMOROSO, 2010). In this sense, like the legal research, under the argument of its specificity, uses as entrance door a view over the *ought to be*, its rejection makes sense not out of numbers, but out of the difficulty in effectuating observations on the world. Our researchers, before describing the world or establishing causal relations, establishing inferences between some of its different dimensions, are more concerned with saying how it *ought to be*. Therefore, the answers seem to precede the formulation of the problems.

How to conjugate, thus, empirical legal research with the theoretical approximation previously described, as exposed in the past section? The relevance of this question can be synthesized in one assertive: the knowledge about the social phenomenon at its juridical strand demands comprehension of the intricate notions employed by its participants. Now, in simple terms, how is it possible to understand socially law, fully, without understanding the semantic subtleties of the legal debate? It is certain that if the cognition process is driven to some focus or objects, the need is a lot smaller. Just think of a study which focuses the social consequences of a determinate judicial decision. In truth, the law-object in the case is not understood as a specific social process. It is only appreciated as an "output", that is, in the same way a political or economical decision possesses social consequences. The product is

taken as a black box (LATOUR, 2000). The object of this research will be the actors – recipients – of the judicial decision. For example – we can have the appreciation of contractual cost's raise due to a legislative alteration that strengthen subjective rights of the borrowers or, still, that difficult the execution processes. Another example would be to understand the consequences of the creation of special criminal courts for domestic violence and to demonstrate that criminal transaction[16] would not be enough to socially restrain man from spanking women. In fact, these hypothetical studies don't demand, in principle, familiarity with legal knowledge, especially with the debates about polemic points of interpretation. However, there is an interdisciplinary field in which there is a need to concatenate legal parlance and its concepts with empirical apprehension of the phenomena. This is possible, although not quite understood in practice and has been giving place to the occurrence of many problems – expressed in academic products – under the label of interdisciplinarity.

> Another risk the interdisciplinarity speech can turn invisible refers to the fact that, in its name, are developed only forms of disciplinary imperialism within law. This is not an exclusive Brazilian problem, it rounds also law schools in the so called developed countries. So this is, that, for example, many times, implicit or explicitly, under the label of interdisciplinarity, the roll of the economic analysis of law is overestimated and, mainly under the apparent interdisciplinary formula "law and economics", it is intended to subordinate the criteria of law to a rationality purely economic. (…) Also in relation to a political analysis of law, there is a strong tradition of considering law as an epiphenomenon of power or political ideology, claiming a "political jurisprudence". Symptoms of this tradition were manifested, at last, in the movement "critical legal studies". (…) Last, certain tendencies of legal sociology must be adverted that, in an apparently interdisciplinary assumption, transforming sociologic legal knowledge in an ultimate standard of the legal practice, proposing a sort of "sociological jurisprudence". Instead of an interdisciplinary intermediation between sociology and legal dogmatic or in the shape of "law and society", it is, in this case, a "sociological imperialism" or social colonization of law. (NEVES, 2005, p. 209)[17].

[16] TN: a kind of plea bargaining.

[17] Freely translated from the original in Portuguese: "Outro risco que o discurso da interdisciplinaridade pode tornar invisível refere-se ao fato de que, em seu nome, venham

In a previous work, Alexandre Veronese divides legal knowledge in four fields of incidence, in order to identify the possibility of theoretical and analytical coupling of the many methodological options (2011, p. 109-130), in a sense near to what was diagnosed by Jaap Hage. The figure below summarizes the exposition of the possible conjugation:

Fig. 4. The four moments of the legal analysis

Consequences	"How is law applied?"	Empirical sciences
Interpretation	"How to analyze law?"	Hermeneutics
Description	"How are norms organized?"	(a)Normative science of law; and (b) empirical sciences
Theoretical assumptions	"What is law?"	Epistemology

A legal research in the field of normative science of law, before indicated as philosophical or theoretical, can move between the three last fields, above listed. It can be a work about legal epistemology, that is, a study on the possibility of cognitive conditions about the legal phe-

a desenvolver-se apenas formas de imperialismo disciplinar no âmbito do direito. Esse não é um problema exclusivamente brasileiro, ele ronda as faculdades de direito também nos chamados países desenvolvidos. Assim é que, por exemplo, muitas vezes, implícita ou explicitamente, sob o rótulo da interdisciplinaridade, superestima-se o papel da análise econômica do direito e, sobretudo sob a fórmula aparentemente interdisciplinar "law and economics", pretende-se subordinar os critérios do direito a uma racionalidade puramente econômica. (...) Também com relação à análise política do direito, há uma forte tradição de considerar o direito como epifenômeno do poder ou ideologia política, pleiteando uma "political jurisprudence". Sintomas dessa tradição manifestaram-se, por último, no movimento "critical legal studies". (...) Por fim, cabe advertir certas tendências da sociologia jurídica de, em pretensão aparentemente interdisciplinar, transformar o conhecimento sociológico do direito em padrão último da prática jurídica, propondo uma espécie de "sociological jurisprudence". Em vez de uma intermediação interdisciplinar entre sociologia e dogmática jurídica ou na forma de "law and society", trata-se, nesse caso, de "imperialismo sociológico" ou colonização social do direito".

nomenon, as well as a debate about the interpretation methods or the description of possible understandings about the current law. It is interesting to notice that empirical sciences, applied to legal phenomena, can help apprehending current law, by the contraposition between effective law and the various possibilities of appliance, besides allowing understanding wider causes and consequences of the legal phenomenon, by apprehending the normative phenomenon combined to the social prism.

The horizon of possibilities is immense. It's even possible to imagine that legal research comes to incorporate an empirical dimension, amplifying the heterogeneity of its practices. The diversity – especially, of methodological strategies – is a preponderant factor to enrich the process of construction of a true academic community in the legal field. Those who make empirical research into it more than one time have already expressed their wishes of belongingness. However, the richness of the future cannot serve as a weak answer to the problems of the present (SANTOS, 2008). Actually, so that the future is not just a horizon of possibilities, strong answers must be offered to (at least) two current questions: the dominance of the technique and the scientific posture.

As to the first question, it must be recognized that, on one side, empirical research is not totally strange to the legal field. But, on the other side, it is also necessary to admit that the common trace of this pioneer empiricism lies precisely in the voluntarism of its achievers. Indeed, the dominance by the legal empirical researchers of the methodological arsenal mobilized in such circumstances is, most times, very precarious, because it is fruit of autodidactism. The apprenticeship occurs in practice and, sometimes, in an intuitive way, usually without any specific formation being obtained during the education process. Now, this can be a problem, not because in order to make legal empirical research it is necessary a total dominance over the techniques which are related, but because it is necessary to know, specially within a collective work (as is, most times, the empirical work), how to lend intelligibility to the dialog about the method. Therefore, eventual methodological problems arising from technical choices are not seen as true black boxes, which can only be opened by "experts", but are faced naturally and collectively discussed. For overcoming this handicap, it is necessary to make an effort to amplify the familiarity of the legal researchers with the empirical research techniques. Beyond desirable, it would be a fundamental initiative to socialize and amplify the knowledge around quantitative techniques (especially, of statistics), so as to qualitative techniques (as, for example,

interviews and documents). Actually, it is necessary to overcome the voluntarism of the first initiatives and thicken the knowledge around possible methodological strategies at disposal of the investigator.

As to the posture, it must be recognized – without hesitations or tergiversation – that we are used to other kin of exercise, which does not correspond to the academic model. Indeed, we are used to *defend hypothesis* instead of truly *testing hypothesis*. Though it can be used (and effectively be used) to reinforce a supposed specificity of research in law – that, in the end, only amplifies its (our) isolation –, this posture is translated by a strong contamination of the academic work by the juridical practice, that is, by the praxis tradition. In other words, the legal academic works are essentially structures from the binomial *problem-solution*, instead of facing the classic *hypothesis-demonstration* line. The reading of the production effectuated within post-graduation law programs is, in this sense, very revealing. With rare exceptions, dissertations and theses do not possess a hypothesis, but start from a problem and, after surveying the different possibilities of solution, indicate which seems to be the most adequate of the answers. Little or none demonstration if effectively made, what explains, by one side, the little importance attributed to the methodological aspects of the works and, by the other side, the strong "technical norms manual" characteristic of the correlated disciplines in the post-graduation in law programs.

Moreover, the question of the posture might be a good clue to explain the resistance of the legal area to the professional master degree. Effectively, as the academic production about law would be essentially structured above the binomial *problem-solution*, which, by its turn, would be the main characteristic of the professional master degree, we would have a huge difficulty in distinguishing what would actually be academic or professional. In other words, our post-graduation programs, while qualified as academic, would already be professional. We insist, however, that this is just a trace for further investigation, that would require a good mapping and reading work of dissertations and theses for a thicker proof. But, this is a question of public policy within the law post-graduation programs that goes beyond the purposes of this text.

3. Final Considerations

The universe of possibilities is wide and instigating, moreover on a scenario in which the number of interlocutors seems, although slow-

ly, to enlarge itself with the institutionalization of some spaces for socialization of research results. A research coordinated by Luci Oliveira, executed with fomentation from the Ford Foundation by researchers of FGV Direito Rio, was divided in two focuses (OLIVEIRA, 2012). The first was to identify the researchers and means of diffusion of the empirical research in law in the social sciences field. Journals of the area had their data analyzed, conjugated with information from the main congress of the area, carried out annually by the Associação Nacional de Pesquisa e Pós-Graduação em Ciências Sociais[18] (ANPOCS). Under other focus, the research was driven to studies presented at the annual congresses of the Conselho Nacional de Pesquisas e Pós-Graduação em Direito[19] (CONPEDI) and to the analysis of the curricula at the Lattes platform. It is true that, at the CONPEDI, the theme of the empirical research is still very residual – less bodied – than the spaces in construction at the Associação Brasileira de Ciência Política[20] (ABCP) and the ANPOCS. Nevertheless, as hard as predicting the future may be, it does not seem impossible to speculate around two scenarios, which signalize, from one side, being *more of the same*, and, from the other, to just a *shy rearrange* of the area. In other words, in the first, the empirical research would remain marginal and strongly executed by other areas, without turning visible a possible equationing of the schizophrenia pertinent to the grey zone in which is found the correlated production, whereas, in the second, the empirical research would be constituted as a legitimate field of investigation, encouraged by pairs, converging to a dialog with researches theoretically informed, such as indicated in the precedent fields. Naturally, researches who propose to privilege the scientific view over reality desire the triumph of the second scenario with its constitution in a palpable reality in the Brazilian academic field. However, the answer is not in our desires. Actually, it is necessary to transform the desire in conquest and, for such, there is still a lot to be done.

There are two indications that the attention to empirical research – and to the marching dialog – must continue. The first is the strengthening of public initiatives for alternative fomentation of researches applied to public policies, which focus has been eminently at the conjugation between the debate of the law universe with the comprehension of wider phenomena. These researches started with isolated initiatives,

[18] National Association for Research and Post-Graduation in Social Science

[19] National Counsel of Research and Post-Graduation in Law

[20] Brazilian Association of Political Science

initially fomented by traditional sources and, after, by new fountains, as resources from the Associação de Magistrados Brasileiros[21] (AMB) (VIANNA; MELO; REZENDE DE CARVALHO; BURGOS, 1997) and of the own Conselho Nacional de Justiça[22] (CNJ)[23]. However, the first large scale initiative, sustained through years, has been the program "Pensando Direito" ["*Thinking Law*"][24], managed by the Secretariat of Legislative Matters (SAL, in Portuguese) of the Ministry of Justice and fomented by the United Nations Development Program (UNDP). Recently, the Department of Judicial Researches of the CNJ reproduced the well-succeeded Ministry's program and created the project "Justiça Pesquisa" ["*Justice Researches*"], which is currently in its first call for papers. The varied sources can be seen at the figure below:

Fig. 5. Sources of research fomentation in Brazil

[21] Association of Brazilian Judges

[22] National Counsel of Justice

[23] The program "CNJ Acadêmico" ["Academic CNJ"], war a partnership between CAPES [Coordination of Improvement of People with Higher Level Education] and the CNJ [National Counsel of Justice] and produced so far only one edition in 2010. BRASIL: CAPES (Fundação Coordenação de Aperfeiçoamento de Pessoal de Nível Superior), "CNJ Acadêmico - Programa de Apoio à Pesquisa Jurídica", available at: http://www.capes.gov.br/bolsas/programas-especiais/cnj-academico, accessed in: Feb. 17th. 2013; BRASIL: Conselho Nacional de Justiça, "CNJ Acadêmico", available at: http://www.cnj.jus.br/programas-de-a-a-z/formacao-e-capacitacao/cnj-academico, accessed in: 17 fev. 2013. The results of this initiative are found available at: http://www.cnj.jus.br/dpj/seer/index.php/CNJA/issue/archive, accessed in: Feb. 17th. 2013.

[24] BRASIL: Ministry of Justice, "Pensando o Direito" [Thinking Law], available at: http://portal.mj.gov.br, accessed in: Feb. 17th, 2013.

The initiatives of creating incipient sources for legal research in Brazil, highlighting the need of empirical researches production, have fomented an interesting phenomenon: the involvement of researchers so far primarily focused on the theoretical debate with applied researches. This fact itself is an evidence that the dialog between theoretically informed researches and the field of empirical researches is already happening and must generate good works and debates in the next years.

The second evidence is that the international debate has amplified itself significantly. It is not possible, in the space of this article, to dimension how much accretion was given to the discussion between researchers of the two alignments. Notwithstanding this, the bibliography referred through this exposition shows that even groups which were primarily dedicated to the theoretical and philosophical debate started to discuss the need of convergence between the two fields. The problematic synthesis to the future of research in law in Brazil, regarding the two evidences mentioned, is the need that these traditional research sources, inserted in the fomentation agencies (CAPES, CNPq and foment foundations), observe this international tendency and destine more resources to convergence researches that allow the debate about Theory of Law, together with the obtainment and analysis of realities' information. That is, so that the debate about law that *ought to be* is not made separately from the interpretation of the law *that is*. Following this tendency, the density of the legal scientific field in Brazil will only tend to increase.

References

FRAGALE FILHO, Roberto; NORONHA, Rodolfo. Pesquisa empírica em direito no Brasil: o estado da arte a partir da plataforma Lattes e dos encontros do CONPEDI. [*Empirical research on law in Brazil: the state of art from the Lattes platform and from the CONPEDI meetings*] In: OLIVEIRA, Fabiana Luci de (Org.). **Justiça em foco: estudos empíricos**.[*Justice in focus: empirical studies*] Rio de Janeiro: Editora FGV, 2012, p. 97-144.

FRAGALE FILHO, Roberto; VERONESE, Alexandre. A pesquisa em direito: diagnóstico e perspectivas [*The research on law: diagnosis and perspectives*], **Revista Brasileira de Pós-Graduação** (RBPG), Brasília: Capes, v. 2, p. 53-70, 2004.

HAGE, Jaap. The method of a truly normative legal science. In: VAN HOECKE, Mark (Ed.). **Methodologies of legal research**. Oxford: Hart Pub., 2011.

HALIS, Denis. **Por que conhecer o judiciário e os perfis dos juízes: o pragmatismo de Oliver Holmes e a formação das decisões judiciais**. [*Why knowing the*

Judiciary and the judges' profiles: the pragmatism of Oliver Holmes and the formation of judicial decisions] Curitiba: Juruá, 2010.

KANT DE LIMA, Roberto. Antropologia jurídica. [*Anthropology of Law*] In: SOUZA LIMA, Antonio Carlos (Coord.). **Antropologia e direito: temas antropológicos para estudos jurídicos**.[*Anthropology and Law: anthropological themes for legal studies*] Rio de Janeiro/Brasília: Contra Capa/LACED/ABA, 2012, p. 35-37.

KANT DE LIMA, Roberto. Por uma Antropologia do Direito no Brasil. [*Towards na Anthropology of Law in Brazil*] In: CERQUEIRA, Daniel Torres; FRAGALE FILHO, Roberto (Orgs.). **O ensino jurídico em debate: o papel das disciplinas propedêuticas na formação jurídica**. [*Legal education in debate: the roll of propaedeutic disciplines in legal education*] Campinas, SP: Millennium, 2007, p. 89-115.

KANT DE LIMA, Roberto; BAPTISTA, Bárbara Gomes Lupetti. O desafio de realizar pesquisa empírica no Direito: uma contribuição antropológica, [*The challenge of making empirical research on law: an anthropological contribution*] In: 7º Encontro da Associação Brasileira de Ciência Política. Recife: Associação Brasileira de Ciência Política, 2010, disponível em: http://cienciapolitica.servicos.ws/abcp2010, acesso em: 12 fev. 2013.

LATOUR, Bruno. **Ciência em ação: como seguir cientistas e engenheiros sociedade afora**. [*Science in action: how to follow scientists and engineers society away*] São Paulo: Editora Unesp, 2000.

MARTINS, Carlos Benedito; CARVALHO, Inaiá Maria Moreira de. "Mestres e doutores em Direito" [*Masters and doctors of Law*], in VELLOSO, Jacques (Org.). **A pós-graduação no Brasil: formação e trabalho de mestres e doutores no país (volume 2)**. [*Post-Graduation in Brazil: education and work of masters and doctors in the country (volume 2)*] Brasília: Fundação Coordenação de Aperfeiçoamento de Pessoal de Nível Superior (Capes), 2003.

McCOVILLE, Mike; CHUI, Wing H. (Eds.). **Research methods for law**. Edinburgh: Edinburgh University Press, 2007.

NEVES, Marcelo. Pesquisa interdisciplinar no Brasil: o paradoxo da interdisciplinaridade. [*Interdisciplinary research in Brazil: the paradoz of interdisciplinarity*] **Revista do Instituto de Hermenêutica Jurídica**, v. 1, n. 3, Porto Alegre, p. 214, 2005.

NOBRE, Marcos. Apontamentos sobre a pesquisa em direito no Brasil.[*Notes about research on law in Brazil*] **Novos Estados CEBRAP**, n. 66, p. 145-154, jul. 2003.

OLIVEIRA, Fabiana Luci de (Org.). **Justiça em foco: estudos empíricos**. [*Justice in focus: empirical studies*] Rio de Janeiro: Editora FGV, 2012.

OLIVEIRA, Luciano. Não fale do código de Hamurábi! – a pesquisa sócio-ju-

rídica na pós-graduação em direito. [*Don't tell me about the Hamorábi Code! – the social-legal research at post-graduation on law*] **Anuário dos Cursos de Pós-Graduação em Direito** (UFPE), v. 13, p. 299-330, 2003.

OLIVEIRA, Luciano. **Sua Excelência o Comissário e outros ensaios de Sociologia Jurídica**. [*Your Excellence the Commissioner and other essays of Sociology of Law*] Rio de Janeiro: Letra Legal, 2004.

RAGIN, Charles C; AMOROSO, Lisa M. **Constructing social research: the unity and diversity of method**, 2 ed. London: SAGE Publications, 2010.

RODRIGUEZ, José Rodrigo; SILVA E COSTA, Carlos Eduardo Batalha; BARBOSA, Samuel Rodrigues (Eds.). **Nas fronteiras do formalismo: a função social da dogmática jurídica hoje**. [*At the frontiers of formalism: the social function of legal dogmatic today*] São Paulo: Saraiva, Direito GV, 2010.

SADEK, Maria Tereza. Estudos sobre o sistema de justiça. [*Essay on the system of justice*] In: MICELI, Sérgio (Org.). **O que ler na ciência social brasileira (volume IV)** [*What to read in Brazilian social science (volume IV)*. São Paulo: Sumaré e ANPOCS, 2002.

SADEK, Maria Tereza; BENETI, Sidnei; FALCÃO, Joaquim. **Magistrados: uma imagem em movimento**. [*Judges: an image in movement*] Rio de Janeiro: Editora FGV, 2006.

SAMPAIO FERRAZ Jr., Tércio. **A ciência do direito**. [*The science of law*] São Paulo: Atlas, 1977.

SANTOS, Boaventura de Sousa. A filosofia à venda, a douta ignorância e a aposta de Pascal, [*Philosophy at sale, the scholarly ignorance and the betting of Pascal*] **Revista Crítica de Ciências Sociais**, vol. 80, p. 11-43, 2008.

SCHLEGEL, John Henry. **American legal realism and empirical social science**. Chapel Hill, NC: University of North Carolina Press, 1995.

VAN HOECKE, Mark. Legal doctrine: which method(s) for what kind of discipline. In: VAN HOECKE, Mark (Ed.). **Methodologies of legal research**. Oxford: Hart Pub., 2011.

VERONESE, Alexandre. Considerações sobre o problema da pesquisa empírica e sua baixa integração na área de direito: a tentativa de uma perspectiva brasileira a partir da avaliação dos cursos de pós-graduação do Rio de Janeiro. [*Considerations on the problem of empirical research and its low integration in the law área: the attempt of a Brazilian perspective from the evaluation of post-graduation courses in Rio de Janeiro*] In: MIRANDA NETTO, Fernando Gama (Org.). **Epistemologia e Metodologia do Direito**. [*Epistemology and Methodology of Law*] Campinas: Millenium Editora, 2011, p. 109-130.

VERONESE, Alexandre. O papel da pesquisa empírica na formação do profissional de direito [*The roll of empirical research in the education of the professional of law*], **Revista OABRJ**, v. 27, n. 1, Rio de Janeiro, p. 171-218, jan./jun. 2011.

VIANNA, Luiz Werneck; MELO, Manuel Palácios Cunha; REZENDE DE CARVALHO, Maria Alice Rezende de; BURGOS, Marcelo Baumann. **Corpo e alma da magistratura brasileira**. [*Body and soul of the Brazilian magistracy*] Rio de Janeiro: Editora Revan, 1997.

Kelsen's legal theory, indetermination and completeness in law

J. Alberto del Real Alcalá[1]

I. Inconclusive law or completeness of law?

One of the most persistent controversies in law is related to its ***completeness*** or ***incompleteness.*** Roughly speaking, the law is ***complete*** when within the universe of ***foreseen*** (real) and ***unforeseen*** (possible) cases, ***all*** are envisaged by the legal system in their full scope. Fullness or completeness is synonymous with "regulation" or "deontological qualification" and its consequence on implementation and interpretation is the absence of legal ***indeterminacy.*** An action or situation is "regulated" - and consequently "determined" - in a legal system if there is a rule or principle belonging to this system that qualifies the action or system. Thus, law is declared to have fullness or completeness when it provides a legal qualification in every specific case for ***every*** action or situation, real or possible[2]. On the other hand, the law is ***inconclusive*** when it does not contemplate a specific solution for each and every given case.

There are three areas that can provide information on whether the law is or isn't ***complete***: the criteria of legal validity; the rules and principles of law; and judicial decisions. In this text I will refer to the question of fullness or incompleteness in relation to the ***rules*** and ***principles*** of law, as well as the influence of the aforementioned positions on legal interpretation (judicial decisions). To this end I will take into account canonical legislative formulations (rules), but also the ***implicit*** content of legislation (principles); in other words, both statutory law and the law implicit in statutory law. In addition to the above, in synop-

[1] Professor of Philosophy of Law, University of Jaén, Spain.

[2] Cf. REDONDO, M.C.: "Teorías del Derecho e indeterminación normativa", in Doxa, nº 20, 1997, pp. 180 et seq.

ses three and four I will discuss the doctrine of the norm as a frame and the thesis of indeterminacy in KELSEN.

As mentioned by R. de ASÍS, the problem under discussion can be approached synthetically as follows: we begin with the fact that "it's obviously difficult to believe that the legal system has sufficient rules to solve all conflicts", even though "the legal system is obliged to view the law as something capable of providing solutions to all problems that may arise". Fullness is therefore a kind of ***ideal*** view of the law to be pursued by legal practitioners "who should act as if the legal system were complete". This allows us to distinguish two senses of the term "fullness" (***completeness***) of the law: an ***absolute*** and a ***relative*** sense. From the "absolute" point of view "fullness is associated with the existence of norms that solve, as it were, all problems". From the "relative" point of view, "the absence of specific norms for solving certain problems is accepted, but... [at the same time] so is the existence of mechanisms that integrate these problems into the legal system"[3]. In both senses (absolute and relative), the law is full and complete.

In this respect, of the three cases that diminish the occurrence of fullness or incompleteness of the law, it is only the "absence of a norm with a precise solution and [furthermore] the impossibility of finding a solution through various techniques" that would allow us to say in the strict sense that "fullness has deteriorated". The other two cases ("The existence of a norm that provides a precise solution to the problem [in a legal dispute]"; and "The absence of a norm with a precise solution, but the possibility of reaching a solution through various techniques") would not constitute cases of incompleteness of the law[4].

From the above we can infer that the fullness or completeness of the law is assessed according to the following criteria:

Firstly, the ability of the rules and principles to cover any ***actual*** or ***possible*** (future) case that presents itself within the legal system. If the rules and principles apply to ***any*** actual or possible case, they constitute a ***factor*** of the completeness of the legal system. If the opposite is the case, the law lacks fullness.

And secondly, for the law to be full or complete, its rules and principles must "regulate or contemplate in ***all*** their scope" those cas-

[3] ASÍS ROIG, R. de: *Jueces y normas. La decisión judicial desde el Ordenamiento,* prologue by G. Peces-Barba, Madrid, Marcial Pons, 1995, pp. 29 and 32.

[4] ASÍS ROIG, R. de: *Jueces y normas*. La decisión judicial desde el Ordenamiento, cit., pp. 32 et seq.

es which they cover, without leaving ***any*** aspects of these cases indeterminate. If this is the case, and the rules and principles extend their application to "***any*** aspect" of the cases they relate to, this favours the completeness of the law; if they do not, they affirm incompleteness as a characteristic of inconclusive law.

Approaches to this issue vary according to the various ***theories of law*** and of the ***legal argument*** used.

Thus, the ***completeness*** of law is discussed by contemporary legal positivism with the idea that the law is indeterminate because it is incomplete, as it is impossible for it to regulate the entire universe of ***foreseen*** (real) and ***unforeseen*** (possible) cases. Consequently, ***not*** all legal controversies that judges must resolve can be solved through established law, but rather sometimes (partial indeterminacy) or always (complete indeterminacy) the judge must use his powers of discretion to resolve a particular case[5]. Positivists believe that this conceptual framework - which includes a significant thesis on legal indeterminacy - receives the greatest support when ***testing the suitability*** of legal theory to the practice of law[6].

In this debate, an argument that has increasingly gained favour in determining the fullness or incompleteness of the law is related to the explanations given by various legal theories as to why ***genuine disagreements*** occur between jurists in a legal case. As Albert CALSAMIGLIA rightly states, "one of the fundamental characteristics of the legal profession is ***controversy***; jurists discuss and have numerous disagreements about the solutions offered by positive law", and yet "very few theories have paid attention to the analysis of these disagreements"[7]. However, the genuine disagreement between jurists involved in a legal case, in terms of legal reasoning, has been explained primarily from two points of view: firstly, from the fundamentals of law applicable to the particular case ("theoretical disagreement"); and secondly, from the question

---

[5] Cf. IGLESIAS VILA, M.: "Discreción judicial y positivismo jurídico: los criterios sustantivos de validez", in SABA, R. (ed.), *Estado de Derecho y democracia. Un debate acerca del rule of law,* Sela, 2001, p. 92. cf. also IGLESIAS VILA, M.: *El problema de la discreción judicial. Una aproximación al conocimiento jurídico*, Madrid, Centro de Estudios Políticos y Constitucionales, 1999, Chapter I.

[6] Cf. DEL REAL ALCALÁ, J.A.: "Ámbitos de la doctrina de la indeterminación del Derecho", in *Jueces para la Democracia,* no. 56, July 2006, pp. 48-58.

[7] CALSAMIGLIA, A.: "El concepto de integridad en Dworkin", in *Doxa*, no. 12, 1992, pp. 159 et seq.; also, ID., "Ensayo sobre Dworkin", in DWORKIN, R., *Los derechos en serio,* Barcelona, Ariel, 2005, pp. 7-29.

of whether or not these fundamentals are in fact satisfied in a particular case ("empirical disagreement")[8].

The main explanation supplied by legal positivism is ***empirical*** and is directly related to: a) the notion of "open texture" in law; b) the consideration of "borderline cases" in the legal system; and c) the ***significant*** affirmation of (partial or complete) indeterminacy of the law. ***Borderline*** cases (doubtful, indeterminate or marginal cases) must be taken into consideration, as must those legal cases that involve indeterminacy at the moment of application and interpretation, whether in all legal controversies (if it is believed that the law is ***always*** indeterminate) or only in some of them (if it is believed that the law is ***sometimes*** indeterminate). In other words, the mechanisms of legal interpretation that may be able to solve borderline cases will either never be able to solve them (complete indeterminacy) or sometimes will and sometimes won't (partial indeterminacy).

One legal positivist has been most successful in explaining genuine disagreements between jurists: H.L.A. HART, with his notion of the ***open texture*** of the law [9], which arrives at the conclusion that the genuine disagreement between jurists is an "***empirical*** disagreement". Thus, when jurists must apply a legal term to a particular case, genuine disagreement arises because this particular case has fallen into the ***twilight zone*** of the area in which the ***paradigm*** case of a legal term can be applied. This generates ***subjective uncertainty*** or ***doubt*** (which may lead to legal indeterminacy) as to whether the particular case falls ***within*** or ***outside of*** the area of clear application or clear non-application. The result in this case is that the legal term is "indeterminate" within the legal system, which consequently lacks fullness and is inconclusive. The disagreement or dispute is an ***empirical*** one because it centres on the act of ***applying*** (qualifying) a legal concept to a ***particular*** case. It is true, as Jules COLEMAN warns, that if we pay too much attention to the genuine controversies between jurists when resolving the issue of fullness or incompleteness we may end up understanding law exclusively

[8] DWORKIN, R.: *Law's Empire*, Oxford, Hart Publishing, 2000, pp. 4-6.

[9] See HART, H.L.A.: *The Concept of Law*, Oxford, Oxford University Press, 1961; Spanish translation: ID., *El concepto de Derecho*, translated by Genaro R. Carrió, Buenos Aires, Abeledo-Perrot, 1998; also, ID., "Postscript", in Hart, H.L.A.: *The Concept of Law*, 2nd edition, Oxford, Clarendon Press, 1997, edited by Penélope A. Bullock and Joseph Raz, pp. 238-276; Spanish translation: ID., *Post scriptum al concepto de derecho*, edited by Penélope A. Bullock and Joseph Raz, preliminary study, translation, notes and bibliography by Rolando Tamayo and Salmorán, México D.F., UNAM, 2000.

in terms of ***litigants*** and judges, and overlook the important role of law as a "guide" for citizens[10].

In opposition to the current positions of legal positivism, the contemporary anti-positivist approach, as developed by L.L. FULLER and R. DWORKIN, uses two core arguments to support the fullness of the law: a) the radical statement that the ***implicit contents*** of the law are ***integrated*** into the judicial sphere, and that these implicit contents avoid legal indeterminacy by producing an "***ex post*** determinacy" of law in relation to any given legal case, whether in relation to the explicit law of rules or the implicit law of principles[11]; b) the "argument of controversy" in response to the question as to why genuine disagreements arise between jurists.

The anti-positivist theory of L.L. FULLER already provided an argument in favour of ***implicit*** law: "in the law or in legal provisions there is always a substratum of implicit law"[12]. FULLER also uses other arguments in the field of constitutional law to explain why a ***theory on the sources of law*** must include implicit law:

(i) because "the drafting of any Constitution would be impossible unless the writer can assume that the legislator will agree to accept certain implicit notions.... [for] if the writer tries to foresee all possible arbitrary actions of the legislative power, his constitution will turn into a museum of monstrosities and excesses"[13];

(ii) because "it is necessary to anticipate emergency situations, and to foresee the modifications that will have to be made in order to confront such situations"[14];

(iii) another reason "why a written Constitution cannot avoid assuming implicit principles on the integrity of the law that can not be formulated ... is the simple fact that the words of a Constitution must be

---

[10] COLEMAN, J.: *The Practice of Principle: in Defense of a Pragmatist Approach to Legal Theory*, Oxford, Oxford University Press, 2001, pp. 166 et seq.

[11] Cf. DEL REAL ALCALÁ, J.A.: "¿Certeza del Derecho *vs*. Indeterminación jurídica? El debate entre Positivistas y anti-positivistas", in *Archiv für Rechts-und Sozialphilosophie*, ARSP Beiheft Nr. 106, volume I (*Legal Theory/Legal Positivism and Conceptual Analysis*, Moreso, J.J., ed.), Franz Steiner Verlag, Stuttgart, 1st Edition 2007, pp. 94-106.

[12] FULLER, L.L.: *The Anatomy of Law*, Frederick A. Praeger, Inc., Publishers, 1968; Spanish translation: ID., *Anatomía del Derecho*, version by Luis Castro, Monte Ávila Editores, Editorial Arte, 1969, p. 78.

[13] FULLER, L.L.; *Anatomía del Derecho,* cit., p. 113.

[14] FULLER, L.L.; *Anatomía del Derecho,* cit., p. 117.

interpreted before they can be applied" given "the fallacy of supposing that a judge simply extracts from a legal text a meaning that the legislator has inserted into it". FULLER talks of the "implicit sources" of law, "which are derived from the uses, practices, community attitudes and a sort of consensus" in relation to them, which allows the law to cover the whole range of cases the judge is presented with, and to do so to their full extent[15].

Given that for R. DWORKIN "the legal norm is an ideal more noble than the norm of a legal text"[16], only a theory on the sources of law as described above (that includes implicit law) can allow the rules and principles to ***cover*** any legal case, in such a way that the judge is able to ***determine*** the "demands" of the law in ***every*** legal dispute. For citizens, this would make it possible for "every one of them to have rights and duties in relation to other citizens and in relation to their government, even when not all of these rights and duties are codified and written down in books"[17]. This leads him to reject the positivist claim that if a legal dispute is not regulated by ***explicit*** law it is because the law is indeterminate. From this anti-positivist approach, a legal system will always have rules and/or principles (identified and determined by the criteria of legal validity) that are able to contemplate any problems of any case that presents itself to the legal system. This means that any legal dispute can always be resolved - and to its full extent - by the law, and that the law is therefore complete.

This position depends largely on the "argument of controversy" as an explanation of ***genuine disagreements*** between jurists. In fact, modern anti-positivism resolves this issue in such a way that, through interpretation, rules and principles can be determined for every real or possible case. This is the case even where these rules and principles include ***imprecise*** terms that may at first appear to generate indeterminacy in their application to a particular case. Thus, in contemporary anti-positivism the ***argument of controversy*** constitutes a factor of the completeness of law in relation to rules and principles, and in the two following senses:

a) In relation to the "disputed" nature (as opposed to open texture) of law, and the Dworkian distinction between the ***concept itself*** (le-

[15] FULLER, L.L.; *Anatomía del Derecho,* cit., pp. 118, and also 119.

[16] DWORKIN, R: *Taking Rights Seriously*, 2nd edition, London, Duckworth, 2002; Spanish translation ID., *Los derechos en serio*, cit., p. 464.

[17] DWORKIN, R.: ID., *Los derechos en serio,* cit., p. 463.

gal) and ***conceptions*** (of the concept)[18]. One should bear in mind that R. DWORKIN, in opposition to the "open texture" nature of law described by Hartian legal positivism, claims that the law (rules and principles) is always "determinable" (for every case) even when it is "disputed". This means that any problem in law dealt with by legal practitioners that is initially indeterminate can always be resolved by the mechanisms of legal interpretation and integration[19].

There is a prior reasoning that underlies the anti-positivist explanation as to why jurists disagree. It is crucial to understand that when the argument of ***controversy*** distinguishes between a "concept" (legal) and "conceptions" (of the concept) it is not referring to the difference between the ***meaning*** of a legal term that is part of a norm and its empirical application (extension) or non-application to a given case. Rather, the distinction is a "conceptual", theoretical one concerning ***differing conceptions*** (of a theoretical/doctrinal nature) that each of the parties have in a legal dispute in relation to the term or legal concept included in the norm that the legal practitioner is interpreting. In other words, the argument centres on the distinction between the "abstract idea (or conception)" and the "specific idea (or conception)" that the legal practitioner applies to the legal term in order to particularise the abstract idea in a given case[20].

Therefore, the reason why genuine disagreements occur between jurists is not, as the positivists wrongly claim, because the legal terms or concepts under discussion (as to whether they should or shouldn't be applied in a particular case) have an ***open texture*** and are therefore ***indeterminate***. They occur because such legal terms are "abstract" concepts. And in order for the abstract concepts contained in a rule or principle to be applied to a ***specific*** case, it is not enough to simply observe the facts and subsume them under some applicable ***paradigm***; but rather a particular "conception" of the legal concept must be developed in relation to the given case. In short, the key to explaining legal controversy is

[18] DWORKIN, R.; "Thirty Years On", in *Harvard Law Review*, vol. 115, 2002, pp. 1655 et seq.

[19] DWORKIN, R: *Los derechos en serio*, p. 176 and also p. 173. Also cf. IGARTUA SALABARRÍA, J.: "El indeterminado concepto de los conceptos indeterminados", in *Revista Vasca de Administración Pública*, no. 56, January-April, 2000, pp. 151 et seq. GALLIE, W.B.: "Essentially Contested Concepts", *Proceeding of the Aristotelian Society*, v. 56, 1955-1956, pp. 167-198 who originally defined concepts that invoke conceptions as "essentially disputed concepts".

[20] DWORKIN, R.: *Law's Empire*, cit., p. 71.

the fact that each party to the dispute develops a "***different*** conception" of the ***same*** legal term. This is where legally controversy truly derives from.

In fact, R. DWORKIN classifies abstract ***concepts*** (those that necessarily require a particular theoretical/doctrinal ***conception*** in order to be applied) as "disputed" concepts. Of course, to say that a concept is ***disputed*** does not in any way imply that the concept is ***vague*** and ***indeterminate***[21]. In fact, disputed concepts are not ***indeterminate*** but simply ***subject to litigation***: the parties dispute over their specific meaning in a given legal case.

b) In view of the above, the ***argument of controversy*** that states that in legal disputes there is a theoretical disagreement between jurists regarding the conception of legal terms, and not an empirical disagreement regarding their application, represents, for anti-positivists, an important factor in the completeness of the law in relation to rules and principles. In fact, according to A. CALSAMIGLIA, the argument of***disagreement between jurists*** is the Dworkian anti-positivists' most potent weapon for challenging contemporary positivism. In his own words: "There are disagreements about what it is the law demands. This is the basic disagreement [between jurists], the one which must be explained, the one faced by those who deal with law from an internal point of view. Disagreements between jurists aren't about whether or not a law has been passed. Their disagreement goes much deeper as it is about the extent to which state coercion should be used in this case and how it can be justified. The problem is not just about identifying the text without using it. And this requires the reconstruction of something more complex and abstract than the semantics of the norm. Even if they agree on which laws are in force, and agree on the meaning of the wording of the law, theoretical disagreements about what the law demands [in each case] can and do arise. Dworkin would suggest that the law is an interpretative concept and that texts say nothing in and of themselves. A particular approach is required and that is what positivism has not understood". [22]

The conclusion is that, from a contemporary anti-positivist - and

[21] For T. ENDICOTT, the "abstract" concepts that Dworkin speaks of are "vague" concepts. See ENDICOTT, T.: "Herbert Hart and the Semantic Swing", in *Legal Theory*, v. 4, no. 3, pp. 283-300.; Spanish translation: ID., "Herbert Hart y el aguijón semántico", in NAVARRO, P.E. and REDONDO, C. (comps.), *La relevancia del Derecho,* Barcelona, Gedisa, 2002, pp. 37-38.

[22] CALSAMIGLIA, A.: "El concepto de integridad en Dworkin", *cit.*, p. 160.

especially Dworkian - point of view, the controversies between jurists are "interpretative" and can therefore be resolved through the methods of interpretation afforded by the legal system. Consequently, these controversies do not imply any legal indeterminacy[23].

The issue of whether or not the law is complete or incomplete has an impact on how judges approach the task of legal interpretation. They can either accept the thesis that cases which are (partly or completely) "non-regulated", and the rights and duties of citizens that are argued over judicially, are ***ineradicably*** indeterminate, meaning that the law is an inconclusive system. Or they can preserve their decision-making capacity through interpretative methods and rules of construction that always and in every case resolve the initial indeterminacy, meaning that the law is a ***complete*** system.

So, according to the anti-positivists, the resolution of a legal dispute is never ***indeterminate*** as long the judge is always able to identify a ***unique*** and ***correct*** response within the law. This statement that the law is complete is of crucial importance to anti-positivism, as it is the final and most important step of the argument that it uses to ***reject*** the conclusion of legal indeterminacy. It is so important that anti-positivist law is largely reduced to a theory of adjudication, a theory of how to construct the judicial decision: it practically views law as an argumentative practice, wherein the most important development is the judicial process. Naturally this may give the impression that, according to anti-positivism, what makes the law ***complete*** is not that it is complete in and of itself, but rather that the anti-positivist ***theories of law*** (particularly its ***theories of adjudication***) act as a ***factor*** of completeness (and the main factor) while constructing the judicial decision.

A closely related point is that the anti-positivist approach has largely focused on how to tackle the ***hard cases*** that arise in law, a test bed for theories of law and adjudication in observing how the judicial decision is constructed in legal practice. Indeed, Dworkian anti-positivism largely reduces contemporary positivism to an erroneous "theory of hard cases" where Dworkin understands hard cases as those that arise in a legal system "when a particular litigation cannot be clearly subsumed under a legal norm previously established by an institution, [and that in order for them to be settled] the judge has 'discretion' to decide

[23] DWORKIN, R.: *Law's Empire*, cit., pp. 71 and 37-44. Also, DWORKIN, R.: *Law's Empire*, cit., pp. 87-90; and IGLESIAS VILA, M.: "Los conceptos esencialmente controvertidos en la interpretación constitucional", in *Doxa*, nº 23, 2000, p. 101.

the outcome of the case". [24]

However, R. DWORKIN argues that where, in positivism, the judge "has discretion to decide the outcome of the case", this implies that if "one of the parties has a pre-existing right to win the case,... this idea [from the positivist point of view] is no more than a fiction". Indeed, when positivism settles a legal case in this way it is ***creating*** "new rights": "the judge has introduced new rights [through the interpretative solution, granting them to the party that wins the case, and] applying them, retroactively, to the case"[25].

From an anti-positivist point of view, the description of the judicial function in terms of discretion in ***hard cases*** does not give a satisfactory account of what adjudication is or of the structure of ***judicial duty***[26]. The alternative for anti-positivism is to try "to present and defend a better theory" that more plausibly reflects legal practice [27]. To this end, Dworkian anti-positivism must construct the "judge Hercules procedure": a model of an ***ideal*** judge, a paradigm of how to construct the judicial decision in ***hard*** cases, although equally valid for ***easy*** cases[28]. The ***Hercules*** procedure is also a ***descriptive*** and ***prescriptive*** perspective on adjudication, based on the idea of law as an ***integral*** social practice that takes into account the internal point of view of those who participate in the legal practice; in other words, arguments in the practice of law that develop within the judicial process while solving the legal ***controversies*** that arise therein.

In fact, the Herculean procedure constitutes one of the most important strategies that anti-positivism (in its paradigmatic Dworkian version) uses to provide grounds for the ***completeness*** of the law, and to counter the thesis of its partial or complete indeterminacy. The basis of the Herculean procedure is the conceptual link between law and morality, based on a ***theory of the sources of law*** that includes both explicit statutory law and the implicit content of statutory law. This theory leads to the claim that the legal system has always envisaged a "correct" response to every real or possible legal dispute. The result is that the judge can settle all cases in law.

As an argument generated by anti-positivism in favour of com-

[24] HART, H.L.A.: *El concepto de Derecho,* cit., pp. 155-169.
[25] DWORKIN, R.: *Los derechos en serio,* cit., p. 146.
[26] DWORKIN, R.: *Law's Empire*, cit., pp. 37-39.
[27] DWORKIN, R.: *Los derechos en serio,* cit., p. 146.
[28] DWORKIN, R.: *Law's Empire*, cit., pp. 352-354.

pleteness, the unique ***characteristics*** of the Herculean procedure which provide an ideal model of judicial decision-making, do a great deal to vindicate the view of law as a full system. I refer to the following characteristics:

(1) Always settling a dispute ***according to*** the law; that is, through ***arguments of principle***, and not with ***political*** or ***opportunistic*** arguments (discretional arguments)[29].

(2) The bivalent structure of the judicial decision, by virtue of which the Hercules procedure contains a "bivalent" logical and conceptual scheme for judicial decision-making. The judge does ***not*** have a third possibility available in which a rule and/or principle "neither applies nor does not apply", as this would constitute an "indeterminate" response. In anti-positivist theories, ***judicial bivalence*** is a technical resource for the ***completeness*** of the law, even for confronting the most complex legal disputes.

(3) The ***correct univocal*** response that the law has for any present or future legal dispute[30].

(4) The strength of ***principles*** in constructing the judicial decision: to bring about a situation wherein the law covers ***all*** cases (foreseen and unforeseen), the (implicit) ***principles*** of law play a very important role in the legal argument of the Herculean procedure. The use of principles for the completion of law has often been used in contemporary anti-positivism as, for example, L.L. FULLER's theory on adjudication when used to solve what he called "problematic cases".[31]

(5) The "unlimited capacity" of the interpretative resources of law as a factor in the completeness of law[32].

By virtue of these premises, judges perform their duties with the supposition that for any legal dispute that citizens bring before them "there is some solution inherent in law that is waiting to be discovered". For this reason, the judge "must never assume that the law is incom-

[29] According to the opinion of DWORKIN, R.: *Los derechos en serio,* cit., pp. 14 y 175-177.

[30] DWORKIN, R.: *Law's Empire*, cit., pp. 239-240.

[31] FULLER, L.L.; *Anatomía del Derecho,* cit., p. 106; see also DWORKIN, R.: *Los derechos en serio*, cit, pp. 74-78.

[32] See ENDICOTT, T.: *Vagueness in Law*, Oxford, Oxford University Press, 2000; Spanish translation: ENDICOTT, T.: *La vaguedad en el Derecho*, translated by J. Alberto del Real Alcalá and Juan Vega Gómez, Madrid, Dykinson, 2006, pp. 159-160; also, DWORKIN, R.: *Law's Empire*, cit., p. 44.

plete, inconsistent or indeterminate"; and when it appears to be so, he must realise that the defect is not within the law but rather due to the limited abilities of the judge himself to discover the solution that the legal system envisages for the particular dispute, whether by virtue of rules (explicit statutory law) or principles (implicit law). So the judge not only has no room to create law in the performance of his duties, but he must also justify what he believes the law ***to be***. He must work to identify the ***principles*** that are objectively enshrined within the system, and if divergent ideas (***conceptions***) on these principles exist, he must decide which of these ideas corresponds to the best conception of these principles[33].

Completeness in the area of the judicial decision means that "every case compiled involves an opinion [the judge's decision] that maintains that one of the parties has, after the [judge's] assessment, the best legal argument [and therefore wins the case]" within the legal dispute[34]. Thus, according to this anti-positivist position, if the judges did not follow the Herculean procedure as an objective and decisive procedure for resolving both hard and easy cases, it would be impossible for them to fulfil the professional duty required of them by the Rule of Law to ***always settle*** any legal dispute raised by citizens[35]. This is the ***sine qua non*** for satisfying the ***fundamental right*** of citizens to effective justice[36].

However, two significant kinds of objections have been made to the anti-positivist view of adjudication. First of all, is it really possible (and not merely ***conceptually***) to ***totally*** eliminate the indeterminacy that sometimes occurs in law? Or is this not a ***useless*** task, or even a not really ***desirable*** one, as HART[37] or T.ENDICOTT[38] claim, for any theory

[33] DWORKIN, R.: *Law's Empire*, cit., pp. 337-350.

[34] DWORKIN, R.: "Is there really no right answer in hard cases?", in ID., *A Matter of Principle*, Harvard University Press, Cambridge, 1985, pp. 120-145 [a revised version of "No Right Answer", in P.M.S. Hacker, P.M.S. and Raz, J. (eds.), *Law, Morality and Society: Essays in Honor of H.L.A. Hart*, Oxford, Oxford University Press, 1977], Spanish translation: ID., "¿Realmente hay respuesta correcta en los casos difíciles?", translated by Maribel Narváez Mora, in CASANOVAS, P. and MORESO, J.J. (eds.), *El ámbito de lo jurídico*, Barcelona, Crítica, 1994, p. 510.

[35] See HART, H.L.A.: "El nuevo desafío al positivismo jurídico", translated by L. Hierro, F. Laporta and J. del Páramo, *Sistema*, number 36, May-1980, p. 14.

[36] See Article 24 of the Spanish Constitution.

[37] HART, H.L.A.: *Post Scriptum al concepto de derecho*, *cit.*, p. 28; also, ID., *El concepto de Derecho*, cit., p. 160.

[38] ENDICOTT, T.; "Law is Necessarily Vague", in *Legal Theory* (2001), 7, pp. 379-385;

of adjudication, given the ***structure*** of the law? Another objection relates to the question of whether this doctrine can adequately respond to challenges such as the argument of ***higher-order vagueness*** (for example, the distinction between ***clear cases*** and ***hard cases*** is not always clear cut). According to T.ENDICOTT, the legal theory of R.DWORKIN - to which the thesis of the completeness of the law is fundamental - cannot respond to this argument.

II. Legal indeterminacy in Kelsen

According to the criteria discussed in the text, Hans KELSEN's theory of law, a paradigm of legal positivism, should be classified as one of the legal theories that accept the incompleteness of law due to its indeterminacy. Traditionally, it has been claimed that KELSEN's thesis of the indeterminacy of law derives from his doctrine of the "norm as a frame".

However, I would like to briefly present a number of important points that question this affirmation. If these reasons are valid, it would be more correct to say that H.KELSEN's legal theory contains a "thesis of the completeness" of law than a thesis of indeterminacy. Consequently, whilst DWORKIN and KELSEN set out from opposing positions and move in different directions, both of them would arrive at the same conclusion that law is "complete".

The reasons I put forward can be resumed as one: Kelsen's legal theory does not really contemplate borderline cases, as long as it can settle all ***present*** and ***possible*** cases "according to the law". And it would seem meaningless to "accept" the thesis of legal indeterminacy, while simultaneously "denying" the existence of ***indeterminate*** cases in law. In my opinion, this is precisely what H.KELSEN's thesis of law does. I therefore question the traditional view that Kelsen accepts the thesis of legal indeterminacy.

Four strong arguments serve to undermine the view that H. Kelsen's theory of law contains a thesis of indeterminacy. They are as follows:

1) The argument for the distinction between "individual" and "general" norms.

From a Kelsenian point of view, "the norm can be either individ-

---

Spanish translation ENDICOTT, T., "El Derecho es necesariamente vago", translated by J. Alberto del Real Alcalá, in *Derechos y Libertades*, no. 12, 2003, p. 180.

ual or general in nature. A norm is individual when it dictates a unique and individually determined required behaviour; for example, a judge's decision"; and "a norm is general when it dictates a required behaviour determined at a general level."[39]

From the Kelsenian perspective, the individual norm seems to correspond to ***clear*** cases. Logically, the Rule of Law provides judges with ***precise***, and largely ***objective*** cases, and these are used to settle clear cases ***in accordance*** with ***pre***-established law. In this type of court case the ruling must be made from ***within*** the law, in contrast to cases that can only be settled ***discretionally***. However, these procedures are insufficient when the legal case has no solution ***within*** the legal system because it is a ***borderline*** case.

If we consider the fact that H. KELSEN equates the individual norm with the typical situations of ***clear*** cases, it is probably true that the general norm should correspond to those represented by ***borderline*** cases. However, this is where the contradiction arises in Kelsen's legal theory, as will now be explained.

2) The argument of the "norm as a framework", based on the above distinction.

As H.L.A. HART observed, borderline cases are located in the "area of indeterminacy" or "twilight zone" of the area in which rules can be applied, for "in any legal system there will also be cases that are not legally regulated".[40] These cases are then ***indeterminate***.[41]

Borderline cases are characterised as being:

i)- "marginal cases", in that they are at the limit between the ***clear*** applicability or ***clear*** inapplicability of the law.

ii)- "doubtful cases", in that it is uncertain whether or not the law can be applied to them with certainty.

iii)- "***indeterminate*** cases" by virtue of the consequence of ***indeterminacy*** they produce when applying the law.

iv)- "hard cases", by virtue of the ***complexity*** involved in constructing the judicial decision in these indeterminate cases, which are either ***incompletely*** regulated or even ***not regulated*** in any sense by the legal system. This contrasts with the simplicity of constructing a decision in ***clear*** cases.

According to ENDICOTT, ***borderline*** cases can be synthetically

[39] KELSEN, H.: *Teoría General de las Normas,* Editorial Trillas, México D.F., 2003, p. 25.
[40] HART, H.L.A.: *Post scriptum al concepto de derecho*, *cit*., p. 54.
[41] HART, H.L.A.: *El concepto de Derecho*, cit., p. 158.

defined as "those cases in which one does not know whether the rule should be applied or not, and the fact that one does not know is not due to ignorance of the facts".[42] I use the nomenclature ***borderline*** cases or ***marginal*** cases, as this is the most common in legal theories that accept the thesis of indeterminacy.

Traditionally, the category ***borderline*** cases and the thesis of legal indeterminacy are common to positivist legal theories. However, an interesting case arises in this context: H. KELSEN's theory of law, considered as one of the paradigms of legal positivism. Kelsenian legal theory ***supposedly*** allows some type of a thesis of legal ***indeterminacy***, but it also tries to make it compatible with the opposite thesis of the ***completeness*** of the law. In my opinion, stating one thing alongside its opposite its inevitably paradoxical. This contradiction arises because in Kelsenian legal theory, genuinely ***incomplete*** legal cases do not really arise. In fact, all legal cases that this legal theory considers can be resolved "according to the law". This seems to run counter to the very nature of an authentic borderline case.

The work of completing the law, and of consequently eliminating all legal indeterminacy, is performed by H.KELSEN through his theory of the "norm as a framework". For Kelsen, "The legal system is a system of general and individual norms that are interrelated in accordance with the principle that law regulates its own creation. Every law of this system is created according to the prescriptions of another and, ultimately, according to the fundamental norm that constitutes the unity of the system".[43] In this regard, "From a dynamic point of view, the court's decision represents an individual norm, created on the basis of a general norm of statutory or customary law, just as this general norm is created by the Constitution"[44]. And, "For this reason, the judge is always a legislator, even in the sense that the content of his rulings can never be exhaustively determined by a pre-existing norm from substantive law"[45].

Consequently, for Kelsen, a judicial decision "is an act by which a general norm, a law, is applied; but at the same time it is an individual norm that imposes obligations on one or both of the parties in

[42] ENDICOTT, T.: *La vaguedad en el Derecho*, cit., pp. 65-66.

[43] KELSEN, H.: *Teoría General del Derecho y del Estado*, translated by Eduardo García Máynez, UNAM, México, D.F., 1995, p. 156.

[44] KELSEN, H.: *Teoría General del Derecho y del Estado*, cit., p. 171.

[45] KELSEN, H.: *Teoría General del Derecho y del Estado*, cit., p. 174.

conflict". So "by resolving the dispute between two parties", what occurs is that "the court actually applies a general norm of customary or statutory law". And although, as H. KELSEN claims "the court simultaneously creates an individual norm establishing a particular sanction to be imposed upon a certain individual", this creation does not mean that the judge is going "beyond" the law. This is because "this individual norm can be referred to general norms just as the law is referred to the Constitution".[46] From this it can be deduced that the legal system can always provide the solution to any legal case from "within" the law.

What seems to be clear is that the judicial decision in Kelsenian indeterminate cases, which are resolved using the notion of the norm as a framework, does not present exactly the same characteristics as those typical of the judicial ruling in genuine borderline cases: that is, those that do not just present themselves as indeterminate "initially" but "ultimately" turn out to be indeterminate. And for this reason they find no solution within the legal system. However, KELSEN does not consider this type of case. Moreover, from his point of view, when the judge resolves indeterminate (Kelsenian) cases, he is not "stepping outside" of the law, but rather reaches a resolution from within the possibilities of the norm, and hence, according to the law.

The question that now arises is whether a genuinely indeterminate case can be resolved according to the law, because then it would not "ultimately" be an indeterminate case, but rather a hard case contemplated by the law (a pivotal case).

3) Even where H. KELSEN accepts the notion of the judge as legislator, the argument that his legal theory refutes the "theory of gaps" in the law rejects the indeterminacy of the law: "This theory [of gaps] is erroneous, as it is based on ignorance of the fact that when the legal system does not impose any obligation upon an individual, his behaviour is permitted." [And] "where an isolated legal norm cannot be applied, it is nonetheless possible to apply the legal system, and this is also an application of the law"[47].

Moreover, H. KELSEN believes that the "theory of gaps" is a "fiction", allowing for the thesis that the "completeness" of the law is always possible: "The legal system cannot have gaps." The theory of gaps is really a fiction, because it is always logically possible, even though at

[46] KELSEN, H.: *Teoría General del Derecho y del Estado*, cit., pp. 157 and 159.

[47] KELSEN, H.: *Teoría Pura del Derecho*, Spanish translation from the 2nd German edition by Roberto J. Vernengo, Editorial Porrúa, México D.F., 1993, p. 255.

times inadequate, to apply the legal system when passing judgment"[48].

4) The argument for the "completeness" of the law, which he advocates from a legal positivist position that he defines as "consistent", is incompatible with the thesis of legal indeterminacy:

H. KELSEN tries to safeguard first and foremost "the postulate of legal positivism that every specific case must be resolved on the basis of current positive law."[49] And, in his opinion, "it is essential for a consistent positivist theory of law to show that the system of positive law contains this express or tacit authorization [to "fill this or that gap"]"[50] But the idea that positive law can resolve any type of case does not seem very compatible with the thesis of indeterminacy.

III. Conclusion

For contemporary legal anti-positivism, the law is clearly complete in relation to laws and principles, because the legal system is always able to provide complete regulation through the interpretation of these laws and principles in relation to any real or possible case. This approach argues for the completeness of the legal system through a theory on the sources of created law, including explicit and implicit law, from which a solution to the Universe of real and possible cases can be provided. Non-regulated cases are seen as gaps, a sort of defect of the law, but one that can be fixed through a theory of interpretative adjudication, which is always able to provide a correct response to any legal dispute. It follows that the completeness of law is one of the theses that most clearly distinguishes anti-positivism (especially the Dworkian paradigm) from contemporary legal positivism. On the other hand, legal positivism claims that the nature of the legal practice is such that the law is ***inconclusive as it is incomplete***, and supports a (partial or complete) thesis of legal indeterminacy.

This has a consequence on the application of the law and on legal interpretation. For anti-positivists, completeness necessarily evokes a "model judge" capable of resolving all current or future disputes, regarding which the law will never be indeterminate; and even if a case is initially indeterminate, this has no ***significance*** or ***relevance*** to the law, as the case can always be resolved through the interpretative methods

[48] KELSEN, H.: *Teoría General del Derecho y del Estado*, cit., pp. 176 and 177.
[49] KELSEN, H.: *Teoría General de las Normas*, cit., p. 226.
[50] KELSEN, H.: *Teoría General de las Normas*, cit., p. 139.

supplied by the law itself. Legal positivism, by contrast, questions the fullness of the law by noting its open texture, the existence of borderline cases and the resulting conclusion of legal indeterminacy that gives rise to judicial discretion. The inevitable result is that the law is inconclusive as it is incomplete.

The disagreement between the two legal theories seems to reside in the "ideal description" of the law given by anti-positivism and the more ***realistic*** description of the legal practice given by Hartian positivism and by the followers of this doctrine. In any case, both theories currently compete with each other to provide the best description of the legal system underlying the Constitutional Rule of Law.

However, this account of the differences between positivism and anti-positivism breaks down when we consider the thesis of indeterminacy in Kelsen and his doctrine of the norm as a framework. If the four arguments we put forward to consider his (apparent) thesis of legal indeterminacy are correct, they may put into question the claim that Kelsen's legal theory allows for legal indeterminacy. This is because it does not appear logical to accept a system of law that both "indeterminate" and yet "without gaps", as suggested by KELSEN. In other words, if we accept that Kelsen's legal theory allows both one thesis (legal ***indeterminacy***) and its opposite (the ***completeness*** of the law), we must at least accept that H. KELSEN's legal theory contains a "paradox" in relation to indeterminacy.

In my opinion, these considerations show that this legal theory is closer to the thesis of the ***completeness*** of law than it is to the thesis of the ***indeterminacy*** of the law. Or at least, they seem to seriously challenge the idea that this theory of law is really a thesis of indeterminacy.

Perhaps the issue can be clarified by distinguishing between cases that are indeterminate in the ***Kelsenian*** sense, which are not real borderline cases as they can be resolved ***within*** the law and ***according*** to the law; and cases that are indeterminate in the ***Hartian*** sense, which can only be resolved by "stepping outside" the legal system, as they consist of cases that are really ***not contemplated*** by the law, or ***incompletely*** contemplated. Only these latter cases constitute genuine ***borderline*** or ***indeterminate*** cases.

It seems that contemporary legal positivism of the ***Hartian*** variety understands indeterminacy in terms of cases that are "un-regulated" (or at least ***incompletely*** regulated) by the law. And indeterminacy from Kelsen's perspective refers, by contrast, to cases that are ***regulated*** by the law "within the norm as a framework". Therefore, whilst cases that

are indeterminate in the Hartian sense ***can not*** be resolved by the legal system, the indeterminate cases considered by H. KELSEN can ***always*** be resolved by the law and by the system of established sources by applying the doctrine of the "norm as a framework". Consequently, such cases never ***ultimately*** imply the indeterminacy of applicable law. So why is it claimed that H. KELSEN's theory of law contains a thesis of legal indeterminacy? It should also be considered that if Kelsen's legal theory does indeed contain a thesis of indeterminacy, it would be a thesis of indeterminacy that denies the existence of ***indeterminate*** cases, which seems meaningless.

Thus, if this reasoning is valid, it means that the legal theories of H. KELSEN and of R. DWORKIN paradoxically converge in denying legal indeterminacy, albeit from radically different and opposing positions. It would also follow that both theories include a thesis of the completeness of the law.

From ought-to-be to ought-to-do
semantic investigation in Kelsen and Castañeda

Gustavo Vieira Vilar Garcia[1]

Abstract: Accordingly to the polish legal philosopher Jerzy Wróblewski, although Kelsen's normativism was one of the first legal theories able to be built-up over solid philosophical foundations, it still suffers from an important theoretical lack, which corresponds to the non-characterization of its peculiar semantics, the ought-to-be. In fact, Kelsen assumes explicitly in his Pure Theory of Law that the difference between the Is and the Ought "cannot be explained further" and that "we are immediately aware of the difference".

It is so an unconcluded work, especially within philosophy of law, the adequate description of the semantic basis of norms and normativity. For this task, it seems that we can resort to logic, and more specifically to the logic of norms in order to achieve a better understanding of the position occupied by norms in language, and its function in logical theory (despite Kelsen's deep distrust towards the logical approach to normativity).

It seems that a valid and sharp analysis of this subject was undertaken by Guatemalan philosopher Héctor-Néri Castañeda. Overcoming the long-term discussion about the proper status of norms between prescriptions and propositions, Castañeda assume norms to be a species of the proposition gender and proceed to a semantic correction: rather than belonging to the ought-to-be, as maintained Kelsen and the deontic logic tradition, it seems that a most suitable semantic basis for norms is the ought-to-do. This position has some roots in the history of philosophy, that could be traced as far as to the autonomy of practical reason in Aristotle, and as near as the recent development of the logic of action, within which Castañeda's proposal could be adjoined. As for the ought-to-do, it

[1] Post-graduation Program in Law, Law School, Federal University of Paraná. E-mail: gustavovvg@gmail.com.

expresses an important alternative for the description of norms that could deal either with the profuse linguistic inconsistencies (paradoxes) that emerge from the formalization of arguments with prescriptive elements in traditional deontic logic, and also with the semantic deficiency in positivistic normativism.

Keywords: ought-to-be; ought-to-do; semantics.

1. Introduction

This paper, entitled "*From ought-to-be to ought-to-do: a semantic investigation in Kelsen and Castañeda*" intends to adjoin theoretical contributions originated from deontic logic, more specifically from the logic of action as it was proposed by Guatemalan philosopher Héctor-Neri Castañeda[2], and from the normativistic positivism of Hans Kelsen, taken as a privileged theoretical model of law as a system of norms.

The beginning of our inquiry can be traced back to a conceptual lack existent inside kelsenian thought (WRÓBLEWSKI, 1981, p. 510). Although the author sought to conceive a science branch having norms as its central element, his description of norms as featuring an *ought-to-be* of human conduct is limited to his straight assertion that the difference between what *is* and what *ought-to-be* cannot be further probed: says Kelsen it is impossible to deny the fundamental difference between something that is and something that ought-to-be (KELSEN, 2006, p. 06).

This self-limitation in Kelsen's thought, clearly pointed out by legal philosopher Jerzy Wróblewski, seems to indicate insistently the need to develop a semantical approach specifically aimed to norms, concerned with the particular problems and fundamental features of legal systems and normativity.

This claim, however, seems to be in contradiction with a warning stated by Kelsen himself and addressed to the attempt of pulling together logic and normativity: according to the author it is not possible to apply logical principles to legal systems for a very straightforward reason: norms, unlike propositions, are not true or false. Ultimately,

[2] Born in San Vicente Zacapa, Guatemala, Héctor-Neri Castañeda began his philosophical studies at the University of San Carlos, Guatemala. In the United States the author obtained his Ph.D. title, granted by the University of Minnesota, under the tutelage of Wilfrid Sellars. Castañeda taught in many universities, among them the Wayne State University, Oxford University, Indiana University, University of Texas. Founded the philosophy journal *Nôus*. Died in 1991. (RAPAPORT, 2005).

norms could be qualified as valid or invalid, if enacted by the competent authority and accordingly to the adequate legislative procedure, a classification which keeps no connection to the typical bivalence of propositions.

Another problem that could be associated with the last one is the necessary relationship settled between logic and proposition. Since Frege, formal logic was established as the natural course of development of logical theory, by embodying mathematic's typical language and also by assuming mathematical problems as datum for the investigation of language. In linguistic field, proposition was taken as the basic unit of assertive activity and the primary work material of logicians. Since propositions concern to states of being, a significant part of language could not be adjoined to logic, or was hardly done, bringing forth several technical inconsistencies and linguistic paradoxes.

Deontic logics, in this scenario, emerges as a theoretical possibility of systematic comprehension of prescriptive expressions in general, as imperatives, mandates, orders, requests and norms belonging to manifold normative systems, as moral rules, the rules of a game and, finally, legal norms.

In this vast framework of prescriptive categories under the analytical lenses of deontic logic, what is the possible contribution to clarifying the logical form of norms? How to preserve the relative autonomy of law in view of theoretical approaches that seems not to consider the existence of principles generated by legal systems themselves to face their normative conflicts and gaps?

The imprecision (or absence) of a semantical basis to norms in Kelsen's work authorizes the search for comparative models in normative logics and, specifically regarding Castañeda's logical system, a model that admits settling legal experience over practical reason, from where emerges the ought-to-do semantic model.

2. Kelsen and the is-ought dichotomy

Within the limits of a legal system, the *ought* expressions from which we can derive prescriptions and rules of conduct receive the particular *status* or *title* of *legal norms.* Admitting norms as the central object of his investigation, the Austrian legal philosopher Hans Kelsen aimed to describe norm-analysis in a scientific manner, which culminated in the publishing, in 1934, of his celebrated *Pure Theory of Law.* The sem-

inal work of the major exponent of legal positivism in its normativistic branch was, according to the Polish legal theorist Jerzy Wróblewski, one of the first legal theories able to be built-up over solid philosophical foundations, related with the is-ought dichotomy, located in the basis of positivistic thinking:

> The dualism or dichotomy of the Is and the Ought is basic for Kelsen's normativism. This dualism is not only proclaimed as one of the foundations of the pure theory but also in fact is highly relevant in normativistic thinking. It is, thus, not a decoration making the positivistic antecedents more philosophic, but is the real basis of normativism. (WRÓBLEWSKI, 1981, p. 509)

A remote and not fully developed version of the dichotomy already appears in the *Treatise of Human Nature*, from David Hume, under the title of what would be later called "Hume's Law", or naturalistic fallacy thesis. Hume observes that many authors of his time were using premises connected by the verb "is", in order to prescribe a rule of conduct. He then identified a logical error that consisted in extracting from factual premises, which belonged to the logical category of *is*, conclusions entailing a prescription, without the addition of any premise that enabled this logical consequence. Although Hume had aimed the moralists of his time by criticizing the logical form of their arguments, the author, reflexively, suggests the existence of two specific modalities of thought, one of them directed to the assertive activity through the use of the 'is' copula, and the other headed to the prescription of conducts, by means of the 'ought' copula.

The most remarkable consequence of the dichotomy seems to be the postulation of an inferential barrier (GENRO, 2007, p. 84), that distinguishes and separates these two apparently well-organized dimensions of thought. In the dimension we shall call *cognitive* our thought turns towards the acquaintance and description of the world, concerning itself with the truth or falsehood of its assertions — the scientific attitude of thinking. On the other hand, the *normative* dimension of thought seeks to ascribe courses of action to its addressees, determining how agents should conduct themselves — the characteristic field of morals and law.

Kelsen's accession to the naturalistic fallacy thesis is doubtless, as we can extract from the following excerpt of the Pure Theory of Law. After having briefly discussed the necessary distinction between the norm, taken as an *ought-to-be* of human conduct, and the conduct itself,

as a part of the *being* dimension, that may or may not conform to the normative pattern, Kelsen approaches the topic:

> The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: "something is" – that is, the statement by which an existent fact is described – is fundamentally different from the statement: "something ought to be" – which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa. (KELSEN, 2005, p. 06)

The kelsenian insight, however, abandons us to our own efforts, as it refuses to establish minimum parameters with which we could examine the is-ought dichotomy within his theory, claiming only that "we are immediately aware the difference"[3].

If we cannot find amidst Kelsen's theory an adequate description of the semantic structure of legal norms we should pursue it elsewhere, having in mind the fundamental distinction within his work of is and ought, often alluded by the author.

Thereby, the systematic analysis of the logical relations between norms is in debt to the great development of deontic logics, and to the relative autonomy it achieved face modal logics.

Although Kelsen had contact with the approach given to prescriptive statements by deontic logics, as displays the debate he had with the German logician and legal philosopher Ulrich Klug between 1959 and 1965, Kelsen denied the use of logical principles in the evaluation of legal norms because these, unlike propositions, were not able to express contents imbued with truth values (truth and falsehood) (KELSEN; KLUG, 1984).

Despite Kelsen's warning, normative or deontic logics and, specifically, the logical approach to norms had a considerable development in the course of the last century, mostly due to Georg Henrik von

[3] Wróblewski identifies this definition problem in the Pure Theory, stating that it is necessary to deeply probe the dichotomy in order to understand its rich implications for normativism: "Any analysis of the Is-Ought dichotomy within the framework of Kelsen's normativism is difficult because of the lack of any definition of both concepts involved in it: *Sein* as well as *Sollen* are thought of as primary, undefined concepts or categories […]. One has, therefore, to identify the meaning of the dichotomy in question from the context of its use." (WRÓBLEWSKI, 1981, p. 510).

Wright's works, and the consequent systematization of the modalities of obligation, prohibition and permission existent in normative systems.

3. Ought-to-do and practical reason in Castañeda

We had the opportunity to briefly notice that the ought-to-be category was always bound to prescriptive discourse, not only in Law, but mainly in Morals. We also remarked that Hume had observed the is-ought dichotomy in ordinary language, when he identified a confusion in the application of their appropriate copulas and indirectly distinguished ought-to-be as the adequate mode of the language of conduct, conceiving a primitive formulation of the naturalistic fallacy. It was, then, natural to Kelsen and many other jurists to unadvisedly take hold of the ought-to-be as the basic configuration of norms, especially having in mind the established opposition between the logical forms is-ought, so dear to kelsenian normativism.

According to Castañeda, an ought-to-be semantics is not able to integrate agents and actions in prescriptive statements and so is unfit to lay down rules of conduct or prescriptions and to guide practical reason. In the end, ought-to-be is useful strictly to enunciate wishes and utopias in general terms, without aiming no agents at all.

> The primary contrast in the above conception of deontic logic [*standard approach, ought-to-be*] is the contrast between what (it) is and what (it) ought to be. The idea of *who* is to realize the obligation is not considered, so that the approach can handle very nicely genuinely impersonal statements like "There ought to be no pain", meant merely to articulate something about the universe, which is not conceived as an agent but simply as the totality of all existents and all facts. This impersonal statement tells of what would be a necessary lack in every universe, and neither attributes responsibility for any action to somebody nor demands any action from anybody: the statement is oriented to no agents: it has the structure of the statement 'It is (would be) desirable that there were no pain'. (CASTAÑEDA, 1970, p. 450, our note)

Facing the apparently inadequacy of the ought-to-be, Castañeda proposes a semantic correction so that the standard approach may be replaced by an action semantics, under the peculiar form of the ought-to-do. The ought-to-do semantics in Castañeda demands the construc-

tion of sentences yielding agents, and actions prescriptively assigned to those agents, that is, requires the use of copulas that denotes its normative character. That doesn't mean, on the other side, that agents should explicitly take part on the norms contents. What a norm must achieve, in fact, is the establishing of a normative focus that could be able to guide conducts of agents, determined or not.

> Now, an important feature of certain deontic statements is that they involve an action and an agent and demand that the agent do, or fail to do, the action in question. Many an ordinary statement that is apparently agentless demands an action; e.g., "Cars ought to have plates" demands that some agents put plates on cars; it is short for a statement to the effect that people in a relationship R of a certain kind to a car (ownership, usership, managership, etc.) put plates on that car. The statement supports imperatives of the form "If you are R to that car, put plates on it" That statement contrasts very sharply with the agentless statement "There ought to be no pain" […]. In short, deontic statements divide neatly into: (i) those that involve agents and actions and support imperatives, and (ii) those that involve states of affairs and are agentless and have by themselves nothing to do with imperatives. The former belong to what used to be called the *Ought-to-do* and the latter to the *Ought-to-be*. Our non-standard approach, then, is not suited for the Ought-to-be; but, we hope, it is adequate for the Ought-to-do. (CASTAÑEDA, 1970, p. 452)

Castañeda's proposal, then, is located within the theoretical field of the normative logic of action, founded over the ought-to-do-semantics. The author's philosophical system takes as its initial step the exam of the ontological primacy of pure reason over practical thinking. Men, however, are not only well constructed machines that formulate hypothesis; what, on the other hand, seems to better fit human reason is its aptitude for concrete action, for decision-making, although this function is inwardly connected with the investigative and propositional leaning of thought:

> […] if a creature is an agent endowed with practical reason, he is, a fortiori, endowed with contemplative thinking. […] The comprehensiveness of practical thinking that includes and requires contemplative thinking is characteristic of a mind that has the adequate mechanism, with great survival value, for keeping fast to

> the needed *unity* of the world of contemplation and the world of action. While contemplative thinking is, as explained, ontologically prior, and could in principle appear pure in an angelic creature, practical thinking becomes psychologically dominant and logically encompassing. The ultimate unity of reason *is* the unity of practical reason. (CASTAÑEDA, 1975, p. 08)

Practical reason is deeply linked to institutions, where mandates and orders are enacted, decisions are made, duties are addressed, different norms and promises conflict with each other, and where Castañeda locates a theoretical lack that deserves the attention of philosophy. His *magnum opus* entitled *Thinking and Doing* announces clearly this pretension in its subtitle "The Philosophical Foundations of Institutions". The institutions which rule practical life *act* by means of its own legislative activity (*enactment*) that establishes its normativity field. From Constitutional Law to the rules of a game (CASTAÑEDA, 1975, p. 179-181), normative systems regulate its field of activity, and are even *determined* by the contents of its norms. In order to identify what would be the complete theory of a normative system, Castañeda relies on a definition that remarkably approximates him towards Kelsen and his idea of law's science:

> The full theory of a given institution *i* is at bottom, then, the total theory of the norms characterizing, or, better, constituting, the normative system N(*i*) that determines institution *i*. This is the theory that accounts for the logical form of such norms, their implication relationships, and their truth conditions. For example, the total theory or philosophy of morality is the theory of the norms of the form 'X ought *morally* to do action A' as well as of the complex statements composed of such norms. Likewise, the theory or philosophy of law is the theory of the norms involving the form 'X must (ought, should) *legally* do A'. (CASTAÑEDA, 1975, p. 03)

Castañeda lists several linguistic categories concerning practical reason, as deliberations, mandates, prescriptions, intentions, and also what he conceives as deontic judgments or norms. His deontic system is framed in a threefold structure that includes prescriptions, intentions and deontic propositions. Prescriptions and intentions are grouped under the common title of *practitions*. Practitions themselves are not equivalent to propositions, but, in the context of his work, are imbued with semantic values analogous to truth values, said *Legitimacy values* or *or-*

thotic values[4]: "prescriptions and mandates have ontological, or semantical values that are formally, logically exactly analogous to truth-values" (CASTAÑEDA, 1975, p. 120). Deontic judgments, on the other hand, are taken as the fundamental form of institutional norms, among them legal norms. Its peculiar aspect is that, unlike practitions, deontic judgments are propositions to which the deontic operators of obligation, permission, prohibition and option are adjoined. The immediate consequence of this conclusion is that, in fact, norms can be taken as true or false (something that was completely rejected by Kelsen). But says the author: "What are we to do? Are we to say that deontic judgments are true or false? Are they true or false in exactly the same sense in which ordinary propositions are true or false?" (CASTAÑEDA, 1975, p. 183). These questions seem to be related to the perception that something goes wrong when comparing deontic truth to scientific or mathematical truth:

> Nevertheless, there is a difference between mathematical and scientific verification procedures and all the procedures for verifying deontic judgments. The difference is, roughly, that many a deontic truth seems to depend intimately on legislative procedures, so that deontic truth seems man-made in a way in which scientific and mathematical truths are not man-made. (CASTAÑEDA, 1975, p. 183)

What truth is, then, in deontic sense? What could be accepted in deontic logic as a reference frame, able to establish a correspondence with deontic propositions, in order to lay down deontic truth values, in the same manner as the isomorphism relation between facts and propositions that distinguishes truth for propositions?

According to Castañeda, deontic judgments are integrated by a deontic property/operator that denotes its belonging to a specific normative system — that is, a deontic operator underwritten by a variable that expresses its relation with a specific normative system, as, for example, obligatory, that could be understood as an obligation in legal sense — and by a core practition (CASTAÑEDA, 1975, pp. 40 e 190). Let us return, then, to practitions. As Castañeda says, Legitimacy or, in his terminology, *orthotic* values of practitions can be determined from Legit-

[4] Castañeda employs a capital letter do distinguish Legitimacy as a value of practitions, equivalent to the truth values of propositions, from the ordinary usage of the word. *Orthotes* and *anarthotes* are used in the same sense, to bring about, respectively, Legitimacy and Illegitimacy.

imacy contexts, bonded to intended ends. Agents to whom practitions are addressed in compliance to these ends may act in a Legitimate or Illegitimate manner, in case they endorse or not the mentioned practitions, qualified by Legitimacy contexts. But orthotic values of practitions vary according to their qualification contexts. The same practition may be Legitimate or orthotic with respect to Legitimacy context *p*, but Illegitimate or anarthotic according to Legitimacy context *q*. This means that, unlike truth values that are perennial and independent, Legitimacy values are determined by its context of use.

> There is a tremendously important difference between the semantical values of propositions, i.e., those involved in implication, namely truth and falsity, and the semantical values of practitions. The former are just two absolute values in the sense that a proposition has its values once and for all tenselessly and regardless of how large a segment of the actual universe we consider. [...] On the other hand, the semantical values of practitions are many and depend intimately on segments of the universe. (CASTAÑEDA, 1975, p. 240)

We saw that Castañeda admits the propositional character of deontic judgments. This aspect, yet, do not reproduces truth notion in exact the same manner in which mathematical propositions, for instance, reveal themselves to be true. On the contrary, deontic propositions truth values refer, ultimately, to the Legitimacy values of their corresponding practitions. Now, if deontic judgments are subject to the modulations of relative institutional contexts, what could be the theoretical achievement in admitting them to be imbued with truth values?

> But the Legitimacy or Non-legitimacy of an imperative relative to a certain context constituted by a set of facts, ends, procedural conventions and decisions would be useless unless the conflict were resolved in a larger context. In cases of conflict, life itself forces us to make choices and produce a balance, so that we may speak of a total context, in which we regard the ends and procedural conventions as hierarchically organized, even if that organization is rough and revisable and even if its structure and outline are only dimly conceived (as it may well be, especially in the case of a conflict.) (CASTAÑEDA, 1975, p. 241)

The total contexts of hierarchically organized ends are referred

by Castañeda as *absolute contexts*. In effect, the ordinary use of imperatives disregards the persistent designation of the context taken as relevant to legitimize the usage of a mandate. This means that not all imperatives depends on specific legitimization contexts, or as Castañeda sustains, that some obligations draw their legitimacy from implicit absolute contexts, that mark them with such a degree of prominence that they become dominant in regard to conflicting duties (*overriding oughts*). The values matching them also receive a special designation: as they aren't qualified by specific contexts, they are taken as *unqualified orthotes*. Well, deontic judgments belonging to this category are precisely those imbued with universal truth values, that can't be subject to the critic addressed to relativity of local institutional contexts.

4. Conclusion

Labeling norms as deontic propositions and, in consequence, allowing to verify them in terms of truth and falsehood under the semantic form of the ought-to-do seems to be a considerable gain, especially when it becomes clear that all achievements of propositional logic are also admitted in the analysis of norms. Castañeda himself catches a glimpse of this possibility: "We rejoice at our fast enrichment of logical theory. Since deontic judgments are propositions, every principle of truth [...] discussed [...] automatically applies to deontic judgments." (CASTAÑEDA, 1975, p. 184)

So Castañeda offers a consistent theoretical instrument whose main benefit seems to be his meticulous consideration of human practical activity as essential in the task of examining prescriptions and the linguistic display mobilized in the leading of human acts. If this is Law's foremost duty and if legal norms could be rightly described by the ought-to-do semantics, then we can also conceive a vast and promising investigation field concerning Law and its components.

References

CASTAÑEDA, Héctor-Neri. On the semantics of the ought-to-do. **Synthese**. Dordrecht, v. 21, nº3-4, p.449-468, 1970

_____. **Thinking and Doing**. Dordrecht/Boston: D. Reidel Publishing Company, 1975

_____. **Structure of Morality**. Springfield: Charles C. Thomas Publisher, 1974

GENRO, Guilherme Saideles. **Dedução Transcendental e Norma Fundamental: Questões de Legitimação em Kant e Kelsen.** Santa Maria: Master Thesis, Federal University of Santa Maria, 2007. In: <http://w3.ufsm.br/ppgf/menuesp2/35dd2324f1feb4ee04f1c5dd2794794c.pdf>.

HUME, David. **Tratado da Natureza Humana**, Trad. Déborah Danowski. São Paulo: Unesp, 2009

_____. **Pure Theory of Law**, Trad. Max Knight. New Jersey: The Lawbook Exchange, 2005

_____; KLUG, Ulrich. **Normas Jurídicas e Análise Lógica**, Trad. Paulo Bonavides. Rio de Janeiro: Forense, 1984

McNAMARA, Paul. Deontic Logic. In: GABBAY, Dov M.; WOODS, John; (Org.). **Handbook of the History of Logic.** Amsterdam: Elsevier, 2006

RAPAPORT, W. "CASTAÑEDA, Hector-Neri (1924-1991)". In: **Dictionary of Modern American Philosophers**, Briston: Thoemmes Press, 2005. Disponível em: <http://www.cse.buffalo.edu/~rapaport/Papers/hncdict.tr.pdf>. Acesso em 12 de setembro de 2012.

VON WRIGHT, Georg Henrik. **Norm and Action**. Disponível em <http://www.giffordlectures.org/Browse.as?ubID=TPNORM&Volume=0&Issue=0&TOC=TRUE> Acesso em 02 de agosto de 2012.

WRÓBLEWSKI, Jerzy. Kelsen, the Is-Ought Dichotomy and Naturalistic Fallacy. **Revue Internationale de Philosophie**, Bruxelles, nº138, p. 508-517, 1981

WRÓBLEWSKI, Jerzy. Semantic Basis of Legal Interpretation. **Logique et analyse**, 21-24, p. 379-416, 1963.

The countermajoritarian theory
A philosophical perspective on rawlsian public reason[1]

Carlos Bolonha[2]
Gabriella Costa[3]
Igor de Lazari[4]
Marina Rezende[5]

Abstract: The significant difficulty in identifying minorities and majorities results in the precariousness of the countermajoritarian conception. Two kinds of minorities may be defined, though, political and popular minorities implies the countermajoritarian dualism. Both share supporting difficulties. Certainly, the countermajoritaran character of judicial decisions are not easily verifiable. A comparative study between the United States and Brazil taking into account the public opinion, institutional designs, and Branches' dialogues suggests that countermajoritarism is not as obvious as doctrine usually suggests. Furthermore, Rawls suggests that if a Court prevents biased legal changes by transient majorities, it is not antidemocratic, but antimajoritarian regarding to ordinary legislation. It is not, however, antimajaritarian regarding to the higher law. By the other side, transient majorities eventually embraces constitutional interpretative changes hindered by judicial enforcement of public reason. Moreover, if public reason is a characteristic of a certain people, countermajoritarism is in-

[1] This article was developed at Laboratory of Analytical and Theoretical Studies on Institutional Behavior (LETACI), at the National School of Law (FND) and the Graduate Program in Law (PPGD) of the Universidade Federal do Rio de Janeiro (UFRJ). This research was sponsored by the Fundação Carlos Chagas Filho de Amparo à Pesquisa do Estado do Rio de Janeiro (FAPERJ), and the Conselho Nacional de Desenvolvimento Científico e Tecnológico (CNPq).

[2] Law Professor. National School of Law, Federal University of Rio de Janeiro, Brazil. Director of the Bar's Research Office in Rio de Janeiro. Director of the Laboratory of Analytical and Theoretical Studies on Instituinal Behavior (LETACI) of the Graduate Law Program of the Federal University of Rio de Janeiro. E-mail: bolonhacarlos@gmail.com.
[3] LETACI Researcher (Federal University of Rio de Janeiro).
[4] LETACI Researcher (Federal University of Rio de Janeiro). Federal Lower Court Clerk in Rio de Janeiro, Brazil. E-mail: igorlazari@ufrj.br.
[5] LETACI Researcher (Federal University of Rio de Janeiro).

nocuous or meaningless: it stems from the democratic difficulty suppressed in reasonable societies.

Keywords: minorities; majorities; countermajoritarism; public reason.

Introduction

The "countermajoritarian difficulty"[6], is so commonly regarded that it is neglected its conceptual difficulty. It is a metonymical difficulty. That is, the lack of a clear definition of minorities and majorities concurs[7], *ipso facto*, to the conceptual brittleness of majoritarism, which also involves the countermajoritarism back cover.

Majorities, however, can be satisfactorily joined into two categories: (i) popular majorities, (numerically - CPr - or ideologically - CPr2 – considered), from which stems popular countermajoritarism (CPr), and (ii) political majorities, (composed by political coalitions within and between branches), from which stems the political countermajoritarism (CPo).

Moreover, Rawls comprehends the Majoritarian Theory in a particular way: majorities, political or popular, might be figured under the public reason ideal, especially within the public political forum, as in judges' decisions. However, it does not overcomes conceptual difficulties. That said, none of the understandings about the Majoritarian Theory make it an objective and well-defined theory, and they are unable of correctly defining the character of judicial decisions.

Democracy and Majorities

Firstly, the Majoritarian Theory is related to Democratic Theory, by the fact that the ideal of democracy has long been defined a "majori-

[6] Robert Dahl dealed with the majoritarin character of the american Supreme Court in 1957. *See* DAHL, Robert. *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*. **Journal of Public Law,** No. 6, 1957. The so-called *"countermajoritarian difficulty"* has been used later by Alexander Bickel. *See* BICKEL, Alexander. **The Least Dangerous Branch: The Supreme Court at the Bar of Politics**. New Haven: Yale University Press, 1961.

[7] LEVINSON, Daryl; PILDES, Richard. *Separation of Parties, Not Powers.* **Harvard Public Law Working Paper No. 131,** 2006.

tarian phenomenon"[8]. Indeed, Tocqueville has said that, "*it is the very essence of democratic government that the power of the majority should be absolute, for in democracies nothing outside the majority can keep it check*." [9]

However, it is accepted nowadays that democracy also presumes the possibility of insurgent minorities take part somehow of political decisions[10]. The judiciary has the authority to assure them that right if they lack political support. Thence follows an allegedly difficulty[11].

However, it is inherent to judicial decisions any eventual agreement to majorities, or indistinctly to minorities preferences[12]. The Court therefore paradoxical and invariably offends democracy (a) when it upholds minority interests (democracy as majoritarian phenomenon) or (b) when it overlooks them (democracy as equality, or anything like that). The discussion thus deviates from democratic principles.

---

[8] "*It is not at all difficult to show by appeals to authorities as various and imposing as Aristotle, Locke, Rousseau, Jefferson, and Lincoln that the term democracy means, among other things, that the power to rule resides in popular majorities and their representatives […] [n]o amount of tempering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems*". Dahl DAHL, Robert. *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*. **Journal of Public Law,** No. 6, 1957, p. 283

[9]TOCQUEVILLE, Alexis de. **Democracy in America and Two Essays on America**. London: Penguin Classics, 2003, p. 287. From the original: *"Il est de l'essence même des gouvernements démocratiques que l'empire de la majorité y soit absolu; car en dehors de la majorité, dans les démocraties, il n'y a rien qui resiste*".

[10]COHEN, Joshua. *Procedure and substance in deliberative democracy*. In: BOHMAN, James & REHG, Willian. **Deliberative democracy. Essays on reason and politics**. Cambridge: MIT Press, 1997. p. 407

[11]Hamilton, however, affirms that interpreting the constitutional *"by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both*" (Federalist No. 78). Bickel, by the other side, suggests that declaring laws unconstitutional actually frustrates popular sovereignty. BICKEL, Alexander. **The Least Dangerous Branch: The Supreme Court at the Bar of Politics**. New Haven: Yale University Press, p. 16-17). Moreover, Bickel describes *judicial review* as "*a deviant institution in the American Democracy*" (i*dem. p. 18.*).

[12]As Dahl has said, "*no matter how the Court acts in determining the legality or constitutionality of one alternative or the other, the outcome of the Court's decision must either (1) accord with the preferences of a minority of citizens and run counter to the preferences of a majority; (2) accord with the preferences of a majority and run counter to the preferences of a minority; or (3) accord with the preferences of a minority and run counter to the preferences of another minority, the rest being indifferent*". DAHL, op. cit. 282.

Two Countermajoritarian Models

Firstly, we support that majorities are gatherable in two categories: i) *popular majorities* and *ii) political majorities*, from which stems, respectively, *i) popular countermajoritarism* e *ii) political countermajoritarism.*

Popular Contermajoritarism (PoC)

Popular minorities are repeatedly addressed numerically. However, PoC is essentially a matter of public opinion; we do not mean there are no groups that lack full enjoyment of rights, but only that ensuring them those rights does not necessarily make a decision countermajoritarian.

Brown and *Dred Scott* are elucidating. First, let's take *Brown v. Board of Education*[13], paradigmatic to the Majoritarian Theory. At the time of the decision, blacks were numerically minority (one-tenth of the American population). Numerically, decisions sympathetic to the black cause would be supposedly countermajoritarian; ideologically, however, *"a national majority favored the result of Brown, as well as external political elites. Brown was not an example of an attack by the Court to the will of the majority, it was an example of a Court that is aligned to the dominant political coalition and the national political elites"*[14]. Moreover, political leaders and presidential wings of both parties favored the eradication of segregation. Brown v. Board of Education, therefore, historically adopted as a countermajoritarian paradigm, perhaps meant precisely the opposite[15].

Hereinafter, let's take the decision in *Dred Scott v. Sanford*[16] (con-

[13] 347 U.S. 483 (1954); *Chief Justice Earl Warren* (unanimous).

[14]BALKIN, Jack. *Framework Originalism and the Living Constitution.* **Northwestern Law Review,** Vol. 103, No. 2, 2009, p. 576.

[15] Graber demonstrated, by the way, that the Eisenhower to the Supreme Court were well-known proponents of blacks civil rights, and recent studies suggest that they have been chosen because of that. Moreover, even South democrats that lacked interest to vote civil rights proposals have supported the nomination of racial equity proponents in federal judges. GRABER, Mark. *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary.* **Studies in American Political Development** , No. 7, 1993, p. 37, p. 63. The same way, the legal recognition of same-sex marriage in 2011 by the Brazilian Supremo Tribunal Federal (Ação Direta de Inconstitucionalidade - ADI) 4277; Arguição de Descumprimento de Preceito Fundamental – ADPF - 132) cannot be easily defined. It's not enough the existence of a numerical minority and a favorable decision.

[16] *Dred Scott v. Sanford*, 60 U.S. 393 (1857). *Chief Justice* Roger Taney (7x2). Dred Scott

sidered one of the biggest gaffes of the American Supreme Court), apparently a clearly majoritarian decision. It has neglected black slaves' rights (one-fifth of the American population, between 1850 e 1860), so it did not incur in difficulty. It has supported south interests, precisely the property rights of slaveholders. "*This decision so universally condemned today was not universally condemned by the vast majority of people in 1857"*, especially in the South[17]. Moreover, slavery was a constitutional evil necessary to the Union[18].

However, disasters arising from that decision are clear[19]: it has frustrated the population because it has decided that case; Lincoln did not oppose the decision, but the Court deciding[20]. Moreover, *Dred Scott*

---

was a slave bought by army surgeon John Emerson in the state Missouri in 1834; the transfers of Emerson led him eventually to the free states of Illinois and Minnesota, and then again, "voluntarily" to Missouri. Dred Scott challenged his adjudication to Emerson widow in 1843, and required his freedom by living at a Free State. In 1857, Dred Scott demand reached the Supreme Court.

[17] Even in the North, abolitionists were not a majority, said Mark Graber to C-Span (march, 2007): *"everybody in the south, of course, said "a wonderful decision". Northern republicans [were] intended to ban slavery in the territories, so "this is a horrible decision". But it is worth noting that democrats were about half of the northern population mostly said "not a great decision, but we can leave with this…" […] That this decision so universally condemned today was not universally condemned by the vast majority of people in 1857. Indeed […] Abrahan Lincoln during the Lincoln-Douglas debates specifically said he was not going to complain about Dred Scott for its holding that free persons of color could not be citizens; indeed, he announce the people of the state that he was opposed to making free blacks citizens of Illinois. That's how strong the public support among white people was for the racist aspects on Dred Scott".*

[18] GRABER, Mark. **Dred Scott and the Problem of Constitutional Evil.** New York: Cambridge University Press, 2008.

[19] *"Historians would say that the Supreme Court tried to put itself in a position of resolving the dispute about the extension of slavery and resolving it in a particular way that it thought was the best for the nation, and we saw what disastrous consequences flowed from that".* ROBERTS, John. *Senate Confirmation Hearings* (2005). Rehnquist trata também dos graves efeitos da decisão ao longo da história Norte-americana: "*The Dred Scott decision, of course, was repealed in fact as a result of the Civil War and in law by the Civil War amendments. The injury to the reputation of the Supreme Court thatresulted from the Dred Scott decision, however, took more than a generation to heal. Indeed, newspaper accounts long after the Dred Scott decision bristled with attacks on the Court, and particularly on Chief Justice Taney, unequalled in their bitterness even to this day.* REHNQUIST, REHNQUIST, Willian. *The Notion of a Living Constitution.* **Harvard Journal of Law & Public Policy,** No. 2, Vol. 29, p. 411

[20] [T]he candid citizen must confess that if the policy of the Government, upon vital

encouraged the Civil War, becoming doubtful the support to the decision. Thus, it is not clear the character of *Dred Scott*.

Finally, popular countermajoritarism is not sustainable: majorities and public opinion are unintelligible – it requires an ideological assessment; polls or national elections may failure[21]. Therefore, under popular perspective, it can rarely be said the character of judicial decisions.

Political Countermajoritarism (PlC)

Political representation also arranges itself in majorities through coalitions. The ideological assessment indispensable to identifying or recognizing majorities occurs regularly through suffrage; individuals, therefore, delegate to a minority group decisional authority. The political branches essentially the Legislature presumably represent the population. The Legislature express itself through lawmaking, or failing to make it. There, considering Congress a majoritarian institution the judiciary is *lato sensu* (PlC1) politically countermajoritarian when it decides against legitimate political decision-making (essentially laws) or decides about political matters.

However, political majorities are transient; given that, said Dahl, "*it is to be expected, then, that the Court is least likely to be successful in blocking a determined and persistent lawmaking majority on a major policy and most likely to succeed against a "weak" majority", "a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance"* [22].

---

questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court […] the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. LINCOLN, Abrahan. "First Inaugural Address" (1861). *In.* HAY, John; NICOLAI, John. **Abrahan Lincoln: A History, Vol. III.** New York: Cosimo, 2009. p. 338

[21] *See* FRIEDMAN, Barry. **The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution.** New York: Farrar, Straus and Giroux, 2009 . Also, PILDES, Richard. *Is The Supreme Court a Majoritarian Institution*. **The Supreme Court Review**, 2010, p. 24 ("[t]esting this claim is difficult, not just because public opinion polls are notoriously sensitive to subtle wording and framing differences, but because data are available only for relatively small number of issues that historically have come before the Court").

[22] DAHL, op. cit., p. 286. By the way, Balkin said that *"federal courts cooperate with the national political coalition by limiting or striking down laws that reflect an older coalition's values*". BALKIN, Jack. *Framework Originalism and the Living Constitution*.**Northwest-**

An exam of the cases in which the Supreme Court and the STF declared unconstitutional the Federal legislation confirm the expectations. It is verified in the United States (throughout the entire history) and Brazil (from 1995) that more than half of the unconstitutionality decisions has been taken after four years the approval of the unconstitutional law (precisely 58.9% in Brazil and 65.2% in the U.S.).

Thus, it might be understand that the Court is constrained by a four-year-term; countermajoritarian (politically), therefore, would be the decisions of unconstitutionality of for-year old (or less) laws[23], *"so that the Court could be plausibly be said to be standing against the preferences of the current, national lawmaking institutions"*[24].

It is affirmed that, at least in the U.S., *"on the whole, the Court has been no more likely to strike down the laws of its partisan opponents than the laws of its partisan allies"*.[25]

Either way, however, the plausibility of the political countermajoritarism in a broad sense remains precarious as to another objection: the judiciary can be no more than a scapegoat to legislative omissions. That is, the Court has often interfered in matters legislative coalitions lack interest to deal with or are "unable" to. A significant implication is that judicial review of this kind serves both the national party coalition and the party system, removing disruptive matters off the agenda of political majorities. [26]

The countermajoritarian difficulty does not offer an appropriate access point for assessing an institution that typically decides solely over "vacancy policies". The supposed lack of independence (or connivance), therefore, implies the definition of the political countermajoritarism *stricto sensu* (CPo2). Hereafter, the judiciary must be comprehended as an independent institution, and there will be called countermajoritarian independent decisions that frustrates the interests of political majorities.

---

ern University Law Review. Vol. 103, No. 2, 2009, p. 572.

[23] Maximum interval necessary to a congressional renewal, given a renewal average of 46% within the Brazilian parliament between 1994 and 2014.

[24] PILDES, *op. cit.*, p. 12.

[25] CLARK, Tom; WHITTINGTON, Keith *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789-2006*, 2009, p.31. Available at SSRN: http://ssrn.com/abstract=1475660.

[26] BALKIN, op. cit., p. 573; GRABER, op. cit., p. 37; McCANN, Michael. *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives.* In: Gillman, Howard; Clayton, Cornell. **The Supreme Court in American Politics - New Institutionalist Interpretations**. University Press of Kansas, 1999, pp. 69-70.

However, there seems to be a broad consensus that judicial review is fully independent from constraints only it is identified a segregation of political coalitions[27]. PlC, then, is supportable if it is verified the Court's independence. In Brazil it seems not to be, though. There are three tips:

1. The first of them stems from the number of appointments to the Federal Supreme Court between 1985 and 2013. There were 24 successful appointments within the period; one appointment each 1,1 year, in average, which means the appointment of 7,1 Justices during a double-term mandate, or 65% of the composition of the Court:

Appointments to the Supremo Tribunal Federal from 1985				
President	**Mandate (no. of years)**	**Appointments (no. of)**	**Rate (per year)**	**Contribution (total composition)**
J. Sarney	5	5	1	45%
F. Collor	2	4	2	36%
I. Franco	2	1	0,5	10%
F. H. Cardoso	8	3	0,375	27%
Lula	**8**	**8**	**1**	**73%**
D. Rousseff	2	3	1,5	27%
Total	27	24	0,89	35%

Table elaborated by the author from STF data.

Note: appointments until 2013. José Sarney has appointed two Justices between the end of the military regime and the new Constitution, which are Célio de Oliveira Borja and Carlos Alberto Madeira,

[27] CLARK & WHITTINGTON, op. cit., p. 31 ("*The Court is significantly more likely to uphold legislation adopted under conditions of divided government*"); LEVINSON, D; PILDES, R., *op. cit.*, p. 53 ("*In divided periods, when there is no dominant legislative-executive consensus on policy, judicial review can be significantly countermajoritarian, given the strong supermajoritarian requirements for political action. When a relatively cohesive majority controls the legislative and executive branches, on the other hand, courts are much more constrained*"); DAHL, op. cit., pp. 291;293 ("*Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance* […] *As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance*"). Also, "*[h]istorically, justices have engaged in classic countermajoritarian behavior only in those relatively brief periods when members of a newly formed dominant national coalition have not yet had the time necessary to install their adherents on the bench.* GRABER, op. cit., p. 38.

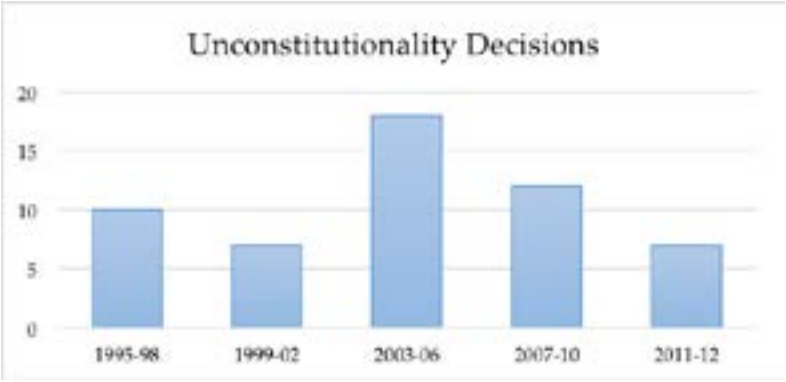
succeeded by Justices Francisco Rezek and Marco Aurélio Mello. The appointment of Justice Carlos Alberto Menezes Direito, who died two years after later, has not been considered among Lula appointments. Justice Dias Toffoli has succeeded him.

2. Considering that a Court is fully independent when parties are segregated, a study of the Congress composition between 1995 (first term of FHC) and 2011 (first term of Dilma Rousseff) reveals that the government basis of the presidency repeatedly overcame the opposition, suppressing, though, the Court independence. The only exception is the first term of Lula, when the STF mostly declared Federal legislation unconstitutional.

	Congress Houses							
	Base				Opposition			
Period	Chamber		Senate		Chamber		Senate	
1995-98	181	35,28%	34	41,98%	93	18,13%	7	8,64%
1999-02	303	59,06%	41	50,62%	109	21,25%	12	14,81%
2003-06	254	49,51%	31	38,27%	259	50,49%	50	61,73%
2007-10	353	68,81%	49	60,49%	160	31,19%	32	39,51%
2011-12	373	72,71%	62	76,54%	111	21,64%	18	22,22%

Table elaborated by the author from DIAP (Departamento Intersindical de Assessoria Parlamentar) and Superior Electoral Tribunal data.[28]

[28] Alliances in 1995-98 and 1999-02, respectivelly: PSDB, PFL & PTB and PSDB, PFL, PPB, PTB & PSD (base), and PT, PSB, PC do B, PPS, PV & PSTU and PT, PDT, PSB, PCdoB & PCB (opposition). PMDB has not been alligned because of the lack of party consensus. In 2003-07: base: PT, PL, PSB, PTB, PDT, PPS, PC do B, PV, PMN, PSD, PST, PSL & PSDC; opposition, DEM (past PFL), PMDB, PSDB, PP, Prona and PSC. In 2007-2010: base: PT, PMDB, PP, PR (union of PL and Prona), PSB, PTB, PDT, PC do B, PV, PSC & PRB; opposition: PSDB, DEM, PPS, PSOL, PMN & PTC. In 2011-12: base: PT, PMDB, PR, PDT, PSB, PC do B, PRB, PSC, PP & PTB; opposition: PSDB, DEM, PPS & PSOL.



3. The average conversion rate of Provisional Measures subsequent to Amendment 32/01 of 87.2% confirms the hypothesis of mutual cooperation between Executive and Legislative, and internal Legislative cooperation.

Provisional Measures													
Year	**No.**	**Conversion Rate**		**Chamber (rejection)**		**Senate (rejection)**		**Congress (inefficacy)**		**Rejection or inefficacy**		**Other**	
2003	58	57	98,3%	-	-	-	-	-	-	-	-	1	1,7%
2004	73	66	90,4%	1	1,4%	3	4,1%	3	4,1%	7	9,6%	-	-
2005	43	36	83,7%	2	4,7%	1	2,3%	2	4,7%	5	11,6%	2	4,7%
2006	66	59	89,4%	2	3,0%	-	-	4	6,1%	6	9,1%	1	1,5%
2007	70	60	85,7%	-	-	4	5,7%	-	-	4	5,7%	6	8,6%
2008	40	35	87,5%	2	5,0%	1	2,5%	-	-	3	7,5%	2	5,0%
2009	27	24	88,9%	-	-	-	-	1	3,7%	1	3,7%	2	7,4%
2010	42	30	71,4%	-	-	1	2,4%	10	23,8%	11	26,2%	1	2,4%
2011	35	29	82,9%	-	-	4	11,4%	2	5,7%	6	17,1%	-	-
Total	**454**	**396**	**87,2%**	**7**	**1,5%**	**14**	**3,1%**	**22**	**4,8%**	**43**	**9,5%**	15	3,3%

Table elaborated by the author from Presidency data.[29]

[29] *Other:* Sem Efeitos, Revogadas, ou Prejudicadas

There are reasons to assume, therefore, it has been in the last decade a strong alignment and coalition of political branches and parties, thus it is absent the requirement for full independence of the Court (the inexistence or weakness of coalitions) preventing Political Countermajoritarism supporting.

Rawlsen Prospect of Countermajoritarism

The Rawlsian prospect of the Majoritarian Theory is distinct from the ordinary understanding. That is, he considers the Supreme Court "the highest judicial interpreter of the Constitution"[30] and defines it the exemplar of public reason. Therefore, in a democratic and constitutional system that cherish justice as fairness with judicial review, public reason is the reason of the Supreme Court.

Thus, the Court is a protection tool of the higher law. When it accords to public reason, it prevents the erosion of the higher law erosion by transient majorities' legislation. If the Court assumes this role, it is incorrect to say, Rawls assumes, that it is undemocratic. It is, in fact, antimajoritarian regarding to ordinary law, because it can declare it unconstitutional. However, the Court is not antimajoritarian regarding to the higher law when its decisions reasonably agree with the Constitution and its amendments.

It is noticed therefore that Rawls prospect of majoritarism is essentially political. That is, the judiciary is, *lato sensu* (PlC1), politically countermajoritarian, when it decides against legitimate political decision-making (essentially laws); that is, when it declares them unconstitutional.

Ralws, however, states that those decisions are not countermajoritarian regarding to the higher law when they agree with the Constitution and its amendments. It is undoubtedly an originalist interpretation. The majoritarian difficulty is a subgenre of the "democratic difficulty" and judicial decisions are said countermajoritarian when they disregard transient ordinary legislation. The Constitution is a review parameter, but not a redemption for judicial decisions. Transient majorities legislation do not imply necessarily an outrage to the higher law. By the way, says Rawls, the Court is not antimajoritarian regarding to the higher law when its decisions reasonably agree with the amendments of the Con-

[30] RAWLS, John. **Political Liberalism.** New York: Columbia University Press, New York, 1993, p. 232.

stitution. Amendments are, in other words, legislation of further majorities, commonly transient. It may not be the case of the United States, but it is the Brazilian. In Brazil, there were 72 Constitutional Amendments between 1992 and 2013. It may be affirmed, therefore, that amendments in Brazil distinguish or have nothing to do with higher law despite enjoying the same legal status paradoxically. In any case, there are two logical conclusions: (i) the Brazilian Supreme Court is countermajoritarin when it declares constitutional amendments unconstitutional, but it is not undemocratic because its decision is supposedly coherent with the higher law; (ii) the Brazilian Supreme Court is countermajoritarian when it declares unconstitutional ordinary laws that disagree with Amendments, but it is not undemocratic because, in this case, the Amendment integrates the higher law.

Therefore, the Amendment is simultaneously a transitory tool of constitutional erosion, but it is part of the higher law when it works as a parameter for assessing the constitutionality of ordinary laws.

Finally, if the ideal of public reason (the reason that satisfies the criterion of reciprocity) is satisfied by judges, legislators, executive chiefs, or other government official, that is, if citizens explain their reasons for supporting fundamental political views under the political conception of justice (in other words, exercising the duty of civility)[31], countermajoritarism must be disregarded.

One should only cogitate majorities or minorities who acquiesce or not to those reasons; however, they are mere undefined majorities who lack common values. Moreover, boundaries between majorities and minorities are tenuous if citizens are reasonable and satisfy the criterion of reciprocity.

Conclusion

The different sides of countermajoritarism share the same difficulty, namely the lack of a particular premise - minorities, public opinion or judicial independence. It seems rather reasonable, therefore, accounting henceforth the "the nonmajoritarian difficulty"[32] or "the antimajoritarian difficulty"[33], instead of the "hailed" "countermajoritarian

[31] RAWLS, John. The Idea of Public Reason Revisited. **The University of Chicago Law Review**, Vol. 64, No. 3, p. 768.

[32] GRABER, op. cit., p. 37

[33] TRIBE, Laurence. **American Constitutional Law.** Mineola: The Foundation Press,

difficulty".

Thus, none of the conceptions of the Majoritarian Theory, neither the Rawlsian, makes it an objective and well-defined theory, or precisely defines majorities. They are therefore unable to identify the character of judicial decisions in Democratic States. Incidentally, Ralws is paradoxical because he assumes majoritarian imbalances ideally reasonable in societies.

That said, perhaps attributing to the countermajoritarism the "myth" epithet is not but a rhetorical effect, but with great caution it should be said that the character of a particular judicial decision is "clearly countermajoritarian".

References

BALKIN, Jack. "Framework Originalism and the Living Constitution". *Northwestern Law Review*, Vol. 103, No. 2, 2009.

BICKEL, Alexander. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* New Haven: Yale University Press, 1961.

CLARK, Tom; WHITTINGTON, Keith *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789-2006*, 2009. Available at SSRN: http://ssrn.com/abstract=1475660.

COHEN, Joshua. "Procedure and substance in deliberative democracy". In: BOHMAN, James & REHG, Willian. *Deliberative democracy. Essays on reason and politics.* Cambridge: MIT Press, 1997.

DAHL, Robert. "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker". *Journal of Public Law*, No. 6, 1957.

FRIEDMAN, Barry. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution.* New York: Farrar, Straus and Giroux, 2009.

GRABER, Mark. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary". *Studies in American Political Development*, No. 7, 1993.

GRABER, Mark. *Dred Scott and the Problem of Constitutional Evil*. New York: Cambridge University Press, 2008.

LEVINSON, Daryl; PILDES, Richard. "Separation of Parties, Not Powers". *Harvard Public Law Working Paper,* No. 131, 2006.

1988, p. 10

LINCOLN, Abrahan. "First Inaugural Address" (1861). *In.* HAY, John; NICOLAI, John. *Abrahan Lincoln: A History, Vol. III***.** New York: Cosimo, 2009.

McCANN, Michael. "How the Supreme Court Matters in American Politics: New Institutionalist Perspectives". In: GILLMAN, Howard; CLAYTON, Cornell. *The Supreme Court in American Politics - New Institutionalist Interpretations.* University Press of Kansas, 1999.

PILDES, Richard. "Is The Supreme Court a Majoritarian Institution". *The Supreme Court Review,* 2010.

RAWLS, John. *Political Liberalism***.** New York: Columbia University Press, New York, 1993.

RAWLS, John. "The Idea of Public Reason Revisited". *The University of Chicago Law Review*, Vol. 64, No. 3.

REHNQUIST, Willian. "The Notion of a Living Constitution". *Harvard Journal of Law & Public Policy,* No. 2, Vol. 29.

TOCQUEVILLE, Alexis de. *Democracy in America and Two Essays on America*. London: Penguin Classics, 2003.

TRIBE, Laurence. *American Constitutional Law***.** Mineola: The Foundation Press, 1988.

Police-Community Partnership Forum (FKPM) as a means of implementing Restorative Justice
Study Case in Lasem, Rembang, Central Java, Indonesia

Ferry Fathurokhman[1]

Abstract: Restorative justice has been studied and implemented in several countries as a new method handling crime in lieu of criminal court. The basic idea is to meet victim needs, to instill the offender that his/her act has been harming victim and community that affected by the crime. The ending process of restorative justice would be something that can be done to repair the harm. In Indonesia, best practice in term of restorative justice would be found in FKPM, a Police-Community Partnership Forum (FKPM) that consisted of one police officer and stakeholders in one village. A data shows that FKPMs in Lasem have succeeded to reach peaceful settlement of 19 cases outside of criminal court. Different from criminal court, FKPM seeks to 'win-win' solution in order to meet victim needs, offender reforms and community demands. FKPM fixes victim-offender relationships which the same thing does not happen in criminal court.

Prior to the wide spread of restorative justice notions, all criminal cases should be proceeded under criminal justice system. Conflicts within society are taken over solely by the state. Victim's interest was neglected and abandoned. These conditions were naked facts that can be easily found in our justice system. However, for most of Indonesian people, criminal court is the last resort for seeking justice. If they have a conflict, they would rather to solve the conflict by themselves assisted by their relatives. The victim's family and the offender's family will gather to discuss the best way out of conflict resolution. However, since there is no legal basis for the agreement therefore there is no guarantee that the state would not take over the case, even if the case already resolved.

FKPM gives a legal basis for the settlement between parties. Chief of Police of Indonesian Republic gave FKPM an authority and competency to handle and settle some criminal cases, particularly in the area of misdemeanors. With FKPM, restorative justice now meets its legal basis.

Keywords: FKPM, restorative justice, Indonesia

[1] Faculty of Law, Sultan Ageng Tirtayasa University, Jl Raya Jakarta KM 4, Serang Banten, 41221, Indonesia. Graduate School of Human and Socio-Environmental Studies, Kanazawa University, Kakuma, Kanazawa, 920-1192 Japan..

1. Definition of Restorative Justice

Restorative justice has become global trend in handling crime. But, what is actually restorative justice? This paper is not designed to solve this unsolved question. Proponents of restorative justice propose definitions. Some are completing its predecessor whilst some other reject and create a new one. The definitions that I quote here is merely for the interest of basic understanding regarding what restorative justice is.

In his audio visual lecture, John Braithwaite, an Australian criminologist, explained restorative justice by describing the history and process in this way:

> "Restorative Justice evolved from searching more productive way of dealing the crimes rather than putting more and more people away in prison. The main idea is about restoring the victim, restoring the offender and restoring the community. Because crime hurts, justice should heal. In a typical process the victim will be asked to say who would they like to come to support them trough the audience, and the offender will be asked in the same way, and supporter of the offender with the offender come together with the victim and the victim supporter, facilitated, sit together in a circle. First, they talk about what happened, who was hurt by what happened and what might be done to right the wrong and come up with plan of action. Facilitator follows up and checks whether the plan of action actually implemented to the satisfaction of all stakeholder.2

For most of criminal law scholars, the notion for incorporating victim [and affected community when appropriate] as stated above in criminal justice process is a relatively new idea since in criminal justice system, the role of victim is represented and taken over by prosecutor. Definitely restorative justice idea has a different core with criminal justice.

Utilizing lens in photography as a parable, Howard Zehr urged its reader to understand that the choice of lens affects its outcome and result. Different lens creates different picture. The same way goes for understanding a crime. If we view crime through retributive lens, he noted, the "criminal justice" process fails to meet many of the needs of either victim or offender. The process neglects victims while failing to meet its

[2] www.anu.edu.au/fellows/jbraithwaite/lectures/index.php. Accessed July 2011.

expressed goals of holding offender accountable and deterring crime.[3]

To understand its differences, Zehr then differentiates criminal justice and restorative justice as shown in this table below: [4]

Table of Two Different Views of Justice

Criminal Justice	Restorative Justice
• Crime is a violation of the law and the state • Violations create guilt • Justice requires the state to determine blame (guilt) and impose pain (punishment) • Central focus: Offenders getting what they deserve	• Crime is a violation of people and relationships • Violations create obligation • Justice involves victims, offenders, and community members in an effort to put things right • Central focus: Victim needs and offender responsibility for repairing harm

According to Zehr as cited by Mark Umbreit and Marilyn Peter Armour, the two approaches above have different way in seeking justice. The differences can be cleared by emerging three questions. In criminal justice system the questions are what laws have been broken? Who did it? What do they deserve? While in restorative justice perspective, the questions would be who has been hurt? What are they needs? Whose obligations are these?[5]

To Allison Morris and Gabrielle Maxwell restorative justice is a process which drastically reduces the role of court, the judiciary and other criminal justice professionals by returning the offence to those most affected by it and by encouraging them to determine appropriate responses to it.[6]

Relying on reparative and encounter conception,[7] Daniel W. Van

---

[3] Howard Zehr. *Changing Lens: A New Focus for Crime and Justice.* Canada. Herald Press. 2005, p. 178-179

[4] Mark Umbreit and Marilyn Peterson Armour. *Restorative Justice Dialogue, an Essential Guide for Research and Practice.* New York. Springer. 2011, p.8

[5] Ibid.

[6] Allison Morris and Gabrielle Maxwell in Adam Crafword and Jo Goodey (Eds). *Integrating a Victim Perspective within Criminal Justice. International Debates.* Vermont. Ashgate Publishing. 2000,p. 207

[7] The key point of reparative conception is crime causes harm, justice must repair that harm while encounter focuses on the important of stakeholder meetings and on the

Ness and Karen Heetderks Strong defined restorative justice as a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders.[8] Steve Mulligan by citing Marian Liebmann wrote that restorative justice is a criminal justice paradigm that emphasizes restoring victim.[9] Lyle Keanini, cited Tony Marshal work, wrote that restorative justice is "centrally concerned with restoration: restoration of the victim, restoration of the offender to a law-abiding life, [and] restoration of the damage caused by [the] crime to the community."[10]

There are many more definitions proposed by restorative justice proponent due to the development of restorative justice program. Some are general which can cover all restorative justice programs, some others leaving loophole that does not fit some restorative justice programs. In many respect, some definitions complete one another, while the others criticize and formulate a new one. This will be discussed more in categorization of restorative justice part of this paper.

2. Categorization

Presently restorative justice has been developing widely. To understand the variation of restorative justice, I categorize it in four categories as below:

2.1 Based on its Origin

Restorative justice may be divorced into two narratives: a novel and innovative system and modification of indigenous law. The earlier sees restorative justice as a subsequent movement from its first experiment in Kitchener Ontario Canada, North America.[11] The latter means

many benefits that come as stakeholders discuss the crime, what contributed to it and its aftermath. See in Daniel W. Van Ness and Karen Heetderks Strong. *Restoring Justice: An Introduction to Restorative Justice 4th Edition.* New Jersey. Anderson Publishing. 2010,p. 42.

[8] Ibid. P.43.

[9] Steve Mulligan. *From Retribution to Repair: Juvenile Justice and The History of Restorative Justice.* 2009. University of LaVerne Law Review. 31.U.La Verve L. Rev.139

[10] Lyle Keanini. *ADR in Hawaii Courts: The Role of Restorative Justice Mediators.* 12. Asian-Pac. L. & Pol'y J. 174. 2011.

[11] To many, VORP (Victim-Offender Reconciliation Program) is the first "baby" of restorative justice program in sense of modern form. VORP was born from "Kitchener

that restorative justice is not a novel neither innovative system rather restorative justice is an old practice, practice that precedes a theory, theory come later before we realize that old practice is actually restorative justice.[12] According to Steve Mulligan, there has no dispute in the first narrative which is different with the second narrative.[13]

In the view of the first proponent, the second narrative proponents mislead in viewing restorative justice. For instance Kathleen Dally who tried to redress misconception that conference is based on indigenous practices. According to Dally, efforts to write history of restorative justice where a pre-modern past is romantically invoked to justify current justice practice are not only in error, but also unwittingly re-inscribe an ethnocentrism they wish to avoid. Dally added that this misconception is ubiquitous, found in many prominent source of restorative justice advocates. In particular, Dally asserted that just because restorative justice is flexible and accommodating does not mean that conferencing

---

experiment" in 1974. At that time, two young teenagers (ages 18 and 19) from Elmira, Ontario, Canada, pleaded guilty to vandalizing 22 properties (houses and cars). The case was published and discussed widely. Mark Yantzi, a probation officer whom in charged in preparing the presentence report in that case, attended a Christian group meeting which was conducted several days earlier before guilty pleading was filed. The meeting discussed about Christian response to shoplifting. He then imagined that if offenders meet the victims to repair the damage. In criminal procedural law, this idea is impossible to be done since the victims interests is taken over by the prosecutor as I earlier mentioned in this part. Mark then buried the idea due to lack of legal basis for his notion. Dave Worth, coordinator of voluntary service worker for Mennonite Central Committee (MCC), endorsed Mark to realize the idea. Mark took a change and proposed to judge that the offenders meet and pay back the victims. As previously predicted, the judge refused the idea. However Mark proposal seemed had influenced the judged, when the time for sentencing arrived, the judge ordered the offenders to have a face-to-face meeting with the victims in order to work out restitution as a condition of probation. The offenders then, accompanied by their probation officer, visited all their victims negotiated restitution and within three months repayment had been made. See further more in Daniel Van W Ness and Karen Heetderks Strong. *Restoring Justice: An Introduction to Restorative Justice 4th Ed.* New Jersey. Anderson Publishing. 2010, Mark Umbreit and Marilyn Peterson Armor. *Restorative Justice Dialogue: An Essential Guide for Research and Practice.* New York. Springer Publishing. 2011, and Howard *Zehr. Changing Lenses: A New Focus for Crime and Justice.* Ontario. Herald Press. 2005.

[12] Paul McCold in Dennis Sullivan and Larry Tifft (Eds). *Handbook of Restorative Justice.* New York. Routledge. 2008, p. 24.

[13] Steve Mulligan. *From Retribution to Repair: Juvenile Justice and The History of Restorative Justice.* 2009. University of LaVerne Law Review. 31.U.La Verve L. Rev.139

(particularly in New Zealand) is indigenous practice.[14] However, in my view, the practice of FGC in New Zealand is difficult to be detached from the practice of Maori's people which has gave great contribution to FGC. Therefore even though it can not be said as indigenous practice as Dally wrote, in the same way it is also can not be said as the very new practice. To end this part I cite Zehr and Ali Gohar regarding on this issue as below:[15]

> "…the movement owes a great debt to earlier movements and to variety of cultural and religious traditions. It owes a special debt to the native people of North America and New Zealand. The precedents and roots of this movement are much wider and deeper than the Mennonite-led initiatives of the 1970s. Indeed, they are as old as human history"

2.2 Based the Initial Forms

Paul McCold wrote that there are three forms of the initial form of restorative justice practices, namely Mediation, Conferencing and Circle.[16] These practices transform onto many programs. For instance Victim Offender Reconciliation Program (VORP), Victim Offender Mediation (VOM) and Community Mediation are belongs to mediation category. In the field of conference there are Family Group Conference (FGC), W*agga Wagga* Conference, and Community Group Conferencing. The example of last category is Navajo Justice and Sentencing Circle. The brief further detail described below:

2.2.1 Mediation

[14] Kathleen Dally. *Conferencing in Australia and New Zealand: Variations, Researchs, Findings and Prospects* in Allison Morris and Gabrielle Maxwell (Eds). *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*. Oregon. Hart Publishing. 2003,p. 65.
[15]Howard Zeher and Ali Gohar. *The Little Book of Restorative Justice*. 2003,p.10. Downloaded from http://www.unicef.org/tdad/littlebookrjpakaf.pdf
[16] Paul McCold. *Primary Restorative Justice* in Allison Morris and Gabrielle Maxwell. *Restorative Justice for Juvenile, Conferencing, Mediation and Circles*. Oregon. Hart Publishing. 2003,p. 42

VORP

- The primary purpose is reconciliation (involving healing of injuries and restoring right relationship)
- Direct mediation (face-to-face meeting between victim and offender)
- Complementary to traditional criminal justice system (not a diversionary model)
- Faith-based (particularly Christianity values)

VOM

- Occasionally needs pre-mediation session of each party
- Non-directive "dialogue driven"
- Direct mediation (face-to-face meeting between victim and offender)
- Can be used at various stage of criminal justice process[17]

Community Mediation

- Operated by community dispute resolution center
- Receive cases from police, prosecutor and probation
- "Settlement-driven" (mediator can not impose decision but may help to finding multiple path to an agreement)
- Theoretically secular model (not in practice)

In further development, these characteristics are becoming blur and not clear cut. For example indirect mediation recently also possible to be done for the victim who does not want to meet but still want to express their feeling that caused by the crime.[18] In Europe also, most of mediation such VOM does not mandatorily need direct meeting between victim and offender.[19]

---

[17] See Lyle Keanini. *ADR in Hawaii Courts: The Role of Restorative Justice Mediators.* 2011. 12 Asian –Pac.L & Pol'y J. 174.

[18] Ibid.

[19]Norio Takahashi. *Restorative Justice and Treatment of Offenders* in Sonderdruck Aus. Menschengerechtes Strafrecht. Festschrift Fur Albin Eser Zum 70. Geburtstag. Verlag C.H. Beck Muncen 2005, p.1434-1439. See also Allison Morris and Gabriele Maxwell. *Restorative Justice for Juveniles, Conferencing, Mediation and Circles.* Hart Publishig. 2003, p.7.

2.2.2. Conferencing

Family Group Conference (FGC) in New Zealand

- Large in number of participant compared to VOM or VORP
- Statutory-based
- Designed both for alternative to court proceeding and guidance for sentencers.
- Facilitated by youth justice coordinator, employee of Department of Child, Youth and Family Service.

Wagga Wagga Conference,

- Held within police discretionary power scope
- Facilitated by police officer
- Coincidentally in line with re-integrative shaming[20]

Community Group Conferencing.

- Conducted by particular community within wide range circumstances and places (school, workplace, community, youth organization, college campus.
- Incident-focus (limited to repairing the damage caused by specific offence)

2.2.3. Circle

Navajo Justice[21]

- Conducted if *nalyeeh* (compensation) that demanded by victim to offender is unsuccessful.
- Facilitated by *naat'aanii* (peacemaker that respected by

[20] Re-integrative shaming is a notion which proposed by John Braithwaite that differ from "stigmatization shaming" within traditional criminal justice system. See furthermore in John Braithwaite. *Restorative Justice and Responsive Regulation.* New York. Oxford University Press. 2002. See also Gerry Johnstone. *Restorative Justice: Ideas, values, Debates 2nd Ed.* New York. Routledge. 2011,p.99.

[21] Navajo nation inhabits Arizona, New Mexico and Utah. There are approximately 200.000 inhabitants that live in the states mention. See in Gerry Johnstone. *Restorative Justice, Ideas, Values, Debates 2nd Ed.* New York. Routledge. 2011,p. 50

the community)
- Based on traditional spiritual belief

Sentencing circle[22]
- Adopted from traditional circle ritual
- In cooperation with criminal justice system
- Initially based on judicial discretionary and facilitated by judge

2.3. Based its Time-line Operation

Susan L Miller breaks down restorative justice programs into two types: diversionary and therapeutic. Diversionary type refers to any restorative programs which are designed to operate in lieu of criminal justice system process and provide alternative outcome. In her view this type is more offender-centered. On the other hand, the later i.e. therapeutics, are more victim-centered since they operate after offender have been convicted. The goal of this type is to empower and heal victim.[23]

In relation with this category, Moriss and Maxwell mentioned three possibilities process of restorative justice referring its flexibility: pre-court as a diversion; pre-sentence to inform sentencers; and pre-release.[24]

---

[22] The first its emergence was in Mayo Town, Yukon territory, Canada. A 26 years old recidivist committed "new" crime after his 46 criminal convictions. Realizing that conventional criminal justice process will not effective for the offender, the judge, probation officer and Crown Counsel explored another way to engage other parties within sentence determination. The judge then modified the courtroom setting. 30 chairs arranged in a circle, the judge, lawyer, police, First nation officials and members, probation officer, victim and other could sit there. By this way, the judge gets a number of advantages to using circle process as opposed to a traditional sentencing hearing. See in Daniel W. Van Ness and Karen Heetderks Strong. *Restoring Justice: An Introduction to Restorative Justice 4th Edition.* New Jersey. Anderson Publishing. 2010, p.29

[23] Susan L Miller. *After the Crime. The Power of Restorative Justice Dialogues Between Victims and Violent Offender.* New York University Press. 2011, p.12.

[24] Allison Morris and Gabrielle Maxwell. *The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice* in Adam Crawford and Jo Goodey (Eds). *Integrating a Victim Perspective within Criminal Justice, International Debates.* England. Ashgate Publishing Ltd. 2000, p. 207. One of examples of pre-release restorative justice programs is VVH (Victim Voice Heard) which

2.4 Based its Enforcement

The last category is based on its enforcement: voluntarily and coercion. In many literatures, this category is known also as "the purist" model and "the maximalist" model respectively. The purist relies on initial definition of restorative justice. Take for instance Toni Marshal whom, for many, categorized as the purist. He defined restorative justice in this way: "restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future." From Marshal's definition, it was clear that the initial notion of restorative justice is to "resolve collectively", not by one-side party, it means voluntary consent of each party is necessarily needed.

On the other hand maximalists take different path by referring to Lode Walgrave and other who defined restorative justice as "all activities oriented to realize justice by restoring harm brought by a crime."[25] In maximalist view, the word "all activities" can be extended, therefore all measure can be done to realize justice as long the purpose is to restore the harm caused by the crime. This also means coercive way is enforceable to be enforced in restorative justice. For example it can be done by judge verdict regardless whether the offender agree or disagree with the verdict.

In conclusion, restorative justice should be understood in a very wide aspect to obtain a clear comprehensive picture of restorative justice. With these categorizations, a nation can choose which category that fit its nation characteristic so restorative justice is plausible to be implemented.

---

was formed by Kim Book in Delaware United States. Susan L Miller described clearly regarding VVH in her book After the Crime, *The Power of Restorative Justice Dialogue between Victims and Violent Offenders.* New York University Press. 2011.

[25] See Norio Takahashi.*Restorative Justice and Treatment of Offenders* in Sonderdruck Aus. Menschengerechtes Strafrecht. Festschrift Fur Albin Eser Zum 70. Geburtstag. Verlag C.H. Beck Muncen 2005, p.1434-1435. See also Lode Walgrave *Extending the Victim Perspective Toward a Sistemic Restorative Justice Alternative* in Adam Crawford and Jo Goodey (Eds). *Integrating a Victim Perspective within Criminal Justice, International Debates.* England. Ashgate Publishing Ltd. 2000, p. 273-277.

3. Police-Community Partnership Forum (FKPM), a Form of Indonesian Restorative Justice[26]

Police-Community Partnership Forum (FKPM) is a means to resolve dispute, criminal dispute included, restoratively outside of criminal justice system. It is a communication vehicle between police and the community which is conducted based on voluntarily agreement in order to discuss social problems that need to be solved by community and police in order to support police function.[27]

Its establishment is based on police discretionary power which assured by Ordinance of Indonesian Police Chief Number 7/1998 and Decree of Indonesian Police Chief (Skep/433/VII/2006) as its legal basis. Based on this legal basis, FKPM is given authority to settle several cases as its jurisdiction of subject matters which are:[28]

> 1. All cases that are stipulated in book III (Misdemeanor) of Indonesian Penal Code.
> 2. Criminal offenses that are threatened with a maximum of 3 months imprisonment
> 3. Petty crimes: light maltreatment to animals (Art.302), light maltreatment (Art.352), light theft (Art.364), light embezzlement (Art.373), light fraud (Art.379), simple receiving of stolen property (Art.482), simple defamation (Art 315)
> 4. To resolve social conflict.

Ideally, FKPM is formed in every village in Indonesia which means actually there should be 72.944 FKPM in Indonesia. However by virtue of many problems, one FKPM may be formed for assisting three villages.[29]

The structure of FKPM consisted of one police officer and sev-

---

[26] This part is resumed from field research which financed by Kanazawa University and conducted from 4-15 February 2013 in Pandeglang Banten and mostly in Lasem, Rembang Central Java.

[27] Currently in Indonesia, the inhabitants outnumber the police in term of ideal ratio. The ratio number between police and citizen presently is 1:650 whilst the ideal ratio based on standard determined by UN is 1:400. FKPM is one of solutions to balance this ratio by using community policing concept.

[28] Appendix of Decree of Indonesian Police Chief (Skep/433/VII/2006), p.54

[29] Interview Brigade Police Endin Nuryadin, head of administration of community counseling unit at Pandeglang Resort Police (04/02/2013)

eral representatives from community member that voted through a deliberation (*musyawarah*). Community here may in form of geographical community or community of interest.[30] The head of FKPM should always from the community member. The police officer will merely be a secretary of FKPM. According to Hermanto, this is in order to assure the fairness process in settling a case within community.[31] Typically the structure of FKPM will be consisted of a head, a secretary, and divisions which differ from FKPM to FKPM.

Lasem, a sub-district in Rembang Regency, may be considered as a sub-district which has successful FKPM. Lasem constituted of twenty villages which means has twenty FKPMs.

Since its establishment in 2007, FKPMs in Lasem has been settling 19 cases out side of criminal justice system. The cases are included: Domestic violence, adultery, fights between villages, theft, inheritance, irrigation.

In FKPM there is no strict separation between civil and criminal dispute. For instance dispute within inheritance is actually the area of civil law. As long as the dispute parties agree, the case may be settled at FKPM.

The theft case above involved a teenager who stole a part of scale at a traditional market in Lasem. The boy was caught later by a villager when the boy offered the stolen good to be sold. The case was handed over to FKPM to be solved. A conference was held, the juvenile delinquent and his parents, the victim and FKPM members deliberated to discuss and find the best outcome of the case. The parents of the juvenile felt ashamed for what their son had done. Both the juvenile and the parents apologized to the victim. The victim accepted their apology since the victim sought merely an apology from the offender. Nevertheless, the delinquent parents insisted to give back a good with the same as the stolen thing i.e. a part of scale. Now, the boy is growing up and become a driver in Lasem.[32]

The same outcome for juvenile case settled within FKPM above would not be gained within traditional criminal justice system. Albeit a juvenile delinquent would have the same feeling i.e. ashamed if s/he is charged under criminal justice system, the shaming is a different kind

[30] Decree of Indonesian Police Chief No. Pol. Skep/433/VII/2006, p.11.

[31] Interview with Adjunct First Police Inspector (Aiptu) Hermanto, Head of Community Counseling Unit at Lasem Sector Police, Rembang, Central Java. 14 February 2013.

[32] Interview with Hermanto.

with shaming within a conference such in FKPM. This is probably in line with what Braithwaite called as re-integrative shaming which differs from disintegrative shaming within traditional criminal justice system. To understand the two different shaming above, I cite Braithwaite as follow:

> The crucial distinction is between shaming that is re-integrative and shaming that is disintegrative (stigmatization). Re-integrative shaming means the expression of community disapproval….are followed by gesture of reacceptance into the community of law-abiding citizens … Disintegrative shaming (stigmatization), in contrast, divides the community by creating a class of outcast (Braithwaite, cited in Gerry Johnston 2011: 99)

Furthermore Zehr described shame that mirrors traditional criminal justice system in this way:

> The shame that our criminal justice system reflects is a stigmatizing shame. It says that … what you did is bad, but you are also bad, and there is really nothing you can do… You will always be an ex-offender (Ibid: 98)

FKPM offers an integrative way of handling crime and an ADR (Alternative Dispute Resolution) in lieu of criminal justice system. The typical process of dispute settlement would be like this. Mostly, the case would be reported by victim to an FKPM member, FKPM follows up and analyzes the case, determines the interest parties that should be invited in FKPM. Usually the parties that attend the forum will be victim and his/her supporter, offender and his/her supporter (mostly the supporter is their family), a head and a secretary of FKPM and other FKPM member or parties if needed depending on the case. The forum is led by the head of FKPM as the mediator. If mediation ends up with successful mediation, the end of the process will be established by a joint decision as an agreement which mainly has three points: apologize, redress, and a promise there will be no reoffending. So far there is no record of failure mediation in Lasem, however, if the mediation ends up with a disagreement the case will be transferred into formal criminal justice system. Schematically, the whole process of ADR in FKPM is portrayed in scheme below:

4. Conclusion

From the categorization I mentioned earlier, FKPM may be categorized as voluntarily and diversionary system. Based its initial form, FKPM is close to conference. In addition, its dispute settlement process is actually rooted from Indonesian local wisdom, meaning it is not something that new for Indonesian people. So far FKPM can be considered as an effective means for implementing restorative justice in Indonesia based on police discretionary power as its legal basis.

References

Adam Crafword and Jo Goodey (Eds). *Integrating a Victim Perspective within Criminal Justice. International Debates.* Vermont. Ashgate Publishing. 2000.

Allison Morris and Gabrielle Maxwell (Eds). *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*. Oregon. Hart Publishing. 2003.

Daniel W. Van Ness and Karen Heetderks Strong. *Restoring Justice: An Introduction to Restorative Justice 4th Edition*. New Jersey. Anderson Publishing. 2010.

Dennis Sullivan and Larry Tifft (Eds). *Handbook of Restorative Justice.* New York. Routledge. 2008.

Gerry Johnstone. *Restorative Justice: Ideas, values, Debates 2nd Ed*. New York. Routledge. 2011.

Howard Zehr. *Changing Lens: A New Focus for Crime and Justice*. Canada. Herald Press. 2005.

Howard Zehr and Ali Gohar. *The Little Book of Restorative Justice*. 2003. (Downloaded from http://www.unicef.org/tdad/littlebookrjpakaf.pdf)

John Braithwaite. *Restorative Justice and Responsive Regulation*. New York. Oxford University Press. 2002.

Lyle Keanini. *ADR in Hawaii Courts: The Role of Restorative Justice Mediators*. 2011. 12. Asian-Pac. L. & Pol'y J. 174.

Mark Umbreit and Marilyn Peterson Armour. *Restorative Justice Dialogue, an Essential Guide for Research and Practice.* New York. Springer. 2011.

Norio Takahashi. *Restorative Justice and Treatment of Offenders*. Sonderdruck Aus. Menschengerechtes Strafrecht. Festschrift Fur Albin Eser Zum 70. Geburtstag. Verlag C.H. Beck Muncen. 2005

Steve Mulligan. *From Retribution to Repair: Juvenile Justice and The History of Restorative Justice*. University of LaVerne Law Review. 2009. 31.U.La Verve L. Rev.139.

Susan L Miller. *After the Crime. The Power of Restorative Justice Dialogues between victims and Violent Offender*. New York. University Press. 2011.

Decree of Indonesian Police Chief (Skep/433/VII/2006). www.anu.edu.au/fellows/jbraithwaite/lectures/index.php.Acesso July 2011.

Interviews:

Interview Brigade Police (*BrigPol*) Endin Nuryadin, head of administration of community counseling unit at Pandeglang Resort Police. 4 February 2013

Interview Adjunct First Police Inspector (*Aiptu*) Hermanto, Head of Community Counseling Unit at Lasem Sector Police, Rembang, Central Java. 14 February 2013.

Laïcité and the *affaires des foulard*
An analysis based on the work of John Rawls

Camila Sombra Muiños de Andrade[1]

Abstract: "How is it possible that there may exist over time a stable and just society, whose free and equal citizens are profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines?" This is the question that John Rawls seeks to answer in "Political Liberalism". Starting from the notion of the existence of a reasonable pluralism in comprehensive conceptions of the good (be these religious, philosophical or moral), Rawls concludes that the only possible point of agreement is the principle of tolerance. He understands that, for a democratic society to be stable over the long term, it cannot depend predominantly on coercion, but must be freely supported by citizens with a diverse range of views. This is the foundation of liberal tolerance, which forms part of Rawls' project for the construction of a just society. The plurality of comprehensive doctrines of the good, particularly when religious in nature, was specifically responded to in France: in the principle of French secularism, or laïcité. French secularism, one of the influences left over from the 1789 French Revolution and the consequent adoption of Republicanism, is related to the principle of formal equality, requiring that the State remain neutral when dealing with diverse religions. In the name of this idea, a series of restrictive legislative measures has been taken in France regarding the use of the Islamic veil, such as Law no. 228 of 15th March 2004, which bans from public schools religious symbols considered "overt", and Law 1192 of 2010, which outlaws the concealment of the face in public spaces, thereby affecting the use of so-called full-face veils, such as the burqa and the niqab. The question that guides this investigation is this: is the principle of laïcité, as evoked in this specific case, a consequence of the ideas of neutrality and liberal tolerance, like those understood by John Rawls, or a degeneration of them? This work seeks to analyse the issue of neutrality and liberal tolerance, centred, above all, on John Rawls' perspective. In seeking to clarify this issue, it sets out from the French debates about the use of Muslim veils in public spaces (the affaires des foulards), which are the product of the above-mentioned legislation. These debates provide evidence of the timeliness

[1] Master's student in Human Rights, University of São Paulo (*Universidade de São Paulo*: USP).

of this theme and provoke reflections about the demands of liberal tolerance and its potential configurations and limitations.

Keywords: Laïcité – Liberal Tolerance – John Rawls

Introduction

"How is it possible that there may exist … a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[2] This is the question that John Rawls seeks to answer in *Political Liberalism*.

Starting from this question, Rawls concludes that the only possible point of agreement is the principle of tolerance. He understands that for a democratic society to be stable over the long term, it cannot predominantly depend on coercion, but must be freely supported by citizens with a diverse range of views. This is the foundation of liberal tolerance, which forms part of Rawls' project for the construction of a just society.

This article seeks to analyse the theme of neutrality and liberal tolerance, particularly centred on the perspective of John Rawls in *Political Liberalism.* In seeking to investigate this issue, it considers the French debates about the use of Islamic headscarves in public spaces - the *affaires des foulards* -, which provide evidence of the timeliness of this theme and provoke reflections about the demands of liberal tolerance and its potential contours and boundaries.

I. Tolerance and neutrality in John Rawls

A. The fact of reasonable pluralism and tolerance

When constructing his idea of liberal tolerance in *Political Liberalism* Rawls begins with an assumption: the "fact of reasonable pluralism". This is the expression he gives to the observation that "the comprehensive diversity of religious, philosophical, and moral doctrines is not mere historical contingency, fated to disappear immediately, but

[2] RAWLS, John. *O liberalismo político*. São Paulo: WMF Martins Fontes, 2011, p. 157.

rather a permanent feature of the public culture of democracy".[3]By "comprehensive doctrines", we mean moral or religious beliefs or those otherwise present in society, the sources of varied ideas about what a valuable life is and how it should be lived.

For Rawls, this plurality is a social fact that arises from the limits of the burdens of judgement, in other words, from a situation in which reasonable people inevitably disagree about what constitutes the *summum bonum*. Such dissonance not only arises from ignorance or personal interests but is also a result of the exercise of human reason on free institutions.[4]

As Rawls himself notes, he departs from the tradition of political philosophy, marked by thinkers such as Plato, Aristotle and Bentham, who dwelt on a single, rational and reasonable good to be pursued by society.[5] Rawls does not theorize about the valid way of life, but asks himself this: given the fact of reasonable pluralism, how can the stability of democratic society be achieved, bearing in mind that consensus about the comprehensive doctrine that society should adopt is unattainable except by oppressive political means?

Moreover, Rawls does not seek any type of stability, such as that provided by a *modus vivendi*. As he explains, this term is used to designate "treaties between two states whose national objectives and interests place them in conflict". The author highlights the fragility of this type of agreement, in that respect for the treaty tends to come from States only when they consider it to be in their national interest. Once these circumstances alter, however, a breakdown may occur to the commitment undertaken.[6]

His concern is thus with achieving stability for particular reasons, that is, for moral reasons and not merely as a result of the use of force. In this sense, he concludes that the only possible point of reasonable agreement between two such doctrines, which remain stable even in the face of changes to the distribution of power, is the principle of tolerance.[7] This state position of tolerance, as Álvaro de Vita observes, is opposed to varieties of "perfectionism", a term used to designate doctrines that assume a pre-determined way of valuing life that must be pursued, whose

[3] RAWLS, John. *O liberalismo político*, p.43.
[4] RAWLS, *O liberalismo político*, pp.64-78.
[5] RAWLS, *O liberalismo político*, p.159.
[6] RAWLS, *O liberalismo político*, p.173.
[7] RAWLS, *O liberalismo político*, pp.169-177.

political consequence is the distribution of opportunities and resources and even the use of state coercion to achieve the pursued societal ideal.[8]

According to Rawls, the principle of tolerance, within an interpretation of the requirement for stability, is the object of an overlapping consensus. This concept, introduced in *Political Liberalism*, is based on the idea that several reasonable comprehensive concepts[9] may support the idea of justice for reasons internal to their doctrines.[10]

Based on this notion, the formulation of the stability of justice as equity is divided into two stages. Added to the common basis of the public justification of society, which stands on its own because it is grounded on the liberal principle of legitimacy (which requires that the exercise of political power meet the criterion of no reasonable rejection)[11], is the justification of overlapping consensus.[12]Besides the independent justification of the fact of reasonable pluralism, this division thus provides a justification that addresses such diversity.[13]

This tolerance argument occurs through a distinction made between reasons internal to the comprehensive doctrines and public reasons.[14] The idea is that a person may consider that their comprehensive doctrine is reasonable, while at the same time understanding that others may reasonably reject it. In this way, one's doctrine may not serve as a justification for public social coercion.

This concept of public reason has an implication for citizens: the duty of civility. This duty is an exact result of the idea that, "citizens

[8] VITA, Álvaro de. "Sociedade Democrática e Tolerância Liberal". In: *Novos Estudos* [online]. CEBRAP, n. 84, 2009, p. 62 [Viewed 05 August 2013]. Available from: http://dx.doi.org/10.1590/S0101-33002009000200005.

[9] By reasonable doctrines, one should understand those that accept a democratic constitutional regime and the idea of legitimate law related to it (RAWLS, *O liberalismo político*, p. 523).

[10] RAWLS, *O liberalismo político*, p.175.

[11] "our exercise of political power is fully proper only when it is exercised in accordance with a constitution, the essential of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable for common human reason" RAWLS, *O liberalismo político*, p. 161

[12] RAWLS, *O liberalismo político*, p. 161.

[13] RAWLS, *O liberalismo político*, pp. 165-177.

[14] In Rawls' definition, public reason is public in three ways: as the reason of citizens, it is the reason of the public; its subject is the public good concerning questions of fundamental political justice; and its nature and content are expressed in public reason, since it is determined by ideas and principles of the political concept of justice (RAWLS, *O liberalismo político*, p. 251).

must reason by public reason and be guided by the criterion of reciprocity, whenever constitutional elements and matters of basic justice are at stake." [15]

Rawls' *Political Liberalism* does not, therefore, apply to every single topic, but only to those related to the public political forum, referring to matters of basic justice and essential constitutional elements.[16] Rawls divides the contents of the public political forum into three content categories: "the discourse of judges in their decisions", the "discourse of government officials, especially chief executives and legislators" and "the discourse of candidates for public office and their campaign managers". [17] Thus, the theory of political liberalism addresses itself to people as citizens, and does not seek to interfere in every single domain of human life. It is only these fundamental themes of a political nature that must be guided by the ideal of public reason.

There remains, therefore, the arena for public discussion – the background culture – in which matters of public interest may be discussed based on comprehensive concepts of good.[18]

To achieve this ideal of tolerance, a certain type of state neutrality is necessary, as we shall see below.

B. Neutrality in Rawls

For Rawls the value of tolerance is therefore achievable through some form of state neutrality in relation to the several comprehensive doctrines of the good, guided by the duty of civility between citizens, who must justify fundamental political decisions based on the ideal of public reason.

This idea of liberal neutrality was attacked by MacIntyre, who asserted that liberalism does not constitute an independent tradition, through which matters of justice that involve conflicting traditions related to concepts of the good may be arbitrated, but rests, as do other traditions, on a concept of good in itself.[19] According to this point of view, the idea of tolerance based on liberal neutrality is tainted.

---

[15] RAWLS, *O liberalismo político*, introduction, LX.
[16] RAWLS, *O liberalismo político*, p.162.
[17] RAWLS, *O liberalismo político*, p. 525.
[18] RAWLS, *O liberalismo político*, pp.162-165.
[19]MacINTYRE, Alasdair. *Whose Justice? Which Rationality?* Notre Dame: University of Notre Dame Press, 1988, p. 346.

Brian Barry formulates a response to MacIntyre's assertions, questioning the idea that justice as impartiality, grounded in ideas of neutrality related to the several concepts of the good proposed by Scanlon and Rawls, is a fraud. Barry's central argument is that the required impartiality is second order, in the sense that it does not specify what concept of the good should be adopted. It is a neutral concept in the procedural sense and not substantive.[20] As an example, he asserts that, "justice as impartiality will have things to say about how the legislation or policy can be framed consistently with the demands of justice, but it is silent on the question of what the content of the legislation or policy should be." [21] He sums up by saying that there is a difference between that which may integrate individual beliefs and that which may serve as a justification for the organization of institutions in society. [22] Thus, in this idea of second order procedural impartiality, the values internal to the several concepts of the good are not questioned.

Álvaro de Vita states that one may respond to MacIntyre's criticism by making a distinction between the neutrality of justification and the neutrality of results. The latter involves the requirement that Liberal State politics do not favour any concept of the good. However, as the author notes, a politics of strict neutrality, in the sense of results, does not even enable the adoption of a principle of religious tolerance. Thus, egalitarian liberalism demands neutrality in terms of the justifications it refers to in matters of basic justice and essential constitutional elements.[23] This form of impartiality is based on a notion of pure procedural justice, explained by Rawls as the circumstances under which "in their rational deliberations, the parties do not consider themselves obliged to apply or subscribe to any principle of law or justice which is provided in advance".[24] It does not intend to be absolute neutrality, guided by the idea of the neutrality of results, precisely because this is unattainable.

What to say then about Michael Sandel's criticism, that liberalism, supported by the idea of neutrality in relation to comprehensive doctrines of the good, cannot offer an adequate response to important moral issues, such as abortion or even slavery, which in this regard depend upon a position? Sandel asserts that in these cases the priority of

[20]BARRY, Brian. *Justice as Impartiality.* Oxford, Clarendon Press, 1995.
[21]BARRY, Brian, *Justice as Impartiality*, p. 143.
[22]BARRY, Brian. *Justice as Impartiality*, p. 187.
[23] VITA, Álvaro de. "Sociedade Democrática e Tolerância Liberal", pp. 76-80.
[24] RAWLS, *O liberalismo político*, p.87.

the just over the good cannot be sustained.[25]

Rawls contests this claim and denies that public reason is too limited to address such issues. Regarding 19th century North American debates about slavery, for example, he states that the views of Lincoln (who, contrary to Douglas, did not understand that state politics must be neutral in relation to slavery, but considered it a moral evil) would be considered reasonable in terms of public reason, while those of Douglas would not, since only the former ensures the constitutional dimension of fundamental equal liberties.[26]

As Álvaro de Vita explains, all that the liberal neutrality norm requires is the possibility of justifying the validity of the principle in question rather than, in the case of religious tolerance, to presuppose the intrinsic superiority of any one specific religious concept.[27]

C. Liberal tolerance, its contours and boundaries

The idea of liberal tolerance forms part of John Rawls' project for the construction of a just society. As Thomas Nagel notes, the protection of both the rights of individuals and of pluralism, such as the guarantee of socio-economic equality, are interpreted by Rawls as expressions of human equality in relation to political and social institutions.[28] Precisely because they derive from the same foundation, the two pivots of Rawls' liberalism cannot be disassociated. In this sense, Álvaro de Vita explains that the value of liberal tolerance in Rawls is not merely the idea of non-interference associated with negative liberty, but is also dependent on matters of distributive justice. For this reason, the author notes that, more properly, it is an idea of effective liberty.[29]

Although John Rawls understands that the stability of a concept of justice depends on the realization of an ideal of tolerance, the definition of its contours and boundaries is not an easy task.

In this sense, R. Forst highlights an important aspect - the po-

[25] SANDEL, Michael J. *O liberalismo e os limites da justiça*. Translated by Carlos E. Pacheco do Amaral. Serviço de Educação e Bolsas. Calouste Gulbenkian Foundation, 2005.

[26] RAWLS, John. "A ideia de razão pública revisitada". In: *O liberalismo político.* São Paulo: WMF Martins Fontes, 2011, pp. 575-76.

[27] VITA, Álvaro de. *A justiça igualitária e seus críticos*. São Paulo: Martins Fontes, 2007, p.292.

[28]NAGEL, Thomas. Rawls and Liberalism. In: Freeman, Samuel (org).*The Cambridge Companion to Rawls*. Cambridge: Cambridge University Press, 2003, p. 65.

[29] VITA, Álvaro de. "Sociedade Democrática e Tolerância Liberal", pp. 64-66.

litical use of the concept of tolerance, that is, the attempt always to cast one's own proper behaviour as tolerant and to categorise that of the other as intolerant.[30]

Scanlon also points to another difficulty involving tolerance: the challenge to balance the desires of those who seek to protect potentially excluded groups and the intention to protect a workable system of tolerance (safeguarding it against erosion).[31] There are countless debates about this, such as those relating to the best way to deal with hate speech. Moreover, countries provide multiple responses, ranging from the American formula of not restricting hate speech, to the Brazilian framework for the crime of racism, which typifies intolerant demonstrations/behaviour.

Based on Rawls' theory, one should immediately refute the criticisms made by anti-liberal theorists, who understand that equivalence exists between the imposition on the whole of society of a particular group's comprehensive doctrine and the use of force motivated by the defence of liberal tolerance. Stephen Holmes points out the risks of such thinking:

> Attacks on the idea of neutrality have a sordid message. They imply that one form of "intolerance" is worth another. There is no difference between my imposing my beliefs on others by force and a democratic government forcibly preventing me from imposing my beliefs on others by force.[32]

Forst also demonstrates concern about the confusion between the two meanings of tolerance, and concludes:

> To call both points of view equally "intolerant" pre-supposes that there is no non-arbitrary, impartial way of drawing the boundaries of tolerance in the light of normative considerations of a higher

[30] FORST, Rainer. "Os limites da tolerância". In: *Novos Estudos* [online], CEBRAP, n. 84, July 2009 [Viewed 4 July 2013]. Available from: http://dx.doi.org/10.1590/S0101-33002009000200002.

[31] SCANLON, Thomas. *The Difficulty of Tolerance.* Cambridge: Cambridge University Press, 2003, p. 200.

[32] HOLMES, Stephen. The Permanent Structure of Antiliberal Thought. In: Roseblum, Nancy (org.). *Liberalism and the moral life.* Cambridge, Mass.: Harvard University Press, 1989, p. 245.

> order. However, for the concept of tolerance to be saved from this destructive paradox, such a possibility must exist; only then can the criticism of a possible action against "intolerance" be itself more than just another form of "intolerance". [33]

In this sense, the same author indicates that there are two forms of tolerance: the concept as permission, which is established against a minority by a majority in power, and the concept of tolerance as respect, in which the parties recognize each other, establishing a relationship of mutual respect. In the first case, he asserts that the boundaries of tolerance end up depending on the concept adopted by the majority, while the concept of tolerance with respect seeks to guide its contours and boundaries via a criterion of procedural justice, supported by the principle of the justification of justice, in the sense that institutions should be justified on grounds that others cannot reciprocally and generally reject.[34]

The concept of tolerance that Forst calls permission may, therefore, be associated with the *modus vivendi* referred to by Rawls, who considers it insufficient to guarantee the stability of a democratic society. The tolerance sought by Rawls is that informed by a relationship of respect between citizens, which intends to achieve the ideal of public reason, guided by the duty of civility. In this sense, names may change, but not the central ideas.

Once the issue of the anti-liberal claim of equivalence between the two forms of intolerance is confronted, how does one establish the boundaries of liberal tolerance? For Forst, such limits "must be placed where intolerance begins".[35] This also appears to be John Rawls' position:

> The conclusion, therefore, is that, although the intolerant sect does not have, in itself, the right to complain of intolerance, its liberty must only be restricted when the tolerant, with sincerity and reason, believe that their own safety, and the safety of the institutions of liberty, are in jeopardy.[36]

---

[33] FORST, Rainer. "Os limites da tolerância", p. 18.

[34] FORST, Rainer, "Os limites da tolerância", pp. 20-21.

[35] FORST, Rainer, "Os limites da tolerância".

[36] RAWLS, John. *Uma teoria da justiça.*Technical review, translated from English into Portuguese by Álvaro de Vita. São Paulo: Martins Fontes, 2008, p. 271.

For Rawls, therefore, it is not a simple fact of one group being intolerant, or defending types of intolerant action, that justify the employment of coercion against a group in question. Indeed, the intolerant must also be treated through this notion of mutual respect. As Álvaro de Vita notes, this idea of tolerance appears to be guided by John Stuart Mill's harm principle, that is, the idea that, through political or moral coercion, society may only interfere in such objectives so as to avoid harm caused to others.[37]

II. The French approach: *Laïcité*

The plurality of comprehensive doctrines of the good, particularly those of a religious nature, acquired a specific response in France: the principle of French secularism, or *laïcité*.

This value was not attained following philosophical reflections about the importance of religious liberty, but, as Dominic McGoldrick notes, is the product of centuries of a painful, and often violent, relationship between the State and the (Catholic) Church.[38]Looking at the history of this principle, Jean Glavany remembers that the first French secular text translated into law is the Declaration of the Rights of Man and the Citizen from 1789. This asserts that, "no man ought to be molested on account of his opinions, including his religious opinions, provided that his avowal of them does not disturb the public order established by law". Following this Declaration, one has to wait more than a century, until the Third Republic, when, as Glavany states,[39] the republican laws about public schools were established. Secularism in schools formed part of the measures by the Minister of Education, Jules Ferry (1881-82, 1886), for whom school ought to be an agent of assimilation through which a common language, culture and ideological formation is reached.[40] The end of the 19th century and the beginning of the 20th century were also marked by secular or non-confessional legislation: the divorce laws of

[37] VITA, Álvaro de. "Sociedade Democrática e Tolerância Liberal", p. 62.

[38] McGOLDRICK, Dominic. *Human Rights and Religion*: *The Islamic Headscarf debate in Europe*. Oxford and Portland, Oregon: Hart Publishing, 2006.

[39] GLAVANY, Jean., "La laïcité dans le droit". In: *Point d´Étape sur les travaux de l´Observatoire de la Laïcité* [online]. Observatoire de la Laïcité, 25 jun. 2013, pp.9-11 [Viewed 15 August 2013]. Available from: http://www.gouvernement.fr/premier-ministre/point-d-etape-sur-les-travaux-de-l-observatoire-de-la-laicite.

[40] SCOTT, Joan Wallach. *The Politics of the Veil*. Princeton: PrincetonUniversity Press, 2007, introduction, pp. 24-25

1884; the cemetery laws of 1887; and the laws about congregations of the 1st of July 1901 and 7th July 1904.[41]

Finally, secular law was enshrined in the 1905 law regarding the separation of Church and State.[42] Considered one of the pillars of the French Republic, *laïcité* acquired constitutional status in 1946. This is explained in a report about the "Application of the principle of *laïcité* in the Republic"[43], which asserts that although all democratic states respect freedom of conscience and the principle of non-discrimination through the separation of the political, the religious and the spiritual, France had elevated *laïcité* to the level of a founding value of the Republic.

French secularism cannot be defined simply as the separation of Church and State. This principle requires that specific cultures and religions are only expressed in the private sphere, since it considers that the public sphere should only contain free and equal individuals under the law. As Scott[44] observes, this means the State protects individuals against the interference of religions. In the United States, on the contrary, it involves the protection of religions from State interference. As the same author notes, *laïcité,* or the French version of secularism, is part of a universalism, which, paradoxically, is unique to French culture, to the extent that it can only be described as such in its original language.[45]

The first legal instruments inspired by *laïcité* addressed the relationship between the French State and the Catholic Church. Today, they principally address the relationship between the State and Islam, the second largest religion in the country, which involves new inspirations that claim to be guided by principle. Under these circumstances, the country has adopted a series of restrictive legislative measures related to the use of the Islamic headscarf.

It is worth providing a brief historical overview on this subject here.

In 1989, a French professor from Creil, a suburb of Paris, forbade three students of Maghreb origin from attending a class because they

[41] GLAVANY., "La laïcité dans le droit", pp. 9-11.

[42] Although the 1905 law did not use the word "*laïcité*", the noun "*laïc*" or the adjective "*laïque*", as Jean Glavany notes ("La laïcité dans le droit", pp. 9-11).

[43] COMISSION DE REFLEXION SUR L´APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA REPUBLIQUE. *Rapport au President de la Republique*, 2003, p. 9 [Viewed 10 April 2013]. Available from: <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

[44] SCOTT., *The Politics of the Veil*, pp.24-25.

[45] However, this did not prevent the state funding of religious schools.

were wearing the *foulard*, arguing that this offends the secular principle, considered one of the pillars of the French Republic.[46] This incident gave rise to a huge debate that mobilized several sections of society and inaugurated the "*affaire des foulards*", a series of controversies around the country regarding the use of the Islamic headscarf in public spaces.

In 2003, at the request of the then President Jacques Chirac, the Commission of Reflection on the Application of the Principle of Secularity in the Republic, also known as the Stasi Commission (in reference to its president Bernard Stasi), published the "*Laïcité* and Republic" report. One of the report's recommendations was the prohibition of the use of symbols of a religious or political nature in educational establishments.

In 2004, this recommendation was adopted into Law no. 228 of 15 March[47]. Under the legislation, religious symbols considered "ostentatious" were banned in public schools, based on the argument of state secularism. Through the legislation, the use of a range of types of Islamic headscarf (the *hijab* in Arabic, or *foulard* in French) were then banned in public schools, although they continued to be permitted in universities. Although the prohibition laid down in law covers "ostentatious religious symbols" and is not directly or literally aimed at the Islamic headscarf, the historical context from which it derives, as well as the debates that followed, have proved that limiting the use of the headscarf was most probably the French government's main objective. At the very least, it is undeniable that Muslim women were the most affected by the new law, so that the only recourse for those who refused to follow the new dictates were private educational institutions.

In recent years, government attention has specifically returned to the use of full-face veils (the *burqa* and *niqab*, which cover the wearer's face), extending its reach beyond educational institutions. France's hostility to the full-face veil becomes clear in the light of ex-President Nicolas Sarkozy's declaration on 22 June 2009, asserting in Congress that the "*burqa* is not welcome in France".[48] Finally, in 2010, France became the first country to mandate the prohibition of the use of the full-face veil in public spaces. Following approval by the two houses of Congress, the French Constitutional Council endorsed the bill and the legislation

[46] VAN EECKHOUT, Laetitia. "Rétrocontroverse 1989: la République laïque face au foulard islamique". *Le Monde*, 2 August 2007.

[47] Available from: http://www.legifrance.gouv.fr. [Viewed 4 July 2013].

[48] GABIZON, Cécilia. "Sarkozy: La burqa n'est pas bienvenue em France". *Le Figaro*, 25 June 2009.

came into force on 11 April 2011.[49] The new legislation stipulated a fine of 150 euro for non-compliance and provided for the offense of forced concealment of the face, referring to circumstances in which the full-face veil is worn under the duress of another, the penalty for which is imprisonment for one year or a fine of 30,000 euro.[50]

Far from the *affaires* ending with this law, they have continued to multiply. In April 2013, the French High Court, in what has since become known as the "Baby Loup" case, reignited discussions. This decision concerned the story of Fatima Afif, who worked in a private crèche until she was dismissed for insubordination and misconduct. Reversing the decisions of the lower courts, the Court found, on the contrary, that Fatima had been dismissed as a result of discrimination on the basis of her religious convictions. According to its report, this dismissal occurred when, following a period of parental leave, she returned to work wearing a headscarf.

Before reaching a consensus about the boundaries and requirements of *laïcité*, the decision was accompanied by a series of debates and proposals that aimed to further limit the use of the Islamic veil (in any of its forms, not only the full-face veil).[51]On this subject, President Hollande announced that a new law about ostentatious religious symbols was required. The intention was that the prohibition should be extended to private establishments, such as crèches, in situations where there is contact with children. At the same time, complaints from Muslim women that schools have prevented them from accompanying their children on school trips (to museums, libraries etc.), because they were wearing a headscarf, have multiplied. Although there is no law banning women in headscarves from participating in school trips, a note published in 2012 by the Sarkozy government's Minister of Education recommended that schools ensure public service neutrality on trips. The decision thus remains at the discretion of each school establishment. The protest group "Mamans Toutes Égales" was founded in response to the growing number of Muslim women prevented from accompanying their children on trips.

---

[49] LE PARLEMENT vote l'interdiction du voile integral. *Le Monde*, 14 September 2010.

[50]The debate about the use of the full-face veil in public spaces is not limited to discussions about the application of the principle of *laïcité* but involves arguments about the assertion of national identity, gender equality, and others. However, this work does not address these other perspectives.

[51]CHRISAFIS, Angelique. "France's headscarf war: 'It's an attack on freedom'". *The Guardian*, 22 July 2013.

Moreover, these proposals are not limited to the care and education of children. Hollande himself has suggested that a law may also be required to limit ostentatious symbols in private companies that have contact with the public. In April 2013, as a symbol of the topical nature of discussions related to the *laïcité* principle, the "*Laïcité* Observatory" was officially set up to support government policy decision-making. Although formally created in 2007, Observatory members were only named this year. In the months to come, it is expected to present a report about how to establish a new law that restricts the use of the headscarf and religious symbols in private crèches. The Observatory will also have to examine the proposal of the High Council for Integration (*Haut Conseil* **à** *l'intégration* - HCI) to extend to universities limitations on the use of religious symbols considered ostentatious.[52]

As Jean-Louis Schelegel suggests, from 1989 onwards, a new moment in the post 1905 history of *laïcité* in France has been observed, which may be characterised by religious visibility[53]. In fact, the principle has been the foundation of a number of measures to restrict the visibility of religious symbols, in particular the Islamic headscarf in all its various forms.

III. Rawls and *laïcité*

In the light of such events and with new legal instruments, one may ask whether the principle of *laïcité* is a requirement of the ideas of neutrality and liberal tolerance as understood by John Rawls.

For Catherine Audard, the response is negative. According to this author, French secularism is not compatible with Rawls' vision of tolerance, which requires a secular State, but one founded on a range of justifications. She claims that such liberalism does not require that religion be kept completely private, with no influence in public spaces, or that such influence be excluded from legislative debates.[54]

In the words of Milena Doytcheva, "If the secularization of public life is a feature common to all Western countries, France is one of those

[52] "Le port du voile à l'université remis en question". *Le Monde*, 5 August 2013.

[53]SCHLEGEL, Jean-Louis. "La laïcité irritée par la visibilité des religions". In: *Esprit*, v.5, 2011. ISBN: 9782909210964. ISSN : 10.3917/espri.1105.0080.

[54]AUDARD, Catherine. "John Rawls et les alternatives libérales à la laïcité". In: *Raisons politiques*,. Presses de Sciences Po, n. 34, 2009, pp.101-125. ISBN : 9782724631494. DOI: 10.3917/rai.034.0101.

countries that elevates to the highest degree the requirement of neutrality in relation to any particular religious or spiritual concept."[55]Jean Baubérot goes even further, in a discourse about how French secularism plays the role of a "secular religion"[56]:

> The ties between various forms of anticlericalism, from the most radical to the more moderate, and the French Revolution are moral as well as political. The rights of man, as proclaimed by the Revolution, appeared as nonreligious values, even antagonistic toward Catholicism, and Catholicism was the lens through which all religion was viewed at the time. Mona Ozouf demonstrated that, beyond mere political changes, the goal of the French Revolution was to regenerate the human being, to create a 'new man'. Therefore, it is not surprising that this reference to the founding age of the revolution has also taken on a quasi-religious dimension. The most ideological forms of French Republicanism can indeed be termed a 'secular religion'.

Álvaro de Vita appears to assume a similar position; he defines *laïcité* as a concept of comprehensive secularism extremely hostile to the expression of ethnic or religious identities within the public space[57]. In another text, the same author, referring to legislation adopted by the French State, asserts, "the ideal of liberal tolerance in no way requires a demand that Muslim women remove their headscarves to attend public school".[58]

In these terms, *laïcité* should not be understood as a requirement for Rawls' ideals in *Political Liberalism*. Indeed, Rawls' defence of tolerance does not involve strong secularism, since the author understands that this would also constitute a comprehensive doctrine of the good. Regarding these secular arguments, he states:

---

[55]Directly translated from the original French: "*Si la secularization de la vie publique est um trait commun* à l´ensemble des pays *occidentaux*, *la France est un des ces pays* élevant *au plus haut rang cette exigente de neutralité envers toute concept spirituelle ou religieuse particulière*." DOYTCHEVA, Milena. *Le multiculturalisme.* 2.ed. Paris: La Découverte, Repères, 2011, p.91. ISBN 9782707169341.

[56] McGOLDRICK, Dominic. *Human Rights and Religion*: *The Islamic Headscarf debate in Europe*, p.40.

[57] VITA, Álvaro de. "Sociedade Democrática e Tolerância Liberal", p. 66.

[58] VITA, Álvaro de. "A tolerância liberal". In: *A Justiça Igualitária e seus críticos*. São Paulo: Martins Fontes, 2007, p. 276.

> a central feature of political liberalism is that it views all such arguments in the same way as it views religious ones and, therefore, these secular philosophical doctrines do not provide public reasons. Secular concepts and reasoning of this kind belong to first philosophy and moral doctrine, and fall outside of the domain of the political.[59]

In *Political Liberalism*, Rawls views religions as reasonable doctrines. This is because he understands that his model of society requires support from citizens of faith in order for to be endowed with stability. This is reflected in several aspects of his idea of tolerance.

As well as the idea of "overlapping consensus", in the essay *The Idea of Public Reason Revisited*, he emphasizes that the justification of liberal tolerance does not require religions to be compatible with the idea of free faith, since they accept that the internal reasons of these doctrines are not public reasons, renouncing the desire to take the professed doctrine as a political model for the organization of society:

> While no one is expected to put his or her religious or non-religious doctrine in danger, we must each give up the hope of changing the Constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success.[60]

Along these same lines, Rawls raises the possibility that arguments based on reasonable comprehensive doctrines enter public discussions because, at the right moment, arguments come to be presented that serve the idea of public reason (what he calls the *proviso*). Thus, arguments that introduce religious vocabulary are not necessarily excluded from a notion of appropriate public reason.[61]

In Rawls' own words, the problem of *Political Liberalism* is to formulate "a political conception of justice for a constitutional democratic regime (liberal), which a plurality of doctrines, both religions and non-religious, liberal and non-liberal may endorse for the right reasons".[62]

---

[59] RAWLS, John. "A ideia de razão pública revisitada". In: *O liberalismo político.* São Paulo: WMF Martins Fontes, 2011, p. 543.

[60] RAWLS. "A ideia de razão pública revisitada", p. 546.

[61] RAWLS. "A ideia de razão pública revisitada", pp. 548-552.

[62] RAWLS. *O liberalismo político*, introduction, XLIII.

IV. Final Considerations

About half of the global population lives in democratic countries, although only 11% (eleven percent) reside in full democracies (research categorises nations according to this and three other regimes: flawed democracies, hybrid regimes and authoritarian regimes). This is the conclusion of the "Democracy Index 2011" report, which is based on the following aspects: the electoral process and pluralism, civil liberties, the functioning of government, political participation and political culture.[63]

Added to this data is a statement that political freedom and religious freedom do not always go hand in hand. As the magazine *The Economist*[64] observes, on the one hand there are democracies in which religious freedom is restricted, for example in India, a democracy that has "anti-conversion" laws, which prohibit the renunciation of Hinduism. On the other, there are secular dictatorships, which do not interfere in the religious freedom of minorities, although they adopt a harsh attitude in relation to political dissidents.[65] The Arab Spring appears to confirm this situation. There was hope at the beginning (the end of 2010, the beginning of 2011) that this would bring about a range of freedoms, including limits to restrictions about beliefs and religious practices, but this did not take place. A recent study by the Pew Research Center indicates that the already high levels of religious restrictions in that region of the Middle East and North Africa had further increased.[66]

In its study of religious freedom, the Pew Research Center's Fact Tank takes into account not only government restrictions but also social hostility to religion (manifest, for example, in violence and harassment). Based on these indicators, in 2009 the institution indicated that 70% (seventy percent) of the global population, 6.8 billion people, live

[63] ECONOMIST INTELLIGENCE UNIT. *Democracy Index 2011* – Democracy under stress. 2011 [Viewed 10 August 2013]. Available from: www.eiu.com.

[64] RELIGIOUS FREEDOM. Too many chains - Two centuries after the French and American revolutions, and 20 years after Soviet communism's fall, liberty of conscience may be receding again. *The Economist*, 17 December 2009.

[65] On this topic, reports at the time (2009) cited the example of Christians living in Syria, where they had greater freedom than in neighbouring countries.

[66] PEW RESEARCH CENTER. *Arab Spring Adds to Global Restrictions on Religion* [online]. Religion & Public Life Project, 20 June 2013 [Viewed 10 August 2013]. Available from: http://www.pewforum.org/2013/06/20/arab-spring-restrictions-on-religion-findings/.

in countries with high restrictions on religion, which tends to affect religious minorities.[67] In August 2011,[68] the organization published a new report, which confirmed that more than 2.2 billion people, about one third of the world's population, live in countries where a substantial increase in religious restriction was observed between the middle of 2006 and the middle of 2009. Most of the fourteen countries that recorded the greatest government restrictions over this period were in the Middle East or North Africa, but two European countries were also included in the group, France[69] and Serbia. It is also worth noting that Europe was the region with the highest growth in social hostility over this period – five of the ten countries that manifest this tendency are European: Bulgaria, Denmark, Russia, Sweden and the United Kingdom. Substantial growth in some form of religious restriction was therefore observed in democratic countries with a high level of human development.

In John Rawls, we encounter a proposal to guarantee the freedoms of thought, conscience and religion: the idea of liberal tolerance, the guiding principle of his *political liberalism.*

This is not, however, an easy task. The challenge of tolerance is ongoing, continuously gaining new and specific contours. In many countries today, this occurs because of high levels of immigration, and many controversies come about when Islam is at the centre of the debate, such as those relating to the Islamic headscarf or the construction of minarets.[70] Furthermore, there is a specific difficulty associated with Rawls' tolerance: the ideal does not prescribe a recipe to follow. For this

[67]PEW RESEARCH CENTER. The Pew Forum on Religion and Public Life. *Global Restrictions on Religion* [online], December 17, 2009 [Viewed 10 August 2013]. Available from: http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx.

[68] PEW RESEARCH CENTER. The Pew Forum on Religion and Public Life. *Rising Restrictions on Religion:* One third of the world's population experiences an increase [online], Global Religious Futures Projects, August 2011 [Viewed 15 August 2013]. Available from: http://pewforum.org/uploadedFiles/Topics/Issues/Government/RisingRestrictions-web.pdf.

[69]In the case of France, as well as restrictions to the use of the veil in public spaces, the report cites the pressure from the French government in relation to religious groups that are considered cults, such as the Scientologists. In a case involving the Church of Scientology, a public prosecutor advocated for its criminal nature to be declared (The Pew Research Center, *Rising Restrictions on Religion,* p. 20).

[70] In 2009, following a huge debate, a referendum was held in Switzerland in which the majority of voters approved the banning of the construction of minarets (the towers of Islamic mosques) in that country.

reason, the construction of a tolerant society is a perpetually unfinished process, which demands a case-by-case delineation of the contours and boundaries of tolerance. It is a process guided by an idea of procedural justice, supported by the ideal of public reason, which does not indicate what should be decided but how to conduct the decision-making process.

Scanlon acknowledges that there are many risks and difficulties linked to the politics of tolerance. Despite this, the author still believes in this principle. Other alternatives, he concludes, leave us in a position of antagonism or alienation in relation to other citizens.[71]

References

AUDARD, Catherine. "John Rawls et les alternatives libérales à la laïcité". In: *Raisons politiques*, *Presses de Science Po*, n. 34, 2009. ISBN : 9782724631494. DOI: 10.3917/rai.034.0101.

BARRY, Brian. *Justice as Impartiality*. Oxford, Clarendon Press, 1995.

CHRISAFIS, Angelique. "France's headscarf war: 'It's an attack on freedom'". *The Guardian*, 22 July 2013.

COMISSION DE REFLEXION SUR L´APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA REPUBLIQUE. *Rapport au President de la Republique*, 2003 [Viewed 10 April 2013]. Available from: <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.

DOYTCHEVA, Milena. *Le multiculturalisme*. 2.ed. Paris: La Découverte, Repères, 2011. ISBN 9782707169341.

ECONOMIST INTELLIGENCE UNIT. *Democracy Index 2011* – Democracy under stress. 2011 [Viewed 10 August 2013]. Available from: www.eiu.com.

FORST, Rainer. "Os limites da tolerância". In: *Novos Estudos* [online], CEBRAP, n. 84, July 2009 [Viewed 4 July 2013]. Available from: http://dx.doi.org/10.1590/S0101-33002009000200002.

GABIZON, Cécilia. "Sarkozy: La burqa n'est pas bienvenue em France". *Le Figaro*, 25 June 2009.

GLAVANY, Jean., "La laïcité dans le droit". In: *Point d´Étape sur les travaux de l´Observatoire de la Laïcité* [online]. Observatoire de la Laïcité, 25 jun. 2013 [Viewed 15 August 2013]. Available from: http://www.gouvernement.fr/premier-ministre/point-d-etape-sur-les-travaux-de-l-observatoire-de-la-laicite.

[71]SCANLON, Thomas. *The Difficulty of Tolerance*, 2003.

HOLMES, Stephen. The Permanent Structure of Antiliberal Thought. In: Roseblum, Nancy (org.). *Liberalism and the moral life.* Cambridge, Mass.: Harvard University Press, 1989.

LE PARLEMENT vote l'interdiction du voile integral. *Le Monde*, 14 September 2010.

LE PORT du voile à l'université remis en question. *Le Monde*, 5 August 2013.

MacINTYRE, Alasdair. *Whose Justice? Which Rationality?* Notre Dame: University of Notre Dame Press, 1988.

McGOLDRICK, Dominic. *Human Rights and Religion*: *The Islamic Headscarf debate in Europe.* Oxford and Portland, Oregon: Hart Publishing, 2006.

NAGEL, Thomas. Rawls and Liberalism. In: Freeman, Samuel (org).*The Cambridge Companion to Rawls*. Cambridge: Cambridge University Press, 2003.

PEW RESEARCH CENTER. *Arab Spring Adds to Global Restrictions on Religion* [online]. Religion & Public Life Project, 20 June 2013 [Viewed 10 August 2013]. Available from: http://www.pewforum.org/2013/06/20/arab-spring-restrictions-on-religion-findings/.

_____. The Pew Forum on Religion and Public Life. *Global Restrictions on Religion* [online], December 17, 2009 [Viewed 10 August 2013]. Available from: http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx.

_____. The Pew Forum on Religion and Public Life. *Rising Restrictions on Religion:* One third of the world's population experiences an increase [online], Global Religious Futures Projects, August 2011 [Viewed 15 August 2013]. Available from: http://pewforum.org/uploadedFiles/Topics/Issues/Government/RisingRestrictions-web.pdf.

RAWLS, John. *O liberalismo político*. São Paulo: WMF Martins Fontes, 2011.

_____. *Uma teoria da justiça.* Technical review, translated from English into Portuguese by Álvaro de Vita. São Paulo: Martins Fontes, 2008.

RELIGIOUS FREEDOM. Too many chains - Two centuries after the French and American revolutions, and 20 years after Soviet communism's fall, liberty of conscience may be receding again". *The Economist*, 17 December 2009.

SANDEL, Michael J. *O liberalismo e os limites da justiça.* Translated by Carlos E. Pacheco do Amaral. Serviço de Educação e Bolsas. Calouste Gulbenkian Foundation, 2005.

SCANLON, Thomas. *The Difficulty of Tolerance.* Cambridge: Cambridge University Press, 2003.

SCHLEGEL, Jean-Louis. “La laïcité irritée par la visibilité des religions”. In: *Esprit*, v.5, 2011. ISBN : 9782909210964. ISSN : 10.3917/espri.1105.0080.

SCOTT, Joan Wallach. *The Politics of the Veil*. Princeton: PrincetonUniversity Press, 2007.

VAN EECKHOUT, Laetitia. “Rétrocontroverse 1989: la République laïque face au foulard islamique”. *Le Monde*, 2 August 2007.

VITA, Álvaro de. *A justiça igualitária e seus críticos*. São Paulo: Martins Fontes, 2007.

VITA, Álvaro de. “Sociedade Democrática e Tolerância Liberal”. In: *Novos Estudos* [online]. CEBRAP, n. 84, 2009 [Viewed 05 August 2013]. Available from: http://dx.doi.org/10.1590/S0101-33002009000200005.

Can one dispense with the idea of social contract as parameter for a relevant theory of justice?
Some disadvantages of Amartya Sen's Comparative Approach

Fábio Creder

Abstract: In The idea of justice, his 2009 work, Sen sets out a biting critique of modern political theories grounded on the idea of social contract, especially that of John Rawls, whose approach to distributive justice is among the most notable examples of this trend. In this paper, I intend to examine the merits of Sen's critique to the Rawlsian contractarianism, to which he opposes an approach supposedly focused not on the transcendental identification of the ideal justice, but in comparing the empirical results of the attempts to fight the phenomena of remediable injustice we face on a daily basis.

Sen's critique clearly has several merits, but one needs to question the possibility of a political theory to conceive the basic structure of a society without a minimal conception of social contract. Sen's theory of justice, marked by the characteristic dynamism of the economic thought, with his comparative method, focused on the achievements actually viable in actual societies, probably lacks elements that enable the design of a minimum institutional structure for a state in constitutional stage. It seems, moreover, that the Rawlsian doctrine is essentially a theory of constitutional law, and as such is to be interpreted.

Thus, the hypothesis I would like to come up with in this paper, suggests that Sen's approach, despite its laudable pragmatism, rather than being an alternative to the Rawlsian theory of justice, would be better considered its important, and even indispensable complement. I intend to show that contractarianism, especially the Rawlsian version, satisfactorily fulfills the task of being a kind of regulative principle of social justice in a given society. But its claims to "perfection" (in Sen's words) must be offset by an impartial and objective analysis of concrete situations of the concerned societies, and of the viable accomplishments towards an effective advance of justice, although precarious, because reality always imposes limits on our most noble aspirations. The method best suited to such an analysis seems to be, in fact, as Sen wants, the comparative; but its application does not exempt the adoption of a more abstract theoretical framework, as proposed by Rawls. Rather, I think that, in fact, it presupposes it.

1

In his 2009 book, *The Idea of Justice,* Amartya Sen outlines a biting analysis of modern political theories grounded on the idea of social contract, especially that of John Rawls, whose approach to distributive justice in the work *A Theory of Justice* constituted a new paradigm among contractual contemporary theories.

In this paper, I intend to examine the merits of Sen's critique of the social contract theories in general, and specially the Rawlsian one. To these theories, he opposes the approach supposedly focused not on the design, or transcendental identification of the ideal of justice, but on the comparison of the empirical results of attempts to fight remediable injustice phenomena with which we encounter every day.

As we shall see, Sen's critique clearly has several merits, but it is natural to question the possibility of a political theory to design the basic structure of a society dispensing with some minimal conception of the social contract. Sen's theory of justice, marked by the dynamism characteristic of the economic thought, with its comparative method, focused on achievements effectively viable in societies such as we deal with nowadays, probably lacks elements that enable the design of a minimal institutional structure to a State under constitution.

Therefore, the hypothesis I would like to suggest in this paper, proposes that Sen's approach, despite its laudable pragmatism, rather than appear to be an alternative to Rawls's theory of justice would be best considered its important and even essential complement.

2

A leitmotif runs through the work in which Sen outlines his theory of justice: the idea that what moves us to act against injustice is not the realization that the world fails to be complete fair, but the fact that the injustices we want to eliminate are clearly eliminable. It is not, therefore, the frustration of a desire perhaps impossible to be satisfied that moves us to action, but the recognition that there are injustices whose abolition is possible.

That is why Amartya Sen argues categorically for identifying eliminable injustices as the crucial element of a theory of justice. His goal is, consequently, quite accurate. He does not want to know, or to conceive, the nature of the perfect justice. Hence, certain difficult issues

that have been placed on this issue, especially in the theories of justice prevalent in contemporary political philosophy, does not seem to him worthy of the effort to answer them. Indeed, according to Sen, other are the questions we must answer. They do not inquire what constitutes the perfect justice, but what is within our reach to do in order to promote justice and eliminate injustice.

3

Sen emphasizes particularly three differences between the kind of theory of justice which he endorses and the one to which the other theories of justice still prevalent today are affiliated (cf. Sen, 2010 [2009], p. ix-xi).

The first relates to *fitness to serve as the basis of practical reasoning.* Theories of justice that only aims to characterize perfectly just societies are unable to serve this purpose. Only a theory of justice that includes *ways of judging how to reduce injustice and promote justice* can serve as the basis of practical reasoning.

There are therefore two antagonistic exercises underlying each of these kinds of theory. One consists in identifying perfectly just social arrangements, and the other in *deciding whether certain social change promotes better or not justice.*

Sen considers the exercise inherent to the second type of theory to be central to decision making about institutions, behaviors and other determinants of justice, and that the process by which such decisions are deliberate are crucial for a theory of justice that intends to guide practical reasoning about what should be done. This is a *comparative* exercise, which, according to Sen, does not depends absolutely on prior identification of the requirements of the perfect justice.

Secondly, Sen recognizes that although is effectively possible to solve many comparative questions of justice, so one can reach, about them, an agreement based on reasonable arguments; there are comparisons in which conflicting considerations cannot be completely resolved. Sen argues for the possibility of several distinct reasons of justice being able to survive a critical scrutiny, and, nonetheless, producing differing conclusions.

Thirdly, Sen notes that the presence of a remediable injustice might not be associated with institutional deficiencies, but with *behavioral transgressions,* since the idea of justice is concerned, above all, with

the way people live, and not merely with the nature of institutions that make up the basic structure of their society.

In contrast, the contemporary theories of justice Sen objected consider crucial the objective of establishing *just institutions,* attributing to behavioral aspects a merely ancillary and derivative role.

Rawls's approach of justice as fairness, for example, would produce a peculiar set of principles of justice whose purpose is to establish just institutions that constitute the basic structure of the society, presuming that the behaviors of its members are impeccably suited to the demands of the proper functioning of these institutions.

The theory of justice advocated by Sen seems to consider naive this emphasis on institutions, as well as the presumption that people's behaviors are properly docile to their demands. What instead we need to emphasize, according to Sen, are the lives people are able to live. The focus on real life in the evaluation of justice would have thus many broad implications for the nature and scope of the idea of justice.

The use of the comparative approach adopted by Sen's theory of justice would have the great merit of transcending the limited and limiting structure of the social contract, in engaging in the making of comparisons of the practices of promotion of justice.

4

Sen dates back both his approach to justice, as those against which he opposes, to the two basic and divergent lines of reasoning about justice arising in the context of the European Enlightenment, to which he calls, respectively, *transcendental institutionalism* and *comparative approach focused on realization.*

Transcendental institutionalism, according to Sen, would assume primarily the task of identifying just institutional arrangements to society, and two basic characteristics would distinguish it. The first would be precisely the focus on the identification of the perfect justice, and not on relative comparisons of justice and injustice. The second, in turn, would concern to the fact that, in the pursuit of the perfect justice, the focus is on obtaining the correctness of institutions, rather than on the actual societies that would eventually emerge. According to Sen, both characteristics refer to the "contractarian" way of thinking inaugurated by Hobbes and developed by Locke, Rousseau and Kant.

A hypothetical "social contract", presumably chosen, is clearly

worried about an ideal alternative to the chaos that otherwise could characterize a society, and the main contracts discussed by the authors dealt mainly with the choice of institutions. The overall result, according to Sen, would have been the designing of theories of justice focused on the transcendental identification of ideal institutions.

In stark contrast to the transcendental institutionalism, Sen proposes that other theorists of the Enlightenment adopted comparative approaches, concerned with social realizations. Versions of this comparative thinking would be found, especially in the works of Adam Smith, Condorcet, Jeremy Bentham, Mary Wollstonecraft, Karl Marx and John Stuart Mill. Although these authors, with their ideas so different from the demands of justice, have proposed ways completely different of doing social comparisons, Sen assumes that all were involved in comparisons of societies that existed or could feasibly arise. They would be concerned with comparisons focused on realizations, and would be interested in removing manifest injustices in the world as it actually is.

For Sen, the distance between these two approaches is quite significant. Would have been on the transcendental institutionalism that contemporary political philosophy leaned on its exploration of the theory of justice.

5

The contractarian approach has been, therefore, according to Sen, the predominant influence in contemporary political philosophy, especially since the publication in 1958 of the article by John Rawls, "Justice as fairness", that preceded his definitive statement on this approach in the classic work, *A Theory of Justice*, in 1971.

That is the reason why Sen dedicates a significant place in his analysis of the idea of justice to an understanding of some fundamental aspects of the Rawlsian work, whose conception that justice must be considered according to the requirements of fairness Sen regards the better achieved example of what is essential to a proper grasp of the subject.

Indeed, Sen emphasizes the value of the Rawlsian perception that fairness, whose most striking feature is impartiality, appears to be the crucial aspect of justice, substantiated in the requirement of equal consideration of interests of all the people involved, and therefore in the zeal to avoid the precedence of any interests, priorities, eccentricities or

particular prejudices.

The notion of fairness, in the core of which lies the need of avoiding bias in evaluations and actions, would be for Rawls, as Sen points out, even more important than the development of the principles of justice.

Rawls expresses the primacy of equity through the famous artifice of the *original position,* whose most striking feature is the effort to devise a way for individuals in a given society to be willing to cooperate with each other, although adhering to "comprehensive doctrines" as disparate as reasonable. Rawls thought that, despite, for example, their religious convictions and several overviews of what constitutes a good life, the citizens of a polity would be able to share a minimum political conception of justice allowing them to elect, in an entirely consensual manner, a set of principles of justice, reputed fair by every reasonable members of the group. Such principles would guide the choice of the elementary social institutions that would constitute the basic structure of this original society, as well as of every subsequent social arrangements.

Sen said to be skeptical about the Rawlsian proposition of a necessity of unanimous choice of a particular set of principles essential to the constitution of a society completely fair.

According to Sen, there are general concerns genuinely plural, and sometimes conflicting, which support an understanding of justice in whose core is rationality, fairness and equity. This fact, according to Sen, radically undermine Rawls' theory and determine its abandonment.

Perhaps one can synthesize Sen's critique to transcendental idealism in general, and to the Rawlsian social contract theory in particular, highlighting what he calls "the problem of the starting point".

Sen thinks that the question of contemporary theories of the social contract, which is "What institutions would be perfectly fair?" is inherently flawed. The question we should put first is "How would you promote justice?"

To start from a pragmatic concern with the effectively possible realizations, instead of with just institutions and rules, would require a radical change in the way we formulate theories of justice. Nevertheless, it would respond to what Sen considers the two basic problems of the social contract theories, namely the problem of viability and the problem of redundancy of searching for an abstract or transcendental solution.

The problem of viability is the fact that there can be no reasonable agreement, even under strict conditions of impartiality and unbiased analysis (e.g., as identified by Rawls in his "original position"),

over the nature of the "just society".

Sen insists that there can be serious differences between the competing principles of justice capable of surviving a critical scrutiny and having claims of impartiality. According to him this is a very serious problem, for example, for the Rawlsian assumption that there will be a unanimous choice of a single set of "two principles of fairness" in a primary hypothetical situation of equality *(original position),* where people ignore their own subjective interests. This assumes that there is only one kind of impartial argument able to satisfy the demands of justice, stripped of personal interests. Sen believes that this may be an error.

If a diagnosis of perfectly just social arrangements is hopelessly problematic, says Sen, then that will deeply affect the whole strategy of the theories of the social contract, even if every conceivable alternative in the world was available. For example, the two principles of justice in Rawls' classic investigation of "justice as fairness" is precisely about institutions perfectly fair in a world where all alternatives are available. However, what we could not know is if the plurality of reasons of justice would allow a single set of principles of justice to arise in the original position. Rawls theory of social justice, which proceeds gradually through the identification and establishment of just institutions, would then be stuck at its very base.

The problem of redundancy, in turn, supposes that an exercise of practical reason involving a real choice requires a framework to compare justice (without which it would be impossible to choose between viable alternatives), rather than an identification of a perfect situation, possibly unavailable, which we could not transcend.

6

Probably we will take some time to fully assimilate and properly understand the novelty of Sen's approach. Hilary Putnam has not exaggerated when he said that *The idea of justice* is the most important contribution to the subject since *A Theory of Justice.*

Rawls's work inaugurated a new phase in the social contract theories. Sen's criticism of the social contract theories might have, for a long time, a similar effect to that caused by the critique once formulated by Hume, but is not likely to determine the decline of such a solid tradition as that of the social contract.

Indeed, in order to respond to the many criticisms addressed to

it throughout history, the social contract tradition has undergone very important transformations that allowed it to retain relevance. The main one was to move from an emphasis on consent to an emphasis on agreement, thereby distinguishing the question of what generates political obligation (which was the main concern of the *consent* tradition of the social contract way of thinking) from the question of what constitutional orders or social institutions are mutually beneficial and stable over time. Therefore, there was a shift from an emphasis on individual obligation to an emphasis on social or public morality.

The central idea of the contemporary theories of the social contract is therefore *agreement*, and the act of making an agreement indicates what reasons we have. If individuals are rational, that about which we agree reflects the reasons we have.

In contemporary theories of the social contract, such as Rawls', the problem of justification thus becomes central. The revival of the social contract theory by Rawls in *A Theory of Justice,* therefore, does not derives obligations from consent, although the apparatus of an "original agreement" persists.

The social contract in contemporary moral and political theory, therefore, is an attempt to solve a justificatory problem converting it into a deliberative problem. At its core is the "question of justification."

Justifying social arrangements requires demonstrating that all citizens have favorable reasons to these arrangements. This would be an unnecessary requirement if the reasons of the citizens fully converge. It is because citizens have various reasons that it is necessary to justify social arrangements demonstrating that all citizens *ideally* have reasons favoring these arrangements.

The social contract is inevitably hypothetical, abstract, ideal (or, to use the term dear to Sen, transcendental), but it is an abstraction whose purpose is to illustrate an argument, justify it, provide reasons. The fact that it is a rhetorical device does not make it irrelevant, but just the opposite: makes it a valuable tool for public discussion.

It seems to me that the social contract theory, namely the Rawlsian one, function as a kind of necessary regulative principle of social justice in a given society. But their claims of "perfection" (in the words of Sen) must be compensated by an impartial and objective analysis of the concrete situations of the societies concerned, and of the realizations that can be achieved towards an effective advance of justice, however precarious, because reality always imposes limits on our most noble intentions. The method most suitable for such an analysis seems to me, in

fact, as Amartya Sen wants, to be the comparative one, but its use does not exempt the adoption of a more abstract theoretical framework, as proposed by Rawls. Rather, I think it, in fact, assumes it.

The voice under arrest in *The Queen of the Prisons of Greece*, by Osman Lins:
An analysis of Paul Ricoeur´s concepts of subject of right and of narrative identity

Hilda Helena Soares Bentes[1]

Abstract: The article aims to analyze the constitution of a subject of rights capable of respect and esteem through the concepts of capacity and of narrative identity elaborated by Paul Ricoeur. It intends to evaluate the capable, emancipated human being, the self that has an ethical and moral dimension and that is susceptible of ethical and juridical imputation, as it is explained in the text "Who is the subject of rights?", in the book The Just, as well as in Oneself as another. Ricoeur leads the discussion to the level of the ethical recognition, way of identifying the other as a person worthy to be regarded as a human being. Ricoeur emphasizes the role of protagonist that the capable man or woman performs in the narrative of his history. The passage to the narrative identity implies the idea of otherness and the contrivance of a narrative dimension that characterizes man or woman as the protagonist of his (her) history and of a people. Ricoeur´s The course of recognition constitutes the theoretical basis to interweave narrative identities, besides Oneself as another, a necessary reference insofar that the hermeneutical of the self aims to point out the individual´s identity marks in the narration of his existence. An intersection between philosophy and literature is proposed as a way of capturing the literary representation deviced by Osman Lins in The queen of the prisons of Greece, particularly in the character of Maria de França, symbol of the poor and defenseless woman interpreted from an educated man´s point of view. The literary interpretation exposes a plot of divergent narratives, although deeply intermingled, that expresses the tension of the lack of recognition, the main point articulated in this reading.

Keywords: Subject of Right; Capacity; Narrative Identity.

[1] Professor in the Graduate School of Law at the Catholic University of Petrópolis (UCP, Brazil). E-mail: hildabentes@uol.com.br

Introduction

The aim of this paper is to examine the constitution of a subject of right capable of respect and esteem through the concepts of capacity and of identity narrative elaborated by Paul Ricoeur. The work will follow the formation of the capable man as explained in the text "Who is the subject of rights?", in *The just* , as well as in *Oneself as another*. We will see that Ricoeur leads the discussion to the level of the ethical recognition, way of identifying the other as a person worthy to be regarded as a human being. Indeed the analysis of *"the man who speaks"* ("Who is it that is speaking?") and of "the man who narrates" ("Whose story [or history] is this?") (Ricoeur 1996, p, 164; 2000, p. 2) establishes a grammar of the capable human being, as such described in *The course of recognition* (2005, p. 93), in the elaboration of the hermeneutical levels of the self. Ricoeur emphasizes the role of protagonist that the capable man or woman performs in the narrative of his (her) story (history). The notion of *capacity* constitutes then the central theoretical framework for the comprehension of the formation of man, and it will be examined in the second part of this paper.

The passage to the narrative identity implies the idea of otherness and the contrivance of a narrative dimension, historical and transformable, that characterizes man or woman as the protagonist of his (her) story (history) and of a people. Ricoeur´s *The course of recognition* represents the theoretical basis to interweave narrative identities, besides *Oneself as another*, a necessary reference insofar the hermeneutical of the self seeks to underline the individual´s identity marks in the narration of his existence.

An intersection between philosophy and literature is proposed as a way of capturing the literary representation conceived by Osman Lins in *The queen of the prisons of Greece*[2], particularly in the character of Maria de França, symbol of the poor and defenseless woman interpreted from an educated man´s point of view. The literary composition exposes a plot of divergent narratives, though deeply intermingled, that expresses the tension of the lack of recognition, the main point articulated in this reading.

A connection between philosophy, literature, and expanding to the domain of law, reveals the importance of the interdisciplinary approach as a possibility of better understanding the humanities and the

[2] The title in Portuguese is *A rainha dos cárceres da Grécia* (2005).

social phenomena. The first part of the development will discuss the relation between philosophy, law and literature in order to consider literature as an artistic expression of the existential problems, a way of highlighting the human being exploitation and, at the same time, of building a humanistic conception of life.

Maria de França´s misfortune, deprived of a legitimate speech, is crossed with the narrator´s, who fails to allow the narrative experience to reach its goal, that is, the movement of communication of the self and the other, in a unique meeting of reception and recognition. This reflection seeks the emergence of a subject capable of inscribing his role in society, with ability to deliberate, as a basic existential condition for the improvement of the intellect and the vocation of politics. The main purpose is therefore to discuss the promotion of the human rights and of the identity questions involving people and groups traditionally excluded from the great narratives constructed by recognized subjectivities. The topics mentioned above will be developed in the second and third part of this paper, respectively.

The examination of the literary text has ultimately the purpose of underlining the social injustices and inhumanities that the people, deprived of the power of speaking according to the cultural patterns, are submitted.

1. The theoretical, literary and juridical relation: its limits and extent

To trace the frontiers between philosophy, literature and law is not an easy task. They represent different fields of knowledge and present specificities that sometimes are considered antagonistic. Furthermore it is important to point out that it has always existed a quarrel between philosophy and literature, conducted in a decisive way by Plato in *The Republic*, by expelling the poets and the tragedians from the political community (*Politeía)*, conceived upon an educational model based on a rational method that enables man to develop his cognitive potentialities (Platão 1996, book X, 605d, pp. 472-473[3]; Havelock, 1998, p. 3-15).

However Plato does not succeed in disguising the visible signs of his irresistible vocation to poetry, as demonstrated in his dialogues. Xavier Zubiri affirms that the philosophers exercise their minds whereas the tragedians the *páthos*, saying that "we can say that while the phi-

[3] The version chosen in this paper is the Portuguese one.

losophers´ work is the noetic form of Wisdom, the tragedy represents the pathetical form of Sophia." (1974, p. 92).[4] In the same way Aristotle, in the *Poetics* (1966), reveals the philosophical dimension of the tragedy declaring that "poetry is something more philosophical and serious than history since that refers to the universal and this to the particular" (1966, 1451b, p. 78; Nussbaum 1995, p. 5).[5] It is precisely at the frontier between poetry and philosophy that the Greeks shape a constellation of beautiful ideas and forms.

Therefore literature can be a powerful instrument to decipher the human condition, which constitutes a valuable resource to understand the human rights in a liberating and emancipating conception (Fachin 2007, p. 19). In this aspect, the juridical speech connected to a literary text is on the route[6] to reveal the incongruities of the State policies and the clamors for justice, derived from a political and juridical system still predominantly unjust. Nevertheless it is important to observe that the literature has its own artistic particularities; so it shall not be interpreted as an ideological speech or as a repository of legal terms.

Literature is essentially liberating and surpasses the limits of an instrumental conception. Indeed literature goes beyond the commonly notions established between literature and philosophy. Literature should be understood as the right to literature, as proposed by Antonio Candido (2011, pp. 171-193), that is, a right that cannot be removed from the process of education. The right to literature leads to the discovery of the obscure reasons that make men practice so many iniquities. For this reason it is deeply related to the human rights. According to Antonio Candido, we still live in a time characterized by barbarism (2011, p. 172-173), so it is necessary that human rights must be considered in relation to the otherness; without the other as a reference, any attempt to speak about human rights will be fruitless.

As a literary critic, Antonio Candido conceives literature per-

[4] In Spanish: "Puede decirse que mientras la obra de los filósofos fue la forma noética de la Sabiduría, la tragedia representa la forma patética de la Sofia." .

[5] The translation into Portuguese of the *Poetics*: "a poesia é algo de mais filosófico e mais sério do que a história, pois refere aquela principalmente o universal, e esta o particular." (1966, 1451b, p. 78; Nussbaum 1995, p. 5).

[6] Melina Girardi Fachin titles the Part I of her study "Law and Literature: towards the emancipatory narrative routes" (In Portuguese: "Direito e literatura: em busca das rotas das narrativas emancipatórias", 2007, p. 21), as a possibility to create an interdisciplinary dialogue between the juridical and literary speeches in order to produce fertile narratives between the two fields of knowledge.

forming three principal and simultaneous functions: as a construction of the literary structure and meaning; as a form of expression; and, as a form of knowledge (2011, p. 178-179). The literary text is a creation that could arouse significant changes and reflections. It constitutes a kind of learning that can guide the reader towards a broader view of humanity. Antonio Candido speaks of the danger of "mutilating the personality" (2011, p. 188) in case literature would be restricted during the learning process of the human being.

Therefore literature helps in the understanding of different languages, silent voices, invisible people, that the literary work allows us to perceive. Maria de França´s portrait in *The queen of the prisons of Greece*, by Osman Lins, shows the misfortune of a significant parcel of the population still deprived of the fruition of literature, *ipso facto,* of humanity. Additionally Paul Ricoeur´s philosophical support on the constitution of the capable human being leaves no doubt about the privation of rights suffered by Maria de França in the making up of her characterization. She cannot be considered a subject of rights and, consequently, be the author of her own story.

2. The constitution of the capable human being

It is relevant to consider the ability of judgement that implies the recognition of a capable human being, worthy of esteem and respect. To Paul Ricoeur the capable human being emerges from the ethical and moral dimension of selfhood (1992, passim), which enables him to be susceptible of the ethic-juridical imputation (2000, pp. 1-10). To achieve the last step of the formation of a subject of rights, Ricoeur begins with the question *Who*?, which arouses several interrogations in relation to the identification of the subject.

From this first question, we move on to the notion of the capable subject. The concept of *capacity* presupposes the condition of the individual to be the author of his actions, to whom will be attributed rights and duties derived from this "ability to do something, what in English is designated by the term *agency* (Ricoeur 2000, p. 3), that is, it follows that man is able to act free and conscious according to his own judgement. Ricoeur´s emphasis on the question *Who?* determines the possibility for man to designate himself as the author of his acts and, consequently, of his story (history). This identity mark is crucial for constructing the core of the self (*ipse*) and for the formation of the moral and juridical predi-

cates that regulate human action, implicit the notion that the capable human being assumes the equivalent duties, thus becoming a responsible man.

The question *Who*? is enlarged to the modals forms of "I can" in the following stages: "To Be Able to Say" (Ricoeur 2005, pp. 93-96); "I can" (to act; "making something happen")" (pp. 96-99); "Being Able to Narrate and to Narrate Oneself" (pp. 99-104); "Imputability" (pp. 104-109). We can affirm that there is a complementary relation between the question *Who*? and the verbal phrase "I can" because the central point of the questioning is the identification of the subject of the speech, of the action, and of the narrative. The goal is to identify the authorship of these predicates, the capable human being the author of his own enunciations and, for this reason, of his identity.

It is important to stress that the pragmatic speech has a fundamental role in the formation of the capable human being due to the relevance of the illocutionary aspect of the act, which implies the notion of the engagement of the speaker. The ability of using the language, taking part and requesting approbation (Ricoeur 2005, p. 96), represent the self-assurance of the capable human being and the recognition of the interlocutor. The speech requires the relation to the otherness, and, therefore, the act of recognizing and of being recognized. (Ricoeur 2000, p. 6). It presupposes the idea of otherness in terms described by Ricoeur:

> "[...] The self-designation of the speaking is produced in interlocutory situations where the reflexivity is combined with otherness. The speech pronounced by someone is a speech act addressed to someone else. What is more, it often is a response to a call from others.[...]" (2005, p. 96)

In this sense, the concept of justice is built in the direction of the other, taking the otherness into consideration. For this reason Ricoeur, by examining who is the subject of rights, guides the discussion to the level of the ethical recognition, way to identify the other – in spite of the ethnic and cultural diversities – as a person worthy to be respected. Also, by analyzing the linguistic implications peculiar to this approach, Ricoeur stresses the role of protagonist that the capable subject develops in the narrative of his story (history). In "Who is the subject of rights?" (2000), Ricoeur expands the horizon of the interpersonal relationships to a broader sense:

> "The same triadic relation of me/you/third person can be found on the plane we have distinguished by the question 'Who acts' 'Who is the author of an action?' The capacity to designate oneself as the author of one´s own actions is inscribed in a context of interaction where the other figures as may antagonist or may helper, in relations that vary between conflict and interaction. But innumerable others are implied in any undertaking. Each agent is bound to these others by the intermediary of different orders of social systems. [...]" (2000, p. 6).

Ricoeur emphasizes the ethical dimension in the constitution of the capable man insofar the *self-esteem* (1992, p. 171) is accomplished with and for the others. Ricoeur names *solicitude* (1992, p. 188) for the movement of the self towards the other, that is, the true search of reciprocity and recognition, of giving and receiving. The perspective of the otherness interrupts the persistent cycle of inequality that has always split an abysm among men. In fact, some men are guided by the will of absolute power; as a consequence they establish several criteria of discrimination based on false beliefs and on the desire for domination (Ricoeur 1996, p. 165).

In the construction of the identity of the capable human being it is implicit the notion of identity narrative, which it is considered a fundamental element in the hermeneutic of the self, conceived by Paul Ricoeur. The significant hermeneutical components might surely help in the intersection between philosophy, literature and law in a consistent way, as it is proposed in this paper.

3. The conception of identity narrative

Ricoeur´s theoretical course of the hermeneutic of the self leads to the third stage, especially to the description of the verbal phrase "I can narrate" ("Being Able to Narrate and to Narrate Oneself"). Ricoeur points out that in the narrative dimension *time* has an important function. It refers to the sequence of the facts in a lifetime, in other words, of the episodes that characterize the story (history) of a person. In this regard, it emerges the notion of identity strictly related to the question *Who?* (1992, passim). Marcelino Agis Villaverde notices that Ricoeur´s *Oneself as another* is a fundamental reference to a perfect comprehension of the narrative identity. Ricoeur describes the hermeneutical of the self in order to capture man´s identity marks in the narration of his existence

(Villaverde 2004, pp. 9-34).

Related to the concept of identity, Ricoeur conceives two terms denominated identity as *sameness* (*idem*), and identity as *selfhood* (*ipse*) (1992, p. 116). It must be observed that *sameness* and *selfhood* are not coincident terms in the theoretical frame built by Ricoeur in *Oneself as another*. There is a dialectic construction to the problem of the *idem* and the *ipse*, named the "*dialectic of selfhood and sameness*" by Ricoeur (1992, pp. 140-141). Following his exposition, it should be noticed that "this dialectic represents the major contribution of the narrative theory to the constitution of the self." (p. 140).

The central point is drawn to the question: *Who am I*?, in the sense of creating narrative mediations that could assign the task of inventing life to a man as being the author of his identity. The emphasis is on the protagonist of the story (history), responsible for the composition of countless revealing plots interwoven by an identity (a unity) full of significance. In fact the narrative identity is constructed by the person, who composes the identity narrative from the elements of the plot corresponding to the chain of movements of a lifetime contrived by the dialectic *idem-ipse* perspective. It follows the writing of a story (history) from a person who is the author of a certain action.

Ricoeur refers to Aristotle´s scheme presented in the *Poetics*[7] (1966, 1447a to 1462b; Ricoeur, 1992, p. 143), studying the concept of emplotment (1992, pp. 140-144) which constitutes primarily the notion of the interweaving of the actions in the plot, through the unification of the elements in the poetical making up. This composition is defined by putting all the divergent components into a constitutive order, called the "discordant concordance" (1992, p. 141), peculiar to the narrative compositions, and reaching the highest level of configuration, according to Ricoeur, in a "synthesis of the heterogeneous" (1992, p. 141). Man is allowed to perceive the condition of being able to tell a story (history), as foreseen in the third stage of the hermeneutic of the person.

The process of narrative mediation reveals the otherness. As a matter of fact the narrative composition is intended to weave the connections of the stories in a fictional frame in order to make the reader be identified in the narration and also to be able to recognize the others. The narrative experience makes it possible the communication between the self and the other, in a unique meeting of reception and recognition. Selfhood does not remain passive in its own identity, unable to see the

[7] The version chosen in this paper is the Portuguese one.

other who shows himself to it. The act of communicating with the other, through the function of the mediations produced in the narrative, inscribes the otherness in the identity, opening a long course of knowing oneself, each one, and the world. For this reason this perspective places the ethics in the confluence of the identity narratives, and therefore the importance attributed to the act of reading in the constitution of a capable human being.

It should be underlined that the conception of identity narrative is not only restricted to individual reports but also to historical studies of the identities of peoples and nations. It is of special relevance the possibility of constructing collective narrative identities, mainly in communities traditionally segregated from the great centers of reference. The search for recognition of groups or persons considered inferior implies the capacity to tell their stories (histories) and to assume the role of protagonists in the plot of the historical happenings (Ricoeur, 2000, pp. 3-4).

With the purpose of constructing a broader, historical and emancipatory narrative, linked to the question of human rights, we shall conclude with some impressions of Maria de França´s character and of the impossibility of a constitution of a subject of rights.

4. Maria de França´s non recognition: "the voice under arrest"[8]

Osman Lins, in his novel *The queen of the prisons of Greece*, tells Maria de França´s trajectory, a poor Brazilian woman from the northeastern part of the country, who moves to Recife with her mother and brothers in search of better opportunities. The protagonist symbolizes the reality of many poor Brazilian people as far as she is a worker without no qualification, always been described having problems at her jobs. Besides the stupidity and the mental illness are frequently associated to her behavior (Dalcastagnè 2005, pp. 48-49). She struggles hopelessly to obtain a physical disability pension from the social welfare system due

[8] It is important to remark that the sub-title "the voice under arrest" is taken from Regina Dalcastagnè in the book *Entre fronteiras e cercado de armadilhas: problemas da representação na narrativa brasileira contemporânea* (*Between frontiers and surrounded by traps: problems of representation in the contemporary Brazilian narrative*), in which it is inserted an article called "O intelectual diante do espelho" ("*The intellectual in front of the mirror*"); see particularly the part entitled "A voz encarcerada" ("The voice under arrest"), which discusses Osman Lins´s *A rainha dos Cárceres da Grécia* (Dalcastagnè 2005, p. 48-58; the version into English was free and made by the author)

to her insanity.

Maria de França´s remarkable traces are her madness and illiteracy, which keeps her completely deprived of any fruition form the educated universe. Regina Dalcastagnè observes that Maria de França is introduced in the narrative by the man who interprets the novel, left unpublished by his deceased lover Julia Marquezin Enone. This narrator elaborates a kind of an "essay-diary" in which he himself (re)constructs his self deeply injured owing to the absence of his lover. (Dalcastagnè 2005, p. 49).

The nameless narrator creates long mythological and literary associations related to the novel. He is a well educated man, in spite of being only a teacher of biology without great academic ambitions. Actually he intends to give some dignity to the character, that is, the purpose of his reading is to emphasize that Maria da França could not have a relevant role in the novel unless his interpretations would have been added to the text (poetical representation, sophisticated metaphors). According to Regina Dalcastagnè "to Julia, the character would have voice (even if it would be only to reproduce a radio station), smell, taste, sensibility, to her interpreter [the narrator] she loses substance, changing into an object of representation, depositary of metaphors and other figures of speech, in a well conceived literary exercise whose explanation is in his charge. (...)" (Dalcastagnè 2005, p. 51; free version)[9].

Maria de França and Macabéa, another Clarice Lispector´s character in *The hour of the star*[10], do not have voices because someone else speaks for them. We know their lives through the information given by intellectuals that make an attempt to reveal (or to enhance) their existence. As examined in *The just* (2000), the capable human being is the one who can speak, who can narrate, who can act and is responsible for his actions, therefore being able to construct his own identity. The difficulty to express herself appropriately suits the character of Maria de França in Ricoeur´s analysis about the man that can speak (or cannot speak).

Indeed Maria de França does not achieve the level of a person who speaks because her cognitive atrophy prevents her from express-

[9] In Portuguese: "para Julia, a personagem teria voz (ainda que parecesse apenas reproduzir uma estação de rádio), olfato, paladar, sensibilidade, para seu intérprete ela perde substância, transformando-se em um objeto de representação, depositário de metáforas e outras figuras de linguagem, um exercício literário bem concebido que cabe a ele explicitar. (...)".

[10] The title in Portuguese is *A hora da estrela* (1998).

ing fluently her perceptions and opinions. She is a mere repository of disconnected information, incapable of understanding the meaning and of articulating with other narrative contexts. In opposition to her we are presented to an educated narrator, master of the plot, and of the precarious life and story of Maria de França (Butler 2006, pp. 128-161; Dalcastagnè 2005, pp. 54-56). It is evident the asymmetry of the characters portrayed.

It is clear that Maria de França does not become a subject of rights due to her limitation to utter enunciations about her life and desires, which deprives her of self-esteem and respect, attributes inherent in the ethical and moral dimension of the selfhood. Concerning the literary work - *The queen of the prisons of Greece* -, it is undeniable the lack of recognition in relation to Maria de França, a victim of human negligence and misunderstanding. The passage below describes the feeling of hopelessness that surrounds Maria de França´s existence:

> "Denunciation, accusation and expulsion also work together in the book´s final scene, when the unmaned man, a projection of Maria de França, smashes his right hand. By destroying his hand the man excludes himself, cuts himself off from the *useful*, productive universe of which he no longer wants to be part. His gesture indicts, in a sort of synthesis, the insensitivity of the ruling classes, expressed in Maria de França´s struggle with the social welfare system narrated in the book. (…)." (1995, p. 51).

In this perspective it is worthy of notice that the debate about who is the subject of rights constitutes a fundamental point in the assertion of the human rights, as it is connected to the idea of recognition, that is, to respect for the other and to justice. According to the previous analysis, the identity narrative dimension implies the otherness interwoven in the narrative. It seems that the narrator succeeds in identifyng Maria de França´s misfortune. Or is it the author – Julia Marquezin Enone or Osman Lins - who expresses the feeling of helplessness that pervades the miserable people´s universe?: "Yes, everything seems clear and in keeping with the central theme of the work: man unarmed in a hostile environment. […]" (1995, p. 123).

Silent voice, without a trace of existential identification, Maria de França represents a significant part of the Brazilian society devoid of the minimal conditions for a dignified survival. Paul Ricoeur´s analysis highlights the concept of capacity, which requires that man shall be

the author of his actions. In other words, man must be able to act free and conscientiously according to his judgement. The constitution of the capable human being is a guarantee to the exercise of citizenship, as a necessary condition to the flourishing of the intellect and to the exercise of the political debate. Maria de França is, on the contrary, the negation of the subject of rights in the existential and political level. In the literary plan, however, she is the possibility to a more humanistic view of the human rights, in Antonio Candido´s the precious lesson.

Final considerations

The connection between philosophy, literature and law is undoubtedly profitable as it creates the adequate instruments for an intense and inspiring dialogue. It is the possibility of discerning a deeper sense of humanity towards the recognition of segments of people deprived of social and political intercourse.

Paul Ricoeur´s theoretical course leads us to cross several levels of the capable human being, mainly in the stages denominated "I can speak" ("To Be Able to Say") and "I can narrate" ("Being Able to Narrate and to Narrate Oneself"). It is well constructed a hermeneutical of the selfhood, decisive to the affirmation of the otherness and of the intrinsic components of identity. It is important to conclude that the steps taken by Ricoeur in describing those stages lead to the point where man can be considered the protagonist of his (her story (history).

The conceptual references brought to the research about the capable human being are appropriate to the analysis of *The queen of the prisons of Greece*, by Osman Lins, mainly of Maria de França´s fragile portrait. Ricoeur reinforces the narrative identity in the composition of the capable human being. Indeed the literary creation offers the necessary elements to the shaping of a hermeneutical based on self-esteem as far as the subject participates artistically in the poetical game and feels confident to contrive a story himself. The other (*alter*) is identified and the course to recognition is taken, while interweavening a narrative identity through a synthesis of the heterogeneous, as Ricoeur nominates the unity reached by de divergent components of the narrative. The narrative is not reproduced by a singular point of view; it acquires widespread outlines since it portraits the story of an individual, a people, a country.

Actually Ricoeur´s theoretical support clarifies the characterization of the subject of rights, being able to be respected by the others,

and, therefore, to be an ethical agent in the reflection and construction of politics based on the principles of a just society to the fulfillment of the rights of man. Maria de França is the artistic representation of the denial of the basic human rights. We, as readers, should recognized her human condition and struggles for justice.

References

ABEL, Olivier. *Paul Ricoeur - a promessa e a regra.* Lisboa: Instituto Piaget, 1997.

ARISTÓTELES. *Poética*. Tradução Eudoro de Sousa. Porto Alegre: Globo, 1966. (Biblioteca dos Séculos).

BITTAR, Eduardo C.B. *Democracia, justiça e direitos humanos: estudos de teoria crítica e filosofia do direito*. São Paulo: Saraiva, 2011.

BUTLER, Judith. *Precarious life: the powers of mourning and violence*. London; New York: Verso, 2006.

CANDIDO, Antonio. *Vários escritos*. 5ª ed. corrigida pelo autor. Rio de Janeiro: Ouro sobre Azul, 2011.

CHAMBERLAIN, Bobby. Sob o limiar da fala: linguagem e representação do subalterno em *Vidas secas* e *A hora da estrela*. In: SANTOS, Luis Alberto Brandão; PEREIRA, Maria Antonieta (Orgs.). *Trocas culturais na América Latina*. Belo Horizonte: Pós-Lit /FALE / UFMG; NELAM / UFMG, 2000.

FACHIN, Melina Girardi. *Direitos humanos e fundamentais: do discurso à prática efetiva: um olhar por meio da literatura.* Porto Alegre: Nuria Fabris Editora, 2007.

DALCASTAGNÈ, Regina. *Entre fronteiras e cercado de armadilhas: problemas da representação na narrativa brasileira contemporânea*. Brasília: Editora Universidade de Brasília: Finatec, 2005.

HAVELOCK, Eric Alfred. *Preface to Plato*. Cambridge, Massachusetts: London, England: The Belknap Press of Harvard University Press, 1998.

LINS, Osman. *A rainha dos cárceres da Grécia*. São Paulo: Companhia das Letras, 2005.

_____. *The queen of the prisons of Greece*. Translated by Adria Frizzi. Illinois: Dalkey Archive Press, 1995.

LISPECTOR, Clarice. *A hora da estrela*. Rio de Janeiro: Rocco, 1998.

NUSSBAUM. Martha. *Poetic justice: the literary imagination and public life*. Boston: Beacon Press, 1995.

OLIVEIRA, Manfredo A. de. *Reviravolta lingüístico-pragmática na filosofia contemporânea.* São Paulo: Edições Loyola, 1996.

PLATÃO, *A República*. 8ª ed. Tradução, introdução e notas Maria Helena da Rocha Pereira. Lisboa: Fundação Calouste Gulbenkian, 1996.

RICOEUR, Paul. *Leituras 2: a região dos filósofos.* Tradução Marcelo Perine e Nicolás Nyimi Campanário; revisão Luiz Paulo Rouanet. São Paulo: Loyola, 1996.

_____. *O justo1: a justiça como regra moral e como instituição*. Tradução Ivone C. Benedetti. São Paulo: WMF Martins Fontes, 2008.

_____. *Oneself as another*. Translated by Kathleen Blamey. Chicago; London: The University of Chicago Press, 1992.

_____. *O si-mesmo como um outro*. Tradução Lucy Moreira Cesar. Campinas, SP: Papirus, 1991.

_____. *Percurso do reconhecimento*. Tradução Nicolás Nyimi Campanário. São Paulo: Edições Loyola, 2006.

_____. *The course of recognition*. Translated by David Pellauer. Cambridge, Massachusetts – London, England: Harvard University Press, 2005.

_____. *The just*. Translated by David Pellauer. Chicago; London: The University of Chicago Press, 2000.

TEIXEIRA, Joaquim de Sousa. *Ipseidade e alteridade: uma leitura da obra de Paul Ricoeur.* Lisboa: Imprensa Nacional-Casa da Moeda, 2004, vol. II. (Centro de Literatura e Cultura Portuguesa e Brasileira; Estudos Gerais – Série Universitária).

VILLAVERDE, Marcelíno Agís. *Paul Ricoeur – a força da razão compartida.* Lisboa: Instituto Piaget, 2004. (Colecção: Pensamento e Filosofia).

ZUBIRI, Xavier. *Naturaleza, Historia, Dios*. Edición sexta. Madrid: Editora Nacional, 1974.

Law & Literature:
Justice and vengeance on Shakespeare and Aeschylus tragedies

Fernanda Borges da Costa[1]

Abstract: This work draws two different conceptions of justice in the tragic plots of Aeschylus' Oresteia and Shakespeare's Hamlet, in accordance to the representation of revenge acts and based on the literary studies of H. D. F. Kitto and A. C. Bradley respectively. Firstly, it establishes the connection between the acts of revenge and its relation to justice, both familial and political demands, in accordance with the revealed background in each play. In order to illustrate different conceptions of justice and vengeance of Orestes and Hamlet narratives I demonstrate the plot's approach that qualifies this comparison, such as the family crime, the prince usurped from his father's inheritance, the tyranny originated on illegitimate power, the demand for revenge against the offender among others. Likewise, each chosen tragedy result in two different conceptions of justice. I highlight particularly the variations in the heroes' attitude across their duty of revenge. Both embody this obligation, only the Oresteia narrates the one-sided sense of justice into the conflict between fate, curse and salvation in a clash of divergent godly orders and divine laws, while Hamlet ponders in doubt about the sense of justice inside the conflict between his fate and freewill amid questionings about the established order on custom and tradition. He lives a two-sided justice that by one hand demands his commitment to bring justice upon his father's murderer, and in other hand claims unfairly his life, casted into damnation for the sake of revenge. I also remind that each play reflect a particular mentality, being needed to assume that relevant features in the literary narrative belongs to certain worldviews and contexts, so that the relationship between justice and vengeance in Oresteia comes through an established cosmic order that necessarily tends to balance within the conflict. Whilst in Hamlet the link between justice and vengeance results in the split of moral obligations and ethical expectations and reflects the very deterioration of a worldview as a unit. It is still important to highlight that my comparisons do not exhaust this extended and interesting subject.

Keywords: Law & Literature, Justice & Vengeance, Shakespeare, Aeschylus.

1. Introduction

[1] Master's student in Classical Studies at Coimbra University, e-mail du.chan@hotmail.com.

I will present here a brief comparison between justice and revenge in the stories of Orestes and Hamlet, the tragic heroes from Aeschylus' Oresteia (from 485 BC) and Shakespeare's Hamlet (between 1599 and 1601 AD). I have based this paper's literary critics on the studies of H. D. F. Kitto and A. C. Bradley respectively, and have chosen those plays for they are quite similar, although their staging is separated by more than a thousand years. These plots narrate the murder of a powerful king by relatives, which become the kingdom's tyrants. Then the young prince is forced to retrieve the power and avenge the murder in dire circumstances. Yet, each tragedy displays two different conceptions of justice inferred from the Hamlet's and Orestes' acts of revenge (or, we may say, acts of justice). Such differences can also lead into two worldviews for the grounds of the staged vengeance are elementarily shared with the tragedies original audience. Here I must remember Kitto's warning to deal with a historical background when dealing with a historical literature (1990, p. 97):

> The dictum that all great art is timeless must be received with caution: it certainly does not mean that any ordinarily sensitive spectator can stroll up to some ancient work of art, in whatever medium, and upon inspection understand and appreciate it; he may be disabled by certain unexamined prepossessions of his own, not shared by the artist.

This comparison is based in Law & Literary studies – since I see the presented questions of justice as much important for Law as it is for Literary studies – by searching for one of the most basic conflicts: the murderer among equals and its given solutions. It is also supported by the yet controversial thesis that literary works are able to talk about their own context, subtly revealing the worldviews of their own time merged into the writer's creative imagination. That is even more apparent if we remember that both tragedies are based on oldest myths, itself a reservoir of a community's memories. In that case, the values and most importantly, the conflicts within the stories, reveals some features on the conceptions of justice and vengeance from their original contexts. Even more interesting is the central connection seen in vengeance as justice and the just act being an act of payback, a core that our modern criminal law still has difficulties to deal with.

I will approach this subject divided into three parts. Firstly, I will compare the tragedies and some common features giving a brief sum-

mary for each plot. Then I will point out three main differences that reveal each conception and values inside justice and vengeance conflicts, making into the third topic where my conclusion comes in: each play reflects a particular meaning for justice and vengeance matching, at least in part, their specific civilization's worldview.

2. Two similar stories: Who are Orestes and Hamlet?

Now I must highlight the connection between the two acts of revenge and their relation with justice. Aeschylus' Oresteia is composed by three plays. The first is called Agamemnon and tells the story about the victorious return of this Greek king from Troy, Orestes' father, and his murder by his wife Clytemnestra, with the help of Aegisthus, Agamemnon's cousin and lover of the queen. Orestes only appears in the second play, called Libation Bearers or Coephoras, to avenge his father by killing his mother, who was since then living with Aegisthus and ruling upon Argos. What remains in the last play, Eumenides, is the story about how Orestes is about to be killed by his mother's avengers, the Furies, when Apollo's aid comes. Then the tragic hero is taken to the Areopagus' court, created by Athena specially to judge his case. There the goddess and the judges decide for his spare and establish a new kind of justice procedure, which tame the horrific Furies into docile Eumenides. Therefore the old goddess give their power to maintain justice at it course, keeping a vigilant eye on men's procedure that here and onward will deal with the need of punishment and vengeance of hideous crimes.

Shakespeare's play Hamlet tells us a similar story. The young prince Hamlet comes back from England to his motherland Denmark to attend his father's funeral. Three months later, at the castle's walls, his father's ghost appears and reveals the identity of his murderer. It was Hamlet's uncle, Claudius, who married the queen and sat on the kingdom's throne. The ghost demands revenge, for Claudius cannot stay with the crown. Thereafter, while pretending to be mad, Hamlet wobbles between delivering the vengeance and the desire to carry on his wishes. He feels his father revenge as a fair request but an unfair destiny to be driven upon. There is justice in the quest, but there isn't any justice in the heroes' circumstances – what makes it tragic by itself. After many advances and retreats, many deaths and a sword fight against his former friend, Hamlet manages to kill Claudius, getting killed in the process. By the time the play closes, all royal family dies and the kingdom is about

to be taken by Fortinbras, king of Norway.

Although they are very distant in time and tradition, both heroes face similar situations that call for their action. The vengeance is needed for family and political reasons. The former kings were killed by someone close and the assassins were not only part of the family, related to the hero by blood, but they also become the ruler in the rightful heir's place by the means of treason and murder. Both plays stage a family crime where the king's son is the only one that can claim justice against the killer. In addition, the murderers become the highest authority by ascending the throne illegitimately, in a way that only the heir can reclaim it. Facing a family crime, the prince is usurped from his father's inheritance. In Orestes and Hamlet's situation, the illegitimate tyranny originated by murder goes beyond the familiar layers in a way that the demand for revenge against the offender also turns out as a public issue.

In this particular case, that is the assassination of a king, there is no higher authority able to meddle in but the gods and supernatural forces. In Aeschylus' play it does interpose: Orestes receives an oracle from Apollo stimulating the matricide, then the Furies came in to torment and kill Orestes and avenge Clytemnestra, but they cannot succeed for the hero is protected by Apollo and Athena, Olympian gods quite aware both of Orestes acts of justice, needed to reclaim the balance in a hideous family filled with the curse of bloodshed, and of the unfair circumstances that had driven his pure hand to kill his mother by god's demands. Although Hamlet is encouraged to vengeance by his father's ghost, who came through unnatural forces to claim punishment, the absence of God and any other powers that be that can save the hero from its tragic circumstances is constantly referred to. In other words, God is an emptiness felt in every corner of the narrative by not interfering either to help the hero in fulfilling the act of justice nor giving hope of salvation for Hamlet after the murder of Claudius.

There are many other important distinctions to be made, but for now I will just point out the heroes' opposite actions when it comes to trustworthiness of the supernatural instances and phenomenon. I think that it is important for it explains part of the tragic heroes' worldview and their evaluation of the revenge. Orestes receives Apollo's commands and his obligations as absolute measures with no questioning. Actually he does say that he do not want to kill his mother, but he must do it because he desires (or rather needs) to act virtuously and act accordingly the god's demand. As for Hamlet, after he faces the ghost wishes he will find himself doubting about the truth and rightness of his father's ghost:

(1) he might ask if the ghost's speech was true and for doing so he will seek for visual prof; (2) he will doubt if he actually had seen the ghost or it wasn't just an illusion; (3) and by clearing the last two, he start to doubt if the creature with whom he spoke was really his father. His beliefs in tradition and supernatural are seriously questioned throughout the piece, which indicates a certain type of worldview that no longer fits into the schemes that we see in the Oresteia.

In both tragedies, the assassination of the king's murderer turns out the only way to restore a disturbed order. But each play got its own background that gives their own sense to the narrative, thus the hero's mission to restore a disturbed order can have very different meanings according to their references.

3. Two different conceptions of Justice and Revenge: pre-modern and modern narratives

Although Orestes and Hamlet are in very much alike circumstances, each hero acts by his own ways to fulfilling vengeance, as well as each play illustrates different conceptions of justice. I intend to demonstrate how their course of actions tends to two different claims of justice by the dissemblance attitude of the tragic heroes.

Aeschylus' Oresteia narrates the sense of justice from the conflict between hero's fate, Orestes family curse and the last minute salvation in a clash of different orders and divine laws (Olympics vs. Chthonic Gods). The Greek hero's destiny precedes his birth. Since his first ancestors his blood is cursed to engage into mortal family conflicts. In the range of Aeschylus' play we witness Agamemnon sacrificing his daughter Iphigenia and being murdered for it by his wife. We also are reminded of Thyestes' curse upon Atreu; Agamemnon's ancestor that cooked his nephews for their father's to eat. This present a chain inside a stained household that drives Orestes fate to slay his mother. Also his vengeance is commanded by old divine laws that demand revenge limb by limb, were killing of kings is almost always paid with more bloodshed.

On the other hand, Shakespeare's tragic hero Hamlet considers in doubt the sense of justice from the conflict between his fate and free-will, amid questioning the order established by custom and tradition. Hamlet finds himself bonded to become a murderer for his father's sake. Despite admitting that killing Claudius is the most correct action to secure justice, the prince seems concerned that he cannot decide about

his own fate, in which he does not intent to take part in the bloodshed. Hamlet is angry against his uncle's actions and his mother's promiscuity, yet the revenge is not taken from his own will and goes against the plans he had for himself.

I would like to remind that each play tend to reflect a particular mentality from a specific civilization (and its time/space features), since the plays firstly addressed a particular audience that sure may understand the laws, social roles and obligations those shown by the heroes (even when the narrative seek to break the expectations). Hence I will assume the possibility of assigning relevant features for the literary narratives that belongs to certain worldviews and possible contexts. In that case, the relationship between justice and vengeance in Orestes path comes from an established cosmic order, in a human world that somehow matches the gods' orders and lawmaking – even if the humans themselves don't quite get how it is done. The struggle between the ancient hero's tragic fate comes from an ambiguous situation that is somehow originated and solved by gods guidance. Otherwise, the relationship between justice and vengeance in Hamlet establishes a split between moral obligations and ethical expectations, which reflects the very deterioration of modern worldview as a unit. He no longer can rely on supernatural beings nor does he fit the virtues within social roles that don't take in account his own freewill.

3.1 Orestes' vengeance and pre-modern background

Aeschylus builds in its tree tragedies a sequence of crimes and their correspondent acts of vengeance that will utterly lead to Orestes matricide. The author goes back to the Trojan War which culminates with the internal failure of Zeus' cosmic order when impose to Orestes absolute but also incompatible obligations (Kitto, 1990, p. 72):

> The obvious implication is that we have here a conception of Dike that cannot work, even though it is the present will of Zeus. If this is not already plain, the rest of the play will make it so: the instinct for violent and bloody retribution dominates and unifies the whole play, and in the end it leads to complete breakdown; we are to see how it is morally, philosophically, and politically bankrupt.

This mechanism of retribution is called dike[2]. Clytemnestra kills her husband upon the calling of dike for her daughter's murder. Dike works as a sacred maintenance medium of Zeus' order, for a crime cannot be tolerated without its needed retribution. This same order is meant to chaos when drives Orestes to avenge Agamemnon by killing his mother. Yet Aeschylus' trilogy has a harmonically conclusion. The conflict between Orestes obligations for his father and mother is ultimately a conflict between old and new divine beings. In the clash between these two orders (the Furies Chthonic goddess revengeful desire vs. Zeus that seeks a reestablished order) the Olympic god act trough Athena to create the Areopagus' Court and by that meddling judge Orestes destiny. It is also a political argument. Orestes does submit to Athena and the Court, and it reflects the social transformation implied from monarchy to democracy and from familiar vengeance to civic distribution of justice. By all means, dike remains as a renewed sense of justice that is still retributive yet domesticate through reasoning, since the Furies shall be domesticated by Athena's arguments and are turned into Eumenides to work alongside the Areopagus' Court.

This cosmic order and divine meddling are typical features of a pre-modern background that inspire the ancient tragic plays. The very own comprehension of Orestes himself is made by comprehending his social functions and correlated duties. In this sense Orestes – being as virtuous as he is – is obliged to act according to his social role as son and heir. It is enough for him to know where he socially belongs for deducting the according course of action. He must honor his father, dethrone the tyrants, clean Argo's palace from all miasma and obey Apollo's wishes, therefore he must kill Clytemnestra. This reflects an ethical aspiration (what the individual desires for himself) that matches with a moral tradition (what is the right thing to do).

However it does not imply an absolute loss of hero's autonomy. Orestes knows his duty and acting in accordance with it is his virtuous choice even meaning his own destruction (that is the tragic element here). This pre-modern acknowledge of virtue is what make him able to keep his obligations in the direst circumstances according the gods' will. Orestes could have not killed his mother and leaved Argo forever, but then he wouldn't be a virtuous tragic hero that this narrative needs. And his virtuous nature is what breaks the thread of bloodshed that I will soon draw here, he is the first through his history that remains a

[2] From the Greek δίκη, known as a justice perpetrated through human action.

pure avenger and gives himself to the divine instructions moved only to fulfill his obligations wherever the consequences (Kitto, 1990, p. 79):

> So far they have been met in the spirit of blind and guilty retribution; Orestes approaches the task very differently. For the first time we meet an avenger whose motives are pure.

The Oresteia is a trilogy that converges of two traditional tragic myths, the myth of Atreus' curse[3] and the Trojan myths. The Atreus' curse is bought to the play by Aegisthus intervention, as the heir of Thyestes whose older sons were cooked and given to eat by Atreus, giving another meaning for Agamemnon's death. He establishes a connection between the past family crimes and the present ones as Agamemnon also dies to achieve Aegisthus vengeance for his father. I dare say that Iphigenia's sacrifice being avenged by Clytemnestra and even the Orestes matricide also carry a new meaning into this family bloodshed as part of consanguineous murders' curse. Alongside there is the connection with the Trojan myths. Agamemnon is the Greek king that claims the vengeance obligation against the Trojans and lead the Greek army into the ten-year battle. Here is also mentioned his daughter's sacrifice that made possible to the Greeks vessels to cross the sea and reach the Trojan shores. In the play there are constant references to Helen, Paris and the Greeks and Trojan sins, making the Oresteia a chain of retributions and vengeances.

Thus the Oresteia's tragic core revolves around the chain of revenge. The first play allows contextualizing Agamemnon's death as required continuity of both myths (Atreus' curse and Trojan War) that will lead to the unavoidable matricide. The tragic context holds the human action in a way that will lead to the collapse of the revenge's chain. But it is important to know that for their context the human autonomy still endures, the individual is still free to performs role, his duties and claim his rights. And he knows the correct actions as long as he knows his roles in the cosmic order. That is partly what happens with the following characters.

Between Paris and Menelaus there was a duty of hospitality[4].The

[3] It is a Family curse caused by an offensive act against the gods and its laws. It is hereditary, so it is characterized by being transmitted from generation to generation, until the crime is wear over time or is withdrawn by divine interference.

[4] From the Greek ξενίνα, from where comes Zeus Xénion, or ξένιον (v. 362 of Agamemnon). It is an obligational relationship formed firstly by Zeus and Amphytrion, Heracles

relation between host and guest is a ritualized act and widely protected by Zeus. It has its own terms and obligations that were broken by Paris when he kidnapped Helen, Menelaus wife. After the crime, Menelaus is obliged to seek revenge upon Paris in accordance with Zeus host rules; otherwise he would cast to himself the rage of the god. Thereby the Trojan War proportions became as huge as the clash between two great civilizations when king Priam of Troy welcomes his son and blesses his marriage with Helen. By offending a king in the Greek tradition is an offense to its kingdom and its people and Menelaus needed Agamemnon's aid to unite the Greeks into one army to march against Troy. On the other hand Paris owned to Aphrodite a charisma[5]. The goddess had given to the Trojan prince the most beautiful woman on earth in exchange of choosing her as the fairest Olympic goddess. By Aphrodite hands Helen belonged to Paris since the beginning and seemed only fair to take the gift once he meets the Spartan queen. Helen being a promised divine gift Paris could not refuse it, for the rejection of Helen would mean an offense to Aphrodite. As for Helen, when a child she had received a prophecy that would command her to be given to the fairest king on earth, since Menelaus couldn't match the title, Paris was most promising to fulfill the prediction.

The same cornering came to Agamemnon when the fortune teller reports the need of Iphigenia's sacrifice to appease Arthemis and allow the Greeks to march into war. Before going to the Trojan War Agamemnon is driven to condemn himself, to stain his hands with the blood of his favorite daughter, and by doing so to be killed by his wife. Otherwise he would have condemned not only himself but also all Greece to face Zeus' wrath by not proceeding with the revenge. It is also possible to relate Clytemnestra's action in these dialectical duties. She must overcome her marital obligations in accordance to atone for Agamemnon's sins. The murderer of the king is her only way to retrieve justice for Iphigenia and restore the cosmic order. Similar to his mother, Orestes hangs between two absolute duties for his both parents – and one must be destroyed. Therefore the Oresteia is the quintessential tragedy of vengeance, driven by human's choice and divine designs. And this conflict shall be tragic for the very divine laws are struggling for balance casting its terrors into human's lives. Even if one cultivates the excellence and virtue his horrific-but-just acts shall be paid with violence, for the yet

foster father.

[5] From the Greek χάρισμα.

not renewed law of the dike demands it. Orestes tragic destiny is driven by his unavoidable circumstances; he must choose either to not avenge his father casting upon himself the Furies from the King's grave and condemning Argos to tyrannical rulers, or to kill Clytemnestra and commit matricide, the worst of crimes. Only through this chain of facts that Orestes dilemma can be really understood (Kitto, 1990, p. 92):

> The dilemma can be stated in general form thus: there can be no such thing as Justice if a king, husband, father, can be murdered with impunity, since ordered society would be at an end. On the other hand, there are instinctive, intimate loyalties and sanctities without which society cannot continue: to the body politic, matricide is no less deadly than regicide—and we have just seen that with matricide Aeschylus combines parricide and outrage to guests.

3.2 Hamlet's vengeance and (almost) modern background

Bradley analyses the Shakespearian hero by noting that the characters actions are not the only factor that will determine the narrative events, although it is the determinant element that will lead to the tragic ending (1905, p. 11-12). Differing essentially from Aeschylus's pre-modern play, Shakespeare's narratives are not tragic by its circumstances but are made tragic by the characters choices (1905, p.11):

> Nor yet would it become so, in the Shakespearean sense, if the fire, and the great wind from the wilderness, and the torments of his flesh were conceived as sent by a supernatural power, whether just or malignant. The calamities of tragedy do not simply happen, nor are they sent; they proceed mainly from actions, and those the actions of men (…).

We see a number of human beings placed in certain circumstances; and we see, arising from the co-operation of their characters in these circumstances, certain actions. These actions beget others, and these others beget others again, until this series of interconnected deeds leads by an apparently inevitable sequence to a catastrophe.

Even taking in account the fortune and all supernatural forces, is ultimately the characters acts that will construct the tragic plot. But also

the actions are determined by the characters since their character builds the final misfortune. About *Hamlet*, Bradley notes that the whole narrative turns around the hero's peculiar character, and without any notion about his character, the history would be inapprehensible (1905, p. 67):

> But for Shakespeare's scanty use of this method there may have been a deeper, though probably an unconscious, reason. The method suits a plot based on intrigue. It may produce intense suspense. It may stir most powerfully the tragic feelings of pity and fear. And it throws into relief that aspect of tragedy in which great or beautiful lives seem caught in the net of fate. But it is apt to be less favourable to the exhibition of character, to show less clearly how an act returns upon the agent, and to produce less strongly the impression of an inexorable order working in the passions and actions of men, and labouring through their agony and waste towards good. Now, it seems clear from his tragedies that what appealed most to Shakespeare was this latter class of effects.

So the hero's character and his decision making seen through action are essential parts for the tragic comprehension.

Comparing Hamlet with Orestes, the latest as perfect fit for his role as son and heir is completely driven by his sense of justice and obligation against the king's murderers. Orestes does not doubt about what are his (even so conflicting) duties, nor concerns about his destroyed future. Unlike the ancient hero, Hamlet fells many needs, for instance he need mundane proof of Claudius' guilt since he does not completely believe the ghost's tale. Hamlet does not feel comfortable towards the supernatural and is unable to proceed until clearing his doubts. The ancient heroes and characters also minded carefully the supernatural, but they didn't doubt their very own existence when facing it. To accentuate the difference in the character of Hamlet Shakespeare's play carries two other individuals driven by the need to avenge their fathers – Fortinbras and Laertes. The similar circumstances are as surprising as Hamlet's refusal to act in accordance, forthrightly in favor of honor and revenge, exactly as one would expect of a hero like him. And precisely what Hamlet cannot do. The play can be seen as a set of mirrors, in which the secondary characters are able to reflect every shattered aspect of the complex personality of the hero.

Hamlet can perceive the moral obligation that constitutes his father's need of revenge but he also question if killing Claudius is the best

course of action. His endless reflection turns out to push him away repeatedly of the fulfillment of his duty and extends the range of the tragic conflict. His meditation challenges the preordained social roles in a way that a pre-modern hero cannot be able to do, for he is not a righteous obedient hero nor is he quite the opposite. Hamlet brings out all the craziness inside that traditional ways of justice by using his mad reasoning; thus, Hamlet's character presents many traits of modernity that allow us to identify an ethical aspect developed beyond his role and the correspondent social position. Hamlet is not only a son, a prince and an heir to the crown, but he is also able to understand himself as an individual apart from those roles that put him against his will and ethical choices.

This ability to see himself apart from social roles, as a unique individual, is part of a modern ethos. It highlights his individuality in so far as he realizes his identity apart from his moral order and in relation to what he designs for his own life. Thus Hamlet is able to shed its role as son and heir, his differences with Orestes, Fortinbras and Laertes are in the level of his individualistic modern character. When capable of determining himself against his social roles, Hamlet is not limited to the circumstances of revenge but has to deal with this ultimate conflict between his desires for himself and the disturbed order that seek for repair.

This Shakespeare's tragedy is not limited to the vengeance plot inasmuch the prince brings his questioning upon the whole human condition. That's why Hamlet's tragedy is seen as profoundly disturbing for a limited and mortal human condition and perverting the very model of the vengeance tragedies. Nevertheless Hamlet's action is also determined by the weight of the obligation to fulfill his father's wishes – he also feels it as an unavoidable obligation even at moments of inertia. All the action staged is only meaningful if we constantly remind the vengeance not yet perpetrated.

Hamlet is abandoned by god, forced into a murder situation by a family crime and the traditional ways to deal with it. He is de modern individual driven through the world in a pre-established social order and with insurmountable social roles that even so tries to rationalize and understand his surroundings. His motivations are unclear; he is not able to deal with the pressure and seems rash and inert in different moments. Hamlet is seen for us modern individuals as a more humanly hero trying to survive in a world out of joint.

4. Conclusion: a one-sided justice vs. a two-sided justice

The heroes' characters are quite different. Here I take as uncontroversial that one's character is build according to one's action inside the tragic plays. Orestes acknowledges a one-sided justice. So he takes action only concerned about justice against Clytemnestra, unwary of the consequences for himself since the current rule is clear: once becoming a murderer for the sake of avenging a murder, he will at some point be killed to conceal his own crime. Any case of mercy that may fall over him can only come from the gods, another level of power and decision making that he cannot interfere but only hope to be blessed with. Then he will fulfill his role as heir and son, whatever may happen to him later – if any salvation is possible, it will only be available after the fulfillment of his duty. Ultimately, Orestes knows that without a miraculous interference his fate relies in the same rules that his mother's, that is, the killer must pay his crimes with blood even if he has done so seeking justice, ordered by a god's will and following an ancient law.

In other terms, Hamlet feels that he needs to take care of a two-sided justice. He is doubtful both about the justice of killing Claudius and about the justice of depriving himself of the life he had planned in order to carry out that duty. He is able to himself at the same time as responsible for avenging his father and as an unfair victim of that burden (while Orestes does feel burdened but in an unavoidable situation). On these terms, Hamlet is concerned about a two-sided justice, meaning one justice for the action and another for the agent (that is, himself): he wants to act justly and to be treated justly. Even if he finds that revenging his father is the right thing to do, it will still be unfair since he will turn into a killer contrary to his will. This conflict between justices (for his father and for himself) is quite shown in the hero's actions, where he is constantly questioning his duty that comes with the social role as prince and son. Hamlet's hesitations and retreats could only be better explained as actions that exteriorize his inner doubts.

Orestes and Hamlet characters conceal some important differences. Orestes obeys the gods laws and oracles because he is determined to be virtuous in a fulfilled life, which means he will avenge his father and deprive his palace from the tyrants even if it is by killing his mother

and condemning himself. He chose to fit in his social roles as son and heir, therefore Orestes will take these obligations within the roles up to extreme consequences. His ethical enterprise matches his traditional values. That is why he is only tied to a one-sided justice: he fits his role, even if it means doing something he didn't want for himself, so what he thinks that is just for him and for his social role is actually the same thing.

But Hamlet acts differently and questions those roles and its obligations. He is concerned with his individual values and freedom besides (or better alongside) the need for revenge. And he is able to do so because he faces a separation between the individual person and its social role. So, he acknowledges that revenging his father's death is needed and taking action would be carrying out justice. But Hamlet also thinks that is unfair to be forced to become a murderer when that was not in his personal plan. He recognizes the right thing to do according to his obligations, but also takes in account the (un)fairness of being driven to become a murderer. In that way, Hamlet faces a two-sided justice and this view also re-reads his tragic situation: in addition to targeting two different obligations (with his father and with himself), their fulfillment is self-excluding. He cannot do both, to serve one justice is failing to the other.

Orestes vengeance, although terrifying and monstrous, can lead to true virtue and be recognized as fair by the guardians of law, being gods or their guided judges. But Hamlet's vengeance is uncertain, as well as his values and virtues, and it is surrounded by many questions while he has no safe place to rely on – in his world, the complications of assassination and vengeance can only be handled by humans, in all its roughness and uncertainty. I may dare to say that Hamlet's tragic situations comes as a result (or the progression) of a disenchanted world, where humans are by themselves when it comes to face their worst crimes and speechless taboos – forsaken by Gods and their rules. But I will also remind that Orestes situation is as tragic as Hamlet's, for depending on transcendental powers only emphasizes human's limitations.

References

AESCHYLUS. *Oresteia: Agamemnon, The Libation Bearers, The Eumenides*. Translated from the Greek by Richmond Lattimore. The Complete Greek Tragedies. Vol. 1. USA: Oxford University Press, 2009.

BRADLEY, A. C. Shakespearean Tragedy: Lectures on Hamlet, Othello, King Lear, Macbeth. 2nd ed. London: Macmillan, 1905.

KITTO, H. D. F. Greek Tragedy: a literary study. 4th ed. London: Routledge, 1990.

SHAKESPEARE, William. Hamlet. Madrid: Nordica Libros, 2012.

Universality, ethical community, and human rights in Lima Vaz

Laura Souza Lima e Brito[1]

Abstract: This paper addresses the opposition between nomothetic universality and hypothetic universality for Henrique Cláudio de Lima Vaz as a core matter for the feasibility and establishment of a universal ethical community and, consequently, for defining and ensuring universal human rights.

Keywords: Universality. Ethical community. Human rights. Henrique Cláudio de Lima Vaz.

1. Initial remarks

This paper has been presented to the Law and Ethics working group at the XXVI World Congress of Philosophy of Law and Social Philosophy, which took place at the Federal University of Minas Gerais. It has the purpose of extracting from the body of work of Henrique Cláudio de Lima Vaz, an important Brazilian philosopher and formulator of a concrete ethical system, what the understanding of the relation between ethics and law may contribute to comprehend the possibility of a universal ethical community today.

This work approaches the relation between ethical community and human rights according to Lima Vaz's conceptions. In other terms, the question to which we seek an answer is: which are to Lima Vaz the present obstacles for the consolidation of a universal ethical community and for the realization of human rights as universal rights?

The search for an answer to this question is theoretical and will take place in Henrique Cláudio de Lima Vaz's work, as well as in works of his commentators, which have already produced in Brazil a vast repertoire on ethics according to Vaz's view

[1] PhD Candidate at the Law School of the University of São Paulo. E-mails: lauraslbrito@gmail.com/laurabrito@usp.br

Therefore, the intent here is to verify, through the prism of ethics, the requirements for the formation of a universal ethical community, from which universal rights would emerge and, by confirmation of this possibility, to also verify the reasons why this community and these rights are not consolidated in the world today.

The relevance of this topic is placed before the actual existence, today, of a world community, in technical and economic terms. In light of this fact, more than ever it is necessary to expand such technical universality to an ethical and legal universality, which is only possible, according to Lima Vaz, by consolidating a universal ethical community, built on the acknowledgment of others and not on the needs of an individual.

2. Contextualization of Henrique Cláudio de Lima Vaz's ethical and legal thinking in his body of work

To face legal issues in Henrique Cláudio de Lima Vaz's thinking is not possible if they are not understood as ethical issues – especially because there lies the focal point of Vaz's position: law cannot be dissociated from ethics.

Lima Vaz built a dense and consistent ethical system whose structure is based on a dialectic of three stages: abstract universality, particularity and singularity, considering that the second stage denies the first and the third one preserves the previous, elevating them to the status of a concrete universality. This is how Lima Vaz understands and explains the world of *nomos*: man as a person, the act to an end and ethics that permeates the human world.

Through his system, it is possible to understand that modern individualism, based in subjectivism, remains stuck at the moment of particularity, denying the universality of the search of good by mankind. It is this obstacle that the proposal of Lima Vaz's ethical system tries to overcome by returning to metaphysics. As noted Maria Celeste de Sousa:

> Claudio Henrique de Lima Vaz is a systematic and dialectical philosopher. His anthropological thinking and ethics lies within the ratio that founds human being and acting in a critical attitude to the primacy of modern subjectivity, and so he is positioned in fa-

vor of returning to metaphysics as prime philosophy.[2] (2010, p. 19)

In context of his ethical system, Lima Vaz will denounce how modernity led to dissociation of law and ethics, due to the abandonment of ethical action that leads to the common good, for the sake of acting for maximum utility. And within this ethical system, the problem of ethical community today excels for Lima Vaz because "he cares about men in their historical vicissitudes, especially with today's social status, its spiritual crisis, solipsism and ethical nihilism extended to the field of ideas and social practices"[3](Sousa, 2010, p. 19).

3. The matter of the ethical community

In order to discuss the matter of the ethical community to Lima Vaz, we must understand what the ethical community means within Vaz's system. Man, as an intelligent and free being, behaves in view of an end, namely, the realization of good. Therefore, the question that guides the behavior of the individual should be: what should I do? How should we live?

This way, a man reveals himself as an ethical individual, and may only remain so as long as he is aware of the ethical knowledge that surrounds him and as a participant in an ethical community and, ultimately, the universal ethical community. In this sense, the universal ethical community is the interaction of all men in pursuit of the common good for humanity.

In antiquity, homologically to the cosmological order that governed the natural world, there was a normative order managing the human world. Thus, there was a determination of the teleological character of ethical action. With the advent of modernity, untying normative order from natural order, by technical reason, caused a rupture within the idea that humanity seeks good to forge the hypothesis that humanity seeks greater utility in its actions. It leads to the crisis denounced by Henrique

[2] In the original: "Henrique Cláudio de Lima Vaz é um filósofo sistemático e dialético. Seu pensamento antropológico e ética situa-se no âmbito do logos que fundamenta o ser e o agir humanos, em uma atitude crítica à primazia da subjetividade moderna, logo ele posiciona-se favoravelmente ao retorno da metafísica, enquanto filosofia primeira."

[3] In the original: "ele preocupa-se com o homem em suas vicissitudes históricas, notadamente com o modelo social hodierno, sua crise espiritual, o solipsismo e o niilismo ético que se estendem ao campo das idéias e das práticas sociais"

Cláudio de Lima Vaz:

> There it is, probably, where lies the core of the crisis in our civilization: its working reason expanded in several directions - scientific, technical, organizational, political, following the expansion of its historical and cultural space; in the field of *ethos*, however, it cannot create a new paradigm of ethical rationality or universal ethics for a universal civilization.[4] (2002, p. 168)

Classical thinking corresponded to a nomothetic universality, which is configured "as from the concept of a universal order to which a prescriptive character of law is assigned"[5] (Lima Vaz, 2002, p. 217). This in turn, modern thinking has forged a hypothetical universality grounded in the hypothesis of a primitive state of nature, from which man escapes by alienation of his freedom, as Mac Dowell explains:

> The individual, therefore, waives part of his original freedom due to his own interests, favored in a greater scale by the limitation of everyone's freedom, in social life, than by self-isolation or conflict state, the 'state of nature'. (...) the decision to join the social contract results from calculation of advantages it brings to the individual.[6] (2007, p. 242).

In the words of Rubens Godoy Sampaio:

> The universality that determined the horizon of antiquity had as foundation a world order that was supposed to be manifested and in which the nomos or the laws of the city were the way of life of men, who reflected the order of the cosmos as contemplated by

[4] In the original: "Eis, pois, onde se situa, provavelmente, o cerne da crise da nossa civilização: a Razão nela operante expandiu-se em várias direções - científica, técnica, organizacional, política - acompanhando a dilatação de seu espaço histórico-cultural; no espaço do ethos, porém, ela não consegue criar um novo paradigma de racionalidade ética ou uma Ética universal para uma civilização universal."

[5] In the original: "a partir do conceito de uma ordem universal à qual se atribui o caráter prescritivo de lei"

[6] In the original: "O indivíduo renuncia, portanto, a parte de sua liberdade original em função de seu próprio interesse, mais favorecido pela limitação da liberdade de todos, na convivência social, do que pela situação de isolamento ou conflito própria do 'estado de natureza'. (...) a decisão de aderir ao pacto social é resultado de um cálculo de vantagens que dele advém para o indivíduo."

> reason. In hypothetical and deductive universality, the foundation is hidden and needs an explanation coming from a former hypothesis, not empirically verified and which needs to be deductively supported by its consequences.[7] (2006, p. 93).

The shift in ethical paradigm, as presented by Lima Vaz, occurred in track of scientific thinking paradigm shift:

> The phenomenon that forged the epistemological assumptions for the overcome of classical horizon (nomothetic universality) to the horizon of modernity (hypothetical and deductive universality) was the scientific revolution, also responsible for the mathematization of physics and mathematizing intention of reality understanding. One of the most significant effects of the Cultural Revolution was the arising of technique as determining factor for the approach of nature.[8] (Sampaio, 2006, p. 92).

The domination of nature by man with modern technical development reinforces the culture of utility, and it is based on the isolated individual. It is not a critique of the advances brought by modernity, but rather to point out serious ethical consequences that emerge on track of technological advances.

The paradigm of calculation of benefits favors subjectivity in its particular moment, discrediting the moment of intersubjectivity, in which an individual acknowledges himself in the other. It is this acknowledgment that guides ethical action and is rather necessary for the pursuit of the common good in the ethical community.

The problem of the ethical community, under the hypothetical

---

[7] In the original: "A universalidade que determinava o horizonte da Antiguidade tinha como fundamento uma ordem do mundo que se supunha manifesta e na qual o nómos ou a lei da cidade era o modo de vida do homem que refletia a ordem do cosmos contemplada pela razão. Na universalidade hipotético-dedutiva, o fundamento se encontra oculto e precisa de uma explicação oriunda de uma primeira hipótese, não verificada empiricamente, que tem a necessidade de ser dedutivamente corroborada pelas suas conseqüências."

[8] In the original: "O fenômeno que forjou os pressupostos epistemológicos da passagem do horizonte clássico (universalidade nomotética) para o horizonte da modernidade (universalidade hipotético-dedutiva) foi a revolução científica, também responsável pela matematização da física e pela pretensão matematizante de compreensão da realidade. Um dos efeitos mais significativos dessa revolução cultural foi a emergência da técnica como fator determinante de abordagem da natureza."

universality paradigm, is the superiority of individual interests over the common interest (common good). The solution is to overcome the subjectivist rationality that supports modern society by rescuing communal life.

The goal of Lima Vaz with his philosophical proposal "is to raise society to an ethical level, as a community of free men, whose intersubjective relations are governed under the right of each one having his personal dignity recognized and being part of the rational consensus around the common good."[9] (Sousa, 2010, p. 20/21)

In due course, the realization of human rights is essential to achieving the scenario designed by Lima Vaz and, as he said, it is precisely the construction of society on a hypothetical universality that prevents the realization of these universal rights.

4. Ethical community and universal human rights

Vaz's proposal for ethics has direct repercussions in the field of law and, in a special way, in regards to the possibility of conception and consolidation of human rights as universal rights. That because law is an ethical phenomenon par excellence, since it is practical reason that should guide the formulation of legal rules.

If "the manifestation of ethical life is objectively universal, since all cultures seek good, even if it is not predetermined as good"[10] (Brito, 2013, p. 104); it is possible, homologously, envision universal rights which are not addressed to cultural particularities, but which precisely guarantee freedom and communal living for the sake of common good.

But if the ethical phenomenon is universal, what explains the ineffectiveness of protection of human rights at the global scale? Lima Vaz attaches to the consolidation of the fundaments of ethical and political life in the hypothetical universality the deep paradox between the overwhelming attempt to define universal human rights and the inability to "bring down such rights from the dead and abstract plan of formalism and bring them to a concrete realization in social practices and institu-

[9] In the original: "é elevar a sociedade ao plano ético, como uma comunidade de homens livres, cuja relação intersubjetiva seja regida segundo o direito de cada um ter a sua dignidade pessoal reconhecida e de ser partícipe do consenso racional em torno do bem comum."

[10] In the original: "a manifestação da vida ética é objetivamente universal, vez que todas as culturas buscam o bem, ainda que não seja um bem previamente determinado"

tions"[11] (Lima Vaz, 2002, p. 237). This because the hypothesis in question is formulated exclusively for the satisfaction of insatiable interests of the individual.

The consolidation of universal human rights does not meet the criteria of utility, but, in fact, to a pretense of equality, in which all human beings share freedom, acknowledge themselves in each other and participate in the construction of the ethical knowledge for humanity.

> In effect, for society to be human, it must transcend the individual interests and create space for men to be consensually equal. This level of sociability is thus constructed as a relation of differentiated acknowledgment, which is not limited to equally satisfying individual needs, but for equality that dialectically supersedes these differences, raising individuals to the political sphere of universal acknowledgment, or of living together with the purpose of universal good.[12] (Sousa, 2010, p. 31)

That's why, in Vaz's perspective, there is an implication between nomothetic universality and the universality of human rights. In this sense, the author underlines that:

> No universal ethics will be possible without that the proper interpersonal relations, especially those that are established in a mutual order between rights and duties, which are interwoven among individuals of an alleged universal civilization and which derive for groups and subgroups within that civilization, are recognized and experienced as ethical relations, that means, objectively legitimized and publicly in force as expressions of an ethical community.[13] (2002, p. 170)

---

[11] In the original: "fazer descer do plano de um formalismo abstrato e inoperante esses direitos e levá-los a uma efetivação concreta nas instituições e práticas sociais"

[12] In the original: "Com efeito, a sociedade para ser humana tem que transcender os interesses particulares e criar espaços para que os homens sejam consensualmente iguais. Esse nível de sociabilidade se constrói, portanto, como uma relação diferenciada do reconhecimento, que não se limita à igualdade da satisfação das necessidades individuais, mas pela igualdade que suprassume dialeticamente essas diferenças, elevando os indivíduos à esfera propriamente política do reconhecimento universal, ou da convivência em vista do bem universal."

[13] In the original: "Nenhuma Ética universal será possível sem que as relações propriamente intersubjetivas, sobretudo aquelas que se estabelecem na ordem da reciprocidade entre direitos e deveres, e que se entretecem entre os indivíduos de uma pretensa civi-

To summarize, in Lima Vaz, the consolidation of a universal ethical community, grounded in intersubjective ethical act, which allows equality and acknowledgment among individuals, and aiming the achievement of the common good of humanity is the path to the realization of universal human rights.

5. Final remarks

We sought to understand in this paper what are, within the work of Henrique Claudio de Lima Vaz, the barriers today to the consolidation of a universal ethical community and the realization of human rights as universal rights.

It has been shown that the abandonment of a universal order to which a prescriptive law character is assigned (nomothetic universality), and its replacement by a hypothesis of social constitution grounded in a calculation of individual advantage (hypothetical-deductive universality) is to Lima Vaz the reason for the exaggerated individualism of our time, which prevents the acknowledgment of the other and the formation of a true universal ethical community.

To overcome the impasse created by the universal presence of the ethical phenomenon and the ineffectiveness of human rights, with the consolidation of a universal ethical community, in which universal human rights are actually guaranteed, Lima Vaz relies in the "assumption of a constitutive relation of the human being to a rational instance, which is in itself transhistorical, but normative throughout historical action: the instance of a transcendent good."[14] (2004, p. 241).

References

Brito, Laura Souza Lima. **Liberdade e direitos humanos**: fundamentação jusfilosófica de sua universalidade. São Paulo: Saraiva, 2013.

Lima Vaz, Henrique Cláudio de. **Escritos de filosofia V:** introdução à ética filosófica 2. 2. ed. São Paulo: Loyola, 2004.

---

lização universal, deles derivando para grupos e subgrupos no seio dessa civilização, sejam reconhecidas e vividas como relações éticas, vem a ser, legitimadas objetivamente e vigentes publicamente como expressões de uma comunidade ética."

[14] In the original: "pressuposição de uma relação constitutiva do ser humano a uma instância racional, em si mesma trans-histórica, mas normativa de todo agir histórico: a instância de um Bem transcendente."

_____. Ética e direito. Organização e introdução de Cláudia Toledo e Luiz Moreira. São Paulo: Edições Loyola, 2002.

Mac Dowell, João Augusto. Ética e direito no pensamento de Henrique de Lima Vaz. *In*: **Revista Brasileira de Direito Constitucional**, nº 9 (jan/jun 2007): 237-273.

Sampaio, Rubens Godoy. **Metafísica e modernidade**: método e estrutura, temas e sistema em Henrique Cláudio de Lima Vaz. São Paulo: Loyola, 2006.

Sousa, Maria Celeste de. O conceito de comunidade segundo Lima Vaz. *In*: **Theoria Revista Eletrônica de Filosofia**, nº 5 (2010): 17-33.

Ethical pluralism as a lesson in humility for lawyers[1]

Beata Polanowska-Sygulska[2]

Abstract: The paper aims at making an interpretation of the two strikingly different positions in contemporary jurisprudence, represented by Joseph Raz and Ronald Dworkin. It is stated that Raz's and Dworkin's positions in jurisprudence constitute an epitome of the maxim: While the 20th century was the age of parliaments, the 21st century is the age of the judicature. A claim is put forward that it is the two philosophers' divergent perspectives in ethics that are responsible for the mentioned gap. Thus, a theory-laden statement is made that the standpoint in moral philosophy bears heavily on the position in political and legal philosophy.

The consequences of the two philosophers' disparate ethical perspectives for the application of the law are examined. Characteristic of Raz's value pluralism, social dependence thesis, in particular his deep insight into the so-called dense human relationships that require habituation, is juxtaposed with the famous Dworkinian 'one right answer' thesis, stemming from the latter's ethical monism. A conclusion is drawn that the value-pluralist position in ethics, initiated independently by Isaiah Berlin and Joseph Raz and continued by John Gray, has a relevant lesson in humility for lawyers.

Keywords: value-pluralism, ethical monism, 'one right answer' thesis

The starting point of this article is a thesis of a profound connection between the three levels of practical philosophy – legal, political and moral. Such an approach is characteristic of the Anglo-Saxon jurisprudence whose influence seems to dominate nowadays general reflection on law. The intellectual path of Joseph Raz, the disciple of H.L.A. Hart and his successor to the Professorship of Jurisprudence at

[1] Article written as part of a research project no. N N116 627839, financed by the Polish governernment.

[2] Department of Legal Theory, Jagiellonian University, Krakow, Poland.

the University of Oxford provides a perfect illustration of the aforementioned relationship. The starting point for Raz's interdisciplinary reflection was exactly jurisprudence; in this field he adheres to the so-called 'hard' legal positivism, stating that the legal and moral are utterly separate realms. Raz's firstly jurisprudential interests evolved with time to a more general reflection, touching on political philosophy. The main result of his investigations of this stage is his perfectionist liberal doctrine, alternative to that of John Rawls. It constitutes an original synthesis of liberal principles, so to say, going beyond the dispute between liberals and communitarians. The most recent sphere of quest that seems to crown Raz's intellectual path is moral philosophy. In this domain he adheres to a relatively novel, dynamically developing movement in ethics, i. e. value pluralism. According to Raz the three fields on the meeting of which he works – jurisprudence, political and moral philosophy – constitute disciplines that throw light on different aspects of human life. He believes in the unity of the aforementioned branches of practical philosophy; his own interdisciplinary investigations express this creed. In a conversation with me carried out in 2010 in Oxford he revealed:

> For many years, probably well before *The Morality of Freedom*, I doubted that morality constitutes (or includes) a distinctive set of considerations, principles, or values. *Engaging Reason* is the first book in which I argued that the distinction between moral and other normative considerations is stylistic, contextual, etc., but devoid of any theoretical or practical significance.[3]

The intellectual profile of Joseph Raz presented above is meant as an introduction to the essence of the present paper. I share Raz's conviction of the unity of practical philosophy. Yet, in one vital respect I shall go beyond his perspective. I put forward a thesis that theoretical assumptions made - whether consciously or not - on the deepest, moral level translating into a given conception of collective life, extend some decisive influence on a vision of law and its applying.

Let us refer now to the considerations of maybe the most eminent contemporary legal philosopher, that is the recently late Ronald Dworkin. It seems at first glance that due to both thinkers' belonging to the same political and jurisprudential tradition their views should closely correspond to each other. After all they share the widely understood

[3] B. Polanowska-Sygulska, *Rozmowy z oksfordzkimi filozofami* [*Conversations with Oxford Philosophers*], Kraków, Księgarnia Akademicka, 2011, p. 256/257.

liberal standpoint. Raz, apart from his communitarian inclinations, vigorously defends the true to type liberal ideal of autonomy. Dworkin promulgates an exemplary, rights-based liberal doctrine, embedded in his individualist perspective. However, both thinkers adhere to two opposite political visions: Raz to state perfectionism an Dworkin to state neutrality. Yet, apart from this theory-laden difference they belong to the same, widely understood liberal tradition.

The more striking are their divergent jurisprudential positions. Raz turned back from his master's - i. e. Hart's - path leading towards the sophisticated legal positivism, firmly supporting a definitely hard version of this standpoint. Dworkin, also dissociating himself from Hart develops an original approach in jurisprudence that goes beyond the well-worn opposition between legal positivism and natural law tradition. His most influential conception of law as integrity gives up the vision of law as an ready object, strongly underlining law's interpretative dimension. Thus, he emphasizes the role of the judge, who acquires in Dworkin's 'law's empire' the status of a prince. The divergent points of view of the two legal philosophers seem to provide a paradigmatic epitome of the maxim: 'While the 20th century was the age of parliaments, the 21st century is the age of the judicature'. In this respect Raz's hard positivism locates him in the 20th century, while Dworkin's interpretative jurisprudence definitely belongs to the present, 21st century. There arises a fundamental question: on what level should one seek for the sources of the aforementioned gap? It does not seem that the field of political philosophy might offer an unambiguous answer. As it was mentioned before, Raz and Dworkin share a liberal standpoint, and consequently promote priority of the individual over the community. Thus, perhaps the focal point is situated much deeper, on the level of crucial moral presuppositions. It is my contention that the cardinal gap between Raz's and Dworkin's positions in jurisprudence is due to their different ethical perspectives. I would also risk a thesis that apart from all the reservations one might have about Raz's philosophical standpoint, ethical pluralism in which he believes on the one hand has a relevant lesson in humility for lawyers, and on the other – reveals dangers, involved in the opposite, Dworkinian stance.

Juxtaposition of both philosophers' ethical perspectives requires sketching an outline of Raz's specific viewpoint. Ethical pluralism to which he adheres to is, so to say, an intermediate position on the spectrum of ethical theories, distancing itself both from monism and relativism and offering a unique, different from the aforementioned move-

ments' account of ethical life. Monistic conceptions assume that there exists only one acceptable system of values; different variants of ethical subjectivism or relativism presuppose that all values are expressions of individual preferences or social conventions. According to the pluralist standpoint in ethics fundamental human values are objective and knowable, but irreducibly plural. Thus, they can neither be ranked, nor reduced to a common measure. Some of them may be incompatible and/or incommensurable. In Raz's interpretation the phenomenon of incommensurability of values, which is indicative of the pluralist position in ethics, boils down to their incomparability. Thus, there is no ultimate standard which would allow rational resolution of unavoidable conflicts among them. The vision inherent in the pluralist perspective is a field of unavoidable clashes of values, moral dilemmas and loss, involved in necessary choices. This is a realm in which by its very nature one cannot have everything; which does not allow achieving complete harmony or any 'final solution' of human problems. This is a reality permanently marked with lack, suffering and possibility of occurring tragedy.

The worldwide discussion on the originated in Oxford, value-pluralist position in ethics, broke off in 1995, after publishing a powerful book by John Gray, entitled *Isaiah Berlin.* Because the authorship of the idea of ethical pluralism is generally ascribed to Isaiah Berlin, although both he and other authors identify its sources in the views of a whole galaxy of former thinkers. The pluralist outlook, roughly sketched in Berlin's writings, has henceforth been remarkably developed.[4]

Joseph Raz promulgated a version of value-pluralism, as it were, parallel to that of Berlin's. Raz's conception amounts to the most sophisticated and theoretically rich contribution to the pluralist movement. Its distinctive trait is the so-called social dependence thesis, i.e. a conviction that human values hinge on social practices. Let us elaborate on this very topic, as it is liable to prove highly relevant to lawyers. One of the arguments for the social dependence thesis advanced by Raz pertains to the so-called comprehensive goals, i.e. those which have an impact on many spheres of human life. Raz claims that such goals cannot be realized without familiarizing oneself in practice with appropriate social forms. In other words, an individual cannot acquire the goal by explicit deliberation, for it can be learnt only by experience. Raz invokes the so-

[4] I had a privilege of having been a witness, and, to a certain extent, a participant of the aforementioned discussion. See: I. Berlin, B. Polanowska-Sygulska, *Unfinished Dialogue*, Amherst: New York, Prometheus Books, 2006, *passim.*

called 'dense relationships' as between spouses or among parents and children. Let us refer directly to the philosopher's characteristics of such relations:

> (…) most of our behaviour remains based on learnt semi-automatic responses (i.e. ones which we can, usually with some effort, suppress, but which we normally do not deliberate on and which we are not explicitly aware of.) Often even where such responses can be deliberate they should not be. They acquire their significance from the fact that they are not. We value their spontaneity, their instinctive, non-reflective immediacy."[5]

Raz contends that dense relationships do not allow explicit description or learning; they may be portrayed adequately enough only in fiction or in drama.

Let us now examine jurisprudential implications of Raz's ethical perspective, invoking an authentic postulate, put forward by an Ecuadorian MP. Several years ago when a new Ecuadorian constitution was being drafted a feminist MP suggested that it should include the right to orgasm. Such a constitutional provision would entitle women to take legal action against their partners in case they do not provide them with adequate sexual satisfaction. Raz's penetrating analysis displays all the absurdity of such an idea. Surely there is no other sphere of human relations that is – in Raz's terms – more 'dense' and for this reason more difficult to be analyzed and described and thus less prone to rational decision or adjudication. It is then preposterous to submit this very realm to court jurisdiction. Moreover, in the light of Raz's devastating critique of rights-based morality and procedural liberalism, the idea of perceiving interpersonal human relations in terms of rights appears by its very nature as pointless because of its not doing justice to the richness of ethical experience.

These issues present themselves quite differently in the perspective of Ronald Dworkin. His postulate of 'taking rights seriously' is an expression of an opposite to Raz's standpoint on the idea of rights-based morality. In other words, contrary to Raz Dworkin perceives human relations just in terms of rights and duties. Let us imagine a legal system including the aforementioned right to orgasm. Dworkinian 'prince of law', that is an ideal judge whose modest name is Hercules, possesses phenomenal knowledge and experience, inaccessible to the man in the

[5] J. Raz, *The Morality of Freedom*, Oxford, Oxford University Press, 1986, p. 312.

street. Thanks to them he is able to capture the social normative structures of a given political community, recognize its ruling principles, balance them and thus identify the one right answer to the legal question.[6] He then encroaches on the territory of delicate human relations armed with a sort of an intellectual circular saw and - if he happens to deal with a developed legal system, abounding with rich legal sources and judicature - he performs a successful vivisection of normative social structures in order to reach the desired effect. He is not, like his positivist counterpart named Herbert bound up with the opinion of majority; he follows his own judgment, depending on his own knowledge and experience. His is a task up to a classical hero; it is exclusively 'princes of law' who are predestined do cleanse the empire in which they wield a real power from allegedly incommensurable conflicts of rights.

On the ethical level the basis of such an approach is a belief in an integrated system of values – which boils down to a monistic standpoint. Dworkin openly declares for such a position in his last but one work, entitled *Justice for Hedgehogs.* The very first sentence of this extensive work is as follows: 'This book defends a large and old philosophical thesis: the unity of value."

The gap between Raz's and Dworkin's positions in jurisprudence reaches down to the level of moral philosophy. Implications of the value-pluralist perspective, which for Raz express the richness and complexity of human ethical experience, for Dworkin evoke the image of the Augean stables to be cleaned up by Hercules. That which according to Raz reveals the limits of reason, according to Dworkin amounts to a challenge for contemporary heroes i.e. judges, equipped with almost superhuman expertise. Unavoidable conflicts of incommensurable values which, in Raz's view, offer a powerful argument for leaving open fundamentally contested issues to forms of political settlement and compromise which can be renegotiated later, in Dworkin's view should be represented as matters of right and thereby submitted to judicial power. As a result, chiming in with the spirit of the 21st century, the process of shifting power from the legislature to judicature will accelerate.

I perceive this tendency for many reasons as disturbing; the more valuable seems the lesson in humility for lawyers, offered by penetrating investigations of Joseph Raz and of other pluralists, like Isaiah Berlin and John Gray.

---

[6] M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, [*Introduction to Legal Philosophy*], Kraków, Zakamycze, 2000, p. 212.

Cultural heritage and urban protection legislation

Marina Salgado

Abstract: In the Article nº 216 of the Federal Constitution of 1988 is mentioned the issue of listing, which may occur at the municipal, state and federal level, as a way to promote and protect the cultural heritage, in addition to inventory, registration, monitoring, expropriation and other . The listing was established by Decree-Law No. 25 of 1937, which organizes the protection of historical and artistic heritage, establishing the necessary guidelines for the protection and preservation of this heritage.

Focusing on the preservation of cultural heritage, the City Statute sum also urban instruments that can contribute to the protection of these heritage. This article aims to explore some of these instruments, such as: transfer of the right to build, right of preemption, neighborhood impact study, joint urban operation, beyond some specific laws for the preservation of cultural heritage in the city of Belo Horizonte.

The goal will be to demonstrate that the preservation of cultural heritage can occur concomitant with urban development through the application of urban instruments that allow the maintenance of the main features of a building or area, and contribute to a democratic management of the areas considering the interest by the population.

Keyword: Cultural heritage; urban legislation; preservation.

Article No. 216 of the Federal Constitution of 1988 defines the nature of what Brazilian Cultural heritage:

> Article 216. Brazilian cultural heritage is any material and immaterial property , taken individually or together, that bears reference to the identity, action, and/or memory of the various groups that make up Brazilian society, including:
> I - forms of expression;
> II - ways of creating, making, and living;
> III - the creations of science, art, and technology;

> IV - works, objects, documents, buildings, and other spaces intended for artistic and cultural expressions;
> V - urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological, and scientific value. (BRAZIL, 1988, p. 97)

Article 23 also establishes that the preservation of public heritage is the common responsibility of the Union, States, Federal District, and Municipalities, and Article 24 states that it is f up to the Union, states, and Federal District to legislate concurrently on the protection the historical, cultural, artistic, touristic, and landscape heritage.

Article 216 further mentions the issue of drawing up lists, which can take place at the local, state, and federal levels, as a way to promote and protect cultural heritage, as well as establishing an inventory, registration, monitoring, and dispossession among other things. The listing was established by Executive Order 25 of 1937, which organizes the protection of historical and artistic heritage, thus providing the necessary guidelines to protect and preserve it.

> Listing is an administrative act of the government aimed at the preservation of cultural heritage. It is characterized by the recognition of the value of the property and its inscription in one of the four books of **the Fall** - I. Archaeological, Ethnographic, and Landscape II. History III. Fine Arts and IV. Applied Arts. (FERNANDES; Rugani, 2002, p. 17)

The Federal Constitution also provides some urban instruments to ensure that the urban property fulfills the social function, namely: compulsory subdivision or construction, progressive property and urban land tax over time, t expropriation, and usurpation. Focusing on the preservation of cultural heritage, the City Statute also added urban instruments that may contribute to its protection.

> The City Statute leaves no room for doubt: to protect, preserve, and restore cultural heritage is not merely an option or choice of city administrators and urban policies, but a bound duty of public order and social interest aimed at the collective good. (MIRANDA, p.3).

The transfer of the right to build, regulated by Article 35 of the City Statute, provides that the owner of urban property, whether private

or public, may exercise its right to build as set forth in the Master Plan, in a place distinct from its source property or sell this right to a third party. Therefore, it becomes an instrument that helps with the preservation of cultural heritage since it compensates for those homeowners who cannot undertake any changes in the building, preventing the use of the constructive potential of this land from taking effect in this site, which could compromise the goal of preserving historical, cultural, landscape, and environmental heritage. However, the owner may transfer his right to build to another location, thus ensuring the right provided for in the Master Plan or specific town planning legislation.

> A very simplistic example may facilitate the understanding of the institute. Imagine that the owner of a listed property that has two stories could build the equivalent of six stories, , according to urban standards, if the building had not been listed. With the listing comes the inability to change the property, thus preventing the full realization of this right to build, with a sacrifice of construction potential equivalent to four floors. In this case, the property owner, may exercise his right to build elsewhere or convey it to third parties by deed, provided there is a local ordinance to that effect. (MIRANDA, p.8).

In addition to this instrument, the Statute City regulates the right of preemption through Articles 25, 26, and 27, being characterized by giving preference to the purchase of urban property to the municipal government, which shall establish by law, based on the Master Plan, the delimitation of areas that will address such an instrument. This may be exercised for unique urban purposes, when the Government needs areas to "protect areas of historical, cultural, or landscape importance" (Section VIII), among other purposes set forth in Article 26.

Thus, the Government may establish areas to which this instrument could be applied, those located in the vicinity of the listed items, thereby ensuring the preference of purchasing real estate in this environment and, consequently, control actions that may mischaracterize an ensemble of cultural interest.

Considering also the issue of the preservation of listed ensembles, the neighborhood impact study is adding one that had been previously reported, since it sets the execution of this technical document for specific types of projects to be defined by municipal law to demonstrate the impact of these developments on the "quality of life of the resident

population in the area and its surroundings." Article. 37 stipulates the minimum amount in this document, and Section VII addresses issues concerning the "urban landscape and natural and cultural heritage."

The Circuito Cultural Praça da Liberdade is a program implemented by the government of the State of Minas Gerais to make use of the buildings previously occupied by the State Secretariats with equipment designed for culture and recreation, such as libraries, museums, restaurants, shops, a planetarium, space workshops, auditoriums, and more. Therefore, it was necessary to conduct a Neighborhood Impact Study to predict the interference of this change in the daily use in the Praça da Liberdade, in relation to the possible increase in the flow of pedestrian and vehicle traffic and the increased demand for parking in the vicinity, for example.

A joint urban operation is scheduled in Section X of the City Statute and provides for the development of specific municipal law that would determine the area to be applied such an instrument in accordance with the Master Plan, and is characterized as:

> "(...) Set of interventions and measures coordinated by the municipal government, with the participation of owners, residents, permanent users, and private investors, aimed at achieving urban structural transformations, social improvements, and environmental enhancement in an area." (BRAZIL, 2001, p. 7)

As an example, in view of the use of urban instruments with the aim of preserving the cultural heritage, we can cite the Urban Operation of the Casa do Conde, Act 8.240/01, to rehabilitate the area surrounding the railway line next to the listed building Casa do Conde de Santa Marinha, located in the downtown area of the city of Belo Horizonte. This environment has some open areas and buildings, such as sheds, which had no practical use being that, through Urban Operation, this site should be transformed into a complex geared toward leisure and culture. For its implementation, The responsibilities for its implementation would be divided between the private sector, which "would fit design and implement projects in accordance with the rules of law", and the municipal government, which "would be responsible for implementing the required road works due to the new subdivision proposed for some of the lots . "

In addition to the instruments provided in the City Statute, one can also cite the example of Belo Horizonte by municipal law 5839 of

1990 that sets up the reassessment of exemptions, incentives and benefits, according to Art. 21 of the Temporary Constitutional Provisions Act of the Organic Law of the Municipality of Belo Horizonte. Article . 9 of this law provides for an exemption from property and urban land tax for listed buildings, with only one caveat: this benefit will focus only on the characteristics that supported its being listed for preservation.

Still using Belo Horizonte as an example, we underscore the establishment of conservation areas of interest through ADE - special guidelines area - envisaged in the Master Plan of Belo Horizonte, Act 7165/96 and amended by Act 8137/2000, which define the ADE standards. This mechanism was created from the observation that the city is formed by a series of spaces with distinct features that ultimately confer identity to them, which are recognized by residents and the general population alike. To maintain these values as to their use and occupation, cultural, social, historical, and environmental aspects, ADEs have been set up with their own parameters and guidelines that overlap with the zoning area. Some examples are:

> • ADE da Serra, with rules for the protection of altimetry;
> • ADE da Bacia da Pampulha, with rules for environmental preservation and permeability;
> • ADE da Cidade Jardim, with rules for protecting the landscape, cultural, and historic ambience zone for single-family residential use, with some economic activity allowed ;
> • ADE de Santa Tereza, with rules for the protection of the characteristics of the occupation site with historical value (as regulated by Act 8137/2000);
> (MUNICIPALITY OF BH, [200 -], p. 2-3)

In light of the above, the possibility of preserving cultural heritage concomitantly with urban development can be seen through the application of urban instruments that facilitate the maintenance of the main features of a building or area and contribute to the democratic management of areas considered to be of interest by the population.

References

FERNANDES, Edésio. RUGANI, Jurema Marteleto. (Org). **Cidade, memória e legislação:** a preservação do patrimônio na perspectiva do direito urbanístico. Belo Horizonte: IAB-MG, 2002.

BELO HORIZONTE. Lei municipal nº 5.839. Belo Horizonte, 1990. Disponível em: < http://jus.com.br/revista/texto/5372/a-protecao-do-patrimonio-cultural>.

BRASIL. **Estatuto da Cidade**: Lei nº 10.257/2001. Brasília, 2001. Disponível em:< http://www.planalto.gov.br/ccivil_03/leis/leis_2001/l10257.htm>.

BRASIL. **Constituição da República Federativa do Brasil**. Brasília, 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm>.

LAGE, Selena Duarte Lage. **A pertinência das Operações Urbanas no Paradigma do Urbanismo Democrático e Includente**: Reflexões a partir da análise da regulamentação e aplicação do instrumento em Belo Horizonte. 2008. 129f. Dissertação (Mestrado em Arquitetura e Urbanismo) - Escola de Arquitetura e Urbanismo, Universidade Federal de Minas Gerais, Belo Horizonte, 2008. Disponível em: <http://www.bibliotecadigital.ufmg.br/dspace/bitstream/1843/RAAO-7FWPTC/1/dissertacao_selena_lage.pdf>

MIRANDA, Marcos Paulo de Souza. **O estatuto da cidade e os novos instrumentos urbanísticos de proteção ao patrimônio cultural.** MINISTÉRIO PÚBLICO DE MINAS GERAIS Disponível em: <www.mp.mg.gov.br/portal/public/interno/arquivo/id/3449>.

SANTIN, Janaína; MARANGON, Elizete Gonçalves Rigo. **O Estatuto da Cidade e os instrumentos de política urbana para proteção do patrimônio histórico**: outorga onerosa e transferência do direito de construir. São Paulo: UNESP. Revista História, v.27, n.2, p.89- 109, 2008.

PREFEITURA MUNICIPAL DE BELO HORIZONTE. **Grupo 6 – Áreas de Diretrizes Especiais.** [200-]. Disponível em: < http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCUQFjAA&url=http%3A%2F%2Fportalpbh.pbh.gov.br%2Fpbh%2Fecp%2Ffiles.do%3Fevento%3Ddownload%26urlArqPlc%3DTexto_Base_areas_Diretrizes_Especiais_ADE.pdf&ei=iPpHUKbVBpHK9QSYwIFw&usg=AFQjCNHo1EA5EoyyI0j0BFG5Uq7SNqkEYQ&sig2=8_SbSWKaakUdWCBf41CRJA>.

The social function of urban property

Marina Salgado

Abstract: Currently, much of the population lives in urban areas, this index being higher than that which occupies the rural area. From this concentration of people around the centers, we observe the appearance of a number of problems related to the organization of the city, among them the issue of urban land that are directly related to the quality of life urban community.

The Federal Constitution of 1988 earmarked a special chapter to the issues of urban policy and provides in its Article No. 182 the institution of the Master Plan, which can be considered a sort of instrument of growth and expansion of urban areas. From the moment the city follows the requirements of the Master Plan, it can be said that the social function of urban property – base of the national urban law - is being fulfilled.

In 2001 it enacted the Federal Law No. 10.257, the City Statute, which regulates articles No. 182 and No. 183 of the Federal Constitution, beyond to establish general guidelines for urban policy, regulating the use of urban property for the goal of the.

From the moment that the issue of urban land use is regulated by law, it creates the possibility of establishing an interference with private property by the government, in order to, even private, this will be at the service of the collective welfare. Thus, the social function of property, based on ensuring the prevalence of the public interest over private, will be discussed in this article based on the urban instruments present in the Master Plan and the City Statute.

Keyword: City Statute; social function; urban property

Currently, most of the world's population lives in urban areas, with this index being higher than that which occupies rural areas, in other words, urbanization is a growing phenomenon – which in Brazil began in 1930 - where people increasingly seek urban centers. The popular rural exodus movement, or rural-urban migration, ultimately generates a large concentration of people around these centers. This concentration

led us to observe the appearance of a number of problems related to the city's organization. Among these problems is the issue of urban land, which is directly related to the community's quality of life.

The Federal Constitution of 1988 dedicated a special chapter to the issues of urban policy and provided in Article 182 for the institution of the Master Plan, which is a municipal responsibility and mandatory for cities with more than twenty thousand inhabitants, and may be considered an instrument of growth and expansion for urban areas. As long as the city follows the Mater Plan's requirements, it can be said that the social function of urban property – the basis of the national urban law - is being fulfilled.

In other words, the improper use of urban land, without the premise of social function, can lead to segregation and social exclusion. To achieve this goal, add Article No. 183, which also provides for an adverse possession instrument in certain specific situations. In those cases that do not meet adequate urban land use, the Federal Constitution also provides for some measures, such as expropriation, compulsory subdivision, and a progressive property and urban land tax over time.

In 2001, Federal Act 10.257, the City Statute, was enacted and it regulates Articles No. 182 and No. 183 of the Federal Constitution, aimed at establishing general guidelines for urban policies and regulating the use of urban property for the goal of social function. The chapter on the Master Plan emphasizes its importance as a tool that ensures the full development of the entire city's social function and the welfare of its population, in other words, the satisfaction of the collective interest through disciplined urban expansion. Furthermore, this Act mandates that the Master Plan should be revised every ten years, which considers our cities' dynamics and becomes an instrument in the process of ongoing planning, ensuring that urban growth is accompanied by guidelines consistent with the city.

> Urban policy has received constitutional treatment, and Federal Act 10.257/2001 - City Statute - established its general guidelines. Thus, the Constitution of 1988 advanced the treatment accorded to the right to property and its social function, being a benchmark for the start of the walk from the legal institute of urban property that matures slowly in our regulatory system. (PIRES, 2007, p. 49-50)

Since the issue of urban land use is regulated by law, this regulation creates the possibility of the government interfering with private

property , so that, while being private, the property will be at the service of the collective welfare. Thus, the social function of property is based on ensuring that public interest prevails over private, in an attempt to create a coordinated, cohesive city.

I It should be emphasized that property that goes beyond its limits is understood as being private, because it directly affects the city as a whole, from its close neighbors up to entire neighborhoods as part of a much more extensive and complex context. This can be exemplified by issues defined by occupation and land use, such as ventilation, sunlight, densification, urban landscape, and the dialogue between public and private spaces. From this holistic idea, the use of private property within the urban space should be socially fair to the citizens, democratizing access to property rights and its consequences.

Thus, it is the duty of the Government to make sure the social function of property is fulfilled, and settle legal instruments to be applied should the owner make self-serving use of his property, or one devoid of its social function as according to Figueiredo (2007, p.69) "we mean property as a right and social function as a duty."

Recently, we noted that the production architectural guidelines established in the Master Plan - Use and Occupation of the Land Act - are used to achieve the maximum degree of use of urban land's building capacity , forgetting the commitment that the architecture has with the city and its inhabitants. This is responsible, in large part, for the inhabitants' quality of life and, therefore, directly related to the social issues that are imbued in architecture.

The concept of republican architecture goes against the idea of the social function of property, since both value the overlap of public values on private to promote a democratic and socially sustainable environment. Within this perspective, Vieira and Salgado (2007) use the example of the Sulacap/Sul-América building, constructed in the center of the city of Belo Horizonte, as a project conceived as respecting and valuing social issues and the inhabitants of this city, not taking only into account the issues related to legislation and the constructive use of the urban land's potential.

> Architect Roberto Campello, designing for a particular area, was careful to take into account the importance of the lot and space that was indispensable in shaping the view from Afonso Pena to Assis Chateaubriand Avenue, highlighting the Santa Teresa viaduct. The results masterfully wielded a public function that is in-

> herent to it. The logic of maximum land use was set aside in favor of the collective benefit. (VIEIRA; SALGADO, 2007, p. 6)

It is observed that the social function of property must be take root in the city, for it must be integrated into the different performances of all branches of power - executive, legislative and judiciary - not only through the aforementioned legislation , but also from social responsibility and joint action on the part of its inhabitants, who should actively participate in decisions that affect the future of their cities, therefore a democratic management, ensuring that the city is sustainable not only today but also for future generations. "Ensuring the citizen's voice and opportunity implies recovering the original meaning of the word "republic" and building public trading of the different interests in society."

References

BANDEIRA DE MELLO, Celso Antônio. Eficácia das normas constitucionais sobre justiça social. **Revista de direito público**, v.14, n. 57/58, p. 233-256, jan./jun. 1981.

BRASIL. **Estatuto da Cidade**: Lei nº 10.257/2001. Brasília, 2001. Disponível em:< http://www.planalto.gov.br/ccivil_03/leis/leis_2001/l10257.htm>.

BRASIL. **Constituição da República Federativa do Brasil**. Brasília, 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm>.

MIRANDA, Marcos Paulo de Souza. **O estatuto da cidade e os novos instrumentos urbanísticos de proteção ao patrimônio cultural.** MINISTÉRIO PÚBLICO DE MINAS GERAIS Disponível em: <www.mp.mg.gov.br/portal/public/interno/arquivo/id/3449>.

PIRES, Lílian Regina Gabriel Moreira. **Função social da propriedade urbana e o plano diretor.** Editora Fórum, Belo Horizonte, 2007.

VIEIRA, José Júlio; SALGADO, Marina. **Arquitetura republicana**: A dimensão privada frente ao caráter público. Interpretar Arquitetura. V. 11, p. 11, 2007. Disponível em: <http://www.arquitetura.ufmg.br/ia/>.

SANTIN, Janaína; MARANGON, Elizete Gonçalves Rigo. **O Estatuto da Cidade e os instrumentos de política urbana para proteção do patrimônio histórico**: outorga onerosa e transferência do direito de construir. São Paulo: UNESP. Revista História, v.27, n.2, p.89- 109, 2008.

The rule of law on a plural society under the perspective of realist culturalism:
Considerations on a Brazilian urban development case

Alan Mariano Bezerra de Carvalho[1]

Abstract: In this paper we look into the proliferation of gated communities in the city of Vinhedo, in the state of São Paulo, and the problems it ensues. Our analysis will be centered on the concept of rule of law, as defined by the United Nations. This concept will be the focal point for our critic on the applicable urban development laws, applying a "realist culturalist" perspective, expression taken from Miguel Reale's work "Teoria do Direito e do Estado". This perspective brings a pragmatic view of the legal phenomena, according to the "axiological historicism" of his Tridimensional Theory of Law. Our critic also takes this distinct approach on the positing of legal norms, on which the State Law is recognized as the highest level of law positing and other law positing nexuses are recognized, although with lesser positivity.

Keywords: culturalism, rule of law, urban development.

Introduction

Several distinct factors, such as the increase in the feeling of public insecurity, the absence of recreational public facilities in most neighborhoods, and the problems at getting urban infrastructure maintenance from the municipalities, led the real state market in Brazil to develop a new product in response to the increasing demand for better public services.

These gated communities claimed to combine the comforts and individuality of domain of a land lot and the perceived safety of condominiums, the two main forms of urban development according to the Brazilian law, each with its distinct legal framework.

The Brazilian urban development laws did not foresee this kind

[1] Associate Attorney practicing Environmental and Mining Law at Braga & Carvalho Law Firm – BCA and student of Philosophy of Law at the University of São Paulo's Masters Program.

of approach to the creation of new housing and neighborhoods. There was much confusion on how to legally implement such a product.

Some of these projects were registered as a kind of condominium, applying the respective legal regulation that structures the institutions for common interest administration to a newly formed "private neighborhood".

Other projects were made by using the land parceling procedure, creating homeowners associations that took over the "condominium management", charging maintenance fees in the form of associative contributions, and in general trying to emulate the institutions of the Condominium Law to make these associations work.

This last alternative became the most usual way these communities were created, with the development of a new neighborhood using the Land Parceling Law procedure, then obtaining municipal authorization to enclose it within walls, with gates for private access control. These neighborhoods can only be accessed through these gates, manned by private security forces hired by the homeowners association.

The public offices were no less confused by this development. Some prefectures accepted the registration of these gated communities as new neighborhoods by the Land Parceling Law or as condominiums, in the case of those made by claiming to follow the Condominium Law. Others claimed that there was no legal support for these enterprises and looked for ways to make them regular by means of municipal laws or administrative acts.

The city of Vinhedo is a focus for this kind of enterprise since the decade of 1970. Vinhedo is located near the city of Campinas and crossed by the Anhanguera Highway, one of the major highways in the state of São Paulo. It had both the available land and ease of access to appeal as a prospective "bedroom city" to the major metropolitan areas nearby.

After decades of urban development using this gated community model, the city of Vinhedo started to see its negative implications. There was a significant absence of public spaces for the implementation of public facilities and services for the wider population.

According to the Brazilian Urban Land Parceling Law, on every land parceling for the creation of a new neighborhood there must be lands destined for public use. These lands are transferred to public domain after the parceling project is finished. With the gated community model that had been accepted so far, the public lands were now located within walled perimeters, with restricted access for the general popula-

tion and even some difficulties of access for the public authorities.

We will analyze the case of Vinhedo, as an example of the heavy impacts of the implementation of gated communities to a city's urban development. For this end, we will have to set up our baseline regarding the concept of Rule of Law. We will then make quick considerations on the Brazilian urban development laws, under the guidelines of the adequate promotion of the Rule of Law on the national level. We'll then look at the implications of an adequate Rule of Law enforcement on the case of the gated communities of Vinhedo.

1. Concept of Rule of Law

For this work we will be applying the concept of Rule of Law as defined by the UN Secretary-General[2], that states that *"It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural legal transparency."*

Attendance to each of these principles that compose the concept of Rule of Law can make for a more reliable and legitimate legal structure. By identifying which principles are not observed on the legal and administrative practice, we can also seek for ways to improve legal norms and institutions, as a way to reinforce the Rule of Law as way to promote the stability of the legal structure and of society itself. A strong Rule of Law approach can help raise the trust of the population on the legal institutions, and help raise the efficacy of legal commands.

2. Brazilian urban development laws[3]

The Brazilian laws have been increasingly adopting an urban development framework with a focus on the public interest over private interests. It is integrated on a general level by the Condominium Law (L.

[2] U.N. Security Council .*Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies.*, 24 Aug. 2004 (S/2004/616), pp. 04.

[3] The names of the laws are presented in a free translation by the author.

4591/64), the Urban Land Parceling Law (L. 6766/79), the City Statute (L. 10257/01) and the Law of the My House, My Life Program (L. 11.977/09).

We present these laws on chronological order as it is relevant to consider the growing concern with the social implications of the access to housing and to the city itself on Brazil over these last decades.

The Condominium Law regulates both the implementation and the administration of condominiums. It establishes the incorporation procedure, a special administrative procedure applied to condominium construction. It also regulates the condominium assemblies, which are responsible for the decisions that affect matters of common interest and the life of the condominium. This law is heavily influenced by private law principles, and mostly focuses on balancing conflicts of property rights and creating institutions for the management of issues of common interest of the owners.

The Urban Land Parceling Law brings a legal structure centered on public interest, while still leaving the initiative for urban development to private companies. It regulates the land parceling by lots and the procedure for the dismemberment of land, which implies the existence of basic infrastructure. It also has dispositions on the conversion of rural land into urban land.

The Urban Land Parceling Law implements several social safeguards and compensations for the parceling projects, such as the obligation the parceling company to build the minimum urban infrastructure, using part of the land parceled as insurance to its completion.

If the parceling company fails to complete the minimum infrastructure, these works will be taken over by the prefecture, selling the lots given as security to finance its completion. It also establishes the need for the transfer of part of the lots to public dominion, registered as green areas, destined environmental preservation and recreational purposes, or institutional areas, destined for the building of public facilities and services such as public schools and hospitals.

The City Statute holds the general guidelines for urban policy, regulating the Article 182 of the Brazilian Constitution, that states that urban policy is centered on the prefectures, and that the prefectures should promote the ordered development of the city's social functions and guarantee the well-being of its population.

It brings the legal tools for urban policy implementation, which are divided on urban planning institutes, tax and financial institutes and legal and politic institutes. The municipal Master Plan deserves a special mention, as it is stated as a mandatory general planning tool, with social

participation as one of its legal validity requirements.

These tools enable a proactive stance of the prefectures in ordering the city occupation and the activities allowed on each of its regions, allowing property to realize its social function, as defined by Brazilian law.

The law of the My House, My Life program is listed here as it not only gives the general guidelines for this specific program, that seeks to promote the expansion of housing for low income families, but also brings new tools to recognize the rights of irregular occupations by low income people, due to the deficit of affordable housing. It alters previous urban development laws and focuses on implementing the access to adequate, affordable housing to low income families.

The current urban development legal structured has evolved to reduce social inequality regarding access to housing and to the city itself, and its core values seek to promote a peaceful coexistence of people on the urban environment.

From a Rule of Law perspective, we see a chronological improvement on the legal texts, with the creation of new forms for the people to participate on matter regarding the interest of the whole city, a greater concern for transparency and accountability to the law for both private parties and public institutions.

The weakest link on the Brazilian urban development legal framework is also its key actor: the prefectures and the municipal law. By means of urban planning laws and the approval for urban development enterprises, the prefectures can direct the development of the city according to its local characteristics and interests.

While there are legal tools for urban planning and development, their proper use requires well prepared public offices and servants. This is far from a reality for many of the Brazilian prefectures. There are generic Master Plans aplenty, leaving a legal vacuum regarding many urban development issues especially relevant to these cities.

This is the case of the city of Vinhedo, which is now trying to correct this figure by means of its new Master Plan. It had significant popular participation and was made under close watch of São Paulo's State "Ministério Público".

It has not yet given an adequate solution to the situation of the deficit of institutional areas on the city, having to contend with the numerous existing gated communities and homeowners associations and while also giving a response to the needs of the people who live outside the walls.

3. On the gated communities of Vinhedo

The city of Vinhedo has several characteristics which made it a target of the real state market for the implementation of high value housing projects. Among these characteristics are its proximity to the major city of Campinas, easy highway access through the Anhanguera Highway, the lack of major urban issues found on the bigger cities and the existence of available land for parceling.

The population of the city of Vinhedo has increased from 47.215 inhabitants on the year 2000 to 63.611 inhabitants on the year 2010. According to the local office of the "Ministério Público", 40% of the urban population of the city lives on gated communities[4].

This development was due to the prefecture's complacency on the approval of land parceling projects. There was a lack of control of the actual nature of the projects and the observance to the applicable law.

Some of these gated communities were regularly established as condominiums, as by the condominium law, using the incorporation process and attending to that law's basic requisites. Most of the gated communities in Vinhedo, however, were made according to the procedures of the Land Parceling Law.

The Land Parceling Law procedure is mandatory for projects that divide the land into lots of individual dominion and that require the opening of new streets, essentially creating a new neighborhood that must be integrated to the city, generating new demands for public services.

The social safeguards and compensations of the Land Parcelling Law are required due to the impact of these projects on the whole city, and the approval procedure requires the judgment of the viability of this integration of the new neighborhood to the whole.

What happened for several years in the city of Vinhedo was a lack of criteria on the approval of land parceling projects. After being approved according to the Land Parceling Law Procedure, the company or a homeowner association would request the permission to erect walls around the new neighborhood. These requests where usually granted, without greater inquiry, and the homeowner associations would them act as if they were a "condominium assembly", institution established

[4] Information obtained from the investigations on the Civil Inquiry nº 163.754/12, made by the local office of São Paulo´s State "Ministério Público" on Vinhedo, led by Rogerio Sanches Cunha.

by the Condominium Law.

These associations would be regulated by private statutes that would promote compulsory association by all homeowners, and consequent compulsory payment of association fees for the maintenance of the "common areas".

These "common areas" where actually the areas legally destined to public domain as green areas and institutional areas, now enclosed within the walled perimeter. With the access to the gated communities restricted by private security, these areas were now out of reach of the wider population it was originally destined to serve and incorporated to the private dominion of these homeowner associations.

During the making of Vinhedo's new Master Plan a diagnostic of the situation was made by the prefecture, and the city saw that this situation hampered its ability to offer public services, due to the lack usable, accessible institutional areas. There was also a deficit of access to green areas and public recreational facilities to the wider population that lived outside of these gated communities.

The new Master Plan was made, promulgated by the Municipal Complementary Law 66/2007, in which the illegality of these gated communities was finally recognized. There was a prohibition to the creation of new gated communities and guidelines to legalize the existing ones. This legalization would involve the compensation for the public areas that existed within the walled perimeters, with the objective of giving the social compensations owned to the city.

These compensations for legalization where removed by the Municipal Complementary Law 98/2011, and the situation is still unsure as if there will be any compensations at all.

After analyzing the closure proposal of the Civil Inquiry 163.754/12, made by the local office of Vinhedo, the Superior Council of São Paulo's State "Ministério Público" decided, on 2013.06.18, that the investigations needed to continue, as several problematic points still remained regarding the observance to the Urban Land Parcelling Laws.

4. Rule of Law implications of the current Master Plan of the city of Vinhedo and insights of a "realist culturalist" perspective

The current text of the Master Plan of the city of Vinhedo has noxious implications from a Rule of Law perspective. Giving up on the social compensations for the legalization of the existing gated commu-

nities goes against the principles of accountability before the law and equality before the law.

It consists on a pardon for the appropriation of public property by these homeowner associations, depriving the citizens as a whole from its benefits.

The alternative of unmaking the walls and gates as means to give the population access to those areas is also in grave conflict with the principles of legal certainty and fairness in the application of law. The population of these gated communities has lived in this way for decades, in some cases, with perceived legality due to administrative acts of approval from the prefecture agents.

The original text of the Master Plan, even with the apparent contradiction of accepting as legal urban parceling made without the observance to the applicable laws, actually enforces the general guidelines and values of the current urban development legal framework.

There is also the need to reconcile the private statutes of these homeowner associations with the Brazilian Constitution, as a way to make these associations accountable to the law and protect the base rights of the people who live under them.

Miguel Reale sustains, based on the work of Del Vecchio, that State Law is not the only positive law applicable, and that positive law can be originated from different sources of power manifested by social integration, the State Law being the greatest level of positivity relative to other legal orders.[5]

The Brazilian Constitution ensures the freedom of association, according to the items XVII, XVIII, XIX, XX and XXI of its 5th article. It protects this freedom from both a positive and a negative perspective, the item XX clearly stating that *"no one should be compelled to associate or stay associated"*; and item XIX stating that *"associations can only be unmade by a judge's decision"*. These dispositions both recognize the legitimacy of the private social integration process and gives the means by which the state affirms its supremacy as the greatest level of legal positivity.

By the means of compulsory association clauses, these homeowner associations arbitrarily violate constitutional rights of the individual owners. The dispositions of such statutes should be reconciled with the State Law, as means to assure the principles of the supremacy of law and avoidance of arbitrariness.

[5] Reale, Miguel. Teoria do Direito e do Estado, 5 ed., Saraiva, São Paulo, 2000, pp.102.

Conclusion

The Rule of Law on a plural society faces the twofold challenge of conciliating Freedom and Safety, of allowing the people to follow their will and act according to it while protecting the same people of the harmful acts they would practice unto themselves or unto other members of the same society.

The State Law has the role to be this common denomination among the varied foci of power and norms, guided by such distinct values that can be taken as a vector of action. Religious norms, customary norms, private norms, all these distinct norms have their role on regulating our lives, but none can be allowed to have power of the Freedom of the whole of society, on the risk of undermining the very structure that allow them to flourish peacefully.

References

U.N. Security Council. *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*., 24 Aug. 2004 (S/2004/616).

Inquérito Civil (Civil Inquiry) nº 163.754/12. State of São Paulo's "Ministério Público" office of Vinhedo.

Lei de Condomínio (Condominium Law), Lei Federal nº 4.591 de 16-12-1964.

Lei de Parcelamento do Solo Urbano (Urban Land Parcelling Law), Lei Federal nº 6.766 de 19-12-1979.

Estatuto da Cidade (City Statute), Lei Federal nº 10.257 de 10-07-2001.

Lei do Programa Minha Casa, Minha Vida (My House, My Life Program Law), Lei Federal 11.977 de 07-07-2009.

Lei do Plano Diretor de Vinhedo (Vinhedo´s Master Plan Law), Lei Complementar Municipal nº 66 de 17-01-2007. Alterada pela Lei Complementar Municipal nº 98 de 12-05-2011.

Miguel Reale. Teoria do Direito e do Estado, 5 ed., Saraiva, São Paulo, 2000.

Right to the city as a condition to the effectiveness of social rights
The possibility of judicial activism and public space

Alessandro Bruce Lied Padilha
Giuliana Redin

Abstract: The efficiency of the social rights is connected to the complexity of development policies, what presupposes public choices. These choices might not be connected to the local demands. It is in the city, by its temporal and spatial dynamics, the first space of effectuation of social rights. According to this view, the government policies of development might not consider the local demands about social rights, which are perceived by specific analysis of the local reality. Given this context, it is put to the Judiciary the challenge of being a public space of claim for local demands, being required from it the taking of political decisions by the legal basis of the social rights. Thereby, It is asked: does the Judiciary represent a public space of claim for local demands about social rights? It's questioned about the capability of the Judiciary at facing the merit of public choices nationally and stately projected, by the presupposition of local public space by the complexity of Right to the City. The Federal Constitution establishes government competences and legal criteria for the formulation and application of public policies, but the realization of social rights might reveal high levels of complexity that transcend the capability of these decisions to satisfy the basic needs of the local sphere, therefore, can the Judiciary be taken as legitimate instance of public choice revision? The goal of the present search is the confrontation of the constitutional core about the legitimacy of the Judiciary to serve as a public space of claim and not only as a sphere of application of the public decision. It is, in Arendt's theoretical perspective on space and public sphere, the political and philosophical analysis of the current constitutionalism, which Dworkin faces starting by the question of the principles and the capability of the judiciary to decide politically. Furthermore, along with the matter of principle, specifically on the agenda is the realization of social rights, which are directly connected to the city, as the first instance for its effectuation, according to Lefebvre. Finally, social rights are complex rights regarding its effectiveness, thus, the search deals with the concepts of basic needs instead of minimum needs, according to Potyara Pereira's approach. As methodology, the research adopts a

dialectical approach, since it makes dogmatic confrontation of the current Brazilian constitutionalism, as well as procedural technique, besides the theoretical and conceptual literature, documentary research and case study.

Keywords: Judicial Activism; Social Rights; Right to the City;

1. Introduction

The transformation of the conception of a traditional state into a Welfare State is understood as a deepening of the individual's protection and reduction of uncertainties. The new characterization of the modern state reflects on the promotion of social rights by the state. Social rights are constitutionally assured in Brazil, although its effectuation depends on public policies, which presupposes public choices.

The goal of the present work is to analyse whether the judiciary can be considered a legitimate space of claim by the civil society on the pursuing of social rights. In order to achieve this goal, the following works are observed: A Principle Question by Ronald Dworkin, which debates the idea of on what the judiciary must be based on to make decisions; "Necessidades Humanas: Subsídios à crítica dos mínimos sociais" by Potyara Pereira, which brings the debate about human needs and the strategic position of the rulers to satisfy those needs with social services; and Right to the city by Henri Lefebvre, that explores the thought that the construction (and reconstruction) of the city must be perceived by a local sphere.

The investigation about the possibility of the judiciary be considered as a legitimate space of claim by the civil society on social rights is seen as a very important issue once it is an ally to the satisfaction of those needs. Social rights are assured by right but depend on public choices. Those rights are satisfied when they are effected in the place where they are needed, in the city.

2. Social rights

Social rights are connected to the role the state plays upon its people. The level of implementation of social rights depends on the state offering, and this offering determines the accesses the individuals enjoy. Rosanvallon (1997) observes that the welfare state is a deepening of the traditional state. While the traditional state provides right to life

and right to property in a way to protect people from an unstable scenario, the welfare state provides practices of redistribution and collective public services in order to reduce the uncertainties and produce a safety environment. According to Rosanvallon (1997) the welfare state shouldn't be seen as emerging from economic determinations but it is derived from a historical process connected to a certain social contract, certain level of economic development and social relations.

The civil and political rights are connected to the ideal of liberty and individual autonomy while the social rights, given their own collective nature, they are linked to the conception of need and keep a relation with the principles of equality, equity and social justice (PEREIRA, 2011, p. 37). Economic and social rights are assured, in 1919, by the Weimar Constitution and, they are derived of the social constitutionalism that gives the idea that happiness of men is achieved not only against the state, but above all, by the state (SILVA VELLOSO, 2003, p. 3). Those rights are a socialist inheritance and they are constituted by rights such as right to social welfare, right to work, right to health and education (SILVA VELLOSO, 2003).

Social rights, such as education, health, work and housing are assured in the Brazilian Constitution of 1988. Despite of being assured, they depend on public choices to have its effectuation in a way they can be accessed by the civil society. The organic bill of social assistance (Lei Orgânica de Assistência Social), with number of 8742, was promulgated in Brazil in 1993, and its content establishes the criteria for the organization of social assistance. In its first chapter and article it expresses that the social assistance is a right of the citizen and must be provided by the state. The nomenclature used connects social minimum to satisfy basic needs, and those provisions are part of a non-contributive policy made by the government which is understood as an advance (PEREIRA, 2011).

The Organic Bill of Social Assistance establishes the promotion of social minimum accesses by the state to satisfy basic needs demanded by the population. Pereira (2011) sees the relation between social minimum accesses and basic needs as a strategic position of the government. Pereira (2011) says that for the satisfaction of basic needs the government must provide social basic services and, only then, will exist an accordance between what is needed by the individuals and what is provided by the state. Her explanation goes on saying that only when it has an accordance between what is needed and what is provided will be possible to talk about fundamental rights, the ones every citizen is holder.

According to Pereira (2011), needs are different of aspirations

and desires because the non-satisfaction of needs will lead the individuals to conditions of serious damages. She says that in every culture the individuals have common basic needs, and even if the satisfaction of the needs varies according to the culture, the need doesn't vary. Defining needs as an objective phenomenon is important to the elaboration of trustable public policies, which can allow the civil society to be free from the coercion made by need. Therefore, to the satisfaction of human basic needs is required social basic services, only then the effectuation of social rights will be made satisfactorily.

3. Right to the city

The city is the space where individuals have their first contact with the material reality and is the place where occurs their first relation with the society they are inserted. The individuals interact constantly with the city, giving to it shape, meaning, making part of its building, influencing and being influenced by it. The urban space is created and recreated by the human relations established in its space through meetings, trade, productive activity, events, politics, etc. This joint of interactions constitute the dynamics of the city, where the individuals dwell and it is also the space where the social rights are demanded by the civil society (LEFEBVRE, 2001).

The city constitutes the first space of participation of individuals in the reality they are inserted and in its space the individuals assume double perspective, as subjects and objects. As the city is seen as the habitat of individuals, the realization of social rights and the satisfaction of human basic needs with social basic services occurs in its space. Therefore, the satisfaction of social rights requires a planning upon the city, its structures, its shape, its dynamics and its ideologies. According to Lefebvre (2001), the realization of the urban society requires a planning oriented to the satisfaction of basic social needs in the city. Only when it is achieved, we can have a right to the city, a right which is superior in relation to the other rights because it is a joint of social rights formulated and thought together with local perspective.

To the city be oriented to the satisfaction of social rights it has to take into account the local demands, or sad in another way, the demands perceived by local population. This local perspective presupposes that individuals occupy a public realm in their political expresses to speak what kind of accesses they need. Then, the civil society in their political

expression occupies a public realm to debate about public choices which are related to the local reality. This way the public choices can have an accordance to social rights in the proportion they are needed in a certain reality (ARENDT, 2013).

The right to the city recognizes that the space where individuals are inserted and where they have contact to the society is the local realm, therefore, the city. The city is the space in which social rights are demanded in the shape of social basic services to satisfy basic needs. The city is where the individuals live, where they are housed, where they have the chance to participate of social and political life. Therefore, the right to the city expresses itself as a right when the human relations and demands established in the local reality are took into account to the construction of the public space (LEFEBVRE, 2001).

4. Judiciary activism for the realization of social rights

The effectuation of fundamental rights rely on public choices, which depend on decisions made by the government. From the government comes guidelines to satisfy human basic needs, but when those choices are thought nationally and stately they might have some disconnections on what is needed by the individuals in their micro space. Although a new management in the government presupposes a new ideological background, the provision of social rights is assured in the Brazilian Constitution of 1988. Therefore, independently of the governmental choices the social rights such as right to health, right to education are rights that must be provided by the state (PEREIRA, 2011).

Sometimes the public choices to allocate available resources in the society don't satisfy social rights properly and given this scenario is questioned: Can the judiciary be considered a space of claim by the civil society for the effectuation of social rights? It is unquestionable the normative content of social rights, then it is needed to comprehend how far the judiciary might go for the effectuation of those rights. According to Dworkin (2000), the judiciary can not make political decisions and then decide what is best chosen for the society, but must make decision based on principle.

The social rights are connected to the dynamics of the city and to the mutability of social life and human relations, so they are complex and not perennial. Therefore, when are exhausted other ways of effectuation of social rights, the judiciary can serve as a legitimate space of claim by

the civil society to satisfy their basic human needs on the sphere of the city. The judiciary serving as a space of claim on the issue of social rights is decided on a matter of principle due to the reason that social rights are connected to the principle of dignity of the human person, which is written in the Brazilian Constitution of 1988 (SARLET, 2009).

When the civil society come to the judiciary to claim for a school or a health center in their city they are expressing their local demands on social rights, therefore, this demand is based on a principle question. The dignity of the human person is a principle assured in the Brazilian Constitution of 1988 and beyond its recognition, as Sarlet (2009) observes, the protection and promotion of this principle rely on social rights.

5. Conclusion

The satisfaction of human basic needs by the provision of social basic services has its effectuation in the space where the individuals are inserted, the city. Therefore, the Right to the City is a right to welfare for individuals from their mundane life condition, in other words, their human condition must be considered and respected by the local realm. The effectuation of those rights is connected to public choices of economic opportunities and they are possible where they are needed, in the local sphere of the city.

Consequently, the satisfaction of human basic needs in the sphere of the city is directly linked to the capability of the civil society manifest their demands. In this perspective, exhausted the traditional ways of claim, the judiciary show itself as a legitimate space of claim to hear and to receive the demands of the civil society by a question of principle. Once the social rights are changeable and not perennial the activism of the judiciary is seen as legitimate space for the effectuation of social rights.

References

PEREIRA, Potyara A. P. Necessidades Humanas: subsídeos à crítica dos mínimos sociais - São Paulo: Cortez, 2011

LOAS Anotada (2009), Ministério do Desenvolvimento Social e Combate à Fome.

Concepção e gestão da proteção social não contributiva no Brasil. -- Brasília: Ministério do Desenvolvimento Social e Combate à Fome, UNESCO, 2009.

NOVELINO, Marcelo. *Direito Constitucional*. São Paulo: Editora Método, 2009, 3º ed., 362/364. http://ww3.lfg.com.br/public_html/article.php?story=20110211091833683&mode=print

DWORKIN, Ronald. Uma Questão de Princípio - São Paulo: Martins Fontes, 2000. - (Justiça e Direito)

LEFEBVRE, Henri. O Direito à Cidade, 2001

SARLET, Wolfgang. Dimensões da Dignidade: ensaios de filosofia do direito e direito constitucional / BéatriceMaurer ...[et. al.]; org. Ingo Wolfgang Sarlet; trad.Ingo Wolfgang Sarlet, Luís Marcos Sander, Pedro Scherer de Mello Aleixo, Rita DostalZanini. 2. ed. ver. eampl. – Porto Alegre: Livraria do Advogado Editora, 2009.

ROSANVALLON, Pierre. A crise do Estado-Providência. Tradução de Joel Pimentel de Ulhôa. Brasília: UnB, 1997.

ARENDT, Hannah. A condição humana. Rio de Janeiro: Forense Universitária, 2005.

Influence of ethics in the concept of law
Questions about actual stage of the "Hart-Dworkin" debate

Leonardo Figueiredo Barbosa

Abstract: This work intends to question the role that ethics plays in the identification of the concept of law. With this purpose we established a theoretical specific point: It will start with an analysis of the debate between Herbert Hart and Ronald Dworkin, focusing on relevant points to the study of the relationship between law and morality. Notwithstanding the debate called "Hart-Dworkin" has started in the 70's and has more direct origins in the debate initiated by Lon Fuller and Hart in the 50's, remains relevant to this day as it can be seen both in the last few books published by Dworkin before his death in 2013 - Justice in robes (2006) and Justice for hedgehogs (2011) - as in the current discussion between proponents and detractors of theories where the connection between morality and law is the focal point of divergence.

Keywords: Hart-Dworkin Debate. Concept of Law. Ethics

1. Introduction

This presentation is derived from an ongoing research that intends to question what is the role moral values[1] may play in identifying

[1] Although there is an extensive literature discussing the existence, or not, of differences between the ethics and morality concepts, we will not review such discussion in the development of this project and we will take the terms as synonymous. This decision is due to two reasons: first of all, because the objective of this work is to evaluate whether there is a required relation between the moral values and the legal system, whether such axiological standards refer to a specific person, group or society or to supposedly global or globalizable values because they can be discovered by the reason or through the idea of dignity. Secondly, because the existing divergence on the subject would require a more detailed analysis, as well as explanatory notes each time one of the terms was quoted, what would deviate from the scope of work and would make it more tiring than necessary. Just as an example to show the diversified handling of the terms: Hart, *The Concept of Law* (1994, pp. 168 and 184) deals with ethics and morals as "associated or nearly synonymous terms", although making a distinction between the "accepted morality" and the critical moral that can be opposed to the former. Dworkin, *Justice for hedgehogs* (2011,

the concept of Law and, specifically, the role of such values in decisions taken by the Judiciary Branch in current democracies, that is, at the current moment of construction of judicial decisions. A specific theoretical section has been established with this objective: this problem shall be analyzed from the discussion between the theories of Herbert Hart (1907-1992) and Ronald Dworkin (1931-2013).

2. The theses of hart and dworkin

Presenting the main points of a debate that lasts nearly five decades can be a risky task; in spite of this, we seek to summarize below, in a logical chain of ideas, the main points in the debate between the binding and separation theses between law and morals.

2.1 Hart's theory

Hart's work search focus on the structural issue of the law, trying to point out the common elements that this social construction would have in any contemporary community and, therefore, that could be identified by any reasonably educated person, as "important points of similarity between the different legal systems" as listed below:

> (i) rules forbidding or enjoining certain types of behavior under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones. (HART, 1994, pp. 3).

Later, along the work, Hart would summarize these five **characteristics of the similar structure** that the several contemporary legal systems present into two different types of rules: ***primary*** (that determine that the individuals do or do not do something) and ***secondary***

pp. 13), however, in his latest work – Justice for hedgehogs – understands that ethics is the study on how to live well, while morals would be the study on how we must treat others: "*I emphasize here and throughout the book the distinction between ethics, which is the study of how to live well, and morality, which is the study of how we must treat other people*".

(that allow the creation of new primary rules, extinction or modification of old rules; determine its incidence and application; and identify the aspects or characteristics able to define which law rules are valid), the interaction of which is considered by the author as the "key for the law science". Therefore, Hart elects as the central or paradigmatic case for his project of identification of the law concept, the combination of primary and secondary rules, arguing that their correct observation and description could clarify a number of issues that were not adequately explained by imperative theories of law (such as John Austin's theory).

Obviously, all theoretical assumption has some consequences and that would not be different here. Among the various consequences resulting from the selection of this paradigmatic case, we can point out the following ones:[2]

1. ***Social sources of law*** –The idea that **the law is** comprised of a set of standards – regardless whether they are rules or principles – that may be **identified through the observation of the social practice**, raising the argument that the ultimate criterion of legal validity derives from the courts' practice to accept what Hart called as "a rule of recognition".
2. **Judicial discretion -** If law can be characterized, at least in central cases, as this set of primary and secondary rules, this means that there may be cases not covered by these rules. In addition to the possible absence of rules, Hart admits that the incompleteness of law may also derive from limitations derived from human language itself, as well as the relative ignorance of fact and the relative indefinite purpose that are typical of any undertaking that aims to influence future behaviors-resulting in what the author calls **open texture of law**. Due to all this, it is reasonable to say that the law is partially incomplete or indefinite - in cases where there are no rules that are clearly applicable (either because this fact has not been anticipated or because the rules created incur in the open texture of law), there is no "law" previously established – and, in such case, if the Judiciary Branch

[2] (Hart, 1980).

need to make a decision, it is up to the magistrate to exercise a discretionary power - since there is no applicable legal rule and, therefore, there is no compulsory binding rule (for the positivists, only the statutory law is required to be complied with) - for the creation of a law for that specific situation.

3. **Conceptual separation between law and morality** - Ultimately, if it is possible to identify the law based on the impartial observation of these rules that occur in social practice, **there would not exist any required relation between morality and legality** (for others, between what the law is and what it should be, between ethics and law, between validity and justice) - although there may exist contingent connections in certain communities –, that is, the existence of the law is one thing; its merits or demerits, is another.[3]

Therefore, these three pillars of Hart's positivism would be logical consequences of his theoretical assumption, that is, that the heart of law is constituted by the gathering of primary and secondary rules that can be objectively identified by a descriptive methodology.

To this work, one of the most important consequences of Hart's assumption is the impossibility to evaluate the value, within a purely descriptive science, since the methodology aims solely at observing and describing the elements listed above. This does not mean that the community's values (included the internal point of view) cannot be present among the elements that will be described – it is in this direction that Hart (1994, pp. 244) states that "description may still be description,

[3] This statement, which is the true mantra of legal positivism up to present time — or, as Hart would say (1994, pp. 207), evidences the battle-cries of legal positivism – is based on Austin's work, originally published in 1832, *The Province of Jurisprudence Determined***:** "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume". (AUSTIN, 2007, pp. 157)

even when what is described is an evaluation". Here, the author intends to defend that the descriptive approach not only makes prevents the consideration of values that may be present in the object of study, but, also, that the reporting of these values does not mean researcher's acceptance of the values reported. MacCormick (2008, pp. 203) – in order to defend the reasonableness of Hart's vision – states that it is possible to consider "important for the improvement of understanding to study a particular object, institution, or set of institutions without ascribing particular moral value to the object or institution(s) studied ", which, in turn, does not mean to say that what has been described is not subject to moral evaluation; it only means that such evaluation shall not be made within the science sphere (or, at least, within the project sphere) but that it only intends to be descriptive and not evaluative.

This does not mean that Hart does not see the possibility of influence of ethics on law. Since the original version of "The Concept of Law", in 1961, Hart had already recognized several possibilities of connection between both of them (Chapter IX, Section 3), however, for the author, all these relationships would be merely contingent **or** would not have as a consequence the required inclusion of morality as a criterion for validity of legal rules, what would allow us to state the existence of morally wicked rules.

Once again, after this particular context is explained, it is possible to consider intelligible Hart's statement that his project "is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law"[4] and, therefore, is an undertaking radically different from Dworkin's theory of law, which is envisioned as evaluative and interpretative.

Such statements indicate that the characterization of Hart's theory as something that seeks to define the law only based on the linguistic or semantic use of the word may be a frivolous accusation – notwithstanding the issue of the philosophy of language being actually crucial for Hart's works. However, it is important to clarify that although Dworkin (2006, pp. 165) continues featuring Hart's thesis of social sources as a "semantic statement", the U.S. professor also recognizes, at least in more recent works, that "Hart did not mean, of course, to offer a simple dictionary definition or set of synonyms for any particular word or phrase".

However, even if Hart's project is not solely about the search

[4] (HART, 1994, pp. 240)

of the concept of law through an analysis of the use of the word "law", but rather is characterized as a proposal for identifying a social concept through a descriptive methodology that focuses on central or paradigmatic cases, characterized by the gathering of primary and secondary rules, there still remains the question on whether the assumption adopted by Hart is true or if it is the best option in the identification of the concept of law, as well as whether the methodology adopted based on this assumption is appropriate and why it would be a better project than the evaluating and justifying alternative proposed by Dworkin.

To take a position on this question, we will use the path suggested by Hart to compare different concepts, although this suggestion is also used here to compare the different methods to achieve the definition of a concept:

> For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both. (HART, 1994, pp. 209).

Therefore, we must question whether a solely descriptive methodology complies with the mission to find the concept of law, than a methodology that also adds an evaluative and justificative dimension of that institution (*value dimension*) stating that there are goals to be achieved and assessing which, among the interpretative options, match the actual practice, can be considered the best methodology from the moral point of view. In addition, there should be made an analysis on the assumption that the central or standard case of law would be characterized by the set of primary and secondary rules regardless of the moral values.

2.3 Dworkin's theory

In this presentation, it is assumed that the initial discussions – on whether the law is composed only by rules or by principles as well and whether the rule of recognition is able to deal with these new standards – are relatively overcome. This work will not analyze these oppositions, since we will focus on the latest arguments which, even according to

some positivists (SHAPIRO, 2007, pp. 27), still represent an "extremely powerful objection" to the legal positivism. [5]

Dworkin's subsequent arguments, mainly after his book "Law's Empire", focus on stating that positivism is not able to explain the occurrence of situations that Dworkin refers to as "**theoretical legal disagreements**". These would be cases where people, although not disagreeing on historical facts relating to a particular situation and not even on the existence of certain provisions of law (which would drain the veracity conditions of law, according to positivists), still disagree on the application of the law to the case under analysis.

In order to understand this criticism, we must first consider the main argument of the "Law's Empire" (DWORKIN, 1986, pp. 190, emphasis added): "the concept of law [...] **connects law with the justification of official coercion**. A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state". This argument seems to be grounded not only in the opinion many jurists would have about law – at least in the contemporary democracies –, but it also seems to reinforce the position defended by Dworkin since the work "Taking Rigths Seriously": rights as political assets that the citizen has against the State.

Once again, as noted in the explanation on Hart's theory, all theoretical assumption has consequences:

1. If the law has a ***purpose***, this means that its identification and application are, at some extent, associated to such purpose. This is why the law consists of an **argumentative practice**, that is, it is characterized by understanding that the participants need to submit **reasons** so that the legal propositions they defend are understood as true by other participants of this practice. Consequently, any proposal on what law means **must be an interpretation** that considers the intentionality and pur-

[5] "Indeed, it is one of the great ironies of modern jurisprudence that in spite of the huge amount of ink spilled on the Hart-Dworkin debate, so little attention has been paid to this second, more powerful objection. To be sure, legal positivists have relentlessly attacked Dworkin's positive theory of constructive interpretation. Yet they have made almost no effort to defend their own theory against Dworkin's negative arguments in Law's Empire. They have made no attempt to show how theoretical legal disagreements are possible".

pose (*value dimension*) assumed by the practice.

2. Any interpretation of a social practice, exactly because it has an evaluative dimension, is characterized partially by more abstract propositions that are shared by the members of the Community (**concept** - consensual part), but from that abstract level of consensus, it is possible to propose sub interpretations of that more abstract and consensual idea (**conception** - nonconsensual part). Therefore, to Dworkin (2006, pp. 10-11, emphasis added), law would be an **interpretive concept**, that is, one of those concepts that people share, despite acute differences on the criteria (there is no consensus) for concept identification and application (e.g. winning a round in boxing). Such concepts "encourage us to **reflect on** and contest **what some practice** we have constructed **requires**. […] the answers to these questions turn on the **best interpretation** of the rules, conventions, expectations, and other phenomena [of social practice] and of how all these are best brought to bear in making that decision on a particular occasion".
3. Therefore, it would not be possible to define an interpretive concept perfectly through a **purely descriptive methodology**: (i) either because there is no perfect consensus on the criteria to be used to define/identify the concept; (ii) either because such concepts require an interpretation and not simply an account of what occurs or has occurred throughout history. This does not mean that the descriptive methodology is not important and even necessary; however, it is not sufficient in these cases, because an evaluative methodology is also required.

Maybe, after developing Dworkin' line of reasoning, it is now easier to understand why he accuses the *hartian positivism* of being unable to explain the "theoretical legal disagreement". If the law can be explained simply as a descriptive form from its structural elements (factual elements), why people disagree on what the law determines in cases where, apparently, everyone agrees about the existent facts and

legal texts?

Dworkin (1986, pp. 3-6) proposes that in order to understand the true nature of the disagreements that exist when the legal experts differ on law, we need to understand two basic concepts:

1. **propositions of law** are those claims that indicate what law allows, authorizes or prohibits – which can be true or false - and the truth, or not, of these propositions depends on what he calls;
2. "**grounds of law**" which are "other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic", and that specify when these propositions of law "should be taken to be sound or true" (DWORKIN, 1986, pp. 4 and 110 respectively). That is, ultimately, what 'the law really is' depends on what we consider as *grounds* for the identification of the law. [6]

Therefore, for Dworkin (1986, pp. 5) "they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law" as well as on the corollary of this divergence: If these elements do not exhaust the grounds of law, what else could be considered as an element able to make legal propositions true?

Dworkin (1986, pp. 5) declares that the disagreements on the veracity of what is determined by law - propositions of law - can occur in two ways:

1. **empirical disagreement** – people can have the same vision as to the fundamentals of law, but they differ with regard to the effective factual occurrence of such grounds in a case (it would be a ?);
2. **theoretical disagreement** – people may disagree exactly about the identification of the grounds of law, that is, which are the arguments that make a proposition of law true, although agreeing on the facts, "even when they agree about what statutes have been enacted and what

[6] These two concepts are critical for Dworkin's recent proposal - in *Justice in Robes* - about the different meanings that the word law can have.

> legal officials have said and thought in the past"[7]. They are disagreeing about what must take place in their legal system before a proposition of law can be said to be true or false.

For Dworkin, Hart's positivist theory could only explain the empirical differences because it assumes, based on the rule of recognition - accepted by the community as the last rule of the system, which allows the criteria through which the validity of the other rules of the system is evaluated –, that the grounds of law are fixed by consensus among legal officials. So, for the positivists, in general, they either simply disregard the existence of theoretical differences or simply disqualify this kind of disagreement stating that this is nothing more than an illusion, it makes no sense or is it just a disguised policy (DWORKIN, 1986, pp. 6-11).

Despite of that, the observation of cases decided by the courts – at least in Western democracies – and the understanding that jurists themselves have of their practice is sufficient to say that the theoretical disagreement effectively occur: in several cases, jurists, although agreeing about factual issues and on what legal texts say, disagree on what the law determines for that specific situation.

Conclusion

While recognizing the merits of Hart's theory, in particular concerning the evolution that represented to the positivism, we consider that Dworkin's theory corresponds more to the judicial practice accomplished in the democratic countries.

Hart's theory – even considering that it is a purely descriptive proposal - seems to disregard that there are concepts that can only be fully understood through an analysis that does not end with the observation of what occurs in social practice, but that also positions itself on the aims and objectives of this practice (see the epilogue that MacCormick includes, in 2008, at second edition of his book H. L. A. Hart). Some examples in the history of mankind can help clarify this argument: One thing is to describe the differences that the concept of "citizen" suffered throughout the history of mankind, another thing is to defend the conception that is considered appropriate to the assumed purposes of this concept; one can define the concept of "equality of opportunities" based

[7] (DWORKIN, 1986, pp. 5).

on the idea that everyone should be treated in a formally equal manner, in another case, in a manner substantially equal; the concept of "marriage" - if we were to adopt a purely descriptive methodology based on its occurrence in the West after the middle ages - could not have evolved to encompass the same-sex unions, as it has occurred in several countries. Each of these examples, although considering elements of a descriptive methodology (the observation and description of different social systems throughout the history of mankind), at some point, goes beyond the mere description and positions itself on its own merits and demerits.

It is true, however, that Hart does not exclude the possibility and even the need for an assessment of the merits of the law, but he claims that the validity (either of individual rules or the legal system as a whole) does not depend on such evaluation, as this would be made externally to the concept of law. Hart may be right in saying that the consideration of moral values is a political choice, however, he seems to be wrong when he gives the impression to suggest that it is possible to identify political concepts or any other social concepts as if we were archaeologists looking for something that is just waiting to be disclosed.

References

AUSTIN, J. *The province of jurisprudence determined*. Cambridge: Cambridge University Press, 2007.

DWORKIN, Ronald. *Justice for hedgehogs*. Cambridge: The Belknap Press of Harvard University Press, 2011.

_____. *Justice in robes*. Cambridge: Harvard University Press, 2006.

_____. *Law's Empire*. Cambridge: The Belknap Press of Harvard University Press, 1986.

_____. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1978.

GUEST, Stephen. *Ronald Dworkin*. Translated by Luís Carlos BORGES. Rio de Janeiro: Elsevier, 2010.

HART, H. L. A. El nuevo desafío del positivismo jurídico. *Sistema: Revista de ciencias sociales (Madrid)*. May 1980, nº 36, pp. 3-18.

_____. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994.

MACCORMICK, Neil. *H. L. A. Hart*. 2nd ed. California: Stanford University Press, 2008.

SHAPIRO, Scott J. The "Hart-Dworkin" Debate: a Short Guide for the Perplexed. In: A. RIPSTEIN, ed. *Ronald Dworkin*. Cambridge: Cambridge University Press, 2007, pp. 22-55.

The presence of Hobbes and Machiavelli in authoritarian thinking in Brazil and Germany in the Decade 30

Rodrigo Augusto Suzuki Dias Cintra[1]
Daniel Francisco Nagao Menezes[2]

Abstract: The central objective of this paper is to analyze the thought of two authors, Hobbes and Machiavelli and what their influence on authoritarian doctrine applied by the governments of Brazil and Germany in the 30s of last century. In this period, Brazil was ruled by Getúlio Vargas, and Germany lived the rise of Nazism. Both governments were sustained by authoritarian governments that had its theoretical justification in the thought of Hobbes and Machiavelli.

Keywords: Hobbes; Machiavelli; Authoritarian Thinking.

[1] Graduated in Law from the University of São Paulo (USP Largo-San Francisco), Degree in Philosophy from the Faculty of Philosophy, Letters and Human Sciences, University of São Paulo (USP-FFLCH), MA and Ph.D. in Philosophy and General Theory of Law the Faculty of Law at USP. Was received with praise for the originality of theme and approach in defense of doctoral thesis at USP. He teaches at the Mackenzie Presbyterian University and the University Sao Judas Tadeu. Is founder and coordinator of LADIFILA (Laboratory of Law, Philosophy and Art). Operates on the following subjects and authors: the relationship between law, philosophy and Arts Legal Sociology, Philosophy of Law, Political Philosophy, John Locke, Machiavelli and Shakespeare. Currently, makes postdoctoral studies on Human Rights and Ideology in the Law Faculty of the University of Coimbra (Portugal).

[2] Graduated in Law from the Catholic University of Campinas (2002), specialization in Constitutional Law and Civil Procedure Law both from PUC-Campinas, Specialization in Curriculum and Teaching Practice in Higher Education at the University Center Padre Anchieta, Master in Political and Economic Law by Mackenzie University. Is currently a doctoral candidate in Political and Economic Law at Mackenzie. University Professor at the Faculty of Law of the Mackenzie Presbyterian University, Campinas campus and Colleges of Campinas - FACAMP.

1. Introduction

The proposed work is to discuss the influence of the thought of Hobbes and Machiavelli in Brazil and in Germany during the 30s of the twentieth century. As is generally known, the period between the two world wars was characterized by the rise to power of authoritarian regimes. In Brazil, had the government of Getúlio Vargas, though brought a great economic development to the country, while starred severe measures contrary to the democratic regime. The policy measures were taken from a central decision without participation of other social actors, such as parliament, social movements or people. The mass was coopted by providing material goods and rights denied before, and in exchange legitimized the government via public acclaim.

In Germany, the presence of an authoritarian regime was felt more strongly than in Brazil, because the Nazi regime sought to control the masses by fear and not by legal inclusion as occurred in Brazil. Germany took advantage of a bureaucratic system of control of social and political decisions, not only of the German state, but direct control of society itself, including the physical elimination of that considered different.

The legal thinking which legitimized these schemes in Germany and Brazil was designed by Carl Schmitt and Francisco Campos in their respective countries. There are, however, at the thought of the two authors a strong influence of Thomas Hobbes and Machiavelli.

The first (Hobbes) influences the thought of Schmitt and fields to propose the existence of a state of chaotic nature that justifies the existence of an absolute leader to lead the masses. The use of the concept of sovereignty is evident in the thinking of the two authors, when proposing the idea that sovereign is he who decides on the state of exception, the cornerstone of the Brazilian authoritarian thinking and German.

The second (Machiavelli), describing the Italy of his time, demonstrates the existence of a State Total Qualitative, indicating that the state, to keep their existential interests, must act promptly in certain situations. It is the use of the concept of reason of state, launched by this thinker, to justify the actions clearly authoritarian period indicated in the two countries to be investigated.

2. The Thought of Hobbes

The Englishman Thomas Hobbes (1588/1679) is known as the father of absolutism. The basis of his thought is man's need to establish and remain in a state of coexistence, as HOBBES puts himself (, p. 237):

> "This is what concerns the elements and general grounds of national laws and policies. For what is right between nations, is the same thing as natural law, because that is the natural law between two men before the establishment of the republic, it is then the right of individuals between sovereign and sovereign "

Hobbes was born at a time when the consequences of the great navigations were felt, and drove the new society reflections on the role of the state. The discoveries of new continents have questioned the organizational role of European society, relando the reflections of how society should behave before the result of the great voyages. Hobbes walks towards the pacification and unification of individuals in society.

The State of Nature in the thought of Hobbes means the previous stage to civilization stage in which prevailed the total freedom of the individual. The situation of full freedom for all in the State of Nature led to the conflict of (*bellum ominia contra omnium*). Hobbes, in his rational jusnaturalism proposes that man abandon his State of Nature.

Only the state could impose order on the chaotic situation of the state of nature, creating a common government and imposing rules sovereignly socializing among men. This state was created by an act of will among men, the so-called Social Contract, contract in which men, the desire to achieve peace, cede their freedom to the state that becomes the Sovereign State Hobbes comes to call Leviathan.

According to HOBBES (1999, p. 27).:

> "And art goes further, imitating that rational creature, the most excellent work of nature, man. For by Art is created that great Leviathan called a State or City (in Latin Civitas) which is but an artificial man, though of greater structure and strength than the natural man, for whose protection and defense it was designed. And in which the sovereignty is an artificial soul, as giving life and motion to the whole body, magistrates and other judicial officers or executives, artificial joints; reward and punishment (by which, linked to the throne of sovereignty, all joints and limbs are driven to do his duty) are the nerves, that do the same in the body

> natural; wealth and prosperity of all the individual members are the strength; Salus Populi (the safety of the people) is a goal; counselors, through which all the things you need to know are suggested, are the memory; justice and laws, an artificial reason and will; harmony is health, sedition is the disease, and civil war is death. Lastly, the pacts and conventions by which the parts of this Body Politics were created, combined and unified resemble those Fiat, Let the man uttered by God in creation."

All power is concentrated in the state and the individual becomes a subject of the state, but obedience to this because with the social pact, sovereign and subjects merge into one reality (HOBBES, 1999, p. 147).

Hobbes inaugurates the modern age, shifting the center of social thought to the individual who, in an act of reason transfers sovereignty to the state founding and justifying the absolutist political regimes.

3. Thought of Machiavelli

Shortly before Hobbes lived Italian Niccolò Machiavelli (1469/1527). The thought of Machiavelli does not seek to create a General Theory of Government, but explain how the government, particularly during the period in which he lived, in an Italy divided multicore power. Machiavelli inaugurates the concept of applied ethics to politics, particularly ethics in the pursuit of the common good.

The moral virtues should be required of the prince in governing, is called virtu must also be accompanied by the virtues of historical possibilities (luck) for the exercise of power. For Rodrigo Suzuki Dias CINTRA (2011, p. 222):

> "There are two concepts in the book The Prince that seem to characterize the construction of the characters in The Mandrake: fortune and virtù. Fortuna and virtù divide the life of men. Fortune is the key to success in politics, but corresponds to that part which can not be governed by man. It provides the occasion, the opportunity to be grasped by man virtù. She can be lucky or unlucky a man. The virtù, on the other hand, was knowing enjoy the most favorable time for action. Machiavelli in The Prince, uses a metaphor to explain the two concepts, the metaphor of the river. Fortune is a torrential river that can devastate all that man has created. But the man virtù can prevent using dikes and dams for the river does not destroy everything it encounters the frente.É must not

> confuse virtù with virtue. Virtue, in the Christian sense, preaches kindness will be rewarded in heaven. The virtù Machiavelli may be preferred strongly to the kindness and not a hope of salvation, but effective action of man on earth, in pursuit of power. A prince of virtù not depend on others, which are unstable and profiteers, but of himself. Reading these concepts by Machiavelli Lefort (1980, p. 44) is extremely unique:
> Certainly this virtù is defined as the antithesis of Fortune, is the power to escape the mayhem of events, raising up the time, as we learn, shoos all before it, is to grab the occasion and therefore know it is short, in the words of the author, enter a form in matter. You could say that virtù respect to the size of man's ambition and his ability to live up to his own ambition."

In other words: How many vocations policies will not have been wasted because they have appeared in historical times and places in which she was required? On the other hand, how many historical possibilities will not have been lost by the absence of leaders equipped with the specific virtues appropriate to act in a situation where the men were prepared to drive policy? Here emerges the crucial importance of history in the theoretical construction of Machiavelli. Does the relationship between concrete and specific historical conjunctures particular men who meet there will emerge-or non-political action able to found a new order.

Moreover, to remain in power, the ruler of conquering people's sympathy, which occurs through the exercise of virtù and not through fear. To stay in power the ruler must conquer the people's friendship, admiration. Thus, the art of government depends on the good deeds of the ruler, so the power, action, unlike Hobbes whose power stems from an act rationally.

Being ethical action, Machiavelli builds an ethic of ends and not means, breaking the hitherto dominant rationalist logic.

4. The Influence of Hobbes and Machiavelli

Although Hobbes and Machiavelli has not been the basis of authoritarian thinking developed in Brazil and Germany, both authors had a strong influence on the structure of thought.

To do so, we must mix the concept of the Sovereign State of Hobbes, with virtù Machiavelli, being the result of mixing the base of

the authoritarian structure existing in Brazil and Germany.

On the one hand, the thought of Hobbes's Sovereign State entered the thinking of these countries to attract all social life into the state life and on the other hand, there is a whole system of acclaim leader (Prince) by people who justify maintenance of the leader in power, something similar to that proposed by Machiavelli.

In general, both states - Brazilian and German - were the intervention, but in the social field, in order to avoid that the pluralism of the social harm somehow Economic Power. The role of the state was intervening in order to organize society in a new light, indirectly creating a wall of protection to the economic, social demands that were beginning to organize themselves politically in the periods preceding the Vargas and Hitler.

The pretense of Germany was to restore social order and economic power prior to World War I, adapting and modernizing these orders (social and economic) to modern times, an issue that would imply the deconstruction model Weimar. In Brazil, the intention was to break with the historical evolution cycle, creating a Brazilian identity and a new state model that passed the recognition and inclusion of the controlled masses.

This state was the refurbishment of the refurbishment of the modern state, the bourgeois establishment who ascended to power in the French Revolution, and shaped a new social and political organization which replaced the power relations of the Middle Ages. The proposal from Germany and Brazil is not in the sense of mere suspension of existing political institutions and forms, with the suspension of the classical liberals (suspension of the Constitution), as some mistakenly assert authors, but proposed the reform of society itself would structure from the central decisions of the State, which was allowed by the ideologies of Brazil (Comtean positivism) and Germany (existentialism).

This division of labor that created the social structure in a given territory, facing economic activity is the accumulation of capital which has been the target of both governments, including the exclusion of changes in the process of capital accumulation. Just as liberalism reshaped the social organization (POLANY, 2012, p. 211) breaking with the conditions that preceded it, this social organization was remodeled (or adapted) for the maintenance of liberal capitalism, only now no more self-regulated, but yes arranged from the State.

This has created a state in which *"there are two ideologies between the dominant ideologies about the development of Western Europe - the com-*

petitive model, market, and normative concept of State" (SANTOS, 1978, p. 32) - duality ideological applied to both countries.

This duality of ideologies is actually the ambiguities that leaders - myths - of both countries possess. On one side the figure of myth carries the historical tradition of personal power coupled with irrational elements as the emotions of the masses and, on the other hand, carries the prospect of modernization, the role of science (reason), the specialized bureaucracy and economic development .

The difference in the myth is the myth in German vision had the role of deciding and from this decision created is the legal while in Brazilian vision myth was a top figure in the institution (State) who held the central power, ie, the myth was part, if the apex, the bureaucracy can not create it.

Both authoritarian models implemented, it should be mentioned, seek to avoid conflicts in society that cluttering the model standing order. Thus, the "authority" of the state does not fall on the whole society, but only those that require intervention to check the homogeneity of the model. No room for organizational models outside of that particular State, and the State shall ensure the incorporation of the "different" within the state, as in Brazil or disposal as occurred in Germany and, to a lesser extent in Brazil.

The state will then cease to be a mere guarantor of rights as in the liberal state, becoming an instrument in the service of authoritarian conception.

In Brazil, this intervention was given for social inclusion, especially of the working masses, which until then were not recognized as social actors, including that this was due to the creation of labor legislation and social security, as well as by other means, such as women's suffrage , happening this and other measures, the nickname Vargas, "Father of the Poor".

Germany, although it has a policy of territorial expansion in search of new habitats, there was a policy of incorporation of the masses, but rather, the exclusion of certain sectors of society, including the occupied territories. Germany expanded to undo political pressures estrangerias. Thus, while in Brazil, were expanding rights, Germany restricts them.

The ideological aspect in Germany was much stronger than in Brazil, reason leads to differentiation already explored in the introduction that the German model was Totalitarian State, with a much deeper ideological control that allowed the defense of ideas as the superiority

of the German race, or the Third Reich that would last longer than the Roman Empire. Brazil had a model of Authoritarian State which did not advocate collective psychology issues - except the adoption by acclamation of Vargas - but only the quest for social order, and only those cases of divergence political ideological punished by the State Security Court but always in the individual aspect, never with the elimination of a particular social or economic class.

It was created in Brazil no movement or political party for sustaining Vargas or anti-liberal ideology, a fact that was to take place in Germany with the creation of the National Socialist Party expressing an ideology and a government platform capable of supporting Hitler in power .

However, both policies were expansionary increasingly regulating sectors of society that actually led to the increasing emergence of doubts and questions to the system, which were suppressed by the organs of state security (SS in Germany and TSN in Brazil).

5. Conclusion

The model of control of the masses created in Germany and Brazil, influenced by Carl Schmitt in the first country in the second and Francisco Campos is a Hobbesian model in which, through public demonstrations mass transfer sovereign power to the leader, transforming the state in Hobbes's Leviathan that controls all social life.

The State becomes sovereign with the transfer of power, can determine who is a friend of the State and who is your enemy and must be eliminated. This assumes sovereign state will own that is represented in the person of its leader that works with the unconscious mass to love him, similar to that proposed by Machiavelli.

We concluded that the thought authoritarian Brazil and Germany were built largely with the theories of Hobbes and Machiavelli on State and Power.

References

CINTRA, Rodrigo Augusto Suzuki Dias. **O Príncipe e a Mandrágora: Filosofia Política e Teatro em Maquiavel.** *in* Revista Direito Mackenzie, V. 5 n. 2, 2011, págs. 217-226.

HOBBES, Thomas. **Elementos de Direito Natural e Político.** Porto: Resjuridica,

s.d.

HOBBES, Thomas. **Leviatã.** São Paulo: Abril Cultural, 1999.

POLANYI, Karl. **Nossa Obsoleta Mentalidade de Mercado**. *in* LEVITT, Kari Polanyi (org.) *A Subsistência do Homem e Ensaios Correlatos.* Tradução Vera Ribeiro. Rio de Janeiro: Contraponto, 2012, págs. 209-228.

SANTOS, Wanderley Guilherme dos. **A Ordem Burguesa e Liberalismo Político.** São Paulo: Duas Cidades, 1978.

SCHMITT, Carl. **El Leviathan en la Teoría del Estado de Tomas Hobbes**. Tradução de Javier Conde. Buenos Aires: Editorial Struhart & Cía., 2007.

From Leviathan State to Leviathan Executive
An institutional perspective of Brazilian powers behavior

Henrique Rangel[1]
Carlos Bolonha[2]
Viviane Almeida[3]

Abstract: This paper addresses the issue of separation of powers and analyzes how the American institutional theory developed critics over the madisonian conception of this institutional arrangement. The main object of this study is the Brazilian government. The post-madisonian approach of this paper relies on Daryl Levinson and Richard Pildes's Separation of Parties, Not Powers, and Eric Posner and Adrian Vermeule's The Executive Unbound. These works were built according to the American constitutional democratic experience. The paper argues the possibility of comprehending the Brazilian constitutional design, and disconvering how its main institutions interact within this perspective of separation of powers. In this sense, the paper emphasizes, in the Brazilian political context, the difficulty in conceiving its government as divided or unified, and the limits of its presidency, even unbounded, characterized as an Executive own-bounded. In the modern administrative state, the Leviathan State idea is substituted by some kind of Leviathan Executive according to its growth and superiority if compared to other departments.

*Keywords***:** *Separation of Powers; Executive Branch; Party System; Politics; Public Opinion.*

1. Introduction

Along the second half of the twentieth century, constitutional theory observed the predominance of perfectionist, both in judicial ac-

[1] M.Sc. student at PPGD of UFRJ and agent at a Brazilian Federal Court.
[2] Professor of Law at FND and PPGD of UFRJ. Director of the Research and Documantation Center of the Brazilian Bar of Lawyers (Ordem dos Advogados do Brasil – OAB) in Rio de Janeiro.
[3] Undergraduate student at FND of UFRJ.

tivity and theoretical and conceptual development.[4] First critics emerged in the 1990s, presenting an institutionalist approach of legal and political scenarios.[5] In the twenty-first century, this approach has strengthened, such that it set an institutional development theory – or, as commonly referred, an institutional turn.[6] An important ground of this theory is

[4] The perfectionist perspective identifies largely with the figure of Judge Hercules, defined in the following terms: "I must try to exhibit that complex structure of legal interpretation, and I shall use for that purpose an imaginary judge of superhuman intellectual Power and patience who accept law as integrity. Call him Hercules." DWORKIN, Ronald. **Law's Empire.** Cambridge: Belknap Press of Harvard University Press, 1986, pp. 239. A harsh criticism, however, is formulated by Cass Sunstein in: "Or consider perfectionism: the view that the Constitution should be construed in a way that makes it best, and in that sense perfects it. Imagine a society—proudly called Olympus—in which the original public meaning of the document does not adequately protect rights, properly understood. Imagine that the text is general enough to be read to provide that protection. Imagine finally that Olympian courts, loosened from Thayerian structures, or from the original understanding, or from minimalism, would generate a far better account of rights and institutions, creating the preconditions for both democracy and autonomy. In Olympus, a perfectionist approach to the Constitution would be entirely appropriate". SUNSTEIN, Cass. Second-Order Perfectionism. **Chicago Public Law and Legal Theory Working Paper Series**, No. 144, 2006, pp. 3.

[5] This paper adopts an institutional placement corresponding to the American perspective that renewed his studies, in terms of institutions, in the 1990s as GILLMAN, Howard and Cornell CLAYTON. **The Supreme Court in American Politics: New Perspectives institutionalist.** Lawrence: Kansas University Press, 1999; GRIFFIN, Stephen. **American Constitutionalism: From Theory to Politics.** Princeton: Princeton University Press, 1999.

[6] This perspective has received greater definition from the publication of the article responsible bythis institutional turn. "By drawing attention to both institutional capacities and dynamic effects, we are suggesting the need for a kind of institutional turn in thinking about interpretive issues. […] In many ways the question of constitutional law is harder, simply because people disagree so sharply about what constitutes a good outcome. Ironically, however, constitutional law has already witnessed a significant if partial institutional turn: Many people emphasize that any approach to the Constitution must take account of the institutional strengths and weaknesses of the judiciary. Even here, however, we have seen that influential voices in constitutional law argue in favor of interpretive strategies in a way that is inadequately attuned to the issue of institutional capacities. Those who emphasize philosophical arguments, or the idea of holistic or intratextual interpretations, seem to us to have given far too little attention to institutional questions. Here as elsewhere, our minimal submission is that a claim about appropriate interpretation is incomplete if it does not pay attention to considerations of administrability, judicial capacities, and systemic effects in addition to the usual impos-

the criticism over the madisonian separation of powers and its control mechanisms and mutual supervision.

Institutional theory offers a different way of assessing the government's willingness, and understands certain situations arising from the relationship maintained between its major institutions. In the institutional theor there is an Leviathan Executive rather than a Leviathan State. If traditionally citizens fear the tyranny of a whole government or basically its liberal representation in which the power is concentrated in the Legislative branch, the modern administrative state is characterized by the strengthening of the Executive and the difficulty of law and other branches control its behavior.

The main object of this work is the Brazilian government, specifically regarding its separation of powers and constraints mechanisms under a post-madisonian outlook. However, this post-madisonian institutional perspective was constituted from analyzes of American democratic constitutional experience and requires certain considerations about the Brazilian political and institutional realities. Thus, the hypothesis formulated is: post-madisonian perspective on the separation of powers is enough to understand arranges and interactions in the Brazilian government.

Among the major benchmarks of institutional thinking designated as post-madisonian, it is possible to points out (i) the defense of separation of parties, not powers, as well as (ii) the failure of liberal legalist doctrines in an attempt to constraint the expansion of Executive branch. Therefore, the subject adopted, understood in the structure and activity of their officers, will be appreciated from these two institutionalist frameworks: (i) the divided or unified government and (ii) the expansion of executive power in the administrative state.

The objective of this paper is to find out possible circumstances and situations that, at first, are not observed in the United States government, and furthermore contribute to the development of the institutional theory, especially within the post-madisonian perspective over the separation of powers.

---

ing claims about legitimacy and constitutional authority." SUNSTEIN, Cass and Adrian VERMEULE. Interpretation and Institutions. **Chicago Public Law and Legal Theory Working Paper Series**, No. 28, 2002, p. 2/48.

2. The post-madisonian perspective of the american institutional theory

2.1 The politics in divided and unified governments

The disposition of separated branches is a deeply settled institutional arrangement and, despite critics, hardly replaceable in countries that lack democratic constitutional experience.[7] When conceived in its original design, the separation of powers answered three political assumptions that are target of severe criticism in institutional grounds. Through the teachings of James Madison, the separation of powers was justified by the need to, after "enable the government to control the governed", "oblige it to control itself".[8] Pursuing this goal, Madison sustains three political assumptions, central to understand the original meaning of this institutional arrangement.

Firstly, Madison points out that "it is evident that each department should have a will of its own".[9] The Framer wanted to establish

[7] The above passage is based on the following: "Why focus on institutional design writ small? The principal reason is that '[d]emocracy is inherently a device for regulating marginal political conflicts'. This reads as an essentialist claim about the very concept of democracy; in context, however, it is a claim about the insuperable costs of changing the large-scale structures of an ongoing democratic order on which the whole society has coordinated. The fact is that in most democratic polities, the basic constitutional arrangements are no longer up for grabs." VERMEULE, Adrian. **Mechanisms of Democracy: institutional design writ small.** New York: Oxford University Press, 2007, pp . 2.

[8] Complementing the passage: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself". MADISON, James. Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Departments. In: Alexander HAMILTON, James MADISON, and John JAY. **The Federalist Papers.** Electronic Classics Series Publication: Pennsylvania State University, 2001, pp. 232.

[9] Complementing the passage: "In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others." MADISON James. Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Departments. In: Alexander HAMILTON, James MADISON, and John JAY. **The Federalist Papers.**

that it was a personification of the government departments, extracting such a will that would be different from that expressed by the people during the elections, as well as by government officials in their activities.[10] This "ambition" mentioned by Madison is the willingness of each department to strengthen and concentrate powers under its control. Secondly, the Founder asserts that "[i]t is equally evident, that the members of each department should be as little dependent as possible on those of the others".[11] The relevance of this high degree of independence of department holders would be justified, according to Madison, as a personal motivation necessary to sustain the corresponding "ambition". Thirdly, strictly linked to the previous assumption, Madison considers that "such devices should be necessary to control the abuses of government" and "[a]mbition must be made to counteract ambition".[12]

These three madisonian political-theoretical assumptions represent a minimal structure to understand the original meaning of the separation of powers in the American constitutional design. In summary, each department would have in a personified way its own "ambition" supported by a certain degree of independence between the managers of departments. That is the main assumption of the effective exercise of mechanisms of checks and balances. This way, the madisonian separation of powers is marked by a branch-based competition. Two factors

Electronic Classics Series Publication: Pennsylvania State University, 2001, pp. 231.

[10] "In the Madisonian simulacrum of democratic politics embraced by constitutional doctrine and theory, the branches of government are personified as political actors with interests and wills of their own, entirely disconnected from the interests and wills of the officials who populate them or the citizens who elect those officials." LEVINSON, Daryl and Richard PILDES. Separation of Parties, Not Powers. *Harvard Law Review*, **119**(1), 2006, pp. 3.

[11] Complementing the passage: "It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices." MADISON James. Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Departments. In: Alexander HAMILTON, James MADISON, and John JAY. **The Federalist Papers.** Electronic Classics Series Publication: Pennsylvania State University, 2001, pp. 231-232.

[12] Complementing the passage: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government." MADISON James. Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Departments. In: Alexander HAMILTON, James MADISON, and John JAY. **The Federalist Papers.** Electronic Classics Series Publication: Pennsylvania State University, 2001, pp. 233.

then should be considered. First, it is a government model characterized by competition in which at least two antagonistic agents and rivals have opposing goals. Second, these objectives are characterized by an interest essentially linked to a personified department of govern.

Despite the historical importance of the proposed madisonian separation of powers as well as the export success of this organization of the state model, it is an anachronistic and unrealistic perspective if regarded as the current political and institutional contexts, according to Daryl Levinson and Richard Pildes.[13] The institutional critique presented in the work *Separation of Parties, Not Powers* against the madisonian perspective can be summed up in two key aspects. Firstly, the authors contend that this "ambition" does not originate in the departments of the government, but the ideology of political parties. Secondly, because of the separation of powers is currently recognized as a party-based design, there would be times where competition among public officials would give way to a party-based cooperation. Therefore, the degree of control and oversign mechanisms exercise depends on the competitive or cooperative conjuncture established between representative departments.[14] The cases of party-based cooperation are often marked by the management of Congress by the Executive. It is one of the evidences that contemporaneously there is not a Leviathan State but, more specifically, an Executive Leviathan.

From that criticism, the institutional theory moves apart the formal vision as separate departments possess own interests. Diversely,

[13] "Few aspects of the founding generation's political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers. Nevertheless, few of the Framers' ideas continue to be taken as literally or sanctified as deeply by courts and constitutional scholars as the passages about interbranch relations in Madison's Federalist 51. To this day, Madison's account of rivalrous, self-interested branches is embraced as an accurate depiction of political reality and a firm foundation for the constitutional law of separation of powers. […] Recognizing that these dynamics shift from competitive when government is divided to cooperative when it is unified calls into question many of the foundational assumptions of separation of powers law and theory. It also allows us to see numerous aspects of legal doctrine, constitutional structure, comparative constitutionalism, and institutional design in a new and more realistic light." LEVINSON, Daryl and Richard PILDES. Separation of Parties, Not Powers. *Harvard Law Review*, **119**(1), 2006, pp. 3-4.

[14] "If interbranch checks and balances remain a vital aspiration, the failure of the Framers' understanding of political competition raises the risk of a mismatch between constitutional structures and constitutional aims." LEVINSON, Daryl and Richard PILDES. Separation of Parties, Not Powers. *Harvard Law Review*, **119**(1), 2006, pp. 72.

it reviews, hereinafter, how the interference of "ambitions" from other political actors could determine the disposition of a government as divided or unified. Thus, the logic behind the exercise or mutual control between powers – unlike suggested by James Madison – essentially derives from the way in which political parties are arranged in command of the government apparatus.[15] The focus is redistributed to the interests of officers of powers to the interests of the party to which it was affiliated. A unified government is characterized by the absence or low level of control and supervision between the representative bodies.[16] According to the U.S. Federal government, the governments are unified by a set occupied by the same political party that commands a majority in Congress Presidency.

2.2 The expansion of Executive branch in the administrative state

The Madisonian understanding of separation of powers was not limited to the original term of the U.S. government, influencing legal theorists and constitutionalists, among others, recognized in academy. Why keep a common feature about factors that would limit the powers of the Executive, such authors are combined into a single figure by Eric Posner and Adrian Vermeule.[17] The liberal legalist doctrines thus represent a comprehensive and complex set of theorists who "holds that representative legislatures govern and should govern, subject to constitutional constraints, while executive and judicial officials carry out the

[15] "Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties." LEVINSON, Daryl and Richard PILDES. Separation of Parties, Not Powers. *Harvard Law Review*, **119**(1), 2006, pp. 2.

[16] A unified government is characterized with the control of Executive and Legislative branches by the same political party. This situation will give rise to numerous problems such as excessive facilitate to adopt extremist and radical legislation in Congress, too fast, recklessly, and without deliberation, favored by the disappearance of the presidential veto, among other factors.

[17] "Liberal legalist cannot be defined in a sentence; it is a complex of theoretical views and institutional commitments related by a family resemblance, including elements of philosophical and political liberalism, constitutionalism, and deliberative democracy". POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 3.

law".[18] These authors are trying to sustains that the Executive may be, and in fact is controlled by law and is subject to the oversight of other departments.

The thesis defended in The *Executive Unbound* is the ineffectiveness of the legal and traditional mechanisms of control and supervision supported by liberal legalist doctrines. The authors seek to demonstrate how the modern administrative state is marked by a predominance of the executive in the government scenario. Even the authors argue that in times of crisis, this growth of Executive becomes more significant due to their better preparation for managing exceptional situations. In contrast to the Madisonian tradition of thought, the authors adopt, albeit partially, the Schmittian theoretical framework to characterize the prevalence of regular Executive before the other departments from the perspective of an *ex ante* or *ex post* performance. Part on the principle that a present-oriented, and especially for the future is an essential activity for the leadership of the Executive factor.[19]

The administrative state, according to post-madisonian perspective, is marked by this executive dominance, even under normal conditions, but "during crises, the Executive governs almost alone".[20] The action of the Executive in circumstances of crisis can be analyzed alongside factors such as delegations and emergencies, designated by the authors of *The Executive Unbound* as twin problems of liberal legalism.[21]

---

[18] "But the simplest version of liberal legal theory holds that representative legislatures govern and should govern, subject to constitutional constraints, while executive and judicial officials carry out the law." POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 3.

[19] "The nub of Schmitt's view is the idea that liberal lawmaking institutions frame general norms that are essentially 'oriented to the past,' whereas 'the dictates of modern interventionist politics cry out for a legal system conductive to a present and future-oriented steering of complex, ever-changing economic scenarios.' Legislatures and courts, then, are continually behind the place of events in the administrative state; they play an essentially reactive and marginally role, modifying and occasionally blocking executive policy initiatives, but rarely taking the lead." POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 4.

[20] "And in crisis, the executive governs nearly alone, at least so far as law is concerned". POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 4.

[21] "Two problems bedevil liberal legalism: delegation and emergencies. The first arises when legislatures enact statutes that grant the executive authority to regulate or other-

The problem of delegations is the transference of lawmaking and policymaking authority, while the problem of emergences is the impotence of any other branch in overcoming the crisis situation. Furthermore, it is usually two problems related in practice. The central argument made by the authors to justify the reason of delegations and emergencies constitute the main problems of liberal legalism too. According to the authors, "The same institutional and economic forces that produce the problems of delegating and emergencies also work to undermine legalistic constraints on the executive".[22]

Delegations and emergencies are factual situations that, in the context of the administrative state, the Executive may lead to a framework of greater concentration of power, *de jure* or *de facto*. There are other circumstances, however, preventing the reach of Executive branch and its submission to the control liberal legalist instruments. Besides the *ex post* performance of the other branches, they are affected by a considerable informational deficit with the Executive structure of technicians and specialized in large-scale agents. According to the authors, there are areas in which this deficit is, for reasons of secrecy, even more sensitive, as national security and foreign policy. Moreover, the hierarchical structure of the Executive remains safe from problems faced by the legislative and judicial collegiate institutions, such as the influence of pluralism in determination, collective action problems and the need to promote partisan compositions. These facts and propositions argued in *The Executive Unbound* can be faced as the second and clearer evidence of the Executive Leviathan thesis. The problem is not the government and the risk of tyranny is not associated to the traditional understand of State. The Leviathan in the modern administrative state is represented precisely by the president and its main agencies.

When authors argue in *The Executive Unbound* Executive is not subject to the constraint tools such as rule of law and separation of powers, seem to suggest that no able means to control this department. However, this is not the proposed text. The term "unbound" is used with the

---

wise determine policy, the second when external shocks require new policies to be adopted and executed with great speed." POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 7.

[22] "The same institutional and economic forces that produce the problems of delegating and emergencies also work to undermine legalistic constraints on the executive". POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 9.

intent to characterize what the authors call tyrannophobia. The currents of liberal legalism contend that the Executive is, and must be controlled by law and for the supervision of other powers under the Madisonian perspective. The failure of these mechanisms does not mean that Executive branch became absolutely "unbound". Instead, the authors argue that tyrannophobia would not be necessary to prevent a dictatorship regime, because other factors are exerting some control of the Executive. Such factors are politics and public opinion.[23]

The political and public opinion factors would be able to, unlike the liberal legalistic mechanisms, control the Executive. According to the authors, "[e]ven between elections, the president needs both popularity, in order to obtain political support", "and credibility, in order to persuade others that his factual and causal assertions are true and his intentions are benevolent".[24] Even in times of normality, it is essential that the president make commitments act responsibly and negotiate interests to optimize the support it receives from the people and alleviate their relationship with other representatives. Strengthening Executive largely depends on how it conquers politics and public opinion. After promoting concessions and win popularity and credibility, president becomes able to focus greater powers at its disposal.

The thesis provided to *The Executive Unbound* also addresses the Madisonian theme, though more broadly. It involves a whole set called liberal legalism, and sustains the failure of rule of law and separation of powers, as well as their legal control mechanisms and mutual oversight in an attempt to constraint Executive. This, in turn, would be essentially limited by the way the president conquests achieves popularity and credibility to finally become more powerful.

3. The post-madisonian perspective over Brazilian institutional and political realities

[23] POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 5.

[24] "Even between elections, the president needs both popularity, in order to obtain political support for his policies, and credibility, in order to persuade others that his factual and causal assertions are true and his intentions are benevolent". POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 13.

3.1 The Brazilian political context and the difficulty in dividing and unifying the government

The American democratic experience allowed researches to demonstrate how the institutional "ambitions" would not be based on departments, but in political parties. This understanding provides a conception of government as divided or unified. During determined times of American constitutional history, some presidents were supported by a Congress dominated by his same political party.[25] In these scenarios, political competition advocated by Madison gives way to a cooperative dynamic, defined by the "ambitions" of the political party concentrating power. The traditional perspective believes in the competition of departments, in order to concentrate powers and control the interests of others. In these cases, actually seems more realistic two powers acting together to implement a political agendas pursued by a particular party. On one hand, divided government remain political competition as a rule, although the replacement of "ambition" to political party interests. On other hand, unified governments, beyond the replace "ambitions" to party interests, reduce or eliminate competition, demonstrating how the interests of Executive may coincide with those within Congress.

The American political context, however, authorizes a rating between divided or unified government safer than the Brazilian context. In United States, the national representation is dominated by two political parties with a regular and well demarcated ideology. This fact facilitaters the task of determine whether governments are divided or unified. In Brazil, this assignment seems to be more complex. Brazil has a multiparty system. A multiparty system multiplies the number of po-

[25] "From 1832 to 1952, an incoming President assumed office with his party also in control of both the House and Senate in all but three elections. Periods of divided government cropped up mostly during the turbulent years leading up to the Civil War (1840–1860) and during the period of fractious politics in the aftermath of Reconstruction (1874–1896). Then, during the first half of the twentieth century, divided government all but disappeared. In only four midterm elections from 1900 until 1952, two of them at the end of wars, did the President's party temporarily lose control of one house of Congress (1910, 1918, 1930, 1946), and in each case unified party control was restored in the next set of elections. During that period, twenty-two out of twenty-six national elections (85%) produced unified party control, with the Republicans dominating in the first quarter of the century (with an interlude during the Wilson Administration) and the Democrats in the second quarter." LEVINSON, Daryl and Richard PILDES. Separation of Parties, Not Powers. *Harvard Law Review*, **119**(1), 2006, pp. 19.

litical actors and difficult the rating of government as unified or divided. Starting from these Brazilian political and institutional realities, it is certain that, according to Levinson and Pildes, the separation is not of powers. However, there seems to be accurate and precise hold that, in Brazil, the separation is exactly of parties.

Unlike the American political and electoral systems with a clear predominance of two political parties, Brazil observes a pluripartidarism organization – a partisan fragmentation. Officially, Brazil has thirty-two political parties regularly registered at the Superior Electoral Court (TSE).[26] Among these thirty-two parties, twenty three have at least one national representative at Congress.

The problems related to Brazilian political parties are not, however, restricted to quantitative measures. It is not easy to distinguish accurately the interests and projects of each of these parties and the mere numerical fragmentation has not been identified by researchers as the main cause for this. This fluid and unstable dynamics have been linked to issues such as low institutionalization of Brazilian parties and the absence of well defined party ideologies in the country. An example of the problem faced by Brazilian policy can be extracted from existing discussion about the so called "party loyalty". A deep discussion was started in Brazil over the possibility of a parliamentary break his bound with the party after elected. This practice has been suppressed by the TSE and also by the Brazilian Supreme Court.[27] More recently, Brazil faces a new and similar controversy. The electoral law guarantees some strategic issues to political parties. Among these, there is a transfer of financial resources to political parties in proportion of their representation in Congress, coming from the called Party Fund (Fundo Partidário). Besides this financial benefit, an amount of minutes in media outlets for disseminating canvass is distributed according to the party representation. The Brazilian Congress discusses the possibility of preventing "disloyalties" representatives to transfer financial and communication resources for parties created during the legislature. The proposal gave rise major repercussions not only for its theme, but culminate in advance

[26] On September 24, 2013, the TSE approved the registration of two political parties: Republican Party of Social Order (Partido Republicano da Ordem Social – PROS) and Solidarity (Solidariedade – SDD).

[27] The TSE suppressed the practice of party unloyalty through Resolution (Resolução) No. 22.610/2007, as amended by Resolution No. 22.733/2008. The Supreme Court addressed this subject through the MS No. 26.603/DF, STF, Plenary, Related by Celso de Mello, Judgment at October, 04, 2007.

from one year to the presidential elections. Both the emblematic case about party loyalty, as the latest controversy over the electoral guarantees for parties created during the term, show problems related to the Brazilian political-party context.

Political fragmentation is so not the only problem faced by Brazil. The above examples illustrate how the politicians do not seem to be securely linked to the political party they are affiliated at the time of election. The party loyalty and the creation of political parties are problems related to low institutionalization and the fragility of their ideologies. These problems, in turn, only made worse by the succession of political parties observed. Given the recurring creation and dissolution of political parties, the low institutionalization and the fragile ideology of parties can be associated to its time of existence, among others causes. Both the internal organization of a party, as the construction of a set of ideas and thoughts are sufficiently consistent issues that require time and democratic experience. The lack of tradition and transcendence in Brazilian political parties may actually hinder the rating of government as divided or unified.

The Brazilian policy is often referred to as a coalition of parties. First, there is no clear division or unification in the government, since the composition of Congress is atomized from around thirty-two parties. Moreover, these parties hardly have a strict ideology that promotes a consistent overview of the constitutional issues or a sedimented internal organization. Beyond that, the parties succession prevents such problems are addressed satisfactorily. Even when a grand coalition is formed to reduce opposition, the support that can be expected of this coalition is not regular and stable. In this sense, it is not merely a question of coalition parties but coalescence too. Coalescence is understood as the internal cohesion in this coalition supporting the government. In many cases, even when a great number of parties is formally linked to the president, the substantial support to his political plans depend on the chose of benefits distribution strategies.

Political parties seem not to be the main political actors in the Brazilian government. Unlike the parties, seeking a formal constitution to promote comprehensive thoughts and ideals in politics, some parliamentary countertops and fronts, with a greater degree of informality in order to protect specific interests – as religious doctrines, professional or business categories, environmentalists thoughts or minority groups politically organized, among others. There is one objective criterion used to differentiate a parliamentary countertop to a front. A counter-

top becomes a parliamentary front when it obtains at least one third of parliamentary federal legislature – considering the Brazilian Senate and House of Representatives.[28] Anyway, both forms of political organization have suprapartisanship nature and have performed with high efficiency in the implementation of their political programs and especially the preservation of their interests.

In this context, some disputes can be analyzed in support of this idea. Two of most significant political defeats in the Dilma Rousseff government, the distribution of oil royalties and the New Forest Code (Novo Código Florestal), are regarding to parliamentary fronts.[29] In both cases, presidential vetoes were overturned by Congress. This requires an absolute majority of the Legislature and, in these differences between the Presidency and Congress, the political parties were not protagonists. In the oil royalties case, three Brazilian states would be deeply harmed – Rio de Janeiro, Espírito Santo, and São Paulo. The harm is associated to an opening of the royalties obtained from oil companies distribution to non-productive states, without respect contracts already concluded in productive states. In New Forest Code case, the discussions were intensely locked inside the Congress, in which are represented groups of antagonistic interests. Among Brazilian suprapartisan structures, there are the rural front, composed by representatives of agriculture, livestock, extraction and landed speculation interests, particularly in the North and Midwest of Country, and the environmental front, focused on the preservation of the main Brazilian ecosystems, including the Amazon Forest – situated in the North and Midwest of Country. When finally

[28] See Act (Ato) No. 69/2005 of the Direction Bord (Mesa Diretora) of the House of Representatives (Câmara dos Deputados), Art. 2nd: "[...] is considered as Parliamentary Front a nonpartisan association of at least one third of members of the Federal Legislature, to promote the improvement of federal legislation on certain sector of society." (free translate)

[29] Regarding to the modification of the oil royalties sharing system, the Law Project (Projeto de Lei) No. 2.565/11 aimed to redistribute them more evenly between producing and non-producing states. President Dilma Rousseff have tried to veto one hundred forty two devices of this bill, with the goal of preserving the contracts already signed by the producer states and local governments to compensate for environmental damage . This resulted in the overthrow of presidential vetoes by a majority of Congress. Regarding to the New Forest Code, Law (Lei Federal) No. 12.651/2012, vetoes and amendments were promoted by President Dilma Rousseff, which significantly altered its content. The National Congress, before the intervention of the Executive rejected the vetoes of the presidency.

both groups signed an agreement, the Presidency initiated a series of changes to the details of the codification. The reaction was an overturn of all modification terms by Congress.

Between these two recent major controversies involving the Presidency and Congress, although the first case is not a strong example of political dynamics around the stands and parliamentary fronts, the second depicts clearly the form of your organization and its activities. In the case of distribution of oil royalties, the formal support of the coalition parties was dropped to meet the interests of an economic nature. Likewise, the case has not been defined as a matter of party ideology. The case of the New Forest Code illustrates even more clearly how suprapartisan organizations articulate in Congress and, depending on the interests at stake, can disregard the will of the political party or coalition that their parliamentarians they are affiliated.

The Brazilian political context makes difficult the analyses of government through a divided or unified logic. This difficulty in dividing and unifying more rigorously derived from the difficulty of the Brazilian political system based around the political parties. American politics can be defined as a "separation of parties, not powers", characterized by a party-based competition or by a party-based cooperation. In contrary, Brazilian design can not understood safely within political parties. Competition and cooperation therefore depend on more determinant variables in the Brazilian design. The difficulty of conceive the Brazilian institutional reality as a party-based model is related to the following problems over its party system: (i) fragmentation in thirty two parties, some of them without representation in Congress, with, in general, (ii) a low institutionalization and (iii) a fragile ideology, exemplified by cases of "party loyalty", and (iv) a strong succession of parties. Despite this problem, Brazil has a peculiar way of organizing around specific themes. In this sense, some suprapartisan organizations performance can be most successful than political parties. The thematic limitations of parliamentary countertops and fronts, however, does not allow us to affirm that Brazilian policy can be strictly based on these forms of organization, but remains enhanced the difficulty of establishing whether the government is divided or unified.

3.2 The Brazilian constitutional design and the Executive own-bounded

The American institutional theory holds that the Executive is often a department standing out in the modern administrative state. According to the Framers' understand, the role of Executive branch is merely apply the content of laws, drawn up by a powerful department that could oppress the rights and freedoms of citizens and therefore should work from a bicameral structure. This Madisonian perspective, in which Legislative concentrates power, while Executive just is submitted to the legal control and the oversight of other branches, seems to be overcome. Not only against Madison relies the current critics, but also against a pool of theorists who believe in the potential of the rule of law and separation of powers to constrain the Executive named by Posner and Vermeule as liberal legalists.

The American administrative state presents some political circumstances in which the growth of Executive branch can be real. Given the low potential of control within the legal instruments, the Presidency can use their resources to anticipate critical situations that facilitate the expansion of its prerogatives and thus invest in the conquer of popular support and trust before govern officials. The Brazilian constitutional design may correspond to determined aspects of *The Executive Unbound*'s argument, but it is necessary to verify to what extent the institutional reality of this particular Executive allows its expansion.

The 1988's Constitution of the Federative Republic of Brazil (Constituição da República Federativa do BRasil de 1988 – CRFB/88) allows the edition of Provisional Measures by the president[30]. Provisional Measures are general and abstract rules, legally founded by "urgency" and "relevant issue", applied as Legislative acts throughout the national territory. In fact, less urgency in relevant areas could be observed than actually Provisional Measures edited. These two legal requirements settled for its edition is typically liberal legalists. Regarding than, the Brazilian Supreme Court adopts a firm understanding that only fits the Executive define the meaning of these terms.[31]

---

[30] According to CRFB/88: "Article 62. In case of relevance and urgency, the President may adopt provisional measures with the force of law and shall submit them immediately to Congress. […]" (free translate)

[31] ADI No 2.150/DF, STF, Plenarium, Related by Ilmar Galvão, Judgment at September, 11, 2002.

Moreover, the approval of Provisional Measures without attempt to its legal requirements – urgency and relevant issue – by the Congress is not usually a difficulty faced by president. The Congress is competent for approve Provisional Measures, but it it has no institutional capacity enough to discuss the issues raised in these executive orders. Since only the Executive structure can mobilize adequate institutional capacity to take initiative in highly technical and complex issues, the approval by Congress ends up becoming the rule.

Likewise, legal limitations do not lead the Judiciary to repress this instrument of Executive. In an emblematic case, the Supreme Court analyzed the constitutionality of a Provisional Measure converted into law by Congress responsible for creating the Chico Mendes Institute for Biodiversity Conservation (Instituto Chico Mendes de Conservação da Biodiversidade – ICMBio)[32]. The Provisional Measure was passed by the Legislature containing constitutional formal vice because certain stages of the proceeding had not been regularly attempt. On the first day of voting, the majority of the Court had already pronounced – in a live television transmission. On the second day, however, an office holder similar to the General Attorney (Advogado Geral da União – AGU)) announced that about five hundred Provisional Measures were approved by the same rite. The outcome of the trial was unanimous by the invalidity of the procedure, but only from that decision. The measure adopted by the Judiciary after the production of five hundred unconstitutional rules was mere co-validation of the acts.

The Brazilian Executive used Provisional Measures in even more clearly unconstitutional situations. According to CRFB/88, this instrument would not be able to deal with matters relating to budgets and additional and supplementary credits, except to meet urgent and unforeseen expenses, such as those resulting from war, internal commotion or public calamity. This reinforces the assertion that Provisional Measures are actually observed more than times of crisis. In recent years, no serious exceptional occurrence reached national proportions, but Executive still appealed to the Provisional Measures to open additional or extraordinary credits[33]. Only in the year 2012, twenty nine billions in the Bra-

[32] The Chico Mendes Institute for Biodiversity Conservation was established by Provisional Measure converted by Congress in Law No. 11.516/07. The Supreme Court considered the constitutionality of this statute by the precedent ADI 4.029/AM, STF, Plenarium, Related by Luiz Fux. Judgment at March, 08, 2012.

[33] According to CRFB/88: "Article 62. In case of relevance and urgency, the President may adopt provisional measures with the force of law and shall submit them immediate-

zilian current monetary unity (Real – R$) were opened in additional or extraordinary credits by Provisional Measures[34]. The exceptional criteria authorizing the opening of additional and extraordinary credits have not been met by the Executive. Thus, the Executive can take ownership of significant financial resources, often applying them so quickly that no action can be implemented by other branches.[35]

The way Provisional Measures are edited is an evidence of the legal constraints fails in Brazilian political reality. Executive violate constitutional rules, the Provisional Measures are approved by Congress and the Judiciary don't offer a significant suppression. The fundamentals of urgency and relevant issue for edition, the ones approved with constitutional formal vices and unlawful opening additional or extraordinary credits can illustrate how the presidency can overcome liberal legalist instruments of constraint. Neither the legal limitation of control nor the interbranch inspection defended by madisonianas could successfully difficult the Brazilian Executive in pursuit its governmental interests.

In *The Executive Unbound*, Posner and Vermeule, after presenting the fallacies of liberal legalism, argue that factors such as the electoral and party systems, as well as political culture, would be better able to control the Executive.[36] In Brazil, where most of the laws that make up the rule of law are proposed by the Executive itself, the expectation of control becomes even smaller.[37] This context thus suggests that the Bra-

---

ly to Congress. § 1 It is forbidden to edict provisional measures on matters: I - concerning: [...] d) multi-annual plans, budget guidelines, and additional budget and additional or extraordinary credits, except as provided in Article 167, §3º, [...]". "Article 167. It is forbidden: [...] §3º - The opening of extraordinary credit will only be allowed to attempt to urgent and unforeseen expenses, such as those resulting from war, internal commotion, or public calamity, subject to the provisions of Article 62." (free translate)

[34] R$ 29 billions is equivalent to US$ 15 bilions.

[35] Under the Brazilian Supreme Court, "[...] the credits were planned or already used or lost its validity and therefore does not exist in situations that could fix this". ADI No 4.041/DF, STF, Plenarium, Related by Menezes Direito. Judgment at March, 12, 2008.

[36] "Our argument is simple: the system of elections, the party system, and American Political Culture constrain the executive far more than do legal rules created by Congress or the courts; and although politics hardly guarantees that the executive will always act in the public interest, politics at least limits the scope for executive abuses". POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010, pp. 113.

[37] There is a regular predominance of the Executive in the Brazilian legislative activity. In addition to the Provisional Measures, whose percentage of conversion in Law by Congress nears 85%, about 80% of approved legislative initiatives are proposed by the

zilian Executive has a considerable tendency to expand, which would require greater political control and public monitoring on its activity.

Public opinion, while a mobile of popularity, despite all the terminological vagueness and methodological problems encountered in their conceptualizations, seemed to be asleep in Brazil. At least until middle of 2013, the elements most closely this notion of public control of the government, as endowed with activism, was the means of media and even social networks. There wasn't, in Brazil, spokespersons mobilizing the community and leading to pressure or responsible public authorities. As an example, significant popular movements of our short democratic experience, such as those disseminated as "Direct Now" (Diretas Já) – defending direct elections in the end of dictatorship regime – and as "Painted Faces" (Caras Pintadas) – requiring the impeachment of President Fernando Collor –, were induced by means of media and promoted by artistic and musical events and celebrities, More recently, a significant movement occurred along the oil royalties controversies with initiatives of State Government of Rio de Janeiro – than, it is not a properly popular movement.

One effective factor in the American administrative state seems not hold the same potential in Brazil. Recent events, however, may suggest a possible change in this scenario. From June of 2013, the population, public authorities, national and international press were surprised by the magnitude of events that unfolded in the main cities of the country a wave of daily protests occupied the main urban roads in capitals and Brazilian metropolitan regions. The movements attacked municipal, provincial, and federal public entities of Executive and Legislative – at times, smashing them too.

The curious wave of protests erupted in middle of 2013 causing perplexity and many observers expect this to have been a landmark in the political consciousness of a population hitherto latent. The media and the social networks try to entitle this turn of events as "Brazilian spring", "wake up Brazil", and "come to street", among others. The

Executive. Moreover, the Brazilian Executive has a remarkable participation in processes of formal constitutional change and proposed about one third of approved projects in general, including four of the six most significant reforms regarding the matter and amount of changes in the constitutional text. See SEPULVEDA, Antonio, Carlos BOLONHA, Henrique RANGEL, Igor de LAZARI, and Roberto KAYAT. The Path of Brazilian Convenient Branches: The Executive Supremacy. **University of Maryland Schmooze "Tickets"**, No. 166, 2013. Available at: <http://digitalcommons.law.umaryland.edu/schmooze_papers/166/> [viewed 15 March, 2013].

popularity may indeed be crucial to the constraint exerted against the Executive – as well as against any institution or public authority. It remains for the Brazilian case wait and see if this democratic experiment will result in the civic maturity of the population and make the protests a repeated practice of our public culture. Only in this way the prospect of an active public opinion forcing the accountability of agents as the president would be compatible with the Brazilian political and institutional context.

In turn, the policy as an expression of credibility seems to be an effective means of control of the Brazilian Executive model. A distinction should be made at this time, dating back to the party system adopted in each country. As already mentioned, some party problems in the Brazilian coalitions systematic hinders to rate government as divided or unified. In unified governments, there is less tendency to political control compared with divided. The Brazilian political reality shaped by a multipartisan organization in the form of irregular and unstable coalitions and the presence of suparpartisanship actors, however, requires other means of evaluation of its potential for control of the Executive.

Brazil's recent democratic history provides an example of changing the political scenario that helps the understanding of how the Executive can be controlled. A strong political transition in Brazil was observed with the outcome of the 2002 elections. In previous years, a party of liberal economic orientation, the Brazilian Social Democracy Party (Partido da Social Democracia Brasileira – PSDB) occupied the presidency, but the loss of credibility and popularity led to his defeat for a party of interventional guidance, the Workers Party (Partido dos Trabalhadores – PT).

The PSDB government was marked by a strong concentration in the distribution of political benefits. The presidency was primarily focused on satisfying the interests of his party and others whose economic orientation was compatible with his. The parties seen as opposing the government formed a minority coalition and his attempts to negotiate with the government were constantly frustrated. The result of this political orientation of the PSDB government has a credibility deficit in Congress and when the popularity ratings of the Presidency at the end of the second term of Fernando Henrique Cardoso (FHC), reached a low expressiveness, the team led by Luis Inácio Lula da Silva (Lula) opposition was successful in elections. The new presidency was conscious of the need to collect credibility within the Congress and decided to adopt a strategy of decentralized distribution of political benefits. The first

expressive measures adopted by this interventionist government had a concession character, like a constitutional reform on the social security in the manner desired by the opposition.[38]

The concentration mode of political benefits distribution is associated to a particular goal of the government. When the government focuses this distribution between the parties of its coalition, the result is an increase in the internal cohesion of the organization (coalescence). In this case, president increase its levels of governance. This was the intention of the PSDB government. The period of their term corresponds to the time in which the Executive participated in most processes of constitutional reforms. Thus, there was enough support for approve measures of simple majority, but also to implement supermajorities plans. The current government of PT also has a high margin of governance instruments when considered simple majority, but increasingly invests less in initiatives to amend the constitution. Rather, this party is characterized by decentralized way of distributing political benefits. While the concentration of such benefits entails increased governance, as inversely proportional, the opposite occurs with the political stability of the president.

The prospect of embarrassment Executive through politics relates to the degree of concentration of the political benefits distribution. With a political party system characterized by fragmentation, which defines a more or less robust support in Congress is the political strategy adopted by the presidency. This factor suggests that Executive control is not rigorous. It depends on the behavior adopted by the president. In theory, with enough popularity and regular trading, the prospect of contention is reduced but the benefits devolve to approach the opposition gets their own dissatisfied coalition, affecting their governance as well as its credibility. The coalition and the presidency can distances easily. This confirms that the politics may be, also in Brazil, one able factor to control the Executive, although this depends on for the most part the political strategy adopted by him.

Despite a still uncertain potential of control the Executive by the Brazilian public opinion and its recent events, politics can still exercise determined constraint. The Brazilian Executive, as well as the American one, seems not to be subject to legal limitations, such as the liber-

[38] This case became known as the Second Reformation of Social Security (Segunda Reforma Previdenciária), promoted by Constitutional Amendment (Emenda Constitucional) No. 41/2003.

al legalists doctrines defend. In turn, the factors that in principle exert this control in the modern administrative state seem certain weakening compared to American reality. In this sense, one could ask whether the Brazilian Executive would not be truly "unbound". To do so, however, it is necessary to check its own potential for expansion.

The Executive is in fact composed of specialized agencies and has a numeric body of administrative staff that puts you ahead of the other branches of government. Meanwhile, the exorbitant cost of maintenance an administrative machine of great proportions in an emerging society and a technical-specialized qualification restricted to only a few strategic institutions seem to characterize the Brazilian Federal Executive. The capacity of the Brazilian Executive to maintain its prominent position requires a structure whose maintenance seems to have escaped the control of the Executive itself.

During the financial meltdown in 2008 started in America and diffused to whole world, Brazil has tried to sustain a strong stance on the international scene. Brazil is a Country with high taxes. Approximately 36% of the Brazilian Gross Domestic Product (GDP) is composed of tax collection and this explains the reason for the Executive strategically invest in the institutional strengthening of the Federal Revenue Service (Secretaria da Receita Federal – RFB).[39] In addition, the Brazilian government does not usually engage in economic investments of exceptional expenses or costly military maneuvers. The most expensive investments in the country tend to be led by the private sector, like the commodity and oil markets. These factors indicate how Brazil has a large collection, but like most of their resources are not directed at economic nature programs, the financial crisis can be overcome with relative safety.

Brazil, especially from the PT government with social and economic "interventionist" orientation, has expensive commitments on social programs. As examples, Brazil has the Unique Health System (Sistema Único de Saúde – SUS) that, despite having numerous problems, structure the provision of their services by the criteria of comprehensiveness and universality, i.e., every sickness may have your treatment, at least in theory, fully funded by the government, regardless of the methods or techniques are. Moreover, there are different programs for income distribution and poverty alleviation in the Country. The most

[39] According to the Brazilian Institute of Tax Planning (Instituto Brasileiro de Planejamento Tributário), Brazil ended 2011 as the 30th highest tax burden Country, reaching an amount corresponding to 36.02% of gross domestic product storage.

significant of these is the "Family Grant" (Bolsa Familia) which in 2012 was responsible for the implementation of two hundred forty-eight billion reais.[40]

Apart from spending on social programs maintained by the PT government, the Brazilian government has a costly institutional structure. The maintenance cost of the Brazilian Congress, i.e., is target of immorality and administrative misconduct accusations. The Brazilian Federal Legislature consists of the House of Representatives (Câmara dos Deputados), with five hundred thirteen Federal Deputies (Deputados Federais) and the Federal Senate (Senado Federal), eighty-one Republic Senators. The annual cost of each Federal Deputie reaches the amount of approximately six million six hundred thousand reais.[41] The annual cost of a Republic Senator reaches thirty three million one hundred thousand reais.[42]

Based on these examples, it is possible to analyze how the Brazilian Executive, despite its large collection, has problems in its administration. Legal constraints, according to the thesis of *The Executive Unbound*, are insufficient on the administrative state. Particularly in Brazil, public opinion and political factors are not responsible for the effective control of the Executive. Although these political circumstances suggest that the Brazilian Executive became a true "unbound", the institutional reality within this design indicates that its main constraints can be associated to its own performance. The cost of social programs and the Brazilian institutional framework hampers the public administration and, even with the high levels of tax, the government observes a significant restraint on his economic and financial resources. Moreover, technological, scientific, and informational investiments and resources in the Brazilian structure can't be compared to the American standards. There is not, in Brazil, a great commitment of economic and financial resources of government in infrastructure, research and technology, which can be implemented to rise the institutional capacities of its agencies, except for those more strategic to the governmental structure – as the Revenue

[40] R$ 248 bilions is equivalent to US$ 124 bilions. According to the website "Transparency", official site of the Federal Government with statements of collections and expenditures, the Family Grant was responsible for expenditure, in 2012, of R$ 248.016.266.327,90. Available at: <http://www.portaldatransparencia.gov.br> [viewed 14 May 2013].

[41] R$ 6,600 milions is equivalent to US$ 3,300 milions.

[42] R$ 33,1 milions is equivalent to US$ 17 bilions. This information was taken from official documents according to the transparency portal. Available at: <http://www.transparencia.org.br/docs/parlamentos.pdf> [viewed 14 May 2013].

Service. As much as the Brazilian political reality does not present a substantial expectation of Executive control, in liberal legalism parameter or post-madisonian one, political and institutional realities present the Brazilian government not as an example of "unbound" Executive but an Executive "own-bounded".

4. Conclusion

The traditional perspective over separation of powers has suffered severe criticism of an institutional nature in recent years. Currently, the issue is "was Madison's original understand overcome?" The madisonianism defends the separate of powers based on ideas such as the "ambitions" and the mutual oversight. Some problems can be pointed out in this traditional perspective and the institutional theory created an alternative model: the post-madisonianism. This more realistic perspective over the separation of powers is based on some ideas as the dividing and unifying government and the Executive growth in the modern administrative state.

Firstly, Levinson and Pildes were responsible for defending the branches operating on the basis of partisan orientations, with the possibility of the scenario of political competition be replaced by cooperation if the government stayed characterized by unification. Second, Posner and Vermeule argued that the rule of law and separation of powers, with the legal instruments of control and supervision, would not be able to contain the advances of the Executive in the modern administrative state, at least not with the popularity and credibility efficiency. These two contributions can aid to portray the moder administrative state as the Leviathan Executive. Contemporaneously, there is not a strong govern, concentrating power against the citizens, but an increasing of Executive in unified governments and with the twin problems of emergency and delegation.

Considering these notes, constructed from the American democratic experience, this paper aims to examine whether such post-madisonianos arguments would be compatible with the Brazilian political and institutional realities. Thus, as a conclusion of this research, it can be argued that such arguments allow us to better understand the Brazilian constitutional design and the way its main institutions interact, but cannot characterize precisely the Brazilian government.

The prospect of "separation of parties, not powers" does not look

compatible with the Brazilian political reality due to at least one particular problem: the difficulty in conceiving the government in Brazil as divided or unified. This difficulty occurs due to two key reasons.

On the one hand, the Brazilian party system has serious problems that hinder this analysis as divided or unified government, such as: (i) fragmentation in thirty two political parties, seven of them even with representation in Congress – besides two newly registered –, in general, (ii) with a low institutionalization and (iii) a weak ideology, exemplified by the practices of party disloyalty and in addition (iv) a strong succession of parties that exacerbates the problems above.

On the other hand, this difficulty is deepened by the presence of suprapartisan organizations in Congress achieving high cohesion compared to parties and coalitions. The successful performance of parliamentary countertops and fronts reinforces the argument that, in Brazil, competition and cooperation policies can not be reliably understood according to a partisan analysis. However, the informality, the limitations on the structure and especially the strictly specialized nature of these forms of suprapartisan organization prevents to relies on them to establish the division or unification of the government.

The thesis defended in *The Executive Unbound*, to establish the impossibility of limiting the Executive through purely legal instruments according to the modern administrative state, seems perfectly compatible with the Brazilian political and institutional realities. The post-madisonian argument that politics and public opinion are able to constrain the presidency, however, needs some consideration about the Brazilian realities, without implying in an Executive absolutely "unbound".

Firstly, the use of Provisional Measures by the Brazilian Executive disregarding constitutional rules illustrates the fail of liberal legalism. Provisional Measures represent a strong *de jure* power available to the presidency. What is striking, however, is the way its normative constraints are not met by the Executive and his edition is approved by Congress, without any significant suppression observed even by the Brazilian Supreme Court. Examples of abuse suffered by the presidency not control or supervision, may indicate: (i) failure to comply with the legal requirements of "urgency" and "relevant issue" in regard to his edition, (ii) the validation of more than five hundred Provisional Measures in a single trial, approved with constitutional formal vice, and (iii) the opening of twenty nine billion reais without observing the legal requirements on the CRFB/88.

Despite the failure of liberal legalism in an attempt to control

the Executive through legal instruments, in the administrative state it could be constrained by public opinion and politics. This seems like a perfectly compatible with the American reality, but the Brazilian political context provides evidence of some weakening of such factors. The public pressure for public authorities monitoring and accountability is not characteristics of Brazilian political culture. As for public opinion, disregarding terminological inaccuracies and methodological problems, though all effects that have presently achieved, it would be hasty to recognize it as a secure means of restricting the Brazilian Executive. The embarrassment of the Executive through politics, in turn, depends on the strategy adopted by the government on the distribution of political benefits. The importance of this political strategy is associated with Brazilian party problems and the presence of suprapartisan organizations in Congress, making difficult to maintain regular and substantial the support from his own coalition. The exercise of political control against Executive largely depends on their success in the distribution of such benefits. In theory, the control can be reduced by a decentralization in this distribution, but in Brazilian political context, this also results in a strong loss of credibility within his coalition. With this, politics and all its caveats preserves given potential and, in fact, requires the president to compromise and negotiate some concerns.

Being insufficient legal instruments advocated by liberal legalism and being post-madisonianos factors relatively weak, one might ask if Brazilian government could be an example of "unbound". Otherwise, the Brazilian institutional reality shows as the Executive is constrained by issues related to its own structure. Brazil is characterized as a country with high tax revenues, not applying resources in an extraordinary way on significant developments or military maneuvers. However, much of its limitation is the lack of financial resources due to the cost required to maintain social programs and to sustain excessive – for many, immoral – spending on certain governmental entities, such as the Congress. With costs of such magnitude, invest in institutional capacity of the Executive becomes something restricted to a set of strategic institutions, such as that responsible for tax collection. Reasons such as these allow permit, even before the fragile containment factors, both madisonian and post-madisonian, the Brazilian case exemplifies an Executive "own-bounded".

In summary, such post-madisonians references are not fully compatible with Brazilian political and institutional realities, because of the difficulty, in Brazil, to rate government as divided or unified, and

because of a partial fitness of public opinion and political to control an Executive "own-bounded".

References

DWORKIN, Ronald. **Law's Empire.** Cambridge: Belknap Press of Harvard University Press, 1986.

GILLMAN, Howard and Cornell CLAYTON. **The Supreme Court in American Politics: New Perspectives institutionalist.** Lawrence: Kansas University Press, 1999.

GRIFFIN, Stephen. **American Constitutionalism: From Theory to Politics.** Princeton: Princeton University Press, 1999.

LEVINSON, Daryl and Richard PILDES. Separation of Parties, Not Powers. *Harvard Law Review*, **119**(1), 2006.

MADISON, James. Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Departments. In: Alexander HAMILTON, James MADISON, and John JAY. **The Federalist Papers.** Electronic Classics Series Publication: Pennsylvania State University, 2001.

POSNER, Eric and Adrian VERMEULE. **The Executive Unbound: after the madisonian republic.** New York: Oxford University Press, 2010.

SEPULVEDA, Antonio, Carlos BOLONHA, Henrique RANGEL, Igor de LAZARI, and Roberto KAYAT. The Path of Brazilian Convenient Branches: The Executive Supremacy. **University of Maryland Schmooze "Tickets"**, No. 166, 2013. Available at: <http://digitalcommons.law.umaryland.edu/schmooze_papers/166/> [viewed 15 March, 2013].

SUNSTEIN, Cass. Second-Order Perfectionism. **Chicago Public Law and Legal Theory Working Paper Series**, No. 144, 2006.

SUNSTEIN, Cass and Adrian VERMEULE. Interpretation and Institutions. **Chicago Public Law and Legal Theory Working Paper Series**, No. 28, 2002.

VERMEULE, Adrian. **Mechanisms of Democracy: institutional design writ small.** New York: Oxford University Press, 2007.

Neoliberal hegemony versus social Justice

Natalia Pais Álvarez, PhD[1]

Abstract: It is possible that the hegemony constitutes the finished shape, the closing of the rational paradigm in the 20th century, and that from it we have met doomed to this period of disturbances, chaos, uncertainty, a sort of tedium. Already we cannot think the power from the old devices with which the privileged classes or the capital perpetuated its domination. The analyses that were uncovering the alienation, the oppression and the mystification (XIX and XXth) and were giving content to the dialectical draft owner - slave would finish with the relation, already they do not serve us; the question is that the destruction of the social links based on the domain already has taken place: it has been realized technically by means of the virtual emancipation (generalization of the exchange, reconciliation of opposite with the assumption of the Human rights…). The position of the owner is internalized on the part of the emancipated slave and there is solved quite in a paradox that, according to Baudrillard, he supposes the total liberation, the resolution of the conflicts and the free disposition of one itself they have led us to submitting us to the world hegemonic order.

Keywords: neoliberal hegemony, oppression, Justice

"It is a world in which the experienced
events have become independent of the man (...)
It is a world of the future, the world
of what happens without that happening to anyone,
and no one is responsible."
(Bouvresse)

Talking about a concept like hegemony in a time marked by the discourse of the scientific-technical performativity at the market service, involves the risk that it could be read as an infertile abstraction against a conspirator and invisible faceless entity.

[1] University of La Laguna (ULL), Spain.

Precisely for this reason, what concerns us here is reveal them in the pursuit of the substrate of discourses and alternative/alterative practices to help overcome the historical conditions that have made it possible in the neoliberal and triumphant order on the capitalist world-system stage.

Antonio Gramsci had already established the distinction between domination and hegemony, so the domain would be crossed by a political dimension, which, in times of crisis can get to make use of coercion, while hegemony refers to an ideological-cultural and non coercive dimension, although it also involved political and social forces.

Gramsci will consider the need to traverse economist dimension of hegemony and gives great weight to ideology, that it will be a privilege engine to rethink policy as an authentic redemptive strategy for the conformation of social transformation subjectivities.

The connotation of domination, of prominence, vertical cutting, is clear and the objective of socialism exposed is governed by antagonism. The "normal" execution of hegemony in what has become the classic field of parliamentary regime is characterized by a balanced combination of strength and consensus. Strength does not overcome, but appears to be supported by the consensus of the majority, expressed by the so called organs of public opinion (which therefore, on certain occasions, are artificially increased).

Between consensus and strength, is the corruption-fraud (which is characteristic of certain situations which make it difficult to execute hegemony, in which the use of strength presents too many dangers). In other words, Gramsci purports that corruption-fraud provokes weakness and paralysis in the antagonists (123-124).

Hegemony as leadership arises, as an influence, not as domination, to the extent that is not imposed by force. It also posits the impossibility of a social order derivative of an absolute consensus. The dominance results in an imposition by force of a political-economic and social order, while hegemony, however, arises from the formula of consensus, although the strength can be used at times when it is impossible to reach it.

Now, it is not participatory and decisive consensus but, therein the problem lies, is considered democratic only insofar as it implies the absence of authoritarianism. And this returns not only dangerous reading of the concept of democracy, but that challenges Fukuyama's proclamation that we are witnessing the end of last metanarrative: the final Consensus, absolute order, absence of conflict or virtual empire of

good. Are these indicators of a perception of reality that has lost its sense of itself, a virtual reality that defines our historical time: a false "order", "consensus" and "good" that overrides all resistance as simultaneously blurs the faces of what could be susceptible to reluctance.

And this, curiously in a postmodern scene inaugurated by the proclaimed death of the metanarratives in the era of mass media communication ecstasy. During this era, paradoxically perhaps the only metanarrative that has pervaded is that of "the metanarrative evil". We must not forget that the twentieth century, the postmodern century, which saw the expansion of the democratic regimes and the right of intervention in the name of democracy, the Universal Declaration of Human rights, and the emergence of pacifist movements, remains to be the same century of wars, terrorism and gratuitous horror. It seems pertinent to highlight here Marta Giacaglia's definition of hegemony:

> The achievement of moral, intellectual and political leadership through the expansion of a discourse that offers a partial meaning around nodal points. It comprises more than a passive consensus and legitimate actions: it involves the expansion of a particular set of rules, values and positions by persuasively "re-describing" the world (155).

These brands of hegemony are real symbols of our time. And this new symbology dethrones the old and certain concepts or representations we used to read the world, including politics. In fact, this hegemony is based on a fundamental principle of deregulation of meanings and references. Displays, in what Baudrillard calls the "ecstasy of communication" (Foster 193), just a series of signifiers promiscuous, desecrated, uninhibited, without regard where the community has no place, and subjects-seduced-fascinated diluted rolled back and are engrossed to withdraw in their particular symbolic universes.

Reality acquires meaning through a common screen where commonality is not possible: loneliness is the ultimate wake of meaningless hegemony. Nothing that is not part of the scene can be real and thus witnessing the beginning of the story of a fictionalized unreality, des-semanticized, that makes invisible the inhabitants of a reality that, after being touched by hegemonic signifiers, no one wants to dwell. So the hegemony proposes a symbolic challenge, makes invisible to those living in reality and creates a "not virtualized yet" people desire to make

the big jump to the scene of order and consensus, where there are no antagonisms, negating any form of reaction reducibility question u option globalized world system.

Precisely, that hegemony with a "democratic" mask, which accommodates an alleged plurality, is what has made it possible the end of the domain, because, among other reasons, of the absence of the "authoritarian mark" and has served as strategy in the pulse between antagonisms, annihilating them.

Public opinion now made these diluted-seduced-fascinated subjects, has made, of the capitalist hegemony, a cultural practice, an awareness, a sense of life, a way of living. Public opinion, which is no more than the new translation of the old proletariat which Gramsci said would have to aspire to occupy the political-economic-social place of the bourgeoisie.

The question is, what are the historical and philosophical constraints that have shaped this as a permanent entity we have called hegemony? We have seen that deterioration at breakneck speed in the last quarter century with the exacerbation of neoliberalism as economic theory and beyond, as an ideology and doctrine of globalization, which envisioned a self-regulating and self-regulating system where free markets conjugated in direct proportionality with greater progress and greater freedom for the subjects (individuals).

Given that this market preeminence has led to globalization is a vital global sense governed by economic laws, to this new idea-force, States are left without arguments and reveal inefficient.

I use the term globalisation, despite Chomsky's warning which I completely agree with. I have not found a substitute which better encompasses the concept I wish to convey. Chomsky tweeted on February 14th 2013 that "Globalisation is a term of propaganda and we should never use it".

The very concepts of market logic move into the political assessment, appearing then the United deficient or unworkable. These succumb seeking their upgrading in the new rationality they understand powerful. So, with the delegation of business understanding them as improper (the distance between either pure, or mixed private good dissolves becoming everything in private good), ends in their basic duties (Education, Health, Social Welfare, Justice, etc.)

We live today another debacle and explanations to this global crisis offered by the economic arms of global State -International Mone-

tary Fund (IMF), World Bank (WB), World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), United Nations Organization (UN)-, together with the brains of the overall state cabinet-the Group of Seven (G-7)- have been childish, laughable and propaganda.

But the truth is that the progression of the crisis will destroy the propaganda and exposing the inadequacy of explanations while discovering the chaotic nature of the global capitalist system and goes putting faces to those responsible of the chaos.

The real reasons for the crisis basically come from a translocation occurred in the global hegemony of the bourgeoisie. Until the end of the seventies it was a dictatorship of productive capital (Keynesianism).

Such restructuring is, in fact, the establishment of new rules of the game. Thus, what it has been called neo-liberalism is not, as suggested by Chomsky, nor "new" nor "liberalism".

This is a conceptual re-semantization of a process facilitated by the corporate elites who held the transnational domain of the capital, with the complicity of media and political legitimacy of the imperial triad, which have resized their position in the great world system board following the strategy of "throw away the ladder with a kick: first we break the rules to climb to the top, then we kicked the ladder so that others can not follow and proclaim justifiably indignant: "play fair and equal" (*Esperanzas y realidades* 99) inspired by the maxim according to which the aim of matching is reduced to the distribution of risks and costs: the benefits are not distributed (socialization of costs and privatization of profits). The law of the funnel, as Chomsky points out.

Countries grow with protectionist measures and once they gain a favorable position in the marketplace, encourage free trade and prevent other countries from competing on equal terms. Chomsky says: "while protectionism and state violence benefited greatly to England and the United States, and the rich industrial countries in general, liberalization imposed by the imperial powers created, to some extent, the Third World" ("Poder en el escenario global" 236). He clarifies that really it has nothing to do with neo-liberalism seeing as the strategy followed by the US is the same as that which imperial England used during the colonisation: protectionism in the first growth period, liberalism to maintain its dominant position as a super power.

The US did not forge a new path. On the contrary, it followed the footsteps of England, its predecessor as super power. In 1846, England finally adopted a liberal agenda after more than a century of intense pro-

tectionism and state intervention. Such protectionism, Chomsky purports, was far from cutting edge, to the extent that competition seemed relatively safe.

On the other hand, these initial protectionist measures which super powers have adopted are not only applied to their country, but transcend the "official" borders. They draw imaginary economic borders which extend as far as their own interests, which are appropriated by means of discourses which contradict the liberal doctrine. A clear example are the declarations of George Kennan (16th August 1954, in the National Security Council 5432) where he urged the "protection of our raw materials", referring to Latin America. Chomsky ironically observes how what is referred to as "our" raw materials, just so happens to be found in a completely different place ("Poder en el escenario global" 236-37).

That inveterate mechanics and interventionist welfare state would be replaced by the state small and expendable, because everything would be in the hands of the "virtuous market". Recall, for example, the words of Anthony Lake (National Security Adviser) when presenting the Clinton Doctrine, announced this new world opening in front of us, presenting "immense opportunities to get to consolidate the victory of democracy and open markets", only the logic and purposes of that market were ascribed more to a vicious circle to a virtuous one.

They shifted the axis of productivity to financial speculation, were made with the management of the world irrespective of any criteria of justice or fairness. Yes, succeeded in forecasting precarious state. What in the thoughtful analysis, Liliana Buschiazzo would say today the state as the main victim of the market and how we have become the Republican utopia to the dictates of the market:

> The state of the new millennium is not missing or perhaps weakened. The new state is under construction: it is a state that has caved in certain fundamental obligations (education, health, research, culture) but was strengthened in others (security, surveillance, repression). (9)

Multilateral agencies increase gradually their power of action and decision on developing scenarios. The UNDP (United Nations Development Programme), IDB (Inter-American Development Bank), the IMF (International Monetary Fund), the OAS (Organization of American States), ECLAC (Economic Commission for Latin America and the

Caribbean), WB (World Bank), among others, emerge as authentic references (some as authors, others as recipients) of new economic guidelines to be adopted, and it seems clear that this process has advanced sponsored packages of measures within the neoliberal structural adjustment program, which in any case is focused on the structural solution of poverty, but as a policy patch containing numerous contradictions *sui generis* and that reverses in an attempt to cut costs and public spending in a process of making a market of the public, including education.

In fact, this is a process of international order, through which they have tried to make public education in to a business. Due to this, according to his notes, in 1998 the WTO (World Trade Organisation) decided to make education one of the twelve services to be transformed in to commercial goods and had to be incorporated in to in to an international fair trade agreement. Consequently education had to be completely privatised in every sense.

We would therefore need to ask ourselves, first, an analysis of the strategies employed by organizations such as the World Bank as one of the visible arms of a project that seeks to limit public policies through privatization and public spending cuts. In fact too many arguments that would lead us to question these agencies and international development, including this one, although this should not be read, following Coraggio thesis, an analysis that denies the contributions of these organisms from positions that could be considered conspiracy.

In his speech questions the effectiveness of the measures the World Bank adopted for Latin America exposes some of its theoretical and practical weaknesses (n. pag.) Simply, we will just try to show, according to this author, some structural weaknesses.

First, we find that the WB is a self-legitimized body based on questionable validity criteria. The first is its undemocratic nature: its members are not elected (are elected by their peers, but can not speak of universal suffrage, representative democracy and, of course, participatory). Moreover, the WB works as the banking cooperative that it is, and the number of participants per country depends on these financial contributions to the institution, and this is an important fact to the extent that obviously weakens the legitimacy of their recommendations and makes suspect the possibility of interest that we are exposed to the public openly.

The question is also on this point, who are the beneficiaries of particular interests, that is, who serve their recommendations and if re-

ally the countries for which these packets have poured effectively demanding requirements of a group of organisms and unelected people from a democratic procedure.

Finally, it should be noted that social policies which seeks to develop the WB are based on strictly economic criteria, are technical proposals at a time when neopositivism triumphs, where as we believe rightly suggests Samoff:

> Is regard economics as the social science that has the important practical consequences because it handles the money and the power of money defines the sense of wellbeing. No wonder the notion of development is understood particularly as economic growth (Torres 173-74).

These organisms are based on the link between development and economic growth, but in many cases, the packages offered do not consider real economic contexts of the countries for which the prescription is prescribed, nor the fact that these are measures targeted and subsidiaries. But we can not read some perversion of the strategy, while income systemically favors (the object of capitalist accumulation of income, not the development of labor), the proposed measures for developing countries translate into the formation of labor in the service of the rentiers. In any case it seems load real equity intention or actual modification capitalist world system.

When, for example, the WB recommends investment in primary education, when economic grants loans to countries to launch your project, no guarantees, simultaneously, the results are to be expected. But when they fail, as has happened on numerous occasions, for example in Latin America, not assumes the relevant responsibilities: recognize the error should induce them to write off the debt incurred by some countries that do not knock on their door. When they fail, as has happened on numerous occasions, questioned how countries have implemented their project or only recognize they made a mistake. But those interests are to continue to be paid. In fact, Carlos Torres makes clear that the World Bank is not an agency grants, but loans, there is nothing to indicate that it is altruistic project, while as Bank makes profits (through tax interest) of its loans.

This would lead to a first inquiry regarding the actual purpose of such agencies. Also, as noted by this author, another aspect of the lending policy of the Bank is that it is "pro-active and not re-active", ie, "very

often initiates contact Bank for the design of a loan specific contacts that reflect the link between knowledge and expertise on the one hand, and the budgets of funding on the other".

Carlos Alberto Torres suggests that these errors are the fruit of programmes that in many cases been exposed inadequate, especially with respects to their analysis of primary education. Amongst other factors, this is the result of the World Bank "experts"' naive beliefs that on finishing their studies, children living in poverty will be able to compete in a globalised labour market (Torres 174).

It also seems quite naive to think that they actually can not apply for higher paying jobs, could be used in countries with high unemployment rates. Palliative training for a global society that has no where humans occupy these assets. The WB offers solutions within frameworks of little or no operation: labor supply has also been globalized, so that only those who are willing actual mobility can access certain posts, and arguably even more: it is naive to project the link training / employability without providing simultaneously offer / mobility, at least not if you want that employability meets the minimum requirements that won't motivate employees to job insecurity (if indeed it comes to getting a job) that threatens fundamental human rights.

We can not talk about quality of life or well-being when an employee is forced to choose between no employment or precarious employment, when carried to countries whose languages ignored (in fact just have been taught through the Primary) in letters organized, although statistically the challenge of poverty reduction is met; somehow chosen mobility is a privilege, the forced, a fact which indicates the success of a particular economic and educational policy.

Propose job promotion in a globalized market and primary education as a means to reduce poverty is to condemn those who have an unfavorable starting point. The World Bank proposes, as we see, solutions (training) are not geared focused even call into question, to resolve structural errors in the system.

Coraggio is very strong at this point, when he says:

> The slogan of success, for individuals, social sectors and countries, is not cooperation and solidarity, but success in competition with others. Being competitive means being able to pass the tests posed by the market, responding quickly and efficiently to your changes. Nationwide, warned of the danger of achieving competitiveness just perverse short-term, based on the degradation of the value

> of labor, the environment and quality of life, it is specified that competitiveness should be "authentic", sustainable and based on Investments in human capital (5).

And here we must expose the fallacy of the neoliberal thesis, according to which the market is a cybernetic system, rational, self-regulated by the natural laws of the market. The numerous crises in the different planetary scenarios after implementing international recommendations such as those offered by WB or IMF, evidence the inefficiency of those, and this is proof of that fallacy.

It might be logical to raise competitiveness projects an utopian global system where the gap between rich and poor countries did not exist, but as suggested Coraggio "sustainable competitiveness requires a non polarized, where there are expectations of continued improvement in the quality of life of economic agents [...] Human development can not be seen as a result of competition possible, but as a condition of it" (17).

Also, as suggested by this author, the policy imposes homogeneous WB have not yielded the expected results, especially in Latin America. What may then have political legitimacy not only undemocratic but inefficient? In the name of what followed have unquestionable budgets?

The World Bank proposes measures, "recommendations" on behalf of "truth" self-legitimized, measures to be adopted by many of the countries of the South, however, it assumes no liability related to who claims the right to decide on the economic destinies of much of the planet. There is an appropriation of success, but not the ownership of the prediction errors resulting from the homogenization resulted in packages of measures that do not take into account the particularities of the countries where they could have applied.

Following Agamben, hence it follows the display of violence, public exposure of the threat, the power of repression that would give the character of intangible sacredness that uncomfortable contiguity between sovereignty and police function, "[...] but the investiture the sovereign as a police officer has another corollary requires the criminalization of the adversary [...] Today there is throughout the land a head of state who is not in this sense virtually a criminal".

Agamben agrees here that this condition has a boomerang effect because criminalizing anytime can be treated as a criminal and Ag-

amben, neither regret "because the sovereign, who willingly consented to appear with the character of executioner henchman and now finally shows its original proximity to the criminal"(92).

With the modifications made in the regulatory principles of life and the market in the last thirty years, opens the new era labeled as Neoliberalism and is not more than the emergence of orthodox capitalism founded on the privatization of services, free trade and economic deregulation.

1989, to give a date, was the beginning of the end of the bipolar world. Capitalism came to dominate the world stage. The implementation of neoliberal thesis had a starting point in making economic adjustment measures proposed in the 1989 Washington Consensus, and all public areas until then, begin to be seen as an expense that was to be minimized, through a privatization process which, as it progresses, is resulting in asmaller share of the poorest in the system. As pointed Grassi,

> The contradiction accumulation/legitimation is in terms different from those of the Keynesian welfare state, including the "naturalization" of inequalities. The relative success of the model lies in part in the conflict have returned to a society entirely fragmented, in which the actors are individualized to the rhythm that subjects lost collective entity. It is understood, then the orientation of social policy and collective consumption, and social rights, but attendance targeted towards those "less pressure capacity" (21).

Just as Andrea Novy, Washington stipulates, "it means the political-economic-intellectual complex integrated by international organisms (International Monetary Fund, World Bank), US Congress, Federal Reserve, top officials of the Administration and groups of experts as outlined by John Williamson". This discourse agreed on ten clear priorities summarised as follows: fiscal discipline which must guarantee a budget surplus; a change in priorities and diversion of public spending to the most productive areas; enforcement of tax reduction; liberalisation of the financial markets; maintenance of standardised and competitive exchange rates; liberalisation of trade, suppression of contingencies, and lower customs tariff; equal treatment of foreign and local direct investment; privatisation and deregulation (including sectors with social objectives); guarantee of property rights (Novy).

It seems specially worthy of mention, the last of these priorities given that the guarantee of property rights was created by those who

are already property owners, without taking in to account the right to possess property of those who have nothing. Furthermore it makes no attempt to justify its protection of private property (as a priority) while the majority of people do not have their basics needs covered i.e. food, water, clothing and shelter.

The disappearance of bipolarity leads us to note the triumph of capitalist hegemony on a global scale and face the thought today for the first time, while a task devoid of illusion and alibis, "everywhere is being fulfilled before our eyes «great transformation» that drives one after another to the kingdoms of the earth (republics and monarchies, tyrannies and democracies, federations and national states) to the integrated spectacular State (Debord) and «capital-parliamentarism» (Badiou), which are end stage of the form of state" (Grassi 93).

Agamben makes us fall well aware that in the same way that after the industrial revolution destroyed the categories of public and social structures of the Ancien Regime, the same way they have transformed the terms sovereignty, right, nation, people, democracy and general will now covering a spectrum of reality that has nothing to do with what these concepts designated:

> Contemporary politics is this devastating experiment, which dismantles and void worldwide institutions and beliefs, ideologies and religions, identity and community, and then returns to propose them a form and definitely affected invalidity (93).

Our reference thinker continues at this point, unraveling the evolution of thought that claims the knot without telos of history in which we are immersed, and leads us to the choice of a thought capable of thinking both the end of history and the State end by facing each other, following Heidegger's style. The man has to take over his very being historical, of the same impropriety.

> The appropriation of historicity can not so still have a state-form not being the State other than the assumption and stay-hidden representation of historical arche -but must clear the ground for a longer life nonstate policy and legal entities that remain completely still thinking (95).

It is a proposal that called our partners as before "new historical project" or recovery of "republican utopia," in this case is radicalized

and output Agamben appears as return to zero point, urging the abandonment of our political tradition and rethinking the concepts of sovereignty and constituent power from the beginning.

> Sovereignty is the idea that there is a link between violence and right undecidable, living and language, and that this link is necessarily paradoxical form of a decision on the state of exception (Schmitt) or one side (Nancy) in which the law (the language) is maintained in relation to the living withdrawing from it, abandoning it to one's own violence and lack of respect. The holy life, is life proposed and abandoned by the law in the state of exception, is the bearer of the sovereignty dumb, the real sovereign subject (95-96).

It infers from this that if there is now a social power, will go to the bottom of his own impotence and therefore the problem that has to face a new thinking, a new policy, tear of the questions:

> [...] is it possible a community policy that is geared exclusively to the full enjoyment of life in this world? But is not this precisely, if one looks, the goal of philosophy, [...] is not defined by the recovery case for political purposes Averrois concept of "sufficient life" and the "good life"?

Reminding that Benjamin left no doubt when he said that "the order of the profane should be directed to the idea of happiness". To finish deriving the redefinition of the concept of "happy life" as one of the essential objectives of thought that comes.

> The "happy life" should be based on the political philosophy can not be neither so bare life that presupposes sovereignty to make it the subject itself, or the impenetrable strangeness of science and modern biopolitics, the today it is in vain to make sacred, but precisely a "sufficient life" and absolutely profane, who has reached the perfection of one's own power and communicability, and over which the sovereignty and right no longer have any control (Agamben 93).

As rightly observed Viviane Forrester radical application of the neoliberal model in a context of economic and political globalization has created "a strange dictatorship" in which the political powers of nation-

al states are subject to institutional supranational powers, such as the International Monetary Fund (IMF) and the World Trade Organization (WTO), and factual as multinationals.

The power we have come to focus these organizations put in check Western democracies, ironically under an official speech in which show just the opposite: global democratization. A democratic process must pass the filter of these organisms as indicated, there are not chosen. These powers have contributed greatly to the precarious state and the triumph of the neoliberal state.

Neutralization of a symbolic universe is as ingrained as widespread, therefore once the have been eclipsed and subsumed the real antagonisms subjectivities complex challenge for the new millennium opened and already announced Baudrillard, who wrote: "And the answer to the hegemony is not so simple. Antagonism, denial, dissent, violent abreaction, but also fascination and ambivalence. Because-and here lies the difference with respect to domination-all partake of hegemony" (La agonía del poder 26).

Utopia has become anti-utopia. The alleged rationality unifying the market is, obviously, a contradiction in termini: if the market is held on speculation is inherently irrational. Faith in the superior efficiency of the market on any other system or institution holds no empirical evidence, so that is another myth tax to disarm any new choice of economic and social planning. If I was a proven truth would not have fit-among many others-verifiable imbalances, preference for centrally programmed and controlled economies in emergency situations.

There is no excuse, today, from the memories of recidivism, to not to identify, report and disarm the new and always old ways of control of the subjectivities. Those that are reinvented, reproduce, reinstalled from the power over what emerges as threatening.

Today, from a perspective devoid of ingenuity, we find this possibility unlikely, especially given the emergence of the police state, the final entry of sovereignty in the police figure. The limited and ill state allocation of the work of control and repression in the service of a supranational order, a gendarmerie exercise far away from the administrative function of law enforcement original increasingly promiscuous naked next to the interchangeability between violence and Right.

Contiguity is no coincidence and utter confusion is today totally under judgement, constitutionality, providing States with impunity diminished one large capacity, the suspension of the validity of the law and the alibi of exceptionality: the reason of security, public order, set

the exception state legitimacy. In the absurdity that has generated a system inspired by the endless accumulation of capital has been no horizon, habited by the simulated subject-seduced-fascinated, postmodernism breaks the infinite mirror fragments presenting the distorted image of a fragmented reality.

If we agree that the desire for progress, development and personal growth and group is found in the history of humanity as an ambition as legitimate as uncontrollable and excessive, we may note that the transformative effects of social mobility are merely substitutions of the actors hegemonic in the same scene.

Only players are exchanges at different times or spaces. The plot of hegemony remains unchanged. Traditionally disadvantaged sectors (not to use terms that may be obsolete such as subaltern classes, proletariat, etc.) greet a welcome descent middle class. In a system that has been commissioned to highlight the robust individualism bonanzas not be expected to generate solidarity between classes. We insist, remains a class war, but a war growing chasm between the contenders: capital is mobile, not workers.

An outstanding example (anecdote cited by Chomsky), which could be applied to any similar situation, is the case of the Illinois workers strike in the 1990s. Here it was made clear the weakness in the bonds of international solidarity between the working class and the idea that capital is mobile, but not the workers. One of the most important syndicates, United Auto Workers, lost the battle with Caterpillar (producers of construction machinery) who decided to substitute the strikers for other permanent workers.

Beside this, which as Chomsky observes, is considered legal in almost all the world, Caterpillar decided to use their capital to produce surplus abroad, even during the strike period. The workers' response around the world, from a solidarity point of view, would have been to stand in solidarity with each other, refusing to work, and joining the cause going beyond the geographical limits of the multi or transnational company operates ("Poder en el escenario global" 244).

So, it is difficult to expect that establishing the complicity necessary to generate a push for change, a change in the directionality only one that could be: from the bottom up, because what is absolutely unthinkable would be a sense of movement to the Conversely, that is, from top to bottom.

References

Agamben, Giorgio. *Medios sin fin. Notas sobre la política.* Valencia: Pre-Textos. 2001.

Baudrillard, Jean. *La Agonía del Poder.* Madrid: Ediciones pensamiento, Círculo de Bellas Artes, 2006.

Buschiazzo, Liliana. *El Estado Precario. De la utopía republicana a los dictados del mercado.* Buenos Aires: Ed. Longseller, 2003.

Chomsky, Noam. "Poder en el escenario global", New Left Review 0 (2000).

Chomsky, Noam. *Esperanzas y realidades*. Barcelona: Ediciones Urano S.A., 2010.

Coraggio, José Luis. "Las propuestas del Banco Mundial para la educación: ¿sentido oculto o problemas de concepción?". Seminario O Banco Mundiale as Politicas de educação no Brasil. Açao Educativa, Sao Paulo, 28-30, Junio, 1995.

Forrester, Viviane. *Una extraña dictadura*. Buenos Aires: Ed. F.C.E, 2000.

Foster Hal, ed. *La posmodernidad*. By Habermas, Jurgen, et al. Barcelona: Kairos S.A., 2008.

Giacaglia, Mirta. "Hegemonía. Concepto clave para pensar la política". *Tópicos*. 10 (2002): 151-159.

Gramsci, Antonio. *Cuadernos de la cárcel. Cuaderno 1 (XVI) 1929-1930.* México: Ediciones Era, 1981.

Grassi, Estela, et al. *Políticas sociales, crisis y ajuste estructural. Un análisis del sistema educativo, de obras sociales y de las políticas alimentarias).* Buenos Aires: Espacio editorial, 1994.

Novy, Andreas. Economía política internacional. En http://www.lateinamerika-studien.at/content/wirtschaft/ipoesp/ipoesp-2108.html

Torres, Carlos Alberto. *Las secretas aventuras del orden*. Buenos Aires: Miño y Dávila, 1996.

Is it possible to have an egological model of legal education?

Diego Luna

"The egological theory of law is a new analytic point of view to investigate to teach and to operate in the Law field."
Carlos Cossio[1]

Abstract: We start from the experience in teaching the egological theory of law, to further investigate and ask about the possibility of shaping the characters of an egological model of legal education. We take as reference the theoretical models identified by Cardinaux and Clérico: "systematic", "legal realism" and "critical analysis" under the assumption that the epistemological starting point about what is meant by law, and its beliefs have a direct impact on the teaching model assumed, as well as guiding the didactic decisions to be taken in teaching.

If it be conceivable an "egological model", at least from a theoretical point of view, to the extent that egology understands the law, as an object of knowledge, as shared human behavior, plural, observed from a specific normative perspective, it would share traits common to all three models of teaching characterized as "systematic", which corresponds to the traditional ius positivism that has its central interest on the norms; "realistic", who concerns about the explanation of social phenomena and predicting the behavior of the judges, and the "critic", which focuses on identifying the relationships among power, ideology and law. We do not intend to arrive at a closed model, but to submit our ideas to discussion as a reflection on the teaching practice.

Keywords: Teaching - Egological Model - Law

[1] Cossio, Carlos, *Panorama de la teoría egológica del derecho*, Buenos Aires, UBA, 1949, p. 11.

I. *Law* as an object of knowledge and the education models.

Cardinaux identifies different ideal models of education that would correspond with the epistemological conception of Law taken as a starting point. Among others, the so called "legal realism", the "systematics" and the "critical analysis", consistent with conceptions found in the *law* phenomenon, are at the same time: an experience; a system of rules; and a group of practices producing a status quo, respectively. Each of them is consistent with a particular education model, namely: rational prediction through social studies (realism); logical regulatory analysis of dogmatic constructions (systematics); acknowledgment of the ideological basis of Law and strengthening skills for the access to justice (criticism).[2]

Without disregarding the fact that it is just about conceptual frameworks aiming at thinking about the practice of education, following the criteria outlined by Cardinaux, we wonder if it could be possible to think of an egological model. We make use of our experience in the teaching of the egological theory of Law, to look into the possibility of an egological model of legal education. A model that would be consistent with the epistemology inspired by the egological school that was founded by Carlos Cossio, which conceives the *law*, regarded as an object of knowledge, as a social phenomenon of human conduct in intersubjective interference.[3]

We believe that such a category should have something in common with the three models previously defined. As a starting point, I would take the realist conception of Law, which sees in shared conduct, in the otherness of social behavior, the core of Law as object of knowledge. All this, without disregarding the systematic aspects in terms of legal logic, and at the same time trying to provide a critical point of view for the analysis of a legal reality, which is always estimative, axiological and, therefore, contingent and affected by power and ideology factors.[4]

---

[2] Cardinaux, Nancy, "Concepciones del derecho: su impacto sobre los métodos de enseñanza", en Schujman, Gustavo e Isabelino Siede (comps.), *Ciudadanía para armar. Aportes para la formación ética y ciudadana*, Buenos Aires, Aique, 2007, p. 128.

[3] Cossio, Carlos, *La teoría egológica del derecho y el concepto jurídico de libertad*, 2ª ed., Buenos Aires, Abeledo-Perrot, 1964, *passim*.

[4] Vilanova speaks of five thesis of the egological orthodoxy: 1) the legal theory studies –or should study- positive *law*; 2) the *law* is conduct; 3) conduct is always valuable (positively or negatively); 4) conduct is free; 5) the *law* is conduct in intersubjective interference. Therefore, he can maintain: "The first three affirmations define egology against

If the legal conception that serves as a basis must direct the didactic decisions, as suggested by Cardinaux[5], the egological model would be characterized for seeking a point of view that could make the contact, that would be as much direct as possible, with legal information on experience possible; that is to say, with what *law* would be in terms of object of knowledge, at the same time considering unavoidable the critical analysis of the legal reality and its political and ideological connections, based on the profile of the individuals involved in the legal phenomenon. Thus, *law* only exists under the condition of always being about to be: that which the *law* would be, according to Cossio, to some extent depends on what the person who acts in its development makes of it.[6]

II. An educational point of view with egological characteristics.

A theoretical counterpoint may be useful to start defining the model considered herein with more accuracy. We make use of Cardinaux contributions, who theorizes different ideal models to identify the diverse teaching method which is consistent with the epistemological conception of Law that is taken as a starting point.[7] Böhmer also understands that the general conception of legal education is based, at least, on three essential issues: 1) the conception of Law; 2) the teaching methods and 3) the goals of teaching it. The conception of Law that is adopted is essential and, in a way, conceptually precedes the other two: it is given in the teaching method, and therefrom emerges the way in which the future task of those who are being educated is conceived.[8]

---

other philosophy of law currents and this could be sufficient. Egology is an *appraisive realist legal positivism*. In the first place, we can take advantage of everything, or almost everything, that positivists say in their confrontation with legal naturalists and then everything, or almost everything, that realists say against normativists" (Vilanova, José, *El concepto de derecho. Estudios iuspositivistas*, Buenos Aires, Abeledo-Perrot, 1993, pp. 25-26).

[5] Cardinaux, *op. cit.*, p. 131.

[6] Cossio, Carlos, "Teoría y práctica del derecho", en Paita, Jorge A. (comp.), *Argentina 1930 - 1960*, Buenos Aires, Sur, 1961, p. 260.

[7] Cardinaux, *op. cit.*, p. 128.

[8] Böhmer, Martín, *La enseñanza del derecho y el ejercicio de la abogacía*, Barcelona, Gedisa, 1999, pp. 14 and 22. In this sense, he states "…the law can be conceived as a group of positive regulations; or as a science that studies the systematization of this group of regulations; or as a form of moral discourse able of justifying actions; or as a profession to make a living and that consists in defending certain interests; or as a profession

A. Egology and the systematizing model of regulations.

An egological teaching would be incompatible with the starting point of the model that Cardinaux and Clérico call "systematizing model of regulations", which implies a teacher who transmits a student a rationalization of law "through its systematization in principles that will thereafter be of use to solve specific cases", able to "reduce the social complexity which must be faced on a daily basis or in which the jurist is immersed, and that may reduce it through the use of a full array of concepts".[9]

In open criticism of legal positivist conceptions which are the epistemological background of this educational approach, Cossio stated that the repetition of concepts that only reconciled with similar concepts and that give birth to new similar concepts, when transmitted by the chair through a good professor, are concepts that arise with prestige and that, therefore, keep the ideology of their origin alive".[10] According to Raffo, who agrees with the same criticism, the deficiency lies in not making a "pre-regulatory" description and that that way of developing theory "only finds an apparent foundation in the words of regulations or in the prestige of those authors and jurists who have developed it, who make use of the metaphor with a descriptive aim and that are circularly quoted creating the appearance of a foundation that is not such".[11]

---

destined for the public interest, etc. At universities, depending on the definition that is adopted, 'law' will be taught based on what is found in the laws, codes, Constitution, law put into practice, economic analysis of law, logic of regulations, history of law, sociology of law, theories of justice, etc." (*cit.*, note 1, p. 22).

[9] Cardinaux, Nancy y Laura Clérico, "La formación docente universitaria y su relación con los 'modelos' de formación de abogados", en Cardinaux, Nancy, Laura Clérico, Andrea Molinari *et al.* (coords.), *De cursos y de formaciones docentes. Historia de la carrera docente de la Facultad de Derecho de la UBA*, Buenos Aires, Departamento de Publicaciones de la Facultad de Derecho de la UBA, 2005, p. 42.

[10] Cossio, Carlos, *La función social de las escuelas de abogacía*, 3ª ed., Buenos Aires, UBA, 1947, p. 33.

[11] Raffo, Julio, *Derecho autoral. Hacia un nuevo paradigma*, Buenos Aires, Marcial Pons, 2011, p. 23. Raffo states the following: "We believe that the knowledge of realities, as legal knowledge should be, finds its foundation in the pre-regulatory experience of the phenomena it seeks to explain, under prejudice of being reduced to developing verbal constructions that find their only support in words of regulations or renowned vocabulary; this methodology does not allow the possibility of being successful with most of its affirmations, but, to our belief, that success is similar to the one achieved by lucky people when participating in the game *piñata*" (cit.).

The problem, in this regards, lies in the non-existent empirical contact with the information on legal experience of the one that suffers such conception. The egological contrasting point of view suggests a very different thing: the contact with reality, with facts themselves. It could be said, as stated by Vasquez: "an inverse process to the one that is based on general regulations is at least possible. This procedure consists in using facts of reality as a basis and, of course, it is the only one which can be used by an individual with a jurisdictional case lying ahead. The parties, their representatives and legal advisors, and the judge who must solve the case must suddenly face facts that are subject to all the complexities of the human existence".[12]

As stated by Cossio: "…the scientific analysis of Argentina's current affairs, which must be undertaken by our School, must make a direct reference to facts and work on facts, in order to reveal their values and guide the action that mends their defects (…). Opposite to past professors, today's professors must get used to work with facts and on facts".[13] In this respect, what has recently become a problem of educational democratization is "the need of the university working towards the inside of the institution, for its task to respond effectively against the country's real needs. Education may be understood not only as a technical-methodological process of launching knowledge, but also as a process developing social actors".[14]

[12] Vasquez, Eduardo, "El Derecho en la cátedra y en el Tribunal (Nota sobre la enseñanza del Derecho)", *Academia. Revista sobre enseñanza del Derecho*, Year 6, No 11, Buenos Aires, Facultad de Derecho - UBA, [1957] 2008, p. 124.

[13] *El Movimiento Justicialista y la Facultad de Derecho y Ciencias Sociales. Encuesta*, Buenos Aires, Ministerio de Educación - UBA, 1952, pp. 74-75. Beyond the value of his opinion in this opportunity, which is generally consistent with the critical position about the education of lawyers in the Law School of Buenos Aires, Cossio would say: "…my answer is a lecture, which is, in its entirety, a visible sarcasm for the Peronist University. Within the possibilities of expression that circumstances allowed without running a big personal risk, using as a front the old University which had ended in the Law School with the *validity* of a closed clique, the lecture has as a leading motif the idea that the School had abandoned the scientific analysis of our problems, to devote to an action of personal propaganda in a purely verbalist manner" (Cossio, Carlos, *La política como conciencia. Meditación sobre la Argentina de 1955*, Buenos Aires, Abeledo-Perrot, 1957, p. 291).

[14] Bianco, Carola y María Cecilia Carrera, "Proyecto institucional y prácticas de enseñanza en la carrera de Derecho. El proceso de formación universitaria y los debates pendientes", Gonzalez, Manuela y Nancy Cardinaux, *Los actores y las prácticas. Enseñar y aprender Derecho en la UNLP*, La Plata, EDULP, 2010, p. 171.

While the systematizing model of regulations is based on concepts to produce more concepts which are ultimately upheld on their own, like a succession of gears that set their first link into the void; the egological model upholds the concepts on the facts which knowledge is reached through the aforementioned concepts. Therefore, it is contrasted with the sistematizing model of regulations, as the egological model intends to make a sufficient ideological criticism of the legal concepts in order to determine the ties in political traditions, power relationships, etc., which would be impossible to accomplish if the concepts were built without the criticism of the concepts on which they rely. The issue falls within what Cossio called "gnoseology of error".[15]

B. Egology with respect to the realistic model and the legal criticism.

The void in the mere regulatory analysis, regarding it is just logic of legal thinking, has been widely studied: the lawyer's or jurist's task does not run out in the mere repetition of legal texts. That's how it has been said that, due to the practical aim of the legal discourse, "it seems paradoxical for the legal education to rely on an educational technique –the course lecture- where the study of a legal regulation and its spirit prevails".[16]

In contrast, by pointing out the realistic nature of the science of law, nothing is gained if there is a poor imitation of the sociologist's job. In turn, the methodological criticism inevitably resulting from a social knowledge affected by political and ideological conflicts, even though it is necessary, it is not enough for a full understanding of the legal phe-

[15] Cossio, Carlos, "La gnoseología del error", en *La Ley*, t. 101, Buenos Aires, 1961, pp. 1079 *et seq*. The specific problem of the gnoseology of error "…is revealing the ideological function of that predetermined harmony between capitalism and legal truth, which results in the thought of jurists, vested with a neutrality that, if it wasn't a pretense, it would show a miracle".

[16] Bianco y Carrera, *op. cit.*, p. 170. Nevertheless, it is worth "…asking if the most effective way, if not the only one, of transmitting theory is the masterclass. This is a decisive point because theory may be, without a doubt, taught by means of different methods and the constant lecture does not seem to be the only possibility and is far from being the most effective" (Gonzalez, Manuela, Nancy Cardinaux y María Angélica Palombo, "Los discursos de los profesores de la FCJyS sobre el proceso de enseñanza, aprendizaje y evaluación", en Gonzalez, Manuela y Nancy Cardinaux, *Los actores y las prácticas. Enseñar y aprender Derecho en la UNLP*, La Plata, EDULP, 2010, p. 215).

nomenon. If the first position would assimilate the jurist to the logician or philosopher (in the linguistic version of the logical positivism) and the second one, to the sociologist; I would assimilate the critical analysis to the political scientist, therefore readapting –in any of the cases- a useless methodological and epistemological repetition.[17]

In accordance with Cossio, we understand that the phrase that accuses the philosophy of law of "having one's head in the clouds" is justified when the task of the general theory of law is reduced to indicating the methodical point of view from which the jurist loses the contact with its information.[18] On the contrary, if –as set out by Cardinaux- the legal conception that serves as a basis must direct the didactic decisions, so the general theory of law must –in order to avoid going up towards the clouds- accomplish a point of view that enables a contact, that is as much direct as possible, with legal information; that is, with what law would be as object of knowledge.

The direct contact with multiple daily legal phenomena that a student faces for the sole fact of his social coexistence (sale, marriage, employment relationships, taxation, etc.) is of great use. However, a mere narration of the particular legal experience taken from the daily life of the students would result in an innocuous sociologism, even though it allows them to make up a composition of the "legal culture" that is lived and that does not always coincide with what is written in the laws.[19] The blind redirection of those individual experiences towards the general regulations that mention them or under which particular cases are considered is ruled out, otherwise it could fall victim of the dogmatic model which does not contribute anything essential.

"Poor judge of life who has not been a defendant before!" This

[17] "…everything that is taught, except for regulations and argumentative techniques to manipulate them, is politics and nothing else" (Kennedy, Dunkan, "La educación legal como preparación para la jerarquía", *Academia. Revista sobre enseñanza del Derecho*, Año 2, No 3, Buenos Aires, Facultad de Derecho - UBA, 2004, p. 128).

[18] Cossio, *La teoría egológica...*, *cit.*, p. 397.

[19] According to Cardinaux: "When realists think of legal education aimed at lawyers, they do not doubt that the most appropriate education is the one that allows them to predict what the judges will decide, because that is the Law (…)It is, without a doubt, a very particular conception of Law, as everything that we can do is predict conducts, but the Law loses all its capacity of operating beyond the "legal culture" in which those judges are immersed" (Cardinaux, Nancy, "La articulación entre enseñanza e investigación del Derecho", en Orler, José y Sebastián Varela (comps.), *Metodología de la Investigación Científica en el campo del Derecho*, La Plata, EDULP, 2008, pp. 184-185).

expression by Ricardo Jaimes Freyre, taken from his book *Los sueños son vida* (The dreams are life), is the heading of the book *El derecho en el derecho judicial (Law in judicial law)*, by Carlos Cossio. Even though not every Law student is a potential judge candidate, every judge has necessarily been a Law student, so that is why at the same time that the expression grossly questions the role of the criminal judge and the contact with the reality that it judges, it may also be generalized to the "poor lawyer of life" who has not had a previous contact with legal experience.

The analysis of reality allows the generality of the theory to be related with the actual experience that the Law student knows after having lived it and to which he is linked due to being part of a social group.[20] This allows him to intellectually deal with the social conflicts and connect them with the legal concepts obtained through the critical dialogue around the reading of the chosen bibliography.[21] All legal experience "shall be established in a conduct phenomenon with legal meanings that are given in advance and in a general manner by applicable regulations and individually by judgments; thus, the study of Law, in order to be realistic, cannot do without the conduct phenomenon as a starting point of its considerations".[22]

This viewpoint allows a better apprehension and comprehension of the legal phenomenon, as object of knowledge of the science of Law as a social reality imbricated in the tension of power, ideology, culture, the role of judges and judicial bureaucracy, etc.; all this allows a realistic approximation to the legal phenomenon and the problem of the theory of justice. With everything, the criticism related to the power, social, cultural, political and even ideological factors that may revolve around legal relationships and the considerations concerning the reasons behind the social phenomena, even though presented as a valid and necessary viewpoint, it is not enough as a use able to make the scientific nature of Law as knowledge clear.

Even though it must be present, the critical perspective must not

[20] We believe it is appropriate to remember Vilanova's words: "The legal sense of particular actions is established by a community in accordance with it that forms the agent and the ones affected by the conduct. It is a sense "for them" which seems to make it undergo the disadvantages of subjectivity. However, a critical legal positivist conception must suspect of a legal sense that is "for everyone" because it would hide the main fact that it is certain human beings in a given time and place who build those legal senses" (Vilanova, *op. cit.*, p. 86).

[21] *Ibíd*, p. 196 y ss.

[22] Raffo, *op. cit.*, pp. 24-25.

exhaust nor replace the problem of the legal phenomenon, but act as a peripheral aspect of law education, to the extent that it allows seeing the social and historical situation in which legal phenomena are presented. The knowledge of Law as a specific social practice requires –as pointed out by Orler and Varela- taking into consideration its historicity, ideological aspects, issues related to power, violence, constituent essence and, especially, its conditions of production and reproduction, among many other subjects.[23] This historical situation, with its own political and ideological circumstances, cannot be separated from the *law* as a social phenomenon. It does not determine it, nor gives rise to it: it provides a situation and meaning. Its knowledge allows its better understanding.

III. The challenge of a professional training in contact with the social reality.

Cossio noticed in the mid-20th century that "the professional failure as a complete divergence between what a Law School teaches and what experience in courts demands is a well-known secret in our country. The fact that the brand new lawyer suddenly realizes how much padding there was in everything he was taught and that his first task is to forget most of that education forever is catastrophic. However, this is the pure truth".[24] Notwithstanding the passing of time, it could be said, roughly speaking, that current issues can be identified with this diagnosis in a degree higher than imaginable.

We understand, in accordance with Bianco and Carrera, that "it is necessary to put theory and practice together, in the educational process of graduates, with a critical social sense and find institutional strategies to carry out this proposal".[25] The general theory of Law provides

[23] Orler y Varela, *op. cit.*, p. 8.

[24] Cossio, "Teoría y práctica...", *cit.*, p. 263. " Even if the graduate is an outstanding student, he does not come out in practical conditions to carry out his profession. He must learn law by practicing it, after having graduated, the hard way in the forensic life and in court practice, with prejudice of their reputation and that of the clients who have entrusted him with their interests, trying to mitigate as much as possible this period of consideration and experiments through the wise or lost advice that may be given by a colleague who has already been down this road. Nobody ignores the fact that, at the time of graduating from University and entering into his professional life, the lawyer must forget almost everything he has been taught and learn it all over again" (Cossio, *La función social…*, *cit.*, p. 96).

[25] Bianco y Carrera, *op. cit.*, p. 171.

something to the practice, but it receives something from it as well. A good theory cannot be detached from experience because every theory just intends to be a conceptual understanding of the reality it targets and that is why from it derives the immediate technical use. The detachment of theory from practice only reflects one scientific mistake in the theoretical conception. It is the experience which presents authentic problems, deficiencies and obstacles; but it is the scientific thinking which, by taking charge of them, sets their course to overcome them.[26]

For education to be really practical, Cossio suggested that apart from students reading and commenting on a prominent judgment, it is necessary that they witness a hearing and that they learn that the hearing is not held by the Judge, as provided by the Code, but by a court employee; that the parties and lawyers get into unpleasant arguments among themselves or with the opposing party's witnesses; that procedural terms are longer than the ones provided by law due to the professionals' skillfulness or due to the employees' negligence; that notices actually have a different nature than the one arising from legal texts, etc. He added eloquently: "It is essential that they see the criminal's mood at the time he appears before the Criminal Court Judge when he is summoned to the preliminary personal hearing and that they learn how to make their own idea of the place regarding the psychological evidence. And like this one, there are a thousand more things that can only be seen through court practice. Without this contact with life, graduates that step for the first time into the courts will always be defenseless beginners who will have a painful learning.[27]

This contact with legal life claimed by Cossio and that students must face on their own leads them to understand what is a notice, a summons, a real hearing, where the judge is conspicuous by his absence, and a long list of other things that are given by the direct contact with legal experience. According to Méndez, the egological theory brings students closer "to the daily life of courts, of the profession, it is not a neutral study of legal regulations, but a committed study and research about "human conducts", which is the real object of the science they study". He also states that egology "is a kind of permanent plot that makes us think, it is not as boring as to make you sleepy, it comes to cause problems".[28] As stated by Cueto Rua, from the egological viewpoint, which

[26] Cossio, Carlos, *Ideología y derecho*, Buenos Aires, 1962, p. 297.

[27] Cossio, *La función social…*, *cit.*, pp. 137-138.

[28] Méndez, Eduardo, "A manera de presentación" (ensayo preliminar), in Cossio, Car-

conceives *law* as a human conduct in intersubjective interference, the memory is not developed through legal education, but through imagination; reality is identified and taken into account, but it is not approved just because it is, it is praised when it is what it should be.[29]

Of course, as stated by Morello, the analysis and understanding with which law men assume legal phenomena and their particular and systematized education is clearly different to the dreams, utopia and precisions that during the years 1920-1940 filled the illuminated and advanced minds like Cossio's.[30] However, we consider that that does not prevent appreciating and updating their contribution to education, given that, during the "egological period", legal education in the University of Buenos Aires was not only taught "in an original and creative" way, but it was also characterized for its approach to "philosophy of law in a way open to discussion of all tendencies and problems; there was a permanent exchange of opinions and that is why controversies were so frequent".[31]

A key element of egological contributions regarding law education is, according to Morello, the "necessary share of humanism that Cossio strived for with such conviction"[32] and which should not be absent in a full-scale and productive law education, if it manages to have some contact with the social reality in which it must be inserted. According to Cossio, "humanism tends to form individuals, who are spiritually complete, culturally comprehensive", and without disregarding the technical professional aspect in the education of lawyers, he considered that "the truth is that the human being must face, at any moment, while being educated, both problems: the technical and the humanist: the problem of struggle for life and the problem of the life earned in such

---

los, *Teoría de la verdad jurídica*, Buenos Aires, El foro, [1954] 2007, pp. XII and VIII. In a way, it can be translated to the Law teacher in general, when Méndez proposes that "the great task of a Philosophy of Law teacher must be to clarify if the science of jurists should be a science of semantic ideals, or if it is about thematizing legal experience, as a biographical reality" (*op. cit.*, p. XVI).

[29] Cueto Rua, Julio, "El buen profesor de derecho", in *Una visión realista del derecho, los jueces y los abogados*, Buenos Aires, Abeledo-Perrot, 2000, p. 208.

[30] Morello, Mario, "La enseñanza del derecho en el pensamiento de Carlos Cossio y su recepción por el derecho procesal", in *Revista de Derecho Procesal*, 2006-1, Buenos Aires, Rubinzal-Culzoni, 2006, p. 502-503.

[31] Cossio, Carlos, "Otoño filosófico en las universidades argentinas", in *Lecciones y ensayos*, No 48, Buenos Aires, Astrea, 1987, pp. 321-322.

[32] Morello, *op. cit.*, p. 507.

struggle".[33]

These thoughts have no other intention than putting them down in paper to stimulate the truthful exchange of ideas regarding the question that serves as a title. We do not intend to get to a complete and comprehensive system, but outline some concerns based on the appreciation of the contributions that have been made from the egological theory of law about the problems in legal education. We trust that, through these pages, we have contributed to achieve that goal.

[33] Cossio, *La función social...*, *cit.*, pp. 90 y 80. "Humanist ideas are, therefore, social ideas, that is, ideas regarding society; and the humanists of today's world are their providers since the problem studied by philosophers, artists and historians is not the struggle for life, but that life is to be lived having been earned with such struggle, thematizing its issue as a reason to transcend, as an emotion to exist or as the will of being" (Cossio, Carlos, "Éxodo y desperdicio de los intelectuales en la América Latina", in *Perspectiva Universitaria*, No 2, Buenos Aires, I-IECSE, 1977, p. 52).

Tax education as an instrument of social change

Ana Cecília Bezerra de Aguiar
Fernanda Castelo Branco Araujo

Abstract: Starting from the role given to the citizen by the current constitutional order and believing in the transformative power that legal rules have to meet the requests of those who create them, the present study looks up to investigate how tax education can contribute to a change that softens the social deficits observed in Brazilian citizenship. For this, we make an initial exposure about citizenship in Brazil, covering an historical analysis and showing the contours it has nowadays. Then we discuss the theme social change, arguing how law and education may contribute to its occurrence. So the study enters specifically on the field of tax education, focusing on the National Tax Education Program. Finally, the last part of the paper addresses to discuss about the deployment of social observatories in public spending in Brazil as a result of a change in citizens posture through the spread of tax education in the country. Based mainly on the connection between the aims of tax education and the components of the current concept of citizenship and the promising performance of social observatories, it is concluded that it's right to invest in tax education as a way of building an active citizen profile. We should not forget, however, that it is necessary to overcoming the difficulties pointed and to increasing such policies to ensure that the promoted social change is also increasingly significant. The methodology of the research is descriptive, presenting information about the elements that form the object of study, and explanatory, seeking to establish relations of cause and effect concerning the objects studied. Its nature, in turn, is qualitative, because the study aims to translate the phenomena of the social world.

Keywords: Citizenship. Social change. Tax education.

1 Introduction

In the current constitutional order, citizenship is given to great prominence, becoming a key precept on which the Federative Republic

of Brazil is structured.

In the context of redemocratization in which the Charter was enacted, its citizen profile was insistently disclosed, as observed, for example, by the wide range of fundamental rights recognized. However, turning attention to the historical and social reality of the country, the gap between the profile of the citizens designed by the current Constitution and the effective popular participation in the conduct of the Nation´s political life.

Thus, it follows that the implementation of constitutional provisions requires changes in Brazilian society, so that people can be engaged in an active citizenship as prescribed in the Higher Law. The simple legal provision does not have the privilege of itself make the necessary changes. However, the existence of such rules offers legitimacy to all actions to turn toward the achievement of their goals.

Among these actions it is believed to be education toward citizenship that can contribute to social change more efficiently. In the present study, tax education was elected among the branches of citizen education to be examined on its potential to contribute to the formation of a stronger citizenship in the country, making concrete the existence of a democratic state.

We make an initial exposure about citizenship in Brazil, covering an historical analysis and showing the contours it has nowadays. Then we discuss the theme social change, arguing how law and education may contribute to its occurrence. So the study enters specifically on the field of tax education, focusing on the National Tax Education Program.

Finally, the last part of the paper addresses to discuss about the deployment of social observatories in public spending in Brazil as a result of a change in citizens posture through the spread of tax education in the country.

Based mainly on the connection between the aims of tax education and the components of the current concept of citizenship and the promising performance of social observatories, it is concluded that it's right to invest in tax education as a way of building an active citizen profile. We should not forget, however, that it is necessary to overcoming the difficulties pointed and to increasing such policies to ensure that the promoted social change is also increasingly significant.

2 Brief history of citizenship in Brazil and its characteristics in the current constitutional order

Considering citizenship as a historic construction, a position also adopted in this work, Marshall shares his concept into three parts: social and civil, and political. The first relates to the acquisition of the rights to freedom (of expression, of movement, of thought, etc.). The political element constitutes the opportunity to act interfering in the exercise of political power. Finally, citizenship incorporates the social element, that "[...] refers to everything that goes from the right to a minimum of economic welfare and security to the right to participate fully in the social heritage and lead to life of a civilized being according to the standards prevailing in the society."[1]

According to the indoctrinator mentioned, the rights listed in each of these categories were embodied in the concept of citizenship in the course of England´s history, in accordance with the following logical order: civil rights (eighteenth century), political rights (nineteenth century) and social rights (twentieth) century. In this sequence, the exercise of the foregoing rights resulted in the recognition of those belonging to the later category. Thereby, based on civil liberties, people claimed the right to vote (political right), and with the election of members of the working classes, the recognition of social rights was possible. [2]

Referring to the lesson outlined above by Marshall, Carvalho[3] clarifies that, in Brazil, this sequence was reversed. In the next lines, an overview of this route of acquisition of rights by the Brazilian people will be exhibited based on this author.

Starting from the colonial period, it is observed that the characteristics of Brazilian society at the time did not contribute to the development of citizenship. We had large land holdings, which developed export-oriented monocultures, using slave labor[4]. The society was formed basically by three groups: slaves, landowners and those who were in an

[1] MARSHALL, Thomas Humprey. **Cidadania e classes sociais**. Brasília: Senado Federal, Centro de Estudos Estratégicos e Ministério da Ciência e Tecnologia, 2002, p. 09. [Freely translated]

[2] CARVALHO, José Murilo de. **Cidadania no Brasil**: o longo caminho. Rio de Janeiro: Civilização brasileira, 2011, p. 10-11.

[3] Ibidem, p. 219.

[4] In this bias, Bastide says: The Portuguese colonization rests therefore on a threefold basisbig lands, monoculture, slavery. Aristocratic society, with the white master occupying the top, vast domain owner and sugar mills - the servant or the native client, householdinhabiting of favors these areas, lower in status - and finally black slave located on the top step of this hierarchy (Freely translated from: BASTIDE, Roger. **Brasil**: terra e contrastes. 4. ed. São Paulo: Difusão europeia do livro, 1971, p. 22-23)

intermediate layer between the previous two.

As explained Carvalho[5], the first group did not enjoy basic civil rights like freedom and physical integrity and was treated as goods. The landowners, members of the wealthier class, also could not be considered citizens because, although they had civil and political rights, they did not have the "[...] own sense of citizenship, the notion of equality of all under the law. [...] The government's power ended at the gate of the large estates."[6] Obviously, those who were between these two groups also can not be called citizens, since, although free, had no basic education for the exercise of civil rights.

Regarding to the education mentioned above, We must also clarify that the eminently exploratory Portuguese colonization did not invest in it. After the expulsion of the Jesuits in 1759, the home government took charge of the few existing initiatives of this nature. According to Carvalho, despite data of that period isn't available, the numbers from a next phase denounce the deficiency at this sector.[7]

In the period between 1822 and 1930, the situation had not undergone significant changes. [8] With respect to political rights, considering the 1824 Constitution, Brazil has a high number of voters compared to the size of the electoral college from other countries that also hadn't established universal suffrage (like England, Portugal, Italy and the Netherlands). However, when it sought to analyze the material aspect of this reality, the situation changed from optimistic to pessimistic, since most of the population did not have any kind of statement to the exercise of those rights. [9]

---

[5] CARVALHO, op. cit., p. 21.

[6] Ibidem, p. 21.

[7] […] if we check in 1872, half a century after independence, only 16% of the population was literate, we can get an idea of the situation at that time. [...] The situation was not much better in higher education. In contrast to Spain, Portugal never allowed the creation of universities in their colony. [...] The Brazilians who wanted and could do university degree had to travel to Portugal, especially to Coimbra. Between 1772 to 1872, passed by the University of Coimbra 1,242 Brazilian students. Compared with 150 000 of the Spanish colony, the number is ridiculous. Ibidem. p. 22-23.

[8] There was no republic in Brazil, ie, there was no political society. There was no 'repúblicos', ie, there was no citizens. Civil rights enjoyed by the few, the very few political rights, social rights have not yet spoke, since social assistance was in charge of the church and individuals. (Ibidem, p. 23-24)

[9] Ibidem, p. 31.

In the same sense, Amado[10], referring to figures for the first census that was done in Brazil, in 1872, stated that:

> The Brazilian people, existing as a living reality, could not fail to be only three hundred thousand or four thousand people belonging to families owning slaves, farmers, planters from where came out the lawyers, doctors, engineers, senior officials, diplomats, heads of companies, only ones who could read, had some positive sense of the world and of things and could understand, within their education, which came to be monarchy, republic, representative system, voting rights, Government etc.

The exercise of civil rights, in turn, was compromised by the legacy of the previous period: slavery, the estates and the State committed to private power exercised by a minority of the population.[11]

The advances in the area of social rights were shy, punctual and sometimes only formal, as the creation of the possibility of retirement and pension only for certain categories of professionals, or the absence of effectiveness of the Juvenile Code, adopted in 1927. A befitting state posture with an orthodox liberalism was prevalent, whereby providing any form of social assistance wasn't among the roles of government.[12]

This scenario of social rights in the country began to change in the period between 1930 and 1964, when there was, for example, the creation of the Ministry of Labour, Industry and Commerce and of an extensive social security and labor legislation.[13]

As the mentioned period was marked by political instability, in which alternated democratic and dictatorial regimes, there was also a major change in the context of political rights.

Thus, for example, after 1930, electoral reform promised by Getúlio Vargas resulted in the extinction of political parties, since for a dictatorial regime, and outside the implanted was nothing interesting multiparty system.[14]

Moreover, after the fall of the New State, in 1945, the country

---

[10] Freely translated from: AMADO, Gilberto. As instituições políticas e o meio social no Brasil. In: **A cidadania no Brasil II**: o voto. Brasília: Senado Federal, 2002, p. 78-79.

[11] CARVALHO, op. cit., p. 45.

[12] Ibidem, p. 61-64.

[13] Ibidem, p. 87.

[14] BONAVIDES, Paulo, ANDRADE, Paes de. **História constitucional do Brasil**. 6. ed. Brasília: OAB, 2004, p. 347-348.

underwent its first properly democratic experience, with the increased honesty of the electoral process, giving added weight to popular vote.[15]

With regard to civil rights, teaches Carvalho[16]:

> Civil rights have progressed slowly. Not disappeared from the three constitutions of the period, including the dictatorial 1937. But its guarantee in real life remained precarious for the vast majority of citizens. During the dictatorship, many of them were suspended, especially freedom of thought and organization. The dictatorial regime promoted the union, but he did within a corporate framework, in close connection with the State. [...] The population's access to the judicial system has made little progress.

One should highlight in this period the emergence of a more significant popular participation, the consequences of which were the 1930 movement and nationalist campaigns of the 50s.[17] In part, this promotion of popular participation can be attributed to the educational policy implemented at the time. During the Estado Novo, the government was concerned about reforming education so that the values espoused since the late 20 th century would be widespread, among whom nationalism. Therefore, a curriculum that valued civic education through the study of History and Geography of Brazil, giving prominence to civic commemorative dates was implemented.[18]

During the military dictatorship (1964-1985), there was a broad restriction of civil rights, attacked strongly on a period marked by, for example, illegal arrests and censorship exercised by state agencies on cultural manifestations.[19]

In the same period, there was an increase of voting rights in 161%, considering the presidential elections of 1960 until the general election of 1985. Paradoxically, this was a time marked by the forfeiture of any other political rights of many Brazilians.[20]

Social rights, in turn, gained emphasis. [21] Is also worth mention-

---

[15] CARVALHO, op. cit., p. 87-88.

[16] Ibidem, p. 88.

[17] Ibidem, p. 88.

[18]HILSDORF, Maria Lucia Spedo. **História da educação brasileira**: leituras. São Paulo: Pioneira Thomson Learning, 2003, p. 99-100.

[19] CARVALHO, op. cit., p. 157 ss.

[20]Ibidem, p. 167.

[21] Ibidem, p. 157 ss. Freely translated from: "[...] o autoritarismo brasileiro pós-30 sem-

ing, for instance, the creation of the National Social Security Institute (INPS) in 1966, and the Fund for Rural Assistance (Funrural). However, one can not help but cast a critical eye on those recognitions of rights, since as alert Carvalho, "[...] the Brazilian authoritarian post-30 has always sought to compensate for the lack of political freedom with social paternalism."[22]

With the end of military dictatorship, it is inaugurated in Brazil a new constitutional order by Federal Constitution of 1988. The Charter received the nickname of "Citizen Charter" during the speech delivered at the ceremony of its promulgation by the then Deputy Ulysses Guimarães, because, for him:

> The Constitution has changed in its preparation, has changed the definition of powers, has changed by restoring the Federation, changed when wanted to change man into citizen, and is only a citizen the one who wins fair and adequate salary, reads and writes, lives, and have hospital medicine, leisure when resting.[23-24]

In this context of democratization, in which Brazil is declared as a democratic state, strong popular participation is essential, as a result of the actions of citizens, true holders of political power, legitimizing its exercise. In this vein, highlighting the importance of promoting popular participation in democratic states, there is the lesson Canotilho:

> The constitutional state is not and should not just be a rule of law. [...] It has to be structured as a democratic rule of law, that is, as

pre procurou compensar a falta de liberdade política com o paternalismo social".

[22] Ibidem, p. 190.

[23] Discurso de Ulysses Guimarães na cerimônia de promulgação da Constituição Federal de 1988, em 05 out. 1988. Available at: <http://www2.camara.leg.br/atividade-legislativa/plenario/discursos/escrevendohistoria/destaque-de-materias/constituinte-1987-1988/pdf/Ulysses%20Guimaraes%20-%20DISCURSO%20%20REVISADO.pdf>. Accessed on: 12 set. 2012

[24] Similarly, let´s transcribe the preface by Ulysses Guimarães for the 1988 Constitution edition launched by the Senate and subsequently withdrawn from circulation: Man is the problem of Brazilian society: without salary, illiterate, without health, without home, so without citizenship. The Constitution fight against pockets of poverty that shame the country. Unlike the seven previous Constitutions, it starts with the man. Geographically witness of the primacy of man, which was written for man, that man is an end, and their hope is citizen Constitution. Citizenis what earns, eats, lives, you know, can heal. (Freely translated from: BONAVIDES, Paulo; ANDRADE, Paes de, op. cit., p. 501)

> an order domain legitimized by the people. The articulation of "right" and "power" in the constitutional state thus means that the power of the state must organize and engage in democratic terms. The principle of popular sovereignty is therefore one of the cornerstones of the Constitutional State. Political power derives from the "power of citizens".[25]

This importance attached to citizenship by CF/88 is expressed, for example, in recognizing in that the foundation of the Federative Republic of Brazil.[26]

With the new charter, there was the expansion of political rights by letting illiterates vote as an option, last still existing constraint, the reduction of the minimum age from 18 to 16, and a lower restriction on the creation and operation of parties politicians compared to the previous legislation.[27]

The list of social law, in turn, is the broadest of all Brazilian Constitutions.[28]

Civil rights attended the same dynamic expansion, having been reinstated after suspension in military regime with some innovations in the legal system as a whole, as the creation of *habeas data*, the writ of injunction, the Code of Consumer and the National Program on Human rights.[29]

However, accompanying a global movement started on the 90s to review the concept of citizenship ruled only on ownership of rights, [30] it is adopted in this study, then, a broad concept of citizenship. It goes beyond the reductionist concept of Marshall and those that, even more

---

[25] CANOTILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição**. 6. ed. Coimbra: Almedina, 2002, p. 109.

[26] "Art. 1º A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: I - a soberania; II - a cidadania; [...]."

[27] CARVALHO, op. cit., p. 200-203.

[28] Ibidem, p. 206.

[29] CARVALHO, op. cit., p. 209.

[30] According to LOPES, Ana Maria D'Ávila. A cidadania na Constituição Federal brasileira de 1988. In: **Constituição e democracia**: estudos em homenagem ao professor J. J. Canotilho. BONAVIDES, Paulo; LIMA, Francisco Gérson Marques de; BEDÊ, Fayga Silveira (coord.). São Paulo: Malheiros, 2006.

briefly, relate citizenship only to the exercise of political rights.[31 - 32]

In this vein, Lopes inserts, on the concept of citizenship, the notion of duty until then forgotten. Thus, for the author, "citizenship should be seen as a right, while simultaneously and in parallel, the notion of duty must be inserted into its content, as there are no rights without their correlative duties".[33]

The same author also indicates citizenship as a fundamental right in the current constitutional order. For this, she used the following concept of fundamental rights: "[...] positive legal rules of a constitutional level, which reflect the essential values of a society to directly protect human dignity, in the quest for legitimacy of state action".[34] She continues detailing that citizenship appears on article 1, II, CF/88, as a core value of the society, since it refers, as already mentioned, to one of the foundations of the Federative Republic of Brazil (art. 1, II, CF/88); it binds to the protection of human dignity as citizens' participation in the construction of history itself is a condition for the existence of a dignified life. Finally, She explains that there is a link between citizenship and legal legitimacy of state action, asserting that popular participation, which follows citizenship, figure as an instrument of state actions, acting as a filter that guarantees the execution of only those that match the interests of the society. Therefore, state power greater degree of legitimacy is achieved.

In order to complement the notion of citizenship adopted in this

[31] As portrayed by Bulos, in his work, the definition of the principle of citizenship constant in art. 1, II, CF/88 would be the "status of individuals who are in full exercise of their active political rights (ability to vote) and passive (ability to be voted on and, also, to be elected). Freely translated from: "status das pessoas físicas que estão no pleno gozo de seus direitos políticos ativos (capacidade de votar) e passivos (capacidade de ser votado e, também, de ser eleito)." (BULOS, Uadi Lammêmgo. **Curso de direito constitucional**. 4. ed. São Paulo: Saraiva, 2009, p. 414).

[32] Silva, speaking of citizenship in CF/88 also underscores the overcome of its link only to the ownership of political rights: "Citizenship is here on a broader than the rights of the holder of political sense. Qualifies participants in the life of the State, the recognition of the individual as an integrated person at State company (art. 5, LXXVII). Means there, too, that the functioning of the state will be subjected to the popular will. Then the term is linked with the concept of popular sovereignty (sole paragraph of art. 1), political rights (Art. 14) and the concept of human dignity (art. 1, III), with aims of education (art. 205), as the basis and the essential goal of the democratic regime. Freely translated from: SILVA, José Afonso da. **Curso de direito constitucional positivo**. 33. ed. São Paulo: Malheiros, 2010, p. 104-105.

[33] LOPES, Ana Maria D'Ávila, op. cit., p. 25.

[34] Ibidem, p. 29.

paper, one add up the solidarity element. On the topic, one brings up the lesson Nabais according to which citizenship has currently undertaken a third stage, which he calls "solidarity citizenship" or "responsibly solidary citizenship".[35] This new phase is inaugurated after overcoming the previous two, the citizenship of the Liberal State, in which they sought the protection of individual rights, and citizenship of the Democratic State, when it sought to ensure participation in the political life of the state. In this new stage, the citizen plays an active role, assuming "[...] burdens, responsibilities and duties that derive from that same political life and that can not be seen as a state task exclusively [...]".[36]

The assumption of this position requires, however, solidarity[37] among society members, the result of a sense of belonging, which guides their actions in the pursuit of common welfare. In other words, there is awareness that the community is made up of individuals as a whole, the consequences of actions (whether positive or negative) exceed the private sphere and influence the configuration of that whole.

One can thereby conclude that, in the current constitutional order citizenship should be treated as a composition of the following elements: awareness of rights and obligations and the sense of belonging to a community that requires acting according to the dictates of solidarity.[38]

---

[35] NABAIS, José Casalta. **Por uma liberdade com responsabilidade**. Coimbra: Coimbra, 2007, p.149-150.

[36] Ibidem, p.150.

[37] According to Nabais, solidarity: while stable or lasting and more general phenomenon, refers to the relationship or the feeling of belonging to a group or social formation, among the very groups or social formations in which man expresses and currently holds its societatis affectio within which emerges naturally the community paradigm of modern time - the state. It follows that solidarity can be understood both in its objective aspect, as it refers to the relationship of belonging and therefore responsibility of sharing and connecting each individual to the vicissitudes of fortune and other community members, whether on subjective meaning and social ethics of that belonging to the community. (Ibidem, p. 134).

[38]Because of the close proximity to the what is here defended, let´s quote the concept of citizenship offered by Nabais, for whom it "[...] can be defined as the quality of the individuals, while active and passive members of a nation-state, are entitled or recipients of a certain number of rights and duties which are universal and, therefore, holders of a specified level of equality. A notion of citizenship where it is easy to identify the three constituent elements, namely: 1) the ownership of a number of rights and duties in a particular society, 2) being a membership of a political community (usually the state), usually linked to the idea of nationality, and 3) the possibility to contribute to the public life of the community through participation (ibid., p 143).

Contradictorily to the prominent role given to the citizen in the current constitutional order, what is not noticed in Brazilian society is the significant ignorance regarding the content of CF/88.[39-40]

Moreover, commenting on the political poverty, says Demo [41]:

> This is no exaggeration to state that the deeper aspect of the political poverty of a people is the lack of organization of civil society, especially from the state and economic oligarchies. A disorganized society comes not to establish itself as conscious and able to achieve its own space for self-sustaining people in history, but rather is characterized as reactionary mass.

Thus, according to the description made by Demo, a situation of political poverty can be identified in the country. It urgently needs to be changed so that the society can make progress in building a Brazilian citizenship in accordance with that placed above.

3 Law and education as promoters of social change and the role

[39] It is to be made clear that it is not required to memorize the entire population of the constitutional text. The essential thing is that it knows its "rights and obligations are in this booklet that President Eurico Gaspar Dutra was always at hand, designating it with this please, not to despise it, but to reveal exactly obedient affection that it was as head of the Nation. (Freely translated from: BONAVIDES, Paulo; ANDRADE, Paes de, op. cit., p. 481)

[40] Relating the lack of enforcement of rights conferred to citizens with the ignorance of those rights by the population, we have: These legal and institutional innovations were important, and some are already showing results. [...] However, it can be said that the rights that comprise the citizenship in Brazil are still civilians with the largest shortfalls in their knowledge, extent and guarantees. The precariousness of knowledge of civil rights, as well as political and social, is demonstrated by research conducted in the metropolitan region of Rio de Janeiro in 1997. The survey showed 57% of respondents knew not to mention one law and only 12 % mentioned some civil law. [...] Research has shown that the most important factor when it comes to knowledge of the law is education. Ignorance of rights was felt in 64 % among respondents who had until 4th grade and 30 % among those who had the third degree, even if incomplete. The data also reveal that education is the factor that best explains the behavior of people in relation to the exercise of civil and political rights. The more educated, the more population belongs to labor unions, professional bodies, political parties. (CARVALHO, José Murilo de, op. cit., p. 210)

[41] Freely translated from: DEMO, Pedro. **Pobreza política**: polêmicas do nosso tempo. 6. ed. Campinas: Autores associados, 2001, p. 24-25.

of tax education

Because it is formed by human beings, who are constantly changing, society follows the same fate, so that is also not static, but lies in continual process of change.[42]

Social change may be so defined as the set of "[...] changes suffered in social processes and institutions, sometimes affecting the global society, sometimes particular groups".[43]

As states Falcão, the degree and speed of these changes are conditioned by several factors, among which he lists the natural factors, the number and composition of the population, social disruption (such as wars, revolutions and class struggles), cultural determinants (such as philosophical schools and the scientific inventions), economic factors, communication and contacts.[44]

From the multiplicity of effects that these factors could have on the processes of change in society, result the different types of social changes. Scientifically, they can then be classified according to the process used in its implementation and the possibility of human control over them.[45]

According to the first criterion, to be classified as normal, those changes must occur naturally and peacefully, whereas abnormal were those operated abruptly and violently.

The second classification, in turn, splits social changes in spontaneous and planned. Those happen unexpectedly, not requiring any human intervention. It is, for example, natural disasters. In contrast, the planned changes are those deliberated by man, who can influence on society through his intelligence and will. Due to the legal nature of this work, it becomes more relevant with regard to the study of social changes, the investigation of its relationship to the law, what is going to do next.

By overcoming realistic views (law conditioned by society) and

[42] In this sense: Human society has the essential characteristics of those who form it. It is then to be a constant (control) and (change) to ensure its permanence and balance. (Freely translated from: SOUTO, Cláudio; SOUTO, Solange. **Sociologia do direito**: Uma visão substantiva. 3. ed. Porto Alegre: Sergio Antonio Fabris, 2003, p. 336)

[43] PINTO, Agerson Tabosa. **Sociologia geral e jurídica**. Fortaleza: Qualygraf, 2005, p. 270.

[44] FALCÃO, Raimundo Bezerra. **Tributação e mudança social**. Rio de Jeniro: Forense, 1981, p.65.

[45] Adota-se a classificação feita por Pinto, em PINTO, Agerso Tabosa, op. cit., p. 276ss.

idealistic (law as a conditioning factor of the society), it is believed that "[...] law plays a dual role within society: active and passive. It acts as a determinant of social reality and at the same time, is determined by an element of that reality." [46- 47]

Playing the active role, law can function both as maintainer of social reality and as a factor of social change. This second is intended to be highlighted in the present study.

In this context, we have that law can influence change in social reality directly or indirectly. This concept, taken from the work of Soriano[48], refers, respectively, to the possibility of the right to intervene in social reality, providing an immediate consequence (positive or negative) to the practice of certain conduct, or to their intrusiveness in an oblique way, when their standards correspond to plans, targets for a transformation of the society actually desired by its members.

Friedman and Landinsky[49], dealing with law as an instrument of social change, also highlight the capacity legal rules have on making true the desires of those who submit to it:

> Law is an institutional mechanism to adjust the human purpose to the aim of securing some concrete social relations. [...] In modern democracies, the rules and legal institutions are an essential ingredient of directed social change, are the strength and authority of the nation in its endless task of stimulation, allocation and reallocation of physical and social resources (health, dexterity well-being, knowledge, status) to economic sectors and social strata of the society. Law reflects the perceptions, attitudes, values, problems, experiences, tensions and conflicts of the society.[50]

---

[46] SABADELL, Ana Lucia. **Manual de sociologia jurídica**. 2. ed. São Paulo: Revista dos Tribunais, 2005, p. 95.

[47] Sharing the same view: "sociologically defined the law as something that conforms to the human sense of duty being (human sense of justice) and with the current empirical science, it is clear that not only the economic and social development conditions the law as conditioned by this. (Freely trabslated from: SOUTO, Cláudio; SOUTO, Solange, op. cit., p. 347.)

[48] Freely translated from: SORIANO, Ramón. **Sociologia del derecho**. Barcelona: Ariel, 1997, p. 312.

[49] Freely translated from: FRIEDMAN, Lawrence; LANDINSKY, Jack. O direito como instrumento de mudança social incremental. In: **Sociologia e direito**. SOUTO, Cláudio; FALCÃO, Joaquim. (org.) 2. ed. São Paulo: Thomson Pioneira, 1999, p. 206.

[50] In a similar vein: "[...] not in rare occasions social change is planned and implemented by a formal legislative act." (SOUTO, Cláudio; SOUTO, Solange, op. cit., p. 336.)

Identified as norms of this nature (able to determine the beacons of the desired society) we have: the constitutional provisions that highlight the importance of citizenship and popular participation in the current constitutional order, in particular, the Article 1, II, already highlighted, those disciplining fundamental rights; those affording citizens the faculties of action (eg, filing a class action, the composition of the National Council of Justice and the National Council of Public Prosecutors and the offering of whistleblowing before the Court of Audit).

It is known that the simple legal provision does not have the privilege of itself make the necessary changes. However, the presence of these norms in the constitutional text, offers puissant legitimacy to all actions to turn toward the achievement of your goals.

In this sense, Bonavides[51] says:

> But let us not take us by the illusion that the Constitution itself solve all problems. Despite its critical importance, it is important to always remember that the basic law is formal principle: it is up to citizens take care that it is enforced. [...] For that to happen, it is urgent that society is organized to defend the principles enshrined in its Constitution. It is necessary that the formal principle is brought into your day-to-day, that it becomes alive, constitutive of social and political relations at all levels.

Thus, it is argued that education fit to make society lay hold of the principles on which stood the constitutional order of the country, among which is located citizenship.

It is believed, therefore, that the constituent elements of citizenship, mentioned above, can and should be disseminated throughout the population, so that, from assimilation, citizenship pass from theory to practice Law, as mentioned by Bonavides. There is the cause of the strong link between education and citizenship.

In this vein, Marshall advocates[52] that the right to education is a prerequisite for the expansion of other rights. And therefore, its absence is an obstacle which overcoming is somenthing required if you want to

[51]BONAVIDES, Paulo, ANDRADE, Paes de, op. cit., p. 488.

[52] In a free translation: The right to education is a social right of citizenship because the genuine aim of education during childhood is to shape the adult in perspective. Basically, it should be considered not as a child's right to attend school, but as the right of adult citizens to have been educated. (MARSHALL, Thomas Humprey. op. cit., p. 20.)

build an active citizenship.[53]

Moreover, it is a state's obligation the development public policies of education among the population for achieving citizenship in the above terms. No one is here dealing with anything new, since the Brazilian law itself enshrines the right to an education that will prepare the population for the exercise of citizenship.[54]

There is an apparatus accordingly in infraconstitutional legislation. It refers to art. 22 of the Law of basic guidelines of education (Law n. 9.394/96)[55], which contains the bases for national education, according to which: "Basic education is to develop the student purposes, assure him the indispensable common training for citizenship and provide him with the means to progress at work and in later studies."

The fact that the training of community members to citizenship is necessary and possible is so undeniable. However, citizenship education can be as wide as the very concept of citizenship, addressing various topics, such as concepts of health, hygiene, manners and environmental preservation. Among them, tax education was elected because of its the potential to corroborate the social change required the implementation of constitutional norms.[56]

Tax education, according to the material used in Brazil training course sponsored by the National disseminators Tax Education Pro-

[53] Although Marshall mention just civic education for children, the position advocated in the work considers the training for citizenship of the entire population. Without, however, fail to prioritize children, because they are in a more intense period of formation than those who have passed this phase.

[54] CF/88 has the following prediction: Art 205. Education is everyone's right and duty of the state and the family and will be promoted and encouraged with the cooperation of society, seeking the full development of the person, its preparation for the exercise of citizenship and its qualifications for the job. [Freely translated]

[55] BRASIL**. Lei n. 9.394**, de 20 de dezembro de 1996. Estabelece as diretrizes e bases da educação nacional. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9394.htm>. Accessed on: 27. dez. 2012.

[56] Nesse Viés mesmo, The correct fiscal behavior is learned. Just as you can learn habits control primary drives, you can learn to control the selfishness and lack of solidarity underlying fraudulent conduct on the two sides of the public budget. If within our education system there is a health education, hygiene and nutrition, driver education, or an education in civic and constitutional values, there can and should be a tax education in the classrooms of our schools. (Freely translated from: LOBO, María Luisa Delgado. ¿Por qué una educación fiscal? In: YUBERO, Fernando Díaz (coord.). **La experiencia educativa de la administración tributaria española**. Madri: Instituto de estudios fiscales, 2009, p. 11.)

gram, can be defined as follows:

> Tax Education shall be understood as a pedagogical-didactic approach able to interpret financial aspects of fundraising and public spending, encouraging citizens to understand their duty to contribute jointly to the benefit of society as a whole and, on the other hand, being aware of the importance of their participation in monitoring the implementation of the funds raised, with justice, transparency, honesty and efficiency, minimizing conflict relationship between the taxpayer and the State.[57]

By reading the concept, you realize that it mirrors the goals of tax education programs[58], discussed below.

The first objective of tax education is "install in the national debate the tax issue, discussing the importance of taxes and transparency in public administration for the benefit of all."

It is known that the terms involved in the tax area are quite technical, which leads to misunderstanding on part of society as a whole. This factor is responsible for the lack of interest in issues related to the theme. Tax education aims then offer citizens the necessary tools to access these contents, making issues, once obscure, become familiar and part of day to day life of the community.

With this, citizen alienation is fought with regard to economic and social life of the country, portrayed by Demo [59]:

> In this same route, technocracy remains where it always was: pontificating in cabinets, pretending that replaces the organization of citizenship. We are so used to plan the economic and social life of the country without citizen participation, that people does not miss it, or is so ignorant that we must decide for him.

The second objective of tax education is "enhance respect for public affairs and to recognize the role of the state in the management of taxes".

---

[57] BRASIL. Ministério da Fazenda. Escola de Administração Fazendária. Programa Nacional de Educação Fiscal. **Educação fiscal no contexto social**. 4. ed. Brasília: ESAF, 2009, p. 27.

[58] According to: RIVILLAS, Borja Díaz; VILARDEBÓ, Andréa; MOTA, Luiza Ondina Santos. Educação fiscal no Brasil e no mundo. In: VIDAL, Eloísa Maia (org.). **Educação fiscal e cidadania**. Fortaleza: Demócrito Rocha, 2010, p. 24-25

[59] DEMO, Pedro, op. cit., p. 89-90.

Here, a key point of tax education is touched, namely, the search for the deconstruction of the concept of antagonism between state and citizen. Pinsky[60] portrays, quite accurately, the feeling that pervades this relationship, which goes beyond the disengagement and achieves the rivalry:

> Because of this separation between government and society, "they" do not respect us and "we" do not give them legitimacy. We do not feel responsible for the acts of the government, so we do not consider ourselves with obligations before the law. Breaking the law, evading taxes, crossing red lights [...] are acts that are often credited to our cleverness and rebellion, never considering them harmful to the citizens of the society of which we are a part or should be part.

To replace this notion, tax education proposes the awareness that there are no state and individuals who are subordinate to him. What actually exist are citizens that are organized around a fictional state, trained and coordinated by themselves. Exchanging the competition relationship between the citizen and the state of cooperation, then brings awareness of the importance of contributing to the welfare of the community by paying taxes, which is one of the expected political consequences of tax education.

The goal in comment also joins the feeling of belonging to the community and solidarity, mentioned earlier. Because the public good requires respect for the notion that, in the society in which we live, there are goods (tangible or intangible) that are at the same time, property of all. And, concomitantly, the awareness of the coexistence of the right to enjoy them and the duty to preserve them, remembering that the consequences of those actions will be for all people.

Among these goods can be found public resources, whose management and allocation are performed by those who hold political office, but the setting and monitoring of these activities is everyone's duty, and of all is also the advantage that a good management of these resources generates.

With this, we enter the territory of the third and final goal of tax education listed in Tax Education Program: "to rescue citizen participation with the exercise of active citizenship and shared responsibility".

Active citizenship mentioned above, under the education tax,

[60] PINSKY, Jaime. **Cidadania e educação**. São Paulo: Contexto, 1998, p. 97.

matches the expectation regarding to the one that received this instruction. So, after building a framework of knowledge that allows to safely know the territory of tax issues and developing a notion of citizenry, what is expected is the monitoring of the administrative State action, through the supervision of the management and allocation of public resources, ensuring that they will be employed as adequately elected in those areas that most urgently need investment.[61]

4. Practicing citizenship from tax education: the case of the social observatories in public spending in Brazil[62]

From all the above shown about tax education, it is clear its potential to collaborate for the necessary social changes to occur, so that the Brazilian citizen can assume an active profile.

As a result of these changes promoted in society, its members has been organizing social observatories.[63] These entities have the goal of controlling public expenditure, valuing transparency in the allocation of resources and thus combating corrupt practices by managers.

It is clear, therefore, that the performance of these organizations fits perfectly in the description made by Demo[64] on the effects that can generate the conscious presence of an organized citizenry:

> [...]If there is a consistent presence of organized popular citizenship, the State curves, at least in part, to the purposes of society, not by vocation, but by control from the bottom up. These are less corrupt, less bureaucratic, more transparent and accountable of

[61] Associating citizen participation in the monitoring of public policies commented above, we have the scholium of Guerra: "What is noted is that despite the various possible ways to address the issue of citizenship directions, is that participation, the act, the act to build their own destiny is inherent to their idea. What changes over time, are the degrees and forms of participation and scope. Therefore, citizenship demands a permanent citizen action in the community, in the monitoring and even in the direction given to public policies. (Freely translated fron: GUERRA, Sidney. **Direitos humanos e cidadania**. São Paulo: Atlas, 2012, p. 63-64.)

[62] The exposed information on this topic were extracted from the electronic site in the Social Observatory of Brazil (OSB).Available at: <http://www.observatoriosocialdobrasil.org.br/>. Acessed on 18 jan. 2013.

[63] The opposite of poverty is thus disorganized citizenship. (Freely translated from: DEMO, Pedro, op. cit., p. 27)

[64] Ibidem, p. 90.

> what they do States. They have no self authority above the popular verdict, which makes them fairly public thing in a very authentic sense.

As a way to better articulate the practices of these observatories, they began to organize themselves into a network called Social Observatory of Brazil (OSB). Currently, OSB operates in 60 cities in 12 Brazilian states (Pará, Paraíba, Pernambuco, Bahia, Rondônia, Mato Grosso, Mato Grosso do Sul, Paraná, Rio de Janeiro, Sao Paulo, Santa Catarina and Rio Grande do Sul), exceeding 1,000 the number of volunteers. To these observatories OSB offers technical support and articulates with them partnerships at regional and national level.

According to information gathered from the electronic site of OSB, due to the action of the associated observatories, there was, in 2011, a savings of more than R $ 100 million of public funds.[65]

Currently, the OSB is held by the following entities: the Federation of Industries of Paraná (FIEP), Federation of Business and Entrepreneurs Associations of the State of Paraná (FACIAP), Cooperative Credit System in Brazil (SICOOB) and SPREP Institute of Paraná.

In order to provide a better understanding about the social observatories, one passes to expose some prominent research data entitled Social Observatories geared to citizenship and tax education in Brazil: structure and operations conducted by the Research Group Politeia, Science Center of Management and Socioeconomic State University of Santa Catarina, between September and December 2010.[66]

It is important to clarify that the study included 20 Brazilian observatories, founded mostly (18 total) between 2008 and 2010, which indicates how this movement is current.[67]

---

[65] Available at: <http://www.observatoriosocialdobrasil.org.br/>. Acessed on 18 jan. 2013.

[66] Available at: < http://www.osflorianopolis.com.br/arquivos/4290_Pesquisa_UDESC_Observatorios.pdf >. Acessed on 10 jan. 2013.

[67] /in Paraná: Associação de Amigos de Mandaguari – ADAMA, Observatório Social de Astorga, Observatório Social de Apucarana, Observatório Social de Campo Mourão, Observatório Social de Cascavel, Observatório Social de Francisco Beltrão, Observatório Social de Marechal Cândido Rondon, Observatório Social de Maringá, Observatório Social de Pato Branco, Observatório Social de Ponta Grossa, Observatório Social de Umuaramaand Observatório Social de União da Vitória. In Mato Grosso: Observatório Social de Rondonópolis. No Rio de Janeiro: Observatório Social de Niterói and Observatório Social de Rio das Ostras. In Rondônia: Observatório Social de Rolim de Moura.

Among the reasons listed for the creation of the entity, the most pointed (with the rate of 55%) was the perceived irregularities in the accounts of municipalities.[68] Then, with 45%, lies the support offered by both OSB as the monitoring centers of the neighbors municipalities, stressing thus the importance of the partnership between the organizations of this nature.

Besides the monitoring of public spending, which constitutes the main action front of observatories, they still work in promoting tax education and improving the quality of public management.

Such tracking is done exclusively by following up biddings, involving legal analysis of calls and even the suggestion of change, the attendance on contests, the request for clarification of actions when it seems necessary; monitoring the execution of contracts and delivery of products in warehouses, monitoring of data on local transparency gates; offering representation before the Public Ministry and the Board of Aldermen, and participation in public hearings.

From their actions the most common types of fraud can be verified, as the one that occurs while govern is carrying out biddings, constituted mainly by the performance of combinations among competitors to ensure the alternation between them; hiring by public managers without bidding in not emergency cases, and negotiation among the participants dividing among themselves the items to bidding to ensure that all win any of them, thus hindering the true hiring the lowest price.

Regarding tax education, observatories promote a wide range of actions. In the survey, the most frequently mentioned were the lectures and training courses, in addition to assisting companies to participate in biddings.

On actions aimed at improving the quality of public management, the presentation of suggestions for action based on the data collected to State agencies and participation in public policy-making[69] and

---

In São Paulo: Observatório Social de Ilhabela e Observatório Social de São Sebastião. Em Santa Catarina: Observatório Social de Itajaí e Observatório Social de Itapema.

[68] In this regard: It is essential to surround the State by organized citizenship, before we become a society whose ideal is parasitize the state. (Freely translated from: DEMO, Pedro, op. cit., p. 93)

[69] This example illustrates the performance prediction made by Dallari for political participation in the XXI century. See: "The new century promises the world a new society. The political participation of many favor the fulfillment of each participant as a human being and accelerate the construction of the new society, in which political decisions

referral of bills.

Finally, it is noteworthy the point of the research revolved about the main difficulties faced by monitoring centers in achieving their goals. The most often mentioned (72%) refers to the lack of skilled staff, which reinforces the need to promote actions to sensitize and empower the population to exercise fiscal citizenship.

Were also quite cited the difficulty of obtaining information by public agencies (50%), difficulty in obtaining financial resources (59%) and the resistance of politicians and regional leaders against the control activities performed (50%).[70]

5 Conclusion

In the current constitutional order, in which Brazil is declared as a democratic state, citizenship occupies a prominent place, it being considered even as a fundamental principle of the Republic.

Thus, for the legitimacy of political Power it is needed an active citizenship that, besides the exercise of rights and obligations, motivates himself for the feeling of belonging, and overcomes individualism, by orienting himself by solidarity.

However, it is observed that, in practice, this type of citizen is far from becoming reality. There is currently, besides an ignorance of the rights and duties among a considerable portion of the population, a poverty of political awareness, characterized, among other reasons, by the lack of articulation of civil society for greater popular participation in setting policy directions to be followed by Nation.

One can point out, as causes of this reality, the factors of Brazilian history analyzed in this article. We talk, for example, about the colonization of exploration undertaken by Portugal in Brazil, where it was not concerned with the development of education, making the knowledge to stay restricted to a small elite who could study in the metropolis.

After independence, the legacy of colonial phase persisted, setting up a society marked, even in our times, a glaring social inequality, in which the enjoyment of rights is restricted to a small portion of the Brazilians.

---

will be all. (Freely translated from: DALLARI, Dalmo de Abreu. **O que é participação política?** São Paulo: Brasiliense, 1993, p. 96)

[70] It is hereby clarified that the sum of indices exceeds 100% because each observatory can point more than one difficulty.

With respect to legal recognition of these rights, this has not occurred primarily as an achievement of the people who claimed them. Then, there wasn't a broad process of making people aware of the importance of seeing them positivized.

In addition, the legal provision, many times came unaccompanied of the basic conditions for its effectiveness, among which it was highlighted education as preparation for its exercise.

It is clear, therefore, that the constitutional plans of building active citizenship in the country lead to the need to transform this citizenship deficit.

Considering the feasibility of making people able to practice that expected citizen profile, in accordance to the constitutional norms, education is seen as a skilled instrument to operationalize this shift.

More specifically, tax education corresponds to this goal, since it aims to offer citizens the tools necessary to enable a monitoring of collection and allocation of public resources activities. Thereby, it promotes the proximity between rulers and ruled, even replacing the situation of antagonism between them. In addition, it is guaranteed that the funds will, in fact, be employed in policies required by the population and it Will reduce the possibilities of misuse.

Finally, it was shown the resulting change in posture of the Brazilian citizen that widespread tax education in the country, includes the creation of social, articulated observatories through the Social Observatory of Brazil network, which is already present in more than 60 cities.

From the survey carried out, it stands out as the main activity carried out by the observatories, the surveillance of public expenditures they make widely, involving, among other activities, the monitoring of bidding through the legal analysis of calls and face-tracking contests, the monitoring of the implementation of procurement and delivery of goods in warehouses, the monitoring of data from the transparency portal of the cities; the offering of representation before the Public Ministry and the Board of Aldermen, and the participation in public audiences.

From these actions, it was possible to determine the most common means of implementation of the illegalities committed with public resources, making it easier to work in the surveillance and eradication of this practice as odious as rooted in Brazilian politics.

The paper also listed the main difficulties faced by observatories, such as the lack of qualified staff, the difficulty of obtaining information by public bodies and fundraising, and the resilience of the political regional leaders against the activities performed.

It is important to emphasize, in conclusion, also the significant role that the discussion of solutions to overcome these obstacles act in achieving the improvement of the observatories performance, making closer, day by day, the constitutional provisions and the social reality.

References

AMADO, Gilberto. As instituições políticas e o meio social no Brasil. In: **A cidadania no Brasil II**: o voto. Brasília: Senado Federal, 2002, p. 67-85.

BASTIDE, Roger. **Brasil**: terra e contrastes. 4. ed. São Paulo: Difusão europeia do livro, 1971.

BONAVIDES, Paulo, ANDRADE, Paes de. **História constitucional do Brasil**. 6. ed. Brasília: OAB, 2004.

BRASIL. **I Congresso Internacional de Educação Fiscal**. Available at: <http://cief2012.com.br/cief/congresso/congresso-internacional-de-educacao-fiscal.html>. Acessed on: 19 jan. 2013.

_____. **Lei n. 9.394**, de 20 de dezembro de 1996. Estabelece as diretrizes e bases da educação nacional. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9394.htm>. Acessed on: 27. dez. 2012.

_____. Ministério da Fazenda. Escola de Administração Fazendária. Programa Nacional de Educação Fiscal. **Educação fiscal no contexto social**. 4. ed. Brasília: ESAF, 2009.

_____. Ministério da Fazenda. Escola de Administração Fazendária. **Documento base do Programa Nacional de Educação Fiscal**. Available at: <http://www.esaf.fazenda.gov.br/esafsite/educacao-fiscal/Edu_Fiscal2008/index.htm>. Acessed on: 11 dez. 2012.

_____. Ministério da Fazenda. Escola de Administração Fazendária. **Regulamento do curso de disseminadores**. Available at: < http://www.fazenda.rj.gov.br>. Acessed on: 12 dez. 2012.

_____. IBGE. **Pesquisa Nacional por Amostras de Domicílios** - PNAD 2010. Available at: <http://www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2011/default_sintese.shtm>. Acessed on:18 jan. 2013.

_____. **Portaria nº 413**, de 31 de dezembro de 2012. Define competências dos órgãos responsáveis pela implementação do Programa Nacional de Educação Fiscal – PNEF. Available at: <http://www.receita.fazenda.gov.br/legislacao/portarias/2002/interministeriais/portinter413.htm>. Acessed on: 10 dez. 2012.

_____. ESCOLA DE ADMINISTRAÇÃO FAZENDÁRIA. **Programa Nacio-**

nal de Educação Fiscal. Available at: <http://www.esaf.fazenda.gov.br/esafsite/educacao-fiscal/Edu_Fiscal2008/programa.htm>. Acessed on: 10 dez. 2012.

OBSERVATÓRIO SOCIAL DO BRASIL. Available at: <http://www.observatoriosocialdobrasil.org.br/>. Acessed on 18 jan. 2013.

BULOS, Uadi Lammêmgo. **Curso de direito constitucional**. 4. ed. São Paulo: Saraiva, 2009.

CÂMARA DOS DEPUTADOS. **Discurso de Ulysses Guimarães na cerimônia de promulgação da Constituição Federal de 1988**, em 05 out. 1988. Available at: <http://www2.camara.leg.br/atividade-legislativa/plenario/discursos/escrevendohistoria/destaque-de-materias/constituinte-1987-1988/pdf/Ulysses%20Guimaraes%20-%20DISCURSO%20%20REVISADO.pdf>. Acesses on: 12 set. 2012

CANOTILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição**. 6. ed. Coimbra: Almedina, 2002.

CARVALHO, José Murilo de. **Cidadania no Brasil**: o longo caminho. Rio de Janeiro: Civilização brasileira, 2011.

DALLARI, Dalmo de Abreu. **O que é participação política?** São Paulo: Brasiliense, 1993.

DEMO, Pedro. **Pobreza política**: polêmicas do nosso tempo. 6. ed. Campinas: Autores associados, 2001.

EUROPEAID. **Portal de educação fiscal.** Available at: <http://educacionfiscal.eurosocialfiscal.org>. Acessed on: 24 dez. 2012.

FALCÃO, Raimundo Bezerra. **Tributação e mudança social**. Rio de Jeniro: Forense, 1981.

FREIRE, Paulo. **Educação e mudança**. 26. ed. São Paulo: Paz e Terra, 2002.

FRIEDMAN, Lawrence; LANDINSKY, Jack. O direito como instrumento de mudança social incremental. In: **Sociologia e direito**. SOUTO, Cláudio; FALCÃO, Joaquim. (org.) 2. ed. São Paulo: Thomson Pioneira, 1999, p. 203 – 207

GUERRA, Sidney. **Direitos humanos e cidadania**. São Paulo: Atlas, 2012.

HILSDORF, Maria Lucia Spedo. **História da educação brasileira**: leituras. São Paulo: Pioneira Thomson Learning, 2003.

LOBO, María Luisa Delgado. ¿Por qué una educación fiscal? In: YUBERO, Fernando Díaz (coord.). **La experiencia educativa de la administración tributaria española**. Madri: Instituto de estudios ficales, 2009, p. 11-18.

MARSHALL, Thomas Humprey. **Cidadania e classes sociais**. Brasília: Senado Federal, Centro de Estudos Estratégicos e Ministério da Ciência e Tecnologia,

2002.

NABAIS, José Casalta. **Por uma liberdade com responsabilidade**. Coimbra: Coimbra, 2007.

PINSKY, Jaime. **Cidadania e educação**. São Paulo: Contexto, 1998.

PINTO, Agerson Tabosa. **Sociologia geral e jurídica**. Fortaleza: Qualygraf, 2005.

RIVILLAS, Borja Díaz; VILARDEBÓ, Andréa; MOTA, Luiza Ondina Santos. Educação fiscal no Brasil e no mundo. In: VIDAL, Eloísa Maia (Org.). **Educação fiscal e cidadania**. Fortaleza: Demócrito Rocha, 2010, p. 24-39.

SABADELL, Ana Lucia. **Manual de sociologia jurídica**. 2. ed. São Paulo: Revista dos Tribunais, 2005.

SILVA, José Afonso da. **Curso de direito constitucional positivo**. 33. ed. São Paulo: Malheiros, 2010.

SORIANO, Ramón. **Sociologia del derecho**. Barcelona: Ariel, 1997.

SOUTO, Cláudio; SOUTO, Solange. **Sociologia do direito**: Uma visão substantiva. 3. ed. Porto Alegre: Sergio Antonio Fabris, 2003.

UNIVERSIDADE DO ESTADO DE SANTA CATARINA. Centro de Ciências da Administração. Grupo de Pesquisa Politeia. **Observatórios Sociais voltados à cidadania e à educação fiscal no Brasil**: estrutura e atuação. Available at: <http://www.osflorianopolis.com.br/arquivos/4290_Pesquisa_UDESC_Observatorios.pdf>. Acessed on: 10 jan. 2013.

Teaching law in basic education
Research method

Anaína Clara de Melo[1]

Abstract: The purpose of this study is to discuss the possibility of teaching Law in basic education for the formation of a true citizen, based on the application of the teaching method which we call "research method". This method can be applied to any discipline in basic education. It is a path for reaching discussions on basic legal issues related to the students' social reality, such as bullying and domestic violence. Through the reflection originated from a problem initially presented by the teacher, the student must, through personal and collective reflections, live the problem, in order to make their own inquiries that are relevant to solve the situation. The teacher should allow situations that raise the questions needed by the student. Reflections made by the students must be similar to those ones thought in the real world. For example, when approaching the bullying thematic, the teacher should initially question about who feels discriminated in their classroom by a colleague. Students should think about the problem in a real way and find their solutions, developing their critical capacity to solve their own problems and fighting for the changes that bother them. The content is presented by the student itself, being the teacher just a figure for systematization of information. In case the dialogue is not productive, the teacher can intervene to elaborate another question that redirects students to issues that are relevant to bullying. Remember that this does not mean asking the student all the questions at once, the teacher shall only intervene with a question, if the dialogue does not progress towards the possibility of creating situations of reflection and questioning by the student itself. This means, that it is the student who has to feel the necessity for thinking about something, to decide something, to fight for something. Thus, it becomes an imaginary life experience for a real life problem, in order for the student to reflect and question something. The teaching of the contents would be based on an improvement on the social condition of the

[1] The author is Professor of Higher Education Institution UNIPÊ, teaching at the undergraduate law course. She also teaches in the graduate of the UNAVIDA – another Higher Education Institution - in the course of Teaching Methodology of the Portuguese Language. The teacher also teaches Portuguese Language in basic education in a public school in the state of Paraíba. Anaína Clara Melo holds a PhD in Literature at Paraíba Federal University – UFPB.

student while a human being inserted in a society. We intend to form a society that interferes in their reality, therefore we will be able to forme citizens who are committed to sustainable worldwide development.

Keywords: Teaching Methods. Basic Education. Sustainable Worldwide Development. Socratic Maieutics. Emancipation of the Human Being.

1. Introduction

The experience we have in the education sector, teaching children, teenagers, students of law and teachers, led us to believe that teaching in Brazil can be improved if we, teachers, move to adopt a new teaching methodology in our classes. We believe that the teaching methodologies so far created by renowned theorists are only concerned with the teaching technique. In our proposal, we included the object of teaching as a factor constituting also the teaching methodology.

Thus, we argue that the law should be inserted in all disciplines of Basic Education. It is the child who must learn to reflect on our social, cultural, economic and political world: the Law, added to the disciplines and the "method of teaching research" will make this possible. This is our main goal in this text.

We can ask ourselves why we want it: simply because we wish to form and emancipated individuals who are committed to sustainable development worldwide. Emancipated individuals are those who have the ability to decide on their lives, change their reality, to think about their living conditions, to practice what they thought, to rethink and evaluate their decisions, to plan their actions. They are, in theory, reflective individuals who compose a society not "fetishized," not "alienated" - in Marxist terms. Only individuals perceive well the importance of sustainable development for the world.

In this sense, we present here our ideas about how the research method can be implemented in primary schools. In fact, it is the integration of the activity of thinking that needs to be widespread in our children, and legal thinking, so to speak, a think its useful life in the community where they live.

This study is too relevant to the extent that, as academics, we see a level of knowledge ever lower among students who enroll in higher education institutions. We always say that this is due to the low level in basic education in our country. Thus, we can ask ourselves why did

not we think of using our knowledge to help in raising the educational level of basic education. It will provide a wider level of knowledge to the students that go to the universities. It would also provide the raise of the level of our discussions in the University.

The constituents of this methodological study is the ontological dialectic of Marxism and the reflection about the cultural industry elaborated by Theodor Adorno and Max Horkheimer. Regarding the ontological dialectic - the human being is at the core of social being - we must stress that it is external as a set of guidelines that govern a sector or the whole of reality. This is an explanation of the contradictions of thought and socioeconomic crises of life in terms of the essential relationships, contradictory and individuals that generate them. Georg Lukács explains that:

> [...] dialectic denies that may exist anywhere in the world cause and effect purely univocal: it recognizes even on the most elementary of complex interactions of real causes and effects. And historical materialism with particular force accentuates the fact that in a case such plurilateral and full of stratifications as is the process of the evolution of society, the total process of historical development-social only materializes in any of its moments like a intricate plot interactions. (1965:14)

The constituent T. Adorno and M. Horkheimer is based on the assumption that the objective social trend - the constituents phonograph - is embodied in obscure subjective intentions - control the culture of the masses for profit - the CEOs, as previously alluded to. This means that culture is determined by the market.

2. Emancipation of the human being

This section will discuss issues related to the theory of Marxism and cultural industry, because we believe these to be the basis of the idea of emancipation widespread by Brazilian educator Paulo Freire. Only then, we will present what we mean by emancipation of the individual. This is necessary because we understand that the function of education is to emancipate the human being.

2.1 Marxism

The first associations that are established about the marxism are the old trend that systematized so rigid and closed, the views Marxists orthodoxy. We begin, then, by stating that we will establish an update of Marxist ideas, so that we can adapt it to the current reality.

Marxism arises from selective fusion between the existing cultural heritage and political intervention of the proletarian. In the first half of the nineteenth century, European society is experiencing a burst of facts - the ideological legacy of the French Revolution and the proletarian insurrections of 1848 - decisive for the development of Marxist thought. It is an understanding of reality rationally, a meeting between the world of culture and the world of work (PAULO NETTO, 1985). In a famous passage of Karl Marx and Friedrich Engels, we have the basis of Marxist thought:

> [...] certain individuals, which act as producers of a particular mode also, establish among themselves certain social and political relations. It must, in each particular case, empirical observation necessarily put in relief - empirically and without any mystification and speculation - the connection between the social and political structure and production. (1986:35)

Thus, the reality can not be understood without a man to be analyzed within a macrossystem. It is a vision of historical development within an economic context of society. This economic context involves the transformation of modes of production, the social classes from these changes and also between those same classes. This way of thinking the reality is called historical materialism. Engels explains that:

> [...] the materialist conception of history part of the thesis that the production, and with it the exchange of products is the basis of all social order, that in all societies parading through the history, distribution of goods, and with it the social division of men into classes or layers is determined by what that society produces, by how the society produces and the way of exchanging your product. (1975:44)

In this sense, the causes of the social, political and historical operated in society must be thought within the changes in the mode of

production and of exchange, ie, the economy in particular. The basis of this understand is the economic structure of society – it is the foundation on which rises a legal and political superstructure. Leandro Konder remember that:

> [...] ideas can never, by themselves, overcome a certain state of things: ideas can only overcome this state of affairs. Ideas outweigh ideas and not automatically material situations. Ideas can never accomplish anything (...), as for the realization of the ideas is that men need to put into action a force practice.(1981:61)

Dialectical materialism comes in addition to historical materialism. This is the aspect of Marxism which is more liable to the Western philosophical tradition, particularly Hegelianism. It is a kind of philosophy of Marxism, which has a view of the world:

> [...] a body of theory considered as true of reality as a whole, and designed, in a sense, as scientific, as a kind of " natural philosophy " that generalizes the findings of specific sciences (while it supports them) in its advance to maturity, among which is the social science of historical materialism (BOTTOMORE, 1983:258).

Dialectical materialism presupposes a unity between the material and the ideal. However, they are opposed and the matter is essential for this unit. The spirit of matter depends for its existence, it originates, but the reverse does not occur.

Leandro Konder explains that Marx draws on Hegel to formulate his dialectical method. Thus " in life, the contradiction is not the mere manifestation of a defect: it is a [sic] reality that can not be suppressed. Certain contradictions appear, others disappear (are overcome), but there is always some contradictions pending solution " (1981:56):

> [...] for Marx, life in capitalist society, presents many contradictions. The main one, but one that affects so more constant and more socially crucial the existence of individuals, is the contradiction between labor and capital, that is, between the proletariat and the bourgeoisie (1981:58).

One of the guidelines necessary for the Marxist conception of history is referred to the history of ideologies. K. Marx and F. Engels,

according to G. Lukacs, understand that:

> [...] historical materialism recognizes - even at this point, in open opposition to the vulgar Marxism - that the development of ideologies and not mechanically attached or follow " pari passu " the degree of economic development of society. In the history of mankind under primitive communism and under the division of society into classes, about which Marx and Engels wrote, is not at all necessary that every economic boom and social unfailingly matches a flowering of literature and art, philosophy, etc.., it is not absolutely necessary that a more socially evolved has a literature, an art, a philosophy inevitably more evolved than a company with lower level of progress. (1965:17)

Therefore the ratio between the network infrastructure and the superstructure is asymmetric, according to Karl Marx. A State may be highly developed technologically, but do not have a cultural progress equivalent, much less artistic achievements of high quality. Thus, for more than a society evolve technically, the development of its culture is not always directly proportional to these developments. For example, in our times we see technology invade the space of our homes with the names of " ipad, ipod, iphone... " but that does not mean the general population also go through a process of transformation, adapting easily to all of these changes and therefore improving your cultural knowledge. These changes occur in isolated regions of developed countries.

Such disparities are also apparent in the field of Arts. A society can make multiple simultaneous productions: productions with artistic quality and other without artistic value. For example, a company may honor a concert of Brazilian Symphony Orchestra, as well as devoting artists without the slightest artistic and musical talent.

Thus, the basic hypothesis of this research is based on the Marxist conception that understand the social relations of production determine, contradictorily, the constitution of individuals. Man possesses certain characteristics collectively being exposed by this collective dominant ideology as the social totality. Knowing that all this is false, the human constitution is ideological, given that the community is too.

To approach the issue of human emancipation, we need the theory of cultural industry, Theodor Adorno and Max Horkheimer.

2.2 Theory of cultural industry

The theory of the culture industry by Theodor Adorno and Max Horkheimer is created from the postulates of Marxist dialectics. T. Adorno and M. Horkheimer used the category of reification[2] in preparing their study. This is a special case of alienation, where we saw a " human objectification ". In Capital, Marx explains that the commodity as value - of - use:

> [...] is intended to satisfy human needs, with its properties, either from the angle that only acquires these properties as a result of human labor. It is clear that humans by their activity modifies the way it is useful to form the natural elements. Modifies, for example, the shape of the timber, where it forms a table. Notwithstanding the table is still wood, something prosaic, material. (1996:79)

However, it seems to take the goods life itself be independent of man, from the moment that:

> [...] human equality of the work is disguised in the form of equality of the work product as values; measurement through the length of the expenditure of human labor force takes the form of the value of the amount of work product and, finally, the relationships between producers, which state the social character of their work, take the form of social relation between the products of labor. (1996:80)

This means that the merchandise hides the social function of men's labor. These start producing things with no direct connection with his being. The goods then present the social characteristics of men's labor " as material characteristics and social properties inherent to the products of labor." (1996:81) There is a specie of inversion of values: what is human becomes the object and what is the product happens to be human, to control, to be determined. The object ends, finally producing man. Hence comes the term " human objectification ". The ease with which this process occurs is imperceptible but real.

On the subject, Georg Lukacs acknowledges, this subversion of categories, the inevitability of fetishism in capitalist society. (1965:20)

[2] Tom Bottomore, previously referenced in his dictionary, which explains the concept of reification already appears in the Economic and Philosophical Manuscripts of Karl Marx. A more detailed analysis of this concept also appears in Grundrisse and Capital.

Similar phenomena occur with manipulation exerted by the culture industry on the man, including tastes, gestures, their conscience and their predilections.

The reflections on the cultural industry is an analysis that Theodor Adorno and Max Horkheimer weave about setting for mass culture in contemporary society. They believe that:

> [...] we live in a world completely surrounded by a web woven by the bureaucracy, the administration and technocracy. The individual is (...) a thing of the past: the era of concentrated capital, planning and mass culture destroyed personal freedom. The critical thinking is dead and gone. The society and consciousness are " totally reified "; seem to have the qualities of natural objects, the condition given and immutable forms. (BOTTOMORE, 1983:258)

To better explain this thought, T. Adorno and M. Horkheimer begin by stating that " contemporary culture gives everything an air of similarity." (1985:113) This is the basis of the theory of both: the whole - represented by macrocosm - means the medium in which we operate. The set of our habits, customs, culture... She is widespread as the universal. This macrocosms, expressed as a total system and true, make us understand that everything and everybody that have the same characteristics should be included in a common group of natural characteristics.

However, all this does not represent a common group because it does not represent the real true. In other words, what we think is an environment created naturally by the man actually is not. Some parts - represented by microcosm – do not belong to the common group of natural characteristics because they do not follow the order. These parts are necessary to the existence of the whole, but at the same time, need to be covert because not serve the interests of a ruling system. Thus, the total is never as such, as always missing one of its constituent parts.

Consequently, as the medium is not naturally formed, the individual also is not. The essence of the individual - his longings, his reflection, his character - is hidden, dormant for the macrocosm, it does not matter to the dominant system. "Under monopoly power, all mass culture is identical, and its skeleton, bone conceptual manufactured by him, begins to take shape." (1985:114) The need to be offset up, materialize, objectify themselves, in order that a domain ideological become intrinsic to the human essence, imperceptible and predominates in society.

The mentioned cancellation of the man gives up, obviously, in a

way imperceptible to the eye more inattentive. Therefore, many believe that their psychological characteristics, and even physical result from one›s personality. In fact, they are conditioned through to be as such: " the music is administratively level the type of production of goods is justified with the willingness of consumers will naturally have manipulated and reproduced, which converges with the trend of the administration." (ADORNO, 1974:268)

In this regard, we note that the medium becomes false because it is not the total. Therefore, the individuals themselves are not what they seem. This is the reason that T. Adorno and M. Horkheimer announce that "the apparent unity of macrocosm and microcosm demonstrates for men the model of their culture: the false identity of the universal and the particular." (1985:113) We must pay attention to the fact that this relationship does not give explicitly abrupt. It is a slow, subtle and objective, which is beyond the control of individuals.

The consequence of the above explicit manipulation is the easy control of the leaders of production on society. The demand becomes equal, since the needs of society are standardized by the system unit. This is a technological explanation of the cultural industry, " the fact that millions of people participate in this industry impose reproduction methods that, in turn, become the inevitable spread of standardized goods to satisfy the same needs." (1985:114) The social need of the products manufactured by the culture industry - domination in the field of culture - is directly proportional to income generated by them.

The Frankfurt School scholars in question still show that "what is not said is that the ground on which the technique achieves its power over society is the power that economically stronger exert on society." (1985:114) In this sense, the cultural industry expressed the aspirations of the macrocosm, which expresses the aspirations of the rulers. Thus, " technical rationality today is the rationality of domination. It is the compulsive character of society alienated from itself. " (1985:114) The logic of art works equivalent to the logic of domination, one more reason to consider art as an expression of society that contains ideology: " the objective social tendency is incarnate in obscure subjective intentions of the directors general, these are basically the sectors most powerful industries "(1985:115): the culture of the company is void to insert themselves within a mass culture for profit.

The technique that the products of the culture industry should follow is to reduce the tension between the work of art and everyday life. The outside world should be extended without breaking the world

who finds himself in the movie, music or any artistic product. If all life is standardized, the possibility is reduced critical, since there is no diversity of situations. The same occur with art when a variety of styles, shapes, should be abolished to give space to the singular art that does not cause estrangement to the public. Incidentally, cultural monopolies that do not fit these rules are purged by the system itself.

The consequence of this process is the dumbing of the individual represented by the the man without critic sense. Like all products of the culture industry are technically similar, the individual becomes uncritical, reaching act innocent to believe that his artistic taste is that he is consuming. Moreover, his life becomes confused with the artistic product tax, due to the absence of rupture between them. He believes, for example, money can achieve a person has received a day on television.

All this control becomes more solid and reduplicate if all speak the " language of naturalness ". It is hard technical schemes and the like, that make the consumer accustomed to and settle with a certain product. T. Adorno and M. Horkheimer explain that:

> [...] binge language technically conditioned that the stars and the directors have to produce as something natural for the people to turn it into your language, is about as fine nuances that they almost attain the subtlety of the means of a forefront of work, thanks to which it, unlike those, serves the truth. The rare capacity minutely to fulfill the requirements of natural language in all sectors of the culture industry becomes the standard of competence. What and how they say it should be controllable by the everyday language. (1985:121)

The consumer becomes accustomed to the style of non- style. Now, nothing is produced naturally by the artist. Everything is framed and mass-produced and thus no style. T. Adorno and M. Horkheimer turn to Nietzsche (1917:187) to clarify that the new style of the culture industry is " a system of non - culture, to which one can give even a certain ' unity of style ' if it still makes sense to speak in a stylized barbarity." (1985:121)

The industrial gear behind the cultural manipulation is such that consumers themselves are clamoring for dominance. T. Adorno and M. Horkheimer say that:

> [...] capitalist production as well as keeps them trapped in body

> and soul that they succumb no resistance is offered to them. Just as the dominated always took more seriously than the dominant morality that received them, nowadays the masses snared more easily succumb to the myth of success than successful. They have their desires. Stubbornly insist on the ideology that enslaves them. The tragic love of the people for the evil that he makes come to anticipate the cunning of control instances. (1985:125)

It is noteworthy that all these studies on the culture industry comes from what was called the Frankfurt School.

2.3 The Paulo Freire´s emancipation

The theme of education as an affirmation of freedom has ancient echoes, even earlier liberal thought. Persisted since the Greeks as one of the most expensive ideas to Western humanism and is widely incorporated into various streams of modern pedagogy. Modern pedagogy, according to Pierre Furter, has the concern of providing " education for the decision, to social and political responsibility."

Paulo Freire opens caveats for their comments, saying that the considerations he weaves about education are only possible within the context of his time. We can say that the foundations of the society of his time, characterized by a context of poverty, domination and exploitation, have not changed much. Moved in terms of superficiality, wrapper, because today we are a virtual company - for ipads, ipods, iphones... However, in terms of essence, fit into her within the same context of exploitation of the time Freire.

We can name ourselves by "society bubbles". When we talk about bubbles, we refer to soap bubbles, whose residence time in reality is only a few seconds. We, humans, are also with a duration actually quite limited: our human values are increasingly ephemeral and superficial, and our human relationships are completely virtualized. This is because we live in the world that information technology creates for us. The culture industry that Adorno and Horkheimer refer is stronger than at other times: it is solidified by the internet, with a power of reach increasingly on people and influence even more profound than in ancient times.

In this sense, I see that we are emancipated (FREIRE, 1967). It occurs because we are still " a society without people, led by an " elite " superimposed on his world, sold in a simple man, minimized and no awareness of this minimization, [is] (...) more " thing "that man even

(...). " (1967:35) method of teaching based on research that we intend to develop search here:

> [...] a new society, which, being subject herself, had on man and the people subject to its history. Option by a company or partially independent option for a society that " descolonize" itself increasingly. Which increasingly cut the chains that did and do remain subject to others, you are subject. (1967:35)

According to Paulo Freire, we believe that education should enable the company an option for change and freedom. This is an education aware that Brazilian society to take " an attitude of self-reflection and reflection on their time and space." (1967:36) The teaching method will be elucidated here intends to form citizens who are respected as people who accept amid diversities already known to us all towards a struggle for humanization and liberation of the individual (1967:36). Citizens who are integrated in society - in a statement, the educator Freire emphasizes the importance of integrating human characteristic:

> We insist on the whole body of our study, integration and not on accommodation, as the orbit purely human activity. The integration results of the ability to adjust to the reality of increased transforming it that joins to choose, whose keynote is criticality. To the extent that man loses the ability to choose and will be subject to the requirements of others and minimize their decisions are no longer his because resulted command strangers, no longer full. Accommodates up. Sets. The integrated man is man subject. Adaptation is thus a passive concept - integration or pooling, active. This passive aspect is revealed in the fact that the man would not be able to change reality, however, you change yourself to adapt. The adaptation would give rise only to a weak defensive action. To defend themselves, the most they do is adapt. Hence the unruly men with revolutionary spirit, is called subversive. Of misfits. (1967:42-43)

The teachings of Paulo Freire are very useful specially when he develops the idea of the need for " eternal dialogue of man with man. The man with the world. (...) It is this dialogue man about the world and the world itself, about the challenges and problems that makes history " (1967:59):

> An education that would enable man to brave the discussion of their problems. Its insertion in this problem. That warn of the dangers of his time, that aware of them, gain strength and courage to fight, rather than being led and drawn to destruction of his own " I ", subject to the requirements of others. Education that put him in constant dialogue with each other. That predisposed to constant revisions. In the critical analysis of their " findings ". At a certain rebelliousness towards more human expression(1967:91). Among us, (...) education would be, above all, a constant attempt to change attitudes. Creation of democratic arrangements through which replace the Brazilian and cultural old habits of passivity, by new habits of participation and intervention, according to the new climate of transition. (1967:95)

Freire also argues that " our culture set in the word corresponds to our inexperience dialogue, research, research that, in turn, are closely linked to critical, fundamental note of the democratic mentality. "(1967:97) This lack of critical thinking, questioning to reconstruct knowledge form a deficit in the teaching - learning deep, with a view to form students to passivity and accommodation to the world. In this study, we intend to change this view by inserting the basics of research as a teaching method.

3 Teaching method: research method

Education is governed by several key documents for their achievement. What is true, however, is a complete lack of part or all of it - our educators - and non-compliance with its precepts by the educational administrators. As a result, data on education in Brazil are catastrophic.

The Programme for International Student Assessment - PISA (Programme for International Student Assessment) - 2009 - shows alarming data of our education. The PISA assessments take place every three years and cover three domains of knowledge - reading, math and science - there, every edition of the program, emphasis in each of these areas. In 2000, the focus was on reading, in 2003, Mathematics, and in 2006, Science. The PISA 2009 starts a new cycle of the program, with the emphasis falling again over the domain of reading, the 2012 emphasized mathematical knowledge.

It is a program of international comparative assessment applied

to students from 7th grade on, in the range of 15 years, age at which assumes completion of compulsory education in most countries. This program is developed and coordinated internationally by the Organization for Economic Cooperation and Development (OECD), with each participating country national coordination. In Brazil, PISA is coordinated by the National Institute for Educational Studies Teixeira (Inep).

The main objective of PISA is to produce indicators that contribute to the discussion of the quality of education provided in the participating countries in order to support policies to improve education. The evaluation seeks to verify the extent to which schools from each participating country are preparing their young people to exercise their role as citizens in contemporary society. The results of this study can be used by the governments of the various countries involved as working tools in the definition and / or refinement of educational policies to improve the preparation of young people for their future life.

Data from Brazil are the most sufferable possible: more than half of our students from seventh grade until the age of fifteen have learning disabilities. It is necessary that the teacher community becomes aware of such data, to enable them to rethink their teaching practices in the classroom. And similarly: it is necessary that public policies in the area of education observe these data when developing their proposals (Sacristan; Gomes, 1998).

Some documents still must be disclosed in the process of finding solutions to an improvement in fact in our education. The first, which is the basis of all others, is the " World Declaration on Education for All: meeting the basic learning needs ". It is a UNESCO document, prepared in Jomtien, Thailand, between 1990 and 1998, which is the basis of all our other educational documents - such as the Law of Guidelines and Basis of National Education (LDB), the Curriculum nationals (PCNs), the national Quality Parameters (PQNs) and the National Plan of Education of Brazil (NAP).

Should work, when devising educational policies, focusing on the main objectives of the statement above: meet the basic learning needs; expand the focus beyond the content; universal access to education and promote equity, to focus learning, broadening the means and range of basic education; provide a suitable environment for learning, strengthening alliances between the federation, states and municipalities, to develop a policy supporting contextualized; actually mobilize resources for education; strengthen international solidarity (UNESCO).

Based on the focus of UNESCO,, which actually expresses what

is most current, within each discipline, about the concepts governing the pedagogical practices of raw isolated arise guidelines LDB. The Law of Guidelines and Bases is unknown by many teachers and is not followed by many educational administrators. Our state of Paraiba is an example of a region that does not follow the daily practice of public schools, no such documents. We can even camouflage, saying that we follow, create projects to name these documents, but the reality of our schools is another. The court staff and teachers of our state is quite lacking in every way: they have no training for the role, working with little recourse from the government, do not give continuity to the actions initiated, finally, we do not have an identity education.

In this article, we intend to create an identity methodology for teaching in the public schools of Paraíba. For this it is necessary that teachers are aware of all educational documents mentioned above and that the practice in their daily profession. It is a constant study of its own shares in order to identify possible failures for immediate reflection on how to improve.

To begin the presentation of this teaching method, it is necessary to know the Socratic method called " maiêutica ".

3.1 Maieutics Socratic

The Socratic method is divided into two stages: the first is to bring the listener to submit their opinions on " then made him realize his own ignorance to contradictions or to undertake a clearance intellectual. Clearance But not only would lead to the truth - get to it was the second stage of the process, which occurred in the " birth of ideas " (expressed by the word maiêutica), at which time occurred the reconstruction of the concept, in which the speaker himself was " polishing " the notions to reach the true concept by successive approximations. (...) " (MELO, 2013).

Melo explains that, "according to Socrates, the philosopher's role is to help the disciple to walk, arousing their cooperation to get it for yourself, " illuminate " their intelligence and consciousness, redefining the role of the master, who was no longer a provider of knowledge, but one who awakens the spirits and must admit reciprocity in exercising its function " enlightening ", allowing the disciples to challenge their arguments the same way that challenges the arguments of his disciples. For the Athenian philosopher, only the exchange of ideas gives freedom to

thought and its expression, which constitute essential conditions for the improvement of the human being." (MELO, 2013).

We fully agree with Socrates when he deems it relevant dialogue between the master and his disciple in the process of teaching and learning. However, we disagree, as many have already noted, that " the soul that resides and all knowledge relevant to humans ", or even know that this " already exists in your soul long before his birth, and already it right and complete".

The importance we attach to Paulo Freire is warranted at this time we do not understand, like Socrates, there 's truth in the inner man, but you know that is collectively constructed by man through dialogue. The disciple can teach to his master, and vice versa. Perhaps the disciple who is most known for being inserted in the community. We do not, for example, that our society participate in social programs - vaccination campaigns, for example - without understanding why they are contributing to their realization. You need to know in order to exercise their citizenship. We believe that the teaching method of research that developed here provides this dialogue with the contents of the student's life, directing it to a sustainable livelihood. We understand that the function of education is to make the individual to participate actively and critically in this community, with the possibility of social mobility, improved quality of life and their community.

The Socratic method leads to truths previously developed. We argue that the function of education should lead to truths built with world knowledge of the student, and that they are ephemeral, due to constant exposure of these truths to a reconstructive questioning. These truths must also be related to the community where students live so they have the opportunity to transform their lives and their community.

3.2 Method of research education

The creation of a teaching method whose agenda the research originated from a debate on the transfer of the universe of companies for schools in relation to the idea of Quality. Such transfer should help to highlight, in the realization of educational activities, the fixing of targets that protrudes, the participation and cooperation of all the task of pursuing them, the enhancement of group work, and especially the resettlement of habit, so often overlooked, to assess performance against the goals of the project is realized. The very idea of reconstruction of

discipline may result from this increased importance of projects such as formatting of the basic activities of the school. Indeed, in a context where what counts are the goals of the project that is pursued, it may become more acceptable to the idea that the study of various disciplines or activities are means to achieve the intermediate useful life projects, articulated interests individual and collective through the construction of citizenship. (IEA, MACHADO, 2012)

Assessed that the crux of the matter lies in the fact that apply, in fact, the need for research to basic education. We intend to take the survey as a basis for the teaching method in schools because we believe that knowledge should be constantly questioned and collectively constructed to be rebuilt. These are truths found in the community, and to themselves, and exactly at that time. Other truths may be found in other times and with other communities due to the historical evolution of the natural things of the world.

In this sense, knowing that the research is characterized as a fundamental questioning, we argue that the teacher should introduce the content of their discipline from the questioning of knowledge. This problem must relate to the community and also serve so it can be modified. Can not be any problem, without a social function practice. We believe that the degree of student engagement with the lesson will be much higher this way, if one compares with a class whose content had no practical relation with their lives.

The foundation of our considerations assumes that man was created to communicate freely in society. The questioning will initiate a dialogue on education which will be based on a dialectic of continuity and discontinuity, a term used by Pierre Furter to sort the ideas in the work of Paulo Freire Education as the practice of freedom. It would be a construct and deconstruct knowledge.

Obviously, the teacher must know initially the group that works under the terms of social, economic and political. This will serve to get it to engage with the group with a mindset also for sustainability.

Starting from a problem, when we approach the ideas of Socrates, the teacher should make it into sustainable. Therefore, we believe that facilitates the teacher to build your teaching plan based on annual thematic groups have focused on sustainability. Thus, we could steer the thematic NCPs such as the environment, sexual orientation, health, ethics and cultural plurality. In our view, NCPs need, and here we would have included, a new thematic area, namely: science and technology. From these axes, the teachers would address the topics of discussion

for sustainability, such as: child abuse, domestic and sexual violence, pedophilia, medicine leaflet, subject to medical treatments, importance of attending the medical dangers of self-medication, children's rights and Adolescent (ECA), consumer rights, the Brazilian Constitution, the importance of following laws, carry them to know, to know the enforcement of laws, to know vote, cultural diversity, tolerance, respect, happiness, acceptance of different etc.. All matters relating to a harmonious coexistence, peace and respect in society.

The teacher would select, within each subject, an issue for discussion in the classroom. Students would be heard, the teacher comment on the important points of the speech of students without closing the debate. It is important to leave open the speech of students because it is these that should end the discussion round.

For example, in a discussion about the differences, the teacher may start wondering what respect means. Then enlarges the question of the meaning of respect differences. The teacher must be aware of the breadth of the term differences, because if students aim for a specific type of difference, the teacher should interfere warning for other possible differences - often, for example, students may be disregarded because they are not using a expensive clothes and not have this notion. At the same time, the teacher should ask about why students have highlighted a type of specific difference. Probably will be the difference with which they are closest examples in your community. This would be a time for students to express their experience with that difference.

We can say that we are achieving our purpose from the time the child asks reflects progresses. We will note their emancipation by the level of depth of the questions asked by the teacher and answered by them, following the logic of questions they develop and by the very logic of these questions, the conclusions she will taking over the debate, the ability to relate to your group, by association of ideas with reality, the ability to listen to another idea without verbal. In English, for example, our biggest goal is to elucidate the functions and uses of language to bring a practical sense to the life of the student and provide the conditions for reflective thinking on social, cultural and legal individuals qualified to serve as to exercise their citizenship in search of a sustainable development of the world. In each discipline the teacher would have more specific objectives to be privileged.

The innovation of this study is the fact that the survey be a teaching strategy here transformed into a teaching method. We can say that this is also a way to make the questioning and solving world issues be-

come the main goal in teaching-learning process. The great difficulty that we face in the public schools of the State of Paraíba is the heterogeneity of the group with which to work. Many students are distinct age group, the problem would be to create conditions that opportunities do everyone had a chance to ask and reflect, or even follow the progress of discussions. The teacher must be aware of those who are not following the discussion and reinforce the explanations for all to reflect together because the classroom is, for this teaching method, a working group in constant debate.

It is with this horizontal relationship of A with B, born of a critical array and generates criticality, we have dialogue to Jaspers. This, according to Freire, also states that dialogue nourished:

> [...] love, humility, hope, faith, trust. Therefore, only dialogue communicates. And when the two poles of the dialogue thus cling with love, with hope, with faith in each other, if critics are in search of something. It installs, then a relationship of sympathy between them. Only there is no communication. " The dialogue is therefore essential way," Jaspers says, " not only on issues vital to our political order, but in every sense of our being. Only by virtue of belief, however, is the dialogue and stimulus significance: the belief in man and his possibilities, the belief that only get to be myself when others also come to be themselves." (FREIRE, 1967:107)

We believe we are well, still developing the authenticity of students; spirit strategist, bold, insightful and critical. Characteristics are important because they allow the man to non- accommodation in modern life. Paulo Freire, appropriating the ideas of Karl Marx and Eric Fromm, shows that:

> From man's relationship with reality, resulting to be with her and be her, for the acts of creation, recreation and decision, will he streamlining your world. Will dominate reality. Will humanizing it. Will adding something to it that he himself is the doer. Will temporalize geographical spaces. Does culture. And it is the play of these relations of man with the world and of man with man, challenged and responding to the challenge, changing, creating, which does not allow the stillness, except in suits relative preponderance, or societies or cultures. And, in that, rearing and decides, will settling historical epochs. It is also creating, recreating and deciding that man must participate in these times. And the best will do,

> every time, integrating the spirit of them, take ownership of their key themes, recognizing their specific tasks. One of the greatest if not the greatest tragedy of modern man is that is now dominated by force of myths and commanded by advertising organized, ideological or not, and so it comes renouncing time, without knowing it, their ability to decide. Has been kicked out of the orbit of the decisions. The tasks of their time are not captured by simple man, but he presented a "elite " that interprets and Taz delivery prescription form, prescription to be followed. And when judges who saved following the prescriptions, drowning in the anonymity of mass leveler, without hope and without faith, tamed and settled: it is no longer subject. Degrades to pure object. Objectifies itself. - "He freed himself - says Fromm - the external links that prevented him from working and thinking in accordance with what was considered appropriate. Now - still - would be free to act according to his own will, you know what you want, think and feel. But do not know. Fits (...) to warrant anonymous authorities and adopts a self that is not yours. The more proceeds in this way, the more they feel forced to conform their conduct to the expectations of others. Despite his guise of optimism and initiative, modern man is crushed by a deep sense of powerlessness that is staring, and as if paralyzed for disasters to come. " (1967:43-44)

Final considerations

The teaching in basic education in the state of Paraíba need a method that favors research. The teaching method of research here extolled proposes that we should teach to worry that we are developing procedures basic research rooted in the discipline of our content. At the same time, we must consider content emanating from the community to which we work, so as to check her needs and we can provide an education that can actually grow into the subject's life and their community, and that actually causes that the audience realizes the importance of sustainability in your life.

Education in the State of Paraíba needs a radical change, because we can not only record low levels of education, without applying a policy that actually will change this situation. Many social projects have been conducted in our schools, but I believe that the basis of the problem lies in a methodological issue. We need to refine the methodological foundations of education in the state, so that projects can be implement-

ed effectively.

The teaching method of research is a critical teaching method that seeks to bring the subject to a new attitude toward the problems of their time and their space. The intimacy with them. The research, instead of mere, dangerous and boring repetition of passages and statements of its disconnected same conditions of life.

References

ADORNO, T. W e HORKHEIMER, M. A Indústria Cultural: o esclarecimento como mistificação das massas. *Dialética do Esclarecimento*: fragmentos filosóficos. Trad. Guido Antonio de Almeida. Rio de Janeiro: Jorge Zahar, 1985.

ADORNO, Theodor W. Idéias para a sociologia da música. In: ADORNO, T. *et al. Textos Escolhidos.* Trad. José Lino Grünnewald. São Paulo: Abril Cultural, 1974. (Coleção *Os Pensadores*).

BOTTOMORE, Tom (org.). Dialética. *Dicionário do Pensamento Marxista.* Trad. Waltensir Dutra. Rio de Janeiro: Jorge Zahar, 1988. pp. 101-106.

ENGELS, F. e MARX, K. Do socialismo utópico ao socialismo científico. In: *Textos.* 1v. São Paulo: Edições Sociais, 1975.

FREIRE, Paulo. *Educação como prática da liberdade.* São Paulo: Paz e Terra, 1967.

JERPHAGNOM, 1992, p.23. Disponível em: <pucpr.br /Eventos/educere>. Acesso em: set\2013.

KONDER, Leandro. Materialismo. *Marx:* vida e obra. 4 ed. Rio de Janeiro: Paz e Terra, 1981. (Coleção Vida e Obra).

LUKÁCS, Georg. Introdução aos escritos estéticos de Marx. *Ensaios sobre Literatura.* Trad. de Giseh Vianna Kondes. Coordenação e prefácio de Leandro Konder. Rio de Janeiro: Civilização Brasileira, 1965. (Biblioteca do Leitor Moderno, 58).

MARX, K. O fetichismo da mercadoria: seu segredo. *O capital:* crítica da economia política. Livro I. Trad. Reginaldo Sant´Anna. 15 ed. Rio de Janeiro: Bertrand Brasil, 1996.

MARX, K. e ENGELS, F. *A Ideologia Alemã.* Trad. José Carlos Bruni e Marco Aurélio Nogueira. 5.ed., São Paulo: HUCITEC, 1986.

MELO, Jonkácio. Maieutica de Socrates - Sociedade das Ciências Antigas. Disponível em: < ebah.com.br>. Acesso em: set|2013.

PAULO NETTO, José. *O que é Marxismo?* São Paulo: Brasiliense, 1985.

UNIVERSIDADE DE SÃO PAULO. Instituto de Estudos Avançados. MACHADO, Nilson José. Anotações para a elaboração de uma ideia de cidadania. Disponível em: <www.iea.usp.br/artigos>. Acesso em: jul/2012.

Terrorism, State of Exception and Human Rights
A look towards the perverted economic face of the 'declared war'

Rosa Maria Zaia Borges[1]

He´s a slave. But maybe a free spirit.
He´s a slave. Does that do him any harm?
Ask someone who is not.
One is a slave of pleasure, other, of avarice, other, of ambition, all of fear.
(SÊNECA, 2008)

Abstract: The paper titled "Terrorism, State of Exception and Human Rights: a look towards the perverse economic face of the 'declared war'" focus on the 2001 September 11th events. The intention is the provoke reflections about what we call "slavery of fear" in which we are (or we have been) immerse specially since 2001. Visiting authors like Noam Chomsky, Giorgio Agamben, Howard Becker, and also George Orwell, this paper starts reflecting the possible translations of the "September 11th"; right after it tries to discuss what it can and cannot be considered "terrorism", so that, in the final topic, create the conditions of possibility to discuss the State of Exception as the justifying mask of a "weapons economy", with green card to perpetuate the differences between rich and pour sovereignties.

Keywords: Terrorism – State of Exception – Human Rights

1. About the (un)nameable "September 11th"

The date: 2001 September 11th. The place: the city of New York.

[1] Doctor in Law at Universidade de São Paulo (USP/Brazil). Professor at the Faculty of Law at Pontifícia Universidade Católica do Rio Grande do Sul (PUCRS/Brazil).

The image: the Twin Towers being destroyed by a plane. The sounds: explosion; collapse; shouts, from inside and outside, those of desperate, these expressing the necessity of verbalizing what was seen; later discovered records from victims who were trying contact with family and friends from inside the building. The name: there wasn't, there isn't, since then we could only call it as a date "September 11th"[2]. Cruelty. Disgrace. Something that changed the course of history. Something that was never seen(?).

The act curtain of this paper is to demonstrate that this happening with senses and exceptional circumstances that was the "September 11th". The purpose is to provoke reflections about what we call "slavery of fear" in which we are (or we were put in) immerse specially since 2001, to create the conditions of possibility to bring into discussion the State of Exception as a justifying mask of an institutionalized politics turned to an "weapons economy", with green card to perpetuate the differences between rich and pour sovereignties.

Therefore, at this first moment, the reflexive provocation couldn't be any other but that one around what the "September 11th" was. Is it possible to translate/digest this event? Is it possible to transform "the date" in something with proper name and characteristics?

Baudrillard (2003, p.8) categorized the "September 11th" as the happening that ended the "strike of happenings". On the other hand, Chomsky defined it as a historical event, not because of the atrocities themselves, but because of the target. It is the first time, the first serious case, in which "one of the occidental powers was itself attacked in a way it generally attacks others"[3].

From these elaborations, it is possible to say that there are some

[2] For semantics reasons, and why not saying for rhetorical ones, in the lack of a proper name, every time the "September 11th" has to be referred it will always be put between quotation marks in this text.

[3] To illustrate his argument, Chomsky, ironically, reinforces that Europe has centuries of atrocities conduction around the world and it was never attacked: "[...] there were some smaller attacks, but Abyssinia didn't invade Italy, for example". To continue his argumentation, the author brings to memory that in Latin America, as well as in other place, the atrocities were hardly condemned, but always followed by some comment that established a link of familiarity with the situation. In this sense, he cites the example of a Panamanian journalist who compares the "September 11th" to the bombing against to El Chorillo neighborhood, in 1989, an intervention called "Operation Faire Cause", commanded by George Bush, in which around three thousand people were killed. (CHOMSKY, 2003, p. 118). See also: (CHOMSKY, 2002); (CHOMSKY, 2002b).

events that acquire meanings and exceptional connotations. Heuristic events like these bring historical and theoretical implications, which can be seen, as said Ianni (2003, pp.11-12), as "scientific experiments", because they explicit nexus, continuities, discontinuities, tensions and contradictions unimaginable in a previous time. In his own words, "it is like it was an explosion that involves the reality and the imaginable, in a way that soon it turned to be distinguishable the best relations, processes and structures of domination and appropriation that weren't well perceived". Suddenly, the social and mental frames of references of all people, individuals and collectivities, fall down around the world. With it, possibilities that weren't imaginable before are opened for the interpretation of relations, processes and domination structures, as well as social, political, economical and cultural nexus that cross the game of social forces and geopolitical operations are made more evident, visible, and transparent, in national, regional and world scales.

In a few time, all around the world, a lot of people realize that many things are out of order. Suddenly take place discontinuities, instability, affliction, fear, terror. The message transmitted by "September 11th", according to Ianni, was the following one: "it is time, for America, to discover how hated it is. The flight 175 of United was an intercontinental ballistic missile shot against America's innocence" (2003, p.13)[4].

It is like if the possibility of real, that was always haunting – but we never expect to be materialized, happened. The "September 11th" promotes the encounter to real, to what till now was dealt with as fiction. It became the metaphor of fear, of what is forbidden to talk about. The result: the forced recognition of fiction in reality, a trauma that can be translated as an excess of sense[5].

There can be many definitions. However, there is the necessity to give names so that the meanings can be associated and clear. Quickly, the "terrorism" category is elected as the translation of all this shock of

[4] In another part, the author says: "For the first time in the history of the world supremacy of the United States of America it is confirmed, for one and another, in the United States and around the world, that the most powerful nation in the world is vulnerable. [...] It is a happening from what it is possible to raise the hypothesis that globalization rimes, simultaneously, with integration, fragmentation and revolution" (IANNI, 2003, p.15).

[5] Zizek (2003, p.34) teaches that in psychoanalysis the lesson is exactly the opposite: "reality mustn't be taken as fiction". It is necessary to have the ability of discerning, in what we notice as fiction, the hardcore of Real that we only have conditions to endure if we transform it in fiction.

reality. Fear. Violence. Destruction. Catastrophe. Barbarization. Death. Caused by whom? Who would be so cruel in a point of taking thousands of innocent lives, in a such barbarian and indefensible way? On the other hand, there's the necessity to find a guilty for the action itself but also to nominate the real that is revealed. It is necessary to recognize the "enemy" and that recognition is always a "*performant* activity" that, in the opposition of the deceiving appearances, brings to light or bild the "true face" of the enemy (ZIZEK, 2003, p.130).

Facing this, it is the conscience that we live in an isolated artificial universe that generates the notion that some criminal agent permanently threatens with total destruction. Therefore, it is possible to say, from Zizek's thinking (2003, p.49), that terrorists are transformed into an abstract irrational agent – abstract in the Hegelian sense of being isolated from the concrete social-ideological network that gave them existence. And "*all the explanation that evokes the social circumstances is despised as a dissimulated justification of terror*, and all particular entity is remembered only in a negative way".

It is like if it exists one manipulated (or manipulable) representation of who is "authorized to be victim". If the victim is defined, defined is the executor. Dichotomizations were always something welcome to humanity, in their most different aspects. "Things of the world" are divided in proper and improper, true or false, possible and real. All this because the established modern common sense settles itself in one truth: there is only one face of things(!), that one that the individuals can truly appropriate themselves. Nevertheless, the truth itself isn't something of what it is possible to take possession.

In this sense it is revealed the complexity of the dichotomy which is being manipulated post "September 11th": peace and war turned to be another dichotomy to be defined from very subjective criteria. And if it's right to say that the classifications of violence, crime and terrorism traditionally reiterate the purposes of economic and cultural powers, the violence associated to "September 11th" wouldn't be an exception.[6]

Even without a proper name, the "September 11th" became a

[6] Stanley adverts, in a text written right after the attempt, that in various political pronouncements the pain and the suffering were associated to those ones lived by the United States. Specially, the author brings to memory the emotional pronouncement of Tony Blair at the time: "we must never forget how we feel when we watched the planes crashing against the towers, we must never forget those voice messages…" This speech turned out to be a 'cold shower' in the memory of the violence suffered by others in these and in the other next days after the bombing of Afghanistan" (STANLEY, 2002, p.209).

watershed in history. It isn't an exaggeration when Chomsky (2002b, p.66) says that the new millennium began with the monstrous crimes: the terrorist attacks of the September 11th, and the reaction against them, that certainly took an enormous number of innocent lives.

It is, therefore, (re)declared[7] the "war against terrorism". To call it like this, in Chomsky's words, "is simply an additional doses of advertisement, unless the war has as target, in fact, the terrorism" [8]. The irony of this speech turns to be, in the end, a crucial question for one deeper and critic analysis of "September 11th" and its consequences. After all, what "war" are we talking about? What is the difference of this "combat" and the other ones promoted, since long time, by the economically powerful countries? Indeed, what is terrorism and who is the terrorist? Who is the one to define it? From which criteria? Who fights who? With which means?

[7] Chomsky registers that the war against terrorism wasn't declared in September 11th, but twenty years before, during Reagan's administration. In accordance to the author, in that time, they announced the war against terrorism, particular against international terrorism directed to the State, as "the plague of modern era", and that it would be the focus of external politics of the United States. So, according to Chomsky, the war is (re) declared (CHOMSKY, 2003, p. 118).

[8] The use the term "war" here is not more than the mere reinforcement of the expression used by the United States when reacting to "September 11th". Chomsky incisively criticizes such used terminology, calling the attention to the convenience of the term "war". He remarks that, in the beginning, the United States used the word "crusade", replaced by "war" later, when they noticed that if there was the intention of make alliances in the Islamic world, for obvious reasons, the use of this term would be a big mistake. The same author recovers that, in Serbian case, the bombing was named "humanitarian intervention", term that, in any way, has a new use. Chomsky sustains that the most appropriate term for the situation of "September 11th" would be "crime", maybe "crime against humanity". However, he makes the reservation that, in this case, it is necessary really concrete proofs, what would open the doors for a dangerous question: who were the authors of the international terrorism crime condemned by Mundial Court fifteen years ago? The author refers to the attack conducted by the United States against Nicaragua, in 1980, when tens of thousands of people were killed. Nicaragua denounced the USA to the International Court of Justice and in 1986, they were condemned by illegal use of force (or international terrorism, as called by the author), vetting, right after, a resolution of the Security Council of the UN that claimed all the countries to follow the international laws (CHOMSKY, 2002, pp. 16-17).

2. Who is the enemy, who are you? Or how to define the terrorism

For the purpose of this paper, it is taken the premise as a consensus: the "September 11th" was a terrorist attack. Someone could call it an act of boldness(!). But, taking the same route of thinking discussed before, that one of reduction of world complexity by formulating dichotomizations, there wasn't any person who defended the event, in opposition of terror, as an act of peace. So, being true this premise, it is important to define what an act of terror is.

Hector SAINT PIERRE (2003, p.53) says that the "September 11th" provoked a new world order, from a realignment of alliances and strategic projections produced with the clear purpose of fighting against a non-definition terrorism or, even worse, a bad definition. His position is that one of the biggest difficulties in defining terrorism is the highly subjective characterization of terror.

The intention here is to propose one (among many others possible) analytical perspective of terrorism borrowing Howard Becker's (2008) concept of *outsiders*. The author is known by his sociological studies about deviation and develops his ideas since the next proposition: all social groups make rules and try, in certain circumstances, to impose them. This way, social rules define situations and kinds of appropriate behaviors related to them, specifying some actions as "right" e prohibiting other ones as "wrong".

When one rule is imposed, that one that presumably violates it can be seen as a special type of person, someone from whom it is not expected to live in accordance to the rules created by the group. This person is taken as an *outsider.* However, according to Becker (2008, p.15), the person labeled as an *outsider* can have a different opinion about the question. He/she cannot accept the rule from which he/she is being jugged, and cannot face those ones who judge himself/herself competent or legitimately authorized to do it. Consequently, it emerges a second meaning of the term: that one who violates the rule can think his/her judges as *outsiders*[9].

By this theoretical discussion we can deduce that the deviation is less a quality of the act that is committed by one person, and more a

[9] According to Saint Pierre (2003, p.53), another difficulty (the first, already mentioned before – the subjective character that rounds the definition) that appears in the discussion to objective and clearly define the concept of "terrorism", is the pejorative sense with the word was pragmatically used during history.

consequence of application by others of rules and sanctions to the violator. The deviator is someone to whom this label was given; the behavior taken as a deviation is that one people label like that. Becker (2008, p.25) alerts, however, that the graduation of an act will be treated as deviation depends also of who practices it and of who feels harm by it; and that the rules tend to be applied more to some people than to others. So, the deviation is not a quality inner of the behavior itself but in the interaction between the person that commits an act and those ones who react to it.

The author builds, yet, an important analysis for the discussion here proposed: if it's possible to think human activity as collective, it is possible to do the same with deviation. Calling it of "interactionist", the general idea of the proposal is the follow one: in its most simple way, the theory consists that all people are involved in any episode of supposed deviation. When this is done, it is discovered that these activities demand the open or presumed cooperation of many people to occur in such way. By this mean, when it is considered all the people and organizations involved in an episode of a potentially deviator behavior, it is also found out that the collective activity in course consist in more than acts in which it is alleged someone's bad action. It is a complex drama, where making accusations is the central point. The idea is to make "the study of deviation as essentially that one of the construction of reaffirmation of moral meanings of everyday social life". From this results that, some of the main social actors don't involve themselves in bad action, best identified as imposers of law or morality, as people who lament themselves that other actors are bad behaving, that arrest them, that present them to legal authorities or give them punishments (BECKER, 2008, pp.184-185).

By this discussion, it is possible to construct viable definitions of particular actions that people could commit or of particular categories of deviation as the world (in special, but not only, the authorities) defines them. But it is not possible to make both completely coincide, because they don't coincide empirically. They belong to two different systems, although partially overlap, of collective action. One consists in people who cooperate to produce the act in question. The other, in people who cooperate in the morality drama by which the "transgression" is discovered and treated, being this process formal and legal, or completely informal (BECKER, 2008, p.186).

In general lines, it is possible to take three conclusions from this briefly presented analysis of the concept of *outsiders:* a. the *outsider* is

considered a "deviator" less by his/her act and more by the way the others label the act; b. the *outsider* is not a category that can be defined and comprehended isolated, individually, that is, the deviation itself is insofar as it reinforces/reaffirms the moral meanings of everyday social life; c. it exists a relation of power the authorizes who defines the *outsider* and who, is a consequence, is target of the definition.

About the terrorist being a deviator there is no doubt. The same can be said about the "September 11th": there is no doubt it was an act of terrorism. However, the important reflection that can be extracted from this discussion is: who fits the definition of terrorist on and who has the authority to define who is "in" and who is "out of" the definition.

We can borrow the definition of terrorism from the *U.S. Code*, an official document of USA government, 1984 dated, where an act of terrorism means any activity that: a. involves a violent act or a serious threat of human life that can be considered crime by the USA or any other nation, or that is crime as that recognized, if committed inside American or any other jurisdictional territories; and b. seems (i) to be an intimidation or coercion to civil population; (ii) to influence the governmental politics by means of intimidation or coercion; or (iii) to threaten the conduct of a government by a murder or kidnapping.

Thus, the "September 11th" could be defined as a terrorist attempt, although, the actors themselves, the Unites States, couldn't assume such definition, because if they do this it is revealed is terrorist State condition (CHOMSKY, 2002, p.17).[10] As we can see there's no mirror behind this definition.

It is clear that it's always easier to personalize the enemy, "to identify a big symbol of Great Evil", than try to comprehend what is behind the atrocities committed. And, of course, as remarked by Chomsky, "there is always the inclination to ignore the own role played in the question [...]" (CHOMSKY, 2002, pp.40-41). The "September 11th" gives to the USA the opportunity to understand the kind of world in which they

[10] In international plan, there is a background of frustrated tries of defining terrorism in a clear way. In 1937, the Convention of Prevention and Punishment of Terrorism, defines it: "(...) criminal acts directed against a State and intended or calculated to create a state of terror in the midds of particular persons, or a group of persons or the general public". Also in 1972, in the Project of the Convention for Prevention and Punishment of International Terrorism, terrorism is defined as "act of any person that kills illegally, causes serious body lesions or kidnaps another person". Yet, the Convention to Prevent and Punish Acts of Terrorism of American States Organization, of 1971; the European Convention for the Repression of Terrorism of 1977.

take part. And, in accordance to the author (ZIZEK, 2003, p.63), they made the option to reaffirm their traditional ideological commitments: down to feelings of responsibility and guilty in relation to the misery of Third World, now *we* are the victims!

By making the correlation of terrorist as an *outsider*, it isn't difficult to conclude that some social actors stay on (or are put on) the "deviation window", while those who label deviate (ironically) themselves from the condition of part of the deviation conduct; and that the relations of power determine who suffers the sanction and who establishes the sanction. It is like, as a consequence of this representation, automatically, it remains authorized the decision making to answer appropriately to that one that is the perpetrator of violence – the outsider, it doesn't matter the means that foray will be done[11].

According to Baudrillard (2003, p.14), the collapse of the towers is the most symbolic happening. If the image wasn't that, the effect wouldn't be the same, the shouting proof of the fragility of the world power wouldn't be the same. This way, the towers, that were the symbol of this power, still embody it in this dramatic end, that remembers a suicide. By watching them falling down, as in an implosion, it creates the impression that they were committing suicide in response of the suicide planes. At the same time architectonic and symbolic object, evidently it was aimed the symbolic one; it is possible to imagine that the physical destruction brought about the symbolic collapse. But it is the opposite: the symbolic aggression caused the physical collapse.

About the terror, it is already known that it is all around, in institutional violence, in (sometimes not so) homeopathic doses. Terrorism just cristalizes all the hung ingredients. It enlaces, even being the violent deconstruction of this extreme way of efficiency and hegemony, the orgy of power, of liberation, of flux, of calculation, of what the Twin Towers were the incarnation. The twin sister of compassion (as twin as the two towers) is arrogance. People cry for themselves at the same time they are stronger. What gives the right to be the strongest is the fact of being, since now, the victims. It is the perfect alibi, all the mental health of the victim, through what it is eliminated all guilty, what allows in some way

[11] About the utilitarian logic behind the measures to combat terrorism, see: BORGES, Rosa Maria Zaia; PIRES JUNIOR, Paulo Abrão. "Guerra contra o terrorismo": do Estado de Direito ao Estado de Emergência passando pelo Direito Internacional. In: III Congresso Brasileiro de Direito Internacional, 2005, Curitiba. Estudos de Direito Internacional - Vol. III - *Anais do 3º Congresso Brasileiro de Direito Internacional*. Curitiba: Juruá, 2005.

to use the unhappiness as a credit card (BAUDRILLARD, 2003, pp.30-).

Characterized the deviation conduct, there can be, according to the system of social rules, a sanction. Becker (2008, p.189) brings an interrogation that deserves to be brought into discussion: in which circumstances are done and imposed the rules *ex post facto*? The empirical investigation will show that this occurs when a participant in a relation is disproportionately powerful, so that he/she can make his/her will overpower above the objections of others, but desires to maintain an appearance of justice and rationality[12].

And *fear* is the key to open all the doors of the strategic constructions (or manipulations) around terrorism, around violence, around action and reaction, defining, on the other hand, in what side is one and other, respectively, terrorist and victim. Chauí (1995, p.44) would say about fear: "strange feeling that makes us insensate putting 'wings in our feet' when we were supposed not to run and 'attaching us to the ground' when running away is necessary. It steals us the courage and *give opportunity to cruelty*".

At this point, it is possible to say that the green card for the (re) affirmation of exceptionality as rule is issued: the State of Exception.

3. State of Exception[13]: the green card for the hegemonic trade of fear

Right after the Second World War, George Orwell wrote series of texts for the *Tribune*. One of these texts, 1945 dated, titled *You and the atomic bomb*, seems to be recently wrote. At that time, Orwell practically begins his text questioning, with a certain irony, the almost indifferent discussion about what he called the biggest concern to all: "how difficult are these things to manufacture?".[14]

[12] Such idea brings back to memory two situations involving states representatives. One of them when Condoleezza Rice, at that time assessor of National Security of the White House, declared that "being Saddam Hussein an entity of evil, the world must help us to fight him". The other one, in occasion of bin Laden's death, when Obama, in a public pronouncement about the "big act", said about the result of the operation that the "justice" have been done.

[13] We follow the terminology adopted by Agamben – State of Exception – in the opposition of the expressions used by Italian and French doctrine – that prefer "decree of urgency" and "state of siege" (AGAMBEN, 2004, pp.15-).

[14] "This George Orwell piece was originally published by the *Tribune* on October 19, 1945 within two months after atomic bombs were dropped over Hiroshima and Naga-

With this question, George Orwell (1945) concluded the atomic bomb is fantastically expensive, that its fabrication demands an enormous industrial effort, and because of that only three or four countries in the world are capable to do it. And he adverts: "This point is of cardinal importance, because it may mean that the discovery of the atomic bomb, so far from reversing the history, will simply intensify the trends which have been apparent for a dozen years past".

The sentence that justifies all the reflection of Orwell (1945) is the follow one: "it is a commonplace that the history of civilization is largely the history of weapons". He completes his argument saying that when the dominant weapons are expensive and difficult to manufacture it tends to be despotic times, while if the dominant weapon is cheap and simple, common people have a chance. Saying this, he concludes that a complex weapon makes the strong stronger, while a simple weapon gives claws to the weak.

To prove this thesis, Orwell (1945) creates a relation between succeed popular revolutions and the facilities of the production and the utilization of certain kinds of arms. While developing his argument, he turns to demonstrate that the evolution of the arms is inversely proportional to the empowerment, from the states or who else that already can (or could) do it. And prophesizes: "The one thing that might reverse it is the discovery of a weapon – or, to put it more broadly, of a method of fighting – not dependent on huge concentrations of industrial plant".

Orwell (1945) proposes an exercise of speculation: suppose that the surviving great nations make a tacit agreement never to use the atomic bomb against one another; suppose they only use it, or the threat of use it, against people who are unable to retaliate. In this case, he concludes, "we are back where we were before, the only difference being that power is concentrated in still fewer hands and that the Outlook for subject peoples and oppressed classes is still more hopeless".

Orwell (1945) goes to the end of his text saying that the atomic bomb maybe completes the process of oppression, by robbing the exploited classes and peoples of all power to revolt, and at the same time putting the possessors of the bomb on a basis of military equality. And

saki, Japan by the only country ever to have used them to kill people and destroy cities, viz., the U.S.A. Orwell had written enough about the same (re: A. Bomb) but this particular piece was exceptional for the insights it shared about the world dispensation that lay ahead in the age of atomic weaponry. In addition, it was clear that the groundwork for his novel, *Nineteen Eighty-Four* had been completed by this writing" (note from the website).

concludes: "Unable to conquer one another, they are likely to continue ruling the world between them [...]. If, as seems to be the case, it is a rare and costly object as difficult to produce as a battleship, it is likelier to put an end to large-scale wars at the cost of prolonging indefinitely a 'peace that is no peace'". Unfortunately, the text is surprisingly of all times: it anticipates, at the same time it authorizes, the proposed analogy to be done to the "September 11th".

Right after the "September 11th", in November of 2001, it is promulgated in the United States a military order that authorizes indefinite detention and the process in the military commissions of non American citizens suspected of being involved to terrorists activities. Before that, it was already approved by American Senate the *USA Patriot Act*[15], that allows to keep detention the foreign suspect of activities that put in risk national security, and in a term of seven days, the foreign person should have been banished or accused of violation of the migration law or any other crime.

Agamben (2004, pp.38-) had already anticipate, analyzing the juridical nature of the *USA Patriot Act*, that these moments considered extraordinary give State power beyond the regulations and the State of Exception became the pattern of action of most of the nations.

We admit as a general consensus that the State of Exception became a paradigm of social (re)organization after "September 11th" and it spread a large process of individuals and collectivities control, starting in the US society, with domino effect also in European societies, sparkling on Asian, African and Latin American societies; also, democratic rights acquired from social fights are reduced or eliminated and the juridical, political, military and police controls were increased under individuals, collectivities, organizations and social movements.

It is also admitted that the State of Exception reinforces the concept of absolute sovereignty, which allows, in the name of security, doing anything, inside or in other States territories – in this case, in the territory of that States who were considered humanity enemies. In this case, it is easy to agree to Chomsky (2002, p.24): "Occident is largely ecumenical in its choice of enemies. The criteria are subordination and servility to power and not to religion".

While encouraging fear, disseminating insecurity, limiting rights,

[15]Available from: http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf. Viewed 15 February 2013. This legislative act, being promulgated during Bush administration, was kept with no alterations in Obama's administration.

centralizing the decision power in the hands of the Executive, the State of Exception appears as a necessary measure, illegal but perfectly juridical and constitutional, that materializes itself with the creation of new rules (or of a new juridical order) (AGAMBEN, 2004, p.44). However, the thesis this paper wants to call the attention is that that the creation of these new rules attends to old purposes – the maintenance of economic hegemony – but with a new "card on the hand": the "war against terrorism".

In other words, the terrorist acts become, because of their atrocities, "a gift to the most inflexible and repressive elements of all factions and they were explored to accelerate the militarization, regimentation and reversion schedule of the democratic social programs, *besides to favor the transference of wealth to restrict segments* and undermine democracy in all its relevant forms" (CHOMSKY, 2002, pp.21-22).

Here is the interesting point of this debate: the economic side of the "September 11th". If it's true that all "crashes" of real world are related to global capitalism, so the "September 11th" sets wide open the crash of economic and geopolitical concerns of the USA. According to Zizek (2003, pp.58-59), the USA are forced to explicitly recognize the primacy of economics under democracy – that is, the secondary and manipulative character of international interventions – when they affirm to protect democracy and human rights[16].

[16] The following passage translates in figures the fallacy of humanitarian interventions: "Even before September 11, millions of Afghans were being sustained – barely – by international food aid. On September 16, the *New York Times* reported that Washington had 'demanded [from Pakistan] the elimination of truck convoys that provide much of the food and other supplies to Afghanistan's civilian population'. There was no detectable reaction in the US or Europe to the demand that enormous numbers of destitute people be subjected to starvation and slow death. In subsequent weeks, the world's leading newspaper reported that 'The threat of military strikes forced the removal of international aid workers, crippling assistance programs'; refugees reaching Pakistan 'after arduous journeys from Afghanistan are describing scenes of desperation and fear at home as the threat of American-led military attacks turns their long-running misery into a potential catastrophe'. 'The country was on a lifeline,' one evacuated aid worker reported, 'and we just cut the line'. […] The Food and Agricultural Administration (FAO) had warned in late September that over 7 million people might face starvation unless aid was immediately resumed and the threat of military action terminated. After bombing began, the FAO issued even more grave warnings of humanitarian catastrophe, and advised that the bombing had disrupted planting that provides 80 per cent of the country's grain supplies, so that the effects next year will be even more severe. All unreported. These unreported appeals happened to coincide with World Food Day, which was also

The key-question that it is the intention to foment could be translated (boldly, it can be said) in the following analysis: if a terrorist (the *outsider* of the manuals against terrorism, defined even before the "September 11th") carries on a weapon it is because there is weapon trade! There is somebody that manufactures, sells and profits this armament. That is, there is a system that (re)produces the means of violence. So, what is the deviation conduct at all?

And more, if the *outsider* is the one who uses the arms, the result is that the speech of "good combat" is enough to justify continuing with the production of arms, as that production is sustained by the "war against terror" and not its support.

The question is that the "war against terror" and its weapons (between them the State of Exception itself) doesn't discuss who makes the arm and the consequences of this for the "feeding the system". The one thing that justifies the "war" is the terrorist, the one who uses the arm to cause terror.

If the function of terrorism is that one given by the U.S. Code – obtain political, ideological, religious or other aims using intimidation, threat or use of violence – so, looking to the present, in fact, "the international terrorism is openly announced as official plan of action" (CHOMSKY, 2003, p.118).

As consequence, the term terrorism is used by each State, each system of power, to refer to the terrorism "they" conduct against us [in reference to the United States], and not for that one "we" conduct against them (CHOMSKY, 2003, p.121). This is the real definition. Thus there are appropriate and inappropriate ways to respond to terrorism, and the appropriate way are not being contemplated. This is the big power, "we do what we want". In this sense, the war is new, in terms that this time it has a certain kind of pretext. But if the observation is towards the conduction of war, it turns to be so familiar[17].

---

ignored, along with the charge by the UN Special Report that the rich and powerful easily have the means, though not the will to overcome this 'silent genocide'. The airstrikes have turned cities into 'ghost towns', the press reported, with electrical power and water supplies destroyed, a form of biological warfare. Seventy per cent of the population was reported to have fled Kandahar and Heart, mostly to the country-side, where in ordinary times between 10 and 20 people are killed or crippled every day by land mines. Those conditions are now much worse. UN mine-clearing operations were halted and unexploded US ordnance adds to the torture, particularly the lethal bomblets scattered by cluster bombs, which are much harder to clear" (CHOMSKY, 2002b, pp. 66-68).

[17] In this same direction: "It isn't about to imagine that the terrorist attack provokes a

Orwell, therefore, was right when he said things could remain the way they were in terms of economic exploitation of the stronger in relation to the weaker ones. It is not necessary to notice that the targets of the attacks "in defense of the American people and its honor" are countries that put to the test the Empire[18], but that don't have any condition to react in the same proportion. To the other hand, the military industry maintains itself under the argument that it is necessary to fight the terror, with media support, which explores and sells fear, which convinces that the enemy can be always around.

In general terms – without taking the risk to generalize because there are movements of reaction to the "war against terrorism" – media and governors occupy the "empty space", in terms of critical reflection, that fear provides. According to Agambem (2000, pp.94-95), this means that a general analysis must take into account the fact that capitalism (or any other name that is possible to give to the process of domination of history of the world) not only commands the expropriation of the productive activity, but also and above all commands the alienation of the language itself, of the communicative nature of human beings.

And, at the end of this process of "war against terrorism", in the name of alleged protection of human rights, there isn't any difference between global and universal. The universal globalizes itself; democracy and human rights circulate exactly like any other world product, as oil or capitals ((BAUDRILLARD, 2003, pp.52-53). Therefore, any political, social and economical system, that is not democratic under the eyes of Occident, must be fought.

That way, the occidental governors reserve the categorization of terrorist for the acts of indiscriminate violence done by activists that don't act under a state organization, and refuse themselves to recognize the existence of State terrorism. They take advantage of the fact that the pure terrorism doesn't intend to hidden itself – on the contrary, does

---

kind of right-wing policy of the elites governing, dominant classes, constituted powers and sectors of public opinion. This can be only a superficial impression. What occurs is mostly the revelation and the development of situations and potentialities in certain way already constituted. Something that is in germination which soon manifests and disseminates itself. This right-wing policy has roots in the industry of national and world society, by its inequalities and active and extended tensions, with what it is fermented McCarthyism, fascism and Nazism, since century XX" (IANNI, 2003, pp.15-16).

[18] We highlight here, that the United States – as Empire – are used as allegory, as a representation of a group of sovereign states that adopt in their international politics the realistic posture, by which the authority is in the military power.

all the efforts so that the society knows about its existence – while State terrorism does all it is possible to become "invisible", because it is as efficient as unnoticed it is[19].

This is free market. Weapons are the products. Fear is the bargaining chip. And State (of Exception) guarantees that everything is made under legality. All in the name of security, liberty and peace as human rights to be defended and preserved.

References

AGAMBEN, Giorgio. *Estado de Exceção.* Tradução de Iraci D. Poleti. São Paulo: Boitempo, 2004. (Estado de sítio).

AGAMBEN, Giorgio. *Means without end:* notes on politics. Translated by Vinncenzo Binetti and Cesare Casarino. Theory out of Bounds. Vol. 20. Minneapolis/London: University of Minnesota Press, 2000.

BAUDRILLARD, Jean. *Power inferno.* Tradução de Juremir Machado da Silva. Porto Alegre: Sulina, 2003. p. 8.

BECKER, Howard S. *Outsiders:* estudos de sociologia do desvio. Tradução de Maria Luiza X. de A. Borges; revisão técnica Karina Kuschnir. Rio de Janeiro: Jorge Zahar, 2008.

BORGES, Rosa Maria Zaia; PIRES JUNIOR, Paulo Abrão. "Guerra contra o terrorismo": do Estado de Direito ao Estado de Emergência passando pelo Direito Internacional. In: III Congresso Brasileiro de Direito Internacional, 2005, Curitiba. Estudos de Direito Internacional - Vol. III - *Anais do 3º Congresso Brasileiro de Direito Internacional*. Curitiba: Juruá, 2005.

CHAUÍ, Marilena. Sobre o medo. In: NOVAES, Adauto. *Os sentidos da paixão.* 6. reimpressão. São Paulo: Companhia das Letras, 1995.

CHOMSKY, Noam. Mídia, terrorismo e (des)informação. *Revista FAMECOS.* Porto Alegre, n. 22, dez. 2003, quadrimestral. pp. 117-125. p. 118.

CHOMSKY, Noam. *11 de setembro.* Tradução de Luiz Antonio Aguiar. 4. ed. Rio

[19] It is not by accident that the people who were target of the attacks of the United States after "September 11th" had been Afghanistan or Iraq. All this justifies why North Korean and Iran, for example, are execrated when "don't follow" the legitimate necessity of control and obligate the countries that manufacture weapons of massive destruction to accept inspections and to support a certain number of restrictions imposed by international community. But, on the other hand, we watch, naturally, the permission conceived to Putin – ally "in the fight against terrorism" – to use weapons of massive destruction, as the gas used in the Theatre of Moscow (SEMPRUN, 2006, p.90).

de Janeiro: Bertrand Brasil, 2002.

CHOMSKY, Noam. September 11 aftermath: where is the world heading? In: SCRATON, Phil (editor). *Beyond September 11:* An Anthology of Dissent. London/Sterling, Virginia: Pluto Press, 2002b. pp. 66-71.

IANNI, Octavio. Sociologia del terrorismo. In: LÓPEZ, Ernesto (compilador). *Escritos sobre terrorismo.* Buenos Aires: Prometeo Libros, 2003. pp. 11-46.

ORWELL, George. *You and the atomic bombs* [online]. Tribune, GB, London, first published in October 19, 1945, [viewed 22 February 2013]. Available from: http://mrfilipkowski.pbworks.com/w/file/fetch/46350019/George%20Orwell%20You%20and%20the%20Atomic%20Bomb.docx.

SAINT PIERRE, Hector L. ¿Guerra de todos contra quién? La necesidad de definir "terrorismo". In: LÓPEZ, Ernesto (compilador). *Escritos sobre terrorismo.* Buenos Aires: Prometeo Libros, 2003. pp. 47-75.

SÊNECA. *Aprendendo a viver:* cartas a Lucílio. Tradução de Lúcia Sá Rebello e Ellen Itanajara Neves Vranas. Porto Alegre: L&PM, 2008.

SEMPRUN, Jorge. A paz contra o terrorismo. In: AHLMARK, Per et. alli. *Imaginar a paz.* Brasília: UNESCO, Paulus Editora, 2006. pp. 89-96.

STANLEY, Elizabeth. An attack on truth? In: SCRATON, Phil (editor). *Beyond September 11:* An Anthology of Dissent. London/Sterling, Virginia: Pluto Press. 2002. pp. 206-210.

ZIZEK, Slavoj. *Bem-Vindo ao deserto do Real*: cinco ensaios sobre o 11 de setembro e datas relacionadas. Tradução de Paulo Cezar Castanheira. São Paulo: Boitempo Editorial, 2003 (Estado de Sítio).

Deconstructing Terrorism
Trauma, perversions and auto-immunities

Augusto Jobim do Amaral[1]

Abstract: This short paper intends, since the radical thought of deconstruction, interferes in the reflection on terrorism, seem as a symptom of an auto-immune crisis that cross through the democratic territory. In this sense, in a way that makes it possible to destabilize the discursive structural properties which commonly keep the debate about this subject, it will be necessary to perceive the viral violence caused by the traumatic experience of what is called September 11th (11S). If after the hit of the economic and military order head symbol, we could, far beyond the physiological point of view, perceive the temporality of trauma produced in the future, it will be possible to touch the auto-evident node of the vicious circle of repression. Such auto-immune perversion that sends forth a threaten of the worse to come, on the one hand, seems to have as the exactly target a kind of self-compassion, (arrogant) vulnerability that becomes a perfect alibi for the committing big atrocities, even worse, in an orgy of power, to extreme the deregulation and disorder logic that feeds the speculative logic in a market scale. The foisted idea of a ´major event´ brings together the abolition of any principle and notion of causality, kidnapping and asphyxiating future itself, in a kind non ending war in which prevention – anticipation as if it was a ´non-war´ state –, perpetuated terror and security obsession take in this order the strategic primacy. As a suction bomb, the higher representation, in democracy, of spontaneous suicide of its own defense mechanisms is placated by the perpetual familiarity state with terror, principle of total insecurity that, far from paying attention to the heteronomy came from the other in its irreducible and non-appropriable difference, fortify the control devices and regenerate exactly what is was supposed to disarm, presenting itself as an universal figure of the power incapable of supporting the diversity spectrum.

Keywords: Deconstruction. Terrorism. Democracy.

[1*] PhD in Contemporary Studies (History of Ideas) from the University of Coimbra (Portugal), Master in Criminal Sciences from the Catholic University of Rio Grande do Sul (PUCRS); Specialist in Criminal Science PUCRS, Specialist in Criminal Law by the European Economic and Coimbra University and Professor of Philosophy of Law, Criminal Law and Criminal Procedure PUCRS.

Writing based on an extreme thought process such as deconstruction, if such a thing is possible at all, calls less for an analytical method and much more for destabilizing structural properties that bind certain conceptual schemes. It entails strong arguments to suspend hypotheses and assumptions, the diametrically rigid oppositions that identify a conceptual construction. An *intervention*, under homogenous identities, which does not mean to negotiate with its subject-matter in exchange for some meaning or signification but seeks deconstructive *features* that detotalize self-inclusive totalities. Hence, thinking about the so-called "terrorism" to some extent requires thinking about a symptom: an invitation to reflect *deconstructing something which*, beyond the metaphor, *had been torn down*. In such case, we could seek new criteria to make a distinction between "understanding" and "justifying", condemning and never acquiescing to neutralize the unspeakableness of the deaths. However, we can explain and describe a series of associations the topic raises.

1. First, namely speaking "September 11" means plunging into a mechanic and repetitious pronunciation of a date that betrays the powerlessness of not knowing what we are actually talking about. We repeat it as though to exorcise the thing, conjure it away, deny it – a repetition compulsion as the portrait of a terrifying imperative. To that end, there is the *feeling*, to a large extent constructed, conditioned and circulated by the media, of an unprecedented *major event*, an indelible mark erroneously imprinted and which confines any horizons. Regardless of such hermeneutic apparatus, that which had been "threatened" was the *credit* of American power, the ballast of some world order since the end of the cold war, that is, the discourse that comes to be *accredited* in the world's public space. However, it should be noted that such monumentalizing through death contains within it a certain logic that regulates an entire process which we can precisely call *autoimmunitary*: a strange behavior where a living being, in a quasi-*suicidal* fashion, "itself" works to destroy its own protection, to immunize itself *against* its "own" immunity. Protecting itself by shedding its self-protection. In and of itself, such implacable law has been quite highly regarded to the extent that the aggression the country suffered "came from within", carried out by immigrants trained and prepared in the US.

A second and even more relevant self immunity reflex is seen as we examine the traumatic event. Extending beyond the trauma only marked as an event by the memory and linked to presence or to the past by the repetition compulsion, this order of temporalization must be rethought. Questioning its chronology means realizing the mark of mak-

ing the September 11 look like a "major event" exactly in the impression of a wound permanently open in the *future* – worse than anything that has ever taken place, a sign of an *im-presentable to come* (*à venir*) through the lingering threat in which the trauma of aggression is present and effective.

On the other hand, that which leads to the attempt of making such event unique, in addition to the hodgepodge of causes and effects or the barrenness of any explanation of the sort, it is especially a certain liberation from any references that elicits the effect of a *suction pump* that smothers all future events and, in some sense, encloses it in a self-sufficient totality. Additionally, when absolute evil derives from the enemy's anonymous invisibility, all efforts are directed towards neutralizing it, desperate attempts at movements that feed back the very monstrosity they claim they are trying to defeat. With that, we have the third and most important *perverse* reflex of *autoimmunity* per se: *the vicious circle of repression*. Regenerating the causes of that which they claim to eradicate is the logic of the *endless war*. However, this time without a distinction between enemy states, or through the identification of rebellion or liberation movements, furthermore in a setting in which the territorial determination of the conflict is inadequate.

It should be said, albeit without much haste, that when compared to the possibilities of destruction in the future, invisible and silently arranged from an "IT bomb" in store on computerized networks across the world, the September 11 will seem like an archaic theater of violence from a distant past. In other words, while today it is technoscience that blurs the difference between *war* and *terrorism*, figures that are always contaminative and impossible to tell apart, likewise at any point in history the affirming the differences between State and non-State terrorism, terrorism and national liberation movements, national and international terrorism has been and remains not viable. As is the case with other crucial legal notions, it is this concept's ineffable irreducibility that makes it self-evident and able to be opportunistically appropriated. It is precisely for remaining obscure and dogmatic that it lends itself to being used by hegemonic powers in the manner they see fit. In other words, it is in the semantic instability that we recognize the force strategies of a prevailing power that manages to impose itself and legitimize (and even legalize) the interpretation that best suits it in a given situation.

2. In other words, upon denaturalizing the concept of terrorism we manage to see, among other things, the US interest in exposing their own vulnerability by giving the greatest coverage possible to the aggres-

sion from which they wish to protect themselves. Again, the *autoimmunitary perversion* of a virtual threat stated as a possibility (something that announces itself before becoming something) is enough to impose itself, above all, as the *non-eradicable root* of terror. That somehow requires certain massive compassion for oneself, the representation of some solicitude that turns everyone into a victim. Lest we forget: the opposite of compassion is arrogance, and given certain moral notion under which we are Good and those who attacked us can only be Evil – we were so good that we have been attacked, the tragedy has finally come to prove we are happy and that others envy our happiness! –, which gives us the right to be the strongest, a sort of "masochism of the strongest", is the fact that from now on we are victims and can speak from a position of authority. The *logic of victimization* which, instead of snatching the United States from any ideological dreams, is used as a sedative to, besides the ideology returning to its usual state, enable the *perfect alibi*: unhappiness given credit as ballast that in no way prevents us from continuing to do Good, now unscrupulously.

In view of that, some standard reading should be inverted. The WTC collapse, instead of representing the intrusion of the *real* that shattered the *illusory sphere*, was but the destruction of the very *reality* by the image that invaded it. Something that in fact used to merely inhabit a distant virtual social reality numbed by some informative device finally enters the coordinates of that which we feel is actually real. A dramatic experience deeply lending itself as an artifice to reaffirm the temptations and basic hegemonic coordinates, oblivious, for instance, to any sense of responsibility or guilt towards the third world's plights, because obviously "we are the victims".

In this backdrop, we cannot lose sight of the possibility of some objective complicity between the superpower and that which raises against it abroad/in the motherland. While the goal of said terrorist attacks may include inflicting some instability or deep impact on the world order superpowers, its inherent absurd is the risk that such increase in disorder and disarray may strengthen police and security control devices. The crowning of the globalization process? If, as it seems, all enemy violence is finally an accomplice of the existing order, it is because it makes the speculative system typical of the current capitalist logic go back to the extremes of the general uncertainty principle, which terrorism merely translates as full-blown lack of security. While floating capitals, unpredictable flows, forced mobility and acceleration, and speculative non-places translate the suspended ingredients of the effi-

cient hegemonic violence, it is in the extension of a logic of underlying violence and uncertainty that such phenomena paradoxically contribute to a sort of "power orgy."

The state of *endless war* commented on above, in which the security order is a strategy on a planetary scale, denotes exactly the virulence and a certain "victory of terrorism" in which the *obsession for security* is turned into a naturally (not so veiled) manner of perpetual terror under the universal principle of *prevention*. A sort of global-scale prophylaxis to neutralize stigmatized populations and channel bias-laden differences. Maximum anticipation and dissuasion as references in the search for a criminal ghost, albeit a reality which will concretely haunt the usual disrupting signs of the hegemonic order. A *viral violence* specter which, out of a chain reaction and in addition to destroying our immunities and any ability to resist, announces some "end of history", obviously excluding the one related to preventative terror as the only possibility of an event.

3. In further closing, a *full power*, where the disquieting non-war state in which terror is familiar is above all power in its pure state, also carries within it its own weakness, the most extreme of all: its end. It ends up turning on itself to the extent it is no longer able to question itself, given it differs from anything other than its own unveiled totality: however, as an absolute, in its wild state, it also carries the empty bottom of sovereignty – this inescapable inner anguish brought to light by terrorism.

References

BAUDRILLARD, Jean. *Power Inferno.* Traduzido por Juremir Machado da Silva. Porto Alegre: Sulina, 2003.

CHOMSKY, Noam. *Poder e Terrorismo*: entrevistas e conferências pós-11 de setembro. Tradução Vera Ribeiro. Rio de Janeiro: Record, 2005.

DERRIDA, Jacques. *Vadios*: Dois Ensaios Sobre a Razão. Coordenação Científica e Tradução de Fernanda Bernardo. Coimbra: Palimage, s/d.

DERRIDA, Jacques. "Auto-imunidade: suicídios reais e simbólicos – Um diálogo com Jacques Derrida". In: *Filosofia em tempo de terror*: diálogos com Jürgen Habermas e Jacques Derrida. BORRADORI, Giovanna. Tradução Roberto Muggiati. Rio de Janeiro: Jorge Zahar, 2004.

DERRIDA, Jacques; VATTIMO, Gianni (orgs.). *A Religião.* O Seminário de Ca-

pri. Tradução Roberta Barni (et. al.). São Paulo: Estação Liberdade, 2000.

HOBSBAWM, Eric. *Globalização, Democracia e Terrorismo.* Tradução de Miguel Romeira. Lisboa: Presença, 2008.

NASCIMENTO, Evando (org.). *Jacques Derrida: pensar e desconstrução*. São Paulo: Estação Liberdade, 2005.

ŽIŽEK, Slavoj. *Bem-vindo ao Deserto do Real!*: cinco ensaios sobre o 11 de Setembro e datas relacionadas. Tradução de Paulo Cezar Castanheira. São Paulo: Boitempo, 2003.

Targeted killings
Legal and ethical justifications

Tomasz Żuradzki[1]

Abstract: The purpose of this paper is the analysis of both legal and ethical ways of justifying targeted killings. I compare two legal models: the law enforcement model vs the rules of armed conflicts; and two ethical ones: retribution vs the right of self-defence. I argue that, if the targeted killing is to be either legally or ethically justified, it would be so due to fulfilling of some criteria common for all acceptable forms of killing, and not because terrorist activity is somehow distinguished and gives special privileges to a state that fights it. The practical implication of my analysis is that one of the most spectacular targeted killings, which was the targeting and killing of Osama bin Laden in May 2011, was not justified, because it was only supposed to be a retribution for the September 11th terrorist attacks.

Keywords: the ethics of war, targeted killings, terrorism

1. Introduction

In the recent years one can observe practices that are morally controversial and often incompatible with international law. The advocates of these practices claim that they are the response to the unprecedented threats to the safety. First and foremost, these practises are based on treating the opponents as "unlawful combatants" (these are the participants of military actions, to whom neither the law of armed conflict nor the criminal law is applied); abductions as well as long-standing detention of people accused of terrorist activity with no right to defence or a court trial; extortion of testimonies through tortures or controversial interrogation techniques; the phenomenon of progressing privatisation of military services; finally, it is a so called targeted killings, applied to those suspected of terrorist actions.

The purpose of this article is the analysis of both legal and ethical acceptability of applying the targeted killing policy. In the field of law

[1]Jagiellonian University, Institute of Philosophy. Kraków. Email: t.zuradzki@uj.edu.pl.

the basic dispute on the understanding practices of this kind looks as follows: should they be understood as an extrajudicial execution, or as one of the ways of conducting a war (Kretzmer 2005)? When it comes to the former option, the targeted killing policy should be understood (and at the same time justified) in a way analogical to very rare cases, in which the internal law allows killing somebody without a trial; concerning the latter option - in a way analogical to the cases of killing fighting opponents, acceptable in the law of armed conflict. In turn, the dispute on the justification of the acceptability of the targeted killing policy looks as follows: should this policy be understood in the categories of the dispensation of justice, or as a self-defence action. As I will prove in this text, the theoretical misunderstandings concerning the legal and ethical justification of the targeted killing policy are often caused by utterances of the politicians themselves, who, while seeking the justification for their actions, refer to mutually contradictory legal and ethical paradigms.

Analyses conducted in this text will be based on the main hypothesis of the research project I currently conduct, which assumes that the norms regulating the acceptability and ways of carrying out armed conflicts should be consistent with moral intuitions concerning the use of violence, when it comes to individual cases. Therefore I claim that the effective justification of the legal acceptability of the targeted killing policy should be close to the justification of the acceptability of killing in the armed conflicts. The ethical justification should refer to the necessity of self-defence actions of a given community.

The main problem I would like to emphasise is that when it comes to the targeted killing policy killing is very often the effect of preventive actions, whereas the typical justification of self-defence refers to the necessity of defence from the existing and unexpected threat. The practical implication of the argumentation presented in this article looks as follows: while it could help in legal and ethical justification of many cases of using the targeted killing policy, it could not be applied in the case of one of the most spectacular actions, which was the targeting and killing of Osama bin Laden in May 2011, which, as one can understand, was supposed to deliver justice for the terrorist attacks from the 11th of September 2001.

2. Targeted killing and the war against terrorism

Targeted killing of selected people has probably always been an

element of armed conflicts and various wars between states: the leaders of other states were secretly killed, as well as people who worked on new types of weapon, and whose disappearance caused civil unrest, etc. However, in most cases the states or groups using this solution did not speak about it openly, but most often denied any connections with this or that assassination. The new aspect that appeared in the current targeted killing policy is the fact that in the several recent years it was recognized as an official tactics of conducting military action and anti-terrorism action in two important democratic countries: Israel and the USA.

Israel has officially applied the targeted killing policy since 2000, when Hussein Abayat was killed this way in the West Bank. Obviously, it is highly probable that when it comes to Israel, such a proceeding is nothing new, but undoubtedly the public admission of using this policy was something new. Other much publicised assassinations were those of Hammas leaders: Ahmed Yassin and Abdel Aziz al-Rantisi, who were targeted and killed by the Israeli forces in 2004. It is estimated that in the period between November 2000 and October 2012, the Israeli forces have killed 437 people as a result of the targeted killing policy, mostly in the Gaza Strip of whom only 261 people were killed "according to the plan" and others were civilian casualties (B'Tselem 2013).

Similar policy of fighting new threats to public security has recently been adopted by the United States of America. In November 2002 six people were killed in Yemen by a rocket launched by a drone. One of the victims was Qaed Salim Sinan al Hareth, bin Laden's bodyguard, who was supposed to be co-responsible for the attack on the American ship Cole in 2000, in which 17 American soldiers died. One of the most recent examples of how severe legal or moral problems can be caused by the targeted killing policy is a relatively late (September 2011) killing of Anwar al-Awlaki by a rocket launched from an American drone. He was a citizen of the USA, who had lived in Yemen for a couple of years, from where he called for conducting the holy war with the West. The permission for launching the rocket was given by the USA secretary of defence. The problem is that - as the critics of this decision argued - American citizens must not be killed without a trial. In turn, the advocates of the decision made by president Barrack Obama's administration presented two ways of argumentation. First of all, they claimed that, according to the law of armed conflict, in war situations one can be killed without a trial, if they fight on the opposite site, even if they are a citizen of a given country; it is also allowed to execute traitors captured during military

action in an enemy's army. Second, they argued that al-Awlaki's assassination is analogical to some actions in the period of peace, e.g. necessary defence that allows police officers or soldiers to kill a given person without a trial, if their actions are a direct threat for other people's lives. In this case one can perfectly see one of the main theoretical problems concerning the justification of the targeted killing policy: if it should be understood in the category of the law of armed conflict or in the category of local law.

The significance of this problem is also proved by the fact that at the time of Barrack Obama's presidency the targeted killing policy became one of the main methods of fighting terrorism. At the time of Obama's rule, American administration issued a permission to conduct many more "target and kill" operations than during the two terms of George W. Bush. According to one of the reports prepared on the basis of the data which appeared in reliable media (both Western and Middle-Eastern), between 2004 and 2013 the USA conducted 422 attacks in Pakistan's and Yemen's territory (including 49 at the time of George W. Bush's presidency), killing from 2426 to 3969 people (New America Foundation 2013; The Bureau Of Investigative Journalism 2013).

The targeted killing policy is commonly recognised as an element of anti-terrorist actions. A model example, to which many authors investigating this problem refer, looks as follows (Blum, Heymann 2010): imagine that American Intelligence Services obtained reliable information about people preparing a terrorist attack against the USA. However, potential terrorists are on the territory of a state, which is not able to enforce the law itself. Obviously, American administration can formally ask the authorities of this state for capturing potential terrorists and judge them on the basis of existing regulations and international obligations of this state. The problem is that the state, where the terrorists are active is weak, the authorities do not control the whole territory effectively or simply refuse to cooperate in this matter - in spite of the obvious international provisions concerning this issue. In such a case - as the supporters of such policy claim - the only effective prevention against the planned terrorist attack is targeting a potential terrorist or their group and striking in an appropriate moment, e.g. by a drone.

However, some authors underline that limiting the targeted killing policy to an anti-terrorist practices is a mistake (Statman 2012). Even if Israel or the USA call every attack on their citizens, territory or property conducted by a group of fighters a "terrorist attack", it is important to differentiate attacking civilian targets (e.g. the WTC attack from the

11th of September 2001) from attacking military targets (e.g. the suicidal attack from the 12th of October, 2000 on American guided missile destroyer USS Cole stationing in Aden, Yemen). According to many popular definitions of terrorism, an attack on military target is not counted as a terrorist attack (Coady 1985, cf Held 1991). What is more, omitting complicated definitional questions concerning the understanding of terrorism, one can imagine using the targeted killing policy during the traditionally understood armed conflicts (e.g. aimed at scientists working on new types of weapon).

Therefore it seems that for the effective justification of targeted killing policy - either ethical or legal - there is no difference if its targets are terrorists (also those potential) or other categories of people. Therefore in this text I will make an assumption that the criteria allowing for justification of killing are the same, no matter the formal classification of the victims, and in this way I will question if there are two different systems regulating the ethical acceptability of killing, depending on whether a given conflict is armed or not (McMahan 2004, Żuradzki 2010a). The criteria allowing for justification of killing are the following: an attack (also a potential one) of the second side has to be unjustified; that killing of a future perpetrator is the only way to stop the attack; that such a killing is proportional to the evil intended by the future perpetrators of the attack etc. Some investigators of international relations or the ethics of war would postulate a requirement that the perpetrator has to be morally responsible for the attack planed by them or a group they belong to (so they would not be only an instrument in somebody's hands). Therefore, if the targeted killing policy has to be ethically justified, it would be so due to fulfilling of some particular criteria, common for all acceptable forms of killing, and not because terrorist activity (also a potential one) is somehow distinguished and gives special privileges to a state that tries to fight it. Therefore the basic rule of the justification of the targeted killing policy has to be that the individuals against whom these methods can be applied, fight in a way that makes this policy the only effective way of fighting, and at the same time killing these individuals is acceptable in the light of the widespread moral intuitions concerning general situations, when killing is allowed at all.

It should also be explained why in this text I write both about legal and ethical justification. By a legal justification I understand such a justification that tries to use the currently existing legal institutions and regulations to justify legality of this policy. Ethical justification is understood as such a justification that uses theories or doctrines in

broadly understood normative ethics to justify the fact that at least some cases of targeted killing are morally acceptable. When it comes to the targeted killing policy, the ethical and legal matters are closely bound to each other. Firstly, the authors who criticise targeted killing policy usually perceive it as both ethically and legally unacceptable, whereas those who defend it do it both in terms of ethics and law. Secondly, law - including international law - has its roots in various theories and doctrines of normative ethics. In particular, it refers to human rights and International humanitarian law. Thirdly, illegality of given practices (in particular when it comes to the law of armed conflict) can prove their unethicalness (although it does not work the other way around: many unethical practices are legally acceptable due to various reasons). Of course, it is worth noting that severe differences between legal and ethical normative evaluation of a given situation can exist: law (international law in particular) takes into consideration consequences of a given norm, therefore many fixed ethical norms are not codified in legal codes.

3. Extrajudicial execution or the law of armed conflict

In this chapter I will present the main theoretical problem connected with justification of the targeted killing policy. Although in Israel this policy had been publicly acknowledged even before the 11th of September 2001, in the USA the application of this policy is in close relation to the so called "war on terrorism". In his Address to Congress from the 20th of September 2011, President George W. Bush said:

> We will direct every resource at our command - every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war - to the disruption and to the defeat of the global terror network [...]. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime (quotation from Ratner 2010, 251).

In this speech one may found the sources of the present theoreti-

cal problems connected with understanding the nature of and justifying the targeted killing policy. From this President Bush's utterance one can draw a conclusion that the USA responses to the attacks on WTC will have various shapes: he speaks both of diplomatic and intelligence service's measures, as well as law enforcement (which suggests non-military actions) and military measures (which suggests an armed conflict). On one hand, a response to terrorist attacks through law enforcement, means treating a terrorist act as a criminal - according to both the law of the country on which territory a given act was committed, and international criminal law. In such a case, the actions should be limited to police methods, both the preventive ones and those aiming at punishing the perpetrators, as well as different methods characteristic for criminal proceedings; extradition, cooperation with intelligence services, cooperation at formulating indictment, etc. On the other hand, terrorist attacks are sometimes understood as a part of an armed conflict or its beginning – it is visible in the fragment of President Bush's speech, in which he threatens the states that give shelter to terrorists. Such an understanding does not mean law enforcement, but a regular armed conflict, during which one is allowed to kill the opponents without warnings or any court sentence.

However, it is worth noticing that some aspects of the September 11 attacks were nothing new, when it comes to using the whole spectrum of measures to fight terrorism. Both common criminal measures and military methods have been already used in fighting terrorism. What is more, the type of a response - as one could assume - did not depend on the scale of attack. For example, after very bloody attacks of 1988 (Lockerbie - 270 victims, mostly the USA citizens) and 1989 (UTA 772 flight, 171 victims, mostly citizens of France), governments of the USA, the United Kingdom and France appealed to Libya for an extradition of the terrorists, who were finally extradited after 10 years. Then they were sentenced in regular criminal trials. Also the investigation after the first attack on WTC in 1993 was conducted in accordance with regular criminal procedure. However, sometimes the United States of America, as well as other countries (e.g. Israel) assumed that a terrorist attack (or its threat only) is enough a basis for acting as if they were attacked by foreign countries, which means referring to military methods and not measures of enforcing criminal law. It happened, for example, in 1986, when the USA bombarded Libya in retaliation for the attack on a Berlin club, popular among American soldiers, in which two USA soldiers died (there were three victims altogether). Similar methods were

used in 1993, when the USA bombarded Iraq in retaliation for the plan of George H.W. Bush's assassination made by Hussein, or in 1998, when Sudan was bombarded in retaliation for the attacks on American embassies in Africa.

In this part of my article I will compare two paradigms (Ratner 2010). I will begin with understanding terrorist activity as a crime, which is fought on the basis of international norms connected with respecting human rights. According to United Nations Charter, states are not allowed to make any operations on the territory of another state without a permission of this state. What is more, no state is obliged to issue such a permission, it is also not obliged to agree on cooperation with other countries concerning extradition of people suspected of criminal activity. In fact, however, most of countries signed various agreements or treaties concerning extradition, and the United Nations Security Council's resolution adopted after the 11th of September 2001 instructs the states to extradite people suspected of terrorist activity. According to the International Covenant on Civil and Political Rights of 1966, states must not kill its citizens without a court sentence, apart from some rare exceptions (I will investigate them below). This very Covenant includes an obligation of conducting a trial for detainees. There is also a customary rule that states are responsible for human rights violation by non-state parties on their territory, it does not, however, mean that other countries have right to invade territory of a given state.

In turn, the second paradigm which refers to terrorism as a threat fought by methods characteristic for armed conflicts says that states are allowed to conduct military operations only as a self-defence after an attack of an enemy or right before it. They can also conduct such actions with permission of the United Nations Security Council (e.g. humanitarian interventions). Referring to the targeted killing policy, the most problematic is the obscurity of the international law rules concerning defence from aggressors who are not states, but, for instance, terrorist groups. Another problematic issue is the acceptability of attacking in retaliation against a state, from whose territory the attack came. What is not controversial is the fact that in military operations states are allowed to kill the opponent's fighters with no warning. The fighter themselves should differ from civilians, who must not be a target of killing, but it is allowed to conduct military operations, which are assumed to be the reason of civilian deaths. However, damages and death of civilians should not be disproportionate to the military benefits expected from the conduct of a given military operation. Those fighting at the oppo-

site side, after being captured cannot be judged or executed only for the reason that they were fighting. They can be judged only when they are accused of committing a war crime.

The following question is obviously arising: which of these paradigms should be valid in case of the targeted killing policy evaluation? At first glance it seems that if the USA does not conduct an armed conflict with another state currently, the paradigm referring to human rights is the proper one. However, this paradigm would certainly not be the basis for justifying the targeted killing policy. An example may be the Convention for the Protection of Human Rights and Fundamental Freedoms, in which the USA is a party. Article 2 of this Convention says that nobody can be killed, except from the cases of court sentences executions. It also says that it is allowed to kill someone in three exceptional situations: 1) in defence of any person from unlawful violence; 2) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; 3) in action lawfully taken for the purpose of quelling a riot or insurrection. Theoretically, only point 1 could be possibly used as a justification for the targeted killing policy, however it is commonly interpreted as a defence from an immediate threat, and not targeting and killing someone long before the attack he is planning.

Therefore the USA itself called the anti-terrorist actions after the 11th of September 2001 a "war on terrorism", and this way qualified it as an armed conflict, during which it is allowed to kill those fighting on the opposite side without a permission or a sentence (even if at a given moment they do not conduct military operations). Basically, during an armed conflict it is allowed to attack only fighters, but also civilians lose their immunity when they actively participate in military operations. American administration deliberately did not specify if the war with terrorism is an international conflict or not, in order to avoid the obligation of applying some rules of *ius in bello*. It was decided that, on one hand, a so called "war with terrorism" is not an internal conflict, since it is not limited to the borders of one country. On the other hand, it is not international, since it is not waged between any particular states. As a result, the USA assumed that there is a legal gap and the regulations of Geneva Conventions and other regulations of international law concerning e.g. the way of treating war prisoners or other people, which are valid in time of either international or internal conflicts, are not applied during the so called "war on terrorism". This way a category of people was established, called by the USA administration as "unlawful combatants". According to the rules applied by American authorities, those people

have neither a status of fighters (so they are not treated as war prisoners), nor the status of civilians. As a result, it was assumed that they are subject to criminal responsibility for the military operations they conduct (in a normal situation the enemy's soldiers cannot be judged for their participation in fight only, as long as they did not commit any war crimes). They are also not restricted by the limits of detention time which are applied to the civilians.

Apparently, the armed conflict paradigm is much more appropriate when it comes to the justification of the targeted killing policy. However, several problems exist. The most important of them is the risk of mistake: I quoted statistics saying that a considerable number of the targeted killing victims are civilian casualties that happened to be next to the actual targets. Somebody might assume that this policy does not meet the requirements of proportionality, which is included in *ius in bello* regulations, and according to which civilians can be casualties of an attack on a military target, but the sufferings inflicted on the civilians have to be proportional to the scale of the military target attacked in a given operation. However, this accusation would not be characteristic for the targeted killing policy - in many contemporary armed conflicts the casualties comprise a disproportionately big percentage of all victims (Żuradzki 2010b).

4. Retribution or self-defence

After targeting and killing of Osama bin Laden by the American Special Forces on the Pakistan's territory, American president barrack Obama said that "justice took its course". Similarly, at the first anniversary of bin Laden's assassination Obama said that his country managed to "bring justice to a man who killed over 3 thousand citizens". Similar conclusions appear also in scientific articles (David 2003). These statements are surprising, since they mean that a typical example of implementation of targeted killing policy, which was bin Laden's killing, was an act of justice understood in terms of retribution, or as a retaliation for the harm done to a give community. One can conclude from American president's speech that in this case he was the judge himself and the executors of the "sentence" were American soldiers. In this part of my article I will try to prove that the targeted killing policy – if it is possible at all to justify it in the field of ethical theories - it would rather be accomplished through a reference to self-defence and not delivering justice.

Firstly, one has to be a death penalty supporter in order to claim that sometimes "delivering justice" requires killing a man. In contemporary times it is quite controversial, since most of Western countries abolished death penalty. This means that delivery of justice - no matter the scale of the crime - never requires the killing of the perpetrator. Of course, one can argue that even in these countries, in which death penalty was abolished (e.g. Poland), the possibility of its reintroduction is not completely excluded in special cases, e.g. when it comes to armed conflicts - and it is analogical to most cases, of the targeted killing policy application.

Secondly, even if one would agree that delivering justice sometimes requires killing, after targeting the perpetrator should rather be brought into court than killed. Making the decision of bin Laden's killing Obama obviously infringed on the separation of powers characteristic for democratic systems: executive power should not pass sentences and then execute them. In all democratic systems it is widely accepted that it is the independent judiciary power, which can more objectively investigate the guilt of a suspect and adjust the sentence to it. At this point a problem connected with this issue is visible: the targeted killing policy - understood as delivery of justice - would assume only one type of a "punishment", which is killing, while passing sentences in normal conditions always adjusts the punishment's level to a defendant's guilt.

Thirdly, the targeted killing policy is connected with a severe risk for outsiders. The data quoted below suggest that, e.g., in case of Israel, only circa 60 percent of "target and kill" actions' victims are the people, who were supposed to be killed - the remaining 40 percent are random witnesses, accompanying persons, sometimes family, including children. When it comes to justice delivery, it is not widely accepted to allow for such high human costs. Obviously, the work of the administration of justice – like every other institution – is burdened with mistakes, but certainly in no democratic country the percentage of mistakes made when delivering justice is as high as in case of the currently applied targeted killing policy. It is even more outrageous, since in this case the mistakes are killing casualties who happened to be close to a victim at a given time. There is also a different kind of risk connected with the targeted killing policy: capital punishment opponents claim that the fact of the system of justice's fallibility is an argument against applying death penalty, which is irreversible. Similar arguments can be used against the targeted killing policy.

Finally, justification of the targeted killing policy which refers to

retributive justice would concern only those people, who have already committed an act of terror. Whereas in bin Laden's case such justification would work, it could not be used to defend many (maybe even most of) cases of using this policy, in which one kills people who only plan a terrorist attack or call for its (e.g. Anwar al-Awlaki).

These are the reasons why a better justification of the targeted killing policy should be found. The basic question that should be answered at this point sounds: why is killing allowed in some circumstances? Various doctrines and ethical theories agree that there are two main ways of justifying the acceptability of taking one's life (McMahan 2012).

Above all, someone can be responsible for threatening other people or just hurting them. If an armed aggressor tells us that they will kill us and there are reasons to believe them that this threat will come true, practically all ethical systems allow us – if only we are able to do it and there is no other way of stopping the aggressor – to kill them in self-defence. In such a case outsiders or we ourselves would be allowed to do it – to defend other people. Some people believe that such an aggressor suspends their right to life or their right no to be killed.

The second way of justification is a bit more controversial. For in this case a given person would not suspend their right to life, or the right to not be killed, but killing them is necessary for certain reasons. One can understand it in two different ways.

From the agent-neutral perspective: in this case killing someone could be justified by the fact that no action would cause a big tragedy - much bigger than killing a given individual. It is worth noting that, although it can be associated with a conventionalist attitude (which is a normative ethics view saying that a moral value of a deed depends on the value of its expected or actual consequences), it does not have to be always this way. Even some people assuming non-conventionalist positions would say that some choices happen to be so tragic that one person's sacrifice is a "lesser evil" than a sacrifice of very many people.

What is more, the necessity of killing can be agent-relative. In this case a subjective perspective of a given agent would be taken into consideration, from whose point of view the situation would be evaluated. Let us provide an example of it: some people claim that when defending the members of one's family, the one is allowed to do the aggressor more harm than the aggressor would do the potential victim. Many normative systems, in example, would allow a parent to kill an innocent person in order to avoid their child's permanent injury. The parent has special relations with their child and a given situation is morally evalu-

ated from the perspective of a worried parent and not a neutral decision-maker whose main task is to minimalise suffering in a given population. However, it could not be justified from the agent-neutral perspective: according to this perspective, since even permanent injury is not as bad as death, it is not allowed to kill an innocent man only to save somebody from injury (as long as the person to be killed is not responsible for the child's injury).

Sometimes the supporters of the traditional ethics of war use this second way to justify the acceptability of killing in armed conflicts. What they claim is that very often private soldiers are not responsible for the fact that they caused a threat and this way they do not suspend their right to life. The most obvious example would be as follows: the Polish soldiers in September 1939 did not suspend their right to life, they did nothing that would suspend this right. However, in the light of the still valid regulations of the armed conflict law German soldiers were allowed to kill them - as long as they conducted military operations in accordance with the law (they did not murder civilians, did not use certain types of weapon, etc.). This is what one of the main assumptions of the traditional just war doctrine is based on - the moral equality of the fighters. Michael Waltzer writes in his book *Just and Unjust Wars*: "The two sorts of judgement (which are *ius in bello* and *ius ad bellum* - TŻ) are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules" (Walzer 2006: 21). It means that all the soldiers who participate in the conflict, no matter if they fight for the just cause or not, can be killed by the opponents, no matter if they are anyhow morally responsible for the conflict's outbreak.

This basic assumption of the traditional just war doctrine is increasingly questioned by philosophers dealing with the ethics of war (McMahan 2009). Interestingly, as I have already mentioned, it was also questioned by the American administration, which on one hand says that they fight a just war with terrorism, but, on the other hand, does not agree that their opponents can fight it - therefore they are treated as "unlawful fighters". This is why the American administration questions the assumption fundamental for the just war doctrine, saying that even unjust war can be fought in accordance with rules and the soldiers themselves cannot be morally and legally responsible for it. For this reason it seems that to justify the targeted killing policy it is better to use the first of the types of justifying acceptability of killing, described in this part. It is a justification saying that it is allowed to kill only those, who are

causatively responsible for posing a threat for other people or just for planning of posing such a threat.

5. Summary

In this article I presented the possibility of justifying the legal and ethical acceptability of applying the targeted killing policy. To this end I used a modified paradigm of an armed conflict. I decided that it is much better for justifying the policy discussed here than the sometimes quoted paradigm of law enforcement. I also outlined the possibility of modifying the now existing paradigm of an armed conflict in a way that it is allowed to kill only those people who are causally and morally responsible for posing a threat (e.g. political leaders responsible for the conflict) or for the intention to pose a threat (e.g. the leaders of a terrorist organisation who plan an attack). The modification proposed in this article would be important for evaluating the acceptability of the targeted killing policy: it would be allowed to conduct it only in extraordinary circumstances, in which it would be the only possible way to stop the severe threat for safety (e.g. planning a terrorist attack, armed conflict). However, this policy would not be justified by means of retributive justice, which means seeking a just retaliation for the previously committed deeds.

Acknowledgement

This work was supported by National Science Centre (NCN) grant SONATA number UMO-2011/03/D/HS5/01152.

References

BLUM, G., HEYMANN, P. Law and Policy of Targeted Killing. *Harvard National Security Journal*, 2010, 1, 145-170.

B'TSELEM INTERNET DATA (The Israeli Information Center for Human Rights in the Occupied Territories). Available at http://www.btselem.org/statistics/fatalities/any/by-date-of-event [viewed 15 April 2013].

COADY, C.A.J. The Morality of Terrorism. *Philosophy*, 1985, 60 (231), 47-69.

David, S.R. Israel's Policy of Targeted Killing. *Ethics and International Affairs*, 2003, 17, 111-126.

HELD, V. Terrorism, rights, and political goals. In: R.G. Fray, C.W. Morris (eds). *Violence, terrorism, and justice*, Cambridge: Cambridge University Press, 1991, 59-85.

KRETZMER, D. Targeted Killing of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence? *European Journal of International Law*, 2005, 171, 171-212.

MCMAHAN, J. The Ethics of Killing in War. *Ethics*, 2004, 114 (4), 693-733.

MCMAHAN, J. *Killing in War*, Oxford: Oxford University Press, 2009.

MCMAHAN, J. Targeted Killing: Murder, Combat or Law Enforcement. In: C. Finkelstein, J.D. Ohlin, A. Altman (eds), *Targeted Killings. Law and Morality in an Asymmetrical World*, Oxford: Oxford University Press, 2012, 135-155.

NEW AMERICA FOUNDATION. http://counterterrorism.newamerica.net/drones [viewed 15 April 2013].

RATNER, S.R. Predator and Prey: Seizing and Killing Suspected Terrorists Abroad. *Journal of Political Philosophy*, 2007, 15 (3), 251-275.

STATMAN, D. Can Just War Theory Justify Targeted Killing? Three Possible Models. In: C. Finkelstein, J.D. Ohlin, A. Altman (eds), *Targeted Killings. Law and Morality in an Asymmetrical World*, Oxford: Oxford University Press, 2012, 90-111.

THE BUREAU OF INVESTIGATIVE JOURNALISM. Available at http://www.thebureauinvestigates.com/category/projects/drones [viewed 15 April 2013].

WALZER, M., *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 4th ed. New York: Basic Books, 2006.

ŻURADZKI, T. The ethics of war and the permissibility of killing [Etyka wojny a dopuszczalność zabijania]. *Diametros* 25, 2010, 103-117.

ŻURADZKI, T. Israel's Intervention in Gaza Strip 2008/2009 or Why the Soldiers Should Sometimes Risk Their Lives to Safe Their Enemy's Civilians? [Interwencja Izraela w Strefie Gazy (2008/09), czyli dlaczego żołnierze powinni niekiedy narażać swoje życie, by ocalić ludność cywilną wroga]. Kraków: Interdyscyplinarne Centrum Etyki UJ, 2010. Available at http://www.incet.uj.edu.pl [viewed 15 April 2013].

The paradigm of Post-War
The construction of a myth

Lara Freire Bezerra de Sant'Anna[1]

Abstract: With the end of World War II takes force the moralization process of law, in the apparent rapprochement jusnaturalists ideals. This process is explained by the belief that legal positivism, the doctrine of law dominant until then, had not only legitimized the abuses of the dictatorial regimes, which have passed under the scrutiny of legality, as left "defenseless people and lawyers against laws more arbitrary, more cruel and more criminal "(Radbruch, 1945, p. 1). The human being himself responsible for the tragedies, looked away from himself to blame for an event that, if it was terrible in its magnitude, was not the first, nor the last. Starting from this premise, it explores the role of the Nuremberg Tribunal, for exposing its contradictions, media demonstrate the character of their decisions. To make use of contemporary words, this sudgn nothing more than a media trial, not only for having tried and convicted only a few pairs of Nazi Germany, handpicked, leaving the rest of Europe to warm up under the mantle of oblivion, as if anything had cooperated, for not having solved the problem of the Jews in that old continent, where they remained victims of segregation and prejudice (Judt, 2008, p. 790). It is a central concern of this work to deal with the issue of the overcome of legal positivism, because it constitutes the basis for conclusions and implications of the remaining components of the postwar myth: the idea that legal positivism was not only the theory of the Nazi state, but also it was responsible for its success, for preaching a blind and uncritical obedience to the law. This premise is refuted in this work to demonstrate that, far more than revolutionary paradigm, the postwar idea represented, above all, a myth. This rebuttal will be divided into two parts: 1) legal positivism was not the theory of the Nazi state, 2) legal positivism does not preach an absolute and blind obedience to the law. The aim is to demonstrate that an authoritarian state, although it continues to have laws, is not a rule of law itself, because it ignores the most important principles of law, being in fact a exceptional state. It seeks, moreover, emphasize the mistake of proposing critics and a limitation of democracy through undemocratic examples. It's academic work, with a focus on historical and philosophical analysis of law.

Keywords: Post-war paradigm ; legal positivism; Nazi state; illegality .

[1] Master in Public Law by the Public University from Sergipe. E-mail: lara.f.b.santanna@gmail.com.

1 Building a paradigm for the Post-War : a new model of law and democracy

Despite the U.S. praxis of judiciary substantive interpretation and control of law since the late eighteenth century, in world scale is with the end of the Second World War that takes place the process of moralizing force of law, in obvious approach to American model, which has a clear inspiration in natural law. This process is explained by the belief that legal positivism was the dominant doctrine of Law until then, which had not only legitimized the abuses of the dictatorial regimes, which have passed under the scrutiny of legality, but also had left "defenseless people and lawyers against the most arbitrary, cruel and criminal laws" (RADBRUCH, 1945, p. 1) . The human being himself, responsible for the tragedies, looked away from themselves to blame for an event that, if it was terrible in its magnitude, was not the first, nor the last.

Moreover, the Nuremberg Trial, blacklighted with the spotlight of justice, reason and the rule of law, words of the American prosecutor Robert Jackson, in his speech by the beginning of the trial[2], it was actually the imposition of winners force and revenge[3]: for this reason, and for no other, the atomic bombing of Hiroshima and Nagasaki, conducted by the United States of America, was never charged, nor tried as a war crime[4] and against humanity[5]. To use contemporary words, it was a media trial, not only for having tried and convicted only a few pairs of Nazi Germany, handpicked, leaving the rest of Europe to bask under the cloak of forgetfulness, as if had not cooperated, but also for not having solved the problem of the Jews in that old continent, where

---

[2] Dialogue from the documentary of Nazis Trial in Nuremberg. [on-line] Available in https://www.youtube.com/watch?v=UGMOD_UkeYY. Captured in February 21, 2013.

[3] Tony Judt (2008, p. 68), says: "Many people complains about the trials, defining them as "winner justice", and that's what they really were, in fact." Also in this sense, the words of the own General LeMay, in a interview for the Time Magazine: "I believe that if we had lose the war I would have been hanged as a criminal war. Happily, I'm in the winners side" (*apud* MOURÃO, 2005, p. 695).

[4] It must be emphazed that war crime means, according to Ronaldo Rogério Fretas Mourão (2005, p. 695), the violation of law and uses of war, usually when one of the parts voluntarily attacks non-military targets. That was the case of Hiroshima and Nagasaki.

[5] In the opposite way of the speach of the time, we now know that Japan was about to surrender, what makes sure that the bombing was motivated by the necessity of power demonstration in front of the URSS, as a strategy to avoid its growing (MOURÃO, 2005, p. 683).

they remained victims of segregation and prejudice (JUDT, 2008, p. 790). The beautiful speech of that promoter, highlighting that moment as a milestone of a new model of international relations, in which barbaric crimes against humanity would no longer be tolerated, proved to be an empty rhetoric.

That War Tribunal, however, marked the beginning of the process of (re) moralization of Law by resurrecting natural law elements, using them as a validity criterion of law: it was understood that certain provisions of the Nazi State were so injustice that it could not be regarded as rules of law and should fall under the yoke of nullity. Declared void, the floor was opened to punish those who acted in obedience to these laws, both citizens, the authorities (HART, 2009, p. 268-269). The Federal Constitutional Court of Germany also used this jurisprudence to prosecute several relevant cases connected to the Nazi laws:

> Law and justice are not available to legislature ... It was just the time of the National Socialist regime in Germany who taught that the legislature can also establish injustice ... Therefore, **the Federal Constitutional Court said the possibility of denying to 'legal' National Socialists rules the validity of law, since they contradict the fundamental principles of justice in a so evident way, that a judge who intended to apply them or recognize their effects would be pronouncing injustice, not a right.** (BVerfGE cited ALEXY, 2011, p. 7) (emphasis added)

What would be the " fundamental principles of justice" but his own and unmistakable Natural Law? Radbruch does not hesitate to address the issue of retroactivity of postwar laws with the statement that "the content of these laws belong to a supra law, whatever the label applied: divine law, natural law or law of reason." The condemnation of positivism came to be added to two other ideas, widespread: the discrediting of majority power, due to the perception that the legislature could also come to perpetrate barbaric[6] (BARROSO, 2010, p. 7) and the election of Judiciary Power, which, as the applicator of the new law, gets starring role in this "new world".

This is followed by a reworking of the democratic model, with the adoption of a constitutionalism that breaks viscerally with the pop-

[6] In the same sense, the words of Mireille Delmas-Marty (2001, p. 163): "It has been needed the Second World War to discover that so-called "civilized" nations could produce a law directly opposed to the sense of respect of the human being".

ular sovereignty basis, imposing moments of unavailability of the standard, as it occurred in the Middle Ages, and imposing a restructuring of the idea of separation powers. It is proposed, especially the limitation of democracy.

Deserves to be discussed more carefully the proposition about the overcoming of legal positivism, constitute the basis for conclusions and implications of other components of the post-war myth : the idea that positivism was not only the theory of the Nazi state , and was responsible for their success , for preaching one blind and uncritical obedience to the law . This premise is refuted in this work to demonstrate that , far more than the revolutionary paradigm , the idea propagated in postwar represented, above all, a myth . This rebuttal will be divided into two parts : 1) positivism was not the theory of the Nazi state , 2) the positivism preaches an absolute and blind obedience to the law .

We seek to emphasize, moreover, the nonsense of proposing a democracy limitation based on non-democratic experiences.

2 Brief exposure of German History: how legal positivism not represented the ideology of the Nazi state.

Firstly, a clear and obvious observation: any human being, or group of it, furthermore when endowed with power, can perpetrate barbaric. This was nothing new in History or stopped happening because of this supposed model that Nuremberg trial came to draw. The first premise outlined above seems to be based on a false idea: that Nazis have imposed that state of injustice to a population and a community of lawyers, among whom the judges, law enforcers, who were vehemently opposed to the National socialist ideology[7]. That's because we must admit that a State is composed not only by the executive and legislative

[7] When we know that the antisemitism was an old problem of Europe. Tony Judt (2008, p. 72) tells the impressive index of Post-War: between 1945 and 1949, the absolute majority of German still believe that Nazi was a good idea, but not well applied; in November of 1946, 37% of the interviewed German expressed the opinion that the "the extermination of Jews, Poles and other non-Aryans was necessary to German security"; still in 1946, one in three German defended the idea that Jews should not have the same rights as the "Aryan race" human being; six years later, in 1952, 37% of German believed was not good to have Jews in his territory; in the same year, 25% of German expressed a positive idea about Hitler. It is also important to emphasize that this was not only a German problem, and the Holocaust project had a high support of all most all Europe (JUDT, 2008, p. 790).

powers, but also by the judiciary, which, even with no genetic power, has a very important role to solve conflicts led to it and, for some jurists, the important role of saying the meanings of law. From this evidence, we should ask what kind of role has been played by judiciary in that perverse Nazi State: faced with legalized injustice, judiciary resisted or consent? What kind of law was told by judges during the dark period pre-1945?

This question is important, even to understand the answer which was formulated: the famous idea expressed in the words of Radbruch[8] (1945, p. 1), above mentioned, according to which positivism had been responsible for "acquiescence" not only by judges, but also by the legal community in general. Under the general belief that, by understanding positivism that legislation coincides with law, and having been the acts of the Nazi state supposedly imposed by the legal form, nothing could make those which had law as a working tool, but obey those legal commands blindly.

Unlike repeats majority doctrine, however, the dominant doctrine in Nazi German was not positivism, but a jusnaturalist slope of free law, who preached the non-submission of Justice to legislation and the existence of a suprapositive law which might be called in cause by judges in specific cases (MAUS, 2000, p. 197). But to demonstrate this idea we must go back a bit in time thought the Empire, under the rule of Bismarck, so we can understand the ideology of Judiciary in the Weimar Republic and later in Hitler's Germany.

The ultimate monarchic period in Germany was marked by the presence of Otto von Bismarck beyond the post of chancellor, on behalf of the king, who remained there until his final days, a period marked by extreme deference of the judiciary to political power. Not without reason: in his condition, Bismarck made a real cleaning in Judiciary, removing and later retiring magistrates with possible progressive and liberal attitudes, which could have received any influence of the revolutions of

[8] It is interesting to note that Radbruch was minister of Justice during the Weimar Republic, moment which had watched the greater support given by judges to the Nazi Party, while severely repressed members of the Socialist Party. Had experienced a non blind Justice, whose balance hanged to one side. Had also received many complaints about several murders left unpunished by judges, fact that he had recognized by the time he was minister. So it is quite strange his assertive about positivism, taking in count that since the Weimar Republic the judiciary praxis was far away from legality (MÖLLER, 2012, p. 241).

1848 (MÜLLER, 1991, p. 6)[9]. During this period, the way to joining judiciary, which involved years of volunteer dedication, had determined only the participation of members of the higher social classes, and the control exercised by the government was crucial for the construction of a group of highly conservative judges and extremely loyal to political authority.

Also important is the fact that the loyalty of this third power of government was inversely proportional to its prestige in that State, according to the fact that judges were classified as mid-level civil servants, below other public servants and military (MÜLLER, 1991 p. 8). Also according to Müller (1991, p. 8), contrary to what it might be expected, that members of judiciary react with protest and disagreement against government, the acquiescence of judges only grew, despite all lack of prestige, maybe to prove that they were worthy of greater trust. This final factor, however, was not based on any theory; on the contrary, despite in theory they were addicted to a strong positivism, whose purity premise also includes the separation between law and politics, judiciary, in that moment of history, was clearly influenced by the politics of its time, also being very loyal to the absolutist regime and have being reacted against the democratic revolutionary ideals (MÜLLER, 1991, p. 8-10). This explains the strength of the judiciary to accept, with the fall of the German Empire and the proclamation of the Weimar Republic, the limiting of its action to the rule of law, since it was now the product of parliament. Also explains their intense struggle for a free-law, from an "expansion of the legal and methodological canon which allowed the Justice to decide in each case whether suited to refer to the law ... or its own views and assumptions" (MAUS, 2000, p. 195).

Allied to this ideological factor, compounds the fact that the period of Weimar Republic was increasing unstable, not only because did not had a majority basis of in government[10], but also as a result of the economic crisis that swept Germany after the 1st Great War, when destroyed and humiliated, suffered several charges of winners. Judiciary was not oblivious to the crisis. H. W. Koch (1989, p. 10) explains that judiciary, which was already in social "descend" process, started having

[9] Ingeborg Maus (2000, p. 193) speaks about the "rude and effective disciplining of Justice by Bismarck".

[10] Koch (1989, p. 9): "*After 1920, it was increasingly impossible to form a government based on the majority support of the Reichstag. Minority governments were the order of the day*". Tradução livre: Após 1920, era impossível formar um governo baseado na maioria com apoio do Parlamento. Governos de minoria eram a ordem do dia.

even worst days: "Already underpaid ... their salaries were reduced by as much as 20 per cent, first by inflation and then by the deflation of the Weimar period and by government economic measures." All this constructed a fertile ground which allowed that judiciary became a very susceptible to the National Socialism propaganda.

Moreover, the sympathy of Judiciary to the National Socialism was very clear from the troubled Weimar Republic, when the newly created National Socialist German Workers Party began its activities: several attempted coups, demonstrations and violent activities of party members were taken to trial and decisions were either mild or totally favorable, although it was against the law (MÜLLER, 1991, p. 14-21). Lenient for the crimes committed by the extreme right, the same Justice was extremely strict with the crimes committed by Communists, even when harmless (Möller, 2012, p. 236). Far from being a simple sympathy, these decisions gave evidence to a clear anti-Semitism, flag already raised by members of the National Socialist party, even with critics about government, due to the existence of important Jews components[11]. This situation have been decisive for victory in 1933, with the Enabling Act, for having encouraged the extreme right and destabilized the trust of those who believed in democracy (MÜLLER, 1991, p. 21-24).

The judge goes through this period, therefore, "the judge of the law ... by investing as priest of a new deity: the suprapositive and unwritten law" (MAUS, 2000, p. 196). The judiciary independence, which is essential in a democratic state, have been, in the view of Horst Möller (2012, p. 236), distorted in a unfortunate way to meet the political aspirations of Judiciary. Signs of erosion of rule of law were already clear with the failure of the Treaty of Versailles, which was part of the body of German law and was above the constitution (MÜLLER, 1991, p. 21). And that's how it comes in Nazi period, whose first months of 1933 already could show the possible overcome of rule of law. In the words of Michael Stolleis (1998, p. 2): "Jewish judges, notaries, and lawyers were dismissed; criminal laws were stiffened; the principle 'no punishment without law' was abolished; political enemies were sent to concentration camps".

[11] Cf. Ingo Müller (1991, p. 18): "*The Courts of Weimar era were not characterized solely by favorable treatment meted out to defendants from the radical right and by persecution of supporters of the republic and Communists, however. There was also the occasional but blatant and unmistakable anti-Semite tone of the decisions of various courts, up to and including those at the highest level*".

Judiciary, therefore, if not completely, mostly unhappy with democracy installed in Weimar Republic, applauded Hitler's rise to power, and in fact embraced its ideology. And by this time its ideology of Free Law had won the battle, since it coincided with the Nazi State expectations, which saw in that power a big ally, with the emergence of broad Community formulas, of finalistic character, that enabled the suspension of any "legal regulation in favor of ' higher determinations" (MAUS, 2010 , p . 32).

To complete the picture, it was created the *Volksgerichtshof*, a court whose praxis was based in a fairly broad interpretation of existing penal laws, plus other few laws created based on the Enabling Act, which brought Hitler to power, and whose competence was restricted to issues of betrayal of any kind and offenses related in the "Decree for the Protection of the German People and the State of 28 February 1933" (Koch, 1989, p. 51-53) . This makes clear that judiciary not only acquiesced to the regime, but actively collaborated through a jurisdiction that represented the second hand of Nazi regime and who, as Koch (1989, p. 7) points out, "*the proper functioning of the National Socialist People's Court required that a substantial minority, if not the majority, of judges embrace National Socialist ideology as an appropriate instrument of the courtroom*". Thus, Müller (1991) says that, despite all attempts to obscure the facts, the vast acquiescence was due to the judges, lawyers and other jurists which have actively cooperated with the draconian regime of Nazism.

It is very important do emphasize that totalitarian States, although producing laws, cannot be considered as a *Rechtstatt* itself. It is important to think about this assumption. It is a fact that a *Rechtstatt* is based on the law, whose concept doesn't matter and could be even considered as "unjust". However the rule of law is based on some fundamental principles of legal positivism itself: the strict legality, according to which no one can be compelled to do or refrain from doing something except by virtue of law; the non-retroactivity of laws, particularly in criminal issues; and legal certainty, in other words, the predictability of acts of human conduct. So, a *Rechtstatt* is a state based on laws, which, although they may have any meaning, must necessarily be existing in the legal system before the facts: the irretroactivity principle is essential to a *Rechtstatt*. Is it really possible to say that a totalitarian State, as was the Nazi, represented a *Rechtsatt*? Is it possible to say that Nazi State followed legal positivism as its theory of law?

The truth, as well notes Norberto Bobbio (1995, p. 236), is that legal positivism has nothing to do with the ideology of authoritarian,

totalitarian or even tyrannical States: meanwhile positivism, in due to identify the law with legal commands, advocates linking the magistrate to the letter of the law, the legal ideology of Nazism argued that the judge should not decide based on the law, but on the political interest of the State, and should consider criminalizing all acts contrary to the "healthy popular sentiment", even if these crimes were not predicted in law. By these praxis, falls both the positivist idea of restricting judicial action, as the basic principle of all State named as a *Rechtsatt*: the anteriority of law. Legal Positivism, by contrast, grew up in those authoritarian States, not as a way to legitimize them, but to fight against them: that's how it grew the values of order, formal equality and certainty, flags from Enlightenment movement against the authoritarian rule of Old regime. In Italy, the principle of legality was a positivism flag not to legitimize fascism, but "to oppose an obstacle to its arbitrariness" (Bobbio, 1995, p. 236). With the same view, Montesquieu (2001, p. 38): "In despotic States, there is no law: the judge is himself his own rule.".

Law, therefore, hardly will be strong enough to fight against an objective reality. Again, catching borrowed the words of Alexy: "A relatively successful unjust regime is able to quickly destroy the consensus of legal praxis, intimidating individuals, changing and rewarding people to adapt." Already said the Terlinder promoter, cited by Perelman (1996, p. 549): "A law - constitution or ordinary law - never lays but for normal periods, for those who we can predict it. Man's product, it is subordinated, like all human things, to the force of things, to a stronger force, to the need".

The postwar myth, therefore, is a product of a misconception built in that post-dictatorship period, which, according to Michael Stolleis (1992), results from the fact that until the mid-1960s, the greatest scholars of the subject were judges or administrators of the Nazi era, who were reluctant to study legal history and strove to maintain the idea that law was not influenced by politics, when in fact all legal fields were swallowed up by the reality of National Socialism. The big question, which goes unnoticed in most studies, is that there was not a renewal of German Justice after 1945, and this same Justice, who have worked in the totalitarian period, was called upon to give answers to the past and proposals for the future, which explains the fact that the preparatory work of the Basic Law, and even then, didn't noticed a minimal tendency to recognize the participation of a submissive judiciary, not to say about his active participation in national Socialism (MAUS, 2000, p. 198).

This lack of renewal, or continuation, of both members of Judi-

ciary, as other lawyers, had fundamental consequences for the direction given to Law, not only about the story that was told, but also to the elaboration of a new thesis for the future. From the construction of positivism myth, as the theory of Nazi State, guilty for acquiescence, we constructed the idea of a "new" model of law, anti-positivist, which is in fact a mere continuation of the ideas already defended in that authoritarian state! Deserves literal quotation, the words of Ingeborg Maus (2000, p. 198):

> The uninterrupted permanence of German Justice after 1945 explains the strong influence of old conceptions on the preparatory work of the Basic Law. Their desires had founded place through the broad participation of lawyers from Herrenchiemsee Convention and from Parliamentary Council, as well as the permanent lobby organizations of jurists, among others the resurrected German Association of Judges.

Under the myth of "the injustices committed by the will of National Socialist State", achieved victory an unscrupulous continuity of Nazi State ideas, such as the construction of a "free Justice from all forms of control and binding", despite the attempts of Parliamentary Council to ensure "not only 'the protection of people by having an independent jurisdiction', but also 'the protection of the people against abuses of the independence of the courts'" (MAUS, 2000, p. 198). As for legal positivism, the so opposed doctrine by judges since the Weimar Republic period, and totally rejected on National Socialist State, was then chosen to be the scapegoat, appointed as the major guilty from a supposed submission of Justice to the Nazi regime, and creating fertile ground to fight against it again, continuing judiciary ideas of a Justice deferential to a suprapositive Law[12].

The myth of post-war goes far way from a broader analysis of what happened in that dark period: it is simple to conclude that beyond National Socialist State ideology, citizens and jurists did not resist because of a theory that "tied their hands". It is simplistic, mainly because

[12] In the words of Ingeborg Maus (2000, p. 198): "For those who taught there, as well to State bureaucracy, was left the power of reconstruct the past, in such way that was possible to call in case the same legal positivist doctrine of interpretation of law, which they had fought against it in the period from 1933 to 1945, accused of destruct governability, and now calling it to be accused, after 1945, as the guilty of Justice submission to Nazi regime".

it fails to question whether these same citizens and jurists wanted to resist. Simplistic, mainly, because don't analyze the context in which Nazi State was constructed and the historical of independence (or not) of Judiciary. As explained above, judiciary, by the time Hitler came to power, already had a history of subservience to political power, although we have some few notice of independence in Weimar Republic period[13]. Again, the myth of post-war implies that judiciary found itself oblivious to these historical events; suggests that their independence was larger than the existing objective reality.

3 As legal positivism do not mean a blind and uncritical obedience to law

The fundamental peace do post-war myth construction also includes the belief that legal positivism leads to a blind and uncritical obedience to legislation. Already have been refuted, in previous topic, the idea that positivism would have been the dominant law theory, not only in Nazi German, but also in other authoritarian and totalitarian States, which have taken Europe during the twentieth century. Now, it is time to defend the following assertive: even if legal positivism had been the dominant law theory of Nazi German, this doctrine does not imply the submission and acquiescence. Let's think about that.

As a starting point, it seems interesting the following question: what does it means legal positivism? Is there only one meaning?

Positivism, as a law theory, emerges as an initiative to transform law study into a true science, understood as such knowledge which, stripped of judgment, focuses on judgments of fact: in regards to law, studies the law as it is, not as it should be (Bobbio, 1995, p. 135). Value, as finds its denial on the "worthlessness", or on unfair, means qualifying something as "good/bad", "fair/unfair". By undressing of value judgments, excludes a positivist all qualifying of this nature of the law definition, i.e., of validity its criterion. It is valid to a positivist the norm which have been made by the competent authority, regardless of its content. There is, therefore, a clear separation between fact and value, law (should be) and moral (should be of should be) (Bobbio, 1995, p. 136-137).

[13] H. W. Koch (1989, p. 8) explains that, meanwhile Judiciary continuous loyalty to the King, it had some few cases that this power had a liberal position, as in the polish minority case.

This separation between law and moral, postulate of Kelsen purism, does not imply the denial of their reciprocal influence or even of the incorporation by law of many moral precepts: although it is recognized that law can be ahead from morality of a time, it is more usual that follow existing moral (Hart, 2012, p. 259). Indeed, the identification between law and morality is the product of a Manichean vision that assumes the existence of absolute values: good/bad, right/wrong. By opposite, Kelsen undue to defend the purity of law and, more specifically, the separation between law and morality, admits the relativity of moral system, in the meaning that there are many systems, not just one: "But this does not exclude the possibility of claim that the positive law should harmonize with some specific moral system and eventually with it coincided in fact..." (Kelsen, 2003, p. 75).

It is important to note that, by proposing the separation of law of other fields, such as morality, justice and politics, positivism does not deny, nor prohibits, the study of law by these angles: the only difference is that this kind of study will not correspond to a "science of law", also called dogmatic; corresponds, however, to the philosophy of law, sociology of law, and politic science, respectively. The big difference is that a jurist, in the exercise of its activity, must remain in the first one: cannot exclude the validity of a law applying its own criteria of fair or social effectiveness. He cans, however, refuses himself to apply (Hart, 2012, p. 268), in an obvious attitude of disobedience, which is predicted even by conventional positivists, like Hobbes (*apus* Bobbio, 1995, p. 235). This is the point where we want to go on this topic.

The consequences of separation between law and morality, so as to remove morality from its concept, and, by consequence, remove from its validity criteria any moral content, only carries legal consequences: the legal norm remains valid, even if unjust. Faced with such finding, we could make this question: what if the applicator considers it unjust? This is possible because moral systems remains existing, which is a fundamental requirement so it appears the (dis)obedience problem, since this problem only comes if there is "another standard to order a different behavior" (Bobbio, 1995, p. 226). The disobedience theory, we must emphasize, finds recognition since early Greek thought, with emphasis on the Antigone tragedy, which resists obeying an order of the King, because she believed that specific order went against the natural law. Even Hobbes, as pointed out, who defends a moral duty of obedience, recognizes the possibility of disobedience if laws turned against the social contract (Bobbio, 1995, p. 228). Although some advocate resistance

today as a "right", which have been supported in some contemporary constitutions, such as the German and Portuguese, that's not the though we defend here. Resistance is factual, something that occurs, it is a fact: it is in the world of facts, not in the legal world.

There's no place to do long endurance considerations about resistence here, however it is important to point out that she have found space in practically every law theory, including legal positivism. The idea of absolute obedience to law is not a postulate of legal positivism in its traditional version, but of a side of it, which Bobbio (1995, p. 225) gives the name of "ethical positivism", or even juspositivism. It is like an extreme version, which escapes even of the ontological postulate of positivist, i.e., escapes from judgments of fact and enter the field of value judgments, constituting itself as an ideology[14]. Unlike positivism, juspositivism doesn't advocate the separation between law and morality; he identifies them to condition the justice of a rule to its validity. Note the subtlety: while jusnaturalism (morality) deduce the validity of a rule of its justice (it is valid only if just), juspositivism deduce justice from its validity (it is fair because it is valid) (Bobbio, 1995, p. 227). This construction of juspositivism, in fact, brings an absolute obedience postulate to existing norms. Legal positivism, in its traditional version, by pretending a non value study, pretends the extreme opposite of absolute obedience, since when he does not make a value criteria, he doesn't extol the virtues of any norm and does not seek to justify any current legal system or their individual standards (DIMOULIS, 2011, p. 241).

In the extreme opposite position of those positivism critics, however, the moralist idea, or jusnaturalist of law, tends to lead to an uncritical obedience of some legal system. The words of Kelsen (2003, p. 78) deserves to be mentioned:

> The thesis that law is, in its own essence, moral, ie , that only a moral order is law, is rejected by the Pure Theory of Law, not only because it presupposes an absolute moral, but because in its effective implementation by the prevailing jurisprudence on a particular legal community, leads to an uncritical legitimation of the coercive state order which makes some community.

[14] In the same sense, Bobbio (1995, p. 225): "It is obvious that with this assumption we are not in theory field anymore, but in the ideological field, since she doesn't inserts herself in the problem which concerns to the definition of law, but in that one which concerns to what we should do…"

Hart (2012, p. 268) also emphasize this point, noting that the insistence on the separation between the two normative systems (Law and Moral), by those entitled as legal positivists, derives from the fact that, by doing this, it is easier to a lawyer, a citizen or any authority required to apply the law, to distinguish clearly between one and another field, so that they can compare between the right and valid moral norm and reflect on their obedience or disobedience. In his own words:

> The perception that exists, outside official system, something in reference to which the individual must ultimately resolve their problem of obedience, certainly is more likely to stay alive among those who are accustomed to think that sometimes rules of law may be wicked, then among those who think that nothing unjust can have the status of law. (Hart, 2012, p. 272)

So when it comes to resistance possibility, what matters is an attitude of skepticism, in the meaning that we must have in mind that the validity of a rule does not mean your necessary obedience; that a moral examination may be pertinent to note that, even valid, that standard should not be applied. That's because, regardless of the dominant theory, resistance depends, above all, of courage, since in an authoritarian state, based on the legal injustices, any positioning otherwise will be basis of reprimand. So it is that even Alexy (2011, p. 60), which supports the idea of the "extreme injustice", base of the Nuremberg trials, recognizes that "for a judge, in an unjust State, there is no significant difference between turn to Hart's lessons[15], refusing to apply an extremely unjust law for moral reason, or to Radbruch's lessons, using legal reasons": in one way or another he will have to face the possibility of personal sacrifices, what it is not everyone that is willing to do[16]. The only difference is argumentative.

The imposition of guilt to legal positivism, a theory of law, is

[15] Hart (2012, p. 271): "In which sense is better, before unmoral requirements, think 'this is not law at all', or, in the other hand, 'this is law, but it is so unjust that does not deserve to be obeyed and applied'? This last point of view couldn't make men more lucid or with more courage to disobey when moral requires?".

[16] It is clear that, although recognizing that, Alexy (2011, p. 62) still comes with a good motive to the adoption of his moral theory of law: the fear of a possible future punition, when the unjust regime fells out. This argument, moreover, seems to be so week, not to say ingenuous. We all know that only goes to trial those unjust cases when that's political interesting to the economic potencies or to the war winners.

actually a "'immense overestimation' of the effects that a theoretical or a philosopher has on the behavior of citizens and lawyers" (HÖESTER *apud* ALEXY, 2011, p. 55). Theoretical-legal or legal-philosophical definitions are not able to change reality[17].

Moreover, Alexy (2011, p. 54) discusses the argument, even to combat it, that understanding moral as a component of law may lead to the so criticized juspositivism: uncritical obedience. That's because if moral is already a part of law, any law, since positively valued, can be considered as moral, and therefore unquestionable on this same morality. He recognizes the danger, trying to overcome it through the idea that only an extreme injustice legitimizes the nullity of a law on moral grounds. The practical implications of this theory, however, ran into the force of the already mentioned objective reality: in the Nazi period also much of the Judiciary had been swallowed by National Socialist ideology, so that, although it could be assumed that judiciary could apply this idea of an extreme injustice to those laws which made typical treason and disobedience crimes, it is a remote possibility that, in turn, runs into the same issue of courage to resist.

4 Going trough conclusion: the mistake of criticism of democracy from experience not democratic

Contemporary constitutionalism theory generally defends itself through the explicitness of totalitarian periods from the first half of the twentieth century, precisely because it lead to the idea that they would have given rise to the breakdown of the democratic tradition of the sovereignty of the elected branches, which have passed to be viewed as potential violators of rights (DIMOULIS, 2009, p. 219) , which sets the ground for the defense of judiciary, not only as the one who must control those popular powers, but as the most qualified for the defense of fundamental rights and, in some situations, the only one able to advance the political and social process (BARROSO, 2011, p. 287).

The postwar discourse is based on the suppose that authoritarian regimes of the first half of the twentieth century would had been the representation of majority, having come to power through democratic means of elections. This, incidentally, is the touchstone of this speech, to the extent that the alternative proposal is precisely the limitation of

[17] Alexy (2011, p. 61) himself admits that "once established with success an unjust State, law concepts are no longer able to make big difference at all".

democracy through judicial review, because of the arbitrariness and injustice allegedly imposed by majority.

In this perspective, the following question is immediately imposed: is it possible to assume that an authoritarian regime can be based in the democratic principle of majority? Would have been barbarism imposed by obeying the rules of the democratic game? This is an obvious nonsense: how a system based on majority principle can legitimize an undemocratic authoritarian regime? Can a majority, which is guided by democratic principles of self-government, use of the self-determination to choose a non-democratic regime?

Well, is the clear that a population can even come to do this. What comes further, however, could hardly be described as democratic. Robert Dahl (2012, p. 270), surfaced with this question, is emphatic on saying that a majority could never do this legitimately, since democracy itself has intrinsic limitations, especially with regard to the democratic process.

Anyway, even though the National Socialist Party, in Germany, and fascism, in Italy, for example, have competed in elections, the electoral process does not end at the ballot box: democracy presupposes a continuous consent. Once in power, breaking ties with what has left of democracy, there is no way to speak of majority government, but the government of a few "competent", undemocratic idea, feature which was basic to the Nazi and Fascist parties (VICENTINO, 2002, p. 380).

Although one might argue, as does Martin Malia (2012, p. 73), that totalitarianism was a product of universal democracy era, it is clear that he only avenged by exterminating her: supplanting the rule of law, democratic legality and everything else that could be presented as an obstacle to the victory of "total government". Democracy has not generated totalitarianism, nor the injustices arising therefrom. Totalitarianism, returning to the question bellow, was not gestated by democracy and emerged victorious momentarily because of an oppressive majority. Totalitarianism can be an example of many things, but it certainly is not an example of the oppression of a minority by a majority. As assumed by Dahl (2012, p. 123), "the experience of the twentieth century is a powerful argument against the guardianship". After all, all these totalitarian regimes were based on the belief of the leadership of a few most able leaders, not the citizens self-government.

Was the majority who ruled and had decisive power in totalitarian states? If we use basic criteria of democracy, such as voting, periodic elections and equal participation, it is possible to quickly discard this

idea.

It seems clear, therefore, the mistake of proposing a limitation on democracy based on experiences that couldn't even remotely be named as democratic. Yes, there were politics, parties, government. However these were not accountable to the people. By the very contrary, they were accountable to their leader and his ideology.

A dictatorship necessarily represents the government of a few, a minority. And it was from undemocratic procedures that have been violated the rights of minorities, especially, as already mentioned, through the moralist case law, which did not been limited by law. That's how we can assume that the laws from those authoritarian States had not even the majority genetics, because they, with few exceptions, had not been made by the power who had the competence to legislate, the Congress, but by the Chief of State. Moreover, the few laws from Congress did not authorized the gravest consequences carried out by the courts. Those totalitarian states of the first half of the twentieth century, in fact, are examples that make us remember this same propose of democracy limitation: the fundamental issues should not be relegated to the people, but to a group of qualified people.

References

ALEXY, Robert. **Conceito e Validade do Direito**. São Paulo:WMF Martins Fontes, 2011.

BARROSO. Luis Roberto. **Constituição, Democracia e Supremacia Judicial:** Direito e Política no Brasil Contemporâneo. [online] Disponível na internet via http://www.lrbarroso.com.br/shared/download/artigo-constituicao-democracia-supremacia-judicial.pdf. Arquivo capturado em 26 de outubro de 2010.

BOBBIO, Norberto. **O Positivismo Jurídico**: Lições de Filosofia do Direito. São Paulo: Ícone, 1995.

DAHL, Robert A. **A democracia e seus críticos.** São Paulo: Martins Fontes, 2012.

DELMAS-MARTY, Mireille. Direitos Fundamentais. In: DARNTON, Robert; DUHAMEL, Olivier (org.). **Democracia**. Tradução de Clóvis Marques. Rio de Janeiro: Record, 2001.

DIMOULIS, Dimitri. A relevância prática do positivismo jurídico. **Revista Brasileira de Estudos Políticos**. Belo Horizonte, nº 102, p. 215-253, jan./jun., 2011.

HART, H. L. A. **O Conceito de Direito.** São Paulo: Editora WMF Martins Fon-

tes, 2009.

JUDT, Tony. **Pós-guerra:** Uma história da Europa desde 1945. Rio de Janeiro: Objetiva, 2008.

KELSEN, Hans. **Teoria Pura do Direito**. 6 ª edição. 5ª tiragem. São Paulo: Martins Fontes, 2003.

KOCH, H. W. **In the name of the Volk**: political justice in Hitler's Germany. New York: St. Martin's Press, 1989.

MALIA, Martin. Face ao totalitarismo. In: DARNTON, Robert; DUHAMEL, Olivier (org.). **Democracia**. Tradução de Clóvis Marques. Rio de Janeiro: Record, 2001.

MAUS, Ingeborg. O Judiciário como superego da sociedade. **Novos Estudos**, nº 58, p. 183-202, nov. 2000. São Paulo: CABRAP, 2000.

MÖLLER, Horst. **La República de Weimar**: una democracia inacabada. Madrid: Papeles Del Tiempo, 2012.

MOURÃO, Ronaldo Rogério de Freitas. Hiroshima e Nagasaki: razões para experimentar a nova arma. **Scientiæ Studia**, v. 3, n. 4, p. 683-710. São Paulo: 2005.

MÜLLER, Ingo. **Hitler's Justice**: the courts of the third reich. Cambridge: Harvard University Press, 1991.

PERELMAN, Chaïm. Ética e Direito. Tradução: Maria Ermantina Galvão G. Pereira. São Paulo: Martins Fontes, 1996.

POSNER, Richard A. **Problemas de filosofia do direito.** Tradução Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2007.

RADBRUCH, Gustav. **5 Minutos de Filosofia do Direito**. [online] Disponível na internet via http://157.86.8.16/comunidade_fiocruz/arquivo/14596/cinco_minutos_de_filosofia_do_direito.pdf. Arquivo capturado em 21 de fevereiro de 2013.

STOLLEIS, Michael. **The Law under the Swastika:** studies on legal history in Nazi Germany. Chicago: University of Chicago Press, 1992.

Criminal law and cultural diversity
A philosophical approach (from a European Standpoint)

Stefano Biancu

Abstract: Globalization and its related migratory phenomena lead to encounters between different cultures and civilizations. But inevitably they also produce clashes and conflicts. Criminal law is an emblematic locus of the difficulties that result from the assumption of these conflicts at the level of public policies. On this topic, in Europe, the positions of Mireille Delmas-Marty and Otfried Höffe are emblematic and in certain respects opposed. Starting form these two theoretical options, this paper questions the radical nature of the philosophical, ethical and anthropological challenge that cultural diversity poses for criminal law and consequently engages in the search for possible ways forward.

Key Words: Criminal Law, Cultural Diversity, Punishment, Tolerance.

1. The problem

Globalization and its related migratory phenomena lead to encounters, minor or major, between different cultures and civilizations. But inevitably they also produce clashes and conflicts, which are something of a novelty in many Western countries, especially in Europe, traditionally notable for a high degree of homogeneity of language, culture and religion, in keeping with a substantially nineteenth–century model of the nation.

Criminal law is an emblematic *locus* of the difficulties that result from the assumption of these conflicts at the level of public policies.[1] In many European countries the criminal law in force was originally designed for homogeneous societies, while naturally ensuring a plurality of personal opinions and the secularity of public institutions, but it is

[1] In reality, outside Europe, there is a long tradition of studies of challenges to criminal law by cultural conflicts, at least since the pioneering work of T. SELLIN, including the celebrated *Culture Conflict and Crime*, New York: Social Science Research Council, 1938.

inadequate to cope with a plurality of points of view that are irreducible to the merely private sphere: the points of view that are precisely characteristic of different civilizations and cultures.[2] (Here the term "culture" must be understood in its anthropological/ethnological sense: as a symbolic system of beliefs, gestures, representations and experiences of reality, handed down from one generation to another and internalized – in a manner not necessarily reflected – by individuals).

Now, the assumption of such cultural differences by the criminal law is far from simple. Different cultures may favour visions of morality and law that are very different from each other, so that what is considered wrong (in the moral sense) or criminal (in the legal sense) in a given cultural context may not be so in another: a migrant may thus arrive in a country where law and ethics express the values and norms (in the form of precepts and/or prohibitions) opposed to those in force in their country of origin, and sometimes even difficult to understand in terms of their cultural horizon. Hence the debate, now broad and rich,[3] about the desirability and/or the necessity for the criminal law to recognize the possibility of a "cultural defence", understood as a reason for the exclusion or reduction of criminal liability, which can be invoked by a person belonging to an ethnic minority with a culture, customs and usages that differ from, or may even be in conflict with, those of the culture of the host country. This, of course, presupposes that the person is able to demonstrate that the illegal act was performed in good faith and in the reasonable belief that he was acting on the basis of his cultural tradition.[4]

Now, discussion of the possibility of a "cultural defence" entails a rethinking of some basic axioms of classic criminal law. Among these, the principle of legality, which does not admit in any case ignorance of the law, not even by those who come from different cultural horizons (*nullum crimen sine poena, nulla poena sine lege*), and the principle of equality, which a penal treatment differentiated to allow for the cultural reasons for an action would seem to violate (with regard to both the of-

[2] See PROVERA, A. Percorsi di verità nelle società multiculturali. In: G. Forti, ed. *Verità del precetto e verità della sanzione penale alla prova del processo*, Naples: Jovene, 2013.

[3] Since at least the celebrated article, unsigned, The Cultural Defense in the Criminal Law. *Harvard Law Review*. 6, 99(1986), 1293-1311. For a recent overview of legal approaches to the subject, see. M.-C FOBLETS and A.D. RENTELN, eds. *Multicultural Jurisprudence. Comparative Perspectives on the Cultural Defense*. Oxford: Hart Publishing, 2009.

[4] See DE MAGLIE, C. *I reati culturalmente motivati: ideologie e modelli penali*. Pisa: ETS, 2010, p. 105.

fenders and the victims).[5]

It is not easy to devise a solution to these problems, so that here it is possible only to offer some general reflections, from a European standpoint.

Before proceeding further, it is necessary to address a basic question: the one concerning the relation between criminal law and cultures. On this topic, in Europe, the positions of Mireille Delmas-Marty and Otfried Höffe are emblematic and in certain respects opposed.

The French jurist has long been engaged in research into the possible conditions for an internationalization of law. She notes that the criminal law is the least universalizable of the systems of law, to the extent that it expresses the representations peculiar to each particular community, in areas such as life and death, power, sex, and the appropriation and sharing of property. Despite this, Delmas-Marty believes it is *also* possible to work towards the internationalization of criminal law, starting from a fundamental and shared rejection of the "inhuman" (the sphere of crimes against humanity).[6] She regards this rejection of the inhuman as what allows one to "relativize relativism", finding something universal within particular legal systems. Seen in these terms, law may help – holds the French jurist – to build a "human community of values", and it may do this to the extent that there is a circle enclosing morality and law: morality (namely the sphere of values) is certainly productive of law (the sphere of rules), but at the same time law is somehow productive of morality, since it is capable of bringing to reflected awareness the moral values that are not explicitly stated by the widely accepted ethics.[7]

This, in brief, is the position of Delmas-Marty: criminal law is essentially related to a particular cultural horizon since it translates the moral values of a community into rules (and above all prohibitions); but at the same time it is capable of a potentially universal openness, insofar as it can help reveal the values already present – but not yet made explicit – in different cultural communities.

---

[5] See DE MAGLIE, C. *I reati culturalmente motivati: ideologie e modelli penali*. op. cit. pp. 131-133.

[6] See DELMAS-MARTY, M. Études juridiques comparatives et internationalisation du droit. *Cours et travaux du Collège de France. Annuaire*. 107e année (2006-2007), 537-561: 538.

[7] See DELMAS-MARTY, M. *Vers une communauté de valeurs. Les forces imaginantes du droit (IV)*. Paris: Le Seuil, 2011.

This is in contrast with Höffe's outlook.[8] He is concerned not so much to delineate a transculturally valid criminal law, but rather to verify the transcultural value of the form of criminal law – ultimately based on retribution (*Vergeltung*) – which is characteristic of advanced liberal democracies. In other words, Höffe's questioning seeks to verify whether the Western structure of criminal law can withstand the challenges posed by the ever-increasing interaction between cultures. His conclusion – fully affirmative – is that this model of criminal law based on retribution has a transcultural value since it is neutral and universalizable, modern and liberal – the two terms have essentially the same value for Höffe. Born in the West, it has a validity that extends beyond the boundaries of the culture that produced it.

Höffe holds therefore that there is no need to study adaptations, and even less to radically rethink, the current approach to the problem of crime in the light of the issues raised (as well as the possibilities offered) by globalization, but rather to verify the viability of the existing, the status quo, in the face of the new challenges.

If Mireille Delmas-Marty therefore admits a structural *dependence* of criminal law on cultural particularities (as well as the capacity of criminal law to reveal a minimal universal ethic within different horizons), Otfried Höffe by contrast defends the thesis of the *independence* of modern, liberal criminal law from cultural particularities: born in a particular (cultural) context, it is in fact said to have a universal (transcultural) value.

So, if we place these two major theoretical options concerning the relation between criminal law and cultures in the background, it is now possible to question the radical nature of the philosophical, ethical and anthropological challenge that cultural diversity poses for criminal law and consequently engages in the search for possible ways forward.

---

[8] See HÖFFE, O. *Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch*. Frankfurt a.M.: Suhrkamp, 1999. For a presentation and a more extensive discussion of Höffe's thesis, see BIANCU, S. Rétributivisme et liberalisme: un mariage indissoluble?. In: BIANCU S. et alii, eds. *Culpabilité et rétribution: essais de philosophie pénale*, Basel: Schwabe Verlag, 2011, pp. 241-264: 243-250; Id., Y-a-t il un droit pénal interculturel? Quelques remarques philosophiques autour des theses de Otfried Höffe. *L'Ircocervo*, 2, 2011 (URL: http://www.lircocervo.it/index/?p=1164). Finally note, Höffe's replies to my objections: HÖFFE, O. N'y a-t-il vraiment pas de droit pénal interculturel? Une réponse. *L'Ircocervo*, 2, 2011 (URL: http://www.lircocervo.it/index/?p=1175).

2. What paths to follow? Some ideas

2.1. Moving beyond the barbaric paradigm

To formulate the problem correctly we have firstly to deal with some typically European and Western representations of the non-Western immigrant. These representations may be partly influenced by what appears to be a persistent and unconscious "barbaric paradigm".[9] This is a recurrent interpretative scheme in the Western imagination, from antiquity to the present day. Applied to current immigration flows, it suggests an understanding of them in the key of modern "barbarian invasions": the immigrant, therefore, as a modern incarnation of the archetype of the "barbarian", the uncivilized par excellence. He is strong and violent, insensitive to the weakest and has a sturdy body, which makes him closer to the animal world than to the human. He is also dirty and especially prolific, and therefore infesting.

The barbarian is configured as an *a priori* category: it models a prior understanding of the different, but one that is destined to enter into crisis when subjected to the test of the encounter with the other in the flesh. In fact, the more closely the "residents" come into contact with the immigrant populations, extending their knowledge of them, the less self-evident becomes the application of the category of "barbarian" to them.

In particular, the archetype of the barbarian proves to be more incisive in times of structural crisis: a civilization in decline is likely to see the barbarian invasion and the figure of the barbarian as the reasons for its crisis and the imminent end of history (of *all* history, not only its own). This is why, when a "void" of civilization occurs, a subject – individual and collective – often makes an appearance on the stage of history, to whom the role of the "barbarian" is attributed.

Now, we need to be aware of the conditioning power of the "barbaric paradigm". Within the ambit of crime policies, it can in fact act implicitly in several directions. It may play a role in the motivations of those who defend the transcultural value of the Western form of criminal law, on the basis of a presumed superiority of civilization over barbarism, but it may also play a role in the motivations of those who are

[9] See BRANCA, P. and PUGLIESI, G. Il paradigma barbarico. *Munera. Rivista europea di cultura*. 1/2013, 21-37; for a rich catalogue of historical testimonies see GUIDETTI, M. *Vivere tra i Barbari vivere con i Barbari*. Milan: Jaca Book, 2007.

minded to recognize a "cultural defence" that justifies the individual on the basis – ultimately – of the legal and moral inferiority of the culture to which he belongs.

The first step, therefore, when it comes to thinking about the challenges that cultural diversity raises for criminal law, is to be aware that our discourses are easily influenced by a "barbaric paradigm" which is both recurrent and implicit in the West.[10]

2.2. Overcoming a pathological vision of culture

Being aware of the pitfalls associated with such a "barbaric paradigm" is thus a first step. A second step is to overcome a (reductive) vision of culture and of cultures as pathologies of subjectivity or as restrictions on the free will of individuals, which criminal law should take into account in the calculation of individual responsibilities. Cultures in themselves are not pathologies (or *limitations*) of free will, but rather the *conditions* for the exercise of this free will. Subjectivity – and therefore free will – is in fact always culturally mediated: the processes through which options and choices become significant for the individual are processes of a cultural nature (notably linguistic and historical).[11] Consequently, cultural membership is a primary asset for the individual and therefore a right that has to be recognized.

Here, quite clearly, there arises the problem of possible conflicts between the right to culture and other fundamental rights (such as the

[10] All the more so because the assumption of such a paradigm may prove functional for the protection of certain economic interests, encouraging dangerous identifications – in the name of the security of persons and property – between the immigrant and the criminal. (See FORTI, G. Nuovi riverberi "infernali". Le politiche penali securitarie di esclusione e criminalizzazione dell'"Altro oscuro". *Munera. Rivista europea di cultura*. 2/2012, 121-141; Id, Il mercato e la criminalizzazione dell'"Altro oscuro". *Munera. Rivista europea di cultura*. 1/2013, 51-62. The transformation into fear of the anxiety that the other, the different, inevitably produces, becomes a privileged instrument of power and control (see PULCINI, E. *La cura del mondo: paura e responsabilità nell'età globale*. Turin: Bollati Boringhieri, 2009).

[11] See KYMLICKA, W. *Liberalism, Community and Culture*. Oxford: Oxford University Press, 1989, in particular pp. 162 ff ("The Value of Cultural Membership"). On the essential symbolic – and therefore cultural and emotional – mediation of subjectivity see BIANCU, S. Il simbolo: una sfida per la filosofia. In: BIANCU, S. and GRILLO, A. *Il simbolo: una sfida per la filosofia e per la teologia*. Cinisello B.: San Paolo, 2013, pp. 13-99: 69-99.

right to life and physical integrity, for example), which a given culture might jeopardize, at least in certain contexts.[12] The question to be asked therefore concerns the extent of tolerance: what cultural differences can be tolerated by the criminal law? If, in fact, every particular criminal law translates, under the form of rules and prohibitions, the heritage of values of a given community, how far can it tolerate cultural diversity, especially if this produces conflicts in the field of the fundamental rights that a given culture recognizes?

The only possible answer to this question is, in my opinion, one that passes through a rethinking, and an enlargement, of tolerance itself.

2.3. A penultimate consideration of tolerance

Now, like other big words that are the offspring of political modernity, tolerance has no value as an ultimate goal, but as a guarantee of something else, hence as a "penultimate" good. In other words, it represents a positive attitude or practice, provided it is placed in the service of principles of a higher rank,[13] which may be many and varied. Certainly social peace plays an important part among these.

Yet tolerance cannot be limited to ensuring social peace, since an exclusive orientation of this type would not be sufficient to eliminate the ambiguity that characterizes it, to the extent that it implies – almost inevitably – a certain superiority of the subject tolerant of the subject tolerated, thereby making any social peace that may be achieved extremely precarious.

The principle of superior rank to which tolerance must therefore aim is that of a shared truth. *On the social level*, some differences will be tolerated in order to create the conditions for the maturation of

[12] For a development of the issue of fundamental rights and of their necessary hierarchization, see FERRAJOLI, L. *Principia iuris: teoria del diritto e della democrazia*, vol. 1: *Teoria del diritto*, 2nd ed. Rome-Bari: Laterza, 2012.

[13] See FORST, R. *Toleranz im Konflikt: Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs*. Frankfurt a.M.: Suhrkamp, 2003, p. 50 ("Toleranz ist [...] eine positive Haltung oder Praxis, wenn sie zu etwas Gutem dient, d.h. wenn sie um willen der Realisierung höherstufiger Prinzipien oder Werte gefordert und dadurch gerechtfertig ist"). In particular, on the relation between criminal law and tolerance, See FORTI, G. Alla ricerca di un luogo per la laicità: il "potenziale di verità" nelle democrazie liberali. In: S. CANESTRARI and L. STORTONI, eds. *Valori e secolarizzazione nel diritto penale*. Bologna: Bononia University Press, 2009, pp. 349-395.

what Böckenförde calls a "common pre-juridical basis"[14]: a shared basis which can be drawn on with a view to producing shared rules. *On the individual level*, and in the specific case of the administration of criminal law, a suitable exercise of tolerance takes the form of a condemnation of the act (the offence) which is not followed by the infliction of a penalty (on the actor). The object of this tolerance should be not, however, be considered as a subject regarded as limited in his accountability because of his membership of a different (and inferior) culture, but because that membership is positively identified as not irrelevant to his personal conformation to the legal order (on the individual level) and for the maturation of a common (social) pre-juridical basis. In other words, the decision to condemn the act but not to punish the actor should aim to foster in the actor a process of rethinking his cultural heritage that will enable him to find in it fundamental values that the positive law is capable of revealing. As noted by Mireille Delmas-Marty,[15] the penal prohibition can have the capacity to bring to awareness moral contents already present, in ways that may not be reflected and not conscious, in different cultural heritages.

The tolerance of which we are speaking should therefore be functional to an extension of the potential for truth that is inherent in any particular tradition[16]: and this with a view, on the social level, to the formation of a common pre-juridical basis (which will allow for the shared production of the positive norm), and with a view to extending, on the part of the individual, the cultural heritage in the direction of values and moral contents already present in it but not yet made explicit.

Tolerance, in other words, makes sense if it does not harden differences, but if it creates the conditions that make agreement and sharing possible on the individual and social levels.

2.4. From the punitive to the narrative

The compliance of the individual with the judicial system that the criminal law seeks to ensure should be understood as a relational bond of sharing, with respect to which a purely coercive approach can only

[14] BÖCKENFÖRDE, E.-W. *Der Säkularisierte Staat. Sein Charakter, seine Rechtfertigung und seine Probleme im 21. Jahrhundert*. München: Carl Friedrich von Siemens Stiftung, 2007, pp. 11-43.

[15] See DELMAS-MARTY, M. *Vers une communauté de valeurs*. op. cit.

[16] See PROVERA, A. *Percorsi di verità nelle società multiculturali*. op. cit.

prove inadequate. In some cases, an approach which is *partly* – though not exclusively – coercive certainly retains a compelling effectiveness in terms of prevention (general and special), as well as an ethical and juridical legitimacy. This, for example, is the case with white-collar crime. But in cases of offences relating to cultural differences, it is a priority to establish a relationship between the individual and the legal system. It is therefore necessary to favour a dialogical approach of a personal and communicative kind, and not simply an impersonal and informative one, as it is typical of classic criminal law.[17] It is essential, in other words, to focus on the possibilities of reparative justice and of mediation, as compared to a purely retributive administration of the public response to the offence.

In this respect three factors prove to be fundamental: interpersonal encounters, speech and time. Once the facts have been ascertained and it has been determined that certain behaviours might be justified in traditional beliefs or practices of various kinds, the encounter between people, the use of speech and time may allow the actor to rediscover – even within his own culture – the reasons for abandoning certain actions contrary to the human person and fundamental rights. There is no such thing as a human culture (in the anthropological sense of the term) that is contrary to human being.

In particular, with regard to the personal encounter, it is certainly essential to valorise the role of the judge who, on behalf of society, has the right and the duty to declare that a particular kind of conduct is not acceptable and therefore constitutes an abuse. But it is also necessary for the victims be given a role, by assigning them, in an adequate and protected formal context, a space for speech and listening. From this it is possible to expect a twofold result. First of all, that victims can obtain recognition and justice: they need to receive authoritative confirmation that domination by others constituted an abuse, an injustice, which has finally been brought to an end. The victim must be formally *liberated* and returned to himself. Secondly, their testimony will enable the offender to understand the meaning – with a transcultural value – of the violation he is charged with. The offender will also be in fact "liberated", to the extent that he, too, is a prisoner of his evil.

This is not a question of focusing on practical solutions of low

[17] As observed by Foucault, the disciplinary prison regimen ensures that the prisoner is the object of information, never a subject of communication: see FOUCAULT, M. *Surveiller et punir. Naissance de la prison*. Paris: Gallimard, 1975, p. 202.

moral intensity, as compared, for example, with a retributive model whose moral foundations have been authoritatively argued already by Kant and Hegel. Rather, it is matter of recognizing that the foundation of law – of *any* law – does not lie in a hyperuranian ideal, but in the human person, which constitutes the "subsisting human law: hence also the essence of law".[18]

That compliance of the individual with the legal order that criminal law has to guarantee, thus finds one of its conditions of possibility in the interpersonal encounter: the interpersonal encounter between the offender and the victim, with the indispensable mediation of the judge and within an appropriate context, has the power to show that the foundation of prohibitions and norms (the violation of which is in dispute) does not reside in a certain cultural horizon (to be accepted or rejected), but in a common humanity. The interpersonal encounter can thus foster an experience of the (universal) foundation of each (particular) right. In this light, the renunciation of punishment – certainly applicable in the particular conditions to be determined – takes the form of an exercise of tolerance with a view to something else: namely with a view to a sharing that, by going beyond differences, gives access to a prior and shared datum.

In the case of crimes that are somehow related to ascertained cultural differences, a gradual transition should therefore be made from an exclusively punitive register to one that favours the narrative phase of speaking and listening,[19] through a replacement of the coercive and retributive element of the penalty with an adequate encounter between people.

The time factor is clearly crucial. We must in fact have time for speech and listening, as well as the time needed to enable the defendant to rethink his cultural heritage in the light of that speech and that listening, including the accompaniment of an adequate cultural mediation. But to ensure speech does not represent a *summa injuria*, it must take into account the fact that not everyone has the same access to the sphere of speech: in this sphere there are also the excluded, to whom justice must

[18] See ROSMINI-SERBATI A. *Filosofia del diritto* (1841-1845). ORECCHIA, R, ed. Padua: Cedam, 1967, p. 191. vol. 1 (=*Opere edite e inedite*, vol. XXXV).

[19] See VAN DE KERCHOVE, M. *Quand dire, c'est punir. Essai sur le jugement penal.* Bruxelles: Publications des Facultés universitaires Saint-Louis, 2005, p. 24; GARAPON, A. *Des crimes qu'on ne peut ni punir ni pardonner. Pour une justice internationale*. Paris: Odile Jacob, 2002, p. 207.

be done.[20]

2.5. Healed memory

If the retributive punishment is based on the assumption that evil is erasable and that it is possible to restore the order violated,[21] a relational approach – based on the encounter between people, speech and time – instead relies on the belief that evil not only *cannot* but *must not* be erased. If we wish to produce history, and *human* history, it is important to retain a memory of evil, a memory *healed*. This is not a memory understood simply as an inability to forget and therefore to erase the debt: this would be a memory that actually arrests personal and collective history, and would eventually produce obsession and psychosis. It is rather an individual and collective memory based on the recognition that the suffering inflicted and endured has been an injustice and an evil that cannot and must not be erased. Responding to evil not merely through the modes of punishment, but also through speech placed within an appropriate official context, surely means giving up an immediate *cosmetic* claim: the need to restore order, magically erasing the disorder produced by the offence. But it also means creating the conditions of possibility for genuine liberation from the "magic" force of evil and guilt, by healing their memory without erasing their traces.

All this will necessarily lead to a profound rethinking of many criminal policies, which grant a very limited space to relationship: to the personal encounter and to speech uttered and heard. It is access to that sphere of experience that Benjamin defined as a sphere of human understanding inaccessible to violence: "the true sphere of 'understanding one another', of language."[22]

It is an "understanding each other" that, between humans, is always possible: *beyond* all differences (cultural, individual, social differences), *thanks* to difference.

---

[20] See on this issue RICŒUR, P. *La mémoire, l'histoire, l'oubli*. Paris: Seuil, 2000, p. 614.

[21] On retribution see BIANCU, S. La colpa: disordine e cosmos. *Jus. Rivista di scienze giuridiche*. 2/2012, 287-299; Id., *Rétributivisme et liberalisme: un mariage indissoluble?*, in: S. BIANCU et alii, eds. *Culpabilité et rétribution: essais de philosophie pénale*, Basel: Schwabe Verlag, 2011, pp. 241-264; Id. La peine, le symbole, l'autorité. *Revue de Théologie e de Philosophie*, vol. 141 (2009), 141-156.

[22] BENJAMIN, W. *Zur Kritik der Gewalt* (1920-1921?). In: *Walter Benjamin Gesammelte Schriften*, vol. II.1, Frankfurt a.M.: Suhrkamp, 1999, pp. 179-204: 192 ("Darin spricht sich aus, daß es eine in dem Grade gewaltlose Sphäre menschlicher Übereinkunft gibt, daß sie der Gewalt vollständig unzugänglich ist: die eigentliche Sphäre der 'Verständigung', die Sprache").

Humans rights and national minority rights in the European community plan

Carla Ribeiro Volpini Silva[1]
Ana Marina de Castro[2]

Abstract: With the ratification of Lisbon Treaty on December 1st, 2009, the situation of Human Rights in the European Union reaches a new level: now, the Charter of Human Rights should be legally enforced by its Member Countries and the bloc comes to a consensus on how the European institutions must be reformed, rethinking its structure to embrace with property the motto "Unity in Diversity". This article discusses the history of Human Rights under the European bloc, systematizes the creation of the Charter of Human Rights of the European Union, problematizes the Lisbon Treaty and aligns this discussion to the demands of the European Free Alliance – party of the European Parliament which represents the national minorities. The party has a platform claiming the recognition of national minorities, and proposals in concert with a project of European Union more democratic.

Keywords: Human Rights. European Union. Communitarian Citizenship. Minority Rights. Cultural Diversity.

1 Introduction: human rights in the main treaties of European Union

The Maastricht Treaty substantially modified the Treaties of European integration. The three European Communities (European Economic Community, Euratom and European Coal and Steel Community)

[1] PhD in Public Law by the Pontíficia Universidade Católica de Minas Gerais, Master in Public International Law and Community Law by the Pontíficia Universidade Católica de Minas Gerais, Professor at the Law Faculty of Universidade Federal de Minas Gerais; Professor, Universidade de Itaúna. Email: carlavolpini@gmail.com.
[2] Bachelor of State Sciences by the Universidade Federal de Minas Gerais. Email: anamarinadecastro@gmail.com

thereafter were designated as the European Union. Also introduced a single currency, enabled a common economic and monetary policy, instituted community citizenship extended to all citizens of member countries; effected and reinvigorated the market for free movement of people, capital, goods and services, abolishing barriers. Gave more political power to the European Parliament, in a process of co-decision procedure for certain legislative matters. Joined Europe into a political, legal and economic unit, linking the States to a Community law, in order to "achieve the common interest and welfare of its citizens" (OLIVEIRA, 2011).

The Treaty of Maastricht establishes the protection of human rights as the foundation and goal of the European Union, and binds all its Member States. Human Rights, thereafter, are recognized under Community law, as well as in the Constitutional Law of the States (Baptist, 1997). The main law sources of Human Rights were: the European Convention on Human Rights, the European Social Charter of 1961 and the Charter of the Fundamental Social Rights of Workers of 1989.

Citizens of the European Union have the following list of rights:

1. freedom of movement and residence;
2. political rights, which include voting and being elected to the European Parliament, or in the Member State of residence;
3. the right to diplomatic protection;
4. the right to petition the European Parliament;
5. the right to complain to the Ombudsman appointed by the European Parliament;
6. fundamental rights of EU citizens.

2. the charter of human rights of the European union

Proclaimed in Nice on 7 December 2000, the Charter enshrines a number of rights and freedoms of the individual, and was adopted as a recommendation and reference text since then (European PARLIAMENT, 2012). It was annexed to the Lisbon Treaty as a statement, and since then has binding legal to states of the European Union.

In a context of increasingly integrated dialogue between the EU institutions, the view of the rights and freedoms of European citizens was necessary to continue advancing the integration (LUQUE, 2004).

Rights and freedoms:

1. the first chapter - Dignity (right to life, prohibition of torture and the death penalty, prohibition of slavery, etc.);
2. second Chapter - Freedoms (culture, speech, religion, thought, assembly, work, personal security, asylum);
3. third Chapter - Equality (prohibits any kind of discrimination and ensures equal treatment by the law, and respect for cultural, religious and linguistic diversity)
4. fourth Section - Solidarity (right to collective bargaining, consumer law, social security and other diffuse rights)
5. fifth chapter - Citizenship (right to vote and be voted for, the right of access to official documents, the right to petition and diplomatic and consular protection);
6. sixth Chapter - Justice (right to due process, presumption of innocence, etc.).

The legal binding of this Charter illustrates the new panorama taken by Community law: the idea of a united and diverse European Union essentially passes thought Human Rights.

3. The Lisbon Treaty

The fundamental rights of the Union was strengthened after the legal binding of the Charter, through the Treaty of Lisbon. The importance of the cultural factor has also been enshrined since the Treaty of Lisbon (2007, p. 121-122), when, in Article 167, provides that:

> 1. The Union shall contribute to the development of the cultures of the Member States, while respecting their national and regional diversity, and at the same time bringing the common cultural heritage.
> 2. The Union's action aims at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
> - Improving the knowledge and dissemination of the culture and history of the European peoples,
> - Conservation and safeguarding of cultural heritage of European significance [...]
> 4. In its action under other provisions of the Treaties, the Union

> shall take cultural aspects into account in order to, inter alia, respect and promote the diversity of its cultures.

The Lisbon Treaty also made important contributions in terms of democratization, since strengthened the powers of Parliament. Now the Parliament and the Council vote the budget jointly, and both are responsible for safeguarding the fundamental rights (European PARLIAMENT, 2012B). Parliament since then has legislative power identical to the Council (extended in 40 areas of law). Furthermore, shall also have power to vote the compulsory EU budget (representing 45% of the total budget, and includes agriculture and international agreements). Parliament ensures that the Charter of Rights is implemented, in addition to collecting the right of initiative (legislative proposals of the European citizens). Also safeguards the right of national parliaments to submit legislative proposals they deem relevant. For 50 years the European Parliament had only a consultative role. In 1979 there was first election by universal suffrage. For several decades was appointed as the main democratic deficit in the European Union. With the Lisbon Treaty, the legal binding of the Charter of Fundamental Rights and its protection as a function of Parliament, it is stated more strongly as the legitimate representative of the problems of European citizens, encouraging minorities to also seek representation by the community institution.

4. Minorities and national minorities

Regarding minorities, more exactly, the EU recognizes a number of instruments, in the International Law and Community Law (European PARLIAMENT, 2011). Among the most important are:

1. the Charter of Fundamental Rights of the European Union;
2. in International Law - International Convention on the Elimination of All Forms of Racial Discrimination, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992;
3. within the European system of human rights protection - the European Convention for the Protection of Human

Rights, the European Social Charter, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages of the Council of Europe .

Moreover, there are several resolutions, directives and regulations issued by different EU institutions that deal on the subject.

5. The European Free Alliance

Since the first elections by direct vote held within the European Union in 1979, the regional and cultural minorities have sought and obtained representation on the block. At that first year, five regionalist parties gained seats in the European Parliament, representing minorities of Northern Ireland, Belgium, Scotland and Italy (European FREE ALLIANCE, 2012).

In 1981 there was officially made a political coalition between European regionalist parties by the European Free Alliance (EFA), and in 1994 the coalition formally became a federation of parties, in accordance with the provisions of the Treaty of the European Union (European FREE ALLIANCE, 2012). Prior to 1999, the number of seats obtained by the association was not exceeded the number of five. However, from 1999, with the coalition with the Green Party for the parliamentary elections, the ALE got more expressive representation, obtaining 10 seats in parliament (European FREE ALLIANCE, 2012).

The next step was in 2004, with the formalization of ALE as a European political party. Cooperation with the Green Party was held by coalition called "Group of the Greens / European Free Alliance" that lasts until the present day. Today EFA is part of the fourth largest political force in the European Parliament, with 58 members in the current legislature (European PARLIAMENT, 2012a). The party is essentially linked to the defense of minority rights and defends a propose of European Union that transcends the boundaries of national states. Brings together over 40 parties from 17 European Member States, plus 17 observers parties. As stated by the organization itself, are covered nations' parties, nations without parties and territorial entities (ALIANZA LIBRE EUROPEA, 2009). Among minorities represented on the party, we can cite the Basques, Catalonians and Andalusians in Spain, the Scots in Scotland, the Walloons and Flemings in Belgium, the Corsicans in France, the Fresians in Netherlands,

the Moravians in the Czech Republic, and the Tyroleans in Italy, among others (ALIANZA LIBRE EUROPEA, 2009).

Among the party claims, few stand out for their bias in tune with the oxygenation of the European Parliament brought by the Lisbon Treaty and the pursuit of a truly pluralistic Europe (ALIANZA LIBRE EUROPEA, 2009), such as:

1. defense of a European Union-inspired Human Rights, less economist, centralist and liberal;
2. recognition of all the languages of the Member Countries of the European Union, the use of minority languages in official documents and media, and making a Declaration of Linguistic Rights;
3. integration and solidarity between different levels of government, including entities which do not have self-government;
4. support for referendums for creating new states in Catalonia, the Basque Country, Scotland, Flanders and Wales;
5. respect for cultural diversity and in particular the stateless nations, since without the state rights and guarantees are without legal support in the classical sense;
6. creation of a "Senate of the Regions", in which minorities have greater political expression.

Catalan, Galician, Welsh and Basque have been recognized as co-official languages of the European Union with the help of the claims of the party (ALIANZA LIBRE EUROPEA, 2009). Moreover, members of the EFA defend commitment to social assistance and use of European funds for social policies, especially for Roma. Henk ten Hoeve, member Fresian National Party (FNP), a party which integrates the European Free Alliance, believes that with the central motes above and strengthening of democracy through the last Treaty, help to reach a more concrete representation in the European Union. The congressman believes that the votes for Parliament elections should be divided by regions and not states, and that citizens could vote for parliamentarians from other countries, because minorities may form more significant European political parties and vote together (as Lapps or Samis , recognized indigenous people in the Nordic countries of Norway, Russia, Finland and Sweden).

Minorities without distinct territory can call for cultural autonomy not specifically regional (As the Lapps that I mentioned, and the Gypsy people). This cultural autonomy would be claimed on the establishment of schools, radio and television with the dialect of the minority, and any other ways found to perpetuate the culture. For the formation of a community will, in terms of legitimacy, the European Parliament should seek heterogeneity, including national, supranational and subnational actors. EFA defends this heterogeneity, and the willingness to build a Europe for people (ALIANZA LIBRE EUROPEA, 2009), not only discursively as palpably

6 Conclusion and debates

With the Lisbon Treaty the demands of minorities can be best embodied in the European Union. The demands of these minorities are in line with an European project based on ties of solidarity and cultural respect mediated by Human Rights. The European Union began its history with purely economic goals, but today the situation is different, and the philosophical perspective of integration should not only be reconsidered, as it has been, but their voices channeled and reflected in the institutions of the Union. The European Parliament affirms itself as the institution of democratic channeling with the Treaty of Lisbon and the reformulations and extensions made. Moreover, since then the Parliament has conditions to have a real clash with the institutions of higher power (Council of the European Union and European Commission).

Europe's wealth is its cultural diversity, and the idea of Europe fortified by the Lisbon Treaty is based on shared values and the Charter of Human Rights. The European Free Alliance and the platform preached by the party indicates the same perspective, going beyond the concept of national state that characterizes Europeans in a more democratic way, placing the motto of "Europe is unity in diversity" in a concrete form.

It is also necessary to say that the European Free Alliance discusses the proper role of the State in regard to minorities. Also, it brings the discussion of the formation of nation states, and the suppression of identities and diversities. The formation of the nation-state is seen in the International Relations, even as the cause of the problem of the minority, since its conception idealizes the identity between the state and the nation, which is not the international reality. The present context evidently discards the state where the minority lives as an object of identification,

despite the fact that States promote the idea of "nation" and a collective identity."

The historical formation of the nation-state assumed unification around a national identity. Other possible identities inside the state were suppressed and denied .It was taken as truth that there is a perfect correspondence between nation and territory. In therms of reality, there are relations of greater or lesser conflict between the government and minorities, and correspondence between state and nation is fictional. Therefore, it is natural that this conflict should be mediated by other organisms. The European Union, supported by the Community Law and the shared sovereignty, is a supranational actor with a vocation for the mediation, as shown by the case of the European Free Alliance. The challenge is to achieve and maintain relations between minorities and the state in the lowest possible degree of conflict.

References

ALIANZA LIBRE EUROPEA. **Manifiesto de la Alianza Libre Europea (ALE) para las elecciones europeas de junio de 2009**: Vision para una Europa para los pueblos. Avaiable at <http://www.e-f-a.org/efaactive.php?id=126>. Acess on: Apr. 20th. 2012

BATISTA, Vanessa Oliveira. **União Europeia: livre circulação de pessoas e direito de asilo.** Belo Horizonte: Del Rey, 1997.

COMISSÃO EUROPEIA. **O seu Guia do Tratado de Lisboa.** Serviço de Publicações da União Européia, 2009. Avaiable at <ec.europa.eu/publications>. Acess on: Apr. 17th 2012.

European FREE ALLIANCE (EFA). **What's EFA?**. Avaiable at <http://www.e-f-a.org/whatsefa.php>. Acess on: May 25th 2012.

CROONEN, Jef; ARENDS, Jan Jippe. **Interview with the Dutch Senator Henk ten Hoeve: The Lisbon Treaty and Minorities Rights.** Portal Hein Online. Avaiable at: <http://heinonline.gov> Acess on: Mar. 1st. 2012.

INSTITUTO DE ESTUDOS ESTRATÉGICOS E INTERNACIONAIS. **Guia do Cidadão Europeu**. Editorial do Instituto de Estudos Estratégicos e Internacionais, 2005.

KAKU, Willian Smith. **O atual confronto político-institucional da União Europeia: A Organização Internacional e o Federalismo em Questão.** Ujuí: Editora UNIJUÍ, 2003.

LUQUE, Luis Aguiar de. **Os direitos fundamentais no processo de integração Europeia**. In: HOFMEISTER, Wilhelm (org.). Anuário Brasil-Europa: Direitos Humanos e Relações Externas. Rio de Janeiro: Konrad-Adenauer-Stiftung, 2004.

MALLÉN, Beatriz, Tomás. **A Carta dos direitos fundamentais da União Europeia ou a otimização da proteção dos direitos e liberdades na Europa**. p. 38. In: HOFMEISTER, Wilhelm (org.). **Anuário Brasil-Europa:** Direitos Humanos e Relações Externas. Rio de Janeiro: Konrad-Adenauer-Stiftung, 2004.

MARTINS, Estevão de Rezende. Ética e relações internacionais: elementos **de uma agenda político-cultural.** Rev. bras. polít. int., Brasília, v. 44, n. 2, Dec. 2001. Avaiable at <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S003473292001000200001&lng=en&nrm=iso>. Acess on: 12 abr. 2012.

OLIVEIRA, Rodrigo Fernando de Almeida. **Os Direitos Fundamentais na União Europeia após a crise de 2008.** 20011. 108f. Dissertação (Mestrado) – Faculdade de Direito/Programa de Pós-Graduação em Direito - Universidade Metodista de Piracicaba, Piracicaba, 2011.

PARLAMENTO EUROPEU. **Deputados**. Avaiable at <http://www.europarl.europa.eu/meps/pt/performsearch.html> Acess on May 2nd 2012(a).

PARLAMENTO EUROPEU. **O Parlamento Europeu e o Tratado de Lisboa**. Avaiable at: < http://www.europarl.europa.eu/aboutparliament/pt/0042423726/O-Parlamento-e-o-Tratado-de-Lisboa.html > Acess on: May 2nd 2012(b).

PARLAMENTO EUROPEU. **Texto do Mandato da Conferência Intergovernamental de 2007**. Avaiable at < http://eur-lex.europa.eu/Result.do?direct=yes&lang=pt&where=EUROVOC:005524&whereihm=EUROVOC:confer%C3%AAncia%20intergovernamental%20CE >. Acess on: Apr. 13th 2012.

POZO, Carlos Francisco Molina del. **Derecho de la Unión Europea.** Zaragoza: Tallares Editoriales Cometa, 2011.

UNIÃO EUROPEIA. **Ato** Único **Europeu**. 1986. Avaiable at <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_pt.htm.> Acess on Apr. 12th 2012.

UNIÃO EUROPEIA. **Tratado de Roma**. 1957. Avaiable at <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_pt.htm> Acess on: Apr. 9th 2012.

Some Critics to Robert Alexy's "Claim to Correctness"

Edna Felício Torres Câmara, MSc, Phd Candidate[1]
Melanie Merlin de Andrade, MSc[2]

Abstract: This summary intends to investigate the controversy established between positivists and non-positivists, regarding to the Law and morals, presenting the main criticisms to Robert Alexy´s theory, made by Eugenio Bulygin, Joseph Raz and Neil MacCormick, specially concerning to the conception of "claim to correctness". The methodology to be used in this research would be qualitative, consisting of a bibliographic review of the mentioned authors. According to Alexy, this claim to correctness is related both to the real dimension of Law (legal certainty), as to the ideal dimension of Law (which is about justice). It is the result of the author´s strong thesis of the connection between Law and morality, which sustains that Law is connected, necessarily, to a correct moral: when a judge faces a doubtful case, he should decide from moral values rationally justified through the argumentative procedure. In this case, that decision can be considered correct - thesis of Justice as a correction. Therefore, Alexy opposes the positivist theories because they did not admit a necessary relation between law and morality. The philosopher received several criticisms taking into account the fragility of his statement that unfair norms continue to be considered legal, although deficient, provided that the system to which they belong has made a claim to correctness. This statement seems to contradict Alexy's thesis sustaining that legal systems, legal standards and judicial decisions, necessarily formulate a claim of correctness. Bulygin points to the lack of consistent arguments, provided that Law, by its own nature, claims to correctness. Raz argues that classifying theories into positivist or non-positivist is useless, because it is clear that Law has moral properties. He also defends that Alexy failed to support the application of the argument from injustice, given that it is not simple to identify extreme injustices. MacCormick, in turn, argues that Law is not capable of performing speech acts, i.e. it is not possible that law

[1] Federal University of Paraná (Brazil).
[2] Federal University of Paraná (Brazil).

formulates a claim to correctness. At the end of this research, it is concluded that the strength of Alexy's theory is endorsed by the attention and criticism that it still raises. On the other hand, those criticisms show fragilities that require better formulation. Nevertheless, it is undeniable that Alexy's contributions to the refinement of the discussions about the relationship between Law and morals, contribute to highlight the permanent tension between law and justice.

Keywords: claim to correctness, non-positivism, Justice, law, morals

1. Robert Alexy's non-positivist concept of law and the "claim to correctness"

Alexy´s theory is based on a concept of basic norm which includes ethic elements. According to him, if a Constitution is effectively established and socially effective, the behavior in accordance with this constitution is legally ordered, as it is consistent with the claim to correctness, if and to the extent that the norms of this constitution are not extremely unfair.

Unlike Kelsen, Alexy's basic norm contains moral arguments, since there is a necessary connection between law and morality. This relationship is reflected in the need for formulation of claim to correctness in Law (adequacy of law to moral issues through rational justification of statements) and in the application of the argument of injustice (as proposed by Gustav Radbruch: "extremely unjust law is no law *ab initio* when injustice goes beyond the so-called "threshold of injustice." So Alexy's theory depends on the thesis that Law necessarily promotes a claim to correctness.

Alexy's starting point is J. L. Austin´s speech act theory, which is about the responsibility that stems from a verbal action: communicative interaction has a contractual aspect or a commitment between the parties. Thus, one who establishes statements necessarily raise a claim to correctness - commitment to truth, in the field of general practical reason (moral), and to justice, in the field of Law.

Both speeches are governed by rules, which deal with the rational balance of interests and are object of the argumentation theory proposed by Alexy. Considering the existence of these rules, it can be stated that the identification of a moral right (reasoned) is possible - strong moral thesis defended by Alexy.

The passage from general practice argumentation to legal argu-

mentation takes place as follows: after the general argumentative procedure, two incompatible norms, justified without violating any rules of discourse, may subsist giving rise to the so called "knowledge problem", i.e. two norms subsist and it is not possible to determine a single correct norm. As this limit is reached, there is a need to move to the level of legal discourse, in which procedures regulated by positive Law guarantee reasoning - this is how the legal discourse is institutionalized. Therefore, Alexy asserts that legal discourse is a special case of practical discourse (this is called the special case thesis).

In terms of legal discourse, positivity (legality) is combined with the need for coercion (element connected to the social effectiveness) and the requirements for social organization, considering that many moral demands cannot be observed as well as certain desirable objectives cannot be achieved only through individual actions and spontaneous cooperation. Therefore, the institutionalization of legal discourse allows possible results that would not be obtained with the use of general practical discourse.

Alexy points out, however, that the theory of argumentation does not guarantee certainty: its rational character does not refer to results, but the application of rules and forms of legal argumentation, which offer the criteria of correctness for legal decisions. According to Alexy, this could lead to the false impression that the transition from general practical discourse to legal discourse flows towards legal positivism. This idea can be rejected with the observation that Law, exactly in this transition, shows its dual nature: on the one hand, in the form of correction and discourse, on the other, in the form of legality and effectiveness (thesis of the dual nature of Law).

This dual nature of law derives from two apparently opposing principles: justice and legal certainty. These principles are included in the claim to correctness and should be combined without any disregard. According to Alexy, in jurisdictional claim, the judge says that he has followed the enacted and effective law, but also states that this law and its interpretation are morally correct.

However, the uncertainties inherent to the legal discourse (especially the open texture of language pointed to by H.L.A. Hart) indicate the need to set limits to the content of ordinary law. These limits are the guarantee of fundamental rights and the invalidity of extremely unfair rules (in the latter case, crossed the threshold of extreme injustice, the argument of injustice, pointed out by Alexy as a second level correction, is applied). Moreover, they make it possible to reject Kelsen´s thesis "all

content may be law".

In addition to guaranteeing fundamental rights, which implies constitutional jurisdiction, the discourse theory leads to the requirement of deliberative democracy, which implies a discursive rationality, in which all participants seek for a correct political solution from arguments. As Alexy states, whoever wants correction, should want discourses, and whoever wants discourses should want democracy.

In this context, the claim to correctness is promoted by subjects who create, interpret, apply or enforce law (this is called "institutional circle") and by people who inquire and argue among themselves about the obligatory, prohibited, permitted or authorized by the system (non-institutional circle) - this explains the methodological importance of the observer´s perspective in Alexy´s theories.

Regarding the consequences arising from the relation between law and morality, Alexy claims that legal systems that do not formulate a claim to correctness are not legal systems; on the other hand, legal systems that formulate but do not satisfy the claim to correctness are deficient. However, legal norms and individual judicial decisions that do not formulate or do it, but do not satisfy the claim to correctness, are deficient, but they are still legal, provided that they are part of legal systems that have at least formulated the claim to correctness. However, if they are extremely unfair, they are not *ab initio* law.

Thus, the relevance of the claim to correctness is to distinguish law of brute force, what gives law the ideal necessary dimension, which is reflected in Alexy´s non-positivist concept of law. According to him, Law is a normative system that formulates a claim to correctness and consists of all the norms of a socially effective constitution, that are not extremely unfair, as well as all of the rules established in accordance with this constitution which have a minimum social effectiveness and are not extremely unfair, to which belong the principles and other normative arguments, on which should rely the procedure of law enforcement in order to satisfy the claim to correctness.

It´s important to emphasize that, according to Alexy, the acceptance of the thesis of the separation between law and morality is what allows us to state that a certain current analysis of law is positivist or non-positivist. According to Alexy, when ethical elements are included in a concept, it is a non-positivist concept of law.

2. The debate between Robert Alexy and Eugenio Bulygin

Eugenio Bulygin, *professor emeritus* at the University of Buenos Aires, is internationally recognized with one of the great philosophers of law today. In a debate that began in 1993, he criticizes various aspects of Alexy´s theory.

According to Bulygin, Alexy's theory central point is the definition of law and the relation between law and morality. For Alexy, all positivist theories defend the Separation Thesis, i.e., there would be no conceptual link between moral laws and the legality and effectiveness would suffice Law. On the other hand, non-positivist theories defend the thesis of the connection, in other words, the concept of law includes moral elements, besides the legality and social effectiveness. Bulygin also says that Alexy's theory is based on the possibility of distinguishing the observer´s points of view (the subject that just describes law without any commitment to following its rules) of the participant´s (the subject who takes part in an argumentation in a legal system of and inquires whether the decision given is correct). The problem, according to Bulygin, is that the distinction between the two points of view is not that clear, and many subjects are, at the same time, participants and observers regarding certain legal system.

For example, the judge acts as an observer when searching for the applicable law to the case and acts as a participant in the formulation and execution of the decision making. Therefore, according to Bulygin it would not be absurd to assure that the judge's opinion would have a significant weight on the decisions.

Even admitting the possibility of distinguishing the observer´s perspective from the participant's perspective, Bulygin criticizes Alexy´s claim that what differentiates a legal system from a gang´s normative system would be the claim to correctness. If so, the rhetoric in formulating the claim would transform a predatory system into a legal system.

Bulygin also questions Alexy´s statement that every creation of a law is conceptually connected with the claim to correctness, thus, normative systems that do not formulate a claim to correctness cannot be considered legal systems; on the other hand, a legal norm or judicial decision taken individually, even though it does not formulate (or formulates, but does not satisfy) the claim to correctness, still remains legal, but in this case, it is legally flawed. In Alexy´s point of view, the notion of deficiency is the evidence that a claim to correctness is required, but

Bulygin points out circularity in this reasoning that leads to the following tautology: flawed legal systems are flawed. Bulygin says:

> The claim to correctness is necessary because normative systems that raise it without fulfilling it are faulty. And this faultiness has a special character because it is based on the necessity of the claim. So the necessity of the claim is at the same time a reason and a consequence of this claim (BULYGIN, 2010, p.15).

Bulygin also refers to the need of including moral elements in the concept of Law indicated by Alexy. This could mean that every legal system would contain elements of any moral (but not of the same moral) or that there would be a certain moral that is included in every Law. Alexy calls "poor connection" the first case and "strong connection" the second case, in which the connection is done with a moral justification. Bulygin objects that, in order to demonstrate that the strong connection is correct, it would be necessary to show evidences that everybody has the same idea of correct moral and he considers unlikely that Kant, Hitler, Stalin, Gandhi and Bush have the same understanding about the correct moral (BULYGIN, 2010, p. 16).

Finally, Bulygin comes to a conclusion that, he assumes to be, in some ways, surprising: Alexy´s theory put an end to the debate between positivists and non-positivists, proving the positivist thesis, since Alexy does not deny that the idea of separation between law and moral, from the observer´s perspective, is essentially correct, since positivism is only interested in identifying the law (an observer can describe a system and its rules without using moral values). Alexy refuted Bulygin´s criticism, however, it seems that both two authors remain firm in their theoretical positions. The disagreement is explained by differences in the authors´ theoretical assumptions: Bulygin assumes the formal conception of the analysis of law whereas Alexy assumes the pragmatic conception (ATIENZA, 1999, p.44) and illustrates the thesis that the debate between positivist and non-positivist has not ended with Alexy´s theories.

3. Some Joseph Raz's criticism

According to Gaido (2011, p. 14), Robert Alexy and Joseph Raz are the main contemporary exponents of non-Positivism and Positivism, respectively. In this work, the following divergence will be discussed, in particular: while Alexy considers the idea of claim to correctness essen-

tial, the notion of claim to authority constitutes the basis of Raz´s theory. Although divergent, these ideas are the characteristics that distinguish Law from mere coercive power, and approximate it to an ideal type.

Alexy´s critic, Raz says that the classification of theories of law as positivist or non-positivist is useless and illusory, since it is evident that Law has necessarily moral properties that cannot be refuted, not even by the theories of positivist tradition. Furthermore, Alexy fails to distinguish the participant´s perspectives from the observer´s, as well as he would not have justified well enough the assertion that Law necessarily formulates a claim to correctness. From Raz´s point of view, it would be more important to forget labels and consider the various theories within their own terms than Alexy´s failed attempt to contradict Legal Positivism. (RAZ, 2007, p. 17-35).

Raz questions, specifically, Alexy´s assertion that Positivism is an obsolete theory because, if so, *"Why flog a dead horse? Why write a book to refute a totally discredited theory*? "(RAZ, 2007, p. 17). The author states that Alexy´s assumptions about the supposed obsolescence of Positivism cannot be supported, especially because the term "Positivism" contains different theories within it and the discussions about them remain.

Moreover, Raz states, Alexy was wrong in suggesting that all so-called positivist theories are based on the Separation Thesis (moral elements would not be included in the concept of Law). The author points ou a crucial discussion:

> Many normative and evaluative concepts are common to moral and non-moral discourse. There are moral and non-moral reasons, duties, rights, virtues, offences, rules, laws, and so on. There are difficulties in demarcating the realm of morality, and distinguishing, between it and the non-moral domain (RAZ, 2007, p. 19).

This difficulty in identifying the concepts within the moral realm, lead him to question what benefits would come from the struggle to solve this impasse.

Moreover, Raz highlights, Law formulates a claim not to correction, but to authority - which is undoubtedly a moral appeal, since law affects basic aspects of people's lives and interaction between individuals.

Therefore, Raz affirms that it is clear that the law has got required moral properties because, from the participant´s point of view, i.e., those who understand law as a source of justification of behaviors, Law can

only be accepted considering moral beliefs in the normativity of Law. So, Law is a legitimate moral authority structure, because only the valid norms, i.e., those with legitimate authority as a source, motivate people to obey them. (GAIDO, 2011, p.109). However, the idea of legitimate authority refers to the idea that there was a previous solution given by other individuals so that, if a certain fact falls within the scope determined by the authority, any further deliberation is irrelevant (GAIDO, 2011, p.179) .

Thus, according to Gaido (2011, p. 14-19), Raz and Alexy have some points in common. Both support that to explain what Law is, is to explain its nature, and the required properties of both. They also have in common the belief that understanding the nature of Law is only possible if one understands the moral value aimed by Law. However, the authors give different implications to that value.

Raz doubts that the Separation Thesis could be used to define Law, since considering it, his own writings should be considered non-positivist. This is because the concept of authority is related to moral, but the author observes that his writings are usually seen as positivists. The question that arises is: what is the use of such classification?

Just as he did to Bulygin, Alexy rejected Raz´s criticism. However, it shows that the arguments between positivists and non-positivists are still relevant and current.

The last theorist that will be attempted is Neil Maccormick, a scottish legal philosopher and politician.

He defends that the affirmation that the law claims correctness is based on a mistake. For him, to say law claims anything, meaning this literally, is a category mistake, because there is no entity "law" which is capable of performing speech acts of this sort.

Law considered generically is a kind of normative order, specifically, it is institutional normative order. The existence of normative order is a state of affairs, that do not have intentions, do not make claims and are incapable of performing speech acts. States of affairs should be distinguished from entities that can have intentions, can make claims.

Legislatives make laws, by a fairly long drown-out process involving inquiries, amendments, debates, until the final vote. The acts of higher agencies of government - in legislative, executive and judiciary are confined to those that fall whiting the category of "speech acts". Any claim to correctness or authority associated with law will there be forms in the context of these speech.

Thereby, it is a misleading to input claims to the law itself. More

obvious contends for such a single point of imputation would, however, surely be "the state" rather than the law itself, at any rate in the case of state law. The state is commonly personified as an acting subject.

In general: all purported acts of legislation involve an implicit claim (or sometimes indeed an express one) on the part of all those participating that each is constitutionally empowered to play the relevant role in the legislature. Purporting to legislative involves the claim: successfully doing it presupposes that the claim is sound or justified.

He agrees with Raz in the proposition that governmental acts-in-law presuppose the authority or the actor, and thus involve an implicit claim by the actor to have appropriate authority.

If the state has a fair and democratic constitution, this fairness and democratic character should be taken seriously even by those who disagree with the particular decision. In legislative politics, there is always some underlying claim about just demands and the demands of justice. That this so indicates that the law is unthinkable without some ascription of value-laden functions to ir. Law is for the securing of civil peace so far as possible; civility requires a common sense of justice, for there is no peace where there is injustice. Certainly, what justice requires may be and often is deeply controversial, diving people sharply into opposing political camps.

MacCormick agree that a well-founded conception of law, has to include a version of the Radbruch Formula. In the contemporary world there arer established human rights instruments that provide a positivised means of establishing in an interpersonal and interstate context an identifiable limit beyond which legislators and governments cannot go, and which all judges ought to respect.

He sustains that it is true that any speech act implicitly carries with a claim of correctness. Therefore, this claim is not of the "law", but that of the law-maker.

Concluding, these are the controversy established between Alexy, Bulygin, Raz and MacCormick specially concerning to the conception of "claim of correctness". The debate is relevant and there's still not a unique answer.

References

ALEXY, Robert. Rights, Legal Reasoning and Rational Discourse. *Ratio Juris*, v.5, n.2, p.143-152, jul. 1992.

_____. *Teoria de los derechos fundamentals*. Madrid: Centro de Estudios Constitucionales, 1997.

_____. Law and Correctness. *Current Legal Problems*, v.51, n.1, p.205-221, 1998. Disponível em: <http://clp.oxfordjournals.org/content/51/1/205.extract>. Acesso em: 15 ago. 2012.

_____. La tesis del caso especial. Tradução de Isabel Lifante. *Isegoría Revista de Filosofía Moral y Política*, n.21, p.23-35, 1999. Disponível em:

<http://isegoria.revistas.csic.es/index.php/isegoria/issue/view/4>. Acesso em: 02 set.2012.

_____. Derecho injusto, retroactividad y principio de legalidad penal: la doctrina del Tribunal Constitucional Federal alemán sobre los homicidios cometidos por los centinelas del Muro de Berlín. *Doxa - Cuadernos de Filosofía del Derecho*, Alicante, v.23, p.197-230, 2000a. Disponível em: <http://bib.cervantesvirtual.com/ servlet/SirveObras/public/12383873132368273109213/Doxa23_09.pdf?portal=4>. Acesso em: 08 ago. 2012.

_____. On the structure of legal principles. *Ratio Juris*, v.13, n.3, p.294-304, set. 2000b.

_____. La crítica de Bulygin al argumento de la corrección. In: ALEXY, Robert; BULYGIN, Eugenio. *La pretensión de corrección del derecho*: la polémica Alexy/Bulygin sobre la relación entre derecho y moral. Tradução de Paula Gaido. Bogotá: Universidad Externado de Colombia, 2001a. p.53-84.

_____. Sobre la tesis de una conexión necesaria entre derecho y moral: la crítica de Bulygin. In: ALEXY, Robert; BULYGIN, Eugenio. *La pretensión de corrección del derecho*: la polémica Alexy/Bulygin sobre la relación entre derecho y moral. Tradução de Paula Gaido. Bogotá: Universidad Externado de Colombia, 2001b. p.95-115.

_____. *Teoria da argumentação jurídica*. Tradução de Zilda Hutchinson Schild Silva. São Paulo: Landy, 2001c.

_____. *The argument from injustice*: a reply to legal positivism. Tradução de Stanley L. Paulson e Bonnie Litschewski Paulson. New York: Oxford University Press, 2002.

_____. Sobre las relaciones necesarias entre el derecho y moral. Tradução de Pablo Larrañaga. In: VÁSQUEZ, Rodolfo (Coord.). *Derecho y Moral*: Ensayos sobre un debate contemporáneo. Barcelona: Gedisa, 2003a. p.115-137.

_____. Justicia como corrección. *Doxa - Cuadernos de Filosofía del Derecho,* Alicante, v.26, p.161-173, 2003b. Disponível em: <http://www.cervantesvirtual.com/obra/justicia-como-correccin-0/>. Acesso em: 08 out. 2012.

_____. An Answer to Joseph Raz. In: PAVLAKOS, George (Ed.). *Law, Rights and Discourse:* themes from the Legal Philosophy of Robert Alexy. Oxford: Hart Publishing, 2007a. p.37-58.

_____. On the concept and the nature of law. *Ratio Juris*, v.21, n.3, p.281-299, set. 2008a.

_____. *Conceito e validade do direito*. Org. Ernesto Garzón Valdes *et al.* Tradução de Gercélia Batista de Oliveira Mendes. São Paulo: WMF Martins Fontes, 2009a.

_____. Los principales elementos de mi filosofía del derecho. *Doxa - Cuadernos de Filosofía del Derecho, Alicante*, v.32, p.68-84, 2009b. Disponível em: <http://bib.cervantesvirtual.com/servlet/SirveObras/01715418215691980708813/ 044469.pdf#search="alexy raz"&page=12>. Acesso em: 08 ago. 2012.

_____. Between positivism and non-positivism? A Third reply to Eugenio Bulygin. In: *Conference On Philosophy And Law Neutrality And Theory Of Law*, 1., 2010. Girona (Espanha), 2010. Disponível em: <http://www.filosofiay derecho.es/congreso/ponencias/alexy.pdf>. Acesso em: 02 set. 2012.

_____. Minha filosofía do direito: a institucionalização da razão. In: HECK, Luís Afonso (Org. e Trad.). *Constitucionalismo discursivo*. 3.ed. Porto Alegre: Livraria do Advogado, 2011. p.19-40.

ATIENZA, Manuel. El Derecho como argumentación. *Isegoría Revista de Filosofía Moral y Política*, v.21, p.37-37, 1999. Disponível em http://isegoria.revistas.csic.es/ index.php/isegoria/article/viewArticle/76>. Acesso em: 10 out. 2012.

AUSTIN, J. L. *Quando dizer é fazer*. Tradução de Danilo Marcondes de Souza Filho. Porto Alegre: Artes Médicas, 1990.

BULYGIN, Eugenio. Alexy y el argumento de la corrección. In: ALEXY, Robert; BULYGIN, Eugenio. *La pretensión de corrección del derecho*: la polémica Alexy/Bulygin sobre la relación entre derecho y moral. Tradução de Paula Gaido. Bogotá: Universidad Externado de Colombia, 2001a. p.41-51.

_____. La tesis de Alexy sobre la conexión necesaria entre el derecho y la moral. In: ALEXY, Robert; BULYGIN, Eugenio. *La pretensión de corrección del derecho*: la polémica Alexy/Bulygin sobre la relación entre derecho y moral. Tradução de Paula Gaido. Bogotá: Universidad Externado de Colombia, 2001b. p.85-93.

_____. ¿Está (parte de) la filosofía del derecho base en un error? *Doxa - Cuadernos de Filosofía del Derecho*, Alicante, v.27, p.15-26, 2004. Disponível em: <http://bib.cervantesvirtual.com/servlet/SirveObras/67923951090103897321457/027916.pdf#search="alexy raz"&page=2>. Acesso em: 10 out. 2012.

_____. Alexy between positivism and non-positivism. In: *Conference On Philosophy And Law Neutrality And Theory Of Law*, 1., 2010. Girona (Espanha), 2010.

Disponível em: <http://www.filosofiayderecho.es/congreso/ ponencias/bulygin.pdf>. Acesso em: 02 set. 2012.

GAIDO, Paula. Introducción. In: ALEXY, Robert; BULYGIN, Eugenio. *La pretensión de corrección del derecho*: la polémica Alexy/Bulygin sobre la relación entre derecho y moral. Tradução de Paula Gaido. Bogotá: Universidad Externado de Colombia, 2001. p.15-39.

_____. *Las pretensiones normativas del derecho*: um análisis de las concepciones de Robert Alexy e Joseph Raz. Madrid: Marcial Pons, 2011.

_____. Some problems with Robert Alexy's account of legal validity: the relevance of the participant's perspective. *Ratio Juris*, v.25, n.3, p.381-392, set. 2012.

HART, Herbert Lionel Adolphus. Positivism and Separation of Law and Morals. In: _____. *Essays in Jurisprudence and Philosophy.* New York: Clarendon Press - Oxford, 1983. p.49-87.

_____. *O conceito de direito.* Tradução de A. Ribeiro Mendes. Lisboa: Fundação Calouste Gulbenkian, 1986.

KELSEN, Hans. *Teoria pura do direito.* 7.ed. Tradução de João Baptista Machado. São Paulo: Martins Fontes, 2006.

MACCORMICK, Neil. Why Law Makes No Claims. In: PAVLAKOS, George (Ed.). *Law, Rights and Discourse*: themes from the Legal Philosophy of Robert Alexy. Oxford: Hart Publishing, 2007. p.59-68.

RAZ, Joseph. The Argument from Justice, or How Not to Reply to Legal Positivism. In: PAVLAKOS, George (Ed.). *Law, Rights and Discourse*: themes from the Legal Philosophy of Robert Alexy. Oxford: Hart Publishing, 2007. p.17-36.

The role of precedent in the rational control of judicial decision from the perspective of the Theory of Legal Argumentation by Robert Alexy

Maira Portes[1]

Abstract: In the context of the democratic constitutional state, the judicial decision is constructed by means of argumentative processes, and must be grounded in the way that the interlocutors be able to knows what were the reasons that led the judge to decide in that way. By the reasoning the plaintiff could knows the premises that led the judge to choose a particular interpretation of the law in its application to that case, which is called the context of justification. The internal justification is sufficient when the argument involves only the analysis of the facts regarding the rules, represented by syllogism. However, it does not include the issues about the content of the constitutional standard, which are the subject of the theory of legal argumentation. Whereas the syllogism is considered a insufficient method to reach all the reasoning contained in the judgment, the use of the argumentation requires some mediations. Which of the arguments must be selected to make a complete decision? Which logical and objective criteria are suitable for choose the winner arguments? Which of these arguments represent the truth of the case? Which concept of truth we are talking about? Based on these questions, Robert Alexy in his "Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Reasoning" proposes the rational control of judicial decisions by establishing logical and objective criteria for selecting those arguments more likely to reach the truth. The sense of truth, in this context, is about truth as correctness, which is discursively constructed, and can only be achieved by the exercise of argumentation towards consensus, even ideal. In this context, the aim of this paper is to examine, by using as main reference the book referred, the judicial precedent as external justification for correcting the premises used in legal reasoning, and its role in building and maintaining the coherence of the legal discourse within the court decision. The claim to correctness of the statements that compose the judicial decision is sought by empirical and normative elements susceptible of valuation, which starts from the notion that legal discourse is part of the general practical discourse, in other words, that one cannot be completely disconnected from

[1] Researcher at Federal University of Paraná (Brazil).

some moral conceptions, which, in a constitutional state, are crystallized in the Constitution. Thus, if the control of rationality consists in imposing limits on reasoning, it can be considered that the precedent is one of these boundary conditions, since it constrains the judge to observe the reasons already stated, thus limiting their argumentative range. In this sense, we will analyze two essential elements to characterize the precedent as a limiting condition to the legal discourse: the principle of universality, by which the present argument taken as the correct interpretation should be applicable to all cases with the same relevant conditions, and the principle of inertia, whereby the removal of a previously established as correct interpretation presupposes a relevant and sufficient reasoning for the interpreter. Both characterize the precedent as an external justification element, and their analysis will serve mainly to investigate the argumentative function of precedent with respect to the divergence of the earlier decision by the two forms of departure of precedent in American law: the distinguishing and overruling. What is sought to demonstrate that it is departure from a precedent is an argumentative procedure, in that the removal of certain reasons considered correct can only be done if the new argument justify the change, and if this new reasoning is applied to similar cases since then. It is quite evident, therefore, that the exception to the universality and inertia must always be grounded, and that this is an argument against the main ways to control the rationality of judicial decision and maintain the pretense of correctness.

Keywords: precedent - legal argumentation - overruling

1. The role of precedent in the control of the rationality of judicial decisions

This paper aims to demonstrate the role of Alexy's theory of legal argumentation to the building of a normative theory of precedent, in the sense that give some reasons to the work with the legal argumentation, in complement of the traditional reasoning method to interpret the law, the syllogism.

According Alexy's theory, syllogism is not sufficient because in some situations like the vagueness of the legal language, the possibility of conflicts between rules, the possible existence of cases not regulated by current rules, as well as the judgment *contra legem* when the judge faces a hard case, thus incoming in a lack of interpretation. This can be faced by other discursive forms through the argumentative process (ALEXY, 2011, p. 280).

Once the legal argumentation is a more flexible method than syllogism, it is necessary to establish some criteria for controlling the rationality of the premises and the conclusion, which are moral criteria.

The notion of the discursive nature of the legal reasoning has its theoretical roots in the rule of grounding developed by Habermas, which, based on the concept of ideal speech condition, marks its three essential aspects: equal rights, the universality of the arguments and the absence of coercion (ALEXY, 2011, p. 133).

These are ideal criteria, what means that can't be fully realized and otherwise demonstrates the flexible nature of speech, which allows that the evaluation of a normative statement acquires different features according to the variation of these aspects, reaching different results. According Alexy (2011, p.33), the most of standards is only discursively possible, and because of this its reasoning is not definitive, since it remains subjected to the constantly changing of the conditions of an ideal speech.

Among these aspects, Alexy points out the need for the universality of the arguments to characterize the precedent as limiting condition to the legal discourse, and also the need for stability in the arguments of the judicial decision, in order to avoid undue oscillation of arguments, what refer to the principle of inertia formulated by Chaim Perelman.

For Alexy, the role of precedent in rational argumentation can be based on these two principles.

1.1. The principle of universality

The principle of universality to which the author refers is linked to the descriptive meaning of the statement, in the sense of that descriptive assumptions applied to a particular object should be applied to all other objects that have the same material aspects. If a certain proposition is elected as a good one to describe an object, so it must be used to describe all the other objects that have this characteristic (ALEXY, 2011, p. 73).

This is a moral rule that connects the concepts of reason and rule: if "A" is the rule in a given situation, hence "A" is good. These rules are moral principles which are minimally generalizable, and are characterized by the absence of any mention of a particular identification. According Alexy's theory, to realize the claim of correctness depends on if these logical rules were taken as starting point (ALEXY, 2011, p. 74-75).

However, it's not sufficient to classify a specific rule as a good one. It is also necessary that this rule be appropriate. The principle of universality, as a logical criterion of valuation, should be read with the principle of prescriptivity, whereby the judge must be willing to suffer the consequences of the applied rule, and, at the same time, to applying the same rule to all the other cases later. So, to accept a standard should means to accept that this rule is morally justified.

Therefore, for discursive theory of law, to follow the judicial precedent is a practice based on the principle of universality, a rule of general practical discourse in which "[a]ny speaker who applies predicate F to object A must be prepared to apply F to any other object that is similar to A in all relevant aspects." This is an equality predicate, which is, according to Alexy, a notion present in any concept of justice (ALEXY, 2011, p. 267).

One of the main difficulties pointed out by the author is to define which are the relevant circumstances that allows the departure of the argument in the previous case. And even when it is possible to identify the relevant circumstances between a case and its precedent, it may considered necessary to modify the arguments, presenting, therefore, other practical reasons that point to an argument closer to correctness (ALEXY, 2011, p. 268).

To observe the principle of universality as a predicate of the claim of correctness results in the fulfillment of another important predicate which is responsible for the notion of stability claimed to ensure that random arguments will not be regarded: the principle of inertia.

1.2. The principle of inertia

According to the principle of universality, the argument presented in a particular decision must be followed whenever it could be possible to identify the resemblance of the relevant circumstances of a case and the precedent case (ALEXY, 2011, p. 171-172).

When this universal rule is broken, by departure of the arguments contained in the precedent, it is up to the interpreter to justify the reason why he diverges from the arguments made in the precedent, what it calls principle of inertia (CELLA, 2002, p. 26).

According this principle, the argument shall only be changed if given sufficient reasons for the previous arguments are considered less accurate than the current arguments, what is a duty of who makes the

further argument.

Does not mean that the argument must be challenged, but the arguments must remain healthy until better arguments are not presented. When a certain argument becomes habitual it becomes a rule, and its departure must be justified, in order to preserve the minimum stability. This intend to avoid the endlessly argumentation and limiting the range of justification to what is put in doubt (ALEXY, 2011, p. 172).

2. The rationality of judicial decision: a requirement of the Constitutional State

The argumentative procedure performed, rather than as an alternative, a complement to the purely formal syllogistic procedure, once enabled the examination of the legal text not only in its semantic plan, but also at the pragmatic level. However, the argumentation does not obviate the syllogism: it remains as the primary method.

So, precedent is a control element of the rationality of judicial decision because it provides means for logical system closure, and logical justification for the argument.

According to the principle of universality, the precedent have a normative claim, not in the sense that should be considered as a general and abstract rule, but in the sense that it is a concrete and specific rule, applicable where the relevant circumstances can be observed.

On the other hand, the principle of inertia is the limitation to the modification of the arguments, since it requires that the modification must be justified. This is due to the need for minimum stability of the system, so that people are not subject to unwarranted modification of the reasons that lead to particular conclusions, and may supposed to guide their behavior in accordance with the understanding currently designed as correct.

Thus, the precedent remains as an external justification to the rule of the decision, to the extent that could provide criteria for correcting the assumptions that are not predetermined in the argumentative dynamics. Also, it is a limitation to the modification of the main arguments in order to promote the distribution of argumentative load between who developed the precedent and who intends to deviate from it.

From this perspective, it is possible to defend the applicability of a normative theory of precedent also to civil law systems, not in the mold of *stare decisis*, but in order to consider the control of rationality,

avoiding perpetuating understandings contrary to the prevailing notion of correctness.

3. The argumentative load in the divergence of precedents. Distinguish and overruling

Departure from judicial precedents has been a thorny problem for the common law judges, because in a context of *stare decisis*, the precedent's basis of authority restricts the ability to disagree, do not apply and even revoke the standard built in precedent, in the name of maintaining the stability and uniformity of law.

Some issues such as coherence, social congruence and systemic consistency, besides the widespread search for legal certainty, concerns the rational demands of judicial precedent, and in this point, the theories of legal argumentation developed throughout the twentieth century may provide some answers to these questions.

By considering the fact that judicial precedent is a judicial decision, we conclude that it must be justified, once there are consolidated legal rules that should be universal, in a concrete way.

The argumentation in a given judicial decision must remains unless one presents sufficient grounds for departure for it. That argumentation is named by the doctrine as the *ratio decidendi* of a case (CROSS, 1991, p. 32). Once the court decision is a response to the claim of correctness, the *ratio decidendi* can be understood as the rule formulated for a given case by applying the law in order to convey the more "correct" solution, or the closest to a given concept of justice.

To define the *ratio decidendi* of a decision it is important to the control of rationality of judicial precedent. Perhaps it would be even more importantly to defend the possibility of more than one ratio for each case, isolating thus the rules of law of the outcome of the trial, and thus the universal aspect of the particular aspect of judicial precedent (ALEXY, DREIER, 1997, p. 156).

Alexy points out that the argumentative role of the judicial precedent becomes more evident when it comes to the chances of its departure, specially distinguish and overruling. These kind of argumentation depends on the strict interpretation of the *ratio decidendi*, so that we can identify the underlying standard decision. When is given to the judge to change the *ratio decidendi*, he reaches the power to change the standard formulated for that context, and this change is justified precisely in a

universal criterion, given that a precedent is not exactly suitable for the resolution of this case, requiring the construction of another rule that could be applied in cases with the same specificity. Thus, it satisfies the requirement of universality (ALEXY, 2011, p. 271).

The underlying question about the two techniques of departure from the precedent is the need to support the removal of the arguments contained in judicial precedent. In one hand, the change in argument requires a rational justification in respect of the principle of inertia. In another, justify the changing or overruling of a certain *ratio decidendi* is also a way to maintaining its universal character, in that the solution offered by the decision can be applied to other cases.

Alexy says, by the way, that by making this control of rationality, ensuring the stability of the argument and the universality of the rule underlying the decision, and therefore electing inertia and universality as logical criteria of rationality, the judge plays a role that is similar to the role of the legislature, as that exercises control over the standard argumentative created for the case (ALEXY, 2003, p.170).

It can be concluded, therefore, that follow precedents can be understood as one of the control criterion of rationality of judgment, by limiting the range of argumentation and demanding justification for the change in the argument. Since the rationality of the decision depends, among other criteria, on the justification of the departure of the previously argument that justify certain decision, and the construction of logical reasoning applies to the other cases, it is an argumentative procedure arising from requirements of a practical and general discourse, as the principle of universality and the distribution of the load argumentative (BUSTAMANTE, 2010, p. 69).

This process is applicable regardless of the admission of precedent as a source of law and the strength of its institutional authority. Of course, the combination of authority with rationality provides more robust subsidies to maintain the coherence of the legal system, but understand that the use of precedent is, above all, a requirement of rationality, leads to conclude that the absence of a doctrine of binding mandatory, as it can be observed in the countries of the civil law tradition, does not prevent to recognize the precedent as an essential element of legal reasoning, having no need to rule the need to follow precedents.

References

ALEXY, Robert. Teoria da Argumentação Jurídica: a teoria do discurso racional como teoria da fundamentação jurídica. Rio de Janeiro: Forense, 2011.

_____; DREIER, Ralf. *Precedent in the Federal Republic of Germany* in MCCORMICK, Neil; SUMMERS, Robert. Interpreting Precedents: a comparative study. Vermont, USA: Ashgate Publishing Company, 1997.

_____. Justicia como corrección. Avaliable in: http://www.cervantesvirtual.com/obra/justicia-como-correccin-0/. Doxa : Cuadernos de Filosofía del Derecho, n. 26 (2003), pp. 161-173.

BUSTAMANTE, Thomas da Rosa. Principles, Precedents and their Interplay in Legal Argumentation: How to Justify Analogies between Cases. Avaliable in: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593606. In BOROWSKI, Martin. *On the nature of principles.* p. 63-77, 2012.

COSTA, Alexandre Araujo. Direito e método: diálogos entre a hermenêutica filosófica e a hermenêutica jurídica. Disponível em: http://repositorio.bce.unb.br/bitstream/10482/1512/1/2008_AlexandreAraujoCosta.pdf.

CROSS, Rupert. *Precedent in English law*. Clarendon Press, Oxford, 1991.

EISENBERG, Melvin A., *The nature of the Common Law*. Harvard University Press, 1988.

LIMA, Newton de Oliveira. A teoria da argumentação jurídica de Robert Alexy: pressupostos e paradigmas para o neokantismo jurídico. Disponível em: http://jusvi.com/artigos/37101.

ROVER, José Aires [et al…]. Conexões entre moral e direito sob um ponto de vista lógico. Disponível em: http://pt.scribd.com/doc/15091163/Conexoes-entre-moral-e-direito-sob-um-ponto-de-vista-logico.

Consensual weighting by arbitration and the Alexy's theory of argumentation

L'Inti Ali Miranda Faiad[2]
Lossian Barbosa Bacelar Miranda[3]

Abstract: We establish links at the level of principles between Antiphon's conjecture about infinite sharing and Robert Alexy's theory of legal argumentation and also a correlated method of consensus assisted by arbiters. Our main problems are: to identify the use of the method of exhaustion in the application of the Alexyan argumentation theory; to construct a method of arriving at consensual weighing through arbitration.

Our goals are: to identify the analogical use of the exhaustion method in the construction of Alexy's theory of legal argumentation and, from there, to establish a multifaceted method of consensual weighting assisted by an arbiter through application of variable parameters and the reiterated use of argumentation techniques.

The proposed method requires, in each phase, fair decisions in accordance with the points of view of the parties involved and allows them to evaluate the process of evolution in each phase. The higher the parties' degree of knowledge of the conflict, the easier will be the application of the method. The fragility of the method derives from the fact that it is only approximate and that the arbitrator becomes indispensable.

Keywords: Method of exhaustion. Weighting. Arbitration. Alexy's theory of argumentation.

1. Introduction.

Unlike the legal knowledge, the constructions made by rule and compass are the safest scientific knowledge of the human being. They are characterized by empiricism, theory, abstraction, realizability by a finite number of procedures, the reproducibility, ability of forecasting, applicability, intuition, deduction and experience. And all of that at a

[2] Lawyer and Master in Law student at University of São Paulo, Brazil.
[3] Professor at the Federal Institute of Education, Science and Technology of Piauí, Brazil.

very low level of difficulty. From efforts to square the circle by successive approximations (passage to the limit) from Antiphon's rhetoric technic of enumerative neighborhood inductive of causality, the differential and integral calculus has been developed. This is the second safest form of human knowledge and the basis of current scientific determinism. Here we are studying the legal discourse and division of assets and obligations, according to this ancient tradition.

Among all the legal procedures, the division of assets and obligations is the most general and the best prototype. At the same time, it is also the judicial procedure that has been most objectively studied by professionals usually working outside the legal sphere. Assuming the fact that the unjust man is greedy, Aristotle refers to the acquisition of assets and obligations as the leading problem of the justice (Aristotle, 1872, pp. 4-5).

We share this point of view and understand that the issue of justice, in a sufficiently broad spectrum, coincides with the fair division problem (distribution of assets and obligations). Based on the theory of proportionality, Aristotle defined a conception of justice as equality, proposing that in distributive justice, the benefits should be higher for those with greater political virtues (Aristotle, 1928, III, Chapter XIII).[4]

We believe that each distribution problem has a uniquely correct solution and that the universalizability of Hare is also a question of distribution where, each legal standard, corresponds to a distribution criterion of all the assets and obligations for all parties. We believe that this approach and the method that we presented constitute a pretension of correction from the increase of knowledge and sharing of themselves through rational discourse. We recognize that injustice can be established from a division of assets due to a lack of knowledge, the bad-faith of its members or the inability of the arbitrator. Admitting or not that, for each practical matter, there is only one correct answer, it seems like the knowledge, as well as the sharing of it, both point in the opposite direction at the injustice. However, this is never fully shared among the parties of a dispute. What remains is only an approximation and this is what we are looking for.

---

[4] For a comparison with Archimedes' Law of the Lever, see: SCHIESS, Loisima and MIRANDA, Lossian. *Physikalische und Mathematische Verbindungen der Teilungsgerechtigkeit*. Paper Series No. 049/2012 Series A. Goethe University Frankfurt am Main, 25th IVR World Congress: Law Science and Technology, Frankfurt am Main, 2012. Available in IVR_World_Congress_2011_No_049.pdf (584 KB), p. 6 (July 10th, 2013).

2. Antiphon's conjecture and the Alexy's theory of legal argumentation.

The method of exhaustion, and consequently the differential and integral calculus, are based on the following principle of Antiphon, originally formulated within a geometric context to effect the squareness of a circle by approximating it using polygons with a successive increase in the number of sides:

> "Two unequal magnitudes being set out, if from the greater there be subtracted a magnitude greater than its half, and from that which is left a magnitude greater than its half, and if this process be repeated continually, there will be left some magnitude which will be less than the lesser magnitude set out" (Euclid's Elements, 1908, X-1, pp. 14-16).[5]

[5] In place of the half can also consider any number of half-open interval]0,1]. Originally, should be considered half, because the geometric proposed procedure by Antiphon to square the circle (Antiphon's conjecture) pleads that possibility, as Simplicius affirms, In Aristotelis Physica 54.12-55. 24 Diels [B.13 DK/ B.13 U/ F13(e) P], as translation of Luís Felipe Bellintani Ribeiro:

"Pois, enquanto muitos buscam a quadratura do círculo (isto é, estabelecer um quadrado que fosse igual a um círculo), tanto Antifonte quanto Hipócrates de Quios consideram erroneamente tê-la descoberto. Mas o erro de Antifonte, por não partir de princípios geométricos, como aprenderemos, não é próprio do geômetra refutar…

Antifonte desenhou um círculo e inscreveu nele a área de um dos polígonos que podem ser inscritos. Seja, por exemplo, um quadrado o polígono inscrito. Em seguida, cortando cada um dos lados do quadrado em dois, traçava linhas ortogonais desde o ponto do corte até a circunferência, cada uma das quais, evidentemente, dividia em dois o respectivo segmento do círculo. Depois, desde o ponto de corte, ligava com linhas retas as extremidades das linhas do quadrado, de modo a formar quatro triângulos a partir dessas linhas retas, sendo o todo da figura inscrita um octógono. E assim novamente segundo o mesmo método, cortando em dois cada um dos lados do octógono e traçando linhas ortogonais do ponto de corte até a circunferência, ligava os pontos em que linhas traçadas tocavam a circunferência até as extremidades das retas divididas, fazendo da figura inscrita um polígono de dezesseis lados. E cortando de novo, seguindo o mesmo raciocínio, os lados do polígono inscrito de dezesseis lados, ligando com retas, duplicando o polígono inscrito e isso sempre fazendo, achava que, quando estivesse esgotada a superfície, restaria inscrito desse modo no círculo certo polígono, cujos lados, por causa da máxima pequenez, adequar-se-iam à circunferência do círculo. E como podemos estabelecer um quadrado equivalente a todo polígono, como aprendemos nos Elementos (Euclides II 14), por supor o polígono igual ao círculo que a ele corresponde, teremos estabelecido um quadrado equivalente a um círculo" [ANTIFONTE - Testemunhos, Frag-

The logographer Antiphon, who we think was also the sophist, made his persuasive arguments by building sequences of irrefutable propositions which, by verisimilitude, will approach what more closely resembles the truth. It's what linguists call enumerative neighborhood inductive of causality.[6] The biggest philosophical principle inspiring Antiphon's thinking is continuity, in the broad sense, which states that, if something is limit (in the widest sense) of a sequence of some other things, then the limit possesses all the properties of the terms of the sequence from certain order. The major problem is how to minimize this broad sense. The major broad sense could be, in our view, the own identity. The major broad sense could be, in our view, the own identity. A less restrictive principle would define a thing *C* as the limit (multiplex) of a sequence $\{C_n\}_{\_(n=1,2,3,...)}$ of some other things relative to a set $\{P_\lambda\}_{(\lambda\in\Lambda)}$ of sufficient assumptions for the existence of a certain trait *P*, then the limit *C* would have this trait *P*.

Be a polygon is a sufficient condition to be squareable with ruler and compass. However, never squares approach circumferences, in relation to "be square", because, effectively, they are not squares. In the Antiphon's proposal for the quadrature of the circle, many assumptions concerning the polygons approximate assumptions concerning the circles, but not all. And we do not know which of these assumptions are, together, sufficient to ensure squareness of the circle via ruler and compass. Indeed, very little is known about the figures that support this type of quadrature. Mathematicians have proven that the fruitful Antiphon's proposal concerning the circle's squareness is false. It is analogous to court speeches of Antiphon, since in the same prevail the verisimilitude and the enumerative neighborhood inductive of causality, known to mathematicians as the method of exhaustion.[7]

---

mentos, Discursos. Edição bilíngue. Prefácio e tradução: Luís Felipe Bellintani Ribeiro. São Paulo: Edições Loyola, 2008: 53-55].

See also: The Physics, or Physical Auscultation of Aristotle. Translated from the Greek with Copious Notes, in which the substance is given of the Invaluable Commentaries of Simplicius, by Thomas Taylor, 1806. pp. 24-25.

[6] Cf. GIL, Xavier Laborda. De Retórica: la comunicación persuasiva http://www.quadernsdigitals.net/index.php?accionMenu=hemeroteca.VisualizaArticuloIU.visualiza&articulo_id=8593&PHPSESSID=18bc006d1dab0fa381375136f9c79acf. 30/04/2013 (July 10th, 2013).

[7] The technique of squareness of circle formulated by Antiphon was the same used in his court speeches. There is a approximation by verisimilitude in relation to the area, seen that the polygons' areas go approaching the area of the circle. There is a approxi-

The principle of inertia, as elaborated by Galileo Galilei in *Giornata Seconda, Opere*[8], follows Antiphon's above cited procedure, since it's an ideal result which is limit of irrefutable empirical procedures.[9] The same applies to the classical mechanical and all physical procedures, where ideal standards, the physical laws, are used to get approximated results.

The Alexy's theory of argumentation also fits within the antiphonian's method, because ideal speech is the limit of real speech, which can approximate it, if are obeyed, in successively higher levels, rules like freedom of contradiction, conceptual idiomatic clarity, empirical truth, consideration of the consequences, weighting, role reversal and analysis of the birth of moral convictions.[10]

---

mation by verisimilitude, but more than that, identity, in the construction process of the figures, seen that the circle as the polygons are constructible by ruler and compass. There is a approximation by verisimilitude in relation to the dimensions of the circle and the polygons, because both are bidimensional figures. Also are approximation in relation to the lengths of the respective sides of the polygon (chords) and its circular arcs. However, there isn't approximation by verisimilitude in relation to the dimensions of the points and the dimensions of circular arcs and segments that they converge. (Cf. Loisima Schiess and Lossian Miranda, Op. cit., p. 5).

[8] G. Galilei. *Opere: Prima edizione completa, condotta sugli autentici manoscritti Palatini*, Tomo I - Soc. Editrice Fiorentina, 1842. pp. 161-164.

9 Based on various experiments done by Galileo Galilei in inclined planes [G. Galilei. Op. cit., pp. 161-164]. Aristotle came close of the principle of inertia in the following quote, where he says if there was a vacuum will exist the principle of inertia:

"Further, no one could say why a thing once set in motion should stop anywhere; for why should it stop here rather than here? So that a thing will either be at rest or must be moved ad infinitum, unless something more powerful get in its way" (ARISTOTLE. Physics, Book IV, Chap. 8. Translated by R. P. Hardie and R. K. Gaye. University of Adelaide, 2013. http://ebooks.adelaide.edu.au/a/aristotle/physics/book4.html).

Aristotle also had great respect for Antiphon's conjecture, as seen in *Aristotle, Physica, I-2:*

At the same time, however, it is not proper to solve all the arguments, but those only, in which some one, demonstrating from principles, concludes falsely: for such as do not thus conclude are not to be solved. Thus, for instance, with respect to the quadrature of lunulas, that which is effected through segments, it is the business of a geometrician to solve; but it is not the province of a geometrician to solve that of Antiphon (Aristotle, 1806, Op. cit, pp. 23-24).

Still, there is no data in his biography of if he used this method to establish physical results.

[10] ALEXY, Robert. *Constitucionalismo discursivo*. Tradução Luís Afonso Heck. 3 ed. Porto Alegre: Livraria do Advogado Editora, 2011, p. 26.

We understand that the approximation between ideal and real discourse is at the root of what Alexy calls the *status problem and problem of reasoning*. In relation to what he calls the *applying problem*, this philosopher raises three issues about the rules system in the discourse theory: i) it contains some ideal rules, therefore, it is only approximately realizable; ii) the rules do not contain any guidance concerning the starting points of the procedure (normative beliefs and the interpretation of parties' interests); iii) the rules do not determine all the steps of the argument. As a result of this combination of factors, the above system, such as Antiphon's conjecture, offers no procedure whereby in finite number of operations, arrive to a rigorous result (Alexy, Op. cit., p. 27-28). That situation is generally shared by all physical theories.

Essentially, there is no difference between the procedure used in physical and in legal discourse. There is no real discourse with pretension of correction without ideal discourse, in the same way that there is no physical predictability without physical laws. There is a clear analogy between Alexy's discourse theory and the physical theories. In summary, the rules of discourse are ideals formalizations that approach the reality such as the physical laws. Both use the enumerative neighborhood inductive of causality, as in human inductive procedures which come from real experiences and extrapolate the finite set of the same to build an ideal world, approximated to reality.

3. Consensual weighting by arbitration.

Two parties, P_1 and P_2, are in dispute over the division of a divisible good[11], whose quantity is q. Without loss of generality, in some sections of this article, will assume that this quantity is unity[12]. Let x_1 and x_2

[11] Eventually may also be an indivisible good, in case the conflict refers to the establishment of weights for each of the parties when establishing the right to only one of them. In that case, any infinitesimal can be decisive in establishing the right and, no way, applies the principle of insignificance of quantum.

[12] For the purposes of calculations of proportionalities, which is our case, it is always possible to consider a nonzero among being unitary.

be the variables which represent the amounts to be divided between the parties. The problem consists in determining these quantities fairly and so that the parties are satisfied. There are two different analyses, which are: to make effective the sharing when you already know the quantum belonging to each party; consensual construction of the quantum due to each party.

3.1. *Consensual sharing when you already know the quantum belonging to each party.*

If there are objective criteria which permit the establishment of fair amounts, videlicet, x_1 for P_1 and $x_2 = 1 - x_1$ for P_2, then the problem will be reduced to make the division, in an analogous situation to *Fair Division for Two,* or grant the right to the part which fits the largest amount (in this case, the weights x_1 or $1 - x_1$).

The analogy with the *Fair Division for Two* is as follow. If $x_1 = p/q$ is a rational number, the procedure consists of making P_1 divide the good in n equal portions and P_2 took $q - p$ portions or P_2 divides the good in q portions and P_1 took p portions. This division process can be outstretched to n parties P_i, $(i \in I_n = \{1, 2, ..., n\})$ with respective rational quantities $x_i = p_i/q_i$,[13] in a similar situation established by Brams–Taylor procedure[14].

If x_1 is an irrational number there's no way to do the division without envy, because in that case one party makes division on the good of unit quantity and the other party chooses supposedly higher part relative to other. If x_1 is irrational, there will always be leftovers, and of these, minor portions could have been added to selected portions. Therefore, we can characterize rational numbers as associated to non-envy divisions and irrational numbers to impossibility of that kind of division[15]. In that situation, the solution is to find a rational number p/q such as $x_1 = p/q$ being an insignificant legal amount and immediately replace x_1 to p/q, proceeding as in the rational case.

---

[13]To achieve this goal, we conjecture that just replace, in Theorem Brams-Taylor, procedures of divisions isonomic by their respective proportional divisions established by quantities fixed $x_i = p_i/q_i$, $i \in I_n$.

[14] BRAMS, S. J; TAYLOR, A. D. An Envy-Free Division Protocol. AMS, Vol. 102, Nº 1, Jan.1995: 9-18.

[15]

3.2. *Consensual construction by arbitration of the quantum due to each party.*

If the aforementioned criteria don't exist, the division relates to one of the most serious problems of the humanity, *the problem of justice*. In what follows, we will assume the next principle according to Socrates (Plato, *Protagoras*, pp. 58-59):

PRINCIPLE (Continuity of justice in relation to knowledge): The closer the knowledge that two rational human beings have about a phenomenon which focuses on the sense of justice (subjective or objective justice), the closer will be this feeling of justice. Moreover, the higher the shared knowledge, the closer will be the sense of justice.

We understand that knowledge allows us to compare the various aspects that may, in allocations, induce us to provide goods for a particular part and not for another. Being the righteous act, in essence, the achievement of equality or balance between various complex aspects that oppose each other in society, shared knowledge at the highest level, in principle, allows the perception of balance or that equality. Through rational discourse and high level of knowledge sharing is possible rapprochement between the consequences that the Kantian categorical imperative requires for the observers of the legal phenomenon in specific cases. In this context, in the following, we will present a method of consensual construction of the quantum due to parties, by arbitration, achieved by applying mathematics and the Alexy's theory of legal argumentation.

Consensual construction by arbitration

Consider two parties, P_1 and P_2 in dispute over the division of a divisible good of quantity with inexistence of liberality of both parties and the nonoccurrence of objective criteria which permit the establishing fair amounts, videlicet, z_1 for P_1 and $z_1 = v - z_1$ for P_2 .

Formalization is the following: considers a segment $\overline{OC}$ which will be divided in another two segments $\overline{OX}$ and $\overline{XC}$ for two parties in conflict.
Being $\Delta = \{(\overline{OX},\overline{XC}) : (\overline{OX},\overline{XC})$ the divison of $\overline{OC}$ in two segments for the parties in conflict$\}$ and $1 = \{(\overline{OX},\overline{XC}) \in \Delta : (\overline{OX},\overline{XC})$ is free from envy $\}$. Then the application $j: \Delta \longrightarrow \mathbb{R}_+ ; (\overline{OX},\overline{XC}) \rightarrow \frac{OX}{XC} = \frac{OX}{OC - OX}$ is bijective and $j(1) = \mathbb{Q}_+$. Is importantly to note that the legal thought often introduces new ways of think mathematics. The biggest example was the method of exhaustion by Antiphon. Toulmin says that logic is the generalization of the science of law (Toulmin. *The Uses of Argument*, Cambridge, 1958, p. 7).

If the level of pretension of correction of a party is close to the level of pretension of correction of the referee and try this same part prejudicing the other party, then the party that is trying to cause injury will be strongly affected by the method specified above. This part will be able even receive "negative quantity", and the other party to receive the full amount and still stay creditor debt corresponding to this nega-

Step 1: Consider the following data:

$\bar{x}_{2,1}$ the amount that P_2 offers to P_1;

$\bar{x}_{1,2}$ the amount that P_1 gives to P_2;

x_1 and $v - x_1$ the quantities which the arbitrator apportions, respectively, to P_1 and to P_2, initially in secret.

Step 2: We will consider $a(P_1)$ as the quantity that the arbitrator apportions to P_1 and $a(P_2)$ the quantity that the arbitrator apportions to P_2, given by the formulas:

$$a(P_1) = x_1 + (x_1 - \bar{x}_{2,1}) - ((v - x_1) - \bar{x}_{1,2})$$
$$a(P_2) = (v - x_1) + \left((v - x_1) - \bar{x}_{1,2}\right) - (x_1 - \bar{x}_{2,1}) \qquad (1).$$

Note that a simplification gives:

$$a(P_1) = 3x_1 - \bar{x}_{2,1} + \bar{x}_{1,2} - v$$
$$a(P_2) = v - (3x_1 - \bar{x}_{2,1} + \bar{x}_{1,2} - v) \qquad (2).$$

tive quantity. This method forces mutual good faith between the parties, since, in principle, there is no way of knowing whether the claim to fix of any of them is or is not close to the referee. The principle of continuity indicates that they should be close, if the arbitrator and the parties to study the case in detail.

If in a first phase there was not a result that satisfied the arbitrator, then his pretension of correction and that of the other parties are not close enough. From the establishment of an Alexyan discourse, the arbitrator can make progress by increasing the level of mutual understanding of the case. From there, effect new applications for this method. With repeated application, it would be possible to approach consensus. Below we consider briefly the case where there is plurality of parts.

Consider the parties $P_1, P_2, ..., P_n$. Let $x_i (i \in I_n = \{1, 2, ..., n\})$ the quantity that the arbitrator initially gives to P_i, with the hypothesis $\sum^{n}_{i=1} x_i = v$. Let $\ddot{x}_{i,j}$ the quantity P_i that P_j gives to, with the hypothesis

$\sum^{n}_{k=1} \ddot{x}_{i,k} = v, \forall i \in I_n$. The analogy with the bipartite case gives us the following results for the quantities finally apportioned by the arbitrator to the parties P_i, $(i \in I_n)$:

$$a(P_i) = x_i + \sum_{k=1}^{n}(x_i - \bar{x}_{k,i}) - \sum_{k=1}^{n}(x_k - \bar{x}_{i,k}), \qquad \forall i \in I_n \qquad (3).$$

Using these hypotheses, a simplification of the above expression gives us:

$$a(P_i) = (n+1)x_i - \sum_{k=1}^{n} \bar{x}_{k,i}, \qquad \forall i \in I_n \qquad (4).$$

From the above hypothesis results $\sum_{i=1}^{n} a(P_i) = v$.

Notice that, being $a(P_i) = x_i - (\bar{x}_{i,i} - x_i) - \sum_{k\neq i,k=1}^{n}(\bar{x}_{k,i} - x_i)$, $\forall i \in I_n$, the greater are the nonnegative number $\bar{x}_{i,i} - x_i$, the lower being $a(P_i)$, meaning that good faith is recommended in order to obtain higher earnings.

Broadly, this method provides for the arbitrator the obligation of, in its claim to correctness, to take from the party P_k what he took from the other party P_s and give to P_k what P_s took from him. Removing from each party an allowance for the damages that have been caused and, giving to it the sum of the earned with the injuries that have caused him. In the general case, with possibility of liberalities, the formula (3) can be generalized to:

In the formula (5), the utilization of the module prevents parties from using liberality for their own benefit. The exposed method induces greater participation of the parties in the trial process. Is common for parties seek unreasonably, showing little responsibility to question the claim of correction (justice). This method points towards this claim.

$$a(P_i) = x_i + \sum_{k=1}^{n}(x_i - \bar{x}_{k,i}) - \sum_{k=1}^{n}|x_k - \bar{x}_{i,k}|, \qquad \forall i \in I_n \qquad (5).$$

4. Conclusion.

Alexy's theory of legal argumentation, as the ideal model of rational discourse approximator of reality, is the natural development of the antiphonian method referred to as enumerative neighborhood inductive of causality (method of exhaustion). Envy-free divisions correspond to rational numbers (total knowledge of decimal places) and envious divisions correspond to irrational numbers (partial knowledge of decimal places). The method of consensual weighting by arbitration is a general mathematical formalization of the golden rule and falls within the spirit of rationality proposed by the Alexy's theory of legal reasoning.

Acknowledgements

We want to give special thanks to the students Oannes de Oliveira Miranda, Liuhan Oliveira de Miranda, Lohans de Oliveira Miranda, Firmo Lopes de Oliveira Neto and the teacher Ceres Regina de Oliveira Vaz for valuable discussions.

References.

ALEXY, Robert. Constitucionalismo discursivo. Tradução Luís Afonso Heck. 3 ed. Porto Alegre: Livraria do Advogado Editora, 2011.

ANTIFONTE - Testemunhos, fragmentos, discursos. Edição bilíngue. Prefácio e tradução: Luís Felipe Bellintani Ribeiro. S**ão Paulo: Edições Loyol**a, 2008.

ARISTOTLE. Aristotle's Nicomachean Ethics, Books V & X. Translated with a revised greek text and brief explanatory notes, by F. A. Paley, M.A. Cambridge: - J. Hall & Son, 1872.

ARISTOTLE. Politics: A Treatise on Government by Aristotle. Translated From The Greek Of Aristotle By William Ellis, A.M. London & Toronto Published By J M Dent & Sons Ltd. & In New York By E. P. Dutton &. Co., 1928.

ARISTOTLE. *The Physics, or Physical Auscultation of Aristotle*. Translated from the Greek with Copious Notes, in which the substance is given of the Invaluable Commentaries of Simplicius, by Thomas Taylor, 1806.

ARISTOTLE. *Physics, Book IV.* Translated by R. P. Hardie and R. K. Gaye. University of Adelaide, 2013. Available in http://ebooks.adelaide.edu.au/a/aristotle/physics/book4.html.

BRAMS, S. J; TAYLOR, A. D. An Envy-Free Division Protocol. AMS, Vol. 102, Nº 1, Jan.1995: 9-18.

EUCLID. *The thirteen books of Euclid's Elements*. Translated from the text of Heiberg, with introduction and commentary by T.L. Heath. Cambridge: at the University Press, 1908.

G. GALILEI. *Opere: Prima edizione completa, condotta sugli autentici manoscritti Palatini*, Tomo I - Soc. Editrice Fiorentina, 1842.

GIL, Xavier Laborda. *De Retórica: la comunicación persuasiva*. Available at http://www.quadernsdigitals.net/index.php?accionMenu=hemeroteca.VisualizaArticuloIU.visualiza&articulo_id=8593&PHPSESSID=18bc006d1dab0fa381375136f9c79acf. 30/04/2013.

PLATO. *Plato's Protagoras*. Translated by Benjamin Jowett. The Electronic Classics Series, Jim Manis, Editor, PSU-Hazleton, Hazleton, PA 18202, 2013. Available at http://www2.hn.psu.edu/faculty/jmanis/plato/protagor.pdf.

SCHIESS, Loisima and MIRANDA, Lossian. *Physikalische und Mathematische Verbindungen der Teilungsgerechtigkeit*. Paper Series No. 049/2012 Series A. Goethe University Frankfurt am Main, 25th IVR World Congress: Law Science and Technology, Frankfurt am Main, 2012.

TOULMIN. *The Uses of Argument*, Cambridge, 1958.

Fair voting in the electronic age

Wade L. Robison

Abstract: There are many barriers in the way to the ideal of a fair vote in elections. An election is fair only if a number of conditions are satisfied, among the most important of which are that a citizen who wishes to vote is able to vote without undue hardship or impediments, that each citizen's vote is counted and is counted for no more and no less than the vote of any other citizen, that citizens are able to determine clearly who is standing for what position and how to vote for one or another, and that the counting of ballots is as perfect procedurally as is possible.

We shall concentrate here on what I call the voting conditions and, in particular, one set of voting conditions, the design of a ballot and of any voting machine in which such a ballot is placed. We shall use as our test case the design of the Palm Beach paper ballot. That design is now famous, or infamous, for misdirecting voters so that even the most intelligent, well-trained and most highly motivated would make mistakes – like voting for Pat Buchanan instead of Al Gore, a mistake apparently made by upwards to 23,000 voters, more than enough to have changed the outcome of the election – and the subsequent history in the United States where, arguably, that ballot design cost Gore the election and opened the way for George W. Bush to become President. That ballot illustrates well what I call an error-provocative design.

Keywords: voting, fair election, procedural justice.

In aiming to achieve the ideal of a fair vote, we should distinguish the following:

Entry conditions – These are whatever conditions are in place to permit someone to vote in an election. Citizenship seems an obvious condition for entry, but some argue that citizenship must be proven by some sort of identification card – a driver's license, for instance, in some states in the United States – and some argued in times we hope are long

gone that only those who can pass a test about the Constitution should be permitted entry. It is rather obvious that those who wish to depress the votes of any particular constituency will find adding an entry condition the easiest way to proceed, and the different varieties of conditions is limited only by the human imagination – which means not at all.

Voting conditions – The conditions under which those entitled to vote get to vote are as multitudinous and varied. Can a voter cast a ballot only on a particular day designated as election day? If so, is that a day everyone can make it to the polls? If not, what are the procedures for not voting on a particular day? What are the procedures for absentee ballots? For those who vote at a polling place, a voter has to get to a polling place, gain entry, pass through whatever procedure is in place to ensure one is entitled to vote, vote, and leave. Each point in the procedure can be problematic. Where are the polling places, and, in particular, how convenient are they are voters? Are they well marked? Is there parking nearby, or are they close to bus or subway lines? How long are the lines at polling places? Are the lines orderly? Are voters hassled or intimidated while in line? What procedures must be followed to gain recognition that one has a right to vote? Are those checking well-trained? Is the information they need readily available so that voters do not have to wait too long? Is the voting done in public or private? Is the mechanism for voting easy to use – a machine, a paper ballot in a box, and so on? Can voters readily leave when finished? Must they pass some sort of gauntlet, physical or otherwise, to leave the polling place?

Counting conditions – Once ballots have been cast, they must be gathered together, with the votes for each candidate counted correctly and then properly recorded next to the candidate's name. All sorts of things can go wrong here. The ballots may not be properly gathered together, some being left out entirely. Or once gathered together, those individuals or machines may miscount, leaving out some or adding in others that were, say, rejected as faulty at the polling place but somehow ended up with the acceptable ballots. Or the ballots themselves may be faulty, smudged and so difficult to read, or with too many boxes marked, or with a lack of clarity about which boxes are marked. What can go wrong will depend upon the nature of the ballots, obviously. Think of Florida's 2000 election and the hanging chads, an issue that only arises in a voting machine that punches out a piece of paper when one "marks" the ballot. But even once we get past those problems, we

still have to tally the totals and then mark the totals for each candidate. Individuals are as prone to make mistakes in either of these operations as in anything else we do.

Transparency – Because of the various ways in which errors can enter into the electoral process, either intentionally or unintentionally, transparency is an absolute necessity. The process cannot be opaque in any way except which citizen votes for which candidate: that cannot be open for view by anyone. But everything else must be so arranged that any objective observer can double check the process to be sure that no mistakes were made or, if they were, to correct them, something that itself must be transparent and open to correction if another mistake was made. In the best of worlds, the process should be designed to make such transparency easy to accomplish. Think here of Florida's hanging chads, created by a machine that didn't quite punch through the ballots completely, leaving those checking ballots uncertain whether a voter had decided, after depressing a lever part way, to vote for another candidate, had simply failed to depress the lever completely, or had been stymied by a voting machine with dull punches or some other mechanical problem.

These are the four essential areas of concern in ensuring that voting is fair: is the pool of voters biased in any way? Is voting accomplished easily? Are ballots easy to tabulate? Can the results be readily verified? A thorough examination of the requirements to ensure that voting is fair would examine each of these areas. We are only going to examine part of one here, a part that may seem quite minor, but is chosen to illustrate just how minor problems can cause major problems. The aim is to show how very easily the electoral process can go awry and thus how important it is that the process be checked and double-checked and monitored and that everything be as transparent as is possible. Otherwise what may seem to be minor problems, like the one we will examine, will be missed and the process skewed.

We are going to examine a problem with voting machines, but not the usual one that catches our attention, problems with the software. We know we should presume that any software can be hacked, for one thing, and so relying on software alone for voting means trusting that no one has hacked into the system. It also means trusting that the software was properly designed to register and count and maintain votes, that

it has no coding mistakes, either unintentionally or intentionally introduced. But this set of problems should not obscure another. In some electoral precincts, the software for voting is on a screen, set within a frame that has the buttons to record votes. It would be easy enough for the screen and the frame to be misaligned – again, either unintentionally or intentionally – so that a voter's choice was not properly registered.

The setting of the mechanism within the screen might seem to fall outside the purview of whoever programs the voting software, but someone needs to pay attention to it, as we shall see, and the person best positioned to do that is whoever designs the software. That person – or company – is obligated to ensure that it works in situ. Otherwise we shall have what I call an error-provocative design, a design solution that provokes mistakes on the part of even the most intelligent, well-trained, and most highly motivated users. It is not enough for a programmer to say, "How they use the stuff is not my business," if, in fact, the program will be set up in such a way as to make its use problematic.

1. Error-provocative designs

We have all had the experience of something's not working the way it appears it ought to work. One way to solve the problem we have in figuring out which knob on a stove controls which burner is to offset the burners, with the ones in the back to the left, say, and the ones in the front to the right. The knobs are then positioned across the front of the stove in the order of the burners. From the left, we would have left back, left front, right back, and right front. My parents' stove has that off-set configuration, but I always mixed up the burners on the left when I visited. I would think I was turning on the left back burner, but would end up turning on the front left burner instead. I thought myself a dunce, and my mother always give me that look only mothers can give wayward children who will not amount to much. After that had happened many times, I took the time to try to figure out what I was doing wrong. I realized that the knobs on the left side has been reversed. The knob controlling the back burner had been placed in front of the front burner, and the knob for the front burner was in front of the back burner. No wonder I kept messing it up! I was not the one at fault: the stove was misleading me.

Such designs are error-provocative: they provoke errors on the part of those who use the artifacts realizing the designs. The worst of

the error-provocative designs are those that provoke errors on the part of the most intelligent, most highly trained, and most motivated of operators. We take into account three variables when trying to understand what has gone wrong in an accident:

1. We investigate the circumstances, wondering if there is something awry about the conditions at the time of the accident, black ice, for instance, when the accident is an auto crash;
2. We investigate the training of the operator, wondering if better training would have helped the operator avoid the accident;
3. We investigate whether the operator could have been trained better, whether, that is, the operator is bright enough to handle the artifact in question; and
4. We investigate whether the operator was paying attention or somehow distracted or otherwise acting with diminished capacity – drunk, sleepy, texting, and so on.

We can see how someone on the low side of the bell curve of intelligence might have difficulty with complex machinery. We can understand how distracted someone might become while engaged in something that requires constant attention, and we can understand how someone without sufficient training could be at a loss to know what to do in an emergency situation or do something harmful that seemed the obvious thing to do for someone untrained, but just the wrong thing to do.

The worst of error-provocative designs are those which produce errors for someone on the high side of the bell curve of intelligence who is as highly trained and as highly motivated as anyone can be. Such designs are to be avoided, obviously, but avoiding them can be more difficult than we might imagine.

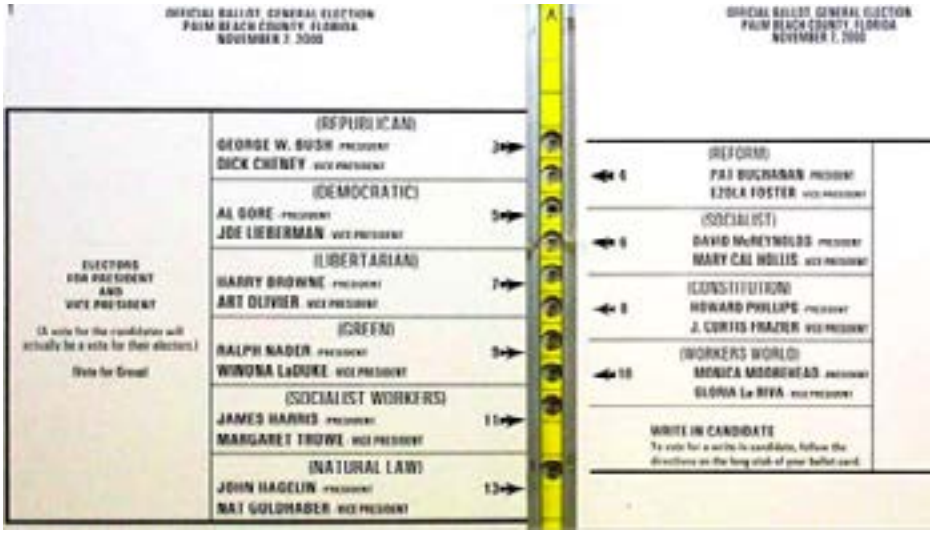
Software can itself be error-provocative. The software in the autopilot in the Columbia airliner that flew into a mountain side in 1996 was error-provocative. The pilot's job was to key in the initial letter of the beacon for the airport where the plane was to land. The autopilot would then pick the top of the listed five options that would appear and land the plane. The default was that the closest beacon was at the top of the list – unless the pilot keyed in "R," in which case the software selected Bogota. The plane was to land at Cali. Its beacon began with the

letter "R", and so when the pilot keyed in "R," the plane turned towards Bogota. The pilots did not figure out that there was a problem until it was too late. 159 people were killed when the plane flew straight into a mountain side near Cali (New York Times, 1996).

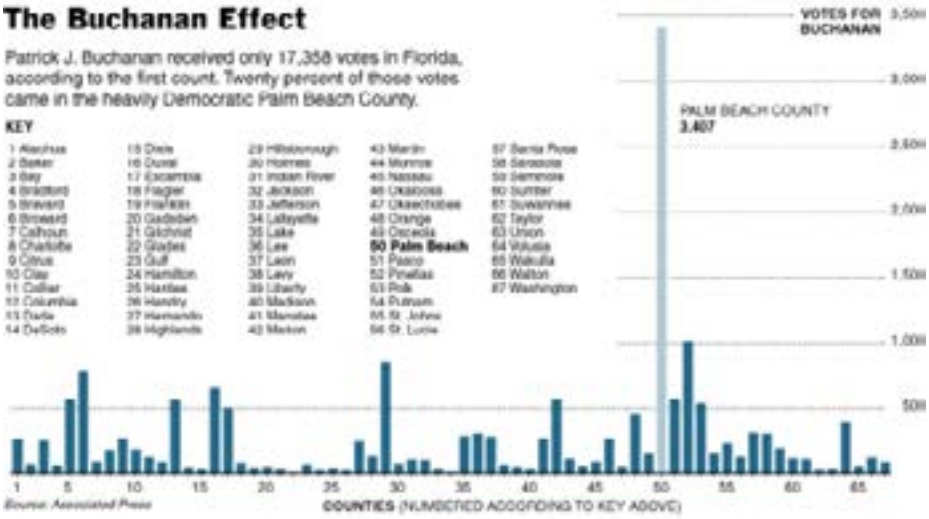
Not even the most intelligent, well-trained, and high motivated of pilots is likely always to avoid the error that led to that disaster. Putting two defaults in the autopilot software was a recipe for disaster. But it was a self-contained recipe. Everything occurred on a screen. We often have the same kind of error-provocative design when an image is produced on a screen set within a frame. The frame has buttons to push, for instance, that trigger the next item on the menu. ATMs often work this way, with the software producing choices – "Checking" or "Savings" – for the operator to choose between by pushing a button to the right of the arrows following "Checking" and "Savings." All too often, the arrows on the screen do not match up directly with the buttons. The software works fine; the buttons on the frame work fine; the two together, however, are error-provocative. One way in which we can produce error-provocative designs, in other words, is to have software encased in a housing which, in combination with the software, misleads. As the ATM example illustrates, this problem of matching the software to the frame in which it appears is a problem that can occur whenever software is married to an artifact. Our concern here is when it happens in voting machines.

2. The Palm Beach Ballot

Among the problems of the 2000 election in the United States (E. J. Dionne Jr. & William Kristol 2001; Cass R. Sunstein & Richard A. Epstein, 2001), few were more significant for the outcome than the ballot design for Palm Beach County in Florida (AIGA.1, 2000):



This ballot has numerous problems. The most obvious is that to vote for the second candidate, Al Gore, a voter punches out the third hole, not the second one. Palm County is heavily Democratic, with many Jewish voters, but Pat Buchanan took 3407 votes there, more than he received in any other county in Florida and twenty percent of the total received in Florida (Laurel Elms & Henry E. Brady, 2001). The following chart shows the anomaly well (STCSIG, 2000):



For those unfamiliar with American politics, this outcome is noteworthy because Buchanan is probably the last candidate any Jewish voter would vote for. Among other things, he has argued that Hitler invaded Poland only because Poland gave him no choice, having refused to negotiate over Danzig. He is also the last candidate any female voter would choose, having claimed, among other things, that women are not suited for politics and that "the rise of feminism spells the death of the nation and end of the West" (Pat Buchanan, 2002). For Buchanan to obtain so many votes in a county so heavily Democratic and Jewish defies explanation unless, somehow, some mistakenly voted for him. The layout of the ballot provides a plausible explanation for how they could have made that mistake.

The image of the ballot is how it would look if it were viewed directly from above. But that is not the image a voter would have seen. When the ballot was loaded into the voting machine, it would look different because the center row of holes were "in a different plane from the two columns of printed names, and the ballot [was] being viewed at an oblique angle" (Wikipedia, 2000). What a voter would have seen is more accurately represented by this view:

"Note in particular the second arrow from the top on the left side, in the section labeled 'Democrat', which appears to be pointing to the second hole from the top. Closer scrutiny reveals that punching that hole actually constitutes a vote for Pat Buchanan, an error which is believed to have been committed by many Florida voters in 2000" (Wikipedia). If you look at the second hole from the top, in other words, it appears next to Al Gore's name. Voting for Gore would mean punching that hole. As it turns out, it is the third hole from the top you need to punch to vote for Al Gore. Punching the second hole is a vote for Pat Buchanan. What is surprising is thus how few voters mistakenly voted for Buchanan.

We should add that this ballot also produced significantly more double votes than usual. One reason is that when viewed head-on and not at the angle seen above, the second hole is next to the Vice Presidential candidate for the Republican party. Some apparently thought that they should also vote for that candidate and so punched a vote for Bush and a vote for Cheney. That invalidated some votes for Bush. Some Democratic supporters apparently had second thoughts about punching the second hole and punched the third as well. That invalided some votes for Gore.

The Palm Beach Post's "reviews of discarded ballots found Gore lost 6,607 votes when voters marked more than one name on the county's 'butterfly ballot'….Voters who marked Gore's name and that of another candidate totaled more than 10 times the winning margin Bush received to claim Florida's 25 electoral votes and the White House." The "review

of the overvotes found 5,330 Palm Beach County residents invalidated their ballots by punching chats for Gore and…Pat Buchanan [while]… another 2,908 voters punched Gore and Socialist David McReynolds, whose hold appeared just below Gore's" (CNN).

One other source of double votes for the Palm Beach ballot was that the last item on the right-hand side asks for voters to write in a candidate. Some voters apparently thought this was a request for them to verify that they had voted and so wrote in the name of the candidate they had already voted for. They thus voted twice, and their votes were thrown out.

There were other problems elsewhere in Florida. For instance, in Duval County "an erroneous instruction told voters to 'vote on every page' of a multi-page ballot design with presidential candidates on two pages. That error caused '20 percent of the ballots from African-Americans areas that went heavily for Mr. Gore' to be invalid because 'voters followed instructions to mark a vote on every pages of the ballots,' thus costing Gore...a net margin in Duval County of 1,999" (Philadelphia Lawyer).

It is certainly arguable, that is, that design flaws in the ballots used in Florida and, just as important, the way the butterfly ballots looked to voters in situ cost Gore Florida and so cost him the election, the 25 electoral votes of Florida being decisive. Without Florida, Gore had 267 electoral votes and Bush 246, with 270 needed for election. We need only contemplate the eight years of the Bush administration to understand how much of a difference that apparently minor set of problems made. We do not know whether a President Gore would have paid more attention to the CIA warnings of a potential al Qaeda strike within the United States, but it is not likely that he would have invaded Iraq or watched the free fall of the financial markets without preventive action. In any event, minor problems can produce major effects.

We have found two problems with the Palm Beach County ballot: it was badly designed, and when placed in the voting machine, it was distorted and its crucial fault – the failure of the names to line up with the proper punch holes – was aggravated. So we have learned that

1. We should design the ballot well, keeping in mind guidelines for good design; and
2. We should ensure that the ballot works in situ, works, that is, in the machine in which it is to be placed.

We will consider in §3 some guidelines for designing a ballot

well. In §4 we will look at some of the problems we run into when we have a ballot within a framework – like a machine through which the ballot looks distorted.

3. Design matters

The Palm Beach County ballot illustrates well the point that it can make a significant difference how we view something. Seen from above, the ballot can mislead, but we can also figure it out. Seen from the perspective of our using a voting machine, with the ballot at an angle to our vision, we can readily see how we could make a mistake. That ballot design is going to provoke errors even for the most highly motivated of voters at the high end of the bell curve for intelligence. If they had been trained regarding the use of this particular ballot, they may have been trained out of the error the ballot makes natural, but they were not.

Designing a ballot is not easy, and as the Palm Beach County design shows, even with the best of intentions, things can easily go wrong. The person who designed the ballot changed the previous format to make the ballot easier to read for the predominantly older population in Palm Beach County. What are needed are guidelines to ensure that ballot designs are easy to read and will produce accurate results. This is particularly so in the United States where there is no uniform national ballot, elections being run locally and often with local election boards creating the ballots and selecting the voting machines. Just as all politics are local, so all elections are local.

The AIGA is the professional association for design, and it has recommended ten guidelines for those designing ballots. As will be seen from some of the details of these guidelines, they are as relevant for software engineers designing interfaces for ballot machines as they are for those designing paper ballots:

1. Use lowercase letters: mixed-case letters are more legible than ALL CAPITAL LETTERS because they are easier to recognize.
2. Avoid centered type: left-aligned type is more legible than centered type, which forces the eye to stop reading in order to find the start of the next line.
3. Use big enough type: "fine print" is hard to read and may intimidate or alienate voters. Use minimum type

sizes: 12-point for optical scan; 25-point for touchscreens. (Following this principle for optical scan ballots may impact printing costs but will be a worthwhile investment in election accuracy.)

4. Pick one sans-serif font: avoid introducing new fonts, which require the eye to stop reading and adjust. Sans-serif fonts with clean strokes (Arial, Univers, Verdana) are recommended for screen and for the quantity and variation of text found on paper ballots. For dual-language materials, use bold text for the primary language, regular text for the secondary language.
5. Support process and navigation: for optical-scan ballots, offer comprehensive instructions and page numbering. For touchscreen ballots, offer language and mode options, continuous access to instructions, consistent and flexible navigation and clear feedback about selections. Post notable wayfinding and instructional materials in and around the polling place.
6. Use clear, simple language: state instructions and options as simply as possible. Summarize referenda in simple language alongside required formats. Do not include more than two languages on any one material.
7. Use accurate instructional illustrations: visual instructions help low-literacy and general-population voters. Photo images, which are difficult to shoot and reproduce well, are not recommended. Illustrations must be accurate in their details to avoid misleading voters.
8. Use informational icons (only): avoid political party icons. Icons that call attention to key information and support navigation are recommended in limited use.
9. Use contrast and color functionally: use color and shading consistently: on optical scan ballots, to differentiate instructions from contents and contests from each other; and on touchscreen ballots, to support navigation, call special attention and provide user feedback. Color cannot be relied on as the only way to communicate impor-

tant information.

10. Decide what's most important: page and screen layout and text sizes should support information hierarchy. For instance, the ballot title should be more prominent than any one contest, a contest header should be more prominent than its candidates' names and a candidate's name should be bolder than his/her party affiliation. Candidates' names and options should be presented with equal importance (AIGA.2, 2007).

Another source of guidelines for designing ballots is the Brennan Center for Justice at New York University School of Law. The list is thorough with the aim of ensuring that each citizen's vote is to count (Norden, 2008). Had these guidelines been followed in Palm Beach County, the ballot would obviously have looked far different: the candidates would all have been in the same column; the ballot would have stated that candidates are not to write in the name of a named candidate; the punch holes would have been consistently placed in front of at the end of the candidate's name; the text would not have been centered, but flush-left; and so on.

Making the ballot clear in those ways may have prevented the problem that occurred when the ballot was placed in the voting machine, but even with a clear ballot, the design choice needs to be examined in the situation in which it is to be used just to be sure that the situation does not change how it is interpreted.

4. Software in situ

My bank's ATM is a wonderful example of how to design software and its frame so that those who use it constantly make mistakes. It works the way most ATMs work. You put in a card and punch in your pin number. Then it asks you a series of questions, the first of which is whether you wish to withdraw or deposit money. Arrows go from the ends of the questions to the right where, outside the window of the display, four buttons are set on the frame for the display. You are to push the button the appropriate arrow points to. But just as in the Palm Beach County ballot, the arrows do not line up exactly with the buttons.

The first question poses an "either/or," and so only two buttons are relevant. The arrow for the first option points to a spot just above

the top button and the arrow for the second option points to a spot just above the second button from the top. So it is clear enough, we think, what button to push for which option. We can ignore the bottom two buttons for these questions.

Suppose I push the button for a withdrawal. I then get a second alternative: "Do you want to withdraw your money from your checking account or your savings account?" Again there are arrows pointing to the right, one just below "checking account" and another just below "savings account."I will have the same situation as before except now the arrow for the first alternative points to a spot just above the second button from the top, and the arrow for the second alternative points to a spot just above the third button from the top. The questions and arrows seem to have moved down one notch. So, being now a little uncertain what to do, I push the second button from the top – for my checking account, I hope. And that works. So I have just learned something about how the system operates: the arrows point to a spot just above the relevant button.

I now get a third set of questions about how much money I want to take from your account. Having learned my lesson about how the system operates, and wanting to withdraw the maximum permitted, I follow the arrow for that amount over to the buttons and see that, like the others, it points to a spot just above a button. So I push that button.

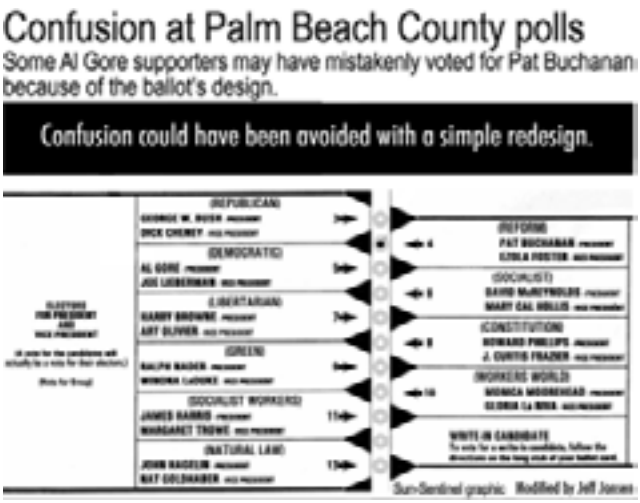
The screen then goes blank, and a new message appears informing me that no transaction has occurred and then, oddly enough, thanking me for completing my transaction and asking, "Do you have any more transactions?" At that point, my spouse tells me what I now know, "You pushed the wrong button." I get a receipt with nothing on it except the date and time and name of the bank.

The correct button is the one above where the arrow points – even though the arrow points to a spot much closer to the lower button. Pushing the lower button cancels the transaction.

People must be able to learn how to operate the ATM: I see vehicles going through on a regular basis. But I find using the ATM maddening. No warning is given when the ATM requires a different response than what I have just been trained into, and because I do not use the machine very often, I cannot recall, from one time to the next, where in the menu the change in response is necessary. Just as in the Palm Beach County ballot, a person must guess whether the arrow points above or below what it ought to be pointing at directly.

There are no doubt a variety of fixes for this problem. The Palm

Beach County ballot could have been made much clearer with a simple redesign (Tidwell, 2000):



Just so, people would be far less prone to make mistakes at my bank's ATM were the system redesigned.

But note that it is the system that needs to be redesigned – not just the software and not just the frame with its four buttons. It is the combination of the two that causes the difficulty. There is a set of oddities in the software that could be removed so the instructions would be easier to follow. There is no reason for the arrows to jump down a notch in the second set of alternatives. It is disconcerting when that first occurs: we do not know if it means anything and can only experiment to determine its irrelevance. There is no reason for the arrows in the third set of alternatives to point to a spot just above the supposedly parallel buttons when they should be pointing higher, to the buttons above that spot. Straighten up the software – make things consistent – and many of the problems will disappear.

One will not. The arrows do not line up with the buttons, and a software programmer will not know that without looking at how the software interacts with those buttons. That requires looking at the software in situ – at how it is going to look to someone using the software, set in the frame with the buttons placed as they are. Then the programmer will see that the questions and arrows are offset from the buttons and that they all need to be moved down enough so that the arrows point to the center of the correct buttons.

We can look at any complex system to see how errors can readily enter. The electrical blackout of the northeast in 2002 was initiated by a fallen limb and cascaded because of a computer "issue" that operators had failed to result and through the way in which electrical grids are connected together (Barron, 2003). The electrical blackout in the southwest in 2011 was triggered by a workman changing out a piece of defective monitoring equipment in Arizona (Watson, 2011). In complex systems parts are so interconnected that even a minor failure at a single point can reverberate throughout the system.

The example from my bank's ATM involves software in situ. The Florida ballot involves how a piece of paper looks in which choices must be marked and how the paper looks in situ, behind glass, that is, that displays the ballot with some distortion. The examples of the failures of the electrical grid in the northeast and northwest United States involved a kink, as it were, in a causal chain, with a power source at one end and air conditioning, among other things, at the other.

In each of these examples we need to ask, "How does the relevant item work when in place?" What will happen if a branch falls on a power line? What will happen if a monitoring device is removed from a power grid? What will happen when someone tries to use an oddly designed ballot when it is behind a piece of glass that distorts it? In each case, that is, we need to be concerned about how all the pieces of the system work together and how humans, who will make mistakes, interact with them.

5. Summary

I distinguished four different features that need to be examined for a full evaluation of any electoral precess – the entry, voting, and counting conditions, all with transparency. I looked at only one feature of one of those conditions, but we have discovered the following:

a. We are not looking at voting, but at a system of voting.
b. Errors can readily enter, intentionally or accidentally, in any place in any complex system, whether it is in the system itself or in the way in which humans use the system.
c. Even minor problems within a system or because of the way humans interact with something in the system can cascade through the system, causing major disruptions

and problems.

The problems we have noted about the American Presidential election of 2000 in Florida are indicative of the way in which what seem to be minor issues can come to have major consequences. Multiply that sort of problem with all the other ways in which things can go wrong within such a complex system as voting, and we can understand why, in every election, we have some problem or other – machines that do not work, polling lines that require much longer waits than voters can readily afford, ballots that somehow disappear.

There are many ways, that is, in which the process of voting can go wrong and so produce unfair results. Indeed, no matter how carefully matters are arranged ahead-of-time, problems are going to occur as an election proceeds. It would seem obvious that systemic problems can only be resolved through changes in the system and that we ought to aim at a system which is fool-proof. Error-provocative designs are at one end of a spectrum of design solutions, with foolproof designs at the other. Aiming for a foolproof design may be a fool's dream. There seem to be too many different kinds of fools in the world to anticipate how someone might misinterpret or misuse an artifact, and it is of the nature of complex entities that they have unintended consequences that even the brightest and best trained will not anticipate. That some of those consequences will impede the end for which the complex entity was designed is obvious. It is also of the nature of complex entities that there are far more likely prospects of breakdowns than there are of perfection. As Aristotle said of virtue, "[I]t is easy to miss the bull's eye and difficult to hit it" (Aristotle). Still, a bull's eye gives us something to aim for, and a foolproof electoral process is thus an ideal worth striving for even for complex systems.

References

AIGA.1 (2007), online at http://www.aiga.org/resources/content/7/4/9/7/documents/PalmBeach2000.pdf, accessed 1.15.2010.

AIGA.2 (2007), online at http://www.aiga.org/content.cfm/election-design-top-ten, accessed 1.15.2010.

Aristotle, The Ethics of Aristotle, J. A. K. Thompson, ed. (Penguin Books: London, 1959), Book II, Chapter VI.

Barron, James, "The Blackout of 2003," New York Times, August 15, 2003.

Buchanan, Pat (2002), Death of the West: How Dying Populations and Immigrant Invasions Imperil Our Country and Civilization, St. Martin's Griffin, p. 42.

CNN Inside Politics, "Newspaper: Butterfly ballot cost Gore White House," http://edition.cnn.com/2001/ALLPOLITICS/03/11/palmbeach.recount/, accessed 9.16.2013.

Dionne, E. J. Jr. and Kristol, William (eds) (2001), Bush v. Gore: The Court Cases and Commentary, Brookings Institute Press.

Elms, Laurel and Brady, Henry (2001), Mapping the Buchanan Vote Escarpment1 In Palm Beach County, Florida, online at http://ucdata.berkeley.edu/pubs/MapBuchanan.PDF, accessed 01.15.2010.

New York Times (August 24, 1996), "Pilot's Wrong Keystroke Led To Crash, Airline Says," p. 9.

Norden, Lawrence; Kimball, David; Quesenbery, Whitney; and Chen, Margaret (2008), Better Ballots, Brennan Center for Justice, 16-17; online at http://brennan.3cdn.net/d6bd3c56be0d0cc861_hlm6i92vl.pdf, accessed 01.15.2010.

Philadelphia Lawyer (Fall 2008, Vol. 71, No. 2; online at http://www.philadelphiabar.org/page/ThePresidentialElection.Fall08.pdf?appNum=3, accessed 9.16.2013.

STCSIG (2000), Society for Technical Communication, Usability and User Experience,

http://www.stcsig.org/usability/topics/ballot/bv-by-county.gif, accessed 01.15.2010.

Sunstein, Cass R. and Epstein, Richard A. (eds) (2001), The Vote: Bush, Gore & the Supreme Court, University of Chicago Press.

Tidwell, Jenifer (2000), "The Palm Beach Ballot Fiasco," online at http://www.mit.edu/~jtidwell/ballot_design.html, accessed 01.15.2010.

Watson, Julie, "Major Power Outage Hits California, Arizona, Mexico," Huffington Post, September 11, 2011.

Wikipedia, online at http://en.wikipedia.org/wiki/File:Butterfly_Voters_View.jpg#filehistory. The Wikipedia article contains a 3D rendering of the ballot replicating how the ballot would look for a voter; I can find no other reference to such a rendering.

The Presidency and the Executive Branch
A philosophical approach to the parameters for interpretation and decision-making authority[1]

Carlos Bolonha[2]
Igor de Lazari[3]
Bernardo Zettel[4]
Camila Marques[5]

Abstract: Studies of the separation of powers in presidential regimes have suggested a supremacy of the executive branch. In the United States, this supremacy stems from crisis or calamity situations; in Brazil, however, it does not depend on extraordinary events. The supremacy of the Brazilian executive branch stems from the convenience of the other branches, which fail to or are unable to constrain the executive power. Liberal legalism fails, then, when it assumes that the executive is submitted to the rule of law, as long as the Brazilian executive, supported by the convenience of the other branches, dismiss it.

Key-words: Executive Branch; Brazilian Executive; Liberal Legalism; Convenience.

---

[1] This paper has been originally presented at the 2013 Maryland Law Schmooze, by the authors Antônio Sepúlveda, Carlos Bolonha, Henrique Rangel, Igor de Lazari and Roberto Kayat. The authors Carlos Bolonha, Igor de Lazari, Bernardo Zettel and Camila Marques have elaborated the IVR presentation version under a new title. Both have been elaborated within the Laboratory of Analytical and Theoretical Studies on Institutional Behavior (LETACI), at the National School of Law (FND) and the Graduate Law Program (PPGD) of the Universidade Federal do Rio de Janeiro (UFRJ). This research was sponsored by the Fundação Carlos Chagas Filho de Amparo à Pesquisa do Estado do Rio de Janeiro (FAPERJ), and the Conselho Nacional de Desenvolvimento Científico e Tecnológico (CNPq).

[2] Law Professor. National School of Law, Federal University of Rio de Janeiro, Brazil. Director of the Bar's Research Office in Rio de Janeiro. Director of the Laboratory of Analytical and Theoretical Studies on Instituinal Behavior (LETACI) of the Graduate Law Program of the Federal University of Rio de Janeiro. E-mail: bolonhacarlos@gmail.com.
[3] LETACI Researcher (Federal University of Rio de Janeiro). Federal Lower Court Clerk in Rio de Janeiro. E-mail: igorlazari@ufrj.br.
[4] LETACI Researcher (Federal University of Rio de Janeiro).
[5] LETACI Researcher (Federal University of Rio de Janeiro).

Introduction

Studies of the separation of powers in presidential regimes have suggested a supremacy of the executive branch.[6] Throughout North America, this supremacy stems from crisis or calamity situations;[7] in Brazil, however, it is uninterrupted, and independent of any extraordinary events.[8] The supremacy of the Brazilian executive branch stems from the *convenience status* of the other branches, which fail to or are unable to constrain the executive expansion. In addition, the historical and political factors, the constitutional design and the proactivity expected of the executive branch add to this inability. Some examples include constitutional amendments (CAs) and provisional measures (PMs), which this study uses to demonstrate that showdowns[9] are avoided for the convenience of the branches, but the consequence of their avoidance is the supremacy of the executive. Progressive CAs produced by the executive with little risk of legislative rejection and judicial control over the provisional measures are political-juridical maneuvers to maintain inter-branch *pax* while simultaneously promoting constitutional redesign.

Liberal legalism fails when it assumes that the executive will submit to the rule of law. In the case of the American Administrative

[6] The dominance of the executive is a particular feature of presidential regimes. From a post-Madisonian perspective, given some of the inter-branch showdowns and economic and political crises, the executive appears to have assumed a "super-activist" status.

[7] The crises are significant because fundamental institutional reforms take place over a brief time even as existing institutions struggle to fulfill their mandate. Sometimes, the existing institutions simply claim more power than they were understood to have. At other times, Congress rouses itself to act, but only to confirm a seizure of power or discretion by the executive, or to impart vast new powers. POSNER, Eric A. VERMEULE, Adrian. **The Executive Unbound: After the Madisonian Republic.** Oxford University Press: New York, 2010, p. 32.

[8] While Brazil boasts an apparent judicial supremacy, whether through expressions that attempt to reiterate the prominence of the judiciary as "having the last word," the "last guardian of the Constitution," among others—or by statements from various authorities, including the President, in which the executive has shown sufficient capacity to avoid the final decisions of the Supreme Court, specifically in some cases of federal tax matters

[9] Episodes of confrontation between the institutions in a given context.

State, party politics[10] and public opinion[11] clearly play decisive roles in constraining the executive branch. The Brazilian "State of Convenience," however, has not yet fully overcome its nearly two-hundred-year-old authoritarian and interventionist tradition. Even after the adoption of the 1988 Constitution, both the legislature and the judiciary as well as, in some ways, the executive, fail to undertake their minimum required institutional roles.[12]

Moreover, the Brazilian public is apathetic, with no well-defined public opinion, and rarely intervenes in governmental dynamics.

The present study aims to demonstrate that the Brazilian executive is an expanded branch that bypasses the formal distribution of constitutional competences and is supported, at the convenience of the other branches, through the use of constitutional instruments such as constitutional amendments and provisional measures that suit (i) the maintenance of an executive supremacy and governance, (ii) an uninterrupted constitutional redesign and (iii) the prospect of continuous constitutional emergency.

The Redesign of the Constitution: Constitutional Amendments

Despite the fact that amendments to the constitution have a high political cost,[13] in both the Brazilian and American contexts, a significant

[10] "Partisanship undermines the separation of powers during periods of unified government." POSNER, E.; VERMEULE, A. *op. Cit.* p., 27; LEVINSON, Daryl J.; PILDES, Richard H. "*Separation of Parties, Not Powers.*" **Harvard Law Review**, 2006.

[11] POSNER, E.; VERMEULE, A. *op. cit.*, p. 4.

[12] This problem stems from a failure of the mutual control mechanisms (checks and balances) and, *ipso facto*, the rule of law.

[13] Art. 60 of the Brazilian Constitution provides for the legitimate proposal of amendments to the Constitution by the following: a) at least one third of either the Chamber of Deputies or the Senate members (the two parliamentary houses at the federal level), b) the President of the Republic, or c) more than half of the legislative assemblies of the federated states. The proposal must be examined by two chamber committees and then by the plenary, undergoing two rounds of voting, each of which requires three fifths of the votes for approval. Once approved in the chamber, the proposal is sent to the Senate, and examined by a committee and by the plenary, undergoing two rounds of voting, each of which requires three fifths of the votes for approval. Once approved by both houses, the proposal is promulgated by the Chamber of Deputies and the Senate Boards (management bodies) and published in the official dissemination media when it comes into force.

number have been proposed by the Brazilian executive during the two presidential terms of Fernando Henrique Cardoso (FHC) (1995–2002), a member of the Brazilian Social Democracy Party (Partido da Social Democracia Brasileira - PSDB). However, the number of amendment proposals by the executive branch decreased after the ascension of the Workers Party (Partido dos Trabalhadores - PT)—Lula (2003–2010) and Dilma (2011–2013)—to the presidency. This reduction was due to a decrease in partisan coalescence (internal cohesion) despite an increase in the government base's coalition.

Table 1: *Composition of the National Congress*

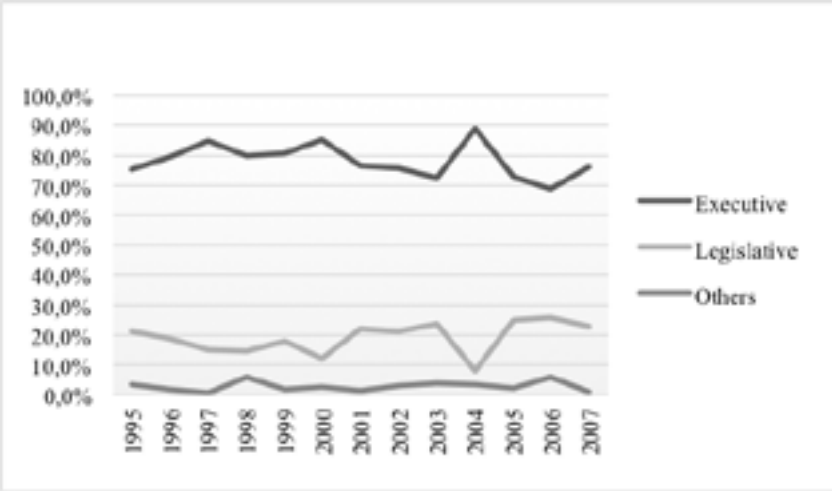
	Base				Opposition			
Period	Chamber		Senate		Chamber		Senate	
1995–98	181	35.28%	34	41.98%	93	18.13%	7	8.64%
1999–02	303	59.06%	41	50.62%	109	21.25%	12	14.81%
2003–06	254	49.51%	31	38.27%	259	50.49%	50	61.73%
2007–10	353	68.81%	49	60.49%	160	31.19%	32	39.51%
2011–12	373	72.71%	62	76.54%	111	21.64%	18	22.22%

Source: author's elaboration from Congress website

Assessing the level of governance largely depends on the presence of coalescence and not just on a partisan coalition. Although the PT governments formally formed coalitions that were numerically superior to those of the opposition, they lacked coalescence, creating a less unified government. Conversely, coalescence was present in the PSDB governments in which the addition of a few independent parties in the Congress was sufficient for approving political programs, creating a more unified government. These changes led to a reduction in the use of formal amendments to the Constitution, the procedures for which are relatively cumbersome.

Therefore, the government base lost its qualified majority in the Congress, transitioning to a less unified government. The governance by the executive branch, however, was not severely impaired because the executive could conveniently dismiss constitutional amendments using lower-cost mechanisms. Legislation initiated by the executive branch peaked in 2004 following the loss of a qualified majority.

Figure 1: *Percentage of Approved Legal Initiatives*



Source: author's elaboration from Congress website

Moreover, the executive branch already had the power of provisional measures, which do not require legislative intervention for immediate action. According to this hypothesis, the legislative allocation of provisional measures does not stem from a showdown, crisis or delegation, but from a *de jure* primary constitutional provision.

The Legal Redesign: Provisional Measures

The Brazilian executive plays an *atypical legislative function* through regulatory decrees and delegated laws. Both require *a priori* legislative intervention by issuing legislation that lacks regulation and *a posteriori* legislative intervention by approving delegated laws. Moreover, the executive has the power to propose laws—which represent 80% of the ordinary Brazilian legislation[14]—and constitutional amendments.

[14] Article 47 of the Constitution stipulates that the deliberations of each house and its committees shall be taken by a majority vote, provided the presence of an absolute majority of its members. Thus, for the approval of an ordinary law in the Senate, which is composed of 81 members, 21 votes in favor are required, highlighting the ease of the procedure as compared with constitutional amendments, which require a three-fifths

However, the provisional measures represent primary normative acts with immediate legal efficacy, submitted for subsequent assessment by the Congress.

The executive plays a role equal to that of the legislators in these cases. The Constitution provides that "*[i]n case of* ***relevance and urgency****, the President of the Republic may adopt provisional measures with the force of law, and shall immediately submit them to Congress.*" If examined by the Congress, a simple majority is sufficient to convert a provisional measure into law.[15] If rejected or voided in practice due to a lapse in time,[16] the legal relations both constituted and resulting from any acts performed during its validity shall be governed by them, according to the determinations of the executive.

However, *"relevance"* and *"urgency"* are not required of the legislative or judicial examination. The convenience of passing provisional measures is largely justified by the *institutional capacities* of the executive, which are higher than those of the National Congress. However, this convenience essentially results from the potential risk and burden that might arise from the possible showdown upon rejection of the measures.

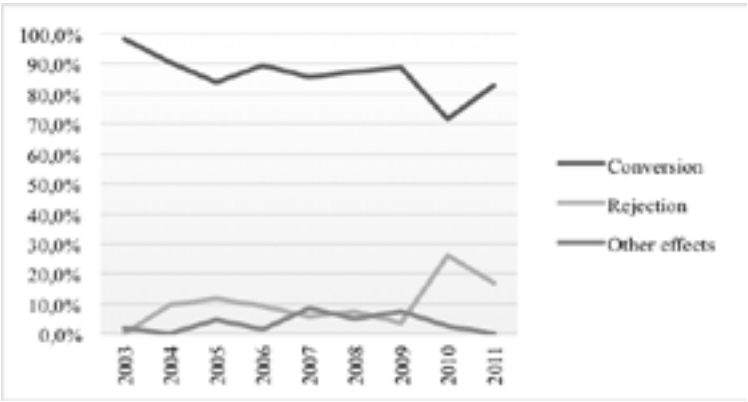
---

majority of the parliamentarians for approval (in the Senate, 49 votes out of the 81 senators).

[15] In agreement with articles 84, subsection XXVI, and 62 and paragraphs of the 1988 Constitution, the President of the republic has the exclusive responsibility to issue provisional measures (PMs). Such norms have the force of ordinary law, upon publication, although the President must immediately submit them to the National Congress for examination. Once sent to the Congress, the PM will be examined by a joint committee of deputies and senators, which shall provide an opinion regarding its constitutionality. Later, the PM will be submitted to a vote by the plenary of each house, starting with the chamber, and will be approved by a simple majority in both plenaries, being thus converted into law. The PMs can be approved and converted into law within a maximum of sixty days, which is extendable for only one equal period. If this limit is exceeded, the PM becomes void dated to its issuing. The Congress can adopt four attitudes when analyzing a PM: (a) approve it without changes; b) approve it with amendments to the text prepared by the presidency of the republic; (c) not examine the PM within the maximum time limit; or d) reject the PM. If the Congress does not examine or rejects the PM, a legislative decree must be promulgated, regulating the legal relations brought about by the PM, for the period in which it was effective. If the parliamentarians do not issue this legislative decree until sixty days after the PM becomes valid, those legal relations will be governed by the unexamined or rejected PM itself, providing the executive with a preponderance of will if the Parliament does not pronounce itself.

[16] In this case, a legislative decree is rarely issued by the parliament.

Figure 2: *Annual Rate of Conversion for Provisional Measures*



Source: author's elaboration from Government Law Database

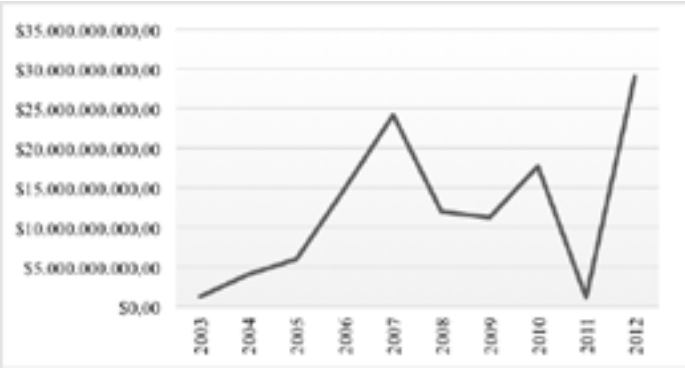
As shown in the above figure, the legislative branch converted 87% of the provisional measures into law. Moreover, the 32nd constitutional amendment ratified in 2001, though originally conceived to constrain the issuance of provisional measures, was approved after expanding the executive discretion provided therein. The PMs could therefore be considered a constitutional evil that many people regard as necessary or positive, although it is a constitutional imperfection.[17]

The executive has made use of provisional measures even when their consequent constitutional redesigns violate the permitted constitutional limits, which not only violates the separation of powers, but the Constitution itself; art. 62, § 1, I, *d*, provides that *it is forbidden to issue provisional measures on matters related to budgets and additional or supplementary credits*, except for, pursuant to art. 167, *to meet unforeseeable and urgent expenses, such as those resulting from war, internal commotion or public calamity*.

However, as shown in the following figure the values of the aforementioned expenses surpass any concept of extraordinariness.

[17] GRABER, Mark. **Dred Scott and the Problem of Constitutional Evil.** Cambridge University Press: New York, 2006, p. 9.

Figure 3: *Extraordinary Credit Opened by Means of Provisional Measures* (US$)



Source: author's elaboration from Government Law Database

The path convenient for the branches also has implications with respect to judicial convenience. The Brazilian Supreme Court (Supremo Tribunal Federal - STF) has repeatedly held that it is not competent to assess "relevance" and "urgency,"[18] a pre-requirement for the issuance of PMs. Moreover, when consulted on the opening of extraordinary credits, the STF has stated that "the foreseen credits have either been used or lost their validity, and therefore, no emendable situations subsist at the present time."[19]

In another example, in the judgment of the direct action of unconstitutionality 4029/AM (03/2012), the STF "backed out"[20] one day af-

[18] Thus, the following should be noted: (i) "*The understanding of this Court is that examination of urgency and importance requirements can only be submitted to the judiciary when there is abuse of discretion by the head of the executive branch. Regimental appeal that shall be withheld*" (AI 489108, 2006); (ii) the "*relevance and urgency requirements for issuing provisional measure are a discretionary power of the head of the executive branch, hence should not be examined by the judiciary branch , except in the case of a misuse of power. Understanding decided upon STF jurisprudence. Action dismissed*" (ADI 2150, 2002).

[19] ADI nº 4.041, 2011.

[20] "The Switch in Time that Saved Eleven." The radical change in the STF behavior is similar to that of the US Supreme Court in 1937, after the failed court-packing plan of

ter a decision that declared the formal unconstitutionality of the provisional measure that created the Chico Mendes Institute (Instituto Chico Mendes) due to a procedural flaw in the examination of the measure by the Congress following a point of order raised by the Attorney General of the Union, a representative of the executive. By *sweeping unconstitutionalities under the rug*, the STF attributed the potential effects to the decision, which threatened 500 prior provisional measures.[21]

The *status quo* of a "permanent crisis" and 400 claims of relevance and urgency between 2003 and 2011 have prevented showdowns, eventual crises, higher lawmaking or even judicial doctrine.[22] The Brazilian "state of convenience" thus surpasses the administrative state, though it does not necessarily make the executive more effective. The continuous constitutional emergency, which derives from the executive convenience and connivance, negates all other branches, causing them to be frequently ignored and reserved.

Final Considerations

One can conclude that the supremacy of the Brazilian executive branch also stems from the convenience of the other branches, a condition that avoids institutional crises or confrontations. The present study presented two constitutional instruments, constitutional amendments and provisional measures, that demonstrate those relationships of convenience and the prestige enjoyed by the executive. The executive has progressively and conveniently reduced the number constitutional amendments, given the political burden of a formal constitutional amendment and the loss of a qualified majority in the government base. However, the low-cost political tools remain in use to preserve governance. The other branches rarely interfere with provisional measures to avoid constitutional showdowns. The judiciary does not precisely define relevance and urgency, abstaining itself from examining the con-

---

President Roosevelt.

[21] "*We have found that, in spite of declaring the measures unconstitutional, it could generate a serious social crisis of legal uncertainty and institutional crises, indicating that we should be careful with the consequences of our decision*" (Luiz Fux – Brazilian Supreme Court Justice).

[22] "*We suggest that the central mechanism of constitutional change is not amendment, higher lawmaking or even judicial doctrine, but episodes of conflict between institutions over the distribution of policymaking authority.*" POSNER, E.; VERMEULE, A. *op. cit.* p. 67.

stitutionality of most provisional measures, and eventually modulates the effects of its own decisions, making them "more beneficial" to the executive. Likewise, the legislature ratifies the legislative assignment to the executive, converting provisional measures into law and approving executive initiatives. Thus, the Brazilian executive not only enjoys supremacy due to the convenience of the other branches but also conveniently preserves the existence of these branches.

References

Adrian Vermeule, *Mechanisms of democracy: Institutional design writ small* (New York: Oxford University Press, 2007); 'The atrophy of constitutional powers', *Harvard Law School Public Law & Legal Theory Working Paper Series,* 11:07 (2011).

Antonio Sepulveda, Carlos Bolonha, Henrique Rangel, Igor Lazari and Roberto Kayat, 'The convenient path of Brazilian branches: The executive supremacy', *University of Maryland Schmooze 'Tickets'*, 166 (2013). Available at: <http://digitalcommons.law.umaryland.edu/schmooze_papers/166/>.

Carlos Pereira, Timothy Power, and Eric Raile, 'Presidencialismo de coalizão e recompensas paralelas: Explicando o escândalo do mensalão' [Presidentialism of parallel coalition and rewards: Explaining the mensalão scandal], in: Magna Inácio and Lucio Rennó, (eds.), *Legislativo Brasileiro em Perspectiva Comparada* (Belo Horizonte: Editora UFMG, 2009).

Cass Sunstein and Adrian Vermeule, 'Interpretation and institutions', *Chicago Public Law & Legal Theory Working Paper Series*, 28 (2002).

Daryl Levinson and Richard Pildes, 'Separation of parties, not powers', *Harvard Law Review*, 119:1 (2006).

Eric Posner and Adrian Vermeule, *The executive unbound: After the Madisonian republic* (New York: Oxford University Press, 2010).

Fabiano Santos, *O poder legislativo no presidencialismo de coalizão [The legislative power in coalition presidentialism]* (Belo Horizonte/Rio de Janeiro: Editora UFMG/IUPERJ, 2003).

Flávio Corrêa and Henrique Rangel, 'Competente mas descapacitado: desenhos institucionais em matéria tributária' [Competent but disabled: Institutional design and tributary matter], in Carlos M. Venerio, Flávia Ávila, and Antonio Carlos Wolkmer (eds.), *Anais do XXI Congresso Nacional do Conselho Nacional de Pesquisa e Pós-Graduação em Direito* (Florianópolis: FUNJAB, 2012).

Jeremy Waldron, 'The core of the case against judicial review', *The Yale Law Journal,* 115: 6 (2006).

Mark Graber, 'Popular constitutionalism, judicial supremacy, and the complete Lincoln-Douglas debates', *Chicago-Kent Law Review*, 81:923 (2006); 'The nonmajoritarian difficulty: Legislative deference to the judiciary', *Studies in American Political Development*, 7:35 (1993).

Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judiciary Power* (New York: New York University Press, 1995).

Personified Executive Power and Discredited Legislative Power

Prospects of a failure democratic model

Bernardo Supranzetti de Moraes[23]
Jacqueline Ferreira Torres[24]

Abstract: Since beginning of nineties crisis of Brazilian Representative Democracies became more apparent. Legitimacy of public agents, in special legislative ones, and their capacity of representing all society´s interests increased questions about democracy model. During the past, citizen was main topic in political decisions unlike nowadays when we are near of institute a "Complex society", where a plurality of interests and groups participate of political decisions. In this context emerges the idea that representative model is not enough for society's needs. Politics no longer incorporate societies' expectations but individuals/corporative interests. This critic is tougher on the legislative power, fact that is observed in Brazilian culture where there is a strong empathy with Executive Power. Popular need for tutelage and the concept of democratic model's incapacity in responding the demands of society still are key components in Brazilian policy ideals. To increase representative capacity and popular participation, the Brazilian legislator created in 1988´s Constitution an all-embracing system. This system promotes an diminishing utilization of participative instruments in all instances of power. The legislator had the freedom to defend his interests reinforcing current idea of the inefficiency of Legislative. In several times, Legislative embodies popular interests but isn't able to rapid resolving issues. As a consequence, this power uses judicialisation of causes in order to guarantee social rights. The possibility of approving emergency or extreme public appeal cases by Legislative instances is more difficult due their conservativeness. So, Executive interferes in Legislative deliberations rising deliberations efficiency without exclude Legislative's legitimacy. Brazil has progressed in democratic process. Society is still improving the ways of pressuring and interning on Public Administration either by direct participation either by capturing their necessities by institutional ways. In a general way, Public Administration and States' powers do not internalized paradigm of Democratic

[23] Federal University of Minas Gerais.
[24] Federal University of Minas Gerais.

State of Law proposed by the Constitution of 1988 yet. This fact do not invalidate the paradigm. There is necessary a bigger opening for the paradigm though radical democratization and wide diffusion of rights.

Keywords: Democracy crisis; Legislative Power; Executive Power

1. Introduction

Brazil lives a unique moment in its history. The 1988's Constitution began a new state paradigm and a new institutional arrangement, fully democratic and participatory. New ways of dialogue with the society were open for more involvement in the Public Administration and for an overcoming of the Representative Democracies crisis.

Since the beginning of the nineties, crisis of Brazilian Representative Democracies became more apparent. Legitimacy of public agents, in special legislative ones, and their capacity of representing all society's interests increased questions about democracy model.

Norberto Bobbio, in his book "The Future of Democracy", writes this: "the democracy of our days it was made to operate in an individualistic society", in other words, the individual interests are always in front of the interests of the collectivity and this it's very bad for the citizen itself.

During the past, the citizen was the main topic in political decisions, unlike nowadays, when we are near to institute a "Complex society", where a plurality of interests and groups participate in political decisions. In this context emerges the idea that representative model isn´t enough for society's needs. Politics no longer incorporate societies' expectations, but individuals/corporative interests. This critic is tougher on the legislative power, fact that is observed in Brazilian culture where there is a strong empathy with Executive Power. The brazilian history had leaders who inspire the ideal of nation and State since its formation, with Dom Pedro II, to the present day, with Lula. The society requests more governmental actions every day and because of that, the Executive Power gets more personification and the Legislative Power gets more discredit of the people. This situation causes the interference of one power in another sphere.

2. The Traditionally Personified Executive Power

We live in the Brazil the post 1988 constitution period, and because of this charter, we have the best democratic means in the country so far, but why is still said that democracy is living a crisis?

Beginning in the 90s, this crisis has become more apparent with the increasing inquiries about the legitimacy of public officials, especially those linked to the Legislative Power and their ability to represent their citizens. In the book "The Future of Democracy", Norberto Bobbio shows that "democracy practiced in the present day is designed to operate in an individualistic society", in other words, the individual interests always come before the collective interest.

Along with this Legislature factor - which will be explained later - we still have a peculiar feature in the Brazilian culture, which is the personification of the Executive Power, which comes from the time of the Empire and continues until the present day. Its origin begins with the classic division of the three powers created by Montesquieu, in which each power is independent and autonomous.

During the Empire the Fourth Power was created, which was the Reserve Power and who held this power was the Emperor, who solved conflicts between the three powers. This caused the image of the "chief of the executive" to be bound with big decisions and control of other powers, which reflected the population a sense of guardianship by the Emperor.

Nowadays, we see in all aspects of the society, a hope that the president is the solution of all problems and that the legislature is unable to do something by population. Thus the chief of the Executive is charged when there is a government problem, or in the executive power or in the legislative power.

The representative crisis makes the executive power more exalted and more personified, which means that the executive power, for most of society, is represented by the image of the president. This happened not only because of historical factors, but also because of society itself, that we are calling today as "complex society", since there are diverse interests of various social groups, which makes the representation of all very difficult. What we see is the representation of minority interests, which includes individual and corporative interests, criticizing the incumbent on the Legislative Power. Vianna and Burgos shows this very well by saying: "In modern societies, this complexity would be present

for the emerging phenomenon of the plurality of expressive forms of sovereignty, as evidenced by the processes of affirmation of deliberative democracy and participatory democracy non-governmental organizations, meaning that alongside political citizenship formally linked to rites electoral presence has made a "social citizenship".

3. An Unrepresentative Legislative Power

The discredit of the Legislative power could be divided in two. The first aspect refers to the structural inadequacies of this power in relation to complex society. The second one is related to the structural problems of the division of powers itself.

Nowadays we are about to institute a "Complex society", in which, according with different interests and groups participate of political decisions. In this context emerges the idea that representative model isn´t enough for society's needs. Politics no longer incorporate societies' expectations but individuals and corporative interests.

This complex society show problems in the legislative such as the vulnerability to majority representations, and increasing doubts about the legitimacy of public agents and their capacity of representing all society´s interests. In order to popular participation and direct representation, the Brazilian legislator created in 1988´s a Constitution with an all-embracing system. This system promotes a bigger utilization of participative instruments in all instances of power. The legislator had the freedom to defend his interests reinforcing current idea of the inefficiency of Legislative. In several times, Legislative incorporates popular interests but is not able to resolve issues quickly.

Such aspects along with conservative character of the society reinforce popular sense of inefficiency of the legislative power once discussions of controversial issues are slower. Consequently, we have the discredit of the legislature, a fact that leads to questions about structural problems of the division of powers.

Since the Legislative power shows this low efficacy, judicialisation became one of the most common ways of requiring social rights. This tendency opens space to a danger inference of the Judiciary in the Legislature. Although judicial activism accelerates decisions, it may exceed its role, disrespecting powers division and democrat's devices of checks and balances.

Another way to evade the legislature's problems it's by the execu-

tive power. In order to prompt the discussion of controversial issues, the executive makes use of provisional measures, making possible public policies that hardly pass by the legislature without a lengthy discussion. In Brazil, this was the case of the approval of the program "Fome Zero" and the program to expand access to higher education, the "REUNI".

Brazil has progressed in democratic process. Society is still improving the ways of pressuring and interning on Public Administration either by direct participation either by capturing their necessities by institutional ways. In a general way, Public Administration and States' powers doesn't internalized paradigm of Democratic State of Law proposed by the Constitution of 1988 yet. This fact doesn't invalidate the paradigm. There is necessary a bigger opening for the paradigm though radical democratization and wide diffusion of rights.

According to Giorgio Agamben, all these interferences in the power division show us that this model isn't working since First World War, when "states of exception" became the only way for states maintaining its sovereignty. "States of exception", in his definition, is those that suspend, partially or fully their legal systems. All these reflections may us infer that Brazil is a state of exception once there is no harmony between its powers and they are always sabotaging each other to gain more power.

Conclusion

The Brazilian democracy relies on the separation and self-government of its powers, but our reality and new demands don't allow the preservation of a tight system like the proposed by Montesquieu on the 18th century.

By the previous analysis, we believe that Brazil has progressed plenty on its democratic process. The society, in constant modification, is learning the ways to pressure and make entries on the Public Administration, if it did not know that all along. Either by direct participation or by the capture of society's needs by institutional means, like the public prosecutor or the representatives of the Legislative power, rights has been recognized.

The personification of the national hopes on the Executive Power don't stand by the populists molds anymore. That power have interfered on the deliberations of the Legislative Power in cases of emergency or popular appeal. In a political analysis, this maneuver increases the

possibilities of approval on the conservative's instances of the Legislature. Provisional measures with social dimensions, like the university programme "ProUni", would take years in progress. The same analysis has been done by the Judiciary on the case of the approval of the homosexual stable union.

The Legislative Power does not exhibit signs of total exhaustion to the social interests. Inside of that power, however, a huge conservatism that extended deliberations in accordance with specific parts of the complex society is noted.

In a general way, Public Administration and States' powers did not internalize paradigm of Democratic State of Law proposed by the Constitution of 1988 yet. This fact does not invalidate the paradigm. It is necessary a bigger opening for the paradigm though radical democratization and wide diffusion of rights.

So, what is the solution to this conflict? We believe that a political reform, including the reviewing of the electoral system and the powers division itself, must be conducted.

References

AGAMBEN, Giorgio. Estado de exceção: Homo Sacer II. São Paulo: Boitempo, 2004.

ANASTASIA, Fátima; CASTRO, Mônica Mata Machado de; NUNES, Felipe. De lá para cá – As condições e as instituições da democracia depois de 1988. In: MELO, Carlos Ranulfo; SÁEZ, Manuel Alcântara (orgs.). A democracia brasileira: balanço e perspectivas para o século XXI. Belo Horizonte: UFMG, 2007, p. 109-145.

BOBBIO, Noberto. O Futuro da Democracia, Rio de Janeiro, Ed. Paz e Terra, 1992.

CARVALHO, José Murilo de. Cidadania no Brasil: O longo caminho. Rio de Janeiro: Civilização Brasileira, 2006.

INÁCIO, Magna. Estrutura e funcionamento da Câmara dos Deputados. In: MELO, Carlos Ranulfo; SÁEZ, Manuel Alcântara (orgs.). A democracia brasileira: balanço e perspectivas para o século XXI. Belo Horizonte: UFMG, 2007, p. 199-235.

PESSANHA, Charles. O poder executivo e o processo legislativo nas constituições brasileiras – teoria e prática. In: VIANNA, Luiz Werneck (org.). A democracia e os Três Poderes no Brasil. Belo Horizonte: UFMG, Rio de Janeiro:

IUPERJ/FAPERJ, 2002, p. 141-194.

VIANNA, Luiz Werneck; BURGOS, Marcelo. Revolução processual do direito e democracia progressiva. In: VIANNA, Luiz Werneck (org.). A democracia e os Três Poderes no Brasil. Belo Horizonte: UFMG, Rio de Janeiro: IUPERJ/FAPERJ, 2002, p. 337-491.

O caráter complementar entre retórica, filosofia e direito em Cícero

A concepção de uma totalidade física, ética e política na relação entre a retórica e outros saberes

Fernando Joaquim Ferreira Maia[1]

Resumo: Pretende-se analisar a relação entre retórica, filosofia e direito em Cícero. Segundo Cícero, partindo do cotidiano, a retórica deve conduzir o discurso jurídico na aplicação de soluções racionais para problemas concretos. Aqui, a filosofia deve permitir a abundância de ideias, a boa dicção e a conciliação da sabedoria com a retórica. Busca-se o orador sábio, pois considera-se que o bom orador possui a ciência do filósofo. É na retórica que o saber filosófico mostra relação com a reprodução do poder político, permitindo uma linguagem jurídica articulada e conclusiva, que procure incutir na sociedade a concepção do "fim do homem romano", apresentando os interesses aristocráticos como interesses da sociedade. Cícero vai defender a necessidade de uma profunda formação filosófica no orador e o distanciamento deste de excessos ornamentais no discurso, proclamando uma união da escola dos retores com a academia filosófica na otimização do discurso jurídico. Em Cícero, a retórica é uma praxis.

Palavras-chave: Cícero, retórica, Filosofia do Direito.

1. Introdução: a retórica metodológica de Cícero além de Aristóteles

O objetivo é tentar estabelecer os passos de Cícero na sua teoria da retórica da práxis que, ao partir de Aristóteles, dão originalidade ao seu pensamento.

A tese parte, basicamente, de um problema geral. Consiste no desenvolvimento original da retórica de Cícero frente à de Aristóteles. É

[1] Doutor e Mestre em Direito pela UFPE, Especialista em Direito Processual Civil pela UFPE, membro do Grupo de Pesquisa "As retóricas na história das ideias jurídicas no Brasil: originalidade e continuidade como questões de um pensamento periférico", Professor Adjunto da Universidade Federal Rural de Pernambuco-UFRPE. E-mail: fernandojoaquimmaia@gmail.com

importante saber se, ao desenvolver elementos da retórica aristotélica, a retórica ciceroniana se constituiu num paradigma de novo tipo, à base dos condicionantes históricos da Roma daquela época. Esta preocupação serve para questionar se Cícero acaba direcionando os mecanismos retóricos à legitimação de determinados interesses na sociedade. O certo é que a falência dos mecanismos de reprodução da ideologia do Estado pode ter contribuído para a relevância do papel da retórica na eficiência do discurso jurídico. Vale ressaltar que esses mecanismos envolvem os órgãos encarregados de julgar litígios, de produzir leis e de administrar a coisa pública, o rodízio em cargos públicos, a família, a escola, o sufrágio etc, atuando juntamente com a coerção estatal, mecanismos esses que têm papel ativo na disseminação da ideologia do Estado, na constituição e perpetuação do poder político e da hegemonia.

Essa questão geral se reflete no seguinte problema específico que a tese toma para caracterizar a retórica de Cícero.

É relativo à unidade entre a retórica, a filosofia e o direito, com isso se investiga a preocupação de Cícero com o conteúdo e a forma da retórica, os quais têm a ver, respectivamente, com a invenção e a elocução. A primeira significa a construção de argumentos, pelos quais o orador deve encontrar e decidir o que deve ser dito ao auditório. Já a elocução refere-se ao "modo retórico", ou seja, à maneira de se empregarem pensamentos e palavras para descrever o conteúdo da argumentação. É importante saber se Cícero busca unir a invenção com a elocução e qual a repercussão na retórica da práxis.

Cícero coloca o discurso retórico centrado no sujeito retor, na perspectiva da intervenção deste sujeito na defesa da ordem social, política e jurídica, o que só poderia ser assegurado se a retórica se voltasse para a afirmação também de um projeto jurídico-político amplo. Tinha de envolver, por isso, a defesa dos interesses da aristocracia, da essência do Estado romano e do sistema escravista. Busca-se a manutenção de relações de dominação. A formação filosófica do orador é fundamental para a retórica e possibilita canalizar a persuasão e a articulação correta da palavra para os objetivos do Estado.

A base da retórica de Cícero foi construída como uma técnica jurídica discursiva, objetiva, destinada a afirmar o papel ativo do orador na sociedade, considerando sempre o poder político e a formação econômica escravista, bem como os princípios fundamentais do Estado romano. Incorpora elementos da realidade romana no discurso jurídico e direciona-o à universalização de interesses relativos.

Sustenta-se que o Arpinate, ao ligar a retórica com a filosofia e

com o direito, parte de uma teoria do Estado, considera sempre a relação da retórica com a legitimação do poder político em Roma. O jurista romano insere a retórica nas estratégias de agregação humana, ao envolver uma concepção geral de sociedade, Estado e cultura. A transformação de Roma de Cidade-Estado para Estado continental impunha ao orador a defesa da República e a disseminação da ideologia social perante as nacionalidades submetidas. O orador deveria ter amplos conhecimentos, principalmente de filosofia e de direito para guiar a sua ação prática. Esse é o elo entre a retórica e a filosofia transposto dos sofistas por Cícero. Defende-se que o "homem orador" deva ser também o "homem filósofo" e este é também o "homem político", pois, para ele, uma das tarefas da filosofia é ensinar ao homem a virtude, o culto da pátria e da sociedade e a viver somente na moralidade. O direito auxilia nesta tarefa.

A abordagem é feita conforme o modelo desenvolvido por Adeodato. A retórica, como metódica, descreve as estratégias utilizadas por Cícero para mobilizar a opinião do auditório (retórica metodológica). Essas estratégias serão desenvolvidas à base do ambiente material em que o orador, o discurso e o auditório estão inseridos (retórica dos métodos).

No primeiro nível da retórica ocorre um controle público da linguagem, em cima das expectativas do sujeito, pelo qual a realidade só existe para o homem na comunicação; nada acontece fora da linguagem. No segundo nível, o sujeito orador verifica fórmulas para a persuasão e tenta alterar a realidade para atingir objetivos seus. Já no terceiro nível, o orador verifica a relação da retórica dos métodos com a retórica metodológica para desvelar os mecanismos de persuasão empregados, como o próprio conhecimento obtido pelo homem no ambiente comunicativo[2].

Utilizar-se-á a retórica como metódica. Significa situá-la analiticamente e separar os aspectos contrários e positivos da formação do paradigma retórico ciceroniano, à base da projeção da retórica metodológica sobre a dos métodos, ou seja, sobre os condicionantes históricos em que a Roma da época estava inserida, com possíveis influências da retórica aristotélica. Atenta-se aos aspectos quem/o que/onde/quando/por quê[3].

---

[2] ADEODATO, João Maurício. **A retórica constitucional** (sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo). São Paulo: Saraiva, 2009, p. 35, 37, 39, 40, 41, 43, 45.

[3] LEACH, Joan. Análise retórica. In: BAUER, Martin W.; GASKELL, George. **Pesquisa**

Por fim, defende-se que a retórica só encontra sentido prático na filosofia e na sua relação com o direito e que somente a unidade entre retórica e filosofia, por não incluir o direito como forma de controle social, não teria condições de produzir os efeitos esperados. Sustenta-se a unidade entre a retórica e a filosofia e o direito. A ação prática do orador, seguida por Cícero, em Roma, só ocorre junto do fenômeno jurídico.

2. A teoria do Estado em Cícero e a função do orador na sociedade

Assim como Aristóteles já indicava, Cícero vai sustentar o caráter complementar entre a retórica e a filosofia[4]. A filosofia complementa a retórica, pois, sem a filosofia, não se pode discernir o gênero e a espécie de cada matéria, nem explicá-la pela acepção. Tampouco classificá-la, julgar o verdadeiro e o falso, nem perceber as consequências, identificar contradições e ambiguidades, por outro lado, sem a retórica, a filosofia não consegue transmitir o conhecimento[5], pois, além da arte militar, só a retórica pode ser objeto de honraria[6]. Cita-se passagem da obra de Cícero intitulada *O orador*:

> E não deve só estar instruído na dialética, senão que deve também ter conhecimentos e prática de todos os temas da filosofia. E é que sem esta ciência que acabo de citar não poderá falar nem explicar com profundidade, amplitude e com abundância[...][7].

---

qualitativa com texto, som e imagem. 3. ed. Petrópolis: Editora Vozes, 2004, p. 299; ARISTÓTELES. Analíticos posteriores. In: ARISTÓTELES. **Órganon**: Categorias, Da interpretação, Analíticos anteriores, Analíticos posteriores, Tópicos, Refutações sofísticas. Bauru: EDIPRO, 2005, II, 89b23-89b35, p. 313.

[4] PEREIRA, Maria Helena da Rocha. **Estudos de história da cultura clássica** (I volume-cultura grega). 10 ed. Lisboa: Fundação Calouste Gulbenkian, 2006, p. 129, 130, 132; CICERÓN, Marco Tulio. Cuestiones tusculanas. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. V, p. 2, 4.

[5] CICERÓN, Marco Tulio. **El orador**. Madrid: Alianza Editorial, 2004, p. 32-33, 76-79.

[6] CICERÓN, Marco Tulio. Discurso en defensa de Lucinio Murena. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1917, t. XIV, p. 215-216.

[7] "Y no debe estar instruido en la dialéctica, sino que debe tener conocimientos y práctica de todos los temas de la filosofía" (CICERÓN, Marco Tulio. **El orador**. Madrid: Alianza Editorial, 2004, p. 79).

Na retórica da práxis, o orador não discrimina a filosofia, o direito e a política. A religião, a virtude, a nacionalidade, a sociedade e a moral são encaradas pelo orador como um todo harmonioso[8], isso se depreende das palavras seguintes de Cícero: "Fixemos já, em primeiro lugar, -isto depois se entenderá melhor-que, sem filosofia, não se pode conseguir o orador que buscamos, não no sentido, sem embargo, de que a filosofia seja tudo, senão do que ajuda"[...][9].

É por isso que ele define o filósofo como aquele que conhece a natureza e as causas de todas as coisas divinas e humanas, bem como aquele que sabe conviver em sociedade. Denomina orador como aquele filósofo que possui abundância de ideias e boa dicção. O filósofo é o orador que concilia a sabedoria com a retórica[10]. Busca-se o orador sábio, pois se considera que o bom orador possui a ciência do filósofo[11]. Cícero é claro:

> E se alguém quer chamar orador ao filósofo que possui abundância de ideias e riqueza de dicção, eu não me oporei, nem tão pouco a que se chame filósofo ao orador que une a sabedoria com a eloquência [...]. Porém, se buscamos o melhor de todos, deveremos outorgar a palma ao orador sábio. Consintamos em que se o chame de filósofo [...]. [...] o orador perfeito possui a ciência do filósofo [...][12].

A explicação da formulação acima é pragmática. Conforme dito anteriormente, o Arpinate estrutura seu pensamento a partir de uma teoria do Estado. A preocupação aqui é com o dever do cidadão para

---

[8] VALENTE, Milton. **A ética estóica em Cícero**. Caxias do Sul: EDUCS, 1984, p. 319, 321, 326.

[9] Establezcamos ante todo - y esto se entenderá mejor después- que sin la filosofía no puede conseguirse el orador que buscamos, no en el sentido, sin embargo, de que la filosofía lo sea todo, sino en el de que ayuda (CICERÓN, Marco Tulio. **El orador**. Madrid: Alianza Editorial, 2004, p. 32).

[10] VILLEY, Michel. **A formação do pensamento jurídico moderno**. São Paulo: Martins Fontes, 2005, p. 479.

[11] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 67, 247.

[12] Y si alguno quiere llamar orador al filósofo que posee abundancia de ideas y riqueza de dición, yo no me opondré, ni tampoco a que se llame filósofo al orador que une la sabiduría con la elocuencia[...]. Pero si buscamos lo mejor de todo deberemos otorgar la palma al orador sabio. Consintamos en que Le llamen filósofo[...]. [...] el orador perfecto posee la ciencia del filósofo[...] (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 247).

com o próximo e com a sociedade, o que leva à construção de uma moral prática e política. A moral política deve ensinar o dever, mas o dever presente, útil ao Estado e à sociedade, nos seguintes termos:

> Pois, embora tenham sido discutidos acurada e abundantemente, na filosofia, diversos assuntos não só graves como úteis, parecem muito amplos aqueles que, a propósito dos deveres, foram transmitidos e prescritos por ela. De fato, parcela alguma da vida, quer nos negócios públicos, quer nos privados, quer nos forenses, quer nos domésticos, quer nos da esfera estritamente pessoal, pode prescindir do dever[13].

Por isto, o mito do orador perfeito envolve a lealdade e a utilidade ao Estado, ou seja, uma função pública, política, social e familiar. Todas culminam no dever para com a manutenção das condições de existência e de vida da *Civitas*[14], o que só seria possível se o orador dominasse vastos assuntos de interesse social, principalmente jurídicos. Daí também que a filosofia tinha um papel pedagógico, pois era essencial na educação e formação do orador perfeito[15]. Essa função obviamente se estendia ao direito.

Prevalece a retórica dos métodos, pois Cícero começa a desenvolver a sua teoria retórica em cima da realidade romana, com o objetivo de que o orador possa, ao atuar, influenciá-la. Vai apresentar uma descrição universal da história como se fosse a melhor, a mais coerente com os interesses da aristocracia. Não sem razão, a tese considera Cícero um homem do seu tempo, mas que ajudou e ajuda a iluminar o presente.

O raciocínio é que os homens constituem a base do Estado e de que eles precisam se unir para garantir as condições da vida social[16]. Essa congregação é estimulada por alguém ou por alguma força. Seguem suas palavras: [...]"um cidadão (não sabemos quem), sem dúvida grande e sábio, [...] congregou os homens dispersos pelo campo e ocultos na selva, lhes induziu a algo útil e honesto[...], tornando-os mansos

---

[13] CÍCERO, Marco Túlio. **Dos deveres**. São Paulo: Martins Fontes, 1999, p. 5.

[14] VALENTE, Milton. **A ética estóica em Cícero**. Caxias do Sul: EDUCS, 1984, p. 22-24, 116.

[15] ESTEVÃO, Roberto da Freiria. **A retórica no direito**: a lógica da argumentação jurídica e o uso da retórica na interpretação. São Paulo: Letras Jurídicas, 2010, p. 78-79.

[16] CICERÓN, Marco Tulio. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 1, 2.

e civilizados"[17].

Conclui que no processo de formação do Estado, concorreram dois fatores: a razão e a retórica. A razão não tem, por si mesma, a capacidade de persuadir o indivíduo sobre as verdades descobertas, ou seja, sobre os assuntos da sociedade e os valores sociais, o que exigiria a retórica para viabilizá-la e a própria existência social do homem. Para tanto, a retórica, ao objetivar persuadir os homens a aceitarem as "verdades", mesmo que prováveis, descobertas pela razão, precisa ser dotada de conhecimentos necessários à defesa da *Civitas*. A filosofia, o direito e a história permitiam justamente ao orador encontrar a utilidade humana universal para a defesa da união social[18].

Saliente-se que a filosofia, desde que em harmonia com o direito civil, dá legitimidade à persuasão no discurso, pois perde toda a força persuasiva quando o orador não conhece a matéria de que trata[19]. O orador precisa de uma instrução universal em ciências e artes, uma cultura geral[20]. São esses os conhecimentos que enriquecem o argumento e dão força persuasiva ao discurso[21]. Como o próprio Cícero afirma, a retórica necessita de muita variedade de ciências e estudos[22]. Diz: "Sem dúvida que é a eloquência algo mais do que imaginam os homens, e que requer muita variedade de ciências e estudos"[23]. E mais: "Deve ser profundo o orador no conhecimento da antiguidade, e não desrespeitar as leis e o direito civil"[24].

---

[17] [...] un varon (no sabemos quién), sin duda grande y sabio, [...] congrego á los hombres dispersos por el campo y ocultos en la selva, les indujo á algo útil y honesto[...], tornólos mansos y civilizados (CICERÓN, Marco Tulio. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 2).

[18] CÍCERO, Marco Túlio. **Dos deveres**. São Paulo: Martins Fontes, 1999, p. 77, 80-81, 139.

[19] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 13-14, 22.

[20] SÁNCHEZ, Luis Ángel. **Retórica y Linguística en el *De Oratore* de Cicerón**. Disponível em: < http://investigadores.uncoma.edu.ar/cecym/iij2004/Sanchez.pdf.>. Acesso em: 07 fev. 2009.

[21] ALBERTE GONZÁLEZ, A. **Cicerón ante la retórica**. Valladolid: [s.n.], 1987, p. 25.

[22] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 22, 25.

[23] Sin Duda que es la elocuencia algo más de lo que imaginan los hombres, y que requiere mucha variedad de ciencias y estúdios (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 13).

[24] Debe ser profundo el orador en el conocimiento de la antiguidad, y no profano en el de las leyes y el derecho civil (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos

A referência ao direito civil não é sem propósito. Cícero entende que este permite a conservação e perpetuação da igualdade e da justiça nas causas e negócios civis[25]. A retórica se relacionava com o direito civil[26]. Observam-se as linhas abaixo:

> [...] A unidade do povo, pelo contrário, e a do Senado, são coisas possíveis, e sua ausência acarreta todos os perigos. Pois bem: vemos que essa dupla concórdia não existe, e sabemos que ao restabelecê-la teríamos mais sabedoria e mais felicidade. Que pensas, pois, Lélio, que devamos aprender para alcançar esse fim? As artes que nos tornam úteis à República, porque esse é o mais glorioso benefício da sabedoria e o maior testemunho da virtude, assim como o maior de seus deveres[27].

E ainda:

> Se alguém é aficionado à ciência política, que Cévola não crê própria do orador, senão de outro gênero de disciplina, nas Doze Tábuas encontrará descritos os interesses e o governos da República. Se o deleita essa prepotente e gloriosa filosofia (me atreveria a dizê-lo), no direito civil e nas leis encontrará as fontes para todas as suas disputas[28].

Ressalte-se que, em Roma, o direito tem grande ligação com a religião. A legitimidade do jurídico não vinha apenas do Estado, mas também do sagrado. Em virtude disto, o direito, enquanto ordem universal, não podia ser discutido. O próprio termo *ius* expressava a ideia de integridade e perfeição. O direito regulava a área de atividades e pretensões individuais ou coletivas e estabelecia os deveres e as atribuições conforme o lugar que cada indivíduo ocupava na sociedade. O direito devia

---

Aires: Emecé, 1943, p. 13-14)

[25] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 59; CÍCERO, Marco Túlio. **Dos deveres**. São Paulo: Martins Fontes, 1999, p. 158.

[26] ADOMEIT, Klaus. **Filosofia do direito e do Estado**. Por Alegre: SAFE, 2000, v.1, p. 163, 192.

[27] CÍCERO, Marco Túlio. **Da República**. Bauru: EDIPRO, 1996, p. 24.

[28] Si alguien es aficionado a la ciencia política que Scévola no cree propia del orador, sino de otro género de disciplina, en las Doce Tablas hallará descritos todos los intereses y el gobierno de la República. Si Le deleita esa prepotente y gloriosa filosofia (me atreveria a decirlo), en el derecho civil y en las leyes encontrará las fuentes para todas sus disputas (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 60-61).

levar em consideração a ordem do mundo enquanto ordem superior[29].

A justiça e a injustiça provinham da contrariedade da ordem do universo, da natureza. Assim, toda lei que contrariar a natureza deve ser considerada ilegítima.

A ligação entre direito e sagrado acabava por retratar as ideias da aristocracia, para ajustar os interesses dessa classe ao cosmo, dava legitimidade ao controle político, bem como o monopólio para a determinação da legitimidade das leis.

3. Cícero e a instrumentalização da tarefa da filosofia e do direito

Entre o direito e o sagrado, novamente aparece a tarefa da filosofia. O pensamento ciceroniano entende que a filosofia abrange três partes, a primeira refere-se aos segredos naturais; a segunda diz respeito à lógica; já a terceira é relativa aos usos e costumes sociais. Cícero entende que, embora o orador deva considerar as duas primeiras, é justamente sobre a última que deve dar atenção especial[30].

O orador deve concentrar-se nos condicionantes históricos e materiais em que a sua sociedade se situa, pois é aqui que ele encontrará os fatores perceptíveis a todos os cidadãos, os quais serão utilizados para imprimir força persuasiva ao discurso. Para que possa influir nos destinos da sociedade, ele precisa utilizar um discurso fundamentado, saber os valores e o modo de comportamento dos homens no convívio social em que estão inseridos, bem como a mutação desses valores e comportamentos. Quanto à natureza e à lógica, o orador poderá utilizá-las, mas deverá sempre situá-las à base do contexto em que está inserido[31]. Reforça-se com a seguinte passagem:

> Para dar conselhos sobre o negócio da República, o primeiro é conhecê-los; para falar com algum fundamento, é preciso saber os costumes da cidade; e como estes variam a cada momento, que varie também o gênero da oratória. Ainda que sua força seja sempre a mesma, a dignidade do povo, os gravíssimos negócios da República, os tumultuados movimentos da plebe, parecem que exigem um gênero de oratória grande e vigoroso, e a maior parte

[29] DAVIDSON, Jorge. **De Cicerón a Apiano**: los conceptos de orden y desorden en la sociedad romana (siglos I a.C. y II d.C.) Disponível em: <http://www.gtantiga.net/textos/LIBROGALLEGOUBACYT.pdf>. Acesso em: 04 abr. 2010.

[30] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 27.

[31] *Idem*, *ibidem*, p. 27, 190.

> do discurso tem de ser empenhada em excitar os ânimos com alguma exortação ou recordação à esperança, ao medo, à ambição, à glória[...][32].

Vê-se que a retórica da práxis é uma retórica metodológica que atua sobre a retórica dos métodos. Existe uma preocupação de Cícero em inserir o orador no exercício do poder político estatal na sociedade e buscar a eficiência no uso desse poder.

Entende que a grande tarefa da filosofia é estabelecer o fim do homem, sendo alcançado mediante o critério da verdade e do fim dos bens, o que só será possível, inclusive, com a lógica, daí a necessidade de o orador também dominar esse saber[33].

A filosofia podia fornecer uma certeza provável, lastreada na prova do senso comum e do consenso de todos os homens, na medida em que estabelecia os critérios que permitiam alcançar essas certezas. Tal formulação ciceroniana era importante para a retórica por dois motivos: em primeiro lugar, permitia que a retórica utilizasse critérios de verossimilhança, ao expor bem os argumentos de forma articulada, conclusiva e universal. Em segundo lugar, atribuía à retórica um papel mais ativo no sistema jurídico-político, ao melhorar a linguagem e possibilitar uma aplicação otimizada do direito na proteção e reprodução das relações sociais. Cícero expõe os argumentos a seguir:

> Portanto, oh Crasso, julgo que não deves estender tanto os limites de tua arte: bastará ele conseguir nos juízos que a causa que defendes pareça melhor e mais provável; que nas disputas e deliberações valha muito tua oração para persuadir ao povo; em suma, que aos prudentes lhes pareçam que tenhas falado com elegância, e aos ignorantes que tenhas falado com verdade[34].

---

[32] Para dar consejos sobre los negócios de la República, lo primero es conocerlos; para hablar com algún fundamento, es preciso saber las costumbres de la ciudad; y como éstas varían a cada paso, de aqui que varie también el género de oratoria. Aunque su fuerza sea siempre la misma, la dignidad del pueblo, los gravísimos negocios de la República, los alborotados movimentos de la plebe, parecen que exigen um género de oratoria más grande y vigoroso, y la mayor parte del discurso há de emplearse en excitar los ánimos con alguna exhortación o recuerdo a la esperanza, al miedo, a la codicia o a la gloria [...] (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 190).

[33] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 11, 13.

[34] Por lo tanto, oh Craso, juzgo que no debes extender tanto los limites de tu arte: bastará el conseguir en los juicios que la causa que defiendes parezca la mejor e más probable; que en las arengas e deliberaciones valga mucho tu oración para persuadir al pueblo; en

É, mais precisamente, na sua utilização na retórica, que a lógica mostra relação com a reprodução das relações sociais, ela permite uma linguagem jurídica articulada e conclusiva que procura incutir nas camadas sociais a concepção do "fim do homem romano". Ou melhor:

> E se nos perguntar quem é o cidadão que aplica o seu saber e estudo à direção da República, lhe definiríamos deste modo: deve ter-se por bom administrador e conselheiro da República ao que sabe as coisas em que a utilidade da República consiste e faz bom uso delas[...][35].

As linhas descritas acima devem ser lidas conforme a seguinte passagem:

> Em verdade que tudo o que pertence ao trato social, à vida dos cidadãos, a seus costumes, ao governo da República, ao estado social, ao sentido comum, às inclinações naturais, é matéria própria do orador [...]. E deve falar de coisas como falaram os que constituíram as leis, o direito e as cidades [...][36].

Não se pode negar que tais formulações acabam por apresentar os interesses aristocráticos, relativos, como interesses universais de toda a sociedade.

Ora, Cícero vai sustentar que toda controvérsia se resolve a partir de princípios universais, é necessário reduzir os argumentos também de proposições universais[37]. São esses princípios universais que vão ga-

---

suma, que a los prudentes lês parezca que hás hablado con elegancia , e a los ignorantes que hás hablado con verdad (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 21).

[35] Y si se nos preguntare quién es el ciudadano que aplica su saber y estúdio a la gobernación de la República, Le definiríamos de este modo: debe tenerse por buen administrador y consejero de la República al que sabe las cosas en que la utilidad de la República consiste y hace buen uso de ellas [...](CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 66).

[36] En verdad que todo lo que pertence al trato social, a la vida de los ciudadanos, a sus costumbres, al gobierno de la República, al estado social, al sentido común, a las inclinaciones naturales, es matéria própria del orador[...] Y debe hablar de estas cosas que hablaron los que constituyeron las leyes, el derecho y las ciudades [...](CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 107).

[37] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 127, 131.

rantir a união social. Aqui, a retórica, com o aporte da filosofia, do direito, da ética, da política e da história, era também o vínculo racional que centrava o homem, associava os indivíduos entre si e os agregava na *Civitas*[38].

A tese defendida reconhece a similaridade entre Cícero e Aristóteles com formulações para uma retórica destinada à preservação de estruturas jurídicas e estatais de controle social. Entretanto, reconhece também que o Arpinate é mais prático e objetivo na elaboração de uma retórica estratégica. Infere-se que os tais princípios universais se ligam aos interesses do Estado aristocrático romano. O próprio Cícero dá a pista, nas linhas a seguir: "Na verdade as medidas populares nunca foram de meu agrado e considero que a melhor das Repúblicas é a que criou o cônsul aqui presente, ou, por outra, a que está sob o governo dos melhores cidadãos"[39].

Com isso, reforça o caráter complementar entre a retórica, a filosofia e o direito. Esse caráter complementar, como fica claro, só se realiza, na defesa da *Civitas*, o que passa por dar uma função ao orador na defesa da sociedade civil e do Estado. Vê-se que a união entre a filosofia, o direito e a retórica tinha como intuito colocar a última como instrumento de ação do orador na sociedade[40]. A seguinte passagem da obra de Cícero, intitulada *Bruto*, é emblemática: "[...] quando se lhe perguntou pela primeira qualidade do orador, respondeu que era a ação; em respeito à segunda e à terceira qualidades, a resposta foi a mesma: a ação"[41]. Transcrevem-se as palavras a abaixo:

> E protegerá todas essas conquistas, como por meio de uma muralha, recorrendo à dialética, ao conhecimento do verdadeiro e do falso, à arte de descobrir as implicações e às contradições das ideias. Uma vez convencido de que está destinado a viver em uma sociedade civil, compreenderá a necessidade de empregar não só a sutil arte da dialética, mas também a arma de maior alcance, de efeito mais duradouro, isto é, a eloquência que governa os povos, a força das leis que castigam os maus, amparam os bons e que exaltam os homens ilustres. [...] exortando-os à prática da virtude, apartando-os dos vícios, consolando os aflitos e fixando em eter-

[38] CÍCERO, Marco Túlio. **Dos deveres**. São Paulo: Martins Fontes, 1999, p. 27-28

[39] CÍCERO, Marco Túlio. **Tratado das leis**. Caxias do Sul: EDUCS, 2004, p. 118.

[40]PLUTARCO. **Cícero, por Plutarco**. Disponível em: <http://www.dominiopublico.gov.br/download/texto/cv000006.pdf>. Acesso em: 04 fev. 2009.

[41] CICERÓN, Marco Tulio. **Bruto**. Madrid: Alianza Editorial, 2000, p. 115-116

> nos monumentos os feitos e os ditos dos heróis e dos sábios [...][42].

E, ainda, na seguinte passagem:

> Porém, a filosofia esteve abandonada até nossa idade, sem receber luz alguma das letras latinas. Por isto, eu me propus a elevá-la e despertá-la, para que se na vida pública fomos de algum proveito para nossos concidadãos, lhes sejamos também úteis no ócio[43].

4. A retórica e a necessidade de uma profunda formação filosófica e jurídica ao orador

O Arpinate, por tudo isso, vai defender a necessidade de uma profunda formação filosófica e jurídica ao orador[44] e o distanciamento deste de excessos ornamentais no discurso. Proclama uma união das escolas dos retores com a academia filosófica. Observa-se pelo próprio Cícero: "[...] creio eu que a eloquência exige o concurso de todas as demais artes que os homens cultos possuem[...]"[45].

Não vai desprezar a contribuição de Aristóteles para a retórica, muito pelo contrário, ele entende que a retórica é a única capaz de mover e persuadir[46], entretanto, aproveita a aproximação que Aristóteles já fazia entre a retórica e a filosofia e vai criticar a rigidez ornamental do filósofo alheio à retórica[47].

Também reforça e amplia a contribuição retórica do Estagirita

---

[42] CÍCERO, Marco Túlio. **Tratado das leis**. Caxias do Sul: EDUCS, 2004, p. 65.

[43] Pero la filosofia yació abandonada hasta nuestra edad, sin recibir luz alguna de las letras latinas. Por eso yo me he propuesto elevarla y despertarla, para que si en la vida pública fuimos de algún provecho á nuestro conciudadanos, les seamos también útiles en lo ócio (CICERÓN, Marco Tulio. Cuestiones tusculanas. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. V, p. 3).

[44] CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 10-11.

[45] [...] por creer yo que la elocuencia exige el concurso de todas las demás artes que los hombres cultos possuem[...] (CICERÓN, Marco Túlio. **Diálogos del orador**. Buenos Aires: Emecé, 1943, p. 10).

[46] HADOT, Pierre. **O que é a filosofia antiga?** 2. ed. São Paulo: Edições Loyola, 2004, p. 158.

[47] MORA, Carlos de Miguel. **En torno al orador:** modernidad de Cicerón. Disponível em: < http://www2.dlc.ua.pt/classicos/Orator.pdf>. Acesso em: 08 dez. 2008.

para a práxis[48]. Existe um enlace entre as concepções retóricas de Aristóteles e de Cícero. Apesar de o primeiro tentar superar a ruptura realizada por Platão entre o saber e o dizer e colocar a retórica na perspectiva da linguagem racional humana, ao admitir que a retórica pode ser usada para o bem e para a ética, insere-a numa concepção geral de sociedade e cultura, com a função de agregação humana. O primado ciceroniano da práxis sobre a teoria[49] não deixa de ser fortemente influenciado por Aristóteles.

Essas ideias escondiam um real objetivo. A radicalização da luta social em Roma, verificada no final do período republicano, bem como o aprofundamento do dissenso entre os diversos extratos da aristocracia, sobretudo entre *nobilitas* e equestres, impunha a necessidade de aprimoramento na sociedade dos instrumentos de consenso. Não só para tentar disseminar a ideologia da aristocracia no seio da plebe, dos escravos e dos pequenos e médios proprietários de terras e escravos, mas, também, para unificar a própria aristocracia ao redor dos fundamentos do sistema social, político e econômico. O uso da retórica aliada à filosofia e ao direito era uma exigência da própria ideia de *humanitas*, pela qual o orador deveria ter consciência, mediante instrução e cultura, do seu papel na comunidade mediante a solidariedade com o outro e com a manutenção da ordem[50].

O argumento ciceroniano acaba por se revelar como uma técnica jurídica discursiva, que objetiva, por meio do discurso, a melhor argumentação para o melhor convencimento possível, destinada a assegurar os princípios fundamentais da sociedade romana. A retórica tem como origem a razão, a experiência e a história[51]. Por isso, concebe-a como uma arte, pois a mesma fica na confluência do elemento racional da técnica abstrata com o elemento empírico da experiência e do exercício. A retórica tem natureza histórica e varia no espaço-tempo[52]. Cita-se a sua

---

[48]FURHMANN, Manfred. **Cicerón y la retórica**. Disponível em: <https://dspace.unav.es/retrieve/1941/fuhrmann01.pdf>. Acesso em: 04 abr 2006; SILVEIRA, Cássio Rodrigo Paula. **Relendo Cícero:** a formação do orador e sua inserção na política romana (século I a.C). Disponível em < http://www.ufg.br/this2/uploads/files/112/11_CassioSilveira_RelendoCiceroAFormacaoDo.pdf>. Acesso em 04 nov. 2010.

[49] BARILI, Renato. **Retórica**. Lisboa: Editorial Presença, 1979, p. 41-42.

[50] MONTEAGUDO, Ricardo. **Filosofia e paradigma em Cícero**. Disponível em: < http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-31732002000100004>. Acesso em: 25 abr. 2008.

[51] CICERÓN, Marco Tulio. **El orador**. Madrid: Alianza Editorial, 2004, p. 83-84.

[52]FURHMANN, Manfred. **Cicerón y la retórica**. Disponível em: <https://dspace.unav.

obra *Inventio*: "E já que queremos estudar o princípio do que se chama eloquência (seja uma arte, um estudo, um exercício ou uma faculdade natural), veremos nascido de honestíssimas causas e cimentado em perfeitas razões"[53].

Apenas para corroborar a citada passagem, mencionem-se ainda as seguintes linhas: "Parece-me que a sabedoria calada ou pobre de expressão, nunca conseguiu separar os homens subitamente de seus costumes e trazê-los ao novo estilo de vida"[54].

O orador, para Cícero, era, antes de tudo, um político, no sentido de homem da *Civitas*, homem e cidadão, desempenhando sempre uma função na manutenção do *status quo*[55]. Cícero supera a ideia de que a retórica está limitada apenas à manipulação da sintaxe e estende a sintaxe à matéria, ao estabelecer relações do homem com a coisa[56]. A citação não deixa dúvidas: [...] "porém o que se arma com a eloquência para defender os interesses da pátria, em vez de menosprezá-los e combatê-los, é, em meu sentir, um homem utilíssimo para os seus e para a República e um verdadeiro cidadão"[57].

Mas, afinal, o que se quer dizer com a citação acima? Que o orador molde o discurso a partir de elementos concretos da realidade romana, direcione-o à universalização das ideias úteis à ordem social.

A retórica da práxis de Cícero resgata Aristóteles para tecer vá-

---

es/retrieve/1941/fuhrmann01.pdf>. Acesso em: 04 abr 2006.

[53] Y si queremos estudiar el principio de lo que se llama di elocuencia (sea un arte, un estudio, un ejercicio, ó uma facultad natural), veremósle nacido de honestisimas causas y cimentado em perfectas razones (CICERÓN, Marco Tulio. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 2).

[54] Paréceme que la sabiduria callada ó pobre de expresion nunca hubiera logrado apartar á los hombres súbitamente de sus costumbres y traerlos á nuevo género de vida (CICERÓN, Marco Tulio. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 2).

[55] AGUIRRE, Sebastián Antonio Contreras. **Cícerón:** retórica y filosofia moral. Verdad y argumentación jurídica en el *Orator Perfectus*. Disponível em: <http://serbal.pntic.mec.es/~cmunoz11/contreras59.pdf>. Acesso em: 30 set. 2009.

[56] BARILI, Renato. **Retórica**. Lisboa: Editorial Presença, 1979, p. 44.

[57][...]pero el que se arma con la elocuencia para defender los interesses de la pátria en vez de menoscabarlos y combatirlos, es, en mi sentir, un varon utilisimo para los suyos e para la republica y un verdadero ciudadano (CICERÓN, Marco Tulio. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 1-2)

rias orientações ao orador e o transformar num instrumento de defesa social, numa instituição da República romana. Adeodato está correto ao afirmar que a retórica estratégica encontra respaldo na conjuntura do exercício do poder, o que pode envolver desde acordos, passar pela projeção da autoridade perante o auditório indo até a ameaça de violência.

Ratificando: por isso, a retórica deve possibilitar um discurso jurídico objetivo, direcionado ao essencial e que despreze os detalhes. Deve levantar sempre, sobre as questões objetivas, as questões subjetivas e englobar toda a problemática da questão. A retórica deve conduzir o discurso jurídico sempre na aplicação de soluções racionais para problemas concretos e partir sempre da experiência cotidiana[58].

A tese estabelece seis linhas gerais da retórica ciceroniana, principalmente as três primeiras.

A primeira se refere ao caráter complementar entre a retórica, a filosofia e o direito.

A segunda diz respeito à importância do gênero judicial da retórica, Cícero considera que o discurso judicial é o melhor dos gêneros para a técnica retórica.

A terceira linha afirma o *ethos* do orador, Cícero entende que o *ethos* deve ser projetado a partir da reputação prévia do orador frente ao auditório.

A quarta diz respeito à tradução dos termos gregos para o latim. Aqui, as quatro partes do discurso passam a ser denominadas de exórdio, de narração, de confirmação e de peroração[59].

A quinta linha refere-se ao discurso, que deve estar baseado nos condicionantes históricos e materiais em que o orador está inserido, significa que o discurso deve ser montado a partir de *topoi* extraídos da realidade social, de forma a se tornar mais perceptível e mais convincente ao auditório[60]. Cícero diz o que entende por *topoi*: "o tópico é o lugar fundado nas coisas que tem alguma relação com a que é objeto da controvérsia [...]"[61].

---

[58] MICHEL, Alain. Ciceron y el humanismo romano. **Armas y Letras,** Nuevo León, ano 04, julio/septiembre, 1961, p. 8.

[59] CICERÓN, Marco Tulio. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 12.

[60] CICERÓN, Marco Tulio. Tópicos á Cayo Trebacio. *In*: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 214-215, 221, 227-228.

[61] El tópico o lugar fundado en las cosas que tienen alguna relación con la que es objeto

Para facilitar a compreensão, ilustra-se com as suas próprias palavras: "O conhecimento dos tópicos aproveita, portanto, não só aos oradores e filósofos, senão também aos jurisconsultos, para mostrar riqueza de argumentos em suas consultas"[62]. Tal afirmação é suficiente não só para a sustentação do caráter complementar entre retórica e filosofia, mas também para sustentar que ele já fazia uma intersecção entre a retórica, a filosofia e o direito. A invenção filosófica e jurídica e a invenção retórica se aproximam.

Assim, os *topoi* devem partir de percepções sensíveis e concretas dos cidadãos, facilmente identificáveis[63], pois só a tópica pode possibilitar à retórica a generalização ao todo do corpo social romano da identidade da ordem social e política.

A sexta linha diz respeito à mudança na ordem dos argumentos, pela qual se deve começar pelos últimos, deixar para o fim os primeiros e colocar os mais frágeis ao centro, o que será mais bem tratado em outro tópico.

Isto posto, entende-se que, para o direito, Cícero apresentou-se e tem se apresentado como uma forte presença influenciadora de novas abordagens, tanto na filosofia quanto na retórica. A perspectiva retórica, defendida na tese, foge de qualquer ontologia, de qualquer busca por uma verdade absoluta. Essa negação da ontologia se consegue, segundo João Maurício Adeodato, com argumentos persuasivos sobre os diversos lados contraditórios, para concluir pela relativização da verdade dos argumentos[64]. É o que se denomina de consenso circunstancial[65], o que

---

de controvérsia[...] (CICERÓN, Marco Tulio. Tópicos á Cayo Trebacio. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. I, p. 221).

[62] El conocimiento de los Tópicos aprovecha por tanto, no sólo a los oradores y filósofos, sino también a los jurisconsultos, para mostrar riqueza de argumentos en sus consultas (CICERÓN, Marco Tulio. Tópicos á Cayo Trebacio. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. I, p. 228).

[63] CICERÓN, Marco Tulio. Tópicos á Cayo Trebacio. *In*: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 235.

[64] ADEODATO, João Maurício. Pirronismo, direito e senso comum – o ceticismo construtor da tolerância. In: ADEODATO, João Maurício. **Ética e retórica**. 4. ed. São Paulo: Saraiva, 2009, p. 381, 382.

[65] ADEODATO, João Maurício. Positivismo e direito positivo – um diálogo com Robert Alexy sobre o conceito e validade do direito. In: ADEODATO, João Maurício. **Ética e retórica**. 4. ed. São Paulo: Saraiva, 2009, p. 356-357.

não deixa de refletir o pensamento ciceroniano, de base eclética.

5. Conclusão: o reconhecimento da unidade intrínseca entre a retórica e a filosofia e o direito na intervenção do orador na sociedade

Aristóteles admite um papel ativo ao orador na sociedade. Entretanto, considera que a atitude reflexiva para o saber e ação é do filósofo. A formação filosófica do orador tem alguma relevância para a boa retórica, mas não é fundamental para que se possibilite a persuasão e a articulação correta da palavra. Assim, Aristóteles sempre acusou os sofistas de desprezarem o discurso deliberativo e o epidíctico. A assembleia permitia a utilização de argumentos científicos. Já os juízos e tribunais eram palcos para argumentos calcados na enganação e na falsidade. Na retórica, dá mais atenção ao desenvolvimento de formas de raciocínio próprias e à análise da psicologia dos diversos tipos de auditório.

Aristóteles entende que a grande utilidade da retórica se dá naquelas situações em que a filosofia não consegue impor a verdade. Reconhece várias situações em que o máximo que o homem pode alcançar é uma probabilidade. Então, a retórica ajudaria na prevalência daquela posição mais provável, desde que se objetivasse a ética, a prática da boa conduta.

Entretanto, pelas palavras citadas de Cícero, fica claro que o fundo do debate entre filosofia, retórica e direito não é a questão da verdade ou da verossimilhança, mas a necessidade de satisfazer expectativas e drenar insatisfações diante das contradições sociais. Prova disto é o fato de Aristóteles não deixar de considerar a perpetuação de relações de dominação social, pois a retórica é concebida como parte do exercício do poder político. O centro do sistema retórico de Aristóteles está na política e tudo gravita ao redor dela.

Infelizmente, não consegue levar esse pensamento até as últimas consequências, pois ele ainda estava ligado às críticas de Platão aos sofistas e porque as condições da ocupação da península grega pela Macedônia não favoreciam.

A divisão do trabalho e da produção gera classes sociais, contradições no processo de produção de riquezas e interesses antagônicos e inconciliáveis entre as diversas camadas na sociedade e até mesmo entre indivíduos no seu ambiente particular. Tal formulação leva a entender que, desde o surgimento da propriedade privada, a proposição, a crítica

e a produção do conhecimento envolvem (direta ou indiretamente) relações de dominação. Não importa se a filosofia busca o saber, o exercício da cidadania, se é desinteressada ou contestadora da ordem, o homem sempre, ao refletir sobre as coisas, mesmo inconscientemente, favorece ou reforça determinada relação de dominação de um segmento sobre outro.

A filosofia, por si mesma, para ser útil ao homem numa sociedade de classes, não tem condições de dar conta de relações de dominação. Ela necessita da política e do direito. O exercício do poder político tem por objetivo básico a proteção e reprodução das relações sociais mais benéficas ao setor que dirige o Estado. Não há como o ordenamento jurídico não ser instrumentalização desse exercício.

Para Aristóteles, a atividade retórica deve se preocupar com o bem fazer, pois o homem é a medida de sua intervenção na sociedade. Mesmo considerando a ética na relação entre a filosofia e a retórica, não dá a devida atenção ao direito. A retórica é ética metodológica. Parece que este é o ponto da questão. Em Cícero, o discurso retórico perde toda a sua utilidade e a sua força persuasiva, quando o orador não conhece a matéria de que está tratando. O orador precisa de uma ampla cultura geral que a filosofia oferece, mas não é suficiente quando se trata de proteger e reproduzir as relações sociais. Isso só pode ser realizado pelo exercício do poder político estatal, mediante a instrumentalização do direito. Enquanto técnica de controle social, o direito enriquece o argumento e dá força persuasiva ao discurso. A tese tentou apontar que Cícero, ao conceber que o direito civil permite a conservação e a perpetuação da igualdade e da justiça nas relações sociais, sustenta que o orador necessita de muita variedade de ciências e estudos.

Não poderia ser diferente, pois o desenvolvimento das forças produtivas contribuiu para a transformação de Roma de Cidade-Estado em Estado continental, o que naturalmente pressionou a sociedade em direção a uma maior complexidade social, mas não ao ponto de se negar um papel próprio e independente ao direito, na relação entre retórica e filosofia.

Em Roma, o direito garantia a unidade do território e a hierarquia em relação ao poder central. As leis, os regulamentos administrativos e os costumes sancionados pelo Estado tinham caráter pedagógico, ao ensinarem a população a obedecer ao Estado e aos valores sociais. Cabia ao orador, o orador perfeito almejado por Cícero, incutir no seio do povo, a importância da obediência como condição da virtude e da unidade política de Roma.

Na situação descrita, a missão atribuída ao orador de defesa da República e de disseminação dos valores sociais perante as nacionalidades submetidas, não poderia ser realizada apenas pela unidade entre retórica e filosofia. Ao direito cabia um papel fundamental. Ao que parece, Cícero, ao entender que o orador deveria ter amplos conhecimentos filosóficos, também inseria o direito na união entre retórica e filosofia. Não reduziu o papel do direito nesta relação, pois entendia, como já foi mostrado na tese, que o direito cumpria certa função na perpetuação das relações sociais.

É importante reafirmar que, ao ligar a retórica com a filosofia e com o direito, Cícero parte de uma teoria do Estado, considera sempre o poder político estatal em Roma e insere a retórica nas estratégias de agregação humana, o que envolve uma concepção geral de sociedade, Estado e cultura. A retórica da práxis preconizava a superação da dicotomia entre a retórica e a filosofia. Agora, o universo de ação do orador também se encontrava no direito. A retórica aplicada ao direito permite estabelecer e resolver questões jurídicas, relativas ao poder político, à sociedade e à economia. Pode-se dizer que a retórica estratégica de Cícero, envolve a construção de mecanismos ideológicos que assegurem o consenso na sociedade. Com isso, universaliza-se a ideologia dominante, neutralizam-se e se eliminam ideias que antagonizem o poder estatal. É por tal motivo que a retórica da práxis não se limita à unidade com a filosofia e tenta estabelecer conexão com as bases do direito. O objetivo é estabelecer compromissos com a ação jurídica, política e social do orador na transformação da realidade.

Não sem razão, a tese afirma que o direito natural era o liame político do pensamento ciceroniano, é aqui que ele tenta criar uma absolutização do seu modelo de sociedade, pelo qual o direito à propriedade privada, o uso do trabalho escravo, a acumulação privada da riqueza, os valores helenísticos e a civilização romana, aparecem como construções de *topos* em qualquer análise.

Cícero concebe a existência de uma lei natural que funda e agrupa a sociedade e define os direitos e os deveres comuns entre as pessoas, isto à base da paz social. Na sua estratégia persuasória, o orador deve entender que o direito parte da lei natural e é comum a todos e decorre da razão. Só assim, perante o auditório, o justo e o injusto conseguem legitimação[66]. Entretanto, esses direitos e deveres comuns confluem para a *Civitas*, para o Estado, e só pode ser bem gerenciado pelos melhores

[66] CÍCERO, Marco Túlio. **Tratado das leis**. Caxias do Sul: EDUCS, 2004, p. 58-60.

cidadãos, pelos donos de terras e de escravos, pela aristocracia[67]. A retórica da práxis envolve a arte de influir sobre esses direitos e deveres pelo discurso.

Existe nas suas posições uma instrumentalização das relações de dominação, fundada na consciência jurídica dominante. A retórica metodológica se levanta sobre a retórica dos métodos. Cícero elabora orientações claras; impõe que ideias como lealdade, Estado, glória, honra, dignidade, costumes ancestrais e virtude sejam usadas para reforçar o próprio poder político estatal. A sua retórica projeta-se sobre a retórica dos métodos, como meio de busca, diante de uma situação questionada, não da verdade absoluta, mas de formas de persuasão, mediante um discurso lógico e articulado. Objetiva o consenso na sociedade e a condução à prevalência do tecido social.

Com o Arpinate, a fusão da justiça com a virtude atribui uma ação do orador na defesa dos valores da aristocracia. Aperfeiçoa-se a retórica, cujo resultado é o afastamento do modelo de orador das pretensões das camadas populares. Sem justiça, lei natural ou virtude, o pacto aristocrático preconizado por Cícero, mesmo que estivesse fundado na legalidade, perderia legitimidade. Aqui, a ligação entre direito e sagrado era útil para retratar as ideias da aristocracia e ajustar o cosmo aos interesses dessa classe. Isto dava legitimidade aos controles políticos e jurídicos. Cabia ao orador ajudar na tarefa mencionada. Estavam fora desse projeto as outras classes sociais.

A retórica deve ser utilizada para inserir o discurso jurídico no esforço de aprimoramento das formas de controle social pelo direito. A razão é simples. Se no paradigma de Cícero a filosofia permite ao retor amplo conhecimento para a persuasão do auditório, sendo fundamental para garantir a sobrevivência do tecido social, num ambiente de falência dos instrumentos de disseminação de ideias do Estado, o direito representava um espaço prático para a atuação retórica na proteção/reprodução das relações sociais.

A união entre retórica e filosofia, preconizada pelos sofistas, nas condições romanas, não satisfazia a necessidade de tutela das relações sociais. O bom orador, o modelo defendido por Cícero, não seria viável apenas se a retórica fosse unida à filosofia. A tese mostrou que Cícero, em vários trechos de sua obra, faz menção à necessidade do orador in-

[67] CICERÓN, Marco Tulio. Tratado de las leyes. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. VI, p. 214-216, 220.

corporar o direito civil e o conteúdo das leis romanas nas suas posições.

Por outro lado, existe uma pedagogia na sua retórica, pois ela aparece como uma técnica destinada a afirmar o papel ativo do orador na sociedade, mas considerando sempre o poder político e a formação econômica escravista, bem como os princípios fundamentais do Estado romano.

As próprias ideias de justiça, natureza, lei e virtude são levantadas com a preocupação de situá-las à base das contradições que ocorrem na sociedade. Cícero desenvolve estratégias que criam tipos ideais de homem, de lei, de Estado; passa a guiar o discurso em cima desses tipos ideais e tenta mostrar um tipo de sociedade comum, unificada, paradigmática por assim dizer, pela qual as estratégias de persuasão devem se moldar. Os tipos ideais referidos não espelham a sociedade, mas, apenas, uma dada camada, a aristocracia. Mostra alguma afinidade com Platão, para quem, na prática, a lei não regula nada de forma perfeita e universal e sempre vai favorecer um interesse em detrimento de outro interesse.

Desse modo, a tese ressalta que a unidade entre retórica, filosofia e direito tem duas finalidades. Uma imediata, composta pela interação entre os homens e entre o homem e o objeto, persuasão do orador em relação ao auditório, controle da relação social pelo discurso jurídico, justificação das instituições sociais e efetivação do direito. Outra é mediata e equivale à garantia de uma utilização instrumental da retórica. É uma metafinalidade: o reforço do exercício do poder político estatal nas mãos da aristocracia, por meio da retórica, a partir do reconhecimento da inevitabilidade dos instrumentos persuasórios, para a otimização do direito enquanto forma de proteção/reprodução das relações sociais mais vantajosas ao grupo dominante.

Referências

ADEODATO, João Maurício. **A retórica constitucional** (sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo). São Paulo: Saraiva, 2009.

_____. Pirronismo, direito e senso comum – o ceticismo construtor da tolerância. In: ADEODATO, João Maurício. **Ética e retórica**. 4. ed. São Paulo: Saraiva, 2009, p. 381-412.

_____. Positivismo e direito positivo – um diálogo com Robert Alexy sobre o conceito e validade do direito. In: ADEODATO, João Maurício. **Ética e retórica**.

4. ed. São Paulo: Saraiva, 2009, p. 353-379.

ADOMEIT, Klaus. **Filosofia do direito e do Estado**. Por Alegre: SAFE, 2000, v.1.

AGUIRRE, Sebastián Antonio Contreras. **Cícerón:** retórica y filosofia moral. Verdad y argumentación jurídica en el *Orator Perfectus*. Disponível em: <http://serbal.pntic.mec.es/~cmunoz11/contreras59.pdf>. Acesso em: 30 set. 2009.

ALBERTE GONZÁLEZ, A. **Cicerón ante la retórica**. Valladolid: [s.n.], 1987.

ARISTÓTELES. Analíticos posteriores. In: ARISTÓTELES. **Órganon**: Categorias, Da interpretação, Analíticos anteriores, Analíticos posteriores, Tópicos, Refutações sofísticas. Bauru: EDIPRO, 2005, p. 251-347.

_____. **Retórica**. Lisboa: Imprensa Nacional, 1998.

BARILI, Renato. **Retórica**. Lisboa: Editorial Presença, 1979.

CÍCERO. **Dos deveres**. São Paulo: Martins Fontes, 1999.

_____. **Da República**. Bauru: EDIPRO, 1996.

_____. **Tratado das leis**. Caxias do Sul: EDUCS, 2004.

CICERÓN, Marco Tulio. **Bruto**. Madrid: Alianza Editorial, 2000.

_____. **Cuestiones acadêmicas**. Ciudad de Mexico: El Colegio de Mexico, 1944.

_____. Cuestiones tusculanas. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. V, p. 1-206.

_____. De la Invencione retórica. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1924, t. I, p. 1-106.

_____. **Diálogos del orador**. Buenos Aires: Emecé, 1943.

_____. Discurso en defensa de Lucinio Murena. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de Pelardo, Paes e Cª, 1917, t. XIV, p. 200-268.

_____. **El orador**. Madrid: Alianza Editorial, 2004.

_____. Tópicos á Cayo Trebacio. *In*: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. I, p. 212-236.

_____. Tratado de las leyes. In: CICERÓN, Marco Tulio. **Obras completas de Marco Tulio Cicerón**. Madrid: Libreria de los sucesores de Hernando, 1924, t. VI, p. 177-351.

DAVIDSON, Jorge. **De Cicerón a Apiano**: los conceptos de orden y desorden en la sociedad romana (siglos I a.C. y II d.C.) Disponível em: < http://www.gtantiga.net/textos/LIBROGALLEGOUBACYT.pdf>. Acesso em: 04 abr. 2010.

ESTEVÃO, Roberto da Freiria. **A retórica no direito**: a lógica da argumentação jurídica e o uso da retórica na interpretação. São Paulo: Letras Jurídicas, 2010.

FURHMANN, Manfred. **Cicerón y la retórica**. Disponível em: <https://dspace.unav.es/retrieve/1941/fuhrmann01.pdf>. Acesso em: 04 abr. 2006.

HADOT, Pierre. **O que é a filosofia antiga?** 2. ed. São Paulo: Edições Loyola, 2004.

LEACH, Joan. Análise retórica. In: BAUER, Martin W.; GASKELL, George. **Pesquisa qualitativa com texto, som e imagem**. 3. ed. Petrópolis: Editora Vozes, 2004, p. 293-318.

MICHEL, Alain. Ciceron y el humanismo romano. **Armas y Letras,** Nuevo León, ano 04, p. 5-16, jul./sep., 1961.

MONTEAGUDO, Ricardo. **Filosofia e paradigma em Cícero**. Disponível em: < http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-31732002000100004>. Acesso em: 25 abr. 2008.

MORA, Carlos de Miguel. **En torno al orador:** modernidad de Cicerón. Disponível em: < http://www2.dlc.ua.pt/classicos/Orator.pdf>. Acesso em: 08 dez. 2008.

PEREIRA, Maria Helena da Rocha. **Estudos de história da cultura clássica** (I volume-cultura grega). 10 ed. Lisboa: Fundação Calouste Gulbenkian, 2006.

PLUTARCO. **Cícero, por Plutarco**. Disponível em: <http://www.dominiopublico.gov.br/download/texto/cv000006.pdf>. Acesso em: 04 fev. 2009.

SÁNCHEZ, Luis Ángel. **Retórica y Linguística en el *De Oratore* de Cicerón**. Disponível em: < http://investigadores.uncoma.edu.ar/cecym/iij2004/Sanchez.pdf.>. Acesso em: 07 fev. 2009.

SILVEIRA, Cássio Rodrigo Paula. **Relendo Cícero:** a formação do orador e sua inserção na

política romana (século I a.C). Disponível em < http://www.ufg.br/this2/uploads/files/112/11_CassioSilveira_RelendoCiceroAFormacaoDo.pdf>. Acesso em 04 nov. 2010.

VALENTE, Milton. **A ética estóica em Cícero**. Caxias do Sul: EDUCS, 1984.

VILLEY, Michel. **A formação do pensamento jurídico moderno**. São Paulo: Martins Fontes, 2005.

De-constructing the modernity in epistemology
Critical analysis of postmodernism

Alex Feitosa de Oliveira[1]
Felipe Meira Marques[2]

Abstract: This work seeks to identity one of the most difficult concepts of contemporaneity: post-modernism. How this context was built, whereas the paradigm of modernity was weakening. It is verified in what modernity consists and its project. Different crises that broke up with the project of modern rationality will be analyzed. Among these, scientific and identity crisis will have special notability. Among the authors, Paul Feyerabend will have special attention. Even though he did not considered himself post-modern, his ideals soon were defended by the ones who followed the movement. Methodological anarchism questions the way rationality is performed. These changes are essential to the development of the contemporary legal epistemology. Thus, plurality is understood within society, showing how the contexts are important to the production of knowledge and rights. Therefore, the mission of uniting universal rights with the peculiarities of every group or culture will be simpler or less embarrassing.

Keywords: Post-modernism. Modernity. Paul Feyerabend. Relativism.

1 Introduction

It is possible to be said that postmodernism is under the highlights nowadays. In scientific or literary debates, it is a recurring theme. However, what this movement means is still far from a consensus. This article will examine the base of the movement, which has been deconstructed.

The term will be analyzed, its concept and which factors led to postmodernism. Conceptualizing postmodernism is one of the toughest tasks that can be done in the contemporary research. There is a variety

[1] Currently is Master student in Law at the Universidade Federal do Ceará (UFC). Federal Public Defender at Fortaleza/CE.

[2] Currently is Master student in Law at the Student of Master in Law - Universidade Federal do Ceará (UFC) and undergraduate in Psychology (UFC).

of meanings, dating back to various fields of knowledge, as well as an extensive temporal boundaries. Some features, however, are common, and they will be introduced in this work.

It must be highlighted that the relationship between capitalism and consumption is a primary theme in postmodern concerns. Nevertheless, the economic question won't be analyzed in this work, only when extremely necessary.

How it can be imagined, the term postmodernism makes an allusion to an overcoming of modernism. Therefore, before postmodernism, it is first necessary to understand what modernism is. A brief analysis of modernity will be made to demonstrate then what was surpassed in postmodernity.

After the analysis, it will be discussed in what constitutes postmodernism. It will be seen that many crises in various fields that permeate the human condition were fundamental in the transformation. Among them, we can mention the crisis of science and identity.

Epistemology, the philosophy of science, must be aware of these changes. The changes that are experienced by the subject must be observed, as the task of epistemology is to enhance knowledge. Also the object and the logical relations are in its field of action, and they also were redimensioned with postmodernity.

It will be confirmed that modernity is declining. New forms of social organization are being prepared, overcoming the rational project of modernity.

2. Brief analysis of modernity

Modernity was a period of time characterized for the belief in the future; for the rediscovery of the individual and their values; also the belief in the progress of civilization. With the lights, the future became a giant project, whereas the previous age became the age of darkness, although projects and discoveries have been made, especially in the Carolingian Empire and in the Renaissance.

With modernity, skepticism is introduced. The truth dogmatically revealed by the Church is questioned, and certainties begin to fade. The individual no longer believes in everything that is said, causing an underlying problem. What to believe in? That is the question.

Then answers which have notably influenced Western societies to the present day have been come to light, especially the rationalism of

Descartes. His books were indicated in the Index, list of banned books of the Catholic Church. With it, the scientific revolution is consolidated and a new way of making science emerges.

Descartes was deeply skeptical. This can be observed in his thoughts:

> **I w**as fed with the letters from my childhood, and as they have convinced me that through them one could acquire a clear and secure knowledge about everything that is useful to life, I had an immense desire to learn them. But as I finished this entire course of study, on completion of which is usually accepted in the ranks of scholars, opinion changed completely. For I found myself entangled in so many doubts and errors, I seemed to have taken another advantage when looking to instruct me, than to have discovered increasingly my ignorance. And yet, was one of the most famous schools of Europe, where he thought there must be wise learned men, if there are these men somewhere in the earth.[3]

Some tried to build a different thought, based on doubt. This is the only certainty: I doubt it. If I doubt, I exist, I am. Thus it was released a rationalism based on a reasoned self, through which knowledge could expand. This became known as the Cartesian subject: coherent, logical, rational, clear and objective.

The scientific paradigm of rationality gained strength from the seventeenth century. This period is usually known in the philosophy of science, as modernity. Among its main features, we can highlight the intention to universalize knowledge through reason. In this period, science and its rationality gain great power in society. Objectivity, rationality, neutrality, universality and individualism constitute the main ideas around the philosophy of science.

Through Descartes' thoughts, several thoughts were being founded, including positivism, which also has a strong influence on current thinking, even to challenge it. Boaventura[4] says that the "philosophical consciousness of modern science, which had the Baconian empiricism and Cartesian rationalism as its earliest formulations, condensed itself in nineteenth-century positivism". Moreover, it has some basic features:

---

[3] DESCARTES, René. **Discurso do método.** Translated by Maria Ermantina Galvão. 3.ed. São Paulo: Martins Fontes, 2001. p. 8 (Our translation English).

[4] SANTOS, Boaventura de Sousa. **Um discurso sobre as ciências.** 7.ed. São Paulo: Cortez, 2010. p. 33

universalism, rationalism, individualism and autonomy.

Besides that, one also believes in eternal, immutable, natural laws, which therefore does not depend on human action. The role of man would be only discover them neutrally and objectively. The truth was, therefore, unique. As Comte[5] states, "the genuine positive spirit is based on seeing to predict, to study what it is, in order to conclude what it will be, according to the general dogma of the invariability of natural laws".

In addition, any metaphysical thinking must be rejected, once it is not possible of being observed and experimented. The values confused the research. The model to be followed by the social sciences was the one adopted by natural sciences, with its laws and its "perfection". As Figueiredo[6] states, "obedience is necessary for winning, and in order to obey it takes discipline the mind, eliminate all subjectivism. The scientific methodology that has been developed over the last four centuries is exactly the effort to discipline the mind to better conform to nature". It can be stated that there is a scission between object and subject, paying to the first more attention at this point than to the subject itself.

Therefore, it was created in the subject a fragmentation between an external and an internal reality, a subjectivity that was internalized and divided. One should get rid of himself, his passions, his values, in order to meet an external reality outside himself. This duality still causes discussion, and authors such as Gadamer, Hegel and Deleuze offered good answers. Thus,

> Modern science requires a division of the subject itself, and not only a division of the subject in relation to a nature made strange: it is the subject who finds itself strange[7].

Science and its inherent rationality became the hope of solving humanity problems. Science started to be seen as the mean for solving many problems of society. The label of "science" became a mark of quality. While consolidating its hegemony, science also disqualify other forms of knowledge, becoming a model with totalitarian characteristics.

---

[5] COMTE, Augusto**. Discurso preliminar sobre o espírito positivo**. Translated by Renato Rodrigues Pereira. Rio de Janeiro: Ridendo Castigat Mores, 2002. p. 19

[6] FIGUEIREDO, Luis Cláudio; SANTI, Pedro Luiz Ribeiro de. **Psicologia:** uma nova introdução. 3. ed. São Paulo: EDUC, 2008. p. 57

[7] VALADIER, Paul. **A anarquia dos valores:** será o relativismo fatal? Translated by Cristina Furtado Coelho. Lisboa: Piaget, 1997 (Our translation to English).

However, scientific thought have not looked deeply - perhaps because of the authoritarian aspect imposed by science - to questions about the role of science in mankind, and whether science, in the way it was being produced, also brought harm to humans.

Trying to demystify many of the rational ideas derived from science, especially in the twentieth century, various criticisms began to be formulated by many scholars of epistemology and other areas of knowledge, in the sense of following the scientific paradigm. One began to object about scientific knowledge and its real value to humanity.

This very brief mention of some characteristics of modernity was necessary in order to better explain postmodernism. One is, however, aware of the brevity and superficiality of the above subject.

4. Postmodernity: de-constructing modernity

Post-modernity is characterized as a crisis of certainty in various fields of humanity: political, scientific, financial and intellectual. The most varied areas such as art, architecture, law and religion are experiencing a new moment, overcoming the previous forms. Lipovetsky[8] claims that:

> Having initially emerged in architectural discourse (in response to international style), it was quickly mobilized to designate the shaking of the foundations of rationality and the absolute failure of the great ideologies of history, and the powerful dynamic of individualization and pluralization of our societies.

No one knows for sure what was the mark of postmodern ideas. In fact, it is impossible to assign a date for the appearance of this thought. As observed:

> It must be recognized, however, by drawing this kind of division in philosophical thought, that such periods and classifications are human creations that are somewhat arbitrary, because reality does not meet the divisions that men make in attempting to better understand it. There are no certain points of beginning and end of each period, and postmodernism, although it has its roots attributed to Nietzsche, has many of its features already identified

[8] LIPOVETSKY, Gilles; CHARLES, Sébastian. **Os tempos hipermodernos**. Translated by Mário Vilela. São Paulo: Barcarolla, 2004. p.51 (Our translation to English).

> in Kant when it recognizes the limits of reason, and even Miguel Cervantes, in a work where fiction and reality are mixed - characteristic attributed to postmodernism in literature[9]

It is a complex phenomenon since it involves so many fields of human action. These references crisis led to a new form of interaction between the subject and the way it is in the world. Irony, deconstruction and skepticism are some of these characteristics.

Metanarratives - still predominant form of knowledge - are being replaced gradually. This is explained by the fact they need a modern subject, beyond objectivity and universality. One of the proposals of postmodernism is to bring knowledge to the local context, sometimes individual, to overcome the metanarratives.

The great question is how to do research without making it arbitrary or even false, as some critics claim. Relativism would become base, and each would speak whatever he wanted.[10] What is proposed, however, is not that kind of relativism. We seek to bring to a community the way that best answers your questions, since grounded. The reasoning and fundamentals of how we arrived at certain results must be taken to avoid charlatans.

Crises can be of identity, scientific, in arts, in politics, in work, in security and many others. It will be analyzed, in the present work, the scientific crisis and of identity.

Contemporary epistemology undergoes changes. The project of modernity is slowly crumbling, although still widely used,. Authors such as Habermas, however, believe in a late modernity reconfigured. This just shows that it is not a new phase but a transition between two moments in history.

According to Machado Segundo[11] "contemporary epistemology no longer considers as characteristics of scientific objectivity the neutrality, clarity and certainty". As one knows, these are typical characteristics of modernism. However, the mere existence of these features does not mean to be postmodern.

The question that arises is what have led to this. You could say

---

[9] MACHADO SEGUNDO, Hugo de Brito. **Fundamentos do Direito**. São Paulo: Atlas, 2010, p. 65 (Our translation to English).

[10] POPPER, Karl**. O mito do contexto**: em defesa da ciência e da racionalidade. Tradução de Paula Taipas. Lisboa: Edições 70, 2009.

[11] MACHADO SEGUNDO, Hugo de Brito**. Fundamentos do Direito**. São Paulo: Atlas, 2010. p. 115

that the progress of science has shown that these factors are not possible. According to Boaventura[12],"the identification of the limits, of modern scientific paradigm's structural weaknesses is the result of the great advances in the knowledge it has provided". These have led to changes in research, such as temporality and discontinuity.

Some of these advances will be mentioned as examples: Einstein's relativity, quantum mechanics, Godel's incompleteness theorem, and the theory of Prigogine.

About Prigogine's thought, spreading to other sciences, Santos[13] says:

> Instead of eternity, the history; instead of determinism, unpredictability; instead of the mechanism, the interpenetration, spontaneity and self-organization; instead of reversibility, irreversibility and evolution; instead of order, disorder; and instead of need, creativity and hazard.

All these crises in science led to the breakup of the modern paradigm. Its consequences were inevitable. The rupture of basic concepts such as immutability and universality; Objectivism gives way to an active involvement of the researcher in the construction of knowledge; Rationalism is rethought as well as the continuity and accumulation of knowledge; It is observed that social, cultural, psychological and local issues directly affect knowledge.

In postmodernity, the subject actively participates in the production of knowledge. Its action interferes directly in the research and in the object. This separation, so defined in modernity, becomes more intertwined. The historical question becomes decisively influential. As Bulcão[14] states:

> The idea of building broke with the notion of data in science, showing that what was called "given" it was a result that was obtained in a process of knowledge. With the notion of construction, it seems to us that science does not intend to express the real any-

[12] SANTOS, Boaventura de Sousa. **Um discurso sobre as ciências.** 7.ed. São Paulo: Cortez, 2010. p.41

[13] SANTOS, Boaventura de Sousa. **Um discurso sobre as ciências.** 7.ed. São Paulo: Cortez, 2010. p. 48 (Our translation to English)

[14] BULCÃO, Marly. **O racionalismo na ciência contemporânea**: uma análise da epistemologia de Gaston Bachelard. Rio de Janeiro: Antares, 1981.p. 18

> more, but so entering reality, which is clearly demonstrated by the current science.

In postmodernity there is a break with continuity. The discontiguous takes shape, as Kuhn[15], that faces the scientific development "as a succession of tradition-bound periods and punctuated by non-cumulative breaks".

Knowledge was once in modernity taken as linear and progressive, where the last one in a roll of theories was always an evolution of the previous one. Nowadays it is seen through breaks. A new theory could even be minor than its predecessor.

According to Feynman[16] "what we now call scientific knowledge is, therefore, a body of statements of various degrees of certainty. Some are very uncertain, others are almost certain, but none is absolutely certain".

One of the first scholars to question the modern paradigm was Bachelard. He criticized the idea of immutability and accumulation of knowledge. He also believed in discontinuity of knowledge as well as the construction of knowledge by the subject, and not merely capturing the object. In fact, the object does not exist by itself. Bulcão[17] states that "for Bachelard's epistemology, the subject and the scientific city become the builders of own phenomena studied by science, and scientific objectivity itself".

The objectivity of positivism is questioned, once one believes that it should be built. The objectivity of the author is not in the object but in the subject. This should be mindful to develop research consistently. According to Bachelard[18], "therefore, is the effort of rationality and construction that should hold the attention of the epistemologist".

Among the various crises that led to postmodernity, one of them, and essential for epistemology, is the identity crisis of the subject. The new conception of the individual counters the modern subject. How-

---

[15] KUHN, Thomas S. **A estrutura das revoluções científicas**. Translated by Beatriz Vianna Boeira e Nelson Boeira. 10.ed. São Paulo: Perspectiva, 2011. p. 258 (Our translation to English).

[16] FEYNMAN, Richard. **O Significado de Tudo.** Lisboa: Gradiva, 2001.

[17] BULCÃO, Marly. **O racionalismo na ciência contemporânea**: uma análise da epistemologia de Gaston Bachelard. Rio de Janeiro: Antares, 1981

[18] BACHELARD, Gaston. **A formação do espírito científico:** contribuição para uma psicanálise do conhecimento. Tradução de Estela dos Santos Abreu. Rio de Janeiro: Contraponto, 1996.

ever, it is known that epistemology is primarily dependent upon the design of the subject. As example Piaget[19]:

> Every epistemological analysis finds beyond the questions of formal validity, a larger or smaller number of issues of fact relating to the role and to activities of the subject of knowledge. [...] Indeed, if it is true that a formal link remains strange to the subject while we starred at it as logical entity, the epistemological problem of its nature or its use necessarily refers to certain activities of this subject (language, judgment , etc.). In fact, the whole epistemology speaks constantly of the subject from the moment it is no longer pure logic nor the details of expertise.

A reformulation of the concept of knowing or epistemic subject will make epistemology revisit all its operations. In postmodernity, the Cartesian, coherent, rational, one, endowed with an essence subject gives room to a contradictory, fragmented, multiple, mobile and discontinuous subject. Hall mentions five revolutions in thought that showed the identity crisis of the modern subject.

The first one is Marxism. States the author that "Marx changed two key propositions of modern philosophy: that there is a universal essence for men; that this essence is the attribute of each individual, which is its real subject" [20]. In the dialectic of Marx, consciousness is determined by the material conditions of life. The subject is not a logical and coherent subject, there is not an essence. This is determined by historical conditions. Although the authors deny the Marxist theory, it is impossible to deny its impact on society.

A second revolution - strongly contested but also striking - is the Freudian psychoanalysis. Through the unconscious, moved by impulses, libidos and organized in the form of id, ego and superego, the coherence and logic of the modern subject lost space. The unconscious decisions are not always the most "rational", ie, how the mind works is different than thought the Cartesian subject. As Hall[21] says, "psychoanalysis demolishes the concept of rational knowing subject featured

---

[19] PIAGET, Jean. **Lógica e conhecimento científico.** Translated by Sousa dias. Porto: Civilização, 1980. p.62 (Our translation to English).

[20] HALL, Stuart. **A identidade cultural na pós-modernidade.** Translated by Tomaz Tadeu da Silva. 11.ed. Rio de Janeiro: DP&A, 2011. p.35

[21] HALL, Stuart. **A identidade cultural na pós-modernidade.** Translated by Tomaz Tadeu da Silva. 11.ed. Rio de Janeiro: DP&A, 2011. p. 37

with a fixed and unified identity - I think, therefore I am, from the subject of Descartes".

The third is related to language, more precisely refers to Ferdinand de Saussure. It shows that a range of meanings pre-exist the individual, and they are constantly changing. Hall[22] adds:

> The meaning is entirely unstable: it looks for the closing (the identity), but it is constantly disturbed (by the difference). It is constantly slipping away from us. There is always additional meanings over which we have no control, that will emerge and subvert our attempts to create fixed and stable worlds.

The thought of Foucault also modifies the concept of subject. In his theory, he also embraces the multiplicity of roles of the subject and its contradictions. Vaccaro[23] stipulates that "the difference lies in the fact that Foucault and Deleuze have replaced the individual subject - whose sovereignty and substantial unity were not only kept, but carried to the extreme by Stirner and companions - when referring to a multitude of subjects".

Finally, the fifth group is feminism, representing social movements. With these movements, new identities – different from the interior one - are being built. "This is the historical birth of what came to be known as the politics of identity – one identity for each movement"[24].

And what postmodernity proposes is the big question. One could say it fulfilled their role in denouncing some problems o society. But it has not been clearly discussed a suggestion for replace them, neither conclusions were reached. Harvey[25] states that "the modernist feelings may have been undermined, deconstructed, overcome or superseded, but there is little certainty about the meaning or coherence of the thought systems that can have replaced them".

For some authors, postmodernity has been left behind. New arrangements and settings of society redefined and strengthened the plan of modernity. Rationalism was strengthened as well as individualism

---

[22] HALL, Stuart. **A identidade cultural na pós-modernidade.** Translated by Tomaz Tadeu da Silva. 11.ed. Rio de Janeiro: DP&A, 2011. p. 41 (Our translation to English).

[23] VACCARO, Salvo. **Foucault e o anarquismo.** São Paulo: Margem, 1996.

[24] HALL, Stuart. **A identidade cultural na pós-modernidade.** Translated by Tomaz Tadeu da Silva. 11.ed. Rio de Janeiro: DP&A, 2011. p. 45

[25] HARVEY, David. **Condição pós-moderna.** Translated by Maria Stela Gonçalves. 21. ed. São Paulo: Loyola, 2011. P. 47

and universalism. Stands out among them, Lipovetsky.

For the author, postmodernity is in memory. The new logic, grounded in modernity, is based on three factors: technical efficiency, market and individualism. The plan of modernity did not collapse, just was resized up and updated with new ways to impose. He argues that

> Far from death of modernity be decreed, we are witnessing its shot, materialized the globalized liberalism, the almost universal commercialization of lifestyles, in exploitation of instrumental reason to its "death", in a rampant individualization[26].

He argues that in this new configuration, the power of questioning has been lost. There are not alternative designs or resistors, because they were disorganized and disjointed. "We had a limited modernity, now the time has come for consummate modernity"[27].

The individualism, expanded and encouraged in the consumer society, the remodeling of capitalism for supercapitalism[28] and the universalism disguised as globalization reinforce Lipovetsky's view. Democracy, which protects the differences, is struggling to be exercised.

The author, however, does not seem totally skeptical. Recognizes the advances in society, as the strengthening of Human Rights. However, he warns to other factors caused by this new modernity, such as precarious employment, fear and insecurity.

Coelho[29] criticizes the attitude of ideas like this because he believes we are in postmodernity:

> In a certain way, this understanding gives reason to the ones who say that there is no postmodernity, but only a new stage of modernity itself. But this understanding in the meantime disallows this belief: yes, there is something new, and this is a new relationship, in contemporary times, between what existed and what is going to exist and that is different from the previous one.

[26] LIPOVETSKY, Gilles; CHARLES, Sébastian. **Os tempos hipermodernos**. Translated by Mário Vilela. São Paulo: Barcarolla, 2004. p. 53 (Our translation to English).

[27] LIPOVETSKY, Gilles; CHARLES, Sébastian. **Os tempos hipermodernos**. Translated by Mário Vilela. São Paulo: Barcarolla, 2004. p. 54

[28] Para melhor compreensão, vide: REICH, Robert. **Supercapitalismo**: como o capitalismo tem transformado os negócios, a democracia e o cotidiano. Rio de Janeiro: Campus-Elsevier, 2008.

[29] COELHO, Teixeira. **Moderno pós moderno.** São Paulo: Iluminuras, 2011. p. 23 (Our translation to English).

One of the greatest thinkers of postmodernism, even without considering himself as one of them, was Feyerabend. He made severe criticisms on how rationality is exercised in contemporary times. An analysis of his ideas proves helpful to better understand postmodernism.

4. Criticism of postmodernism

Two major critics to the postmodern will be examined: relativism and the one developed by Sokal, who became known as the Sokal affair.

4.1 The "Sokal" affair

An important case occurred in the scientific community that spurred discussion about the post- modern phase is called the Sokal case. Physicist Alan Sokal Sokal[30] submitted a text to a number of Social Text magazine , in 1996 . That exemplar meant oppose the defense of rationality and the ideal of lights organized by the Academy of Sciences in New York in 1995, defense realized through the Congress "The Flight from Sciense and Reason". The journal Social Text would bring contrary postmodern arguments to scientific rationality thoughts. Thus, among the texts published in that issue of the magazine was Alan Sokal 's article "Transgressing the boundaries : towards a transformative Hermeneutics of Quantum Gravity" , which intended to make a postmodern study of quantum gravity, using for both several quotes from unscientific postmodern writers and criticizing some characteristics of modern science. The paper was accepted, and later, Sokal admitted that it was a parody, without any scientific contribution, beyond its critical goal. In fact, the real purpose of the paper was to criticize the way postmodern writers used scientific concepts without the proper criteria[31], making references to science and scientific formulas only to legitimize their articles, giving a "scientific" status. Indeed, Sokal intended to criticize many postmodern authors, especially criticizing the way they wrote and use concepts of natural science in social sciences' papers.

This episode, as well as other previous and subsequent discus-

[30] Alan Sokal is a professor of Physics at the University of New York, researcher at the field of particle physics.

[31] For further details, please read the introduction of the book *Intellectual impostures.*

sions were part of the "science wars"[32], that began as a battle between the natural and social sciences and, as matter for this work also involved the debate on post modernism and its ideas. As a result of discussions involving postmodernism, Sokal himself, along with Jean Bricmont, published the book *Intellectual impostures*[33], which aimed, not only continuing criticism of how postmodern authors wrote (first part), but also of the very postmodern thought, in the second part of the book.

In an interview[34] commenting on the mentioned book, Alan Sokal discusses the criticism made to postmodern thought, particularly when cognitive relativism:

> Ahora bien, la segunda parte del libro 6 me parece más interesante y también mucho más delicada. Se trata de una crítica del relativismo cognitivo, de La idea de que afirmaciones de hecho -ya sean hechos comunes como, por ejemplo, hay un vaso de agua sobre la mesa delante de mı, o afirmaciones históricas o científicas- no pueden ser verdaderas o falsas objetivamente, transculturalmente, sino que sólo pueden ser verdaderas o falsas relativamente a una

[32] Boaventura de Sousa Santos, about the war of sciences: "The debates have taken many forms. The latest was known as the science wars and preferably focused on the nature and validity of knowledge that produces and legitimates the transformation of the world through science. It was essentially a debate among scientists, although the scientific status was itself part of a debate, so that if, for some participants was the debate among scientists, for others this was a debate among scientists and intellectual strangers to the world of science (...) Here are some of the issues that dominated the debate: what is the relationship between scientific knowledge and the fact that he claims to know? Scientific knowledge represents, discovers, invents and creates the reality you want to know? What are the criteria by which assesses the suitability or correctness of these relationships? Scientific knowledge aspires to truth, effectiveness, likelihood , consistency , the referentiality? If the scientific truths of a given historical moment have been refuted in later times, there is actually something more than the story of the truth? The way science is organized and how it performs in practice interfere in the type and validity of the knowledge produced? What are the relationships between science and other ways of knowing? What is the real role of scientific knowledge? As scientists should interact with the rest of society in decision-making?" SANTOS, Boaventura de Sousa. **Conhecimento prudente para uma vida decente:** um discurso sobre as ciências revisitado**.** 2. ed. São Paulo: Cortez, 2006, p.19..

[33] SOKAL; Alan; BRICMONT, Jean. **Imposturas Intelectuales**. Translated by Joan Carles Guix Vilaplana. Barcelona: Paidós, 1999.

[34] SOKAL, Alan. **A propósito de «Imposturas intelectuales»: Una entrevista a Alan Sokal.** Disponível em http://biblioweb.sindominio.net/escepticos/sokal.html. Acesso em 29.06.2012. Interview to Salvador López Arnal y Joan Benach.

> cultura o a un determinado grupo social. Nosotros queremos criticar esas ideas y tratar también de explicar en parte cómo surgieron. Esas concepciones surgieron partiendo de ideas válidas de la filosofıa de la ciencia contemporanea, pero fueron deslizandose hacia nociones, a nuestro parecer, no válidas, gracias a ambiguedades del lenguaje y a errores de lógica. El propósito de ese largo capíıtulo Del libro es desenredar algunas de las confusiones que nos parecen muy difundidas -no tanto en círculos filosóficos sino en círculos de las ciencias sociales-, por ló menos en Estados Unidos, pero nos parece que ocurre también en otros países.

After this episode, other several discussions about postmodernism and its critique of scientific reason were raised. We can cite for example the book Scientific Impostures[35], published in order to fight against the criticisms of the book *Intellectual Impostures*. We can also mention the book "The Postmodern discourse against science: Obscurantism and irresponsibility" (Lisbon, Gradiva), written by Antonio Manuel Batista, which criticizes the ideas presented in the book "A Discourse on the sciences" by Boaventura de Sousa Santos.

Boaventura de Sousa Santos thus discusses about the scientific moment nowadays:

> Effectively, were recently published several books whose theme is to go "beyond the science wars": exchanging ideas instead of insults; discovering areas of consensus on the legitimacy and authority of science as a way of understanding the world. Two books may be mentioned by way of example: Úllica Segerstraile (org.), Beyond the Science Wars: The Missing Discourse about Science and Society (Albany NY: State University of New York Press, 2000) e Jay A. Labinger e Harry Collins (orgs.), The One Culture? A Conversation about Science (Chicago: University of Chicago Press, 2001). The general idea is that the last episode of the science wars came to an end , there has been no formal declaration of truce or surrender. It feels like this war is as mysterious as its beginning . Naturally, the major epistemological debates remain, but seem to have ceased to be battlegrounds for receiving the scope and style of academic discussions undoubtedly intense, but peaceful and mutual respect for differences. The explanation, at least for the case of this war of sciences in America, lies, in my view,

[35] JURDANT , Baudouin. **Imposturas Científicas: Los Malentendidos Del Caso Sokal**. http://books.google.com.br/books/about/Imposturas_Cient%C3%ADficas.html?hl=es&id=c3z-jWcim3ECUniversitat de València, 2004.

> in the fact that, despite having been fought between scientists, it had more political and cultural than scientific motivations. I refer to the policy in general, and scientific and cultural policy in particular. Basically, what was the issue were different conceptions of the role of science and the different concepts of science in political transformation of society; there were also differences on the impact of these views on public funding of science, especially when it comes to very substantial funding such as those required by the Big Science, and were still opposing views on the meaning of cultural diversity and therefore the recognition of multiculturalism in higher education[36].

We agree with this thought. All criticism made by the post-modern school may have occurred more because of the problems faced by science than by a solid theoretical foundation with a tendency to create a new paradigm. The criticism arose as a result of the experienced human problems. One wondered why science did not solve such problems. However, the fact that science is not the solution to all problems was forgotten. Other branches of knowledge should work with science to face the current problems of humanity.

Despite the faults in scientific methods based on rationality, there is no way to defend a scientific thought completely relative. That's because, using Susan Haak's ideas, the relativism defended by post-modernists has no theoretical basis[37]. Alan Sokal and Jean Bricmont also share the idea, criticizing Feyerabend, highlighting that despite of arguing in the sense that science does not advance following a defined, he could not develop and justify the falsity of scientific theories.

4.2 Relativism

The relativistic thought, the main characteristic of the postmodern trend called, then arises with greater emphasis, which can be synthesized as a thought based on the denial of scientific rationality (and of the scientific-rational method)[38] and on the relativization of the world.

---

[36] SANTOS, Boaventura de Sousa. **Conhecimento prudente para uma vida decente:** um discurso sobre as ciências revisitado**.** 2. ed. São Paulo: Cortez, 2006, p.24 (Our translation to English).

[37] Susan Haak states that postmodern authors cannot believe in their discoveries, once the postmodernism is so critical.

[38] The cientific paradigma hás its origins in the works of René Descartes and Francis

That thought strikes well defined definitions: male x female, white x black, etc.. For post-modern authors, realities can be plural and relative, depending on the interests and on what these interests consist. They aim to overcome the overconfidence of modernism, which consider the science as absolute owner of truth.

The postmodern subject denies the existence of a universal truth and of an objective reality. The reality would be a conceptual construct, product of human labor. They criticize the metanarrative of modern scientific thought, especially when it intends to be universal[39]. It denies the Cartesian distinction between nature and men, putting away the idea of empiricism.

They strongly criticize the historical question of veneration of science, in relation to the thought that science would solve all the problems of humanity. They question whether alternative models might not be better than science, proclaiming and defending relativism as the consideration of the world as it is.

Bacon. Arnaldo Vasconcelos, about the changing that occurred during the renaissence, says that: "The changing turns irreversible with René Descartes, with his famous Discourse on the Method, published in 1637. His closer antecedent is Francis Bacon's *Novum Organum*, of 1620, in which the author sought to 'restore sciences'. Both books indicate the begginning of new times of primacy of methodological issue, which Will dominate current philosophy". VASCONCELOS; Arnaldo (Coord). Prefácio à 1ª Edição. In: **Temas de Epistemologia Jurídica**. Universidade de Fortaleza, Gráfica Unifor, 2008, p. 9-16, v.I, p. 9-10. (Our translation to English).

[39] Paul Sheehan, quoting Lyotard and at the same time inserting his ideas states that "Lyotard also claims to be presenting a "report on knowledge." Knowledge requires legitimation, and it is here that his second argument about narrative takes shape. Two "grand narratives" have determined western selfunderstanding – the Enlightenment story of progress and political emancipation, and the Hegelian narrative of the manifestation of scientific reason. Both of these have foundered, he declares, along with every other metadiscursive attempt at organizing modernity's immense sprawl into something coherent and socially useful. Postmodernity, by contrast, recognizes the impossibility of this undertaking and its need for legitimation, and recoils from it: "Simplifying to the extreme, I define postmodern as incredulity towards metanarratives." In postmodernity, legitimation does not stand outside social practices, but is "plural, local, and immanent." In other words, the language game of narrative has become a model for every kind of legitimation, no longer playing second fiddle to scientific "transcendence." The death of the grand narrative thus heralds the birth of the local narrative, with its emphasis on diversity and heterogeneity. SHEEHAN, Paul. Postmodernism and Philosophy. In: CONNOR, Steven (ed.). **The Cambridge companion to postmodernism**. Cambridge: Cambridge University Press, 2004. p. 42-43.

Thus, relativism is a major feature of the postmodern ideology. Postmodernists do not believe in objective truth; they defend relativity also in the epistemological field, defending such relativity starting from the idea that science and its methods are provisional.

Despite the faults in scientific methods based on rationality, there is no way to defend a scientific thought completely relative. That's because, using Susan Haak's ideas, the relativism defended by postmodernists has no theoretical basis. Alan Sokal and Jean Bricmont also share the idea, criticizing Feyerabend, highlighting that despite of arguing in the sense that science does not advance following a defined, he could not develop and justify the falsity of scientific theories.

Paul Feyerabend defends relativism saying:

> Relativism is often attacked not because we find a fault, but because we are afraid of him. Intellectual people fear him because he threatens their role in society as the Enlightenment in once threatened the existence of priests and theologians. And the general public, that is educated, exploited and bullied by intellectual men, learned to identify relativism with cultural decay (social)[40].

Key issue in his work is relativism. It is a complex, highly relevant issue for the understanding of his theory. Rationalists tend not to give credit to relativistic theories, once they contain more than one truth about an object, impossible to reach if they comply with the method properly. Popper says[41]

> While science is the search for truth, there will be critical and rational debate between competing theories and critical and rational discussion of revolutionary theory. This discussion will decide whether the new theory should (or not) be considered better than the old theory: i.e., whether or not be considered a step toward truth.

Feyerabend begins by stating that people are afraid of relativism, that it could lead to chaos. Moreover, he believes that few individuals are prepared to live with different traditions, with different truths from

[40] FEYERABEND, PAUL. **A ciência em uma sociedade livre.** Tradução de Vera Joscelyne. São Paulo: Unesp, 2011, p.99 (Our translation to English).

[41] POPPER, Karl. **O mito do contexto**: em defesa da ciência e da racionalidade. Translated by Paula Taipas. Lisboa: Edições 70, 2009. P. 107 (Our translation to English).

theirs. "For the vast majority - and that includes Christians, rationalists, liberals and a good number of Marxists - there is only one truth and it shall prevail"[42]. Thus, relativism would constitute a threat for accepting that truths coexist with same value.

Another key factor of relativism is anarchy. If each one lived according to what thinks, with each one's truth, no one else would fulfill laws, follow customs or respect the other: chaos would be established in society.

This thought can be illustrated by the movie about Giordano Bruno's life and work, a philosopher and scientist who dared to question the dominant tradition of his time: the Church and its dogmas. The Church had the same fears of rationalism that current individuals have of relativism: chaos.

It should be emphasized that what Church foresaw about the rationalism hasn't happened. The society was restructured under new bases. This new base avoided the chaos because rationalism is objective, it is universal, it is self-critical, autonomous, real and disciplined. The question that arises is whether these rational values are the ones to be followed or are the only ones that would avoid chaos.

Feyerabend does not accept the idea that relativism is to give the same rights to truth and falsehood. Traditions must be respected. Judge them is to put their values as correct instead of other possibilities. Rationalism, because of the mentioned features, believes it can judge certain traditions. It forgets, however, that itself is a tradition that may or may not be followed by the citizen.

Bringing the discussion to the epistemological field, relativism mainly criticizes the attempt of science to be a way of better understanding, even with the flaws it has already committed over the centuries. It also criticizes the way science tries to dominate authoritatively the discipline of knowledge, leaving no room for discussion on the effectiveness of other forms of knowledge[43].

As it turns out, such criticism did not emerge without any foundation. In fact, science and their rationality began to experience problems

[42] FEYERABEND, Paul. **A ciência em uma sociedade livre.** Translated by Vera Joscelyne. São Paulo: Unesp, 2011. p. 100

[43] Paul Feyerabend asks: "What is so important in science? – what makes science better than the other forms of existence, that, consequently, use different patterns and obtain different results? What makes modern science better than the science of Aristotle or Hopi's Cosmology?" FEYERABEND, Paul. **A ciência em uma sociedade livre.** Tradução de Vera Joscelyne. São Paulo: Unesp, 2011, p.92 (Our translation to English).

during their development. The notion of universality and permanence of scientific discoveries have been replaced by the idea of temporariness[44]. Boaventura de Sousa Santos says, criticizing modernism and the dominant paradigm of that era, that science has come to be questioned due to two problems. The first one results of the decline of the concept of law, once it is considered as something provisional, probabilistic and approximate and, as consequence, the decline of causality, explained more by pragmatism than by ontological or methodological reasons, in favor of finalism. The result is the exchange of this notion of law by notions of system, structure, model and process. In such criticism fit up problems in Newton's classical conceptions of space and time, from the study of astrophysics by Einstein; the impossibility to observe or measure an object without interfering him from the study of microphysics by Heisenberg and Bohr; the conjecture of theorems of incompleteness and impossibility to find in certain circumstances, within a given formal system, proof of its consistency; undermining the rigor of mathematics, which becomes unfounded, as shown by Gödel; advances in knowledge of microphysics, chemistry and biology, for example, with Prigogine and the theory of dissipative structures and irreversibility of open systems, with Haken and synergistic, with Eigen and the hypercycle theory and the origin of life, with Maturana and Varela in the study of autopoiesis[45].

In the second category of problem, the social conditions of the crisis, Bonaventure points the loss of autonomy of science and of disinterested knowledge, with a consequent industrialization of science to the level of application and investigations, which eventually resulted, for illustrative purposes, the tragedies of Hiroshima and Nagasaki, where one can notice the huge gap established between science and morality. The effects are diverse, since the proletarianization of scientists in laboratories to the impossibility of having free access to the equipment, which puts the development of knowledge in the hands of who ends up

[44] Temporariness is a result of the ideas of fallibilism, which, according to Karl Popper, is the assertion that scientific truth is not absolute or irrefutable, admitting its counterfeit. Science can remain as conjectures until be distorted. According to Popper, one cannot be sure that scientific theories are true. "Instead, we have good reasons to suspect even of the best of them, which, of course, adds to the countless other endless possibilities of catastrophe". POPPER, Karl. **O problema da indução**. In: MILLER, David (Org.). Popper: textos escolhidos. Tradução de Vera Ribeiro. Rio de Janeiro: Contraponto, 2010, p. 101-115, p.115. (Our translation to English).

[45] SANTOS, Boaventura de Sousa. **Um discurso sobre as ciências.** 7.ed. Porto: Afrontamento, 1995.

owning the material conditions of scientific production, making it undesirable to a rationality that separate the progress of knowledge with the progress of morality.

As seen, the postmodern thought did not arise randomly, but rather as a challenge to all the problems science passes. The negative consequences that remaining as fruit of scientific development eventually end up stimulating critical postmodern thinkers[46].

Conclusion

One sought to understand how the ideals of modernity are unraveling. The universalism, rationalism, objectivism are replaced by new ways of thinking. The few questioned Cartesian subject is disfigured in postmodernity.

These changes are essential to the study of epistemology. As a philosophy of science, this should always be updated with the issues relating to knowledge, especially the logic, the subject and the object. In postmodernism, these concepts were modified, causing a revolution and uncertainty in contemporary epistemology.

A new subject arose: contradictory, with multiple identities and roles that sometimes oppose. The rational and coherent cartesian self - foundation of knowledge - finds objections, as Marx's and Freud's selves.

The eternal and immutable laws of positivism proved to have failures. The accumulation of knowledge, which was based on these laws, ie, the more eternal and immutable laws, the more knowledge one has, it was shown to be false. The knowledge shall be temporary and discontinuous.

The advance of modern science itself can be considered the beginning of its end. Theories such as Einstein's and Bachelard's show how subject's participation is crucial in the way of doing science. The knowledge starts to be built and not just extracted from reality.

As highlighted throughout this article, what was called the postmodern thought brought contributions to the epistemological area. The main contribution was the opening of discussions on how current science is performed, by making inquiries that eventually contribute to a better improvement of science. Relativism has its benefits. It allows a larger opening for discussion and enables science to view its mistakes. How-

[46] Ibid, 1995.

ever, the extreme ideas of postmodernism cannot be sustained. In this work there were also some questions about the existence of a postmodern thought with its own characteristics . Postmodernism was a wave of thoughts that actually sought to criticize modern science without any universal proposal as acceptable solution. Exacerbated relativism is not believable even to those who defend it. However, as widely highlighted throughout the paper, such thought was responsible for making science abandon its authoritarian and unquestionable character, allowing and making room for other life forms than the scientific one, and dialoguing with them seeking solutions to the manhood problem. Indeed, it gave its contribution to the improvement of science, still in progress.

A new time is established, a transition between modernity and contemporaneity. The great challenge consists in establishing what constitute the new times. One knows about deconstructions, the end of certainties, the project that is collapsing. What should replace them is a hard work to define.

References

BACHELARD, Gaston. **A formação do espírito científico:** contribuição para uma psicanálise do conhecimento. Tradução de Estela dos Santos Abreu. Rio de Janeiro: Contraponto, 1996.

BULCÃO, Marly. **O racionalismo na ciência contemporânea**: uma análise da epistemologia de Gaston Bachelard. Rio de Janeiro: Antares, 1981.

CHALMERS, Allan. **O que é ciência afinal.** Tradução de Raul Filker. Brasília: brasiliense, 1993.

COELHO, Teixeira. **Moderno pós moderno.** São Paulo: Iluminuras, 2011.

COMTE, Augusto**. Discurso preliminar sobre o espírito positivo**. Tradução de Renato Rodrigues Pereira. Rio de Janeiro: Ridendo Castigat Mores, 2002.

DESCARTES, René. **Discurso do método.** Tradução de Maria Ermantina Galvão. 3.ed. São Paulo: Martins Fontes, 2001.

FEYERABEND, Paul. **A ciência em uma sociedade livre.** Tradução de Vera Joscelyne. São Paulo: Unesp, 2011.

FEYNMAN, Richard. **O Significado de Tudo.** Lisboa: Gradiva, 2001.

FIGUEIREDO, Luis Cláudio; SANTI, Pedro Luiz Ribeiro de. **Psicologia:** uma nova introdução. 3. ed. São Paulo: EDUC, 2008.

HAACK, Susan. **Manifesto de uma moderada apaixonada**. Ensaios contra a moda irracionalista. Tradução de Rachel Herdy. Rio de Janeiro: Loyola, 2011.

_____. **Entrevista**. Disponível em http://www.editora.vrc.puc-rio.br/autores/autores_entrevistas_susan_haack.html. Acesso em 30.05.2012 . Entrevista concedida à Editora PUC-Rio.

HALL, Stuart. **A identidade cultural na pós-modernidade.** Tradução por Tomaz Tadeu da Silva. 11.ed. Rio de Janeiro: DP&A, 2011.

HARVEY, David. **Condição pós-moderna.** Tradução de Maria Stela Gonçalves. 21. ed. São Paulo: Loyola, 2011.

KUHN, Thomas S. **A estrutura das revoluções científicas**. Tradução de Beatriz Vianna Boeira e Nelson Boeira. 10.ed. São Paulo: Perspectiva, 2011.

LIPOVETSKY, Gilles; CHARLES, Sébastian. **Os tempos hipermodernos**. Tradução de Mário Vilela. São Paulo: Barcarolla, 2004.

MACHADO SEGUNDO, Hugo de Brito**. Fundamentos do Direito**. São Paulo: Atlas, 2010.

PIAGET, Jean. **Lógica e conhecimento científico.** Tradução de Sousa dias. Porto: Civilização, 1980.

POPPER, Karl**. O mito do contexto**: em defesa da ciência e da racionalidade. Tradução de Paula Taipas. Lisboa: Edições 70, 2009.

REICH, Robert. **Supercapitalismo**: como o capitalismo tem transformado os negócios, a democracia e o cotidiano. Rio de Janeiro: Campus-Elsevier, 2008

SANTOS, Boaventura de Sousa. **Um discurso sobre as ciências.** 7.ed. São Paulo: Cortez, 2010.

_____. **Conhecimento prudente para uma vida decente**: um discurso sobre as ciências revisitado. 2. ed. São Paulo: Cortez, 2006.

SOKAL, Alan. Pseudoscience and postmodernism: antagonists or fellow-travelers? In: FAGAN, Garrett (ed**.). Archaeological fantasies**: How pseudoarchaeology misrepresents the past and misleads the public. New York: Routledge, 2006. p. 286-361.

_____. **A propósito de Imposturas intelectuales**: Una entrevista a Alan Sokal.

Disponível em http://biblioweb.sindominio.net/escepticos/sokal.html. Acesso em 29.06.2012. Entrevista concedida a Salvador López Arnal y Joan Benach

SOKAL; Alan; BRICMONT, Jean**. Imposturas Intelectuales**. Tradução de Joan Carles Guix Vilaplana. Barcelona: Paidós, 1999.

VACCARO, Salvo. **Foucault e o anarquismo.** São Paulo: Margem, 1996.

VALADIER, Paul. **A anarquia dos valores:** será o relativismo fatal? Tradução de Cristina Furtado Coelho. Lisboa: Piaget, 1997.

Post-positivist Philosophy of Law and a Theory of Judgment of Justice

Kant, Arendt and the contemporary debate

Maria Lucia de Paula Oliveira

Abstract: The post-positivist theory of law contains a moral concept of law, founded on an argumentative dimension. An interesting way to found a theory of just law in a pluralistic world, in constant change, is that which is based on the theory of reflecting judgment. A political theory founded on judgment is based on Kantian philosophy; it was developed by Hannah Arendt and has widely influenced the current debate, as an alternative theory in which the moral basis of law can be more sensible to human contexts; a universalistic theory more adequate in dealing with the tragic dimension of human life. A theory of justice as judgment uses the concept of reflecting judgment and enlarged thought as the main concepts. A theory like this considers as a starting point the singular judgments of justice that each person makes. The background, therefore, isn´t a rational foundation of principles, but the capacity of judgment of rational beings. A post-positivist theory of law, based on judgment, is a critique of the positivist legal theory, but presents itself as an alternative to an idealistic theory of law.

Keywords: Immanuel Kant. Judgment. Justice.

Historical texts on philosophy of law have, for a long while, shown an important dichotomy of natural law and legal positivism. For the greater part of western history, since Greek philosophy, thoughts concerning law have tried to find supra-positive groundwork above the law in practice - established by men in a specific historical moment – that could somehow subordinate it, thereof originating the categories of "natural right" or "natural law". The fundamental thesis of natural law theory was the supra-positive legal existence and the subordination one way or another of positive law to natural law. Nevertheless, the relation

natural law - positive law has recently lost its determinate role in the theory of law, turning out to be a "weak dichotomy"[1]. This weakening dichotomy would derive from the perception of the relativity of positive law – always and each day more mutable and circumstantial - and the lost of intrinsic validity, since positive law gets the support from formal validity and social efficiency, which weakens the argument of moral validity of legal principle.[2]

Contemporary philosophy of law face the weakening of this dichotomy which, not so long ago, was still central in the history of philosophy of law. The studies of theory of justice have been brought up in that soil where legal positivist criticism has to defend itself from new paradigms, beyond that of natural law theory. The revival of these studies did not mean a move backwards to any theory of natural law, in which a specific well-being or value is identified to transcendent and, therefore, untouchable. The contemporary theory of justice emerges infiltrated by the paradigm of intersubjectivity and of communication.

The term "post-positivism" has recently been chosen to name a new phase of the theory of law whose intention was to rethink the groundwork of legal science as well as the mechanism of the jurist's reasoning in daily practice[3]. As Antonio Cavalcanti Maia reminds us (in Albert Calsamiglia´s lessons), the first important thesis to identify post-positivism has to do with the recognition of elements distinct from social facts as normative material capable of determining the social behavior - principles, of moral grounds, which function as reasons for decision. Another thesis that differs positivist theories from post-positivist ones has to do with the separation of moral, politics and law. For post-positivist theories, an absolute separation of law and moral would not make sense. Instead, there is an articulation between them, without loss of each one´s own specificity. The pos-positivist theory, be it said, would also recognize the theoretical contributions given by the philosophers affiliated to legal positivism (referring, for instance, to the theory of legal order), but would try to accept the influence of morals in law – especially public law – in contemporary democracies. Close to post-positivism there is neo-constitutionalism, which tries to explain, particularly, the

[1] FERRAZ JUNIOR. T.S.. *Introdução ao Estudo do Direito*. 3a. Ed., São Paulo: Atlas, 2001. p.167.

[2] Ibid, p. 169-170.

[3] GRZEGORCZYK, C. MICHAUT, F. TROPER, M. (dir.), *Le positivisme juridique***.** Paris: LGDJ, 1992.

constitutional role changes in nations of constitutional tradition (Italy, Spain, South America), that has led to a need in revising the terms with which legal theory is thought, with the intention to explain a moral conception of law, derived from the theory of principles and legal argumentation.

That which is in common between post-positivist authors, concerning the theory of justice in particular, would be the starting point of their analysis: the language. This new moment of legal theory stands out new challenges to the theory of justice. The first of them refers to its own subsistence: if ethics proceeds itself, not existing transcendent values to social practices, how could we continue talking about justice nowadays? We could possibly point out to an answer that has to do with the viewpoint of the judgment of justice. The relevant question concerning the relation between law and moral is that there is a capacity to moral judgment, which refers to other people and organizations in general, that implies the consideration of the other. If it cannot be said that every action or organization reputed to be unfair is illegitimate, there is a connection between singular judgments of injustice and a political legitimacy. Political organizations in a democratic system assents its legitimacy in public expressing processes named "people´s will"- be them electoral contests, public opinion survey, manifestations of organized civil society, among others. Also, the so called "Will of the Minority" must be preserved to greater or minor degrees by means of organized society movements and instances of judicial actions. Organizations which do not minimally take into consideration the distribution of welfare and social roles to all who are under their jurisdiction, would wound singular judgments of justice.

Another problem, with clear repercussion in the philosophy of law, is the discussion around the "project of modernity", that would have been left incomplete[4]. Man´s emancipation through the freedom of thought, the different kinds of knowledge constituted from the paradigm of man itself (no more God or the cosmos) are marks of the modernity. Foucault´s formula, always mentioned when explaining modernity in philosophy has the following words: "Modern philosophy is the philosophy that tries to respond to the question that so imprudently has been done for centuries: *Was ist Alfklärung?*"[5] Another characteris-

[4] HABERMAS, J. *The Philosophical Discourse of Modernity.* Lisboa: Publicações Dom Quixote, 1990. p.29-30).

[5] AURÉLIO, D.P. "Sociedade, Estado e Razão". In: CARRILHO,M. (Direção). *Dicionário do Pensamento Contemporâneo***.** Lisboa: Publicações Dom Quixote, 1991. p.291.

tic of modernity is the separation of the domains of science, moral and art, and the separation of these kinds of knowledge from the issues of faith, as reminded by Habermas. But that project remains incomplete (to some people) or interrupted by the urgency of the new realities (to post-modernism). The judgment view of justice does not reject the so called "project of the modernity", but it understands that it must be rethought. Therefore, the separation, for instance, between theory of knowledge, theory of moral and theory of aesthetics must be considered relatively without producing an "aesthetic moral" or a reduction of the normative nature of a theory of moral. This way, we would not only be at a resumption of the mentioned "project of modernity", but also at a "rethinking", that means a reading over modernity with new lenses. In this diapason, the non orthodox proximity between aesthetic judgment and political judgment is only possible with a revision, in which the distinctions and separations made in modern philosophy thereafter Kant are not to be taken literally. It obviously does not mean to confuse aesthetics and political theory, but to get hold of the philosophical tradition in a creative and free way, sufficiently enough to shine new light on the questions of political justice or of aesthetics. This way of dealing with what is modern, to rethink it, has, on the other hand, everything to do with Arendt´s modernity and it can be, as Jean-Marc Ferry states, more "modern" than Habermas's, for instance.[6] Being "modern" today means to do as Arendt does: to argue about how to face the rupture oneself from tradition; how to restructure community sense; how to radically rethink history and politics in the name of liberty and equality. It could be a "radical critique to the modern spirit", without intending to supplement or substitute it.

On the other hand, it´s possible to say that the revival of the theory of justice in the late XXth century has as a background the so called "pragmatic-linguistics turnaround" of philosophy. The paradigm change in philosophy of consciousness (grounded on the subject who knows) to the philosophy of language, which considers the intersubjective experience, one mediated by language (the pragmatic one, caring for the usages of language), might be the turning point that made it possible to revive the debate on the Theory of Justice. André Berten and Jacques Lenoble called attention to the fact that the contemporary debate on philosophy of law, political philosophy and philosophy of

---

[6] FERRY. J.M. *Habermas – L´éthique de la communication***.** Paris: Presses Universitaires de France, 1987.

language had expanded and taken new directions. From the birth of democratic modernity, whose bound-marks actually are the Liberal Revolutions and the philosophy of Kant, modernity gets into an unprecedented crises; therefore, the return to its origins. To those authors, the actual political crises (an issue on the relation of liberty to equality) and the legal crises (identified with the crises on judicial power) which are implicitly understood in the crises of the providential State are signs of a deficiency in the philosophical groundwork based on what our democratic philosophy was thought.[7] Therefore, there is a claim to rethink the "project of modernity"[8], in which the idea of justice is resumed and the underlying need of a moral validity to law, without falling to, one side - the idealism, or an extremely abstract generalization; and, on the other side, the relativism or cynicism of values. This rethinking of the "project of modernity", evidently produces a revision of categories and their articulation, as they were in the philosophical modernity. This way, strict distinctions of thoughts, as the one made between aesthetics and moral are reviewed. Our intention is to keep pace with this actual moment of legal Philosophy, one that could be well summarized in the words of Alessandro Ferrara:

> While Kant himself would have been horrified by the linkage of justice and aesthetics, it is not unreasonable to claim that, under conditions quite different from those under which he lived his intellectual life, in the spirit with which we turn to aesthetics, some seeds survive of the spirit of modest and willingness to learn - with which Kant looked at the accomplishments of modern physics. He sought in Newtonian Physics, that nexus of certainty and experience that pre-modern metaphysics was unable to generate and placed that nexus, reconstructed as theory of the knowing subject, at the centre of his transcendental philosophy. After the linguistic turn, we seek in in aesthetics that nexus of universality and radical pluralism that modern thought in all of its variants seems unable do generate.[9]

It means a revision of the "project of modernity", under the light

[7] LENOBLE, J. BERTEN. A. *Dire la norme – droit, politique et énonciation*. Paris: L.G.D.J.,1996; p.3.

[8] FERRARA, A. *Reflective Authenticity – Rethinking the Project of Modernity.* London and New York: Routledge, 1998; p.149.

[9] FERRARA, A. *Justice and Judgement.* London: SAGE Publications, 1998; p.xi.

of the turnaround of the pragmatic linguistics. We might have thereafter, an important interlocutor in the philosophical tradition like Immanuel Kant himself, who gave to modern philosophy its most sophisticated formula and critics. Some questions were resumed and reinterpreted by contemporary theory of justice, and these questions, summarize how the concept of Justice has been discussed throughout history.

The judgment view of justice reverberate in the contemporary philosophy, first of all, as A. Berten and J. Lenoble demonstrate it, for anticipating the substitution of the subjective paradigm by the intersubjective one, concerning moral and legal judgments (judge that which is correct or that which is just in a particular case). Actually, the importance of the theory of judgment has taken in the debate about justice today drives to another important role, that is, to counterbalance universalistic theories by the means of a criterion which, without denying the importance of abstract reasoning, permits to include in the political debate the differences that exist among people, as a relevant fact.

We dare suggest that the great importance of the theory of judgment and that of the underlying discussion on the act of judging is to reinforce the emotional component present in human action, many times totally ignored by the tradition of moral or legal philosophy. The importance of that which is personal, subjective in the judging does not mean or does not want to be translated into a relativism or a turn-back to idealism, in which the search for the ideal and the just is made in a world different from that in which humanity lives. This world in which men live is a world where there is terrorism, misery, violence and unstoppable consumption. If we are to and can have hope, this hope would rise up from the capacity of human freedom and from the capacity that man has to always create something new, to be born again.

It is after the theory of judgment of Immanuel Kant and its interpretation by Hannah Arendt, that a theory of the judgment of justice is proposed. It is a proposed alternative consonant to a post-positivist theory. It is with the *Critique of the Power of Judgment* that the power of judgment becomes an object of central concern to Kant. The imagination also becomes relevant and turns to be not only reproducer, but also producer, as reminded by Hannah Arendt. That imagination produces concepts of which it is not possible to have knowledge of. There is an activity with "concepts" that does not produce knowledge: it is the aesthetic judgment.

Some important differences are established by Kant in the *Critique of the Power of Judgment*. Therefore, the judgment of beauty would

be distinct from the judgment of agreeable, as well as from the judgment of good (or yet, the useful). In relation to the judgment of agreeable, it is always particular and it does not intend the universalization: when something pleases me, I do not intend it to please everybody. The judgment of beauty is singular, but intends the universalization (for it is from the feelings of pleasure or unpleasure that there is a free play of imagination and understanding, not being submitted to any principle *a priori*), while the judgment of agreeable is exclusively private. Instead, the moral good (or the useful), for being a judgment interested in the existence of the object, it does not constitute a disinterested representation; reason why, for Kant, moral interest or utility make it impossible for these judgments to be aesthetic judgments. By those distinctions, some of the most important distinctive aspects of the judgment of taste are introduced. The judgment of taste is singular, because it is a reflective judgment. The singularity of the judgment of taste is associated to its own nature of reflective judgment. Moreover, to the pure judgment of taste it is indispensable not to be interested in the existence of the object, be that an interest of knowledge or of morality or of utility of the object. The lack of interest underlying the judgment of taste does not mean an indifference or a contempt for what it is being judged, but that for the aesthetics judgment there is supposed to be a distance of the subject in relation to the object being judged: something is not judged beautiful or sublime, once concerned with its utility, with its measures or its moral correction. For the moral judgment, the complacence of the object must lack interest. Actually, the singularity of aesthetic judgment is the best foreshadowing of the called reflective judgment. A theory of the judgment of justice intends exactly that the judgment of justice can be view as political one: these judgments would bring rationality, but that rationality does not elide the importance of feelings (or emotions), which are essential to the process of judgment. It must be given the adequate importance to emotions or to feelings in man´s activity. There is no way to set apart the rational nature from the emotional nature and reduce the second to natural inclinations to be overcome, as certain interpreters of Kant´s moral philosophy wish to. Moreover, the singularity of the judgment of taste does not exclude the plea for universalization. It is true that the eventual universalization of the judgment in this case is the hope of the one who pronounces it, more than the truth assented on validity based on aprioristic principles. But the intersubjective validity that is founded, even if less "cogent", comes from the effort of the one who judges to use the "communal sense", the "thinking in the position

of everyone else". The hope enclosed in the judgment of taste in relation to its universalization derives exactly from this appeal to the "communal sense". It is not, therefore, an utopia or a dream of the one who pronounces the judgment, but a hope based on a communicative activity with the others (how would it be possible to think in the place of the other, if not through the process of communication - the "usage of public reason", as Kant used to say). A theory of justice as a judgment would guide the validity of the judgments of justice by a very similar criterion: that which is judged to be just, it is just for the one who judges; but the one who judges intends it to be for all, and that intention comes from the relationship of the one who judges with other men.

Among Aesthetics judgments, there are, for Kant, the judgment of beauty and the judgment of the sublime. The difference between these two judgments is that the beauty attracts by form, while the sublime attracts by the unrestrainedness of the same object. This lack of restrain makes reason violently powerful over imagination. The judgment of sublime in kantian philosophical system would be closer to the moral experience, because the feeling of the sublime amplifies experience in such a way that it sends man to the practical domain, the super-sensible. The experience of man´s own limits, for example, in comparison to the size or the complexity of the world would be experiences which provoked on man the power towards moral questions. But beauty is also a symbol of good for Kant, since many times, the moral idea is symbolized through something beautiful. The beautiful object is many times a good object: it is here presented the importance of "symbolic representation" to practical philosophy. This aspect of Kant´s thought is resumed today in a more general context of his philosophy, to show the importance of those symbols (empirical experiences of supra-sensible ideas, a way to make the supra-sensible world present in the world of Nature), as explained, for example, by Heiner Bielefeldt.[10]

The notion of *sensus communis* is of great importance. It implies to "think in the position of everyone else", or to expand the thought. The maxims of the understanding would be three: "to think for oneself", "to think in accord with oneself" and "to think in the position of everyone else". The man who keeps thinking by himself becomes free from prejudice and superstition. A consequent thought supposes a self vigilant watching that man does, when examining inside himself, whereas

[10] BIELEFELDT, H. *Symbolic Representation in Kant´s Practical Philosophy.* Cambridge: Cambridge University Press, 2003.

"enlarged thought" supposes an abstraction of private conditions, with a thoughtful thinking of the judgment from a universal viewpoint. Arendt foresees in such conception one of the most relevant position in the *Critique of the Power of Judgment*.

It is worthwhile to mention that there are two ways to approach the contribution of the Third *Critique* to a theory of justice. There is a branch which focuses mainly on the notion of reflective judgment, of which aesthetic judgment is one of the clearest examples. The reflective judgment, in opposition to the determinate judgment, is a "power of thinking the universal as contained in the particular". In the case of the reflective judgment, there would be particular empirical laws, in relation to that which is left undetermined by the universal laws that should be admitted "as if" they could be considered a unit. In the notion of reflective judgment there would be a judgment that is not made from de principals or universal laws: it is according to this conception that Alessandro Ferrara, for example, considers relevant to think a theory of justice "without principles"; one that to be universal does not need to be supported by universal principles. The recall to aesthetic judgment happens exactly because it is the best expression of a reflective judgment. Arendt, though, wants more than that: she proposes a proximity between political judgment and aesthetic judgment, since they take place in a similar form of judgment.

One cannot deny the contribution of Hannah Arendt in calling attention to the importance of the *Critique of Power of t Judgment* to the political philosophy. One of Kant´s ideas which particularly of Arendt´s interest is the "unsociable sociability" of men: the idea that men should live together, despite all the difficulties brought up with this living. The relationship between philosophy and Politics is one of the themes evidently important to a Political Philosophy. Arendt intends to oppose the tradition which places Philosophy in a privileged position in relation to Politics. In that tradition there would be Plato, Aristotle, Spinoza and even Hobbes, to her evaluation. Concerning Kant, his philosophy would be paradoxal. From one side, kantian melancholy, expressed in the difficulty and dislikes of human life, would demonstrate what could be an "unnoticed proximity" with the Greeks. An overcome of that melancholic disposition in the context of kantian philosophy would take place, at first, through the notion of progress in History - a non individual one, but of the kind (the historical theses of teleology, to which Arendt particularly does not cultivate any admiration). At second place, a mitigation of the mentioned kantian melancholy is grounded on the

moral dignity of man as a moral being, which is an end in itself. The freedom of a man, who lives in the world with other talented men with common sense, would be exactly the object of the first part of the *Critique of the Power of Judgment*. Kant´s position concerning the relationship between philosophy and politics could be inserted in a tradition different from that which defends the superiority of philosophy over politics; and this evidently is of Arendt´s interest.

Against Plato, for instance, true knowledge for Kant supposes sensibility, as he shows in the *Critique of Pure Reason*. Furthermore, the evaluation of the morality of actions is not exclusive to erudite philosophers, as he presents in his main works in moral philosophy, as the *Groundwork of the Metaphysics of Morals*. To him, erudition or formal education, far from facilitating, can complicate the evaluation of the morality of the actions. Philosophy, to Kant, should not be an activity addressed to the elected ones – a privileged minority, but must be (or become) accessible to all. Therefore, the political philosophy of Kant, different from others, does not intend to give principles, based on which, men could organize its life in community; but he intends to investigate the reasons which drive men to get associated and how this association can be made perfect, based on the same given reasons. The core notion to this purpose would be the "public use of reason", where the political freedom would be grounded, according to the author of *What is the Enlightenment?* The freedom of communication would imply not only communicability between men, but also the willingness to listen and to be listened to. Not only does it mean impartiality in relation to other men, but "enlarged thought" would suppose to be among other men in order to judge: there cannot be a judgment from a privileged viewpoint, from a higher level. It would be, in the beautiful words of Arendt, "to train its own imagination to go visiting". That "enlarged thought" thus, it must be said, would not embrace an extended empathy, by means of which we would want to put ourselves in the place of the others, that is, a passive reception of the thought of the other.

In the context of the *Lessons on Political Philosophy of Kant*, which summarizes Hannah Arendt lessons on the importance of the theory of judgment of Kant to the political philosophy, we can find the resumption to an analogy from the viewpoint of the spectator. The "citizen of the world" - a viewpoint on which the cosmopolitism of the world was founded, would actually be the spectator of the world. This position is well illustrated in the judgment Kant makes of French Revolution - Arendt reminds us. She mentions Kant's position resistant to the revolu-

tions, to the right of rebellion or the war. But, in relation to these issues, the same Kant expresses himself in a different way when analyzing them through the eyes of the spectator, who judges not morally, but from the viewpoint of the senses underlying the historical process going on. It is necessary, though, in a parallel between the war and the revolution, to establish a distinction: while in the first, Kant can see the sublimity (especially considering the progress that may follow up), in the second case, Kant has a much nicer position, even being able to show admiration for what was going on with French Revolution.

The spectator is always a singular man, and the contemplation is a solitary activity. But, the contemplative activity does not elide the need for publicity, which is inherent to politics both for Kant and Arendt. Turning to Kant´s aesthetic judgment, Arendt resumes his distinction between the genius and the taste, in which she reinforces Kant´s position in favor of the preeminence of the taste over the genius: "The public domain is made of critics and spectators, not of actors and creators." And the power of judging what is right or wrong belongs to the *common sense*, grounded on the judgment of taste. The communicability of the judgments of taste would assent on imagination, which, by means of reasoning, makes present that what was absent. Therefore, to well judge it is necessary to keep distance: the one who is in the middle of a revolutionary process, for instance, would not be in condition to well judge. The criterion is then a kind of communicability or publicity that brings up a sense common to all.

How then, from the singularity of the spectator´s judgment can one reach the "mysterious" generalization? One of the answers would be in the idea of an original agreement of human kind, that is, the notion of Humanity. The things without finality would be exactly the aesthetic objects and man himself; therefore, there is a confluence of the theory of reflecting judgment also towards the judgment of human actions; towards the political judgment. Another relevant notion would be the one of exemplary validity, constant in the third *Critique*. The proceeding is to take something judged to be the best possible and make it a model of how things should be. The power of the model (example) comes from its effective existence in the world and its durability, but also its temporality (I can find a better model in some time). Therefrom the "the power of the example", there could be a exemplary universalism, which does not come from a universal principle, but from the contingence of singular judgment concerning what is just that, indeed, suppose a "thinking in the position of everyone´s else", that is, an "enlarged thought'.

The judgment of justice, which is singular, supposes a feeling of justice or injustice in face of something. As a matter of fact, the singularity of the judgment of justice (in the pattern of the judgment of taste, which is reflexive) is not thus an obstacle to the hope or intention for a universalization. That, because when judging something to be just, this is done under the consideration that all the other people could judge it to be just too ("common sense" or "communitarian sense").

Besides it, the viewpoint of the judgment approaches human capacity to think (which is not an appanage of the philosophers, as both Kant and Arendt teaches us) to politics. The judgment of justice supposes the consideration of the common history of everybody involved in the "search for a destiny". This "search for a destiny" does not mean a predetermination of human attitudes, but a search - by man - for a sense to his actions and, this way, the judgment of justice is much more than an overwhelming feeling.

As Alessandro Ferrara well reminds it, the importance of Kant to the XXIst century has to do with his "philosophical attitude": "a certain way to do philosophy in the age of interregnum", in which philosophical certitudes faded away: Kant's reaction was to examine the internal operations and the philosophical presumptions of a practice: the natural Newtonian Science; and therefrom sets his oppositions to metaphysical theories[11]. Today, the practices that would be meaningful models to the conciliation between universalism and pluralism are connected exactly to the aesthetics´ field[12]. The congruence of a piece of art or, as Ferrara proposes, a political identity, cannot be translated into a vocabulary or conceptual scheme, without it being an obstacle to the universality of the judgment. The question about the universality of the judgment obtains a response, to a certain point, non-cognitive and non-naturalist, along the line proposed by Kant. It assents on the circumstances that "independently of the culture we inhabit, and just by virtue of simply existing, in the way humans exist, with a body, a mind, a consciousness of the self and of its finiteness – we all have an intuitive sense of what it means to enhance and further, or to constrain and stifle, our life."[13] The judgment inspires a exemplary action, which is able to have an influence on us, guiding us, not by a *schemata*, with principles or rules to follow, but with symbols, that is, self-posed instances of congruence, able to

[11] FERRARA, A. *Reflective Authenticity –Rethinking the project of modernity*; p.40.

[12] To Ferrara, two of these practices would be the psychoanalyses and the art criticism.

[13] FERRARA, A. *Reflective Authenticity – Rethinking the Project of Modernity*; p.48.

educate the discernment by means of exposition to selective instances of a "feeling of a furtherance of our life" (a very fascinating kantian concept, which means "that life must involve not only the capacity to act, but also the consciousness of being acted upon"[14]). A theory of justice that searches universality in such a pluralistic world is much better formulated from the notion of reflecting judgment. Such universalism, though, is different from the universalism based on generalizing principals, which predominate in some political, moral and legal theories.

The theory of justice in the viewpoint of the judgment will drink in these sources to state the possibility of a theory of justice that notices the necessity of the resumption to specific political and historical contexts, but which does not stop trying to drink in the fountain sources of the "project of modernity", betting on the capacity of man (and on his hope) to try and have a world less unfair and under a universalist ethics. The post-positivist theory of law - in which the communicative and argumentative dimensions are so present - can be better understood from the viewpoint of the theory of judgment. As Seyla Benhabib well states it, "There is an essential link between civil education with public participation and the moral quality of the enlarged thought. The enlarged thought, which makes us morally think under the viewpoint of all the others, politically demands a creation of organizations and practices through which, by self-rights, the voice and the perspective of the others - many times unknown to us - can be expressed"[15].

References

ARENDT, H. *Lectures on Kant´s Political Philosophy*. Editer by Ronald Beiner. Chicago: Chicago, 1992.

AURÉLIO, D.P. "Sociedade, Estado e Razão". In: CARRILHO,M. (Direção). *Dicionário do Pensamento Contemporâneo***.** Lisboa: Dom Quixote, 1991.

BENHABIB, S. *El Ser y El Outro en la ética contemporánea***.** Translated by Gabriel Zadunaisky. Barcelona: Gediva, 2006.

FERRARA, A. *Justice and Judgement.* London: SAGE Publications, 1998.

FERRARA, A. *Reflective Authenticity – Rethinking the Project of Modernity.* Lon-

[14] MAKKREEL, R. *Imagination and Interpretation in Kant – The Hermeneutical Import of The Critique of Judgment***.** Chicago: The University of Chicago Press, 1994. p.91.

[15] BENHABIB, S. *El Ser y El Outro en la ética contemporánea***,** Barcelona: Gediva, 2006; p.160.

don and New York: Routledge, 1998.

FERRAZ JUNIOR. T.S.. *Introdução ao Estudo do Direito*. São Paulo: Atlas, 2001.

FERRY. J.M. *Habermas – L´éthique de la communication***.** Paris: Presses Universitaires de France, 1987.

GRZEGORCZYK, C. MICHAUT, F. TROPER, M. (dir.), *Le positivisme juridique***.** Paris: LGDJ, 1992.

HABERMAS, J. *The Philosophical Discourse of Modernity.* Lisboa: Publicações Dom Quixote, 1990. p.29-30).

KANT, I. *Critique of the Power of Judgment.* Translated by P.Guyer & E.Matthews. Cambridge: Cambridge, 2000.

LENOBLE, J. BERTEN. A. *Dire la norme – droit, politique et énonciation*. Paris: L.G.D.J.,1996.

MAKKREEL, R. *Imagination and Interpretation in Kant – The Hermeneutical Import of The Critique of Judgment***.** Chicago: The University of Chicago Press, 1994.

Human Rights between tolerance and hospitality
An essay from the though of Jacques Derrida

Gustavo Oliveira de Lima Pereira[1]

Abstract: *This article aims to problematize the philosophical implications that the categories of "tolerance" and "hospitality" may represent grounds for Human Rights in cosmopolitan. At first, attempts to contextualize the interplay between the concept of "tolerance" and "Consensus" as remnants of Enlightenment rationality. It will be explore the idea of "unconditional hospitality" from the "democracy to come" by Jacques Derrida's thought, as one overcome legal barriers that define the traditional foundation of human rights and as a alternative to radical enough construction of a new sense of ethics for international relational plan, beyond the political and beyond the law.*

Keywords: Tolerance, hospitality, democracy to come.

1. Introduction

The strange strategy of this article, without a pre-determined purpose or just one purpose on the verge of passivity, is to investigate the collision course that weaves together the categories of "tolerance" and "hospitality" in the tense game of chess involving the ethical-political constructions of the West.

Between the "consensus" and "tolerance", underlies the decisive category for understanding of his merits and also his exhaustion: "freedom". Is by way of understanding of freedom that leaning the tension between the categories suggested. Is the firm ground and quicksand on the ground of this philosophical game.

What moves us in the confrontation of the theme will be the writings of Jacques Derrida, accompanied all the time by your present/absence; that is sometimes cited, other excited. But before starting on the

[1] Professor of international law and theory of law at PUC/RS. PhD student in philosophy at PUC\/RS. CNPq. Master in law from Unisnos. Contact: gustavo.pereira@pucrs.br

author's thinking, it takes back a little more. The essential point to be explored will be the contrast of the thought of Jacques Derrida hospitality with the consensus, developed by ethical tradition.

I – An ethic beyond politics and beyond the law: hospitality against the tolerance in Jacques Derrida

To Derrida and his the philosophy of hospitality, the search for a consensus, in fact, disrupts the intercultural relationship. From the meeting with a diverse culture emphasizes the search for consensus, even invested in a heartfelt argument, just driving me in the pursuit of equality and not give space to the difference. At most tolerate the difference. The consensus, in this case, germinates in its relational dimension tolerance, circumstance that philosophers of consensus, like Habermas, does not deny. The consensus transits between upon itself ideas contratualists establishing boundary fences on their interrelationship. As a result, we can affirm that the difference, at first glance, shocks. Traumatizes the expectations of all. The open hand of Egomania, on the experience of infinity ethical, enables the date on which the difference can coexist. The meeting takes place, in this sphere of relationship, regardless of consensus, as well as independent of reciprocity.

The consensus, in any democracy, or experience in a sketch of democracy, as a coming, works as an apparatus of procedural legitimacy. Attempts to organize and systematize the social relationships, but never takes the place of singular recognition of difference. The consensus, by the argument proposed here, is heading for a kind of unattainable fantasy or hit greatly reduced, since what is realizes in the field of human relationships are the social rules and discursive rules (impregnated with overcoming strategies on the other) that enclose a discussion. Because the foundations of a society are not consensual.

Habermas's theory of communicative action, seen also as an attempt to solve the ethical barrier by means of tolerance and consensus, brings the possibility of a Dialogic construction of people standing of symmetry of emancipation. There is a dimension of circularity that removes that dialogue which does not present the minimum conditions for dialogue. Who is outside the initial game of the communicative sphere tends to remain not inserted by the logic of construction of ethics of speech. Is vetoed those who do not adhere to the contract that visualises reciprocity. This would be the conception of what is meant

by "central fallacy of the ethics of speech" (SOUZA, 1996. -123 120 p), since this doesn't need that enters the earlier communication. In practical terms, "If the skeptic enters somehow at argumentative discourse, with the cynical that dominates in the final analysis the possibilities for establishment of the speech, before and outside of it, presents logical and ontological grandfathering" (SOUZA, 1996. p. 120). In this context, criticism of the ethics of speech bears a sufficiently critical dimension to establish ethical meeting par excellence, because only a philosophical construct that proposes to subvert the limits of intelligibility Western may be able to remove the political thought of enlightenment ideals and ties from the advance in the preparation of a new sense of respect, from the experience of a culture of singularities.

The communicative reason, to integrate the other, assumes something that comes before, which here we be, his own receipt of another, by unconditional hospitality. There's only communicative action with someone if that somebody is understood as others (independent and prior to any speech Act)-exactly as someone who may not agree with me and that can remain not agreeing. More than that: it may not be willing to acknowledge how symmetrical the communicative game. Can shake the pre-originárias structures of communication.

But to understand what Jacques Derrida conceives as displacement of ontological plan for ethical plan, despite their resistance to the use of this term, we should explore how their thinking provides the break with the ideology of "tolerance" and freedom from the solitary focus of tension that exposes its limitations.

The design of agreement, of "tolerance"; to tolerate each other, to establish a good contract connivance with each other, meaning, no doubt, an achievement of humanity. But this is the exact point that we discuss in this text: for more than the conception of "tolerance" is a significant achievement, this does not mean that it constitutes in rational product in such a way over that don't get the deconstruction, because it still remains the desire for a rationale beyond the contractual relational dream, originating in the enlightenment. In fact, apart from the whole idea of law or politics and beyond the idea of State because "his own deconstruction is intertwined with the re-politicization as another political concept" (BERNARDO, 2005, p. 174).

My point is: the philosophical enlightenment construction of the idea of "tolerance" is currently the limit concept in terms of Western political theory. The idea of tolerance cannot be seen as the panacea or the decisive basis for the prism of violence, strife and war, which still lean-

ing in the world. Just tolerate that, in initial headquarters, don't tolerate it. So when I got the last word still tolerate and decide if I'm merciful with the difference that brings discomfort. A judge in the Court of appeal. To tolerate each other assume a level of hierarchy. I'm still Lord of reason and the other to what model my cognitive representation leads. -Prevent him from being another. Torn apart what primarily sets up the possibility of the meeting.

Tolerance thus translates as the "reason for the stronger", i.e. is thought, according to Derrida's insinuations, as a concept still on the hillside of the logocentrism articulated by the West, anxious for the presence, for originality, for the light and a vision. Hospitality already presupposes the multiplicity of origin, as Franz Rosenzweig does, and renunciation (or abandonment) of claim to find the starting point. The original point.

II - The law of hospitality and the laws of hospitality in Jacques Derrida

The law of hospitality claims and represents this disclaimer. Derrida translates the law of hospitality as an unconditional and unlimited law, as offering the home who comes out, abroad of subjectivity. More than that; the law of hospitality offers itself, its own self, "without asking him or his name or return, or fill the minimal condition" (DERRIDA, 2003. p. 69). The law of hospitality is in counterpoint to the laws of hospitality, which address the rights and duties always conditioned and conditionals, the way they treat the treaties and conventions in relations between Nations. The conditional mode view hospitality dates back the whole tradition of Western culture, since its inception, Greek and Roman Antiquities of every law and Hegel's philosophy of right up.

Already the law of hospitality focuses on thinking beyond political politician, from a new internationalism; from a reinvented cosmopolitanism. A cosmopolitanism beyond political cosmopolitanism thought by enlightenment ideals, because this cosmopolitanism is conditioned by the sovereignty of the State. Is structured by the legal-political boundaries (BERNARDO, 2002, p. 437). And this legal cosmopolitanism, guided by the laws of the conditional hospitality, proved and proves to be incapable of responding to the numerous international conflicts involving human beings these days.

The idea of tolerance presupposes a detachment and a cultural

barrier that prevents the contact between different cultures; Although it is impossible to think any culture without relation with the other, since no custom originates from solitary. The criticism extends here also the idea conceived "multiculturalism" that despite their goodwill, it remains still in the registry of social contract, because metaphysical assumes the mere peaceful co-existence of cultures or cultural identities in a space of mutual tolerance. Is, according to Fernanda Bernardo, a kind of consensus "reliever or the confident belief (and arrogant!) of a given "identity" or "socio-cultural community" that, generously, opens the other ". In multicultural agreement, there is no room for the shadow (or the "haunting") of actual miscegenation. For the experience of thinking about the question of "foreigner".

Thus, the idea of tolerance, heritage of the enlightenment thought and one of the key concepts of the theoretical construction of the idea of globalization, is still far from being set up as what we understand, in cosmopolitan chain, be the effective reception of the philosophy of hospitality, because that is always on the side of the stronger. "Is a trademark of sovereignty, which speaks to the other on the high position of power, I'm leaving you there, you're not unacceptable, I'm leaving a place in my home, but don't forget that this is my home ..." (DERRIDA, 2003, p. 137).

Tolerance, so for Derrida, is seen as the boundary zone between the law and the laws of hospitality. Is the game of reason alone. Indeed, tolerance becomes a cautious action, enforced; a conditional hospitality on obedience to rules and taxes (DERRIDA, 2003). This conditional hospitality, Derrida contrasts with what he called "pure and unconditional hospitality"-a manifestation of madness and true transgression of the logic of the contract, assuming receipt of otherness; where the doors open for someone who is not expected nor asked for the "absolutely alien to aimlessly or without a country, for the" unpredictable, in short, totally other "(DERRIDA, 2003, p. 137). But the drama translates to this status of hospitality being impossible to legislate or organize institutionally; Although only from that concept is possible if think legally and politically. The possibility of thinking the hospitality is what allows understanding the world of cosmopolitan way.

Let´s see what´s is a Derrida´s point of view (2003, p. 137):

> Without this idea of pure hospitality (...) we wouldn't have even the idea of another, the otherness of the other, i.e. someone who

> comes into our lives without having been invited (...) the unconditional hospitality, which is not even legal yet policy is political and legal condition. Precisely for these reasons, I'm not even sure that is unethical, as it does not come to rely on a decision. But what would be the "ethics" without hospitality?

By inciting caused by author, not afraid to say that unconditional hospitality transcends to well beyond the border of the social contract. In fact, breaks down by establishing a new approach of structuring of rationality that does not conform to standards or territorial and political constraints. The possibility of hospitality, as proposed by Derrida, in fact, assumes his own rupture with the solipsistic ideals of freedom, translated by the conception of tolerance.

This is a hospitality of visitation and inviting hospitality. A host who arrives unexpectedly to my house. Remove me from the comfort of my home ontological. A hospitality that reinvents the language and lies in the order pre-moral and even pre-human (BERNARDO, 2005, p. 196).

Conclusion

The entire argument here exposed do not intend destroy the procedimentalism or the liberal democracy, experienced by most Western countries. The review recognises their importance, however denounces their inadequacy. The Democracy for coming and the law of hospitality, in derridian sense, claim the return to the Foundation of democracy, like the crazy by him who assume interrogates himself in a space beyond the democratic, in these terms.

It may seem a claim to the impossible. And Derrida makes it clear that is! But impossible in the sense of a consecration or some universal procedural proposal or for some kind of purism relational ethics. However, it is in perpetual and endless hospitality development without dogmas, without law, without ordering the other or at least your name, - a relationship outside of the rules of procedure is -, that it will be possible to increase the levels of recognition of uniqueness, under procedural and formal. In other words: the magnification of sense of cosmopolitanism is insufficient for via international treaties, constitutions, tolerance among peoples or consensual speech spaces.

The recognition of the law of hospitality may go against the laws of hospitality. Leave your trail. Your shadow. Can haunt your will and the will of solitary and contractual freedom that tolerant liberalism be-

queathed us.

Such haunting is only possible in a minimum space of democracy. There's only deconstruction where there is democracy. There's only room for questioning the claim by unconditional and come from a perfect democracy in imperfection of democracies of here and now.

References

_____. BERNARDO, Fernanda. *Mal de hospitalidade*. Ed. São Paulo: Estação liberdade, 2005.

DERRIDA, Jacques. *Força de lei.* Ed. São Paulo: Martins fontes, 2007.

_____. *A escritura e a diferença.* Ed. São Paulo: Perspectiva, 2009.

_____. *Espectros de Marx. O Estado da dívida, o trabalho do luto e a nova Internacional.* Ed. Rio de Janeiro: Relume, 1994.

_____. *Rogues. Two essays on reason***.** Ed. California: Stanford University Press, 2005.

_____.*Anne Dufourmantelle convida Jacques Derrida a falar da hospitalidade*. Ed. São Paulo: Escuta, 2003.

HABERMAS, Jürgen. *A ética da discussão e a questão da verdade*. Ed. São Paulo: Martins Fontes, 2004.

_____. *Teoria de La acción comunicativa I.* Ed. Madrid: Taurus, 1999.

PEREIRA, Gustavo Oliveira de Lima. **A** *pátria dos sem pátria: direitos humanos & Alteridade.* Ed. Porto Alegre: Uniritter, 2011.

ROSENZWEIG, Franz. *El nuevo pensamiento.* Ed. Madrid: La balsa de La medusa, tradução: Isidoro Reguera. 1989.

SOUZA, Ricardo Timm de. *Totalidade e desagregação*. Ed. Sobre as fronteiras do pensamento e suas alternativas. Porto Alegre: Edipucrs, 1996.

_____. *Justiça em seus termos. Dignidade humana, dignidade do mundo*. Ed. Rio de janeiro: Lumen Juris, 2010.

Democracy and Deliberation

Rubens Becak[1]

Abstract: Day to day we are faced with the constant use of the term democracy, a concept which put as a natural system has been perceived like an obviousness in the last two centuries or two centuries and a half. It's conducted us to a misperceiving that in slow evolution became a non-attacked political postulated.
In this path, with the absolutization of the idea and the ideal the real investigation of the correspondence of legitimacy between the representatives and the represented have been lost. It has been said whether that, on one hand the traditional forms of political representation survives, on the other hand its legitimacy has constantly decreased and its effectiveness declined. In this way, the use of the so called "deliberative democracy" has increased substantially. Among the various possibilities in the search for the filling of the space of the legitimacy left opened, many possibilities have been developed and worked on, such as the redesigning of the representation through the electoral process or partidary improvement, proposals for boosting the digital use, the adoption of "digital" democratic model and many others. Without ignoring the value, appropriateness and timeliness of countless strands of discussion of the problem, we prefer to situate it in the field of today's discussion(s) proposal(s) of deliberative democracy, as an increase in what we have for "democratic optimization".

Keywords: Democracy; Legitimacy; Deliberation.

Introduction

This paper, assuming as truthful the rather common assessment in the work criticizing democracy of the need for optimization thereof, does not intend to enter the realms of discussion of the advantages that verify that.

[1] PhD in Constitucional Law. Associate Professor at University of Sao Paulo at Faculty of Law and Ribeirao Preto Faculty of Law.Secretary-General of University of Sao Paulo.

Nor does it intend to discuss the advantages of this form of exercise of power over other regimes, which might be a prerogative of Political Science.

No. Addressing it in a different way, we start from the assumption of excellence thereof, and the unfeasibility and implausibility of its alteration as the ideal system.

In spite of being a relatively recent phenomenon, democracy seems to have achieved a "historical victory over alternative forms of governance," even when giving rise to a series of different types. [2]

The existence of democracy and its glorification as a postulate are sometimes seen as obvious phenomena. Ross Harrison says that "Democracy surrounds us like tables and chairs and the air we breathe, normally totally taken for granted."[3]

However, if democracy is this "obvious", this "natural" system that is expected to be found in the political environment, why then this "strange" sensation when, for example, we find ourselves face to face with Lincoln's historical phrase that concisely defined it as "a government of the people, by the people, for the people?"[4]

The considerations on each of the assurances contained therein certainly give rise to a great deal of questioning, if not contradictions in our cores.

Among critics, some are so categorical that their manifestations are on the verge of acidity: "Contemporaneous democracies seek for a new spirit, new grounds. The classic forms of political representation survive; however, their legitimacy diminishes and their effectiveness declines. The power of the representative institutions is corroded all over, its authority fallen and its capacity of imposing distinct solutions

---

[2]HELD, David. Democracy: from city-states to a cosmopolitan order? In: HELD, David. Prospects for democracy: north, south, east, west. (Ed.). Stanford: Stanford University Press, 1993. p. 13.

[3]HARRISON, Ross. Democracy. London, New York: Routledge, 1995. p. 1. Find as follows the original text: "Similarly, we agree that democracy is a good thing and that political system inside which we currently operate is a democratic system. Democracy surrounds us like tables and chairs and the air we breathe, normally totally taken for granted."

[4]BONAVIDES, Paulo. Ciência política. 10. ed. São Paulo; Malheiros, 2001a. p. 267. See also CARNEIRO, Rommel Madeiro de Macedo. Teoria da democracia participativa: análise à luz do princípio da soberania popular. In: Revista jurídica. Brasília. v. 9, n. 87, Oct-Nov. 2007., p. 25-34. Available on : <http://www.planalto.gov.br/ccivil_03/revista/revistajuridica /index.htm>. Access on Nov 25 2011., p. 26.

strongly eroded."[5]

By the way, a portion of the questioning tends towards the fact of knowing whether we have ever been in the presence of democracy in modern times.

Jacques Maritain used to say: "The tragedy of modern democracies is that they haven't managed to realize democracy yet."[6] Wouldn't it be "essentially the dream of some 18th century philosophers that was mistakenly transcribed into the western political structures of the 19th century by a class that found therein the synthesis between a very vague idealism and a very accurate interest?"[7]

On the other hand, despite its vicissitudes and notably thanks to the huge diffusion the system experienced worldwide, the critics we are interested in are those that try to debate the possibility of improving it, nearing the intended collective ideal.

It is exactly at this point that a series of authors, producing a great deal of work along the past few years, supports the adoption of the so-called "deliberative democracy."

Extending the debate

As we have previously said, for an important part of the doctrine, we are already experiencing participatory democracy.[8]

In Afonso da Silva's opinion, representative democracy,[9] as the "system of parties, the universal suffrage, and the proportional representation" has become concrete and, has given rise to the "idea of participation."

---

[5]BLONDIAUX, Loïc. Le nouvel esprit de la démocratie: actualité de la démocratie participative. France: Seuil, La République des Idées, 2008. p. 5. The original excerpt as follows : «Les démocraties contemporaines se cherchent un nouvel esprit, de nouveaux fondements. Les formes classiques de la représentation politique survivent, mais leur légitimité s'amenuise et leur efficacité decline. Le pouvoir des institutions représentatives est partout rogné, leur autorité chahutée et leur capacité à imposer des solutions par le haut fortement érodée.»

[6]ALEIXO, José Carlos Brandi. Democracia representativa. In: Revista de informação legislativa. a. 14, n.53, p. 67-92, Jan.-Mar.1977., p. 79.

[7]Rafael Caldeira apud ALEIXO, 1977., p. 79.

[8]BONAVIDES, Paulo. Teoria constitucional da democracia participativa. São Paulo: Malheiros, 2001b.

[9]AFONSO DA SILVA, José. Curso de direito constitucional positivo. 33rd reviewed and updated ed. São Paulo: Malheiros, 2010., p. 137-138.

Even if materialized in the act of voting, participation is expressed. Now, it is a matter of extending it beyond the suffrage, in what is called "participatory principle."[10]

Following this line of thought, the symbiosis of the instruments to check the collective will with representative democracy, the "semi-direct democracy," already constitutes a manifestation of participatory democracy.

In its interpretation, it is the *referendum*[11] that has a "predominant"[12] role, because, if we exclude the popular initiative, all the instruments posses "characteristics of *referendum*."

That is why some use the expression "*referendum* democracy."

Even realizing that, the possibilities contemplated by the semi-direct model, seeking to near the "direct democracy" model, will not pose any obstacle to the exacerbation of the "critical" and, many times, "delegitimizing discourse"[13] of political representation.

This will speed up within the scenario we pictured at the end of the previous chapter.

Most certainly, the receding of the Legislative, losing to the Executive its role of importance,[14] gains significant meaning.

In this respect, we point out that the Executive will assume the role, at least before the public, of that who exercises the supremacy of the representation legitimacy, much easier to be perceived, or even appreciated.[15]

In this challenge one notices basically, the criticism based on

---

[10]CANOTILHO, José Joaquim Gomes. Direito constitucional e teoria da constituição. 7th ed. Coimbra: Almedina, 2003., p. 301.

[11]We remember our previous excerpt, in which we showed the use of the expressions "referendum" and "popular referendum" for the instrument as well.

[12]AFONSO DA SILVA, José. O sistema representativo e a democracia semi-direta. In: CONCHA CANTÚ, Hugo A. (Coord.). Sistema representativo y democracia semidirecta: memoria del VII Congreso Iberoamericano de Derecho Constitucional. Mexico: UNAM, 2002, ., p. 13.

[13]GARCÍA GUITIÁN, Elena. Representación y participación: la rendición de cuentas en las democracias contemporáneas. In: MENÉNDEZ ALZAMORA, Manuel. (Ed.). Participacíon y representación política. Valencia: Tirant lo blanch, 2009. (Coleccíon Ciência Política, 30). p. 27-28.

[14]We had the opportunity to work on this phenomenon in BECAK, Rubens. A hipertrofia do executivo brasileiro: o impacto da constituição de 1988. Campinas: Millennium, 2008a.

[15]BECAK, 2008a, op. cit.. Cap. III – O executivo como governo, p. 29-59.

some vectors, mainly: 1) the absence of the imperative mandate, especially given its historical supremacy, comes to contribute to the "lack of personal and material relationship between voters and representatives" and 2) there should be a "relationship that ensured" "the coincidence between the interests of the voters and that of the elected."[16]

During the 1960s a new series of experiments will rise to try and solve these challenges.

They constitute practices that were soon called "participatory" which creates a new designation in the political vocabulary, "participatory democracy," which tries to encompass those practices.

The "participation" and democracy

As early as 1970, Carole Pateman, warns us about the crucial importance of participation in the construction of the theory of democracy, tarnished, in his understanding, by the myth and proliferation of the "classic doctrine of democracy".[17]

In this sense, it is worth remembering that at the very beginning of the affirmation of democracy (the "representative government"), Condorcet did not exclude the direct popular participation in the constitutional approval and the declaration of rights.

Edward Mead Earle, in his well known introduction to the 1937 edition of the "*Federalist papers*",[18] goes the same way, making it clear that the final decision of the Convention, determining the approval of the new constitution by sate conventions,[19] with representatives chosen especially for such purpose, constituted a real "*coup d'état*", "revolution-

[16]ESPÍN TEMPLADO, Eduardo. Una reflexión sobre la representación política y los sistemas electorales en las democracias constitucionales. In: RUIZ-RICO RUIZ, Gerardo José; GAMBINO, Silvio (Coords.). Formas de gobierno y sistemas electorales: la experiencia italiana y española. Valencia: Tirant lo blanch, 1997. p. 30-31

[17]PATEMAN., Carole. Participation and democratic theory. Cambridge: Cambridge University Press, 1970., p. 103. The author highlights Schumpeter's role in the construction of the idea.

[18]Edition by the NY Modern Library in 1937: The federalist: a commentary on the Constitution of the United States, being a collection of essays written in support of the Constitution agreed upon September 17, 1787, by the Federal convention / from the original text of Alexander Hamilton, John Jay [and] James Madison, with an introduction by Edward Mead Earle.

[19]The process of constitutional ratification by the state Conventions took place between 1787-1789.

ary act."[20]

The determination of a popular "endorsement," after approval by the Philadelphian delegates, already denoted the perception of the importance of deliberativeness in the process.

More recently, the issue, as already mentioned, will come back to the agenda.

The discussion on the need of democratic improvement, with the revaluation and reassessment of the deliberation, will rise in a symptomatic manner.[21]

The core issue has been the value and the currentness of the representation. Some understand it has never worked, while others sustain it has fulfilled its historical role.

In this respect, Roberto Gargarella thinks differently, saying that the political system worked "as it was expected."[22]

The representation crisis has to do with the way the political institutions were designed, which means, with the aim of "discouraging" the participation of the citizen in political affairs, instead of promoting it.

The "*Founding Fathers"* wished to provide the body of representatives with such an enormous autonomy, pushing the citizens away, because they feared the assemblies and the majority discourses.

The opposition to this system would not lead exactly to the populist alternative, as it was feared in the United States by then.

The existence of some peculiar institutions, at least at the beginning – such as the reduced terms of office, the larger forced turnover, the right to revoke the mandate, and the "letters of instruction" – provides fuel to the discussion that the alternative model is already implemented in the birthplace of American constitutionalism.[23]

More than the suffrage

[20]EARLE, Edward Mead. Deliberation and constitution making. In: ELSTER, Jon. (Ed.). Deliberative democracy. Cambridge: Cambridge University Press, 1998.,p. 15-28 and, the excerpt on p.18.

[21]VIOLA, Francesco. La democracia deliberativa entre constitucionalismo y multiculturalismo. Trad. Javier Saldaña. México: Unam, 2006. p. 20.

[22]GARGARELLA, Roberto. Crisis de la representación política. México: Fontamara,1997. (Biblioteca de Ética, Filosofía del Derecho y Política, 53). p. 93.

[23]Idem, Ibidem, p. 94-95.

Following a similar reasoning,[24] Joseph Bessette,[25] proposes the term deliberative democracy as a way of explaining the apparent contradiction in the choice made for the constitutional ratification by the American state conventions, already mentioned herein.

Both democratic "parameters" were already foreseen by the "Founding Fathers." On one end, the vote, emanated by the constitutional representatives, following the traditional representation model. On the other end, the idea of deliberation, a possibility to be explained by the debates necessary for the ratifications mentioned.

Samantha Besson and José Luis Martí,[26] are two other authors that follow on the same line. By highlighting the increasing debate on the subject from the 1980s, they noticed the conception as implicit "in some interpretation" by the "*Founding Fathers*".[27]

The challenge found fertile ground particularly in the USA where, especially after the emblematic 1968 democrat convention[28] the adage "the cure for the ills of democracy is more democracy" was coined.[29]

The increase of pluralism plays a very important role in this whole process, when all sorts of diversities of several different aspects were more and more valued.[30]

In a society where everything was labeled as important, with the exponential exacerbation of individualisms and idiosyncrasies, it is natural the perception that a system founded on the verification of the common wellbeing by the criterion of majority would be challenged.

It is more and more difficult to establish parameters that meet

[24]SCHAEFER, David Lewis. Deliberative democracy: the transformation of a political concept. In: SCHAEFER, David Lewis. Democratic decision-making: historical and contemporary perspectives. New York: Lexington, 2012. p. 86.

[25]BESSETTE, Joseph R. The mild voice of reason: deliberative democracy and American National Government. Chicago: University of Chicago Press, 1994.

[26]BESSON, Samantha, MARTÍ, José Luis. Deliberative democracy and its discontents. Hampshire: Ashgate, 2006.

[27]Bessette is credited with authorship of the term "deliberative democracy."

[28]Convention held in Chicago between August 26 and 29 1968, famous for the protests and riots that took place during the convention.

[29]FISHKIN, James S. Democracy and deliberation: new directions for democratic reform. New Haven, London: Yale University Press, 1991. p. 60. The phrase is part of the conclusion of the McGovern-Fraser Commission, convened in the wake of the happenings.

[30]GREPPI, Andrea. Concepciones de la democracia en el pensamiento político contemporáneo. Madrid: Trotta, 2006. (Colección Estructuras y Procesos, Serie Derecho). p. 44-45.

the alleged general interest, when during the "daily routine" the interests of a plural society are (and must be) those valued.

Based on these considerations, the value of what some call "deliberative turn," in the attempt of facing such "difficulties."

Actually, the American and French academic environments have been fecund in the production of specific work on this overcoming, which proves, the preference of the American doctrine for the use of the expression "deliberative democracy," while the French prefers "participatory democracy."

We have to mention here, particularly, the studies and pioneering of Joshua Cohen, who, for part of the doctrine, was the first to coin the expression "deliberative democracy".[31] [32] [33]

We must also point out the studies by[34] Bruce Ackerman, Benjamin Barber, Samantha Besson, John Burnheim, John S. Dryzek, Jon Elster, James S. Fishkin, Amy Gutmann, Alan Hamlin, Peter Laslett, Bernard Manin, José Luis Martí, Philip Pettit, Adam Przeworski, Cass R. Sunstein, Susan C. Stokes and Dennis Thompson, in the doctrine produced in the USA and; and those produced in France by Marie-Hélène Bacque, Loïc Blondiaux, Marc Crépon, Jean-Pierre Gaudin, Henri Rey, Yves Sintomer and Bernard Stiegler.

The deliberativeness

It is worth establishing here an essential semantic issue, namely, the exact meaning of the word "deliberation."

---

[31]Strongly influenced by an article by Cass Sunstein ("Interest groups in American public law") and the ideas of democracy in a "fair society" by John Rawls. See SCHAEFER, 2012, op. cit.,, p. 85-86.

[32]Cohen, in turn, mentions to have learned about Bessette's article later on. Therefore, he attests the anteriority of the use to the latter... See COHEN, Joshua. Deliberation and democratic legitimacy. In: HAMLIN, Alan; PETTIT Philip. (Eds.). The good polity: normative analysis of the State. Oxford: Basil Blackwell, 1989. p. 34, NR 1.

[33]COHEN, Joshua. Democracy and liberty. In: ELSTER, Jon. (Ed.). Deliberative democracy. Cambridge: Cambridge University Press, 1998.

[34]We did not worry about mentioning all, or even listing the most important and productive thinkers of these two production poles of material on the subject of the thesis, but only, furnishing parameters of those who have pieces of work that most directly influenced the author. By the way, and obviously, the pieces of work by these authors that were deemed essential for the development chosen, are listed in the Bibliography herein.

The word, from Latin "*deliberare*",[35] in Portuguese popularly means "collectively making a decision," or yet "the decision made by the collectivity."[36]

It is also commonly used (and sometimes preferably used), in the sense of "voting."

In English, "deliberate" kept the meaning as close as possible to the Latin origin, which can be checked by the noun "*deliberation.*"[37]

Considerations made, it is easier to notice why English speaking authors who work on the subject prefer the designation "deliberative" as a complement to democracy in this tendency of improvement.

Therefore, its meaning for the democratic process is the participation in a collective process, in which the free exposition of ideas and their justifications so the decision is made either on one hand or the other, will be freely debated, with equal opportunities.

At the end, presuming reasonable time for these procedures, the deliberation will come with the persuasion provoked in a reciprocated fashion.

---

[35]deliberare – Latin verb that can be transitive or intransitive, meaning discuss, deliberate, resolve, decide, consult, advise. In turn, the Latin verb comes from the Latin noun libra,ae, which means weight, counterweight, any object or instrument used for weighing and, more commonly, it means scale. See Dicionário latino-português. 3. ed. Francisco Torrinha, Porto: Marânus, 1945., p. 237 e 477. Examples: deliberare de aliqua re (= deliberte on someting); deliberare non adesse (= decide not to participate); deliberare aut cum cupiditate aut cum sapientia (= take advice, either from passion, or from wisdom).

[36]The two dictionaries that are mostly used for Brazilian Portuguese, Houaiss (Dicionário Houaiss da língua portuguesa. Rio de Janeiro: Objetiva, 2009.) and Aurélio (Novo dicionário Aurélio da língua portuguesa. Curitiba: Positivo, 2009.), bring the following definitions, respectively: "deliberation. (...) the act or effect of deliberating 1 debate with the purpose of resolving some deadlock or making a decision 2 questioning, reflection in view of the resolution of a problem or the planning of an attitude 3 action taken after consultation or reflection (...)";"deliberation. (...)1 the act of deliberating; a discussion to study or resolve some subject, issue, or make a decision (...) 2 Internal examination; reflection, meditation. 3 Resolution, decision. (...) 4 Capacity to resolve, decide, deliberate; decision, resolution (...)".

[37]"deliberation 1 careful consideration and discussion; debate (...) 2 being deliberate(2); slowness of movement (...)". see Oxford advanced learner's dictionary of current English, 3. ed. de A. S. Hornby. Oxford: Oxford University Press, 1974., p. 228. Or yet "the act of deliberating; mature reflection: calmness: coolness (...)". see Chambers 20th century dictionary., new ed. de E. M. Kirkpatrick. Edinburgh: Chambers, 1983., p. 329. (emphasis ours)

This way, it is agreed that the word "deliberation" must be understood exactly in accordance with its historical dimension in a broader and more open manner than that which reduces it (even if as a perception) to "vote."[38] [39]

This is because the diffusion of the representative government as the expression of democracy in the modern world and, as a consequence, the voting as a form of exercising that, has caused that, in the evolution of the language, a process (the vote) started to be used as an equivalent to its purpose (the deliberation).[40]

In a way, a concept ended up to be equivalent to the other.[41]

For some, deliberation has been described as "a conversation in which the individuals speak and listen in a sequence," before making a collective decision. For others, it would be placed somewhere between the extremes of bargaining, which "involves the exchange of threats and promises" and the "discussion, which may refer to principles or facts and causalities."[42]

The question of definition seems to be so important to everyone that it is the great difficulty (at least initially) of those who are willing to debate the subject. For some authors, better than discussing the subject, is showing "the value of a discussion before making political decisions."[43]

---

[38]See, in both already mentioned dictionaries: "vote (...) 6 the act or process of exercising the right to this manifestation, and its result (...) 8 favorable opinion; approval (...)"; "vote (...) 1 the act of voting; ballot (...) 8 The way of expressing the will or opinion in an electoral act or assembly. 9 Suffrage, ballot (...)".

[39]Very different from English: "vote 1 (...) expression of opinion or will by persons for or against sb or sth, esp by ballot or by putting up of hands (...)". see Oxford advanced learner's dictionary of current english,3. ed. by A. S. Hornby. Oxford: Oxford University Press, 1974., p. 961. Or yet "(...) collective opinion, decision by a majority (...) the right to vote: that by which a choice is expressed, as a ballot (...)". See Chambers 20th century dictionary., new ed. de E. M. Kirkpatrick. Edinburgh: Chambers, 1983., p. 1458-1459. (emphasis ours).

[40]And not only in the political jargon.

[41]That's why it is used constantly in this sense in the Brazilian daily language. Deliberating in a condominium meeting, in an association, a student union is usually equivalent to voting. Also in the elections as a whole: when it is said that "the voters have voted in such or such way," we understand they "have deliberated."

[42]Austen-Smith apud GAMBETTA, Diego. "Claro!": an essay on discursive machismo. In: ELSTER, Jon. (Ed.). Deliberative democracy. Cambridge: Cambridge University Press, 1998. p. 19.

[43]FEARON, James D. Deliberation as discussion. In: ELSTER, Jon. (Ed.). Deliberative

Anyhow, going beyond the question of designation, what can be said for sure is that the idea of deliberative democracy, "making decisions after discussion between free and equal citizens" is being experienced again.[44]

The Habermasian[45] conception that democracy involves the whole process of transformation, and not only the simple aggregation of preferences," is there from deemed one of the best accepted positions within the democratic theory.

Trying to establish requirements

Amy Gutmann and Dennis Thompson,[46] in their attempt to provide fundaments to deliberativeness, establish requirements for the validity thereof.

These would be, first of all, the discussion made in public and their understandability. Add to that the need of the "constructive" discussion for a while, and, finally, a bit of dynamism.[47]

Some values seem to be presupposed in the supporters of deliberativeness, as long as "the deliberative democracy is an ideal of political legitimacy," namely the perception that those who take part in the deliberative processes "are committed with the values of rationality and impartiality" and, those affected by the decision to be actually taken, "may take part thereof in a direct manner or through their representatives."[48] [49]

Also, the willingness of those involved in the processes to be infused with dialogical mentality, as a necessary process for collective ar-

---

democracy. Cambridge: Cambridge University Press, 1998. p. 44.

[44]ELSTER, Jon. (Ed.). Deliberative democracy. Cambridge: Cambridge University Press, 1998. Introduction, p. 1.

[45]HABERMAS, Jürgen.. Direito e Democracia: entre facticidade e validade. 2. ed. 2 v. Trad. Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 2003. (Biblioteca Tempo Universitário, 101, 102). v. II, especially chapter VII, Política deliberativa: um conceito procedimental de democracia., where the grounds for this conception is shown. (p. 9-56).

[46]GUTMANN, Amy; THOMPSON, Dennis. Why deliberative democracy? Princeton: Princeton University Press, 2004.

[47]Idem, Ibidem, p. 3-6.

[48]BESSON, 2006, op. cit., p. xv.

[49]We understood "any" representative.

gumentation, [50] which allows to presuppose "the willingness to change their thoughts and preferences," if persuaded by the others.[51]

As for the persuasion used in deliberation, it must happen in a way to differentiate it from other communicative processes,[52] which means, trying to transform the preferences of others, in the quest for a "reasonable" consensus, obtained by means of "rational persuasion with strong arguments," supposing that the parties involved will seek "impartiality." This quest for impartiality is not compatible with the existence of "personal interests" or "strategic behaviors."[53]

Despite pointing out the "distinction between deliberation and polling," especially considering the fact that "the rational change of preferences differs from mere aggregation thereof," one must not exclude the possibility that on the course of the process, under certain conditions, the final decision takes place using the vote as well.[54]

This must be seen as a mere procedural factor, pointing out the differences between the two processes. The same observation serves for the occasional use of other methods, such as negotiation.[55]

We must say there are many others communicative theories applied to the political field, such as "roughly" aggregated, the "economic theories of democracy," the "pluralist theories," and also, those called "agonists theories."[56] [57]

Paul Ginsborg gives us examples of experiments of deliberative democracy effectively used worldwide, namely: the German *planungszelle* (planning cells), the American and English juries, the electronic town meetings, the consensus conferences, the US national

---

[50]James Bohman works on the concept and understands that "public deliberation is the dialogical process of exchanging reasons, with the purpose of solving problematic situations that cannot be solved without interpersonal coordination and cooperation". See the original text in BOHMAN, James. Public deliberation: pluralism, complexity, and democracy. Cambridge: MIT Press, 1996. p. 27.

[51]BESSON, 2006, op. cit., p. xvi.

[52]Idem, Ibidem, p. xvi. The authors mention as other communicative processes the "irrational persuasion" or the use of "coercion and threats," such as "negotiation or bargaining."

[53]Idem, Ibidem, p. xvii.

[54]Idem, Ibidem, p. xvii.

[55]Idem, Ibidem, p. xvii.

[56]Idem, Ibidem, p. xviii.

[57]MAÍZ, Ramón (Comp.). Teorías políticas contemporáneas. 2. ed. rev. e ampl. Valencia: Tirant lo blanch, 2009. (Colección Ciencia Política, 9.).

deliberation day (as proposed by James Fishkin), the experiments in Chicago regarding the governance of citizens in public education and police patrol, the *e-thePeople website* and the *Danish empowerment of parents in primary schools*.[58]

Ginsborg divides the experiments above into two major groups: the first where there is a selection process for the participants in the deliberative process. In this one we would have the German *planning cells*, the American electronic town meetings and the institution of the Brazilian jury.[59] In the second group, it is attempted to establish greater participation of the population.[60] In this one, the deliberative process is not ancillary or subsidiary, but tries to combine representative and participatory democracies.[61]

Indeed, these are experiments brought by the doctrine that in fact, can be complemented by other experiments around the world, including the Brazilian ones, such as the participatory budgeting and the establishment of communitarian committees in several fields, such as safety, education, health, and public space management.[62]

Conclusion

It is clear, but it is worth saying, that the challenging of democracy and the quest to improve it can run along several ways.

Within the strict scope of this paper, we tried to examine solely the discussion and the theoretical support of the way proposed with the deliberative perspective.

That is what we tried to research and present as a contribution

[58]GINSBORG, Paul. Democracy: crisis and renewal. London: Profile, 2008., p. 65.

[59]As expected, the author refers to the institution of the jury such as it is seen in the United Kingdom, in the USA, and other common law countries, such as Australia. He does not make reference to the institution in other countries, like brazil, but the parallel seemed to be plausible.

[60]The expression used by the author is "open-door policy". See GINSBORG, 2008, op. cit., p. 69.

[61]Idem, Ibidem, p. 69.

[62]BECAK, Rubens; LONGUI, João Victor Rozzati. A democracia participativa e sua realização - perspectiva histórica e prospecção futura: o marco civil para a regulamentação da internet no Brasil. In: XIX National Meeting of CONPEDI – Brazilian Board of Research and Graduation in Law. (Fortaleza, Jun 9-12, 2010)., p. 7017. See also BECAK, Rubens. Instrumentos de democracia participativa. In: Legal Sciences Magazine – UEM, v. 6, n.2, p. 143-153, Jul-Dec 2008b., p. 150-151.

to this field.

Several other possibilities of discussion and presentation of propositions exist in parallel, as for instance, those studies guided to reassessment of the representation upon improvement of the electoral or partisan process.[63]

Also, the proposals to accelerate the use of digital tools as a "quality gain" in the realization of the electoral system,[64] or, going further, the structuring itself of a specific democracy model, the so-called "digital" one.[65]

Particularly, we have been working and seeing how the virtual tools, and specifically, that allowed by the Internet and the social networks, can provide quality gains and increase the democratic decision spectrum.

We would like to reinforce that in this paper , as duly described in the Introduction hereof, these other subjects were not addressed. Apparently, for this purpose, the field is open for researchers that have interest.

We tried to restrict ourselves to the subject proposed, and so this paper is a historical exposition of how the democratic idea evolved, from the Modern Age, exploring its implementation and consecration, until it is perceived as the majority idea in the last century.

Having said that, we started working on what was called "criticism," taking more time with the rise and spread of the "semi-direct" model.

In the last chapter we showed how the use of this model has not closed the debate for unexplored dimensions, some with a historical strain going through revaluation these days.

---

[63]CAGGIANO, Monica Herman. Direito parlamentar e direito eleitoral. Presentation by Cláudio Lembo. Barueri: Manole, 2004. see also CAGGIANO, Monica Herman. Sistemas eleitorais x representação política (tese). São Paulo: USP Law School. 1988. 391p. From the same author, but dealing with a broader topic, "democratic re-architecture," see CAGGIANO, 1995, op. cit.. On the presentation of electoral systems and their types, the study by SILVA, Luís Virgílio Afonso da. Sistemas eleitorais, tipos, efeitos jurídico-políticos e aplicação ao caso brasileiro. São Paulo: Malheiros, 1999., and see ESPÍN TEMPLADO, 1997, op. cit.

[64]CAIRO CAROU, Heriberto. (Ed.). Democracia digital: limites y oportunidades. Madrid: Trotta, 2002. (Colección Estructuras y Procesos, Serie Ciencias Sociales). especially p. 9.

[65]ROMERO FLORES, Rodolfo; TÉLLEZ VALDÉS, Julio Alejandro. Voto electrónico, derecho y otras implicaciones. México: Unam, 2010.

It has been left far behind the reality expressed in Macpherson final sentence of his well known "The liberal democracy," [66] where he affirmed how rarefied were the "realistic" work on participatory democracy.

The Canadian author pointed out that its supporters tended to merely "proclaim the excellences of direct democracy, sometimes simply aiming at achieving an ideal anarchist society."[67] He made an important exception of Carole Pateman,[68] among other publications.[69]

The following decades revealed that the study and debate about the subject have only increased, becoming even very current.

In this paper we have reinforced this assertive, starting from a necessary digression on democracy of modern times, its slow evolution towards becoming the majority idea, and, for sure, the criticism and models formulated in the intended tendency of the study, as a way of improving it.

The debate resulting from the challenging of the dynamics of the Welfare State enabled what was called "recrudescence" of the criticism to the traditional representative model, resulting in the rise of alternative propositions, sometimes designated participatory, sometimes deliberative.

In all of them, it was clear the need for the establishment of a new paradigm in democracy, which is the increase of participation as a condition for the effective permeation thereof through the society.

This occurs both for those that observe semi-direct democracy and see the need to add new elements to it, and those that already conceptualize that we are going through an evolving participatory democracy.

Anyway, it is now a question, during this metamorphosis of democracy, of seeking solutions that privilege the construction of a plan rich in deliberativeness, under the patterns exposed in the previous chapter.

---

[66]MACPHERSON, C. B. A democracia liberal: origens e evolução. Trad. Nathanael C. Caixeiro (from the original in English The life and times of liberal democracy, Oxford University Press, 1977). Rio de Janeiro: Zahar, 1978. (Biblioteca de Ciências Sociais, Ciência Política).

[67]Idem, Ibdem, p. 118.

[68]PATEMAN,, 1970, op. cit..

[69]The works are Nomos, v. XVI. Participation in politics, organized by J. R. Pennock and J. W. Chapman (New York: s. e., 1975) and Participation in politics, organized by Geraint Parry (Manchester: Manchester University Press, 1972).

For this purpose, we noticed that the doctrine worries about the subject, and has sought to establish patterns where deliberativeness should manifest through.

Here, for sure, we must first dissociate from the quotidian language pattern, which, as addressed in the specific chapter, takes deliberation for vote, in a coarse assimilation.

Therefore, we come to some important conclusions listed as follows to make them clear:

a) There is no way we can disregard representative democracy (practiced by the political parties) because, despite all the criticism, no satisfactory system has been invented to replace it;

b) Put together, all the mechanisms to check the popular will through semi-direct tools (which characterizes, according to some people, the presence of another democratic model) have proved not to be sufficient to solve the deficit in the representative system, causing this way, and along the time, the creation of other mechanisms to extend it;

c) Furthermore, the preparation of new models seems to be common place in the doctrine produced along the past few years;

d) From this need arises the view that deliberativeness is a vital element to guide the decision making process; symbolically seen by some as already foreseen at the time of creation of the democratic doctrine;

e) Here arises the need for re-conceptualization of deliberativeness, with the attempt of establishing some requirements to verify it;

f) It is then certainly necessary that the practice subsidizes the construction of a possible unified theoretical model, inexistent so far;

g) The experiments existing in Brazil and other countries come to contribute to this assertive, as a series of mechanisms created along the past years seek to get the decision making end closer to the end that is directly affected thereby;

h) Here, we make a quick reference to the Internet and the social networks, giving the role they might come to play in this sense.

References

AFONSO DA SILVA, José. *Curso de direito constitucional positivo*. 33rd reviewed and updated ed. São Paulo: Malheiros, 2010.

ALEIXO, José Carlos Brandi. Democracia representativa. In: *Revista de informação legislativa*. a. 14, n.53, p. 67-92, Jan.-Mar.1977.

BECAK, Rubens. *A hipertrofia do executivo brasileiro*: o impacto da constituição de 1988. Campinas: Millennium, 2008a.

_____. *Instrumentos de democracia participativa*. In: Legal Sciences Magazine – UEM, v. 6, n.2, p. 143-153, Jul-Dec 2008b.

_____. *Reflexões sobre o evolver democrático rumo à sua otimização: a atualidade da "democracia deliberativa" e suporte teórico. Enfoque histórico evolutivo. Contribuição à Teoria Geral do Estado*. 2012. 173f. Tese (Livre-Docência) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2012

_____; LONGUI, João Victor Rozzati. A democracia participativa e sua realização - perspectiva histórica e prospecção futura: o marco civil para a regulamentação da internet no Brasil. In: *XIX National Meeting of CONPEDI – Brazilian Board of Research and Graduation in Law*. (Fortaleza, Jun 9-12, 2010).

BESSETTE, Joseph R. *The mild voice of reason: deliberative democracy and American National Government*. Chicago: University of Chicago Press, 1994.

BESSON, Samantha, MARTÍ, José Luis. *Deliberative democracy and its discontents. Hampshire*: Ashgate, 2006.

BLONDIAUX, Loïc. *Le nouvel esprit de la démocratie*: actualité de la démocratie participative. France: Seuil, La République des Idées, 2008.

BOHMAN, James. *Public deliberation*: pluralism, complexity, and democracy. Cambridge: MIT Press, 1996.

BONAVIDES, Paulo. *Ciência política*. 10. ed. São Paulo; Malheiros, 2001a.

_____. *Teoria constitucional da democracia participativa*. São Paulo: Malheiros, 2001b.

_____. *O sistema representativo e a democracia semi-direta*. In: CONCHA CANTÚ, Hugo A. (Coord.). *Sistema representativo y democracia semidirecta*: memoria del VII Congreso Iberoamericano de Derecho Constitucional. Mexico: UNAM, 2002.

CAGGIANO, Monica Herman. *Direito parlamentar e direito eleitoral*. Presentation by Cláudio Lembo. Barueri: Manole, 2004.

_____. *Sistemas eleitorais x representação política* (tese). São Paulo: USP Law School. 1988.

CAIRO CAROU, Heriberto. (Ed.). *Democracia digital*: limites y oportunidades. Madrid: Trotta, 2002. (Colección Estructuras y Procesos, Serie Ciencias Sociales).

CARNEIRO, Rommel Madeiro de Macedo. Teoria da democracia participativa:

análise à luz do princípio da soberania popular. In: *Revista jurídica*. Brasília. v. 9, n. 87, Oct-Nov. 2007., p. 25-34.

Available on : <http://www.planalto.gov.br/ccivil_03/revista/revistajuridica / index.htm>. Access on Nov 25 2011.

COHEN, Joshua. *Deliberation and democratic legitimacy*. In: HAMLIN, Alan; PETTIT Philip. (Eds.). *The good polity*: normative analysis of the State. Oxford: Basil Blackwell, 1989.

_____. *Democracy and liberty*. In: ELSTER, Jon. (Ed.). *Deliberative democracy*. Cambridge: Cambridge University Press, 1998.

EARLE, Edward Mead. *Deliberation and constitution making*. In: ELSTER, Jon. (Ed.). *Deliberative democracy*. Cambridge: Cambridge University Press, 1998.

ELSTER, Jon. (Ed.). *Deliberative democracy*. Cambridge: Cambridge University Press, 1998.

ESPÍN TEMPLADO, Eduardo. *Una reflexión sobre la representación política y los sistemas electorales en las democracias constitucionales*. In: RUIZ-RICO RUIZ, Gerardo José; GAMBINO, Silvio (Coords.). *Formas de gobierno y sistemas electorales*: la experiencia italiana y española. Valencia: Tirant lo blanch, 1997.

FEARON, James D. *Deliberation as discussion*. In: ELSTER, Jon. (Ed.). *Deliberative democracy*. Cambridge: Cambridge University Press, 1998.

FISHKIN, James S. *Democracy and deliberation*: new directions for democratic reform. New Haven, London: Yale University Press, 1991.

GAMBETTA, Diego. *"Claro!"*: an essay on discursive machismo. In: ELSTER, Jon. (Ed.). *Deliberative democracy*. Cambridge: Cambridge University Press, 1998.

GARCÍA GUITIÁN, Elena. *Representación y participación*: la rendición de cuentas en las democracias contemporáneas. In: MENÉNDEZ ALZAMORA, Manuel. (Ed.). *Participacíon y representación política*. Valencia: Tirant lo blanch, 2009.

GARGARELLA, Roberto. *Crisis de la representación política*. México: Fontamara,1997.

GREPPI, Andrea. *Concepciones de la democracia en el pensamiento político contemporáneo*. Madrid: Trotta, 2006. (Colección Estructuras y Procesos, Serie Derecho).

GUTMANN, Amy; THOMPSON, Dennis. *Why deliberative democracy?* Princeton: Princeton University Press, 2004.

HABERMAS, Jürgen. *Direito e Democracia*: entre facticidade e validade. 2. ed. 2 v. Trad. Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 2003.

HAMILTON, Alexander; MADISON, James; JAY, John. *The federalist*. In: Ameri-

can State papers. Ed. Willian Benton. Chicago, London, Toronto: Encyclopædia Britannica, 1952.

HARRISON, Ross. *Democracy*. London, New York: Routledge, 1995.

HELD, David. *Democracy*: from city-states to a cosmopolitan order? In: HELD, David. *Prospects for democracy*: north, south, east, west. (Ed.). Stanford: Stanford University Press, 1993.

MACPHERSON, C. B. *A democracia liberal*: origens e evolução. Trad. Nathanael C. Caixeiro (from the original in English The life and times of liberal democracy, Oxford University Press, 1977). Rio de Janeiro: Zahar, 1978. (Biblioteca de Ciências Sociais, Ciência Política).

MAÍZ, Ramón (Comp.). *Teorías políticas contemporáneas*. 2. ed. rev. e ampl. Valencia: Tirant lo blanch, 2009.

PATEMAN., Carole. *Participation and democratic theory*. Cambridge: Cambridge University Press, 1970.

ROMERO FLORES, Rodolfo; TÉLLEZ VALDÉS, Julio Alejandro. *Voto electrónico, derecho y otras implicaciones*. México: Unam, 2010.

SCHAEFER, David Lewis. *"Deliberative democracy"*: the transformation of a political concept. In: SCHAEFER, David Lewis. *Democratic decision-making*: historical and contemporary perspectives. New York: Lexington, 2012.

Law And Democracy Between Political Paradigms In Conflict

José Alcebíades de Oliveira Junior[1]

Abstract: The research intends to discuss in this "special workshop" the resulting conflict expressed, on one hand, by liberal doctrines, and on the other hand, by communitarian doctrines in the conformation of sociopolitical order. From this conflict derives a series of questions about cultural pluralism and democracy, as well as it is translated into several controversial issues related to human rights.

Keywords: Law and Deliberative Democracy - Plural Citizenship - Human Rights and Fundamental Rights

Introduction

In this paper, we continue our discussions about the importance of law and democracy - especially deliberative - while essential institutional dimensions for a free social solidarity, therefore, as inherent to the protection of fundamental rights in its various dimensions. However, according to our initial hypothesis for this work, these institutions (law and democracy) are permanently under tension, which are allocated among policy paradigms in conflict, among which stand out Liberalism and Communitarianism.

And this tension has been exacerbated by recent phenomena and expressed by the enormous increase in the share of "social movements", that spontaneous or articulated by internet, express a dissatisfaction that is not yet fully diagnosed, but it indicates broadly about a distrust with the nation - states with representative, democratic or dictatorial systems,

[1] Professor at the Faculty of Law of the Federal University of Rio Grande do Sul; Coordinator of Postgraduate Program in Law - PPGDir - UFRGS - Researcher with productivity scholarship from CNPq.

and that would be too committed to the international economic and operating systems driven by various elements of corruption[2]. So, indeed, there seems to be a great necessity of civil society participation in the debates inherent to different views on complex issues and decisions and destinies of nations.

Therefore, our academic research has led us by the ways of what Jürgen Habermas has shown as "deliberative democracy" [3] . In his "Law and Democracy, between facticity and validity" *(free translation, check the original title)*, Chapter VII, he shows how he sees the "deliberative politics - as a concept of procedural democracy":

> The analysis of the genesis and legitimacy of law was focused on legislative policy, leaving in the background the political processes. And my theory of law describes this politics as a process that involves negotiations and forms of argument. In addition, the legitimate creation of law depends on demanding conditions, derived from the processes and assumptions of communication, where the ratio, that introduces and examines, assumes a procedural figure [free translation] 4 .

We can see that Habermas' proposal tries - as he emphasizes – to overcome the positions -sometimes radical - of some liberals and communitarians about priority values. It happens especially because in post-traditional or post-metaphysical societies there is an increasing fragmentation of the idea "goodness". This makes necessary, first of all, a 'suitable arena' for confrontation of arguments to be considered a priority.

There are many critical analyzes of Habermas' efforts, who, with his proceduralism, ends up being accused of "liberal" by communitarians. This communitarians, on the other hand, when they try to protect

---

[2] In Brazil, these movements started in June, 2013. About corruption, we recommend "Patologias Corruptivas nas Relações entre Estado, Administração Pública e Sociedade: causas, consequências e tratamentos", de Rogério Gesta Leal, Santa Cruz do Sul: EDUNISC, 2013.

[3] "Teoria do Direito e Democracia Deliberativa - A terceira via de Habermas". Diálogo e Entendimento, vol.3. Rio de Janeiro, GZ Editora, 2011, p.37- 46 is a important book about this theme. We will bring ideas that are exposed in the book, but with the view that deliberative democracy can offer a structure able to deal with political paradigms in conflict.

[4] Cfe. Jürgen Habermas, "Direito e Democracia", vol. II, p. 09.

cultural interests of certain excluded groups, turn out to be considered against the idea of freedom.

But the main spot of this kind of democracy – that is the establishment of an effective communication between the state and civil society – more and more must to be thought, although day-by-day it is difficult to achieve.

Social movements, spontaneous or not, from streets' protests and from computers are at least saying that: there is an insufficiency of traditional ideologies, mainly because the official institutions are built by these ideologies and they are speaking from them and their own interests. The guidelines have been expanded …

Undeniably, explanations for the serious institutional worldwide crisis that happens nowadays and that are facing the powers in many countries, according to the movements participants, come from prevailing dissatisfaction with a political system that has aimed solely its self-reproduction. In other words, the crisis of politics and political systems ('flags' of political parties) that were emerged in modernity -and now they serve only as rhetorical arguments to *the struggle of power for power* - has given opportunity to the most gigantic pit of corruption.

The law itself hasn't a genuine way to survive only on its own fictions and fantasies. In this sense, as I have said in another paper[5], mentioning Professor, Nytamar de Oliveira Junior[6], from PUC-RS,: "jurists were concerned with a constitutional reading of law, aiming only to understand the restricted competence and closed correlation between powers, in order to not defraud a purported social contract 'a priori' of power" (*free translation*). However, post-traditional societies, that have requirements beyond economic needs, have increasingly placed the importance of civil society participation for the construction of institutional and constitutional legitimacy.

For this reason, it is found in Habermas' book "La necessidad de revisión de la izquierda", a concern for rescue philosophy of law from hands of jurists and give it to philosophers' hands, intending to demonstrate why the right should not be seen solely as a superstructure that serves the government, but that through an expanded politi-

[5] "Teoria do Direito e Democracia Deliberativa - A terceira via de Habermas". Diálogo e Entendimento, vol.3. Rio de Janeiro, GZ Editora, 2011, p.37-46..

[6] "Teoria discursiva do Direito e democracia deliberativa segundo Jürgen Habermas", in Correntes contemporâneas do Pensamento Jurídico, orgs. Anderson V. Teixeira e Elton Somensi de Oliveira. SP:Manole, 2010, p. 60.

cal philosophy view it could be understood as a privileged instrument of democracy, and able of realizing the interests both from "right" and "left" political sides, in other words, it means as a structure able to give "vent" to the different interests of plural societies, multicultural and post-metaphysical. Notice that in one of his writings about "Teoría y Política" Habermas says that:

> Otfried Höffe has the merit of regain a kind of ground that, since the days of Hegel, philosophy has been given space almost without fighting against the jurists. With the interruption of the traditional Aristotelian philosophy during the 19th century, with the transition of philosophy of law to society's theory, with the irruption of historicist and hermeneutic approaches in the normative sciences, with the arising of social sciences (...) with the distinction of a legal doctrine that in its oscillations between conceptual jurisprudence and historicisms, between realism and legal positivism, tried to put under control, deeper and deeper, a subject that was becoming more and more complex, The philosophy of law and of the state has been placed in the periphery of the law schools. Criminalists and constitutionalists were made with what has been before field of philosophers, with an additional subject that actually wasn't taken in serious" 7 [Free translation].

This is the kind of dialogue that we need and that we are talking about. It's unbelievable, but theoretical and philosophical disciplines still remain on the periphery of law schools. It remains as a reductionist view of legal science, as if the law could be explained, understood and be self-sufficient in their institutionalized legal rules (rules and principles). Habermas, especially with its proposal for deliberative democracy, tries to put law not only as a way to solve conflicts, but also as a subsystem able to put itself at borders of jurists and social scientists, and at borders of public sphere interests too. He seeks to associate technique to the political and moral construction of a legal science - and this is a key issue that still needs be thorough.

1. Needed Questions For A Deliberative Democracy

The establishment of a political or deliberative democracy, because it is a form of social organization that could safely be deduced

[7] "La necesidad de revisión de la izquierda", Habermas, p. 101.

from the current constitutions, and as we already said, can be an important addition for effective relationship between the legal authority and authority based on citizenship of individuals and civil society as a whole in democratic states law. Nevertheless, although the supremacy of constitutional orders should be respected, there are many demonstrations for and against the so-called deliberative democracy, both at the theoretical (conceptual) or in practice (empirical and pragmatic). We should go to Professor Leonardo Avritzer[8] that draws attention to the following aspects:

a) At which points deliberative democracy (DD) may represent an overcoming of traditional views of democracy? As Avritzer:

> First, it is an attempt to overcome an aggregative conception of democracy centered in voting (SHUMPTER, 1944 SARTORI, 1994), and secondly, the DD identifies the political rationality with the idea of change and justification for preferences and thirdly, the DD presupposes a principle of inclusion (HABERMAS), and, fourthly, the DD involves the idea of an institution building based on the assumption that the individuals' preferences for large discussion should imply the demand for institutions capable of effecting such preferences (COHEN, 1997) (*free translation*).

And in the opinion of Avritzer, the last one would be the center of the deliberative democratic canon[9] .

b) Of the various issues surrounding the discussion of deliberative democracy, Angela Cristina Salgueiro Marques[10] highlights a fundamental issue that still needs to be worked on and 'has to do with' the question: 'if a deliberative democracy would (even) able to establish forms of communication that could guarantee the legitimacy of public policies, creating discursive (effective) articulations between "institutional discourse" and "the civic conversation among citizens," thesis proposed by Habermas. In other words, what are the possibilities of effective communication power turn into administrative power?

On the other hand, among the observations about the difficulties in the practical implementation of deliberative democracy, Amy Gutmann and Dennis Thompson studied an interesting case regarding deliberation about health care in the UK, which rightly expressed a conflict

[8] Conforme prefácio no livro "A Deliberação Publica", Ângela Marques (org.), 2009.
[9] "A Deliberação Pública", Marques, op.cit.p.07 e 08
[10] "A Deliberação Pública", Marques, op.cit.p. 12.

between a National Institute of Clinical Excellence, created by the government and whose role was to provide access to treatments and clinical guidelines for use by the National Health Service, that has been criticized, in its deliberations, by a forum also on the same topic created by the House of Commons. It shows that decentralization of decisions can generate additive consequences, in other words, new conflicts between government, legislature and executive in the face of the real concerns of civil society.

Advancing a little more on the questions now emphasized, it is possible to say that in Brazil, since the Constitution of 1988 and especially since the nineties, there were discussions and functioning of Advisory Councils on various topics, in civil, political and social sphere. This is the case about the creation of Ministries of Education, Health, Safety, Environment, Cities and many others, advisory councils to establish public policy interest of the public sphere. Unfortunately, until the moment what we can see is that only a few subjects are taken to the allocation decisions of these councils, getting, in most cases, the most important issues related to infrastructure and these ministries, decisions monocratic with closed doors and carried out by chief executives of ministries.

On the other hand, it is to record that also in the specific field of operation of the judiciary in Brazil, now checks for institutes that also lead to a more effective participation of citizens in the fortunes of his justice, and may be cited as examples "Public Hearings" on complex subjects and reasonable dissent, like abortion, etc., and the figure of "amicus curiae" (friends of the court), that makes themselves represented, thus several important segments interested in the legal decisions of these cases.

Anyway, it is in possession of these assumptions that we intend to advance the debate on the deliberative democracy should go on. In our case, we are in the moment of a deeper contact with the books of some important authors about the theme. With no doubt, Habermas is among them. He is a complex author, but well-known and respected; so we want to see some points about his work.

2. Deliberative dzemocracy between Liberalism and Comunitarians in Habermas' View

As it is in the preceding text, succinctly we can say that Habermas addresses the issue of deliberative politics from a description of a

battle (or perhaps a dialectic) between the issues raised by empirical and normativists models of democracy, emphasizing the problem of neutrality as the center of the democratic process, forth discussing a normative position for deliberative politics while overcoming the classical liberal and republican theories of democracy.

Thus, although he is aiming at the construction of an ideal model of communicative and participatory democracy, his proposal wants to talk about issues of empirical relevance for democracy, regarding the nexus between power and right, that can be found "in the pragmatic presuppositions theoretically inevitable that accompany the introduction of the legitimate right" (free translation) , as well as those who express themselves "by institutionalizing the practice of self-determination for the corresponding private persons" [11] (free translation).

It is important to realize that one of the key points of Habermas' deliberative democracy can be found in the need to move from the mere critique of modern reason in crisis (e.g., concern with the unequal distribution of capital), in search of a revitalization of modern reason through dialogic deliberative practices - that would enable us to overcome the liberal and republican radicalism in other aspects (cultural, e.g.). Thus, a theory of discourse is relevant as a tool that allows not only a discussion of the content of rules for strategic purposes, but also as a possibility to increase the capacity for self-reflection and intersubjectivity of subjects. So, Habermas leads his debate with liberal theories, that aim solely to ensure the possibility of a free clash of ideas and that emphasize the economic side, but he also overcomes the communitarian visions that, in trying to rescue the idea of sovereignty community, are overloaded with a "certain political ethics", considered insufficient and problematic in face of complex and fragmented societies. What this societies most need is freedom, in order to enhance "real" integrative processes - and not just "artificial", as well as forms of articulation and sovereign organization, private and public, in addition to an assumption social contract .

In order to synthesize properly, we want to bring a Habermas' quote:

> [...] the theory of discourse assimilates elements from both sides (liberal and communitarian), integrating them into the concept of an ideal procedure for deliberation and decision making . This democratic process establishes a link between internal pragmatic considerations, compromis-

[11] "Direito e Democracia", op.cit., p. 10, 11, passim.

> es, discourses of self-understanding and speeches of justice, supporting the assumption that it is possible to get rational and equitable results. In this line, the practice ratio goes from universal human rights or concrete ethics of a certain community to the rules of discourse and forms of argumentation, that draw them normative content of the basis of validity of acting directed by understanding, and ultimately, the structure of linguistic communication and irreplaceable order of communicative socialization. (free translation) [12].

As we have said in other researches, Habermas' discussion helps us to clarify many distinctions of his procedural deliberative democracy in the face of proceduralists classical theories, as Norberto Bobbio's [13] and Robert Dahl's theories, that we intend to continue working . Although Habermas suffers, as we have determined, the charge of be an idealist, the fact is that his starting point, based on empirical's and normativist's theories, notes that "the nexus between law and constitutive power acquires empirical relevance by two ways : "through the pragmatic assumptions inevitable theoretically, that accompanying the establishment of legitimate law, and by institutionalizing the practice of self-determination for private people, adding up, then, a necessary discussion of the ideal of establishing a communicative discourse". Well, by one side, the feeling that things are not good, and on the other hand, the search for symbolical places where things can be possible, as discussions about deliberative democracy participation in all decisions, and pragmatic ways to show to the government.

To conclude this topic, considering the text of Professor Nythamar Fernandes de Oliveira Junior said, it is important to say that:

> Increasingly now, it is procedure to understand the legitimacy of deliberative processes involving participation ever more inclusive and diverse of actors in decision-making processes - not just by voting, by constitutional rights or established procedures and prescribed by legal encodings . By deliberation, the conception of communicative action itself is enlarged and always able to be revisited, innovated and rectified. The same paper, by the media and

[12] "Direito e Democracia", Habermas, op.cit. p. 19. See also page 21 about "theory of discourse".

[13] About Norberto Bobbio book, nowadays well-known in Brazil, we would like to say that our researches with CNPq try to reconstruct dialogs, real and imaginative, where Bobbio and Habermas have some themes, as Democracy, Human Rights and International Relations.

> by social groups with well-defined interests, also turn to be revisited, as the deliberation remains concurrently in broad and narrow reflective equilibrium , i.e. , not only to translate personal preferences and identity , but also in the conceptions more complex and, in a long term , such as values and moral judgments , religious and historical horizons of self-comprehension [14](free translation).

3. Human And Fundamental Rights And The "Inclusion Of The Other"

As already announced by Leonardo Avritzer[15] , the issue of inclusion is the key to the deliberative democracy. Habermas gives ample attention to this issue, trying to treat it from varied nuances in the book "A Inclusão do Outro" (*The Inclusion of the Other, free translation*)[16].

In the book "A Inclusão do Outro" Habermas states that his studies, collected and presented immediately after those held in "Direito e Democracia – entre faticidade e validade" (1992), carry a needed deepening of his proposal of deliberative politics . And it is clear that his writings have a special "color" due to his institutional concern with democracy and its relations with the theme of "recognition" in the Rule of Law.

In these texts, which will be further investigated in the sequence of our research and writings, what we can see, beyond the rescue of the theme of theory of discourse as a spot to the deliberative democracy, is an accent is quite significant in contemporary constitutionalism, while an instrumental and a document that expresses the most rational way of law until then. These texts also supports a new discussion about the problematic issue of neutrality procedure of political and legal power that, in times of multiculturalism, should be understood as a concern more located in civil society (or public sphere *lato sensu*), than a true empirical problem - pragmatic forms of action of the constituted powers

---

[14] "Teoria discursiva do direito e democracia deliberativa segundo Jürgen Habermas", Nythamar de Oliveira Junior in "Correntes contemporâneas do pensamento jurídico", op.cit. p. 70.

[15] "A Deliberação Pública", op.cit., p. 07 e segs.

[16] "A Inclusão do Outro", studies of political theory, pages. 237 to 275, where is exposed a discussion with Charles Taylor, one of the most important communitarianism defensors. See also that Habermas has an important discussion with Nancy Fraser and Axel Honneth, about necessary implications about redistribuition and acknoledgment, in the book "Redistribution or Recognition?", London: Verso, 2003.

(legislators, judges or officials).

However, his ethical proceduralism[17] leads him to critics against one of the fathers of multiculturalism, Charles Taylor, who Habermas accuses of proposing the defense of collective interests or minority groups at the expense and dangerous restrictions of civil liberties recently gained, but this point overpasses our original intention. In fact these collective defenses lead the well-known "affirmative actions" (as job vacancies for some ethnical groups or people with physical limitations), that many times are misunderstood. Although Brazilian National Congress has tried to take part into this discussion, the fact is that this topic is not a consensus in civil society.

4. Critics Against Habermas' Deliberative Democracy

Habermas' theories have been criticized by many authors. One of them is Juan Fernando Segovia[18], Argentinean researcher and professor at the University of Mendoza , and the other is from the Brazilian professor Nythamar Fernandes de Oliveira Junior, from Pontifícia Universidade Católica do Rio Grande do Sul (PUC-RS), who has a specific text about it[19]. We will finish this topic with some sayings about deliberative democracy and law reality in Brazil.

Segovia called Habermas' thesis as "an utopia with pragmatic traces that end in a democratic utilitarianism self-satisfied" (free translation). Among the considerations that he does, he calls the proposal for deliberative democracy as "the utopia of the secular city, the City of God on earth, man's city transformed by men themselves" *(free translation).*

In other words, would be contained in the proposal of Habermas, an apology for the modern consciousness revolution of men and it would manifest itself in several ways:

> historical consciousness that breaks with the traditionalism of the continuities generated spontaneously; understanding of political

[17] See "Dimensões políticas da justiça", organized by Leonardo Avritzer, Newton Bignotto and others, that in "Justiça como procedimento", by Thomas da Rosa Bustamente, it mentions the procedimentalism of Habermas as pure, adding Theory of Justice, by John Rawls as a procedimentalism, but not as pure as Habermas. Page 105.

[18] "Habermas y la democracia deliberativa – una utopía tardo moderna", Juan F. Segovia, Madrid: Marcial Pons, 2009.

[19] "Teoria discursiva do direito e democracia deliberativa segundo Jürgen Habermas ", Nythamar Fernandes, In "Correntes contemporâneas do pensamento jurídico", op.cit.

> praxis under the sign of self- determination; confidence in rational discourse through which should legitimize themselves any form of political domination 20 .

From Segovia's considerations, we could say that deliberative democracy to Habermas crave a "revolution without weapons and without disruption to the existing bourgeois system", unlike other classical sociologists , among which stands out Karl Marx .

Habermas' dream would still for Segovia' thought, as the German author wants to perform a "revolutionary" bourgeois revolution, to overcome the strategic interests of class without confrontation, therefore, as if it were possible to transform the world from within (in an intersubjective way). As the commentator says , "Habermas is dreaming - as before Marx did - in a public structure not dominated by the power, free of domination; the hope recognizes Habermas, does not seem realistic, but properly understood , would not be utopian in the bad sense of the word […] ". The difference with Marx would be obvious: do not think of revolution, Marx understood only way for a free society without domination[21].

On the other hand, the observations of Nythamar Fernandes can be summarized as it follows:

> a. the problem of proceduralism and neutrality in a theory of law and democracy , b . the problem of universalism as opposed to particularistic and communitarian models and, in what I consider an immanent critique of the Rawls' universalism (in particular, in its pure proceduralism) c. the problem of egalitarianism , as opposed to possessive individualism and , in the case of Habermas, as an alternative to models of solipsistic and monological consciousness philosophy or philosophies of the subject . The question of the other concrete, the otherness of the other and their recognition , developed in more recent writings , attest to the importance and the postmodern challenge beyond criticism developed in defense of Enlightenment modernity (...) 22 .

Observe that, in general, the comments of Professor Nythamar

[20] "Habermas y la democracia deliberativa – uma utopia tardo moderna", Segovia, op.cit.p. 90 e 91.

[21] "Habermas y la democracia deliberativa – una utopia tardo moderna", Segovia, op.cit. pag. 98, passim.

[22] "Teoria discursiva do direito", Nythamar Fernandes, op.cit. p. 71

circumscribe themes have also treated by Avritzer, Rogério Leal [23], Segovia and ourselves throughout our research. Nevertheless, it is important to keep on discussing the first theme and observe a difficulty that arises from the incessant Habermas' attempted to remain within a deontology rather than teleology, while it cannot be admitted as democracy or any placement no positioning. There exist, unless better judgment, one at least apparent contradiction between formal proceduralism and absence of materiality to be achieved by democracy, or some objective ethical material, as we understand the Nythamar's observations [24].

Also, the second theme is commented by Nythamar in a sense which we agreed and he notes that "Habermas accepts the major premises of communitarian criticism since it does not incur in a naturalistic fallacy or reverse the hermeneutic circle that characterizes our inability to dispense pre-understandings of the world of life, as if the ethics, the social ethos, *modus vivendi* could justify or socialization in normative terms the empirical data of ordinary life" [25] .

Finally, the third observation deserved a consideration of Nythamar that seems very appropriate:

> Unlike the possessive individualism of the Hobbesian model and different versions of libertarianism, the deliberative democratic conception of justice incorporates a conception of justice as fairness and not as arising from a rule between conflicting interests. Nothing is worse than approaches so liberal models in Rawls and in Habermas to a version neoliberal or libertarian who advocates a minimal state 26 .

And the most interesting in the analysis of Nythamar is his statement - with which we fully agree - that Habermas cannot be inserted into radical egalitarianism mode of communitarians (see the strong criticism that Habermas performs against Charles Taylor), as well as his proposal cannot be seen as a third way social democratic conception that vehemently defends the state of well-being, why is not it that his theory of

[23] Ver seu "A democracia deliberativa como nova matriz de gestão pública: alguns estudos de casos". Rogério Leal (Org.), Santa Cruz: Edunisc, 2011.

[24] "Teoria discursiva do direito e democracia deliberativa segundo Jürgen Habermas ", Nythamar Fernandes, op.cit., p.72

[25] "Teoria discursiva do direito...", Nythamar, *op.cit,.* p. 73.

[26] "Teoria discursiva do direito...", Nythamar, *op.cit.,* p. 75.

deliberative democracy is proposed [27].

Final Considerations

The theory of law and democracy, therefore, cannot be confined only to a territory dominated by jurists. Philosophers, sociologists and political scientists also have much to say about the role transcendental intersubjective and especially communicative law and democracy. In this sense, we reproduce some words of Habermas on the subject and that we have already highlighted in our other works:

> the normative self-understanding of deliberative politics demands for the legal community a way of social collectivization, this same mode of social collectivization, however, does not extend to the whole of society in which it lodges the political system consists of state - legal way . Also in itself comprehension, the deliberative politics remains as a constitutive element of a complex society in which every disclaim assume a normative point of view as the theory of law. In this sense, the reading of democracy made according to the theory of discourse can be linked to a distanced approach, from the social sciences, which the political system is neither the top nor the center of society , much less the model that determines its structural mark, but a system of action alongside others 28.

So, as we have already said, some egocentricity has pierced in a dangerous way to the analysis of political and legal dimensions of contemporary societies . As highlights Höffe, the value "justice" cannot distance himself or policy or law. And as he has shown, the jurists s come in a progressive transformation of attitudes, in a gesture of self-understanding of the shortcomings of classical positivism . Without wishing to execrate great thinkers such as Hans Kelsen, for example, one of the masters of constitutional jurisdiction, what has been able to be realized among others works of John Rawls, Herbert Hart and Ronald Dworkin is that science no longer holds legal fictions with auto-sufficiency and transcendent . It is need to seek some sort of version of a "full right" sitting under a normative pragmatics of communication, as says the important thinker Tércio Sampaio Ferraz Junior [29].

---

[27] "Teoria discursiva do direito...", Nythamar, op.cit., p. 75.

[28] "A Inclusão do Outro", op.cit..p. 292.

[29] "Teoria da Norma Jurídica, ensaio de pragmática da comunicação normativa", Tércio

It is certain, however, that we live in the era of so-called "linguistic turn" and has placed communication as the road more suitable for human understanding, certainly much more than assumptions values shared by all, especially in the current post- traditional societies in which conceptions of good are fragmented. And this has been the challenge of widening horizons that we have pursued in interesting philosophers with legal interests, as in Otfried Höffe and Jürgen Habermas.

It must be said finally that, when Luigi Bobbio [30], son of Norberto Bobbio , talked at UFRGS in June 7th, 2006, clarified points such as that such proposals are actually considered by many as idealistic, and perhaps as in the fable of " Wolf and the Lamb", we end up being devoured. However, with an important modification in the framework traditionally painted: "we can even be eaten, but not without a serious and compelling argument part of the devourer".

We also believe the Brazilian reality has begun to provide the tools for greater participation by the various advisory councils in the various ministries as well as civil society has begun to show great strength and vehemence with your real desire to discuss paths and decisions that involve them. Therefore, the institutions are under a very critical look and adjudicative, demanding the reform policies such that only appear on paper as concerns.

In this sense, what Frank Cunningham can be approximated Habermas' theory. He said: "institutions and legitimate decisions should be seen as those with which those involved must agree on a democratic procedure 'if they can participate as free and equal in the discursive formation of will'" [31] . The feeling is that we have not reached this condition. Let us consider, however, the fact that the "noise of the streets" is increasingly deafening and we must move quickly to build institutions that enable social participation more effective.

References

ALEXY, Robert. **Teoría del discurso y derechos humanos**. Bogotá: Universidad Externado de Colombia, 2005.

BOBBIO, Luigi. **Democracia Deliberativa**. Palestra na UFRGS. Tradução Mar-

S. Ferraz Junior. RJ: Forense, 1978.

[30] There is an article about it, translated by Marcelo Sgarbossa, post-graduation alumnus of UFRGS.

[31] "Teorias da Democracia, uma introdução crítica", Frank Cunningham, 2009, p.194.

celo Sgarbossa. Junho de 2006. (manuscrito).

CUNNINGHAM, Frank. **Teorias da democracia:** uma introdução crítica. Tradução Delmar José Volpato Dutra. Porto Alegre: Artmed, 2009.

HABERMAS, Jürgen. **A inclusão do outro:** estudos de teoria política. São Paulo: Loyola, 2002.

HABERMAS, Jürgen. **Direito e Democracia. Entre faticidade e validade**. Trad. Flávio B. Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997.

HABERMAS, Jürgen. **Between Facts and Norms** - Contribucions to a Discourse Theory of Law and Democracy. Trad. William Rehg. Cambridge: Massachusetts, 1998.

HÖFFE, Otfried. **Justiça Política -** Fundamentação de uma Filosofia Crítica do Direito e do Estado. Trad. Ernildo Stein. Petrópolis: Vozes, 1991.

LEAL, Rogério (Org.). **A Democracia Deliberativa como nova matriz de gestão pública:** alguns estudos de casos. Santa Cruz: EDUNISC, 2011.

MARTÍ, J. Luis. **La República deliberativa.** Madrid: Marcial Pons, 2006.

MARQUES, Ângela Cristina Salgueiro (Organização e tradução). **A Deliberação Pública e suas dimensões sociais, políticas e comunicativas.** Belo Horizonte: Autêntica Editora, 2009.

OLIVEIRA JUNIOR, José Alcebíades. **Sociologia Judiciária.** Brasília: STJ ENFAM, 2012. (no prelo)

OLIVEIRA JUNIOR, Nythamar Fernandes de e SOUZA, Draiton Gonzaga. **Justiça e Política**, Homenagem a Otfried Höffe. Porto Alegre: EDIPUCRS, 2003.

OLIVEIRA JUNIOR. Nythamar Fernandes de. **Teoria discursiva do Direito e democracia deliberativa segundo Jürgen Habermas.** *In* Correntes Contemporâneas do Pensamento Jurídico. São Paulo: Manole, 2010, p. 61-81.

SEGOVIA, Juan Fernando. **Habermas y La democracia deliberativa:** una utopia tardo moderna. Madrid: Marcial Pons, 2008.

TEIXEIRA, Anderson Vichikeski e OLIVEIRA, Elton Somensi. **Correntes Contemporâneas do Pensamento Jurídico.** São Paulo:Manole, 2010.

Law, Democracy And Public Reason:
An analysis of constitutional justice from the thought of John Rawls.

Bruno Camilloto Arantes[1]
Vanessa Nunes Kaut[2]

Abstract: The book "The theory of justice" by John Rawls thought influenced the legal, political and philosophical discussion in the contemporary great opportunity Anglo-Saxon world and in major Western countries. The construction of a thought turned to the reasons for a democracy in the midst of a pluralistic society is based on the central theme of justice. For Rawls justice is the first virtue of social institutions by which it is possible to reorganize the society. Therefore, justice is a basic principle of any society. The search for justice in the work of Rawls, is based on the question of the social contract and leads, invariably, the theory of the constitution. This essay aims to present a reading of the theory of the constitution's in light of the theory of justice Rawls trying to assess whether the principles of justice submitted by the American author serve as the basis for a constitutional democracy.

Keywords: Law, democracy, justice

1 Introduction

The American philosopher John Rawls presents in his book *A Theory of Justice* an understanding of justice, stating that this is the first virtue of social institutions. The author relates the concept of justice to the whole of human life by asserting that one should rest on two core principles: freedom and equality. Rawls defines such principles in an attempt to provide a reflection on the organization of society (RAWLS, 2000b).

Rawls sees society as a cooperative venture where participants

[1] Federal University of Ouro Preto - Brazil. E-mail: brunocamilloto@gmail.com.
[2] Federal University of Ouro Preto - Brazil. E-mail: vanessakaut@gmail.com.

choose rationally the principles that will govern the citizens and the basic institutions of society. The author seeks to elucidate on a definitely important question about "How might political philosophy find a shared basis for settling such a fundamental question as that of the most appropriate family of institutions to secure democratic liberty and equality?" (RAWLS, 2005, p. 8), and also, what would be the political-institutional dimension of justice in a democracy.

Later in the book *Political Liberalism*, the author alludes to the central question that guides his work, which is: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?" (RAWLS, 2005, p. xviii).

In order to answer the question put, Rawls accepts that his theory of justice is a political conception of justice. This reformulation is an argumentative requirement on the need that this theoretical perspective reach stability faced to fact of reasonable pluralism. Such stability is characterized in the liberal figure of reasonable and rational citizens who do not impose the acceptance of a comprehensive doctrine to others. The citizens should get a social cooperation able to structure a well-ordered society where coexist different conceptions of good and where all publicly covenant a political conception of justice.

In a democratic ideal a political conception of justice is formed by the exercise of reason of free and equal citizens that establish a consensus on the founding principles of the constitutional regime. Rawls brings the concept of public reason to the political sphere highlighting that thinking it is thinking about the result of a debate among citizens in the public space about the constitutional foundations and the basic issues of justice. The exercise of public reason makes possible a political view as derived or congruent of the diversity of comprehensive doctrines in a reciprocal relationship.

The integration of the ideal of public reason to the political culture gives the individual[3] the quality of social and political participative *being* who represents the principles of justice defined and incorporated by the citizens. This participation enables a social agreement about the form of organization of the basic institutions shaped in a constitutional regime.

[3] Individual, in this case, is used as a conceptual category before the concept of the citizen. This one, brings the concept implicit in the very condition of being participating in the formation of the public will.

It is important to point out that the ideal of public reason suggested by the author applies differently to citizens and social institutions. The way it is applied to ordinary citizens happens when they are involved in public forums to defend political positions, like members of parties, candidates and groups supporting them during their campaigns, as well as those who must vote when constitutional essentials and matters of basic justice[4] are at stake (RAWLS, 2005, p. 215). Appliance that differs when it comes to its application on the official forums: Legislative, Executive and Judiciary.

For Rawls the legitimacy of political power presupposes a moral justification of its decisions on matters of essential constitutional questions and basic justice guided by the political values expressed by public reason. In this sense the author highlights the importance of justification of the decisions of state authorities (government) for the configuration of its democratic legitimacy and stresses that this must be based on reasons that are publicly accepted by all reasonable citizens.

The author points out in his presentation that the ideal of public reason applies in a special way to the Judiciary and further, underlines that in a constitutional democracy in which there is judicial review of laws this appliance supervenes at the figure of the Supreme Court. When he addresses the Supreme Court as **"**exemplar of public reason**"** Rawls says that in a constitutional regime in which there is a judicial review of laws "public reason is the reason of its supreme court[5]" (RAWLS, 2005, p. 231).

Given the arguments of Rawls seeking to reflect on the Brazilian current political situation and in the case of a country that is constituted politically and legally as a constitutional democracy, this paper proposes an analysis of the articulation of the concept of public reason in the Brazilian political scene in order to highlight its implications in the actions of the Legislative and Judicial Branches. The proposed analysis will combine two variables that are (i) assessing the way the legislative process unfolds in Brazil and (ii) the role played by the Judiciary.

The importance of this analysis stems from the observation of a legitimacy crisis of the Legislature in the exercise of its legislating func-

[4] Constitutional essentials and matters of basic justice match what Rawls conceives as political values to address the fundamental matters inherent to society, for example, voting rights, religious freedom, equality and property (RAWLS 2005, p. 227-230).

[5] Rawls highlights in a footnote that this is not a definition and points out: "I assume that in a well-ordered society the two more or less overlap" (RAWLS, 2005, p 231).

tion. One of the consequences of this crisis is expressed by the expansion of judicial activity that fosters the discussion about the idea of separation of powers envisaged in the Constitution of 1988 as an entrenchment clause. Integrating the concept of public reason is fundamental to the debate about the judicialization of controversial issues involving fundamental rights, in particular in seeking to assess the democratic legitimacy of social institutions.

It is understood that the Brazilian political scenario indicates a distortion of the public use of reason in the instances of the legislating body of the country pledging its democratic legitimacy. This same scenario puts the spotlight on the characterization of the Supreme Court as "exemplar of public reason" informing its counter-majoritarian role in support of democracy. It leave us, however, the question about the extent to which judicial review fits democratic constitutionalism and how should we think it strategically in Brazil faced to his historical contours and its political profile.

2 The role of Brazilian legislative and judiciary branches

Brazil is politically and legally organized as a constitutional democracy. The Brazilian Constitution, characterized by its analyticity, largely defines the rights and guarantees to be preserved to the citizens as well as the principles that should govern the Democratic Constitutional State. There are, however, some disparity between the Constitution and the institutional scope of these guaranties in relation to social minorities[6] in view of a current "mischaracterization" of the use of public reason in the legislative instances of the country, which is called on the present work as legitimacy crisis of the Brazilian Legislature.

As known, the country faces too many social inequalities and their citizens live an educational, institutional and political deficit. Brazilian people's discontent with their institutions is explicit, needless to say, however, it is a politically apathetic society given the fact that these same people were responsible for "creating and starting the structure of the Democratic State of Law" (TOLEDO, 2005, p. 22) (free translation).

[6] The concept of minority is not used here in the sense of quantification or even as opposed to a numerical majority. Rather, the concept of minority is linked to the idea of representing social collectivities who suffer discrimination processes. Thus, even when there is a numerical majority of people this collectivity becomes the minority by some mechanism that generates a result of inequality and social exclusion.

It is lived, since 1988, a process of implementation of democracy in the country. In the struggle for effective democracy we see a disbelief of the Brazilian people with regard to the action of the Legislature.

It is not believed that it is possible to say that the people would lack representation given that the country constitutes an institutional model where representatives are elected by the citizens. Although still by a mandatory way, and, subject to the critics about such "law enforcement", voting characterizes the exercise of active positive political rights, having the citizens to assess the candidates and choose to whom cast their votes. It is expected that the principles that they established at the constituent moment are guides of representation as prescribed Rawls.

This institutional configuration - constitutional democracies - assumes voters in the condition of free, equal, rational and reasonable citizens, who delegate to their representatives the role of safeguarding the principles determined by them (RAWLS, 2005). Although the modern notion of parliamentary representation is characterized by a free mandate, which is the presupposition of an autonomous agent (unrelated to the will of the defendant), the absence of binding of wills is offset by an elective mandate, for its transience, and in particular the constitutional duty of the representatives to stick to a political conception of justice.

What is noticeable in Brazilian political activity, however, is that the legislative activity, in its great majority, is being developed without their parliamentarians make use of public reason, albeit as people's representatives, they are acting in accordance with their moral and religious convictions minted in both personal and partisan interests. This situation is evident when one observes that the representatives of the people excuse themselves to put on the agenda for discussion and deliberation controversial issues that do not meet their interests ignoring constitutional principles and depriving social groups to exercise their fundamental rights.

Given this reality, Parliament - originally home of the people - becomes a space in which they debate religious beliefs, agreements and strategic trends as mistaken understanding that the majority will be the ideal way to do justice to the detriment of effective public exercise of the function of legislating in favor of the Brazilian society, considered in its plural aspect. It is confirmed that there is no need to talk about lack of representativeness, but lack of democratic legitimacy.

There should still be mentioned that not only the distortion of the use of public reason demonstrates the bad legislative exercise. It should be noted that there is too much calling by the parties, allies and con-

stituencies for the presentation of bills and proposals of constitutional amendment entailing the excessive bringing of these institutes. Many in the end declared unconstitutional[7].

This scenario of unconstitutionality is presented to portray how the tremendous inquiry for law propositions affects not only the proper functioning of the Legislature, but also the quality of these institutes, resulting in proposals and laws that are not consistent with the Constitution. This result goes against the principles chosen by the citizens, which should be observed by their elected representatives in the scope of its functions.

The acting of the legislature by moving away from constitutional principles, aiming to defend their individual interests, moves itself away from the exercise of public reason losing democratic legitimacy and occasioning a strong but unwanted trend towards injustice of their decisions.

When Rawls, teaches on the "constitutional, legislative and judicial" stages and presents the dynamics of these stages, argues that the injustice of decisions corrupts democratic legitimacy, stating that "legitimacy of legislative enactments depends of the justice of the Constitution" (RAWLS, 2005, p. 429).

It is sought to present the legislative situation in which Brazil currently is, once a legislative democracy presupposes a strong and credible legislature that watches out for its public function looking to guarantee citizens the effectiveness of their rights and legislating to guarantee that this ideal is reached. Once the legislature of a country is weakened, fragile is the democracy in this country, a solution should be sought to restore their prestige and legitimacy.

---

[7] To illustrate this situation it is reported that there are currently over two thousand proposals of constitutional amendment and about 15.400 bills run in the Parliament (BRASIL, 2013b). The lack of rationality in the legislative activity was also seen in 2011 when it was introduced just to the House of Representatives 3.268 bills. Of this total, this house has approved 337 of these bills, of which 45% were subsequently declared unconstitutional as data measured by the Anuário da Justiça de 2012 shows (the Brazilian Federal Legislature is bicameral and consists of the Chamber of Deputies and the Senate). The Anuário da Justiça, made based on the analyzes of actions pertinent to the Brazilian judicial review and appretiated by the Supreme Court in 2011, it also raised the percentage of unconstitutionality of laws, pointing out that eight in every ten state or federal laws of the country submited to the Supreme Court scrutiny are declared unconstitutional. The state uncostitutionality index reaches the level of 90% and the federal 45% summing out na average of unconstitutionality of 83% in the country just in 2011.

It is in this presented scenario that the Judiciary stands out, once that before the current constitutional model in Brazil it is the institution constitutionally responsible for exercising the role of judicial reviewing of laws, as well as the final judge of the demands of society that fall within its skills. The demands that gain special relevance are involved in controversial issues where the legislature omits to legislate for not wanting to, not being allowed to, or not being able to act and where such omission results in the lack of assurance of fundamental right.

The Supreme Court stands out as the figure of an interpreter of the principles, often featuring the Judiciary as a positive legislator, when argumentatively creates legal solutions in specific cases based on the exposure of reasons in the quest for maximum effectiveness of the Constitution. It should be remembered that according to John Rawls these reasons must be publicly accepted by all rational and reasonable citizens endowed with a political conception of justice.

What is meant is that a fundamental right can not depend on the will of a legislator, and when there is unconstitutional legislative omissions, i.e., resulting in the absence of a guarantee of a fundamental right, they must be resolved in the light of constitutional principles in order to prevail these rights and to remedy this omission. Likewise, when there are unconstitutional proposals or laws, they should be evaluated and declared unconstitutional avoiding conflict with the rights of citizens.

It is therefore necessary to see that the Judiciary needs to perform a strong and independent political activity for the protection of fundamental rights, fulfilling a countermajoritarian role, meeting social needs often unmet by the Legislature. This would not be an option to judge, but an obligation to decide, an inevitability, characterized by the complexity of relationships and the constant demand for solutions.

The legitimacy of the decisions of the judiciary must be measured and argumentatively express the public reason of a certain well-ordered society. That is why on the spectrum shown it is understood that the Supreme Court is accentuated as "exemplary case of public reason" being an organ withdrawn from the possibility of using it, but whose public reason should be your reason itself.

It is necessary, however, to observe how far the role of the judiciary ties together with democracy and when will it break it, at the risk of its action also fade legitimacy. It should be noted that when the legislator within his powers and where there isn't a discussion of the fundamental right, make decisions that do not conflict with the Constitution, the Judiciary must respect them.

In such cases should prevail legislator's decision, what suggests a large watershed between "necessary judicialization" of certain issues (which derives from the very Brazilian institutional structure), and the much criticized "judicial activism".

To illustrate the scenario presented is possible to highlight issues recently discussed under these Powers. Regarding the issues involving fundamental rights serve as an example the debate on the termination of pregnancy of anencephalic fetus as well as the discussions that guide the debate on civil marriage between homoaffective couples.

Regarding termination of pregnancy of anencephalic fetus, it was verified a unconstitutional legislative omission, which Parliament by ideological arguments clearly avoided to remedy, violating fundamental rights, and letting to be understood that an religious ideal prevails over an ideal of health and freedom for women. The Supreme Court decided in the end by their legality, thus remedying the legislative omission in defense of the fundamental rights involved.

Likewise this Parliament omitted itself, from treating the equiparation of matrimonial rights of homoaffective couples, a theme that finds no express legislative prevision, on which the National Council of Justice[8] came to decide, recognizing this equiparation and determining that the public registries begin to pronounce these marriages. The constitutionalist Luis Roberto Barroso highlights that "the legislator cannot prohibit a person from exercising his affection the way he wants it" and to "criminalize a homoaffective relationship violates a fundamental right" (BARROSO, 2010b, p.2) (free translation).

On the other hand, when it comes to the demands of society where fundamental rights are not involved, but result from legislative omissions, where there was demand of society to be dealt with, even to leverage the credibility of the Legislature and its democratic legitimacy, should be clear that on these assumptions the choices of the legislator are the ones that should prevail. Since they are being treated by Parliament and in accordance with the Constitution, the debate on this feature only entail additional performance of the Judiciary when the Legislature fails to do so, or when doing it in an unconstitutional manner, by not paying attention to the use of public reason. Thus, it would avoid the

[8] The National Council of Justice (CNJ) is a public institution that aims to improve the work of the Brazilian legal system, especially with regard to the control and the administrative and procedual transparency. (BRASIL, 2013), and his acts are endowed with original normativity.

over-interference of the Judiciary in the context of legislative activity.

We observe, therefore, that the harmony of powers required by Article 2 of the Brazilian Constitution is not a mere constitutional provision, but a guideline of conduct of the institutions that must exercise their powers in a democratic way in pursuit of the accomplishment of the fundamental objectives that this same norm foresees, using the powers of their reciprocal control mechanisms in order to keep the well-established boundaries between their respective powers, as well as a strengthened systemic character in between these on the constitutional arrangement.

3 Separation of powers and judicial review

Although clear that this relationship of independence and harmony between the powers that was presented is the assumption of a Democratic State, we observe today that there is a clash between the Legislative and Judicial Branches in Brazil, which comes to the criticisms already raised and debated and stands out with greater severity. It is thereafter spoken about an impasse that could compromise the constitutional entrenchment clause of separation of powers (Article 60, § 4 of CRFB/88).

It is, in short, the debate so recurrent in political philosophy on which power should have the last word in interpreting the Constitution and to whom should remain the analysis of compatibility of laws with it, in order to most effectively meet the democratic assumptions and seek the maximum guarantee of fundamental rights.

This debate has been highlighted more specifically in Brazil since the knowledge of the Proposal of Constitutional Amendment no. 3, which suggests an expansion of the supervisory power granted to the Legislative Branch, as provided in art. 49 V of the Constitution, to stop the normative acts of the Executive that surpasses the regulatory power or the limits of legislative delegation, also extending it to apply to the Judiciary.

It is at this point that should be taken over the reflections on the decisions indicated in this work and wonder about what would the results of the demands on the interruption of pregnancy of anencephalic fetus and the possibility of civil marriage between homoaffective couples be if the Parliament had the final decision, and also how guarantor of basic rights would such a decision be. These questions concern to

the present discussion for the relationship established between the law, public reason and the own conception of democracy.

In this scenario still stands out the Proposal of Constitutional Amendment no. 33, which proposes to amend the minimum amount of votes of members of the courts to declare the unconstitutionality of laws; the conditioning of the binding effect of *súmulas* (precedents) approved by the Supreme Court for approval by the Legislative Branch and; the submission to the Parliament of the decision about the unconstitutionality of Constitutional Amendments[9].

In specific, it interests in a particular point of this proposed amendment which suggests that if there is disagreement on the constitutionality of a Constitutional Amendment between the Supreme Court and Parliament, it would pass through the popular scrutiny the question incited, so that citizens can solve the controversy. According to Mr. Nazareno Fonteles (PT-PI), rapporteur of the proposal, the referendum would make the decision more democratic because "the will of the people is the will that is consistent with democracy".

It should be noted that democracy itself does not presuppose a specific separation of powers and that "the assumption that the separation of powers is necessary for public freedom is debatable" (FREEMAN, 1994, p.195) (free translation), but the purpose of the Law in regulate relationships does not characterize a mere formality necessary to order, but justice. This is where a revisional power endowed with reason should have highlighted its role in countermajoritorian acting in pursuit of maximum effectiveness of fundamental rights - basic rights of a constitutional democracy - considered the pluralism inherent in contemporary societies.

It is long known that majority will is not always the most fair and that a democracy is not made of political majorities. It is in this sense that Luis Roberto Barroso teaches (2010a, p. 5) noting that "often the right decision is an unpopular decision. So the Judiciary may not have its merit measured in public research". As for the laws, it should be noted that, as instructed by Freeman, "any laws that have the purpose of violating these basic rights are invalid, even if they are supported by a majority" (1994, p.186) (free translation).

[9] The text still strengthens, that the proposal intends to induce the currently non-existent institutional dialogue among the Branches, which should serve as a mechanism to correct the anomaly that is judicial activism and overcome the belief that the Legislature is not able to deal with minority rights.

The constitutionalist Luis Roberto Barroso also points out that in a society where the Constitution provides an extensive range of general clauses as indeterminate legal concepts and principles brings to the Law and removes from politics these issues allowing the judicialization and enhancing the role of the interpreter in determining the sense of the norm. It is understood that leaving to the scrutiny of the Judiciary to find a legal solution in specific cases does not generate instability between the powers, since these decisions are based on solid reasons that can be publicly accepted by reasonable citizens.

Rawls presents us how public reason "assumes particular relevance in contemporary societies, which have as an indispensable component the existence of the so called reasonable moral disagreement regarding conceptions of decent life, having noted the absence of a substantive consensus on values" (BUNCHAFT, 2011, p. 74) (free translation).

It is at this point that the Constitution should catch the eye of the representative bodies of the country to the political values rooted in its constituent moment by those who have the democratic power to decide which should be the basis to govern the society they inhabit and integrate - its citizens. That the basic institutions come to be governed by these principles and use up publicly and argumentatively these principles in order to have its democratic legitimacy recognized and so that they gain credibility in this society.

For Rawls, by applying public reason, the courts avoid exactly that the law is eroded by the "laws of transient majorities" or by specific interests, contrary to this reason. By integrating the concept of public reason to the political culture of the country, the debate on the legalization of controversial issues involving fundamental rights becomes crucial, enabling the understanding that the jurisdictional action proves itself unavoidable.

Freeman prescribes with great clarity the situation prompted on this work, it is important to highlight that the lessons of this American author is substantially founded on the teachings of John Rawls in the context of his theory of justice announcing that:

> Granting to a non-legislative body, and witch does not justify its actions electorally, the power to review democratically created legislation, the citizens provide themselves with means to protect its sovereignty and independence of the unreasonable exercise of their political rights in the legislative processes. Thus, they freely

> limit the range of options open to them in the future. Agreeing with judicial review, they tie themselves to their agreement on the equal basic rights that articulate their sovereignty. The judicial review is, therefore, a way for them to protect their status as equal citizens (1994, p. 190-191) (free translation).

The need for a body of judicial review arises from the absence of a broad and reasonable public agreement, since there is no "assurance that the majority rule is not used, as so often it was to subvert the public interest in justice and to deprive individuals categories from the conditions of democratic equality" (FREEMAN, 1994, p. 192) (free translation). Evaluate, therefore, if judicial review is compatible with democracy is a strategic issue that depends on the factors portrayed by the politics of that certain democracy. It could be said that this explanation fits perfectly to the situation in which it is Brazil, considering the current deviation of legitimacy distinguished to the Parliament, when endowed with behavior uncharacteristic of public reason, interpreting judicial review as a commitment to equality.

About the theme of the "last word", the philosopher Hanna Pitkin explains that there is no last word. This seems to be the most appropriate statement to describe a plural and complex constitutionally modeled as it is the Brazilian society. In this sense, dialogical theories that assume importance predict that the constitutional solutions are constructed and assume a provisional character once that remain they are subject to review by the interaction between the powers[10].

There are, however, in regimes where the powers are separated, as sustained by Freeman:

> The need for final authoritative interpretation of the Constitution, (1) to coordinate these different powers and to solve intractable conflicts, (2) to avoid conflicting demands come to be made to the

[10] On the need for constitutional dialogue and the idea of deliberative democracy it is important the position of the constitutionalist Virgílio Afonso da Silva prescribing that there is a unexplored potential about the interaction of judicial review with the deliberative practices and that the judicial review should be envisioned not as "mere process" (prosecution), but as "part of the democratic game" and in this sense, it should be discussed on how to improve the interaction between the ministers themselves and the possibilities of dialogue between institutions, learning from the dialogical models already filed in other democracies (such as Canada), but checking the best way to initiate dialogue in Brazil (2009, p. 197-227) (free translation).

> conduct of citizens, and (3) to ensure that the constitutional forms are respected and obeyed by ordinary powers of government. Once that the constitution specifies the basic abstract rights of citizens, the clear delineation of constitutional rights and the consistency in the application guaranteed by a final interpretation are essential to the pursuit of their own citizens, as well as well as the validity of fair and effective laws (1994, p. 194) (free translation).

Freeman does not argue that the authority of final interpretation should be fixed in the Judiciary, but argues that this also does not require to be located or assigned to the Legislature to have ordinary democratic character, as suggested in the proposed amendments that stood out in this work.

The author believes that the power of judicial review is not a "proper judicial power", but a "power of preservation", which in the hands of whoever it is, should serve the purpose of preserving a democratic constitution (FREEMAN, 1994, p. 196) (free translation).

It is on these reflections that can be concluded that (i) the importance of the review is not because of those who apply but which is applied to preserve constitutional democracy and the basic rights of citizens, (ii) if there is evidence that legislative procedures have not satisfied the requirements of democratic justice, judicial review may be the appropriate way to find support these requirements, and (iii) once used properly the legislative procedures would remain solved the necessary adjustments to democratic legitimacy.

In Brazil it is clear that the Legislature is unable to meet the requirements of democratic justice and therefore a judicial review taken by the Judiciary is necessary since employed in a proper manner and when it does not oppose to majoritarian decisions to preserve power and social privileges of economic elites, but to preserve the protection of minority rights, and empower every citizen to exercise effectively their basic rights.

So, what is understood as the Proposal of Constitutional Amendment no. 3 is that its constitutionality is highly questionable especially before the Brazilian legislative reality which portrays a legitimacy crisis and requires a restructuring in its foundational base in order to restore its democratic legitimacy and deliberative capacity in the important exercise of public reason that should guide it.

We used the theme that circumscribes the debate on those particular proposals of constitutional amendments to bring the discussion

to the debate about the boundaries of the separation of powers and its implications for democracy, as well as the controversial question of who owns the last word in the political debate. In addition to evaluating the Brazilian political scenario, the arguments favor the consideration of many other constitutional regimes that are in stages of pursuing the ideal of institutionalization of democracy.

It is reiterated here that the need to integrate the concept of public reason by representative bodies of the society for the configuration its democratic legitimacy, as well as it is underlined that this reason should be preeminent to the courts, suggesting that basic freedoms should be protected by a constitutional regime in all its instances in an harmonic manner under the protection of the principles of justice. It is important to highlight, that the concept of public reason isn't a plastered concept, and may vary within the limits of the principles of justice that may be different from those presented by the author, since deriving from political values on a political conception of justice, accepted by all.

It was intended to demonstrate that democracy is not only characterized by its structure, since the justice of the institutions stem from the action of its representatives and that we are all representatives as sovereign people.

4 Conclusion

The integration of the concept of public reason in the political scene, whose analysis is proposed in this paper, serves to incite the debate over the dichotomy between legislative and judicial action and how the powers – adding also here the Executive, though not mentioned in the debate - in reality should be interrelated in the persecution of the concretization of basic rights.

Rawls tells us that the content of public reason is provided by a political conception of justice, this content is made up of two key components, namely: "substantive principles of justice for the basic structure (the political values of justice); and guidelines of inquiry and conceptions of virtue that make public reason possible (the political values of public reason)" (RAWLS, 2005, p. 253). These components should surround the political scenario in order that legitimacy and stability are granted to it.

It was in this reference that this debate was supported. This effort is about going through a philosophical view over the development of

social institutions in a real scenario that presents situations of complexity inherent to contemporary societies. Despite this scenario the reasonable disagreement show itself as indispensable element it is necessary to think of a conception of justice able to overcome it to make fair and stable institutions. The idea of justice, therefore, must be shaped by a political conception properly institutionalized by the Constitution.

However, it is necessary to make clear that in presenting his theory of justice this philosopher did not intend to describe a system of a legitimate government, but to suggest a way to walk to the institutionalization of justice in constitutional democracies which are in constant development.

The discussions made in the present study regarding the expansion of the role of the Judiciary, once observed a distortion of reason in legislative bodies, do not suggest a supremacy of this power, far from it they come to demonstrate that it is required balance in relations between the powers and that public reason must be present at all official forums, instances and moments on which a political conception of justice should be perceived.

Rawls describes on this sense that among the principles of constitutionalism it should be understood that in a constitutional government the supreme power cannot be deposited in the hands of the legislator, not even a supreme court, which is only the "highest judicial interpreter of the constitution" (RAWLS, 2005, p. 232). And as Freeman's reflections shows, his role as a judicial reviewer serves more as power to preserve the political values on that society.

Applying the public reason means that the Supreme Court would be (i) avoiding the law to be eroded by the laws of transient majorities or which represents narrow interests, (ii) serving as an institutional model of this reason and (iii) giving strength and vitality to this reason in the public forum through trials endowed with authority over fundamental politic issues. Rawls does not encourage a view of this Court as one endowed with supreme power, but of court as "center of controversy" (RAWLS, 2005, p. 239).

It was sought in this work to reflect on the articulation of the concept of public reason in the Brazilian political reality, and impairments in this setting, although this reflection refers to the evaluation of many other constitutional democracies that are evolving in the quest to achieve the desired justice relations in a society. For this reason, the verification of the way which the legislative process unfolds in the country and the role played by the judiciary were conjugated.

It was observed that (i) the Brazilian Legislative faces a serious crisis of legitimacy and consequently expands judicial activity and (ii) that as a result of this, impasse regarding the separation of powers are being questioned.

In this political-legal scenario, there is a need to rethink the legitimacy of representative institutions seeking to restructure the political bases as well as deliberative capacity in the exercise of public reason ultimately promoting the adjustments in the system of judicial review.

As demonstrated when the understanding that the last word should not be used to characterize a supreme power, but an organ of preservation of values such as democracy and fundamental rights, it is possible to assume changes in judicial review in a constitutional state without confronting the principle the separation of powers. However, before you even think about the possibility of changing the model of judicial review, it should be reflected how the current configuration of the Brazilian constitutional system provides mechanisms to remedy the situation which the country finds itself without excessive efforts have to be dispensed and without having to shut down too much the constitutional tradition that coined in the country. It seems to me that thinking of an interaction between powers can be a great leading idea.

It should be again noted that the decisions of a Supreme Court should only have a supplementary character to the legislative activity when it fails to exercise its powers. Still, these decisions do not have the power to bind this legislating power, which when legislates may ultimately overcome them, thus promoting the systemic dialogue that the Constituent between institutions foresees.

The Constitutional Court therefore should not even be thought of as "the oracle of the best answers, [...] at the risk of atrophying the representative bodies, throwing them into a vicious circle of irrelevance" (PEREIRA, 2013) (free translation), nor suffer limitations that prevent them from exercising their countermajoritarian role and corrector of the asymmetries in democratic deliberation when involved fundamental rights. It is reiterated that the legitimacy of the decisions of the judiciary must be measured argumentatively and, to comply with democracy, public reason should prevail.

What follows on this brief analysis aided by the teachings of the American philosopher John Rawls on the aspects of public reason and its implications in the Brazilian political scene, although this reflection faces vast problems that can and should be more widely debated, is that it should remain the perception that what is required is to think of re-

establishing democratic legitimacy in deliberative bodies in the country and promote effective interaction between the powers that form the basic structure of society in support to citizens and democracy.

It is also estimated that the institution's justice depends on both an exercise of citizenship as a structuring among institutional powers of the State responsible for giving effectiveness to the principles of justice in a society. However, the dynamic between these powers should not be plastered, molding itself to the necessary extent to give effective support to the protection of the principles of justice. If it is found the inexistence of this structuration the realization of justice proposed here will not take place, or even when this condition exists in flaw, say, not corresponding to the public reason of a society, there may occur an imbalance between the institutional powers.

In this sense, it is observed that the Law shaped in the ideal hypotheses of representation would not be characterized as a guarantor of justice, as seems to be the current role of the Supreme Court, but in addition to being the one that enables the expression of the principles reserving their place in Constitution, would also have the role of carrying out justice, ensured to citizens by its action focused on public reason and the establishment of a political conception of justice, taking into account all the stages that present themselves in a democratic society.

It appears, therefore, that the realization of justice depends even more of citizenship when characterized by the active participation of citizens in shaping the political ideal of a society. Thinking about that political participation from the perspective of the historical development of democracies in Western societies, it is observed that countries in which democracy is still recent "get behind" in relation to the more accustomed to it. Given this observation, it would be able to be verified that the civic exercise develops over time, where social realities show the demand for public reasons and citizens accept that the diversity is inherent in societies, and that it should be respected.

Finally, it is in this sense that, it is argued that the Law, Democracy and Public Reason institutes are interdependent, but depend on the same source, which are rational and reasonable citizens, and to achieve what is dealt with here as an ideal, its necessary above all, to invest in people, in education and in the advent of the use of reason.

References

ALEXY, R., 1999. *Direitos fundamentais no Estado Constitucional Democrático*: relação entre direitos do homem, direitos fundamentais, democracia e jurisdição constitucional. *Revista de Direito Administrativo*, no. 217, p.55-66.

2005.*Teoria da argumentação jurídica*: a teoria do discurso racional como teoria da fundamentação jurídica. 2. ed., São Paulo: Landy Editora.

BARROSO, L.R., 2006. *O controle de constitucionalidade no direito brasileiro*. 2. ed., São Paulo: Saraiva.

2010a. Conversas Acadêmicas*:* Luís Roberto Barroso (I). *Os Constitucionalistas*. Available from: <http://www.osconstitucionalistas.com.br/conversas-academicas-luis-roberto-barroso-i>.

2010b. Conversas Acadêmicas*:* Luís Roberto Barroso (II). *Os Constitucionalistas*. Available from: <http://www.osconstitucionalistas.com.br/conversas-academicas-luis-roberto-barroso-ii>.

BRASIL, 2012. Constituição (1988) *Constituição da República Federativa do Brasil*. Brasília: Senado Federal.

2012. Senado Federal. *Atividade Legislativa.* Brasília, DF, 2013. Available from: <http://www.senado.gov.br/atividade/>.

BUNCHAFT, M.E., 2011. *O Supremo Tribunal Federal e a anencefalia*. *Revista Ethic@*, Santa Catarina, v. 10, no. 3, p. 55-82.

CALVET, T.M., 2003. *A ideia de liberalismo político em Rawls:* uma concepção política de justiça. Petrópolis: Vozes.

CANOTILHO, J.J.G., 2003. *Direito constitucional*. 7. ed.; Coimbra: Almedina.

CATTONI DE OLIVEIRA, M.A., 2006. *Devido processo legislativo:* uma justificação democrática do controle de constitucionalidade das leis e do processo legislativo. Belo Horizonte: Mandamentos.

CONJUR, 2012. *Anuário da Justiça Brasil 2012. Revista Consultor Jurídico*, São Paulo.

FREEMAN, S., 1994. *Democracia e controle de constitucionalidade*. *Revista Lua Nova*, São Paulo, n. 32, p. 181-241.

2001. *The Cambridge Companion to Rawls*. Cambridge, Mass.: Cambridge University Press.

HABERMAS, J. & RAWLS, J., 1998. *Debate sobre el liberalismo político*. Barcelona: Paidós.

HABERMAS, J., 2003. *Direito e democracia:* entre facticidade e validade. Rio de Janeiro: Tempo Brasileiro.

HART, H.L.A., 2009. *O conceito de direito*. São Paulo: Martins Fontes.

1989. *Rawls on liberty and its priority*. In: DANIELS, Norman. *Reading Rawls*: critical studies on Rawls. Los Angeles: Stanford University Press.

MENDES, C.H., 2008. *Controle de constitucionalidade e democracia*. Rio de Janeiro: Elsevier.

RAWLS, J., 1999. *A Theory of Justice*. Cambridge, Harvard University Press, 1999.

2003. *Justiça como eqüidade:* uma reformulação. São Paulo: Martins Fontes.

2000a. *Justiça e democracia*. São Paulo, Martins Fontes.

2001. *O direito dos povos*. São Paulo: Martins Fontes.

2011. *O Liberalismo Político*. Trad. Álvaro de Vita. São Paulo: Martins Fontes.

2005. *Political Liberalism*. Expanded Edition. Nova York: Columbia University Press.

2000b *Uma Teoria da Justiça*. São Paulo: Martins Fontes.

SILVA, V.A., 2009. *O STF e o controle de constitucionalidade*: deliberação, diálogo e razão pública. *Revista de Direito Administrativo*. Rio de Janeiro, n. 250, p. 197-227.

TOLEDO, C., 2005. *Introdução à edição brasileira.* In: ALEXY, R. *Teoria da argumentação jurídica*: a teoria do discurso racional como teoria da fundamentação jurídica. 2. ed., São Paulo: Landy Editora.

TUSHNET, M.V., 2003. *Alternative Forms of Judicial Review*. *Michigan Law Review*, v. 101, no. 8, p. 2781-2802.

WALDRON, J., 1999. *Law and Disagreement*. Oxford: Clarendon Press.

Media and democracy:
Challenges and dilemmas of media regulation

Gustavo Ferreira Santos[1][2]

Abstract: We cannot discuss democracy in complex societies without questioning the role of the media alongside the limits and possibilities of media accountability. Media regulation involves a huge number of constitutional issues. On the one hand, the form of the constitution provides a set of fundamental rights that protect individuals and groups from the violation of their rights in the way they communicate. This includes freedom of speech and the press. On the other hand, the democratic process calls for a balance between the various political positions that exist and the set of constitutional values, requiring a specific public policy to avoid the violation of this process. In fact, various policies are needed to protect democracy from undesired phenomena such as media concentration, the manipulation of content, the language produced by hate and the exposure of offensive content to children. These problems become weightier when they are broadcasted, with far-reaching consequences. The impact is deepened by the new communication technologies and, more specifically, by resources on the internet. Media regulation requires complex approaches because the debate which considers the media before the state has always tended to be restricted to the concept of freedom; constitutional institutions have almost always been left out of the picture.

Keywords: Democracy. Media Regulation. Accountability.

Introduction

We live in an era which is marked by the highlighted presence of communication media in social life. Alongside the classic means of communication, we are always seeing the emergence of new possibilities for communicating. Their reach poses problems which cannot be

[1] Professor at Universidade Federal de Pernambuco (Federal University of Pernambuco, Brazil)

[2] Tradution: Peter Key

resolved by the old parameters invented for times when the press had more modest dimensions. One of the most important questions to be raised involves judging the consequences of constitutional norms which pertain to communication.

Basically, two positions are in dispute in this debate on the constitutional regulation of social communication. On the one hand, there is a position which is mainly worried about individual liberty. The liberals are preoccupied with the individual's autonomy. This position will depend on lessening the role of the State. On the other hand, there are those who are preoccupied with media production - and whose opinions will be presented later – being a space which guarantees opportunities for the diverse groups in the dispute for power. For them, state regulation is justifiable in relation to some problems which have come to exist in the public domain.

There are varying positions in the midst of each group, existing, in both camps, ranging degrees of radicalism.

On the side of those who oppose regulation, there are libertarian positions, such as that of Raoul Vaneigan who defends the end of any kind of limitation for the liberty of expression. Even offensive discourses, traditionally criminalized, such as slander, calumny and defamation should not be restricted. All excesses of discourse would be resolved by more discourse.

Where the defenders of regulation are concerned, there are instrumental and voluntarist positions which see intervention as a way of transforming the media in aid of a struggle for a type of society, and to silence inconvenient positions. This type of positioning is akin to some of leftist positions.

Here I wish to elaborate a moderate position whilst taking in the concerns of both sides which find themselves in the tradition of democratic constitutionalism. Owen Fiss localizes the two propositions in the liberal tradition.

Property

An area which does require state regulation is about who owns the media. The Brazilian Constitution of 1988 did not neglect this matter. The rule on the prohibition of monopolies is one the most important within the forms of state intervention in the treatment given to communication. It is in the fifth item of Article 220:

Art. 220.(...)

§ 5º - Social media cannot, directly or indirectly, be an object of monopoly or oligopoly.

Apparently this is the same regulation which is made for economic activities, seeking to avoid concentration. However, there are fundamental differences between the two forms of intervention which originate from the very motives which justify them. While economic regulation of the competition seeks to guarantee the place of other players in the market, the regulation of the property of media goes further, reaching the ties between the free circulation of information and democracy.

The possibility of concentration is a grave threat to democracy, since a certain political position can gain disproportionate power in the spreading of its own ideas. The more that media property can become distributed, the more institutions will reflect, in theory, the plurality marking society.

In Brazil one notes a lack of rules in this area and a high concentration of power.

Besides the concentration phenomenon there is another serious problem in Brazil which is the intermingling between the media and political agents. A great number of TV and radio transmitters are under the control of those who are linked to electoral mandates, held either by themselves or by family members. This causes serious distortion in electoral processes since these people have clear advantages in putting forth the ideas which characterize campaigns. However, the gravest consequence is that this reduction in perspective harms the prospects for constitutionally adequate legislative reform.

To regulate the ownership of media, avoiding monopolies, does not represent a threat to democracy. Quite to the contrary, it is a condition for its development.

What is called "cross-ownership" needs to be limited with specific rules. A business which holds agencies of communication over all types of media can, combining the action of all of them, manipulate information and determine one's desires and visions of the world.

It is evident that there are arguments in favor of concentration. Especially the ones related to the market place. Strong national businesses in the area of social communication would be able to compete in a supposedly open economic context for the sector to perform for international capital. The might of great media groups would also permit investment to be optimized, enhancing the strengths of teams of journal-

ists, for example, in the variety of media handled by the same business.

Nonetheless, such arguments cannot be all-determining with regard to how public power stands. The posture of the State should consider an ample set of variables, being especially preoccupied with the question of democracy and fundamental rights.

This active role in the control of property is important, especially with regard to the lack, in Brazil, of a policy which respects community broadcasting. Community radio and TV transmissions could come to represent the realization of the principles contained in Article 221 of the Constitution, especially item II, which determines the *"promotion of national and regional culture, and the stimulus of independent production which makes their promotion its objective"*.

Protection of children adolescents

The protection of children and adolescents also requires regulation by the State. Children and adolescents are people forming their identities and are vulnerable to certain types of discourses, needing to be guaranteed the obtaining of quality information.

It is here that the debate faces a dilemma. On the one hand it is necessary to guarantee children and adolescents' access to information. On the other hand, access to discourses incompatible with their level of maturity can harm the process of maturity.

Transmissions pose the problem as to whether or not the content is appropriate for certain age groups. This is especially notable on television. Contents such as sex and violence can, depending on the time they are exhibited, reach the age groups for which they are not recommended.

The Brazilian Constitution foresees that the authorities will classify programming with an informative purpose. The "indicative classification" has become regulated and, nowadays, is applied by a system which combines auto classification, indicating to the authorities, independently, the classification which is understood to be adequate for the program; and classification by the government which detains the power to disagree with the auto classification.

Considering the issue of protection for children, an urgent matter which is by no means adequately treated in Brazil, we stumble upon advertising directed towards children. Children are not empowered in a way which permits them to make contracts. Yet there is a daily rise in

the amount of publicity directed towards children.

Studies demonstrate that people under eleven years of age do not have the capacity to differentiate between a true message and advertising. Publicity directed towards children take advantage of fragility and vulnerability. Regulation – or even the banning – of this type of publicity is urgent.

A media which is a great source of worry in terms of the protection of children is the Internet. There it is almost impossible for the state regulation to exist. Criminal law could be one of the few instruments that society has at its disposal, being very limited since the dangerous impacts on children are often the responsibility of those outside of national territory.

Hate speech

Another grave issue is what is called "hate speech", being a discourse which makes individuals, or groups of individuals, inferior, inciting prejudice and violence. Whether or not to regulate this type of discourse is a dilemma faced by constitutional democracies.

In Germany, a country which painfully bore the consequences of a manipulative political discourse, it is easier to justify the prohibition of discourses which cultivate hatred. This has resulted, to cite an example, in the criminalization of the use of the swastika. In the United States it is more difficult for banning to be accepted (BRUGGER, 2002). Nonetheless, the history of jurisdictional assessment on this issue demonstrates a gradual abandon of the position which makes liberty absolute. Decisions on the ceremony which burns the cross, carried out by the Klu Klux Klan, show this.

The discussion on the regulation of discourse connected with inciting hate is only one side of a larger problem which, using an expression by Owen Fiss, is the "silencing effect of the discourse". The discourse can impede other discourses, there being certain forms of discourse which need to be contained in their excesses by the State.

Much of our constitutional debate suffers from the influence of the North American debate on the first amendment, which determines that Congress cannot edit laws limiting freedom of speech and freedom of the press:

> Congress shall make no law respecting an establishment of reli-

> gion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The difficulty, however, in the regulation of hate speech resides in the task of fixing boundaries between this type of discourse and the type which is merely inconvenient. We need to preserve the space for criticism even when its content makes us uncomfortable. However we must not tolerate the instigation of hate.

In 2001 the United Nations, the Organization for Security and Cooperation in Europe and the Organization of American States fixed conditions which need to be respected in the regulation of hate speech:

No one should be penalised for statements which are true

No one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence

a.The right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance

b. No one should be subject to prior censorship

c. Any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

With the internet we enter into contact with a higher number of hate speeches, raising the urgent matter of a national debate on the reach of the State in order to punish such discourse.

Right of acces

In times of printed media, the mere protection of an individual's freedom of speech, untouched by some form of censorship, was enough. Today, with regard to the media's far reach, the lack of balance between the haves and have-nots in terms of who has access is enormous. It is necessary for the State to have rules and policies to guarantee, for a greater number of people and groups, access to media channels.

In broadcasting there is the weighty problem of the limitation of the electromagnetic spectrum. Few are those who own radio or television channels. For this reason, to reserve spaces in programming for the access of political and social groups who are not owners of communication vehicles is very important.

In Brazil political parties have yearly access to time slots on radio and on television for their messages to be heard. This "right to access" could be extended to other social groups, guaranteeing more pluralism in broadcasting.

In the case of religious groups, the provision of reserved time slots in broadcasting could be an alternative to the current situation. Today, the church that has more money appears the most on radio or television. The State could organize access to times in the programming for the greatest possible number of religious entities, thereby balancing access.

It is also important for there to be a clear policy to grant incentives for community broadcasting. Current Brazilian legislation is excessively restrictive and the handling of administrative processes which evaluate requests for new community radios is slow and shows little transparency. This has led real initiatives for community broadcasting into clandestine ways of operating. State repression and the more powerful media become associated with one another in hunting down non-authorized radio stations. Besides this, the State needs to be active in financing the installation of community broadcasting.

Public television also offers a way to give media access to the greatest number of people. A television station which is not subordinated to the will of the governor, but which is open to social control and can reflect the society's pluralism has a lot to offer to democracy. It can even induce private communication companies to take on a heading for better quality in programming.

Still with regard to the problem of access, it is important to have a public policy for access to broad band. With the increasing importance of internet in people's lives it is fundamental for the individual to have quality access to the web. This question of citizenship will not be resolved by the logic of the market place.

Riks for regulation and the dilemma of auto regulation or hereto regulation

The reasons which justify the imposition of limits for media institutions can, however, sustain state interventions which suffocate the free circulation of information and the free manifestation of thought. There are strategies for the containment of excesses in media which can do without the special powers of the State. In this sense, it is important

to highlight the so-called MAS (*media accountability systems*).

According to Claude-Jean Bertrand (2003) one is able to call MAS "any means to better media services for the public, totally independent of government". Included in this subject are institutions directed towards discussion of media quality – for example, the Press Observatory – the ombudsman, independent agencies of journalism regulation, ethics committees, amongst others.

The discourse of mere auto regulation is characteristic of the group which fears the State. As is convenient for communication businesses, who possess the great power to communicate afar, this position is today the one which is most widespread throughout Brazil. Businesses and business people fuel a discourse which says that to give the State the power to regulate the media will always result in censorship. They use "liberty of expression" as an alibi to achieve their market goals. They act as though they were the owners of the discourse of "liberty of expression".

The enemies of regulation always speak in the name of liberties. However, they fail to recognize that modern constitutional democracies function by looking for equilibrium between "liberal liberties" and "democratic liberties" (BOVERO, 2002). It is not just about guaranteeing, by way of a Constitution, free spaces for the individual, where one can behave without external constraints - the objective of liberties inherited from liberal constitutionalism. It is necessary for there to be a guarantee for the equal participation of these individuals in the formation of the general will, in decisions on public enterprising. A lot of the time, what is most threatening to political autonomy is, in reality, the manipulation of information and opinion, if one compares it to explicit constraint.

A democracy needs to guarantee liberty of expression. This individual power to manifest without external constraints on opinion is linked to the fundamental right to participation in the democratic process. Prohibitions on discourse can mean lack of balance in political dispute. For this reason they should always be looked upon with distrust.

In conclusion, I wish to summarize with these proposals:

a) media regulation is a legitimate activity and there are some reasons to regulate it; they are linked to the promotion of democracy;

b) there should be no conflict between self and state regulation: they should be complementary systems;

c) media ownership regulation needs to avoid monopolies and it also needs to limit cross-ownership;

d) child-protection demands the guarantee that parents can con-

trol the contents that children are accessing;

e) the punishment of hate speech needs to separate a dangerous discourse that incites violence from inconvenient opinion, which should be protected;

f) there should be a variety of rules to induce media access and the necessary policies, like access for social organizations in Broadcasting, or making broadband available to the public.

References

BERTRAND, Claude-Jean. An Arsenal for Democracy: Media Accountability Systems. Cresskill, NJ: New Hampton Press, 2003.

BOVERO, Michelangelo. Contra o governo dos piores: uma gramática da democracia. . Trad. Daniela Beccaria Versiani. Rio de Janeiro: Campus, 2002.

BRAZIL. Constitution of the Federative Republic of Brasil, 2010 [Viewer 2 may 2013]. Avaiable from: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf

BRUGGER, Wienfried. Ban on or Protection of Hate Speech? Some Observations Based on German and American Law, in: Tulane European and Civil Law Forum, 2002 , 17, 1-21

FISS, Owen. The irony of free speech. Cambridge: Harvard University Press, 1996.

UN Special Rapporteur on Freedom of Opinion and Expression; OSCE Representative on Freedom of the Media; OAS Special Rapporteur on Freedom of Expression. Joint Statement on Racism and the Media, 2001 [Viewed 10 may 2013]. Avaiable from: http://www.osce.org/fom/40120